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Bankrupted Slaves

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Responsible societies reckon with the pernicious and ugly chapters in their histories. Wherever we look, there exist ever-present reminders of how we failed as a society in permitting the enslavement of millions of black men, women, and children during the first century of this nation's history. No corner of society remains unstained. As such, it is incumbent on institutions to confront their involvement in this horrific past to fully comprehend the kaleidoscopic nature of institutional complicity in legitimating and entrenching slavery. Only by doing so can we properly continue the march of progress, finding ways to improve society, not letting the errors of our past define us, yet at the same time never forgetting them.

This Article represents a contribution toward this progress, by telling what has been, until now, an untold story about institutional complicity in antebellum slavery—that is, the story of how the federal

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government in the 1840s became the owner and seller of hundreds, if not thousands, of slaves belonging to financially distressed slaveowners who sought forgiveness of debt through the federal bankruptcy process. Relying on archival court records that have not been systematically analyzed by any published scholarship, this Article recounts how the Bankruptcy Act of 1841 and the domestic slave trade inevitably collided to create the bankruptcy slave trade, focusing on a case study of the Eastern District of Louisiana, home to New Orleans, which was antebellum America's largest slave market. Knowing the story of the black men, women, and children who found themselves subjected to sale through the federal bankruptcy process is a crucial step toward recognizing how yet another aspect of our legal system—one that has brought in its modern incarnation financial relief to millions upon millions of debtors—had deep roots in antebellum slavery.

INTRODUCTION

August 19, 1841, was a red-letter day in the history of bankruptcy law. The nation up to that point had experimented only ever so briefly with bankruptcy as a mechanism for addressing the problem of financially overburdened debtors—a roughly three-year experiment that began in 1800 and ended in 1803 (the "1800 Act").[1] After a nearly four-decade hiatus, bankruptcy would once again be part of the legal landscape. Regardless of one's politics—and mind you, the political sentiments for and against this legislation were quite pronounced—the Bankruptcy Act of 1841 (the "1841 Act" or "the Act")[2] was a big deal.[3]

News of the landmark legislation traveled slowly to New Orleans. During the week following passage of the 1841 Act, the *Daily Picayune* had little to no information for its readers.[4] On August 20, the *Picayune* reported that "[t]here was no news from Washington yesterday," relying instead on a report from the *Charleston Mercury* to inform New Orleanians that the House of Representatives had debated the bankruptcy bill earlier in the week without voting on it and that "there was no indication of the fate of [the bill]."[5] Four days later, although the *Picayune* had not yet received word about the 1841 Act,

1. Act of Apr. 4, 1800, ch. 19, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248.

2. Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 (repealed 1843).

3. *See, e.g.*, F. REGIS NOEL, A HISTORY OF THE BANKRUPTCY LAW 143 (1919) ("It must not be denied that . . . [the 1841 Act] was the subject of great political contention, for its effect and the struggle in the Congress over its repeal prove this."); DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 31 (2001) ("The 1841 act was the brainchild of the Whig party, which had made bankruptcy law a crucial plank in the platform that brought them the presidency and control of the Senate the year before."); Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 350 (1991) ("[T]he radical nature of the 1841 law precipitated a firestorm of controversy involving the leading political figures of the day.").

4. For background information on the *Picayune*, see ROBERT C. REINDERS, END OF AN ERA: NEW ORLEANS, 1850–1860, at 227–28 (1964).

5. DAILY PICAYUNE (New Orleans), Aug. 20, 1841, at 2; *see also* LE COURRIER DE LA LOUISIANNE (New Orleans), Aug. 20, 1841, at 3 ("Letters, dated at Charleston on the 15th of August, and received here this morning, do not contain one word of news from Washington.").

the newspaper optimistically predicted that the bill would be sent to and signed by President John Tyler.[6] By August 27, that optimism had turned into pessimism as a result of incomplete information regarding the decision of the House to table the bill, a death knell for the legislation in the eyes of the *Picayune*'s editors.[7] Finally, ten days after the bill's enactment, the *Picayune* celebrated the Bankruptcy Act of 1841,[8] announcing "that another 'long agony' is over, and a new and most important measure, in every respect, will soon be in operation."[9]

As alluded to by the *Picayune*, debtors in the Crescent City and the rest of the nation would have to wait to seek relief under the 1841 Act given the law's effective date of February 1, 1842.[10] But once the courts became open for bankruptcy filings, debtors did not hesitate to seek relief. One such debtor was Arthur Morrell, a New Orleanian who petitioned for relief on February 3, 1842, in the U.S. District Court for the Eastern District of Louisiana.[11] By the end of the month, on

6. The brief report on the legislation stated in its entirety as follows: "It is considered pretty certain that the Bankrupt Bill will pass both houses of Congress. Of course Tyler will not hesitate in sanctioning that." DAILY PICAYUNE (New Orleans), Aug. 24, 1841, at 2.

