

PAYING ELIZA: Comity, Contracts, and Critical Race Theory
or
19th Century Choice of Law Doctrine And The Validation of
Antebellum Contracts For the Purchase and Sale of Human Beings

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Introduction

It may not shock the American conscience to learn that during slavery, courts in non-slave-holding states were sometimes called upon to enforce contracts for the purchase and sale of human beings (or contracts whose consideration otherwise consisted of human beings), and sometimes did so,¹ for reasons arguably having more to do with

¹ See, e.g., Greenwood v. Curtis, 6 Mass. 358 (1810); Comm. v. Aves, 35 Mass. (18 Pick.) 193 (1836).

inter-state contract law than with the “peculiar institution” itself.² What may be more surprising, and more difficult to understand, is that some “Union” courts went on doing so even after the Civil War ended,³ when substantive changes of law, together with well-

² Slavery was referred to as the “peculiar institution” in various 19th century sources, perhaps most famously by John C. Calhoun, “Speech on the Reception of Abolition Petitions” (1837).

³ Cases were reported from two states that did not officially secede, but did join the Confederate States of America, Kentucky (Bailey v. Howard, 2 Ky. Op. 294 (1868)) and Missouri (Phillips v. Evans, 38 Mo. 305 (1866)); and two unequivocally Union states, Illinois (Roundtree v. Baker, 52 Ill. 241 (1869), discussed *infra*) and West Virginia (Matthews v. Dunbar, 3 W. Va. 138 (1869)); as well as all eleven of the states that officially seceded, Alabama (McElvain v. Mudd, 44 Ala. 48 (1870); Fitzpatrick v. Hearne, 44 Ala. 171 (1870); Arkansas (Haskill v. Sevier, 25 Ark. 152 (1867), *aff'd*, 26 Ark. 133 (1868), error dismissed, 81 U.S. (14 Wall.) 12 (1872); Jacoway v. Denton, 25 Ark. 625 (1869), error dismissed, 154 U.S. 583 (1872); Osborn v. Nicholson, 80 U.S. (13 Wall.) 654 (1872), *rev'g* 18 F. Cas. 846 (C.C.E.D. Ark. 1870) (No. 10,595)); Florida (Walker v. Gatlin, 12 Fla. 9 (1867); McNealy v. Gregory, 13 Fla. 417 (1870)); Georgia (Hand v. Armstrong, 34 Ga. 232 (1866) (enforcing); Shorter v. Cobb, 39 Ga. 285 (1869) (denying enforcement on basis of state constitutional prohibition); White v. Hart, 39 Ga. 306 (1869) (same), *rev'd*, 80 U.S. (13 Wall.) 646 (1872); Louisiana (Wainwright v. Bridges, 19 La. Ann. 234 (1867) (denying enforcement as a matter of contract law); Boyce v. Tabb, 85 U.S. (18 Wall.) 546 (1873)); Palmer v. Marston, 81 U.S. (14 Wall.) 10 (1872)); Mississippi (Bradford v. Jenkins, 41 Miss. 328 (1867)); North Carolina (Harrell

established exceptions to general principles favoring out-of-state contract enforcement, made the contrary outcome at least equally available.⁴ Why? And what can we learn from it?

Accounting for these decisions requires more than simple charges of judicial racism or reactionary politics, even if well-founded. Prior and contemporaneous decisions sometimes took a more progressive, liberatory approach. We do better by seeking to uncover the intellectual and political pressure placed upon developing conflicts of law doctrine by the politics and the legal impedimenta of slavery. A more fine-grained approach reveals more, and (it is hoped) may contribute more, to the ongoing exploration not only of the conceptual and legal foundations of slavery, but also of reparations for slavery.

v. Watson, 63 N.C. 454 (1869); West v. Hall, 64 N.C. 43 (1870)); South Carolina (Calhoun v. Calhoun, 2 S.C. 283 (1870)); Tennessee (Young v. Thompson, 42 Tenn. (2 Cold.) 596 (1865); Curd v. Bonner, 44 Tenn. (4 Cold.) 632 (1867); Lewis v. Woodfolk, 61 Tenn. 25 (1872)); Texas (Hall v. Keese, 31 Tex. 504 (1868)); and Virginia (Scott's Ex'x v. Scott, 59 Va. (18 Gratt.) 150 (1868)).

⁴ The U.S. Constitutional dimensions of this issue, and the paradoxical unity of interest in denying enforcement to such contracts shared by “neoabolitionists” and Confederate debtors, are ably explored by Andrew Kull, “The Enforceability after Emancipation of Debts Contracted for the Purchase of Slaves,” 70 Chi.-Kent L. Rev. 493 (1994). Kull focuses primarily on the intra-state jurisprudence of the former Confederate states during Reconstruction, and what he calls “the ‘slave consideration’ controversy,” Id. at 494, rather than the interstate or choice of law dimensions of the issue.

Explication of the legal doctrines some judges understood to stand in the way of total repudiation of slave contracts is not an apologia, but a caution. It is entirely too easy to dismiss these judges and their opinions of nearly a century and a half ago as anachronistic and irrelevant, racist, insensitive, and cynical, and congratulate ourselves on our greater enlightenment. This can unfortunately breed complacency, instead of turning a mirror on our own use and abuse of today's legal concepts to frustrate, rather than further, goals of equality and anti-subordination, of "justice" however defined – what the French-Jewish philosopher Emmanuel Levinas called (in another context) "the danger of a premature good conscience."⁵

This Article addresses both *how* (from a doctrinal point of view) and *why* (from a legal, moral, and jurisprudential point of view), these contracts went on being enforced, outside the former Confederacy, even after the Thirteenth Amendment to the United States Constitution, abolishing slavery, took effect in 1865.⁶ A significant part of the analysis will involve a close reading of selected Illinois Supreme Court cases,

⁵ Emmanuel Levinas, "Toward the Other," in *NINE TALMUDIC READINGS* 14 (trans. Annette Aronowicz) (1994).

⁶The Thirteenth Amendment provides as follows:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation."

It took effect as the 13th Amendment to the U.S. Constitution on December 18, 1865.

culminating in 1869's *Roundtree v. Baker*,⁷ which is intended to show that the legal treatment of slavery in the non-slave-holding states, before and after the Civil War, was neither consistent and thorough repudiation, nor hypocrisy, indifference, or sympathy; instead, moments of moral and legal clarity seem to cohabit with tortured exercises of abstract principle thinly disguising cowardice, self-interest, and equivocation. The most fair and useful history attempts to do justice to these contradictory tendencies, and I will offer some tentative suggestions in that direction. Finally, I will address the "road not taken," in which a federal district court in the 1870 Arkansas case of *Osborn v. Nicholson*⁸ interpreted the Thirteenth Amendment to deny enforcement of the payment obligations on contracts for the purchase and sale of human beings,⁹ only to find itself reversed a year later by the U.S. Supreme Court,¹⁰ definitively rejecting this approach as an unconstitutional impairment of vested contract rights¹¹ and abandoning denial of such contracts as a legal avenue for furthering anti-subordinatory ends.

⁷ 1869 WL 5419 (Ill.), 52 Ill. 241 (1869).

⁸ 18 F.Cas. 846 (1870).

⁹ The Arkansas jurisprudence is addressed by Kull, see note 4 *supra*, at 502-507.

¹⁰ 13 Wall. (80 U.S. 654) (1871).

¹¹ 13 Wall. at 662 ("it is a sufficient answer to say that when the thirteenth amendment to the Constitution of the United States was adopted, the rights of the plaintiff in this action had become legally and completely vested. Rights acquired by a...contract executed according to statutes subsequently repealed subsist afterwards, as they were before, in all respects as if the statutes were still in full force"). As Kull puts it, after Osborn (and a group of cases decided with it), "The states could not, consistent with the contracts

I. Theory: Comity, Foreign Contracts, and the “Public Policy” Exception

There were two primary choice of law doctrines implicated during the antebellum period when a court in a non-slave-holding state adjudicated a lawsuit involving human beings as consideration for a contract. The first was that a contract valid in its place of making is valid everywhere, even if such a contract would be invalid in the forum in which enforcement is sought. The applicable law, in other words, was that of the place of making, *lex loci contractus*, and not the (potentially contrary) law of the state of enforcement (*lex fori*).¹² Up until the 19th century, each state or nation’s agreement to uphold this principle was understood to be based on something called “comity.” Originating in Dutchman Ulrich Huber’s extremely influential 1689 essay “De conflictu legum diversarum in diversis imperiis,” “Comity was defined as something between mere courtesy and a legal duty, as derived from the tacit consent of nations and based on mutual forbearance and enlightened self-interest.”¹³

The U.S. Supreme Court described it this way:

clause, prohibit the enforcement of debts for slaves....As a practical matter, the controversy over slave contracts was essentially over.” Kull, *supra* note 4, at 504-505.

¹² There are some nuances here, particularly when the place of making differs from the contemplated place of performance, neither of which is the state where enforcement is sought – interesting and important, but not strictly relevant for our purposes here and beyond the scope of this discussion. See, e.g., Eugene Scoles, et al., *CONFLICT OF LAWS* (4TH ED. 2004) 987, § 18.13 et seq.

¹³ Eugene Scoles, et al., *CONFLICT OF LAWS* 14 (4TH ED. 2004).

‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.¹⁴

Comity in turn supports the general rule of contract validation. As James Kent, an early-19th century American scholar, put it, “a contract valid by the law of the place where it is made is valid everywhere *jure gentium* [by the law of nations]....If it were otherwise, the citizens of one nation could not contract or carry on commerce in the territories of another.”¹⁵ This concept of comity, developed to manage the legal relationships among sovereign European nations, was then applied in the local American inter-*state* context. Huber’s ideas entered American law primarily through Joseph Story’s 1834 work, Commentaries on the Conflict of Laws, Foreign and Domestic, “the first comprehensive conflicts treatise in English,”¹⁶ and took hold in the United States universally.¹⁷ “Comity” was thus understood as providing a basis for the enforcement of

¹⁴ Hilton v. Guyot, 159 U.S. 113, 143, 16 S.Ct. 139, 163-164 (1895).

¹⁵ 2 Kent, Commentaries on American Law 364 (1st ed. 1827), in Scoles 19, note 6.

¹⁶ Scoles, p. 18.

¹⁷ “‘Comity’ sought to reconcile the territoriality (sovereignty) of states with the need to consider foreign law in appropriate cases. The doctrine was generally accepted as an operational theory in the [U.S.] courts during the half century from 1850-1900,” whereupon, after considerable criticism, it gave way to what became known as the

out-of-state agreements that would be invalid had they been contracted within the forum by forum domiciliaries.

Equally well-established, at least theoretically, was the most significant *exception* to this principle of contract validation, generally referred to as the “‘public policy’ exception.”¹⁸ This exception (related to the European ‘ordre public’ exception to the

“vested rights” theory of Joseph Beale. Scoles at 20; Currie, Kay, Kramer and Roosevelt, CONFLICT OF LAWS 12-13 (7th ed. 2006). It appears in the Restatement, First, Conflict of Laws (1934) at § 332, which states: “*Law Governing Validity of Contract*. The law of the place of contracting determines the validity of a promise with respect to (a) capacity to make the contract; (b) the necessary form, if any, in which the promise must be made; (c) the mutual assent or consideration, if any, required to make a promise binding...”

Despite important differences between comity and vested rights theory, Beale’s approach did not represent any significant change with respect to enforcement of contracts; as Beale himself expressed it, “A right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called in question anywhere.” J. Beale, 3 CASES ON THE CONFLICT OF LAW 517 (1901). “To Professor Beale, the place-of-making rule was as obvious as the laws of nature,” citing Beale, “What Law Governs the Validity of a Contract,” 23 Harv. L. Rev. 260, 270-71 (1910), in Currie, et al., at 22.

¹⁸ John Bernard Corr, “Modern Choice of Law and Public Policy: The Emperor Has The Same Old Clothes,” 39 U. Miami L. Rev. 647, 649 (1985), refers to what I am calling “the public policy exception” simply as “public policy.” “For the purpose of choice of law, one may define public policy as that doctrine which permits a court to reject a cause

application of foreign *law* in a different nation's courts¹⁹) permitted a court to refuse enforcement where such enforcement would conflict with the public policy of the forum. From the beginning, states reserved to themselves the power to decline enforcement of truly repugnant out-of-state agreements, reminding the world at large that the enforcing court exercised its power in support of the out-of-state (or "foreign") contract as a matter of comity only, of something like self-interested and pragmatic friendliness between states,²⁰ and not out of any felt or real sense of Constitutional or other legal obligation.²¹

As to foreign contracts specifically, Story stated in his Commentaries,

of action based on the law of a different jurisdiction on the ground that the other jurisdiction's law is not only different from put also offensive to generally accepted values within the forum." Id. at 649.

¹⁹ See Scoles, § 18.4, at 959: "the traditional *ordre public* exception, [under which] the public policy of the forum *qua* forum is always the last shield against the application of a repugnant foreign law." As Joseph Story put it, the forum need not recognize foreign laws "where those laws are deemed oppressive" or "their moral character is questionable, or their provisions impolitic." 3rd ed. at § 33.

²⁰ See, e.g., *Blanchard v. Russell*, 13 Mass. 1, 6 (1816) ("But, as the laws of foreign countries are not admitted *ex proprio vigore* [by its own strength], but only *ex comitate*, the judicial power will exercise a discretion with respect to the laws they may be called upon to sanction; for, if they should be manifestly unjust, or calculated to injure their own citizens, they ought to be rejected").

²¹ See Hilton v. Guyot, *supra* note 14.

Contracts...which are in evasion or fraud of the laws of a country, or the rights and duties of its subjects, contracts against good morals, or religion, or public rights, and contracts opposed to the national policy or institutions, are deemed nullities in every country...although they may be valid by the laws of the place, where they are made.²²

And Story gave specific examples of contracts “against good morals, or religion, or public rights”:²³

Such are contracts...for future illicit cohabitation and prostitution; contracts for the printing or circulation of irreligious and obscene publications; contracts to promote or reward the commission of crimes; contracts to corrupt or evade the due administration of justice; contracts to cheat public agents, or to defeat the public rights; and in short, all contracts which in their own nature are founded in moral turpitude, and are inconsistent with the good order and solid interests of society. All such contracts, even though they might be held valid in the country where they are made, would be held void elsewhere, or at least ought to be, if the

²² Joseph Story, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS (2nd ed. 1841) §244(3) (p. 323 in the 2001 Lawbook Exchange reprint).

²³ Story, 2nd ed., § 258(2), p. 334.

dictates of Christian morality, or even of natural justice, are allowed to have their due force and influence.²⁴

The contemporary (and oft-quoted) *locus classicus* for the standard is surely Judge Cardozo in *Loucks v. Standard Oil Co. of New York* (a tort case), where he stated that the public policy exception is not to be applied to deny enforcement of a right, unless enforcement in the forum “would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”²⁵ As a more contemporary New York court put it, “Even if [a] contract is valid where made, it will not be enforced in another State if it is repugnant to positive statutory enactment and the public policy of that State.”²⁶

²⁴ Story, 2nd ed., § 258(2), pp. 334-335 of reprint.

²⁵ 224 N.Y. 99, 120 N.E. 198, 202 (N.Y. 1918); see Restatement (Second) of Conflict of Laws § 90 cmt. c (1971) (commentators agree that foreign based rights should be enforced unless the judicial enforcement of such contract would be the approval of a transaction that is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense (citing Intercontinental Hotels Corp. (Puerto Rico) v. Golden, 15 N.Y.2d 9, 13 (1964).)).

²⁶ Clifton Steel Corp. v. General Electric Co., 80 A.D.2d 714, 715, 437 N.Y.S.2d 734, 735 (1981), quoting Lynch v. Bailey, 275 A.D. 527, 90 N.Y.S.2d 359, aff’d, 300 N.Y. 615, 90 N.E.2d 484 (1949).

