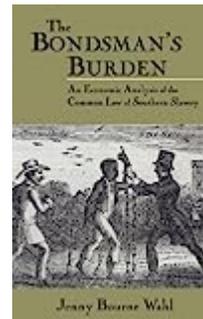


**Jenny Bourne Wahl.** *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery.* Cambridge: Cambridge University Press, 1998. xii + 277 pp. \$49.95 (cloth), ISBN 978-0-521-59238-3.



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For many years, scholars outside the fields of history and law have taken a keen interest in the law of slavery in the American South. A. E. Keir Nash, a political scientist, published a series of important articles on the topic in law reviews during the 1970s, in which he examined the extent to which concepts of “fairness” and “formalism” informed southern judicial decision making in slave cases.[1] Three years ago, William Wiethoff, a professor of speech communication, wrote an account of the law of slavery that focused on southern judges as “humanists and advocates” in the classical tradition, whose courtroom oratory both reflected judicial experiences and influenced popular audiences.[2] Jenny Bourne Wahl, an economist at St. Olaf College, brings yet another theoretical perspective to the topic in her examination of the economics of the common law of slavery. Utilizing a data set that includes all of the published southern appellate cases that involved slaves (nearly 11,000 cases), Wahl concludes that southern courts produced “economically efficient rules that served as structural support for the southern way of life” (p. 1).

Wahl’s understanding of “efficient” legal decision making derives from the economic theories of Robert Cooter and Daniel Rubinfeld, who define efficiency as existing when “costs of dispute resolution are minimized, legal liabilities go to parties who can bear them at least

cost, and legal entitlements go to those who value them most” (p. 2). In contrast to many historians who have examined slave law, Wahl is concerned with what appellate slavery cases reveal neither about the ideology of judges nor about the lives of slaves. Rather, she focuses on how legal outcomes and incentives influenced the operation of slavery in the context of the marketplace. Wahl looks at how legal rules affected slaveowners, as buyers, sellers, investors, hirers—as businessmen. In short, by examining the “efficiency” of slave law, Wahl investigates whether legal decisions fostered the smooth operation of slavery, allowed the institution to coexist alongside economic development, and maintained social peace. The answers to all these questions, according to Wahl, are “yes.”

To make her point, Wahl compares judicial decisions in slave cases to developments in other areas of antebellum law. Wahl shows, for example, how the law of slave sales followed a different path of development than did the law governing the sale of most commodities. While antebellum law in general subscribed to the principle of *caveat emptor*, the law of slave sales placed much greater responsibility on sellers to guarantee their products. Unlike employers of free persons, who could lower the wages of or discharge unsatisfactory employees, slaveowners had little recourse when duped by sellers. An unsatisfied buyer might have tried to hoodwink

another unsuspecting purchaser, but the overall result of such transactions would have been lower overall prices and a stagnant slave market. The great value of slaves and the likelihood of litigation regarding slave sales, according to Wahl, caused judges to formulate strict rules governing such transactions. They created implied warranties (except when flaws were obvious to buyers), required sellers to disclose the “defects” in their slaves, and gave incentives for sellers to establish explicit warranties. In this respect, Wahl concludes, slave buyers received much more protection under law than purchasers of live-stock.

In cases involving common carriers, moreover, Wahl finds that courts offered a substantial degree of protection to slaveowners when trains, boats, and stagecoaches caused injury to bondspersons. With the rapid expansion of railroads, trains especially proved dangerous, and numerous cases arose involving railroad companies and injury to slaves, livestock, and free persons. According to Wahl, southern courts made carriers responsible for nearly all injuries to livestock, many injuries to slaves, some injuries to free passengers, and almost none to other free persons. Livestock, lacking the mental capacity to escape danger, received the most legal protection, while free persons received the least. Courts held common carriers liable in many cases involving slaves, valuable commodities who possessed the intelligence to attempt avoiding injury. Still, courts hesitated to hold common carriers liable when slaves used them to escape to freedom. “As a result,” Wahl argues, “the judiciary helped conserve slave property values as well as protect the expansion of public transportation” (p. 100). Again, judges formulated efficient legal rules that carefully balanced social costs and benefits.

Wahl provides a fresh theoretical perspective on the law of slavery, and her work will no doubt prove most useful to historians of slavery and the southern economy. At times, however, Wahl pushes her argument about efficiency a bit too far and confuses legal protection of slaveholders with legal protection of slaves. She makes bold claims in the introduction that slaves benefitted from the judiciary’s concern with promoting the smooth operation of the system. “In a sense,” she writes, “the apologists for slavery were right: Slaves fared better than free persons in some circumstances because someone powerful had a stake in their well-being” (p. 25). But in the above examples—cases involving sales and common carriers—slaveowners rather than slaves reaped the most from judicial decisions. Her claim that courts protected slaves proves most accurate with regard to slave-hiring cases

and criminal cases involving excessive cruelty, and on the latter issue she provides much evidence that challenges Michael Hindus and others who have argued that courts virtually never protected blacks in criminal trials.[3] In the end, however, whatever beneficence slaves gained at the hands of judges did not undermine or harm in any way the perpetuation of the institution. Quite to the contrary, Wahl contends, the common law helped undergird slavery by “efficiently accommodat[ing] the needs of a slave-holding society” (p. 176).

Wahl’s most innovative finding, a sub-theme of the book, is that the law of slavery provided a series of precedents that courts ultimately applied to commercial, employment, and accident cases. While most historians have examined slave law in order to find out more about life in the Old South, Wahl demonstrates that the law of slavery actually had a long-term impact on the evolution of legal doctrine. Cases involving hired slaves, for example, served as precedent to reform twentieth century employment law by making employers more responsible for accidents in the workplace. Similarly, courts relied upon slave law precedents in subsequent cases involving common carriers, which established the foundation for modern personal injury law.

In short, Wahl brings new insights to the study of slave law. Her three tables documenting the numbers, dates, and types of cases heard in southern state courts will prove useful to any scholar interested in the law of slavery, and her comprehensive approach makes this work stand out from other studies of slave law that confine themselves to particular topics, times, and places. Still, historians of slavery and the American South will find much with which to take issue here. Wahl is uninterested in portraying slaves as agents, only as commodities that the litigants and judges acted upon; southern ideology and culture—religion, honor, paternalism—make almost no appearances in this book; the impact that individual judges had on formulating slave law receives scant treatment; and economic interest, not surprisingly, plays the starring role as the driving force behind legal decision making.

Historians who read Wahl’s book may wonder whether the author is even asking the right questions; for that reason, historians should take a look. Like others outside of the historical and legal profession who have examined the law of slavery, Wahl offers a fresh perspective on an important topic.

Notes

[1]. See, for example, A. E. Keir Nash, "Fairness and Formalism in the Trials of blacks in the State Supreme Courts of the Old South," *Virginia Law Review*, 56 (1970), 64-100; idem, "Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution," *Vanderbilt Law Review*, 32 (1979), 7-218.

[2]. William E. Wiethoff, *A Peculiar Humanism: The Judicial Advocacy of Slavery in High Courts of the Old South, 1820-1850* (Athens: University of Georgia Press, 1996).

[3]. Michael Hindus, "Black Justice under White Law:

Criminal Prosecution of Blacks in Antebellum South Carolina," in Eric H. Monkkonen, ed., *Crime and Justice in American History: Courts and Criminal Procedure* (Westport, Conn.: Meckler, 1991); Andrew Fede, *People Without Rights: An Interpretation of the Fundamentals of the Law of Slavery in the U.S. South* (New York: Garland, 1992).

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