7. *From Washington*, DAILY PICAYUNE (New Orleans), Aug. 27, 1841, at 2 ("In the House the Bankrupt Bill was laid upon the table, by a vote of 110 yeas to 97 nays. This proceeding was considered decisive as regards its fate."); *cf.* LE COURRIER DE LA LOUISIANNE (New Orleans), Aug. 26, 1841, at 3 ("The Bankrupt Bill, it is said, has received its quietus in the U.S. House of Representatives . . . ."). For a discussion on how the House of Representatives resuscitated the tabled bankruptcy bill, see CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 76–78 (Beard Books 1999) (1935).

8. The *Picayune*'s enthusiasm for the 1841 Act can be attributed to its pro-Whig slant at that time. *See* REINDERS, *supra* note 4, at 228 ("In policy the *Picayune* veered with the strongest political winds. It was an 'independent' Whig journal until 1854 . . . ."). One bankruptcy historian has noted that the 1841 Act "was commonly called the Great Whig Bankruptcy Act, and was lauded by the Whigs as a wise and beneficent measure." NOEL, *supra* note 3, at 138.

9. *Highly Important from Washington. Bankrupt Bill Passed.*, DAILY PICAYUNE (New Orleans), Aug. 29, 1841, at 2. A day before, *The Louisiana Courier* tersely reported without fanfare that "[o]n the 19th instant, the Bankrupt Bill was returned to the Senate, with the President's signature." LE COURRIER DE LA LOUISIANNE (New Orleans), Aug. 28, 1841, at 3. This muted response is not surprising given that "[i]n politics the *Courier* was Democratic." REINDERS, *supra* note 4, at 232. Democrats opposed the 1841 Act. WARREN, *supra* note 7, at 61. The newspaper did, however, print the entire 1841 Bankruptcy Act in its August 30 issue. LE COURRIER DE LA LOUISIANNE (New Orleans), Aug. 30, 1841, at 3. For background information on the *Courier*, see REINDERS, *supra* note 4, at 231–32.

10. Act of Aug. 19, 1841, ch. 9, § 17, 5 Stat. 440, 449 (repealed 1843). In his history of U.S. bankruptcy law, Noel inexplicably states that the 1841 Act "went into operation February 2, 1842," NOEL, *supra* note 3, at 138, even though he subsequently acknowledges that "[b]y the terms of the act it was to take effect on the first day of February, 1842," *id.* at 139. The 1841 Act unequivocally states that it "shall take effect *from* and after *the first day of February next*." § 17, 5 Stat. at 449 (emphasis added).

11. Petition for Writ of Possession at 1, *In re* Morrell, No. 19 (E.D. La. May 24, 1842). For a discussion of the main archival sources consulted for this Article, see *infra* Section II.A. For a discussion of the citation method used to refer to these sources, see Rafael I. Pardo, *Documenting Bankrupted Slaves*, 71 VAND. L. REV. EN BANC 73, 87–90 (2018).

February 26, the court had decreed Morrell a bankrupt,[12] thus giving him the opportunity to seek a discharge of his debts.[13]

Morrell, of course, was not alone in his plight seeking forgiveness of debt. Like him, over eight hundred debtors in the Eastern District of Louisiana sought relief from their financial distress under the protective cover of the 1841 Act,[14] albeit within a very limited window of time—a little bit over a year—as a result of the Act's repeal on March 3, 1843.[15] Unlike Morrell, however, nearly all of those debtors received their requested relief. Morrell was one of the few debtors denied a discharge,[16] a jury having found that he was not entitled to such relief because of his fraudulent conduct—specifically, concealment of certain slaves from his creditors,[17] slaves that, as argued by John M. Bach, the assignee charged with administering Morrell's bankruptcy estate, were "to be disposed according to Law, as part of the assets of said Morrell, for the benefit of his said creditors."[18]

James, who was approximately thirty-two years old at the time that Morrell filed for bankruptcy relief,[19] was one of the slaves whom

12. Petition for Writ of Possession, *supra* note 11, at 1.

13. § 4, 5 Stat. at 443.