At the same time, it should be noted that although it was (and is) robust doctrinally, the public policy exception was not widely applied, at least during the period with which we are concerned.²⁷ According to a mid-twentieth century source,

Research into the case law establishes at least one solid fact: The reported cases in which foreign law, applicable under the usually appropriate conflicts rule, is not used solely because the law to be applied is ‘obnoxious’ or ‘repugnant’ to the public policy of the forum are few indeed....The argument that an entirely foreign claim should not be enforced because it is repugnant to the forum has undoubtedly been made

²⁷ Monrad Paulsen and Michael Sovern, “‘Public Policy’ in the Conflict of Laws,” 56 Colum. L. Rev. 969 (1956). Paulsen and Sovern completed a thorough review of the cases up to that time, found just a handful of contract cases employing the exception, and concluded, “An enormous number of cases have *refused* to apply the public policy doctrine to foreign contracts.” Id. at 974 and note 21. Some later cases (from selected jurisdictions) applying the exception are collected in Corr, *supra* note 18. It may be that the exception was actually more frequently used in the second half of the twentieth century than in the first, which would be an interesting result as that period also marked the widespread adoption of the Restatement (Second) approaches to conflicts of law. *See also* Holly Sprague, “Choice of Law: A Fond Farewell to Comity and Public Policy,” 74 Cal. L. Rev. 1447, 1465 and *passim* (1986). Sprague, a strong critic of both doctrines, identifies contemporary cases (three from 1985 alone) in which “comity” and “public policy” are (mis-?) used.

most often in contract cases, but it has met with surprisingly little success.²⁸

In addition, while even today the public policy exception is apparently well-established in American law,²⁹ appearing in both the First and the Second Restatements of Conflict of Laws,³⁰ it continues to be poorly understood even by commentators, who frequently confuse, or fail to differentiate, between the use of the public policy exception to ground a forum's refusal to apply foreign *law* in general (when its own choice of law principles suggest or require that it should); a refusal to recognize a foreign *claim* or

²⁸ Paulsen and Sovern, *supra* note 27, at 972.

²⁹ Though widely criticized by commentators, including Paulsen and Sovern, *supra* note 27, at 1016 (“The principal vice of the public policy concepts is that they provide a substitute for analysis. The concepts stand in the way of careful thought, of discriminating distinctions, and of true policy development in the conflict of laws”); Sprague, *supra* note 27 (who argues that to the extent that the public policy of the forum should matter in choice of law, it is better accounted for by modern “interest analysis” approaches than traditional concepts of comity and public policy).

³⁰ Restatement (First) § 612 recognizes the doctrine to bar suits “upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum.” It also appears in the Restatement (Second) of Conflict of Laws § 90 (1971). As Corr, *supra* note 18, at 649, notes, the public policy exception “is one of the few features of the old learning to have survived the last generation’s surge into modern choice of law thinking.” Corr later remarks, “It is a fact, however, that public policy is a firmly rooted feature of modern choice of law doctrines.” *Id.* at 671.

defense (when the forum typically does not (yet or any longer) recognize such a claim or defense),³¹ and our concern here, namely, a forum’s refusal to enforce a foreign *contract*.³² The considerations appropriate to each employment of the exception are at least potentially distinct, and criticisms based on examples of one type do not necessarily apply to the others. Nevertheless, the existence and basic contours of the public policy exception have long been well-defined and widely accepted.³³

³¹ Paulsen and Sovern are careful not to make this mistake. Paulsen and Sovern, *supra* note 27, at 979 (“We have been dealing thus far with cases in which the courts have refused to take jurisdiction because to do so would violate the forum’s public policy. There is, in addition, authority for the proposition that public policy can be used by the plaintiff to strike down a defense even though the forum has no contact with the transaction before it”).

³² This confusion is unfortunately common in casebooks. See, e.g., Russell Weintraub, COMMENTARY ON THE CONFLICT OF LAWS § 3.6, pages 106-112 (5th ed.) (discussing *seriatim* “a *rule* [emphasis added] found in the state designated by the forum’s choice-of-law rule;” a case involving a foreign *defense* (marital immunity), not available in the forum; enforcement of a foreign *contract* unenforceable in the forum; an out-of-state tort damages limitation; a torts case; then a foreign (international) *law* case – all in the service of jettisoning the public policy exception).

³³ “All the commentators would retain the public policy principle in conflicts to the extent that it is grounded in basic moral conceptions or in ideas of fundamental justice, and we agree.” Paulsen and Sovern, *supra* note 27, at 1015. But see, e.g., Sprague, *supra* note 27, at 1447-1448, arguing that comity and choice of law are “vague and lacking objective

II. Practice: Four Stories of Slavery and Law in 19th Century Illinois

A contract for the purchase and sale of human beings, for which enforcement is sought in a non-slave state, would seem to be tailor-made for the public policy exception.³⁴ For jurists in a state that prohibits slavery, what sort of agreement could more profoundly conflict with “good morals...or public rights,” be more “pernicious and

standards...and that the values reflected in the comity and public policy doctrines are better served by more focused policy-oriented methods.” In fact, she goes so far as to argue, “Since the doctrines of comity and public policy can no longer serve a useful purpose, they should be abandoned by modern courts and relegated to background studies of the evolution of choice-of-law doctrine in the United States.” *Id.* at 1448.

³⁴ Paulsen and Sovern agree, without analysis: “Our courts properly should deny effect to a foreign contract of slavery.” Paulsen and Sovern, *supra* note 27, at 980. At least one English case actually so held, applying the English version of the public policy exception to comity to refuse to return enslaved persons who escaped from Florida (then a Spanish slave-holding province) onto a British ship. Forbes v. Cockburn, 2 Barn. & C. 448, 9 E.C.L. 199 (FULL CITE). Judge Holroyd stated, “The plaintiff, therefore, must recover here upon what is called the comitas inter communitates [comity of nations], but it is a maxim that cannot prevail in any case where it violates the law of our country, the law of nature, or the law of God.” As Judge Caldwell describes, “the court, holding that slavery was contrary to the law of nature and the law of God, the defendant [the British officer in command] had judgment.” Osborn v. Nicholson, 18 F.Cas. at 847.

detestable,”³⁵ more “repugnant to positive statutory enactment and the public policy of that State,”³⁶ than a contract for a slave? What sort of contract could be “in [its] own nature” more deeply “founded in moral turpitude” than one purporting to traffic in human beings?³⁷ In the modern era, a federal court in Illinois used the public policy exception to refuse enforcement of a New Jersey contract arising from a gambling debt.³⁸ Surely

³⁵ Greenwood v. Curtis, *supra* note 1, 6 Mass. at 358. Strikingly, in Hinds v. Brazealle, 2 Howard 837, at *3 (Miss. Err. App. 1838), the Mississippi court used this same language, even citing Greenwood, to explain why it would *refuse* to give effect to an Ohio deed emancipating a Mississippian’s slave (at a time when manumission required ratification by the Mississippi legislature). The “offence [sic] against morality, pernicious and detestable as an example,” Id. at *4, is Elisha Brazealle’s attempt to avoid the laws of Mississippi, and emancipate an enslaved woman and her son, “John Monroe Brazealle,” acknowledged by Elisha as his own son, to whom Elisha also sought to devise his entire estate. Id. at *1.

³⁶ Clifton Steel Corp. v. General Electric Co., *supra* note 26.

³⁷ Under the Second Restatement, a “fundamental policy” of the forum will overcome even the parties’ own contractual choice of law clause. Restatement (Second) of Conflict of Laws §187(2)(b) (1971). Comment g provides that “a fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal.” Surely a Constitutional provision banning slavery would qualify (especially where the contracts in question did not contain choice-of-law clauses).

³⁸ Resorts International Hotel, Inc. v. Zonis, 577 F.Supp. 876 (N.D. Ill. 1984).

slavery was more offensive to mid-nineteenth-century Illinois jurists, than gambling is today? And yet...

As part of the Northwest Territories, Illinois was and always had been a non-slave-holding state. The sixth article of the Northwest Ordinance of 1787, the founding legal document of Illinois, prohibited slavery and involuntary servitude except as a penal sanction.³⁹ Illinois was admitted to the U.S. as a state on December 3, 1818,⁴⁰ and the first section of the sixth article of the Illinois Constitution stated, “Neither slavery nor involuntary servitude shall hereafter be introduced into this state, otherwise than in the punishment of crimes whereof the party shall have been duly convicted.”⁴¹ The first section of the eighth article of the Illinois Constitution stated, “That all men are born equally free and independent, and have certain inherent and inalienable rights; among which are those of enjoying and defending life and liberty, and of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”⁴²

³⁹ Ordinance of 1787, “An ordinance for the government of the territory of the United States northwest of the River Ohio,” art. VI, reprinted in Isaac F. Patterson, *THE CONSTITUTIONS OF OHIO* 52 (1912).

⁴⁰ *THE WORLD ALMANAC AND BOOK OF FACTS* 370 (2003).

⁴¹ Ill. Const. of 1818, art. VI (1970). *But see* Paul Finkelman, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 37-80, 2nd ed. (2001), which argues that the 1787 Ordinance did not effectively abolish slavery in the Northwest Territories, and that it was not finally abolished in Illinois until ratification of the Illinois Constitution of 1848

⁴² Ill. Const. of 1818, art. VIII, § 1 (1970).

That slavery was inconsistent with the official public policy of Illinois is clear;⁴³ what remained to be seen was whether or to what extent the policies embodied by these documents would be used by Illinois courts to decline enforcement of legal arrangements treating people of African descent and the labor of their bodies as the property of others. The balance struck by nineteenth-century courts between the repudiation of slavery and the slave trade, on the one hand, and adherence to traditional contract-validating principles, on the other, even by courts in unequivocally abolitionist states, reveals much about the willingness, or unwillingness, of such courts to use law actively to dismantle or undermine slavery.

The Illinois cases wrestling with these issues culminate in *Roundtree v. Baker*,⁴⁴ in which the 1869 Illinois Supreme Court ordered payment on an antebellum Kentucky slavery contract. The rationale offered in *Roundtree* demonstrates how conventional modes of legal reasoning, even in jurists of otherwise apparently good conscience, may lead to missed opportunities to deploy existing legal technologies in ways that further liberatory, anti-subordination, and anti-racist policies and views.⁴⁵ The goal of studying

⁴³ Commentators critical of the public policy exception have drawn attention to the perhaps inappropriately broad range of legal (or even non-legal) materials used by forum courts as sources of the purported “public policy” of the forum. See, e.g., Corr, *supra* note 18, at 658-659. No one, however, has suggested that the forum state’s *Constitution* is not a proper source of public policy.

⁴⁴ 1869 WL 5419 (Ill.), 52 Ill. 241 (1869).

⁴⁵ See Adrienne Davis, “The Private Law of Race and Sex: An Antebellum Perspective,” 51 *Stan. L. Rev.* 221 (1999), for an unparalleled scholarly elucidation of this approach.

this case thus extends beyond coming to a clearer and more accurate picture of Illinois Reconstruction-era law, valuable and important as that is; it also contains lessons whose significance is not merely historical.⁴⁶

Let us turn now to the cases.

1. Nance v. Howard (1828)

Nance was a girl born into slavery in the early 1800s.⁴⁷ Sometime before Illinois statehood, she was brought into the territory of Illinois, where the operation of Illinois law converted her status from slave to “registered servant” until the age of 32.⁴⁸ Her erstwhile master then found himself in debt, and the creditor sought to execute upon his property, including Nance herself. The same law that rendered slaves registered servants further provided that she was “liable to be sold by her master upon her giving her consent in the ‘presence of a justice of the peace.’”⁴⁹ *Nance v. Howard* addresses the question of whether a person whose labor may be bequeathed, assigned and otherwise voluntarily alienated by another, may also be transferred involuntarily, for his debt.

⁴⁶ Roundtree has also been used as an example of the courts’ general reluctance to employ the public policy exception, the idea being that if courts will tolerate even out-of-state contracts for *slavery*, what will they *not* validate? See Paulsen and Sovern, *supra* note 27 at 972-973. As I hope will become clear in this Article, I think it is dangerous to take slave contracts as an “example” of anything else.

⁴⁷ *Nance v. Howard*, 1 Ill. 242, 1828 WL 1651 (Ill.) (1828), *5.

⁴⁸ *Id.* at *5.

⁴⁹ *Id.* at *5.

The 1828 Illinois Supreme Court, in an opinion written by Justice Samuel Lockwood,⁵⁰ concluded that she might be.⁵¹ More precisely, the court concluded that nothing operated to *exempt* Nance from an 1825 law providing for the seizure and sale of “all and singular, the goods and chattels, land and tenements and real estate”⁵² of a

⁵⁰ The official Supreme Court of Illinois website provides the following biographical information about Justice Lockwood. “Samuel D. Lockwood was born on August 2, 1789 in Poundridge, New York. He studied law under Francis Drake and was admitted to the bar in New York, where he began his legal practice. He also served as justice of the peace and master in chancery. In 1818, Justice Lockwood moved to Illinois and continued the practice of law in Carmi. He moved to Edwardsville in 1821, after the legislature elected him to the office of Attorney General. He became the receiver of the Edwardsville Land Office in 1823. The legislature appointed him to the bench of the Illinois Supreme Court in 1825. When the legislature divided Illinois into nine judicial circuits in 1841 and required supreme court justices to preside over circuits, Justice Lockwood was responsible for the First Judicial Circuit. He represented Morgan County at the 1848 Illinois Constitutional Convention which ultimately reduced the number of supreme court justices from nine to three. Lockwood resigned from the bench the same year. Originally a Whig, Justice Lockwood joined the Republican party in 1855. In 1851, he was appointed Legislative Trustee of the Land Department of the Illinois Central Railroad. He held that position until his death on April 23, 1874, in Batavia, Illinois.” See http://www2.state.il.us/court/SupremeCourt/Previous/Bio_Lockwood.asp.

⁵¹ 1828 WL 1651 at *2.

⁵² *Id.* at *2.

judgment debtor. This, despite the fact that while prior laws listing forms of property available for execution for debt specifically identified “the time of service of negroes and mulattoes,” the 1825 law did not.⁵³ Nevertheless, Lockwood interpreted the 1825 law to include the missing provision explicitly permitting the attachment “on slaves, indentured or registered colored servants and live stock,”⁵⁴ and concluded that Nance’s seizure and sale on execution was also proper.⁵⁵

In order to avoid the sale sought by the judgment creditor, Justice Lockwood had only to read the 1825 execution statute, which explicitly repealed all former acts, as *excluding* execution on human beings (or their bound labor). To read it in this way required simply that he give the omission of any express provision for the sale the significance most naturally and reasonably following from the change from the prior laws of 1807, 1819, and 1823 – that such “property” was no longer to be included.⁵⁶ He might also have drawn support from the consent provision of the law relating to indentured servants, for the proposition that a person in that condition is not simply a chattel, and ought not be subject to execution on the same terms as inanimate goods, animals, or land.

Instead, Lockwood labored intellectually *not* to reach this conclusion – to explain why the 1825 law actually *did* include, and hence permit, what it literally omitted (and impliedly prohibited). To the argument that the omission implied exclusion, he responded,

⁵³ Id. at *2-3.

⁵⁴ Id. at *4.

⁵⁵ Id. at *4.

⁵⁶ Id. at *2-3.

This inference would no doubt be correct, if these servants were only made liable to execution by express enactment of the legislature, but from the review of the legislation in relation to indentured and registered servants, I am inclined to the opinion that the legislature have always regarded them as property, and that the object of the legislature in expressly authorizing them to be sold on execution, was not to introduce a new rule, but to remove “doubts” that had arisen on the subject.⁵⁷

Quære whether the “doubts” sought to removed by prior laws might have arisen because the constitution of Illinois prohibits the traffic in human beings, and whether the felt necessity to permit such executions, explicitly, by legislative enactment three separate times, contradicts the claim that anything *other* than express enactment of the legislature could legitimize such executions (and other legal vestiges of slavery). Note further that Lockwood implicitly acknowledged that the “plain meaning” of the statute is that persons are exempt from execution, hence his interpretation required recourse to legislative intent. He could not even rely on legislative *history* (there may be none recorded) – he simply read the prior legislation and formed an “opinion” at odds with the text. Lockwood continued,

If, then, the statutes concerning executions are only to be considered as declaratory of what the law was, then the omission of a similar provision in the act of 1825, can not be deemed decisive of the intention of the

⁵⁷ Id. at *3 (quotation marks in original).

legislature. The intention must, therefore be sought in the “several acts *in pari materia* and relating to the same subject.”⁵⁸

The “several acts” to which he refers are, in fact, the prior, expressly repealed, laws, revived by Lockwood and read together with the 1825 law that repealed them, for no purpose other than to permit execution on a specific category of property explicitly identified in those prior enactments, but omitted from the law governing the case.

After performing this questionable legal legerdemain, Justice Lockwood then answered his own question – “Are then registered servants, goods or chattels, within the meaning of the [1825] statute [providing for the seizure and sale on execution]?” – affirmatively, and even commented, “This is a question of mere dry law, and does not involve in its investigation and decision, any thing relative to the humanity, policy, or legality of the laws and constitution, authorizing and recognizing the registering and indenturing of Negroes and mulattoes.”⁵⁹ Little remained, indeed, once he had disregarded whatever legislative intent inhered in the consent provision for transfer of indentured servants’ time of service (perhaps, some recognition of the bound laborers’ consciousness, volition, and hence their “humanity”), and resolved the arguably ambiguous omission of bound labor from executable property *against* the statute’s plain meaning.

What might Lockwood have done instead? He might have read the 1825 statute straightforwardly, interpreting the deletion of “the time of service of negroes and mulattoes” from the operable version of the statute as putting such assets beyond the

⁵⁸ Id. at *3.

⁵⁹ Id. at *2.

reach of the execution statute. In general, property that is freely alienable is also reachable for debt; it appears both unfair and inconsistent to allow someone to keep valuable property while his creditor remains unsatisfied. At the same time, creditors are not (and never have been) permitted to reach *every* article of the debtor's property, and making an exception for bound labor could find support in the consent provision that distinguishes this transfer from the debtor's power over his other freely-alienable "property."⁶⁰ In current parlance, surely her labor was "held primarily for the personal, family, or household use of the debtor,"⁶¹ and in that way resembles exempt property.

Moreover, had Nance consented to a voluntary transfer, the proceeds of such a transaction would of course have been reachable by the creditor. But had the debtor preferred to continue to exercise the rights over Nance and her labor permitted him by the Illinois law of the time, he would simply have had to satisfy his debt out of his *own* labor (or other property), rather than hers. This is hardly a radical outcome – it would have left Nance in very nearly the same condition she was in prior to the lawsuit – yet it would

⁶⁰ Today, exemptions are found in the Bankruptcy Code at 11 U.S.C.A. § 522, and cover, *inter alia*, such items as a dollar-value-limited interest in a residence, an automobile, "household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor," 11 U.S.C.A. § 522(d)(3), jewelry, "implements, professional books, or tools, of the trade of the debtor," 11 U.S.C.A. § 522(d)(6).

⁶¹ See, e.g., 11 U.S.C.A. § 522(d).

have represented a small step in the right direction, furthering distinguishing Illinois' "registered servant" status from slavery. Yet Lockwood declined to take that step.

2. **Hone v. Ammons (1852)**

The dispute in *Hone v. Ammons* arose from a contract for the purchase and sale of a man.⁶² We are never told the name or age of the man Hone purported to sell to Ammons, nor do we learn very much about him, other than that he "was walking abroad as free as Hone himself, and for aught that appeared had ever been so."⁶³ Under the law of the time, the man's presence in Illinois itself raised a legal presumption of his free status, and, notably, Hone's testimony that the man was his escaped slave was held insufficient to establish even that he *was* a slave, much less that he belonged to Hone.⁶⁴ Though Ammons had executed a promissory note for the purchase price, and did not pay, Hone had no recovery against him.⁶⁵ For Justice John Caton,⁶⁶ one member of the three-

⁶² Hone v. Ammons, 14 Ill. 29, 1852 WL 4379 (Ill.).

⁶³ Id. at *1.

⁶⁴ Id. at *1.

⁶⁵ Id. at *1.

⁶⁶ Caton's official biography provides as follows: "John Dean Caton was born on March 19, 1812, in Monroe, New York. He studied law under Beardsley and Matterson in Utica, New York, Wheeler and Barnes in Rome, New York, and James H. Collins in Vernon, New York. In 1833 he moved to Chicago, where he obtained a license to practice law from Judges Samuel Lockwood and Theophilus Smith and opened Chicago's first law office with Giles Spring. Caton was the secretary of Illinois's first political convention, which took place in Ottawa, and in 1834, he was elected as a justice of the peace. In 1837

judge panel (and a former apprentice of Justice Samuel Lockwood), this was an end of the matter.

In concurrence, Justice Lyman Trumbull,⁶⁷ who would later go on, as a U.S.

he was elected an Alderman in Chicago. Governor Thomas Carlin appointed Caton as an associate justice of the Illinois Supreme Court in 1842 to fill a vacancy on the court. Governor Thomas Ford reappointed him in 1843 to fill another court vacancy. The general assembly reappointed Caton to the bench when the Ford appointment expired. With the adoption of a new state constitution in 1848, the voters elected Caton to one of the three positions on the Supreme Court. He became Chief Justice when Samuel H. Treat resigned from the bench in 1855, and he became Chief Justice again in 1857. Caton resigned from the court in 1864, having served nearly 22 years. He was interested in telegraph lines and at one time controlled all such lines in Illinois until he leased them to the Western Union Telegraph Company. A widely traveled man, Caton's interest in natural history led to his publication of numerous pamphlets and papers on various subjects. Caton died on July 30, 1895, in Chicago, Illinois. He is buried in Ottawa, Illinois." See http://www2.state.il.us/court/SupremeCourt/Previous/Bio_Caton.asp.

⁶⁷ Trumbull's official biography provides as follows: "Lyman Trumbull was born on October 12, 1813, in Colchester, Connecticut. He was admitted to the bar in 1836 in Georgia, and moved the following year to Belleville, Illinois, to practice law. In 1840, he won election to the state legislature on the Democratic ticket. The following year Governor Thomas Carlin appointed him Secretary of State, and he held that position until 1843. Trumbull continued to practice law until 1848, when he was elected to the Illinois Supreme Court. He was reelected for a nine-year term on the bench in 1852, but he

Senator, to chair the Senate Judiciary Committee and introduce the resolution that became the Thirteenth Amendment, offered an analysis more thoroughly grounded in choice of law concepts, and one that reaches the same conclusion regardless of whether the man had been formerly enslaved by Hone. Citing Story, he reiterated the basic principle of contract validation:

As a general rule, the validity of a contract is to be determined by the law of the place where it is made....If valid where made or to be performed, it is by the general law of nations held valid everywhere.⁶⁸

Trumbull then applied the public policy exception:

[A] contract made in Illinois, for the sale of a person as a slave, who is at the time in this State, and to a citizen thereof, is opposed to the policy

resigned in 1853, after his election to Congress as an Anti-Nebraska Democrat. The following year, the Illinois legislature elected Trumbull over Abraham Lincoln, James Shields, and Governor Joel Matteson for a seat in the United States Senate. While in office, Trumbull joined the Republican party after its formation in 1857. He chaired the Senate judiciary committee and introduced the resolution that became the Thirteenth Amendment, which abolished slavery and involuntary servitude in 1865. He voted against the impeachment of President Andrew Johnson and was associated with the Liberal Republican movement. Trumbull returned to the Democratic party in the 1870s. He served in the Senate until the expiration of his third term in 1873. Justice Trumbull moved to Chicago and continued the practice of law until his death on June 25, 1896, in Chicago.” See http://www2.state.il.us/court/SupremeCourt/Previous/Bio_Trumbull.asp.

⁶⁸ 1852 WL 4379 at *2.

which the people of Illinois thought proper to adopt in the foundation of their State government, and in the very teeth of the express provisions of the constitution.⁶⁹

Trumbull went further still:

A part of this contract, the consideration of the note, was the sale of a negro in Illinois, to a citizen of Illinois, as a slave. Is there room for question even, that the sale of a person in this State as a slave is contrary to the policy of our State government, to say nothing of the express declarations of the constitution?⁷⁰

For Trumbull, the Illinois State Constitution did not simply *permit* non-enforcement of such a contract, but mandated it:

In a legal point of view, I would as soon think of enforcing a contract to carry into effect the African slave trade, as that under consideration. The one is forbidden by an act of Congress, and the other by the fundamental law of the State; both of which are equally binding upon this court....[N]ot only was the contract made in Illinois, a State in which slavery is not allowed by law, but the slave who was the subject-matter of the contract was at the time in Illinois, and the purchaser was also a resident of the same State. For the court to lend its aid to the enforcement of such a contract, would, in my opinion, be a violation of all principle and all

⁶⁹ Id. at *2.

⁷⁰ Id. at *2.

authority.⁷¹

It might be argued that this is, in a sense, too “easy” a case, from a conflicts-of-law point of view. In today’s choice of law vocabulary, the state whose law should govern any transaction is the state having “the most significant relationship”⁷² to it – and that is clearly Illinois (although it is apparently not the domicile of would-be vendor Hone). The contract negotiation and execution occurred there, the purportedly enslaved

⁷¹ Id. at *2, *4.

⁷² Restatement (Second) of Conflict of Laws § 188 (1971) provides, in pertinent part, as follows:

“(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and
- (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.”

person (“the subject matter of the contract”) was physically located there, and the purchaser was also an Illinois resident. Modernly, the consequence is that local Illinois law, under which such a contract is illegal and unenforceable, is most likely to be applied (whatever the forum state might be).

While it appears that Hone was a Missouri domiciliary,⁷³ and hence might imagine himself entitled to the benefit of Missouri law, the difficulty of imagining how the performance of the contract on his part could be successfully carried out either in Illinois or in Missouri suggests either a fraud on his Illinois buyer or a desperate attempt to use the Illinois courts effectively to re-enslave this man – unavailing in either case. The case is also too “easy” because the Illinois court favored its own domiciliary, in relieving him of his obligation to pay the out-of-stater on the note (while also, we should remember, upholding or establishing the free status of the unnamed man).

Nevertheless, for an antebellum case, *Hone* is clearly much more promising than *Nance*. Rather than endeavoring to defend the property rights of one person in another, or avoid “offending” the State of Missouri or the Missourian Hone, Trumbull identified this contract as an example of the prohibited slave trade, and was neither modest nor apologetic in reading the Illinois constitution as straightforwardly barring its enforcement in Illinois.

3. Rodney v. Illinois Central (1857)

Not long after the 1855 case of *Hone v. Ammons*, an enslaved man named Joseph fled from slavery in Missouri, made his way to Cairo, Illinois, and got aboard an Illinois

⁷³ 1852 WL 4379 at *3 (“The moment the master sold the negro, if the sale was valid, he ceased to owe service or labor in the State of Missouri, under the laws thereof”).

Central Railroad Company train to Chicago.⁷⁴ His self-described “owner,” one Thomas Rodney of Missouri, sued the railway company in Illinois state court for, *inter alia*, trespass on the case, an all-purpose tort claim referred to by the time of this opinion simply as “case” (seeking damages of \$3000 for the loss of Joseph’s services); and trover for conversion (the property action used to seek damages for the value of an item of personal property, in this case Joseph himself).⁷⁵

Rodney lost, the defendant railroad won – but obviously the real “winner” was Joseph, who (like the unnamed “man” in *Hone*) was fortunate enough to find himself in a state whose courts would not permit themselves to be used by out-of-state slave owners to vindicate their purported property rights in other human beings. Justice Onias Skinner⁷⁶ of the Illinois Supreme Court was crystal-clear in affirming the court below:

⁷⁴ Rodney v. Illinois Central, 19 Ill. 42, 1857 WL 5640 (Ill.). It is not entirely clear from the opinion whether he also rode an Illinois Central train from Missouri to Cairo, Illinois.

⁷⁵ Id. at *2.

⁷⁶ Skinner’s official biography provides as follows: “Onias C. Skinner was born in 1817 in Floyd, New York. He moved to Peoria, Illinois in 1836, but soon moved to Ohio where he studied law and was admitted to the Ohio bar. In 1840 he moved to Carthage, Illinois, and then to Quincy. Skinner served a term in the state legislature from 1848 - 1850. In 1851, Skinner was elected judge of the Fifth Judicial Circuit, which was composed of Adams, Brown, McDonough, Hancock, Henderson, and Mercer counties. In 1855, he was elected a justice of the Illinois Supreme Court, after the resignation of Samuel H. Treat and served until resigning in 1857. Skinner also served as a member of the 1870 state

neither case nor trover will lie, because “[t]he owner...by force of the laws of another State, under the law of Illinois, has no property in the fugitive, and can here, under State authority, assert no property in, or power over him,”⁷⁷ leaving Rodney to seek his remedy, if any, in federal court under the Fugitive Slave Act of 1850.⁷⁸ The Illinois Supreme Court went further, and declared, “[t]he law of Missouri, under which the negro owes service to the plaintiff, [is] repugnant to our law and the policy of our institutions, [and] neither by the law of nations or the comity of States, can affect the condition of the fugitive slave in this State, or, within our jurisdiction, give the owner any property in or control over him.”⁷⁹ The Court concluded,

Property in persons being repugnant to our laws and the genius of our State institutions, our courts will not enforce, as a general rule, the laws of other States recognizing this species of property, where the cause of action, based upon such laws, arises in this State...[Rodney], under the local law [of Illinois], where the alleged conversion occurred, had no property in the negro, and none under that law...could vest in the [railroad].⁸⁰

constitutional convention. He practiced law until his death on February 4, 1877, in Quincy, Illinois.” http://www2.state.il.us/court/SupremeCourt/Previous/Bio_Skinner.asp.

⁷⁷ 1857 WL 5640 at *2.

⁷⁸ *Id.* at *3.

⁷⁹ *Id.* at *3.

⁸⁰ *Id.* at *3-4.

After *Rodney*, it would appear that the stage was set for the direct repudiation of any contract for the purchase and sale of a human being. However legally valid such an agreement might have been in its place of making, if sought to be enforced in Illinois, enforcement could be declined through a straightforward application of the public policy exception.⁸¹

4. **Roundtree v. Baker (1869)**

Such a contract finally came before the Illinois Supreme Court in *Roundtree v. Baker* in 1869,⁸² by which time, of course, the Civil War and the Thirteenth Amendment had intervened. For a court already apparently poised to decline enforcement of slave contracts *before* the Civil War, one might think that a nationwide Constitutional ban on slavery would only strengthen its position.

⁸¹ *Rodney* was influential enough that, after it was published, someone went back and added a long footnote to the opinion in *Nance v. Howard*, *supra*, sketching the contours of the legal understanding of slavery in Illinois as of *Rodney*. This footnote to *Nance* notes first that “the present constitution of this state does not permit slavery within the state.” *Nance*, at *1. On this basis, “Negroes within [Illinois] jurisdiction are presumed to be free.” *Id.* Because “[s]lavery is the creation of municipal regulations in states where it exists...such regulations have no extra-territorial operation or binding force in another sovereignty.” *Id.* Furthermore, “[a] contract made in Illinois for the sale of a person as a slave, who is at the time in the state, and to a citizen of the state, is illegal and void.” *Id.* Finally, the footnote says explicitly that “[t]he laws of other states recognizing slavery, [are] repugnant to the laws and policy of the institutions of Illinois.” *Id.*

⁸² 1869 WL 5419 (Ill.), 52 Ill. 241 (1869).