14. *See* H.R. DOC. NO. 29-99, at 7 (1847).

15. Act of Mar. 3, 1843, ch. 82, 5 Stat. 614.

16. According to the statistical report provided in 1847 to Congress by N.R. Jennings, the Clerk of the U.S. District Court for the Eastern District of Louisiana, only two individuals failed to receive a discharge. H.R. DOC. NO. 29–99, at 7. While Jennings' report cautioned that "[t]here are still many matters in bankruptcy unsettled, and reports of assignees and commissioners yet to be made," he made that reference in explaining his estimate of "all the costs, fees, and expenses arising from the bankruptcies" in the Eastern District. *Id.* While it would not be surprising that some estates had not yet been fully administered four years after the 1841 Act's repeal, it would be very surprising if there had been any pending matters in 1847 regarding a bankrupt's discharge eligibility. *See* § 4, 5 Stat. at 443 (stating that the bankruptcy "discharge and certificate [were] not . . . to be granted until after ninety days from the decree of bankruptcy, nor until after seventy days' notice in some public newspaper . . . to all creditors who ha[d] proved their debts, and other persons in interest").

17. John M. Bach, the assignee charged with administering Morrell's bankruptcy estate, filed an objection on June 14, 1842, to Morrell's request for a discharge. Opposition of Assignee to the Discharge, *In re* Morrell, No. 19 (E.D. La. June 14, 1842). The cover to Bach's objection contains a notation stating, "We the Jury, find the bankrupt not entitled to a certifficate [sic] of discharge, having concealed certain slaves from his creditors[.]" *Id.* That notation is dated as having been made in New Orleans on November 18, 1842. *Id.* Below the notation there is a signature under which there is a word. Much of the signature and the word are illegible, but the remaining legible letters and the context suggest that the subscribing individual identified himself as a juror. *Id.* The legible letters in the signature are the initials "W" and "J" followed by a last name that begins "McL." *Id.* A New Orleans directory from 1842 includes a listing for a "McLean, W. J. firm of Dick, McLean & Hill, 85 Canal street." NEW ORLEANS DIRECTORY FOR 1842, at 278 (New Orleans, Pitts & Clarke 1842) [hereinafter NEW ORLEANS DIRECTORY]. For a discussion of errors in that directory, see Pardo, *supra* note 11, at 113 n.206.

18. Petition of John M Bach Assignee for Seizure of Slaves at 3, *In re* Morrell, No. 19 (E.D. La. May 24, 1842) [hereinafter Bach Petition for Slave Seizure].

19. *See* Petition of John M. Bach Assignee to Sell Slave James at 2, *In re* Morrell, No. 19 (E.D. La. Dec. 28, 1852) [hereinafter Bach Petition to Sell Slave James] ("[T]he assignee now prays that

Morrell attempted to place beyond the reach of his creditors "through simulated and fraudulent acts of sale . . . to his wife Lucy Ann Huyler" and through a subsequent "simulated mortgage . . . to secure a pretended note for the sum of $3000, drawn by said Morrell in the name of his said wife, to one Charles J Cook, the brother in law of said Morrell."[20] Morrell's fraudulent scheme came to Bach's attention within several months after Morrell's filing. In response, the assignee requested that the district court issue a writ commanding the U.S. Marshal, Algernon Sidney Robertson, to seize Morrell's slaves, including James, for delivery to Bach.[21] While Robertson initially succeeded in taking possession of two of Morrell's slaves and delivering them to Bach,[22] James was not among them.