The transaction at issue in *Roundtree* took place long before the Civil War; specifically, on October 10, 1833,⁸³ when Dudley Roundtree of Kentucky sold an enslaved girl, Eliza, to his relative Turner Roundtree of Illinois, for \$400.⁸⁴ In Kentucky, Turner gave Dudley a “writing obligatory,” a bond containing his written promise to pay.⁸⁵ The price was to be paid in 20 annual installments of \$20 each, beginning on

⁸³ In this respect, the transaction can be distinguished from those at which the Southern movement for “debt relief” was aimed. See Kull, *supra* note 4, at 528 (“Those slave contracts most clearly in view had been entered into shortly before the war, or after its inception”). Interestingly, some conflicts commentators have suggested that it would be appropriate to deny enforcement in general where “a debtor [would] be forced to utter ruin by the enforcement of a contract.” Paulsen and Sovern, *supra* note 27, at 1008, quoting 2 Rabel, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 583 (1947). This would suggest another, quite different, public policy rationale for non-enforcement of slave contracts, where the purchase price was likely to be paid out of the labor of the enslaved person, which is no longer available to satisfy the debt.

⁸⁴ 1869 WL 5419 at *2. The intra-family sale of slaves was a common transaction, accounting (for example) for 40% of the slaves included in decedents’ estates in the state of Maryland from 1831-1844. Kull, *supra* note 4, footnote 127 therein and accompanying text.

⁸⁵ *Id.* *2. Genealogical research discloses the biographical details for several individuals named “Dudley Roundtree” and “Turner Roundtree,” most of whom appear to be related to one another. Revolutionary War pension records, as presented on www.rootsweb.com, disclose the existence of a Dudley Roundtree of Hart County, Kentucky, born in 1768,

December 31, 1834.⁸⁶ Upon receipt of this writing, Dudley turned Eliza over to Turner, who returned with her to Illinois.⁸⁷ The opinion does not tell us whether Turner made any of the promised payments, but we can infer that he did not make all of them.

By the time the case was litigated, decades after the contract, both Dudley and Turner were dead, though Eliza still lived. The suit began when the administrator of Dudley's estate came to Illinois to force Turner's administrator to satisfy what remained

who provided testimony in 1832 about his relatives' service in the Revolution. The same website identifies Nathaniel Roundtree, born 1760, as Dudley's brother, and a son of Nathaniel named Turner. However, the case describes Dudley and Turner as "cousins," rather than uncle and nephew. See http://www.rootsweb.com/~kyhart/pensions_records_of_soldiers.htm. A different family tree website contains a Dudley Roundtree (whose father was also named Dudley), with a brother named Nathaniel born in 1760, "born ABT [about] 1767 in Cumberland Co., VA, and died 29 Nov 1839. He married Martha Allen Richardson 6 May 1790 in Woodford Co., KY, daughter of Turner Richardson and Anne Allen," which may account for the use of "Turner" as a given name. See

<http://worldconnect.rootsweb.com/cgi-bin/igm.cgi?op=AHN&db=doigk&id=I2767>.

Another genealogy website contains a listing for a "Turner Rountree" (note variant spelling), born about 1816 in an unnamed location, whose several older siblings were born in Kentucky and several younger siblings in Illinois, presumably when the family moved, but he would be too young for an 1833 transaction. See

<http://awt.ancestry.com/cgi-in/igm.cgi?op=AHN&db=:2919173&id=I15988&ti=4317>.

⁸⁶ 1869 WL 5419 at *2.

⁸⁷ *Id.* at *2.

of Turner's debt to Dudley.⁸⁸ Marvin Baker, Turner's administrator, pleaded *nil debet*,⁸⁹ and specifically, failure of consideration, because the contract purported to sell a free person.⁹⁰ Baker prevailed in a bench trial in February, 1869, succeeding in avoiding the debt. This outcome was appealed to the Illinois Supreme Court, where Dudley's administrator obtained a reversal, in an opinion by Kentucky-born Justice Pinckney

⁸⁸ Under both 19th century and current law, claims against a decedent or decedent's estate must typically be presented to the court probating the decedent's estate. Because Turner died owning property in Illinois, his estate would be probated by the appropriate Illinois court. 755 Illinois Compiled Statutes 5/5-1, formerly governed by R.L. 1829, p. 197, § 17; R.L. 1833, p. 616, § 17; R.S. 1845, p. 540, § 17 (and subsequent revisions and recodifications).

⁸⁹ "Nil debet," Latin for "he owes nothing," is a general denial in a common law debt action on a simple contract. "The proper general issue in debt on simple contracts and statutes is 'nil debet,' which is a formal denial of the debt. It denies not only the existence of any contract, but under it any matters in excuse or in discharge may also be shown." Benjamin J. Shipman, *Handbook of Common-Law Pleading* § 184, at 327 (Henry Winthrop Ballantine ed., 3d ed. 1923). Black's Law Dictionary (8th ed. 2004).

⁹⁰ Today, we might regard such a contract as void for illegality, rather than failure of consideration, which has fallen into disuse. There was an additional statute of limitations issue pleaded, but the court concluded that the applicable statute of limitations, sixteen years, was met, presumably because suit was filed less than sixteen years after the first missed payment, or less than sixteen years after the final payment was due (December 31, 1854). 1869 WL 5419 at *2.

Walker (another Lockwood apprentice).⁹¹ The court which, a decade before, had described slavery as “repugnant to our law and the policy of our institutions,”⁹² and had stated expressly that “our courts will not enforce, as a general rule, the laws of other States recognizing this species of property, where the cause of action, based upon such laws, arises in this State,”⁹³ then proceeded to enforce a contract made in Kentucky,

⁹¹ Walker’s official biography provides as follows: “Pinckney H. Walker was born on June 18, 1815, in Adair County, Kentucky. He moved from Kentucky to Rushville, Illinois, where he clerked in a store for four years. He studied law in the office of his uncle, Cyrus Walker, and was admitted to the bar in 1839 by Justices Lockwood and Browne. He practiced law in Macomb, Illinois, until 1848, when he returned to Rushville. Walker continued to practice law, and in 1853, he was elected judge of the Fifth Judicial Circuit, which was composed of Schuyler, Pike, Brown, McDonough, Cass, and Mason counties. He resigned from this position in 1858 after accepting an appointment to fill a vacancy on the Illinois Supreme Court, replacing Onias C. Skinner. From 1864 - 1867 and again in 1874 and 1879, Walker served as the chief justice of the court. Walker was reelected to the supreme court three times and held his position on the bench until his death on February 7, 1885, in Rushville, Illinois, having served on the court for twenty-seven years.” See http://www2.state.il.us/court/SupremeCourt/Previous/Bio_Walker.asp.

⁹² 1857 WL 5640 at *2.

⁹³ Id. at *3.

between a Kentuckian and an Illinois citizen, for the purchase and sale of an enslaved human being. And all this took place four years *after* the Civil War!⁹⁴

How? And why? First, the “how.” It is possible, by a certain effort, to analyze this agreement without considering its subject matter more than fleetingly, simply by treating it as a Kentucky contract, fully enforceable under Kentucky law when made, fully performed by Dudley, and hence enforceable by him (or his representative) in an action brought in any U.S. state within the applicable statute of limitations. This would be so even though, in 1869, such a contract newly made would not be enforceable even in Kentucky. As the court says, “Under the laws of Kentucky the sale [of Eliza] was authorized, and there was a sufficient consideration.”⁹⁵ The court might have echoed

⁹⁴ Roundtree is discussed by Paulsen and Sovern, *supra* note 27, who state, “The idea that a court will enforce such a contract as long as it can keep from turning itself into a flesh market also found acceptance in the Supreme Court of Illinois in a suit to recover on a note given for the price of a slave [Roundtree v. Baker]. Relief was granted even though Illinois had abolished slavery long before the sale in Kentucky took place and even though the Civil War and the abolition of slavery had intervened between the time of the transaction and suit. The court indicated its abhorrence of slavery, stating that it would not specifically enforce such a contract but that, since the slave had been delivered, it would enforce payment of a note given for him.” Id. at 972-973. They do not comment further, other than to remark that “it is curious that the sensibilities of the judiciary have been offended in cases involving far less egregious violations.” Id. at 973. Roundtree is also mentioned in Kull, *supra* note 4, at 516.

⁹⁵ 1869 WL 5419 at *4.

Lockwood in *Nance v. Howard* from four decades earlier, and held that enforcement of this agreement “is a question of mere dry law, and does not involve in its investigation and decision, any thing relative to the humanity, policy, or legality of the laws and constitution”⁹⁶ of Illinois as they relate to slavery. As one commentator aptly summarizes, “The legal foundation of the enforcement of a debt, after all, was not the law of slavery but the law of contracts.”⁹⁷

Enforcement on this rationale, if disappointing, would not be completely surprising, though it would be simple-minded after *Hone* and *Rodney*. The “public policy” issue demands attention, hardly less after the Civil War than before. For a proper nineteenth-century jurist employing a proper comity-based approach, the inquiry must address whether the public policy of Illinois, in 1869, militates against the enforcement of this Kentucky agreement – and on *that* question, *Rodney* and *Hone* seem clearly to answer in the affirmative. How does the *Roundtree* court avoid this result?

First, it should be said, *not* by using the mechanisms that a contemporary jurist would – identifying Kentucky as the state with the “most significant relationship” to the contract, and applying Kentucky law (whatever that might be in a post-bellum environment with respect to contracts of this kind). Applying today’s choice of law rules, it is not difficult, as a technical matter, to distinguish this case from *Hone* or *Rodney*. The Illinois court could reason that this claim falls outside *Rodney*’s refusal to grant recovery for causes of action based on property rights in slaves, because it did not “arise in this

⁹⁶ 1828 WL 1651 at *2.

⁹⁷ Kull, *supra* note 4, at 514.

State,”⁹⁸ but rather, in Kentucky. The contract itself was entered into in Kentucky, a slave state, and the “consideration,” Eliza, was located there at that time. Dudley performed in Kentucky, and Turner gave his promise there. We might also think of Turner as having failed to perform *there*, where the promised consideration (\$20 annually) failed to arrive. Another contact with Kentucky is that the injury resulting from Turner’s breach was suffered there, where Dudley resided. In a Restatement (Second) jurisdiction like today’s Illinois, these factors warrant the application of Kentucky law, not Illinois law, to the dispute.⁹⁹ Interestingly, however, even if we *were* to apply a Second Restatement approach, the “public policy” exception is still available, as it has

⁹⁸ 1857 WL 5640 at *3.

⁹⁹ Today Illinois takes a Restatement (Second) approach to resolving disputes based on contractual rights where the contract has connections with more than one state and the parties have not made an explicit and effective choice of law. Illinois Tool Works v. Sierracin Corp., 134 Ill.App.3d 63, 89 Ill.Dec. 40, 479 N.E.2d 1046 (1985); Champagne v. W.E. O’Neil Construction Co., 77 Ill.App.3d 136, 32 Ill.Dec. 609, 395 N.E.2d 990 (1979); accord Palmer v. Beverly Enterprises, 823 F.2d 1105 (7th Cir. 1987). As it happens, Kentucky is also a Restatement (Second) jurisdiction for contracts conflicts of law. Lewis v. American Family Ins. Group, 555 S.W.2d 579 (1977) (adopting Restatement (Second) for contracts conflicts of law).

survived the transition from nineteenth- and early twentieth-century approaches to the Second Restatement in many states, including Illinois.¹⁰⁰ *Plus ça change...*

In any event, the clash between the Kentucky contract and the public policy of Illinois as it relates to slavery is unavoidable. Here is what the *Roundtree* court says:

Our courts would not enforce a contract for the sale of a slave, whether made in this State, where slavery has always been prohibited, or in a State where such contracts are binding, because it is against public policy. But after the parties have fully executed their contract, and a note is given for the price, the note may be collected, and it is not for us, from caprice, or because we may abhor the system of slavery and the sale of human beings, to refuse to lend the aid of the courts for the collection of the money. It is not against the policy of our State to allow its collection, nor is it contrary to the interests of our citizens.¹⁰¹

The passage begins, “Our courts would not enforce a contract for the sale of a slave.” This cannot mean simply that the Illinois court would not order a defendant under the jurisdiction of the Illinois court to deliver to a plaintiff who has paid consideration, a human being to be enslaved. After the unequivocal abolition of slavery in every U.S. state, such a result is unavoidable, and indeed, would hardly have raised an eyebrow in Illinois, even before the war – notwithstanding *Nance v. Howard* – given *Hone* and

¹⁰⁰ Resorts International, Inc. v. Zonis, 577 F.Supp. 876 (N.D.Ill. 1984) (refusing to enforce a gambling debt validly contracted in New Jersey); *see also* Corr, *supra* note 18, at 676-77.

¹⁰¹ 1869 WL 5419 at *4.

Rodney. By 1869, of course, such a contract, wherever made, would be unenforceable not because it was in some inchoate way “against public policy,” but because enforcing it in those terms would violate the U.S. Constitution (and the Illinois Constitution as well).¹⁰² That agreement would be – in 1869 – illegal everywhere, and no “public policy exception” would need to be invoked to deny it enforcement.

But for this antebellum agreement, Justice Walker sidesteps the problem, employing a hypertechnical distinction to separate what is impermissible – “the sale of a slave” – from what is apparently perfectly all right – “the collection of the money.” The court somehow distinguished between enforcing the *contract*, which it would not do, and

¹⁰² The Emancipation Proclamation took effect on January 1, 1863, but was not legally ratified and given effect as the 13th Amendment to the U.S. Constitution until December 18, 1865. The Thirteenth Amendment provides as follows:

“Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.”

The 14th Amendment provides in relevant part, “Section 1. [N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws....Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” The Fourteenth Amendment was ratified and took effect in 1868.

enforcing the *note*, which it did – an exceedingly formal distinction, at best.¹⁰³ Note the striking and unusual non-mutuality of remedy – had Turner fully performed (by paying), and Dudley not done so, ordering the delivery of Eliza into slavery across state lines in 1869 would have been in every sense impossible. The only remedy for that situation, presumably, would have been disgorgement by Dudley’s administrator on an unjust enrichment theory (perhaps with interest at the legal rate). In that situation, giving the parties the full benefit of their bargain, by judicial intervention, after the abolition of slavery, was simply impossible – the only option would be to approximate the pre-contracting status quo. Here, though, if Turner (or, more properly, Turner’s estate) is not made to pay, he will have enjoyed the benefit of Eliza’s bound labor for approximately thirty years without paying anyone for it – the sort of “windfall” a court is unlikely to let lie.

The opinion continues, “it is not for us, from caprice, or because we may abhor the system of slavery and the sale of human beings, to refuse”¹⁰⁴ enforcement. Note how the grammar of the opinion equates the two – mere “caprice,” on the one hand, and “abhor[rence of] the system of slavery and the sale of human beings,”¹⁰⁵ on the other – as

¹⁰³ As Kull remarks with equanimity in a similar context, “Such answers may seem lawyerly and literal-minded, oblivious to the moral issues that many saw in the question. In traditional legal terms, however – the terms in which the challenge to enforcement was posed by the arguments... – the judges’ response was both accurate and cogent.” Kull, *supra* note 4, at 516.

¹⁰⁴ 1869 WL 5419 at *4.

¹⁰⁵ *Id.* at *4.

if the latter is no better a reason to refuse enforcement of a contract than the former, or worse still, as if the latter were merely a species of the former – and almost, in fact, as if there *were* no such thing as the public policy exception at all.

It is the *Nance v. Howard* move all over again – by deliberately abstracting from the real issue, what remains is nothing but a “question of mere dry law, [which] does not involve in its investigation and decision, any thing relative to the humanity, policy, or legality of the laws and constitution”¹⁰⁶ of Illinois as they relate to “the system of slavery and the sale of human beings.”¹⁰⁷ And this maneuver succeeds in framing the later reception of the case. *Miller v. Wilson*, an Illinois case decided in 1893, cites *Roundtree* for the uncontroversial principle that “a contract valid in the state where it is executed may be enforced in another state,”¹⁰⁸ in the comparatively innocuous context of a real property conveyance that satisfied the Kansas, but not the Illinois, statute of frauds.

Where is the Illinois court of the 1850s, unwilling to permit itself to be used to provide legal support for treating any human being as someone else’s property? In 1852, Hone’s attempt to collect on Ammons’ promise to pay for the man who was “walking abroad as free as Hone himself”¹⁰⁹ met with failure. Rodney, the Missouri slave-holder chasing after the fugitive Joseph and hoping to recover the value of his lost services from the Illinois railroad that carried the slave to freedom, encountered the near-derision of the Illinois court in 1857. By 1869, that same court seemed willing to bend over backwards

¹⁰⁶ 1828 WL 1651 at *2.

¹⁰⁷ 1869 WL 5419 at *4.

¹⁰⁸ Miller v. Wilson, 146 Ill. 523, 529, 34 N.E. 1111, 1113 (Ill. 1893).

¹⁰⁹ 1869 WL 5419 at *1.

to ensure that the heirs of a dead slave-seller collected full value on an agreement probably ignored for a decade or more, with both contracting parties dead and slavery abolished everywhere in the U.S. That result required a labored, hyper-technical distinction – between what it called “a contract for the sale of a slave,”¹¹⁰ and “a note...given for the price”¹¹¹ of that slave.

It may be hard to see a “third way” out of this dilemma – either Dudley’s heirs collect on a contract for the sale of a human being years after slavery, or Turner gets away with “stealing” from his cousin by taking years of Eliza’s labor without paying for it. The case is different from *Hone* and *Roundtree*, because in each of those cases, the person whose future labor is at issue is legally, presumptively, a free person.¹¹² The court holds that Ammons is not obligated to pay Hone, because Hone cannot deliver the unnamed man’s future labor to Ammons – the man is in Illinois, and he belongs only to himself. The court denies Rodney a recovery against the railroad, where any such recovery is again premised on Rodney’s loss of Joseph’s *future* labor – for Joseph is in Illinois, where he is a free man who owns himself. But in *Roundtree*, Eliza’s labor has already been performed. The vendee, the late Turner Roundtree, is hardly sympathetic –

¹¹⁰ Id. at *4.

¹¹¹ Id. at *4.

¹¹² And, it should be noted, a man. Although the cases have no overtly gendered legal dimension, it is worth mentioning at least in passing that the formerly enslaved persons whose free status is vindicated are men (Joseph and the man in *Hone*), and are presented in an autonomous and almost heroic light as having successfully escaped slavery, while the bondage of the women Nance and Eliza is tolerated if not endorsed by the court.

he did not buy Eliza to free her, after all – and we can feel the dilemma of the court forced to choose the lesser of these two evils. Eliza is free now. What else is there to do? Turner has received the benefit of his bargain, at least for his own lifetime. Doesn't justice demand that his estate pay for what he received?

It does. But there is a way out of this conundrum, a way to prevent the unjust enrichment of Turner's estate, *without* recognizing Dudley's property right in Eliza (though I readily grant that it is not an approach that would have occurred to Justice Walker).

That approach is to order Turner's estate to *pay Eliza* either on the contract, or for the value of her labor (plus interest) for all those years.

This remedy satisfies an even more fundamental and obvious demand of justice than that Turner's estate pay for what Turner received (though that demand is satisfied as well). Surely Eliza herself is more entitled to the price of her labor than the heirs of a dead slave-dealer? Those heirs may be "innocent" enough – but surely not more so than Eliza herself. Legally and morally, it may not be possible to compensate her for the denial of her liberty – but the law knows how to value expropriated labor.¹¹³ It is not enough to claim to "abhor the system of slavery and the sale of human beings,"¹¹⁴ while

¹¹³ This is not, of course, to suggest that the contract price, with interest, would in any sense *fully* compensate her. The injury she has suffered goes far beyond lost "wages," and may well encompass, for example, her sexual misuse since girlhood. If there is any situation in which the metaphor of "making a party whole" is tragically inapposite, it is surely here. Still, at the very least she is entitled to the market value of her labor.

¹¹⁴ 1869 WL 5419 at *4.

neglecting this perhaps unique opportunity for the Illinois court to quite literally “put its money where its mouth is.”¹¹⁵ In so doing, the court would have retroactively denied the legal reality of the slave relationship, the idea that the surviving Eliza was ever, in the eyes of the Illinois court, the property of another. *That* is what the court might have done, to hold Turner to his promise without validating the contract.¹¹⁶

One other alternative should be mentioned here: total “annihilation” of the contracts, a blanket refusal by the courts to take cognizance of the disputes. In principle, dismissal or denial of all enforcement claims might seem the “purest” anti-slavery position.¹¹⁷ As one contemporary put it, “If these debts are recognized, it is a recognition

¹¹⁵ This same structure – strong condemnatory rhetoric about slavery, resting atop a decision validating a slave contract – reappears in the U.S. Supreme Court decision in Osborn v Nicholson, 80 U.S. 654 (1871), discussed *infra*, in which the Reconstruction-era Court holds a slave buyer to his debt while purporting to acknowledge “[t]he atrocious traffic in human beings, torn from their country to be transported to hopeless bondage in other lands, known as the slave trade.” 80 U.S. at 661.

¹¹⁶ This also avoids the dilemma identified by Kull, as to whether it is correct that “contractual performance was not dependent on the continued existence of slavery,” or rather, would “the enforcement of a slave debt somehow impl[y] the permanence of the institution”? Kull, *supra* note 4, at 502. Payment to Eliza is a form of contractual performance that not only does not imply the future existence of the institution, but actually casts doubt on its *prior* existence as a legally-sanctioned arrangement.

¹¹⁷ Some “radicals” did argue, after abolition, “that such disputes were [no] longer cognizable by the courts.” Kull, *supra* note 4, at 512. Kull describes this as “deny[ing]

of that institution, of its propriety, its justice and morality.”¹¹⁸ The problem is that non-recognition does not so much deny the institution, as simply shift the loss from buyer to seller.¹¹⁹

Paying Eliza goes non-recognition one better: if the buyer is forced to pay, but the seller is unable to collect, *both* suffer a legal penalty – one for attempting to sell a person who could not rightfully belong to him, and the other for attempting to buy someone who ought not to have been reduced to a chattel at all. Moreover, it more fully implements or expresses the “radical” view, occasionally articulated in the Reconstructionist period, “that denied the legality of slavery, even where slavery was recognized by positive law.”¹²⁰ It was a commonplace in the abolitionist analysis to state that slavery existed *only* by “positive law”; the more radical position politically, and in a sense even metaphysically, questioned its existence even then.¹²¹ This is the issue raised

that justice between the buyers and sellers of slaves could ever again be a concern of the courts.” Id.

¹¹⁸ Proceedings of the Constitutional Convention of South Carolina 51 (1868), in Kull, *supra* note 4, at 515.

¹¹⁹ The political dynamics of favoring debtors over creditors in slave transactions, and hence favoring “debt relief” through non-enforcement, are explored in Kull, *supra* note 4, at 522-530.

¹²⁰ Kull, *supra* note 4, at 517.

¹²¹ The metaphysical problem posed by slavery, illuminated first by Adrienne Davis, “The Private Law of Race and Sex: An Antebellum Perspective,” 51 Stan. L. Rev. 221 (1999), *supra* note 45, is simply this: the Anglo-American ontology of property law

in the nineteenth century as whether there can be “any right of property in man.”¹²² To pay Eliza does more than prohibiting of enforcement, or non-recognition, can do to “deny that any human being was *ever* a chattel or a slave.”¹²³

The idea of paying Eliza is suggested only half-seriously, of course, as a sort of legal *Gedankenexperiment* or scientifico-legal fiction, a picture of an alternate reality no more genuinely imaginable in 1869 than cell phones and the Internet. But the fact that the suggestion is surprising or strange is evidence of how thoroughly effaced Eliza is, even from a case in which she is at least named (unlike the “man” in *Hone*). One way to give meaning to the claim that there is no “right of property in [wo]man” is to take her

divides everything that is, into a potential property-*owner*, or a potential item of property. Human chattel slavery posits, in essence, that someone might lie on *both* sides of this divide. Davis explores this in the context of conflicts arising from inheritance *by*, and *of*, enslaved persons. The opinion of Reconstruction-era Judge Caldwell, with perhaps more imagination than sensitivity to the niceties of statutes of limitations, *voir dire*, and other matters of procedure, conjures up the truly ghastly spectacle of a trial on a “breach of warranty” defense in a suit on a slave contract, in which the buyer alleges the slave was not sound in mind and body,” in which “it may chance that the subject of this inquiry is a juror or officer of the court, and indeed it might occur that the judge on the bench would be the subject of such an inquiry.” *Osborn v. Nicholson*, 18 F.Cas. 846, 855 (E.D.Ark. 1870).

¹²² South Carolina Constitutional Convention, *supra* note 114, at 225.

¹²³ Robert DeLarge, South Carolina Constitutional Convention, *supra* note 114 (emphasis added), at 915, quoted in Kull, *supra* note 4, at 520.

seriously, not merely as the subject-matter of the contract, nor precisely as a party to the dispute, but as a person with legal interests very much at stake here. She was, as it were, the “third party detrimental” of the contract in question – the one from whom consideration passed (her labor, and her liberty) but to whom no benefit flowed – and she has suffered a legal injury (apart from every other sort of injury) entitling her to a legal remedy.

It is surprisingly easy to lose sight of this perspective (or never to have noticed it at all). Professor Kull explains that denial of enforcement “pushed back the effective date of emancipation as between these buyers and these sellers, denying to the seller the fruit of his favorable bargain and relieving the buyer from the consequences of his unfavorable one.”¹²⁴ From the seller’s point of view, non-enforcement means “emancipation [is] made retroactive.”¹²⁵ Kull goes so far as to describe “a refusal to enforce the note” as “back-dating the effective date of freedom.”¹²⁶ But nothing has changed “the effective date of emancipation” or “freedom” from the enslaved person’s point of view! His or her days of bound labor were in no way diminished by the outcome of this litigation. Kull’s way of putting this point, which is actually about dating, and hence allocating, casualty loss (not “freedom”), is both technically correct and a reflection of the apparent naturalness of foregrounding the legal (and even moral) claims of those trafficking in human beings, rather than the enslaved persons themselves. Resisting that analytical temptation, even as we enter into the logic of these nineteenth-

¹²⁴ Kull, *supra* note 4, at 524.

¹²⁵ Kull, *supra* note 4, at 532.

¹²⁶ Kull, *supra* note 4, at 494.

century cases, is difficult, but important, if we are to have any hope of stimulating and sensitizing our current legal imagination about dilemmas that seem as intractable to us, as the unexecuted slave contract did to them.

Fully accounting for the *Roundtree* result is more difficult than trying to learn something from it. There is something here, surely, about interstate relations in the post-bellum era, in why the Illinois court seems more deferential to Kentucky, or the law of Kentucky, after the wounds of the Civil War than before. Or perhaps with slavery officially legally dismantled, and in that sense with little or nothing at stake, the Illinois judges meant to act magnanimously, and favor the heir of the slave-seller (the judge's fellow Kentuckian) over his Northern relation? We are left to speculate.

III. Comity and the Laws of Slavery in Antebellum Illinois

A better grip on nineteenth century American understandings of the principle of “comity” in choice of law helps us to understand what *didn't* happen in *Roundtree* but might have – why the Illinois Supreme Court declined to employ the “public policy” exception to void the Kentucky contract for the purchase and sale of Eliza.

The Illinois Supreme Court addressed comity and the clash between the laws of slaveholding and non-slaveholding states most squarely in relation to an Illinois criminal statute, §149 of the criminal code, which prohibited harboring and secreting fugitive slaves. Two cases arising under this statute, *Willard v. People*¹²⁷ and *Eells v. People*,¹²⁸

¹²⁷ 1843 WL 4112 (Ill. 1843), 4 Scam. 461, 5 Ill. 461 (1843).

¹²⁸ 1843 WL 4117 (Ill. 1843), 4 Scam. 498 (1843).

were decided in the winter of 1843. Both involved slave-holders who voluntarily brought enslaved persons with them from a slaveholding state through Illinois *en route* to a destination in another slaveholding state. The enslaved persons escaped and found shelter with Illinois citizens, who were then indicted for violating §149; in subsequent proceedings, the constitutionality of that statute was challenged. Both decisions include significant discussions of comity in this context.

Section 149 of the Illinois criminal code made it a criminal offense to harbor or secrete fugitive slaves.¹²⁹ Such a law obviously depended implicitly on the legal recognition of the relationship of master and slave, as one subsisting outside Illinois, but arguably requiring recognition of the master's property rights in the enslaved person even within Illinois borders. Because the Illinois constitution, by its own terms, apparently denied recognition of such a relationship and such rights, the constitutionality (under the *state* constitution) of the criminal law was challenged.

In concurrence in *Willard*,¹³⁰ and in dissent in *Eells*,¹³¹ Justice Samuel Lockwood, late of *Nance v. Howard*, articulated as clearly as possible the comity-based rationale not only for permitting slaveholders safe passage through the “free” state of Illinois (by not deeming their slaves emancipated solely based on bringing them into Illinois), but for further securing the slaveholders' property rights in enslaved persons by criminalizing the conduct of Illinois citizens who would assist fugitive slaves in escaping from bondage.

¹²⁹ (year of enactment)

¹³⁰ 1843 WL 4112, at *10.

¹³¹ 1843 WL 4117, at *13 (dissenting on the basis that the power to legislate on the subject of fugitive slaves is vested exclusively in the U.S. Congress).

These opinions not only reveal a good deal about the antebellum Illinois judiciary's attitudes toward slaves and slavery, but address the issue precisely in terms of comity.

In *Willard*, the Illinois attorney general MacDougall, defending the statute, presented the policy basis and goals of interstate comity, on analogy to international comity, as applicable specifically in the State of Illinois. He explained,

International comity is not the creature of legislation. It grows out of general rules which are observed to advance the general interests and convenience of nations; and in this state, as well as the other states of the Union, it is the province of the courts of judicature to determine how far they will recognise [sic] the laws of other states, and the rights of citizens of other states, within our own territory. In making such determination, it is their duty to adopt a large and enlightened policy, which will forward and advance a friendly and mutual intercourse between our own state and all the sister states of the confederacy; and our position upon the two great western rivers, connecting our business with the states of the south, and our intermediate location between the states of Kentucky and Missouri, furnish special reasons why they should recognise and respect the rights of the slave owner, so long as those rights do not interfere with our own cherished institutions.¹³²

¹³² 1843 WL 4112 at *6.

Justice Scates,¹³³ born in Virginia and raised in Kentucky, wrote for the Court, and characterized the case as one about the right of free passage by citizens of slaveholding states (with their slaves) through Illinois. He stated,

It would be productive of great and irremediable evils, of discord, of heart burnings, and alienation of kind and fraternal feeling, which should characterize the American brotherhood, and tend greatly to weaken, if not

¹³³ Scates' official biography provides as follows: "Walter B. Scates was born on January 18, 1808, in South Boston, Virginia. He moved with his parents to Kentucky in 1809. In 1831 he moved to Frankfort, Kentucky, and was admitted to the bar in 1833. In 1836 he moved to Vandalia, Illinois, and in December of that year, the state legislature elected him judge of the Third Judicial Circuit. Scates resigned in 1841, when the legislature appointed him to the Illinois Supreme Court, after it expanded the court from four to nine members. Each of the nine justices presided over a circuit court, and Justice Scates was assigned to the Third Judicial Circuit. He resigned from the bench in 1847, and moved to Chicago. He served as a delegate to the 1848 Illinois Constitutional Convention. Elected to the supreme court in 1853, Scates became chief justice in 1855, and resigned from the bench two years later. With the outbreak of the Civil War, Scates served in the military, and in 1862, he was commissioned a major on General John A. McClelland's staff, eventually attaining the rank of brigadier-general. Scates declined President Lincoln's offer of the New Mexico Territory governorship. From 1866 to 1869, Scates served as collector of customs for the port of Chicago. He resumed the practice of law in Chicago in 1870 and continued until his death on October 26, 1886, in Evanston, Illinois." See http://www2.state.il.us/court/SupremeCourt/Previous/Bio_Scates.asp.

to destroy the common bond of union amongst us, and our nationality of character, interest and feeling [to deny recognition to the property rights of slaveholders]. Thousands from Kentucky, Virginia, Maryland, Tennessee and the Carolinas, and other southern states have sought and found free and safe passage with their slaves across our territory, to and from Missouri. It would be startling, indeed, if we should deny our neighbors and kindred that common right of free and safe passage, which foreign nations would hardly dare deny.¹³⁴

While the Scates majority opinion took the more cautious and technical approach of locating the case firmly within the American jurisprudence of fugitive slaves, the concurrence by Justice Lockwood, with more intellectual courage (but fewer pangs of conscience?) refused this route, and rested the result exclusively on principles of comity.

For Lockwood, the general background presumption was that everyone in Illinois was free, unless that person were covered by the federal fugitive slave laws. Julia, the woman in *Willard*, was not technically a “fugitive,” because she was brought voluntarily into Illinois (she did not escape to Illinois).¹³⁵ Lockwood applied this analysis consistently, dissenting in *Eells v. People*, decided during the same term (December 1843), on the basis that the indictment did not contain enough information to determine whether the slave in question was in fact a “fugitive” covered by federal law.¹³⁶ In

¹³⁴ 1843 WL 4112 at *10.

¹³⁵ *Id.* at *10.

¹³⁶ *Richard Eells v. People*, 1843 WL 4117 (Ill.), 4 Scam. 498, 5 Ill. 498 (1843).

Willard, Lockwood cited cases making clear that the federal fugitive slave laws therefore did not apply,¹³⁷ and then asked frankly,

Julia then was not a fugitive from labor, under the constitution of the United States and the law of congress, and being brought into this state by her mistress, where the presumption is in favor of her freedom, the question arises what takes her case out of the operation of this general rule?¹³⁸

Using the same rhetorical strategy employed in *Nance*,¹³⁹ Lockwood again asked and answered this difficult but logical question (at least to his own satisfaction).

The answer is that her case is taken out of the operation of the general rule by the law of comity....[T]he courts of this state have the power independent of legislature [sic] enactment, under the law of comity, and in the exercise of a sound discretion, of determining what laws of other states shall be recognised and enforced in this.¹⁴⁰

¹³⁷ 1843 WL 4112 at *10-11.

¹³⁸ *Id.* at *11.

¹³⁹ Recall that in *Nance*, Lockwood had asked, “Are then registered servants, goods or chattels, within the meaning of the [1825] statute [providing for the seizure and sale on execution]?” and answered it affirmatively. 1828 WL 1651 at *2.

¹⁴⁰ 1843 WL 4112 at *11.

The question is then whether this is such a situation, noting that “regard should be had to the geographical position of Illinois, as well as to the relations we sustain to our sister states, confederated under the same general government.”¹⁴¹

Illinois occupied a unique geographical position, because overland travel between the slave states of Kentucky and Missouri passed through it.¹⁴² Lockwood unapologetically pointed to the commercial advantages for Illinois of being the primary route for settlers on their way westward from Kentucky to Missouri: “While this free passage through the state; with their slaves, recognized as property in the states whence they emigrated, has been of great convenience to the slaveholding states, it has not been without its advantages to our own state.”¹⁴³ He also made a sort of reliance argument, on behalf of citizens of those slaveholding states: “[I]f, after having permitted them this privilege for the last thirty years, we were now to deny it, could they not justly charge us with having availed ourselves of our local position to do them a serious and unnecessary injury?”¹⁴⁴

He summarized,

The facts growing out of our geographical position, the past relations subsisting between this and neighboring states, the inconveniences to which we would subject them by a change of these relations, the loss of

¹⁴¹ Id. at *11.

¹⁴² Id. at *12.

¹⁴³ Id. at *12.

¹⁴⁴ Id. at *12.

benefits to ourselves following a change of these relations, are such as appeal strongly to the discretion of this court.¹⁴⁵

He also emphasized that the reasons for extending comity here were much stronger than in the case of relations with foreign nations. The opinion is worth quoting at some length, for what it reveals about Lockwood's thought processes.

The relations we sustain to our sister states also furnish strong reasons why the law of comity should be expanded, so as to meet the exigencies arising out of that relation. . . . They are not foreign states. We are bound up with them by the constitution of the United States into a Union, upon the preservation of which no one can doubt that our own peace and welfare greatly depend. Other nations may cherish friendly relations with each other, and endeavor to promote alliances and frequent intercourse, from fear of foreign war, or a desire of commercial prosperity. But to us these relations and this intercourse have a value and importance which are inestimable. They are the grounds of safety for our domestic peace, and for our hopes of the continuation of the happy government under which we live. What injures one state injures the others. It is consequently our duty to consult the good of all the states, and so frame and administer our laws, that we give our sister states no real cause of offence. We ought to do them all the kind offices in our power, consistently with our duty to ourselves. Thus will be produced that concord, that union of affection, and interest among the states, which may prove an enduring cement to that

¹⁴⁵ 1843 WL 4112 at *12.

happy and glorious union, upon the continuation of which our hopes of domestic peace and rational freedom so eminently depend.¹⁴⁶

Note certain features of his reasoning, articulated here two decades before the Civil War. We know, with the benefit of hindsight, that the endless uneasy legal and political compromises between slaveholding and nonslaveholding states failed utterly to produce an “enduring cement” for the Union. But Lockwood’s words (and Scates’ as well) convey a palpable sense of the fragility of the Union, together with a felt need to appease the slaveholding states to preserve it. Never does Lockwood seem to consider that by using Illinois for the transportation of enslaved persons, citizens of those slaveholding states might be in some way injuring or offending the citizens of *Illinois*, to say nothing of the clear exclusion of enslaved Americans or their recently-emancipated kind from the class of those who share “our hopes” of so-called “rational freedom.”

He continued,

By the law of nations, it would be considered just cause of complaint, if we should arbitrarily refuse to the citizens of foreign nations at peace with us permission to pass through our territories, with their property. If this be so, as regards the citizens of foreign nations, how much greater propriety does there exist that we should extend this boon, if boon it be, to our fellow citizens, who are also our friends, our neighbors and our relations. That our denial to the people of our sister states to have the right of passage for themselves and their slaves would inflict on them a most

¹⁴⁶ Id. at *12.

serious injury cannot be doubted.¹⁴⁷ The bitterness which usually characterizes border animosities admonishes us of the propriety of cultivating, by every just means in our power, that social intercourse with our neighbors which will be productive of mutual esteem and good will. Should we refuse them the privilege of taking their slaves through our state, would there not be danger that such refusal would engender feelings on their part not favorable to a continuance of our happy Union? Are there reasons of sufficient magnitude to induce us to risk such consequences? I think not. Our interest, our duty, our love to our whole country, conspire to prove the propriety of allowing our fellow citizens of our sister states the right to travel through this state, either as emigrants or travelers, with their slaves, unless serious injury will result to ourselves by

¹⁴⁷ As a matter of overland travel, that is probably correct. The Trail of Tears (1838-1839) route, traversed roughly at the same time as these cases were decided, is described as follows: “The northern route started at Calhoun, Tennessee, and crossed central Tennessee, southwestern Kentucky, and southern Illinois. After crossing the Mississippi River north of Cape Girardeau, Missouri, these detachments trekked across southern Missouri and the northwest corner of Arkansas.”

<http://www.nps.gov/fosm/history/5tribes/tot/nunahidunadlohilui.htm>. National Park Service, U.S. Dept. of Interior. Hence, the route from Kentucky to Missouri passed through Illinois. Assuming the Trail of Tears covered the most-traveled route, the most-used Mississippi crossing was in southern Illinois. To avoid Illinois is, however, theoretically possible, because Kentucky and Missouri have a common border. – Author.

giving such permission. How injury can result to the people of this state, by such a permission, I am entirely at a loss to conceive. On the contrary it might be shown, that, in many instances, it was to their decided advantage.¹⁴⁸

The exclusion of persons of African descent, formerly enslaved or otherwise, from Lockwood’s understanding of who constitutes “the people of this state,” is nearly total. Were that not so, perhaps he would not be “entirely at a loss to conceive” how persons of color, as well as others opposed to the institution of slavery, might be “injured” (offended, outraged) not only by being forced to witness, and not interfere with, the transportation of enslaved persons through their home state, but in being criminally prosecuted by their own state government (under a state constitution prohibiting slavery) for helping those who try to escape their bondage. Given the provisions of the Illinois Constitution, moreover, a refusal to allow slaveholders to pass through Illinois with their slaves can hardly be considered “arbitrary.”

Perhaps Lockwood would have done better to recognize that persons of color, from Illinois and elsewhere – and not only white slave-owning Southerners – are properly included among “our fellow citizens, who are also our friends, our neighbors, and our relations.” And had Lockwood a larger moral imagination, perhaps he would have seen that, just as “[w]hat injures one state injures the others,”¹⁴⁹ what injures one group of citizens, injures the others – and that enslaved persons who are citizens of a state, rather than out-of-staters who would enslave them and others like them, are the ones most

¹⁴⁸ 1843 WL 4112 at *13.

¹⁴⁹ Id. at *12.

entitled to expect the “good offices” of (at least!) those states that have seen fit to abolish slavery.

Lockwood even suggested, it is hard to know how seriously, that a refusal of comity – that is, a refusal to recognize and protect the slaveholders’ “property” rights in the enslaved persons they bring voluntarily into and through a state that does not recognize such property or such relationships among its own domiciliaries – would not benefit the enslaved persons, either.

In considering this question it may be well also to enquire what effect our refusal would have upon the slave himself. Would such refusal be injurious or beneficial to him? It would not certainly tend in the slightest degree to emancipate him, nor would it lighten his burdens. It would not prevent the master from emigrating or journeying. The master could still remove him to Missouri by taking a circuitous and tedious route to that state,¹⁵⁰ without passing through our state, and merely subjecting the slave to a long and toilsome journey, probably on foot. Our refusal, then, would seriously injure the master, and not less seriously the slave. If, then, to grant to the citizens of slaveholding states the right of passage through our state, with their slaves, will benefit both the master and the slave, and not injure us, what possible objection can there be to extending this privilege to them?¹⁵¹

¹⁵⁰ Through Tennessee, Arkansas, and then north to Missouri – Author.

¹⁵¹ 1843 WL 4112 at *13.

It is hard to know how to respond to an argument put so frankly, if somewhat disingenuously. Safe (and efficient) passage from Eastern and Southern slaveholding states, to Western ones, through (where necessary) such non-slaveholding states as Illinois, was obviously absolutely essential to the plan to extend slavery to the southwestern part of the United States. Any legal obstacles that made such transportation more difficult, more expensive, and more risky, discouraged the importation of slaves to those Western states, and undermined the slaveholding culture there, while supporting the growth of paid labor. And as for the “burdens” on the enslaved person, the relevant question is not whether he or she would prefer to travel on foot from Kentucky to Missouri through Illinois, or rather to take a longer route through Tennessee and Arkansas. Rather, the question is whether the enslaved person whose best hope of freedom lay in an escape to a non-slaveholding state, would prefer that those who might otherwise offer him or her shelter not be discouraged from doing so by the threat of criminal penalties. It is hard to imagine an enslaved person being indifferent on this question – or indeed, on any matter that tends to secure and enlarge, or on the other hand diminish and undermine, the purported property rights of another person in him or her.

In characterizing the matter as one calling for “the discretion of this court,”¹⁵² Lockwood seemed almost to mean not ordinary judicial discretion, a choice among equally-permitted options based on various policy concerns, but rather that way of being “discreet” which consists, as the Oxford English Dictionary puts it, in being “silent when speech would be inconvenient.”¹⁵³ In the name of peace and harmonious relations among

¹⁵² Id. at *12.

¹⁵³ OED (2nd ed.), Vol. IV, p. 755, col. 1.

sister states, the Illinois court avoids “inconveniently” drawing attention to the outrage being perpetrated upon the free citizens, black and white, of Illinois. Even in justifying the outcome, Lockwood was unflinching in acknowledging that only considerations of the most cynical and craven political type can possibly warrant it.

IV. Comity in the Post-Bellum World, and The Road Not Taken: Albert’s Tale

The paradox of *Roundtree*, in which the highest court of a non-slaveholding state used comity to vindicate a slave contract after the Civil War, is only heightened by the contemporaneous spectacle of a former slaveholding state’s federal district court *refusing* to enforce such a contract on the basis of the 13th amendment¹⁵⁴ – introduced, as the reader may recall, by Judge Trumbull of the *Hone* panel – only to find itself reversed a year later by the U.S. Supreme Court.¹⁵⁵

On March 28, 1861, in Arkansas, Young A. G. Nicholson entered into a \$1300 contract with Henry Osborn for the purchase of an enslaved twenty-three year old man named Albert.¹⁵⁶ Payment was due nine months later, “with interest at the rate of ten per cent. from date.”¹⁵⁷ The Civil War began just two weeks later, on April 12, 1861,

¹⁵⁴ Osborn v. Nicholson, 18 F.Cas. 846 (E.D.Ark. 1870).

¹⁵⁵ Osborn v. Nicholson, 13 Wall. (80 U.S.) 654 (1871).

¹⁵⁶ 18 F.Cas. at 846. Southern “debt relief” policies favoring non-enforcement of slave contracts were typically aimed at transactions like this, made on the very eve of the war. Contrast the 1833 transaction at issue in *Roundtree*, discussed *supra* at II.4.

¹⁵⁷ Osborn v. Nicholson, 80 U.S. at 655.

although South Carolina had actually seceded from the Union the year before.¹⁵⁸ Arkansas seceded shortly after South Carolina, on May 6, 1861.¹⁵⁹ Albert was delivered to Nicholson, but before Nicholson paid Osborn, “on the 1st day of January, 1862, [Albert] was liberated by the United States government,”¹⁶⁰ and, having lost the benefit of Albert’s services, Nicholson was hardly inclined to pay on the contract. After the war, Osborn sued.¹⁶¹ The factual resemblance to *Roundtree* is, of course, unmistakable, though the lapse of time between sale and emancipation dramatically shorter.

¹⁵⁸ The American Civil War began on April 12, 1861 with the firing on Fort Sumter, and ended with the Confederate surrender at Appomattox Court House in early April 1865. South Carolina, the first state to leave the Union, seceded in 1860, prompted by the election of the Republican presidential candidate Abraham Lincoln. Six more followed in early 1861 (Mississippi, Alabama, Florida, Georgia, Louisiana and Texas), and together they formed the Confederate States of America. President Lincoln took the oath of office on March 4, 1861 and sought to maintain ties with eight border states that remained with the Union. The Civil War began on April 12 with the firing on Fort Sumter by Confederate troops off the coast of Charleston, South Carolina. Four more states seceded after war was declared: Virginia, Arkansas, North Carolina, and Tennessee. http://www.tea.state.tx.us/ssc/teks_and_tas/teks/glossdate.htm

¹⁵⁹ Id.

¹⁶⁰ 80 U.S. at 655. Abraham Lincoln delivered the Emancipation Proclamation on September 22, 1862, and it took effect on January 1, 1863.

¹⁶¹ In thinking about the parties, we do well to heed Kull’s analysis, which reminds us that “the most striking fact distinguishing buyers from sellers on the last slave contracts is

A. The Federal District Court Closes the Courthouse To Slave-Traders...

Judge Henry Caldwell,¹⁶² of the federal district court,¹⁶³ readily acknowledged that in general, superseding illegality, where the seller had already performed, would not relieve the buyer of his obligation to pay on the contract. As the judge put it,

On the part of the plaintiff it is claimed that at the date of this contract, slaves were property; that they were so recognized by the constitution of the United States, and the constitution and laws of this state, where the contract was entered into, and that the subsequent abolition of slavery by

that the sellers gave up on slavery before the buyers dId.” Kull, *supra* note 4, at 530.

The buyers therefore “speculated upon the success of the rebellion against the United States,” Kull at 529, rendering them most unsympathetic to neo-abolitionists, but evoking the support of other Southerners. This is yet one more way in which the question of the enforcement of slave contracts is not an ordinary question of commercial law.

¹⁶² As Kull recounts, “Caldwell, a young lawyer and state legislator from Iowa, commanded an Iowa cavalry regiment at the capture of Little Rock in September 1863. In June 1864, while Caldwell was serving with his regiment in Tennessee, he was appointed federal district judge for the District of Arkansas by President Lincoln.” Kull, *supra* note 4, at 502, and footnote 29 thereto.

¹⁶³ Although it is not an issue in this case, it must be that one or the other of the parties was not a citizen of Arkansas, as this began as an ordinary contract case and therefore could only be in federal court based on diversity. Nevertheless, this does not come into the court’s analysis, probably supporting an inference that both were from slaveholding states as of 1861.

the thirteenth amendment of the constitution of the United States and the provisions of section fourteen, article fifteen of the constitution of this state, could not affect the vested rights of the plaintiff under the former law. This is believed to be a full and fair statement of the grounds upon which the right of recovery is rested in this class of cases....¹⁶⁴

However, he continued,

The general rules they lay down with reference to vested rights and the effect of a repeal of a statute upon transactions already concluded, may be sound law, and furnish a rule of decision in cases where they apply, but like most general rules of law, they are subject to exceptions and qualifications.¹⁶⁵

Most significantly, such arguments rest on a particular assumption – what Caldwell called “the fatal vice in the argument of those who maintain the continued validity of these contracts”¹⁶⁶—namely,

It is assumed that there was not when this contract was entered into, and is not now, as to contracts entered into before slavery was abolished, any *distinction* between a contract the consideration for which was slaves, and a contract made upon any other consideration.¹⁶⁷

¹⁶⁴ 18 F.Cas. at 846-7.

¹⁶⁵ Id. at 846-7.

¹⁶⁶ Id. at 847.

¹⁶⁷ Id. at 847 (emphasis added). Kull, *supra* note 4, discusses this Caldwell opinion at 502.

But (Caldwell’s argument might be glossed), slavery *is* different.¹⁶⁸ As he put it, “Slavery was emphatically *sui generis*, and the most astute lawyer will be unable to find its analogy under our constitution.”¹⁶⁹ Contracts for the purchase and sale of human beings are different from contracts based on consideration of other kinds. For Caldwell, “It is obvious that this question cannot be determined without an inquiry into the nature and incidents of slavery, and the relation which the national government sustained, and now sustains to that institution.”¹⁷⁰ Recall that, to Justice Lockwood of Illinois, a similar question was handily reduced to “a question of mere dry law, [which] does not involve in its investigation and decision, any thing relative to the humanity, policy, or legality of the laws and constitution, authorizing and recognizing the registering and indenturing of Negroes and mulattoes.”¹⁷¹ Though Lockwood wrote his opinion in *Nance v. Howard* in

¹⁶⁸ The general “public policy and natural law” arguments against enforceability are discussed by Kull, *supra* note 4, at 512 et seq.

¹⁶⁹ 18 F.Cas. at 854.

¹⁷⁰ *Id.* at 847. Similar points were made by others addressing the more general issue of the constitutionality of “the extinction of debts for slaves.” Kull quotes Oliver P. Morton, former Republican governor of Indiana: “contracts of that kind [relating to slaves] are held...to stand upon a different obligation, a different footing morally, and perhaps legally, from contracts of any other kind. Slave property was swept away; those owning slaves lost them; and it was perhaps just as proper that those owning choses in action, debts, promissory notes, and bills of exchange given for slaves should lose them, also.” Kull, *supra* note 4, at 501.

¹⁷¹ 1828 WL 1651 at *2.

1828, long before the Civil War and indeed even before the Fugitive Slave Act of 1850, the same basic approach was taken in 1869's *Roundtree*, when the court distinguished “a contract for the sale of a slave” from “the collection of the money.”¹⁷²

By contrast, in determining whether Nicholson must pay Osborn on the 1861 agreement for the now-emancipated Albert, Caldwell felt obliged to analyze the “nature and incidents of slavery” from a legal point of view. His premises, most of which were familiar from the anti-slavery jurisprudence of his era, included

- [1] That slavery is against the law of God and the law of nature,
- [2] that slaves were regarded as persons and not property by the constitution of the United States,
- [3] that it was only within the slave states they were regarded as property,
- [4] that this status was stamped upon them by the local laws of those states and limited to their territorial operation, and
- [5] that those laws, though expressed in the form of written constitutions and statutes, had in their origin no higher or better sanction than brute force, and were constantly held, even by the courts that enforced them, to be contrary to natural right.¹⁷³

Because slavery was not supported by “natural law,” it was not supported by the common law either, so only positive local law could create and sustain it; hence, the repeal of such local law (including changes in state constitutions after the Civil War) left

¹⁷² 1869 WL 5419 at *4.

¹⁷³ 18 F.Cas. at 847.

any theory of legal recovery based on the law of slavery utterly without support,¹⁷⁴ *contra* anyone who would claim that “it is still obligatory on the courts to afford a remedy to the slave trader on his slave contracts.”¹⁷⁵

Whither comity? Caldwell rejected it as a basis for enforcement, in part for reasons of non-mutuality of remedy. As he stated, “The comity of states and nations does not demand the enforcement of slave contracts any more than it demands the recognition of the claim of the master to his slave.”¹⁷⁶ In other words, if the facts of *Roundtree* been presented in reverse to the Illinois court before the war – payment made, but the slave not delivered – the Illinois court would not have ordered a person to be delivered over into slavery. Why, then, should such a contract be enforced, as it were, from the other side? “[T]here is no obligation resting on any free state to afford a remedy on such contracts.”¹⁷⁷

Caldwell also specifically employed the public policy exception to avoid enforcement. With understandable exaggeration, he wrote, “The courts are daily in the habit of denying a remedy on contracts because they are against public policy.”¹⁷⁸

The constitutional inhibition against state laws impairing the obligation of contracts is not limited in its operation to laws impairing the obligation of contracts, made and to be performed within the state. The law of the

¹⁷⁴ See discussion at 18 F. Cas. at 850-51.

¹⁷⁵ *Id.* at 847.

¹⁷⁶ *Id.* at 849.

¹⁷⁷ *Id.* at 849.

¹⁷⁸ *Id.* at 855. *Cf.* note 27 *supra* and associated discussion.

contract, -- the obligation of the contract, -- remains the same, and will be the same everywhere....But it does not follow that the constitution compels this state to enforce every species of contracts made in foreign states or other states of this Union....Neither the national [i.e., federal] nor the state courts will enforce contracts against good morals, or against religion, or against public right, nor contracts opposed to our national policy or national institutions. Such contracts will be deemed nullities by the courts of this country, although they may be deemed valid by the laws of the place where they are made.¹⁷⁹

While “public policy” is sometimes hard to discern, that is not so here. “The thirteenth amendment carries with itself the denunciation of slavery in every form; and that as plainly as if the mischief to be remedied thereby had been expressly recited, and the tendency of slavery openly denounced.”¹⁸⁰

In addition to familiar arguments showing that slavery violated public policy, establishing the appropriateness of the public policy exception as a basis for non-enforcement, Caldwell built interestingly on a widely-cited quotation from Lord Mansfield applying the exception to “a contract...maintained by a courtesan for the price of her prostitution.”¹⁸¹ (Recall that Story, too, had offered as an example of a contract

¹⁷⁹ 18 F.Cas. at 849. (Caldwell here cites, of course, Story.)

¹⁸⁰ 18 F.Cas. at 855.

¹⁸¹ Robinson v. Bland, 2 Burrows 1077, 1084 (DATE), cited by Caldwell, 18 F. Cas. at 849.

“against good morals, or religion, or public rights,”¹⁸² a contract “for future illicit cohabitation and prostitution.”¹⁸³) Going beyond merely analogizing the two institutions or practices, Caldwell recognized that “slavery contained in itself all the worst social evils, and the sale of female slaves for purposes of prostitution was only one of its many revolting features.”¹⁸⁴ It is striking to imagine that there might be readers for whom a moral objection to human chattel slavery could best be actuated by a reference to its sexual immorality; but his analysis also serves to remind us that even in the nineteenth century, legal opponents of slavery were well aware of its gendered, sexualized dimensions (even if these were undertheorized compared to more straightforward objections to the denial of liberty and unlawful, unjustified expropriation of labor).

Caldwell also directly engaged with the Constitutional “impairment of the obligations of contract” argument. First, he argued that “fundamental” changes of law unavoidably “impaired” any number and variety of contracts, but this in no way insulated the contracts from such changes.

That a change in the fundamental law and policy of the government does necessarily operate to destroy the obligation of contracts and rights of action depending for their validity and enforcement on a law and policy inconsistent with the last declared will of the sovereign power, has been

¹⁸² Story, 2nd ed., § 258(2), p. 334.

¹⁸³ Story, 2nd ed., § 258(2), pp. 334-335 of reprint.

¹⁸⁴ 18 F. Cas. at 849.

expressly decided.¹⁸⁵

In the specific case of slavery, he argued,

Take the case of a mortgage upon slaves, and there were many, at the time slavery was abolished....Now what becomes of the obligation of such a contract after the state in which the mortgaged slaves were found abolished slavery?....Is the mortgage still valid and binding, and are the slaves embraced in it excepted from the operation of the constitutional provision abolishing slavery?....Again, take the case of a contract for the hire of slaves, or a contract for the sale and delivery of slaves at a future time, or a note, payable in slaves. What becomes of the obligation of the contract in all these cases? Obviously it is impaired....[T]he prohibition on the states to pass laws impairing the obligation of contracts...was never intended to sanction slavery....We have seen that its application to slave contracts would result in a prohibition upon the states from emancipating all slaves, when and so long as such slaves were held under mortgage, or other lien, arising out of a contract. For in a mortgage, the pledge of the property is the very essence of the contract, and the right to subject the property pledged to the payment of the mortgaged debt, is the obligation of that contract. More than half of the slaves of the south were thus

¹⁸⁵ 18 F.Cas. at 855, citing Wheeler v. Moody, 9 Tex. 372, 376 (1853), 1853 WL 4207 (striking a condition subsequent on pre-statehood land grants requiring financial support of the Roman Catholic Church as inconsistent with the Constitution of the Republic of Texas).

pledged at all times, and if this clause can be invoked to uphold slave contracts, there never was a time when it might not have been successfully appealed to by the states to stay emancipation.¹⁸⁶

Finally, Caldwell interpreted the Thirteenth Amendment as further undermining enforcement of such contracts at the national, constitutional level, as the amendment itself was “based on the broad principle that there shall be no further recognition by the national government or the states of the *idea* that there could lawfully be property in man.”¹⁸⁷ He stated,

[T]his principle cuts its way through all vested rights and obligation of contracts based on slave codes, and operates with full force on claims and demands of every character originating in the idea that human beings were property, and the lawful subject of traffic. This construction is in harmony with the spirit of our institutions, and is the necessary and logical result of the grounds upon which slavery was abolished without compensation to the slave owners.¹⁸⁸

¹⁸⁶ 18 F.Cas. at 854, 856.

¹⁸⁷ Id. at 856 (emphasis added).

¹⁸⁸ Id. at 856. Caldwell also discussed the takings issue as applied to movables, noting that although “the states might destroy property in slaves, without compensation....this was not, and is not, the case with any other species of property.” Id. at 849. This is probably not an overstatement even today, after Andrus v. Allard, 441 U.S. 51, 65-66, 100 U.S. 318 (1979), upheld a ban on commercial traffic in artifacts containing parts of certain protected birds (specifically, bald eagle feathers). The Court there noted that “it is

On this basis, Caldwell relived Nicholson of his obligation to pay on the agreement.

B. ...But the U.S. Supreme Court Treats Emancipation As A Casualty Loss

On appeal to the United States Supreme Court, Chief Justice Salmon Chase (appointed by President Abraham Lincoln in 1864) reasoned similarly to District Judge Caldwell. The Chief's opinion is sufficiently brief that it can be reproduced in its entirety. His grounds for affirmance:

1st. That contracts for the purchase and sale of slaves were and are against sound morals and natural justice, and without support except in positive law.

2d. That the laws of the several States by which alone slavery and slave contracts could be supported, were annulled by the thirteenth amendment of the Constitution which abolished slavery.

3d. That thenceforward the common law of all the States was restored to its original principles of liberty, justice, and right, in conformity with which some of the highest courts of the late Slave States, notably that of Louisiana, have decided, and all might, on the same principles, decide, slave contracts to be invalid, as inconsistent with their jurisprudence, and this court has properly refused to interfere with those decisions.

crucial [to the Constitutionality of the challenged regulations promulgated under the Eagle Protection Act, 16 U.S.C. §668(a)] that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.” *Id.* at 66.

Obviously, no such rights in formerly enslaved persons remained after emancipation.

4th. That the clause in the fourteenth amendment of the Constitution which forbids compensation for slaves emancipated by the thirteenth, can be vindicated only on these principles.

5th. That clauses in State constitutions, acts of State legislatures, and decisions of State courts, warranted by the thirteenth and fourteenth amendments, cannot be held void as in violation of the original Constitution, which forbids the States to pass any law violating the obligation of contracts.¹⁸⁹

However, his brethren on the U.S. Supreme Court disagreed in nearly every particular.¹⁹⁰ Chief Justice Chase was the lone dissenter.

Justice Noah Swayne, writing for the majority, analyzed Osborn as a relatively simple case of private contract law and post-execution “destruction” of property.¹⁹¹ Unsurprisingly, the Court began its analysis by saying of the contract, “Being valid when and where it was made, it was so everywhere,”¹⁹² and cited Story for the proposition that,

¹⁸⁹ 80 U.S. 654, at 663-664.

¹⁹⁰ The Associate Justices of the U.S. Supreme Court at the time were Samuel Nelson, Nathan Clifford, Noah Swayne, Samuel Miller, David Davis, Stephen Field, William Strong, and Joseph Bradley. <http://supremecourtus.gov/about/members.pdf>.

¹⁹¹ Osborn was one of five 1872 U.S. Supreme Court cases (three from Arkansas) on “the slave-contract problem” decided together, all with opinions written by Swayne. The “quintet” of cases, three of which are more jurisdictional than substantive in nature, are discussed in Kull, *supra* note 4, at 502-507.

¹⁹² 80 U.S. at 656.

“With certain qualifications not necessary to be considered in this case, this is the rule of the law of nations.”¹⁹³

Arkansas’ post-Civil War state constitutional provisions invalidating slave contracts were of no effect, because “as to all prior transactions the [Arkansas] constitution is...clearly in conflict with that clause of the Constitution of the United States, which ordains that ‘no State shall’... ‘pass any law impairing the obligation of contracts,’”¹⁹⁴ moreover, “when the thirteenth amendment to the Constitution of the United States was adopted, the rights of the plaintiff [seller] in this action had become legally and completely vested.”¹⁹⁵ As the Court ultimately concluded,

Whatever we may think of the institution of slavery viewed in the light of religion, morals, humanity, or a sound political economy, -- as the obligation here in question was valid when executed, sitting as a court of justice, we have no choice but to give it effect. We cannot regard it as differing in its legal efficacy from any other unexecuted contract to pay money made upon a sufficient consideration at the same time and place.¹⁹⁶

¹⁹³ Id. The Court went further “It may be safely asserted that this contract when made could have been enforced in the courts of every State of the Union, and in the courts of every civilized country elsewhere.” Id.

¹⁹⁴ Id. at 656. Arkansas was one of six states whose Reconstruction constitutional convention prohibited enforcement of “debts originating in the hire or purchase of slaves,” Kull, *supra* note 4 at 496.

¹⁹⁵ 80 U.S. at 662.

¹⁹⁶ Id. at 663.

It is useful to track how the Court reaches this disappointing, if predictable, conclusion. Rather than engaging directly with the realities of human chattel slavery, legal and otherwise, the Court denatured the case, first considering and rejecting a seemingly bizarre argument that Albert’s emancipation constituted a breach of warranty, because Albert turned out not to be “a slave for life,”¹⁹⁷ as Osborn had expressly stated in the sale document.¹⁹⁸ In fact, the idea that emancipation relieved buyers of contracts for slave purchases on a “breach of warranty” theory was widely advanced as a defense by debtors on such contracts after the Civil War, though rarely successfully.¹⁹⁹ The Court further analogized Albert to a piece of real property, that might be taken by eminent domain without “a violation of the covenant of quiet enjoyment.”²⁰⁰ Osborn’s title in Albert was no less perfect, reasoned the Court, because the State itself might intrude upon it. Indeed, the Court stated,

As regards the principle involved [that loss by eminent domain is not a breach of warranty] we see nothing to distinguish those cases from the one before us. In all of them the property was lost to the owner by the

¹⁹⁷ Id. at 655.

¹⁹⁸ Id. at 657. Kull discusses the “breach of warranty” and eminent domain issues as treated by different Southern states, *supra* note 4, at 507-508.

¹⁹⁹ See Kull, *supra* note 4, at 494 and *passim*. The Court further notes that an *express* warranty against the “future event” that deprived the buyer of his property – emancipation – would have been enforceable, but that the Court will not “make contracts for the parties” and “interpolate such a stipulation.” 80 U.S. at 658-659.

²⁰⁰ 80 U.S. at 657.

paramount act of the State, which neither party anticipated, and in regard to which the contract was silent. Emancipation and the eminent domain work the same result as regards the title and possession of the owner.

Both are put an end to. Why should the seller be liable in one case and not in the other? We can see no foundation, in reason or principle, for such a claim.²⁰¹

This is a strange way of thinking about the abolition of slavery, since the Thirteenth and Fourteenth Amendments prohibited compensation to slaveowners,²⁰² making clear that the abolition of slavery was *not* to be treated Constitutionally as a 5th Amendment “taking” mandating just compensation to former property owners.²⁰³ The defining feature of the taking by eminent domain – and arguably, therefore, of “private

²⁰¹ Id. at 658. The Court stated that Nicholson *could have* protected himself against the “property” becoming worthless by demanding an express warranty against the future event of emancipation – and perhaps he should have, in March of 1861. “There, as in this case, the buyer might have protected himself by a proper warranty, but had failed to do so.” Id. at 659. Kull reviews the treatment of express warranties against emancipation, and the reflection of such risks in the decline in slave prices as the Civil War approached. Kull, *supra* note 4, at 510-511.

²⁰² “Neither the United States, nor any state, shall assume or pay...any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims, shall be held illegal and void.” U.S. Const. amend. XIV, Section 4, article 14.

²⁰³ The Fifth Amendment provides, “nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V.

property” itself in American law – is precisely that entitlement to compensation. The obvious “foundation, in reason or principle,” therefore, for making the vendor suffer the loss when the vendee’s “property” is lost due to emancipation, and not when the same loss is suffered because of a post-sale exercise of eminent domain by the sovereign, is that in the latter case the State will be compensating the vendee, while in the former case the vendee bears the loss alone.²⁰⁴

Enforcement or non-enforcement has a further political dimension. While Judge Caldwell had pointed out the conceptual inconsistency in denying that emancipation was a taking while allowing private parties to recover from one another²⁰⁵ – either an enslaved person is, or is not, property, whose emancipation is, or is not, therefore a compensable loss – Kull points out that the unavailability of a “takings” remedy actually supported a Southern argument for *denial* of enforcement. As he explains,

by nullifying outstanding debts for slaves, the states might at least avoid compounding the original injustice [emancipation without compensation]: forcing persons already stripped of property to pay for what had been taken from them. Nullification of slave debts caused that loss to be shared

²⁰⁴ It is true that the vendee may suffer some uncompensated, or even uncompensable loss – real property is unique, and may be worth much more to the vendee than the “just compensation” set by the Court after a taking. Nevertheless, the Constitution ensures that the *entire* loss is not shifted onto him.

²⁰⁵ “If a claim against the United States for a slave emancipated by that government is illegal and void, how can the claim of one citizen against another for that same slave be held legal and valid?” 18 F.Cas. at 856.

in some rough measure, affording a partial indemnity to certain former slaveowners at someone else's expense.²⁰⁶

And at the expense of logic, as well. As we have seen, the tension between treating property in persons as “just like” other sorts of property, and the unavoidable difficulties of doing so, afflicted the entire jurisprudence of this area, including this case. The quality of the arguments inevitably suffered. The Supreme Court identified as “a principle of universal jurisprudence” that “[r]ights acquired by a...contract executed according to statutes subsequently repealed subsist afterwards, as they were before, in all respects as if the statutes were still in full force.”²⁰⁷ But as the Court itself had just noted, as to slavery, “it rested upon universally recognized custom, and there were no statutes legalizing its existence.”²⁰⁸ In other words, the legal consequences of the abolition of slavery cannot simply be derived from principles employed to validate a contract made “illegal” by the repeal of some particular statute, because that did not occur.

Moreover, slavery was an institution, or an arrangement, among *persons*, not something which merely created a species of property. Elsewhere in the opinion the Court remarked, “Wherever [slavery is] found, the rights of the owner have been regarded there as surrounded by the same sanctions and covered by the same protection as other property.”²⁰⁹ But the Fourteenth Amendment prohibition on compensation is squarely to the contrary; otherwise, emancipation *would* have been a compensable

²⁰⁶ Kull, *supra* note 4, at 517.

²⁰⁷ 80 U.S. at 662.

²⁰⁸ *Id.* at 661 (emphasis added).

²⁰⁹ *Id.*

“taking,” eliminating the need for debtors to try to escape their financial obligations under slave contracts in private suits brought to mitigate the loss.

Interestingly, particularly in light of some contemporary debates about so-called “foreign precedent,”²¹⁰ the Court also used a foreign decision, *Mittelholzer v. Fullarton*,²¹¹ to bolster its conclusion. The abolition of slavery in British Guyana in 1834²¹² first put “former slaves in a state of mandatory ‘apprenticeship’ to their former owners for a term of years....the colonial authorities [later] abolished the status of ‘apprenticeship,’ thereby completing the emancipation of the former slaves.”²¹³ In

²¹⁰ The use by the U.S. Supreme Court of British and other non-U.S. cases has recently spawned a significant literature, to which this Article does not intend to add. See, e.g., Osmar J. Benvenuto, “Reevaluating the Debate Surrounding the Supreme Court’s Use of Foreign Precedent,” 74 *Fordham L. Rev.* 2692 (April 2006), and materials cited therein. It is worth noting, however, that the British case cited by the U.S. Supreme Court in *Osborn, Mittelholzer v. Fullarton*, was only a few decades old, was decided long after the United States Constitution was ratified, and is treated by the U.S. Supreme Court as “settling” the case (“But we think the exact point here under consideration was *settled* by the Court of Queen’s Bench”). 80 U.S. at 659 (emphasis added). Kull also mentions, without discussing, that this “decision is treated as authoritative in several of the American cases.” Kull, *supra* note 4, at footnote 61.

²¹¹ 6 Adolphus & Ellis 989, 6 Q.B. 989, 1020, 115 Eng. Rep. 373, 385 (1844), *aff’d per curiam*, 6 Q.B. 1022, 115 Eng. Rep. 385 (Exch. Ch. 1845).

²¹² See, e.g., http://news.bbc.co.uk/1/hi/world/americas/country_profiles/1211428.stm.

²¹³ Kull, *supra* note 4, at footnote 61.

Mittelholzer, the English court held that the “determin[ation of] the apprenticeship” after four of six installments had been paid provided no defense in the suit for payment on the last two installments.²¹⁴

In electing to stay close to a well-charted path of commercial law, the U.S. Supreme Court quoted approvingly one of the British judges who characterized the situation as calling for the determination of “who shall bear the loss occasioned by a *vis major*?”²¹⁵ Once put this way it matters little whether the slave is analogized to chattel or real property – under the common law of that time, if title has passed, so too has the risk of loss.²¹⁶ The universal emancipation of enslaved persons, premised on the repudiation of the institution of slavery itself at the Constitutional level, is not enough to relieve the debtor from his slave-purchase debt, or to force the slave-vendor to bear any financial loss. Title has passed. At this point, with the outcome of the case a foregone conclusion,

²¹⁴ 6 *Adolphus & Ellis* 989, 6 Q.B. 989, 1020, 115 Eng. Rep. 373, 385 (1844), *aff'd per curiam*, 6 Q.B. 1022, 115 Eng. Rep. 385 (Exch. Ch. 1845), cited at 80 U.S. at 659.

²¹⁵ 80 U.S. at 659.

²¹⁶ Common law, codified in the Uniform Sales Act (later changed and superseded by the Uniform Commercial Code, Article 2-509) had provided, “Unless otherwise agreed, the goods remain at the seller’s risk until the property therein is transferred to the buyer.”

Unif. Sales Act, § 22. According to Williston, “the effect and purpose of this section may be gathered from the following statement of the common law: risk of loss generally attends title.” 2 S. Williston, *WILLISTON ON SALES* 692-93 (2d ed. 1924). The civil law, from Roman times, was the same – as the Latin maxim had it, *Res perit suo domino* (The loss falls on the owner). 80 U.S. at 660. See also Kull, *supra* note 4, at 509-510.

the Court spares a few lines for rhetorical condemnation of slavery itself, referring to “[t]he atrocious traffic in human beings, torn from their country to be transported to hopeless bondage in other lands, known as the slave trade.”²¹⁷

We might wish that when the Court, as the opinion draws to a close, refers to a “flood-tide of intolerable evils,” it is presciently remarking on the effluence from slavery, which today, as during Reconstruction, threaten at times to submerge our polity. But it is not to be. The threat to “the repose and welfare of all communities,” which “would shake the social fabric to its foundations” (a strangely mixed metaphor that conjures up the image of a tent in the wind), is any legal doctrine that would permit “the destruction of vested rights by implication.”²¹⁸ *That* is the “mischief” that must be avoided, with its effect of “tak[ing] away one man’s property and giv[ing] it to another . . . forbidden by the fundamental principles of the social compact.”²¹⁹ If the buyer is not required to pay, the vendor will have lost his property without compensation, and, as the Court says explicitly, “without due process of law.”²²⁰ In the end, the “takings” analysis comes

²¹⁷ 80 U.S. at 661.

²¹⁸ 80 U.S. at 662.

²¹⁹ 80 U.S. at 663.

²²⁰ 80 U.S. at 663. *Quaere*, however, whether the due process rights of slave-vendors were not satisfied by the Reconstruction-era state legislative proceedings that resulted in the enactment of state constitutional provisions barring enforcement of slave contracts, such as the 1868 Arkansas constitution “which annuls all contracts for the purchase or sale of slaves, and declares that no court of the State should take cognizance of any suit founded on such a contract.” 80 U.S. at 656.

back. The slave *vendor* suffers no “taking,” indeed, no loss at all – the cost is borne by the vendee, in the end simply rewarding those vendors who sold slaves “short” at the twilight of that institution at the expense of those who invested in its long-term viability by purchasing slaves.

Conclusion

Like Justice Lockwood in *Willard*,²²¹ the *Osborn* Court seemed to feel it could not completely neglect to address formerly enslaved persons – albeit as objects, not subjects, of law. The third-to-last sentence of the opinion says only, “Neither the rights nor the interests of those of the colored race lately in bondage are affected by the conclusions we have reached.”²²² Superficially and literally, perhaps, this is true. Just as *Roundtree* was a dispute between the descendants of a slave-vendor and his slave-vendee cousin, and *Willard* was a criminal proceeding for harboring a slave, the outcome of *Osborn* could neither enslave nor emancipate anyone. But for a self-described “court of justice” to focus exclusively on the fair allocation of the lost property value in slaves as between antebellum buyers and sellers, reflects a shocking unconcern and naiveté about the “rights” and the “interests” of formerly enslaved persons. In the words of Judge Caldwell, we deplore that “the courts are still to guard this relic of a condemned system by adjusting the balance of justice between the buyer and seller under such painful and exasperating circumstances[] – and this, when the evil policy of slavery, in all its parts and functions, has been so authoritatively declared[].”²²³ We might ask, as we did about

²²¹ 1843 WL 4112 at *13.

²²² 80 U.S. at 663.

²²³ 18 F.Cas. at 855.

Eliza, why it never occurred to the Court that the most important loss to be made good, even speaking purely legally and economically, was the wholly unjustified and unjustifiable expropriation of generations of labor of the enslaved persons themselves, so “lately in bondage,” injured citizens whose claim for justice from the courts of the United States renders those of individual slave-vendors and slave-vendees trivial by comparison.

Is a contract for the purchase and sale of a human being *sui generis*, or just another species of contract for the sale of goods and chattels? Or is it neither of these, or somehow simultaneously both – a kind of *reductio ad absurdum* of a metaphysics of contract so general, so abstract, that it produces willful blindness about the subject (in both senses) of the contract itself? There is, as we have seen, nothing in the language or doctrine of contracting itself to, as it were, rise up and repudiate such agreements.

Yet in arriving at a historical judgment of these cases, it is essential to see that they genuinely could have been decided otherwise. The judicial literary style often emphasizes the degree to which prior cases and relevant doctrines “compel” a certain outcome, in the face of which the principled jurist cannot but comply. In the application of the public policy exception to contract validation, that apologetic tone should not mislead. The exception itself was and is flexible enough to accommodate any issue the judge deems significant enough – that is the source of both its strength and its danger.

The applicability of the “public policy” exception to enforcement of out-of-state contracts for the purchase and sale of human beings is a problem thus simultaneously unique, unquestionably deep and important in its own right; and utterly paradigmatic of the permanent tension between that aspect of justice that resides in formal, predictable

rules (such as comity in contract validation), and the uncertainty introduced by any “escape device,” no matter how necessary to permit justice to be done.

In the end, the delicate inter-state issues of comity and public policy, between and among states with fundamentally different relationships to the institution of slavery, were “adjudicated” on the battlefields of the Civil War. But the military success of the Union which might have been translated into a much more thoroughgoing extirpation of slavery, root and branch, became something much less.

In the end, antebellum contracts for the purchase and sale of human beings remained enforceable by breached-against vendors because the U.S. Supreme Court said so. But long before that mandate, jurists in non-slaveholding states failed to use the legal tools at their disposal to their maximum liberatory potential.

These cases remind us that the law rarely compels one outcome. Strictly speaking, after Osborn, while a former slave state might not be free to repudiate a slave contract (and favor debtors arguably more loyal to the Confederacy over creditors), the issues presented by interstate enforcement remained distinct. The failure of non-slaveholding state courts to employ the public policy exception before or after the war is therefore fairly criticized, even if, by itself, non-enforcement would in no sense remedy the legal wrong done to the enslaved persons at issue. Repudiation would, as Caldwell argued, have conveyed some sense that contracts for the purchase and sale of human beings (or other similar arrangements, such as mortgages for their purchase price secured by the enslaved persons themselves) formed no part of the ordinary common law of contracts, but rather required for their continued vitality the positive enactments of slaveholding states. Repudiation would also, in that sense, dovetail with that

understanding of the Fourteenth Amendment prohibition on “takings”-style compensation for emancipation which amounts to a denial of “property in man.” But we have seen the limits of such an approach as well. As a practical matter, repudiation neither directly benefits the formerly enslaved, nor sends a meaningful message to former slave-dealers – it simply undoes the last slave-transfer transaction in each case, forcing the economic losses from the debtor class onto a creditor class not obviously better able to bear it. As we know, the “Elizas” of the world never did get paid, and for all that we, with the neoabolitionists and Judge Caldwell, endeavor to deny the reality of “property in man” (or woman), the legal *accoutrements* of its existence were and are inescapable.

An aura of pathos unavoidably surrounds Caldwell’s eloquent plea:

Could it have been intended that free citizens should still be the subject matter of litigation in the courts of justice, as chattels? . . . The government that would permit its free citizens to be thus degraded in the interest of slavery and slave traders, would be unworthy of the name of a free republic.²²⁴

This, then, is *our* continuing challenge – to employ *our* courts of justice to honor, and never degrade, one another, and to be worthy of the name of a free republic.

²²⁴ 18 F.Cas. at 855.