Subsequent documents filed in Morrell's case reveal that, when the court issued the writ of possession to U.S. Marshal Robertson, James "was run off at that time by the said Bankrupt [i.e., Morrell] from the City of N Orleans to prevent the Assignee from getting possession of [James]."[23] Eventually discovering James to be aboard a steamboat in New Orleans in December 1845,[24] Bach requested that the court issue a writ instructing Robertson to take possession of James and then deliver him to Bach.[25] Although Robertson subsequently obtained custody of James, he apparently escaped and eluded recapture for approximately seven years,[26] at which point Bach petitioned the court on December 28, 1852, for an order authorizing Robertson to sell James,

your honorable Court may grant an order of sale, authorizing & empowering him to sell the said slave James, griff color, aged about forty two years . . . ."). Recall that Morrell filed his bankruptcy petition in 1842. *See supra* text accompanying note 11.

20. Bach Petition for Slave Seizure, *supra* note 18, at 2–3.

21. *See id.* at 1, 3. While Bach's petition requesting the issuance of a writ of possession referred to James as "Jim," *id.* at 2–3, a subsequent motion filed by Bach noted "that on the 24th of May 1842 an attachment issued from the Court directed to the Marshall [sic] Commanding him to take a Certain slave by name James," *see* Motion for Attachment at 2, *In re* Morrell, No. 19 (E.D. La. Dec. 22, 1845) [hereinafter Motion for Attachment], thus indicating that the references to "Jim" and "James" in both documents were to the same individual.

22. *See* Petition of J M Bach Assignee to Sell Negroes Belonging to the Estate of A Morrell at 3, *In re* Morrell, No. 19 (E.D. La. Aug. 6, 1842) [hereinafter Bach Petition to Sell Slaves Drake and China].

23. Motion for Attachment, *supra* note 21, at 2.

24. *Id.*

25. *Id.*

26. *See* Bach Petition to Sell Slave James, *supra* note 19, at 2. For a discussion of the experience of runaway slaves in Southern cities and how the urban landscape afforded them unique opportunities to remain absconded, see RICHARD C. WADE, SLAVERY IN THE CITIES: THE SOUTH 1820–1860, at 209–42 (paperback ed. 1967). Wade recounts the experiences of various runaway slaves, including that of a Charleston slave who avoided recapture for at least two years, *see id.* at 216–17, 316 n.25, and that of a New Orleans slave who "changed his name, forged some papers, and then claimed he had never been a slave," *id.* at 217.

now forty-two years old.[27] The court granted Bach's petition on the same day that he filed it.[28] Thirty-nine days later, at approximately noon on Saturday, February 5, 1853, the U.S. Marshal auctioned James at the St. Louis Hotel, selling him to George Clark for $505 in cash,[29] about $14,831 in today's dollars.[30]

Having recounted some of the key events in the Morrell bankruptcy case, it is worth pausing to reflect on them and to absorb their meaning. At first blush, the inclination might be to consider these events as examples of two very familiar stories. First, since time immemorial, individuals have had to confront the challenge of failing to comply with financial obligations due to excessive indebtedness, and the law has responded to that problem in various ways, including providing for judicial sales of debtors' assets to pay the claims of creditors.[31] Second, during the antebellum period, one of American slavery's many horrors was the never-ending sale of black men, women, and children—at least two million slaves between 1820 and 1860 according to one conservative estimate[32]—with some of those sales intended to satisfy the claims of creditors against indebted slaveowners.[33]

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27. Bach Petition to Sell Slave James, *supra* note 19, at 2.

28. *Id.*

29. *See* Account Sales at 1, *In re* Morrell, No. 19 (E.D. La. Feb. 5, 1853) [hereinafter Morrell Account Sales]. For citations to court documents filed under the 1841 Act in the Eastern District of Louisiana and titled "Account Sales," such citations refer to reports filed by the U.S. Marshal documenting the property sold by him in a given bankruptcy case. *See* Pardo, *supra* note 11, at 91–93. The U.S. Marshal's report in *In re Morrell* indicates that he sold James "at the St. Louis Exchange." Morrell Account Sales, *supra*, at 1. New Orleanians used that name to refer to the St. Louis Hotel, a location that played a central role in the New Orleans slave market. *See* MAURIE D. MCINNIS, SLAVES WAITING FOR SALE: ABOLITIONIST ART AND THE AMERICAN SLAVE TRADE 164 (2011). For further discussion regarding the various locations associated with the New Orleans slave market, see *infra* Section IV.A.1.

30. References to "today's dollars" are to 2017 dollars. Nominal dollar amounts from the historical records consulted for this Article have been converted to 2017 dollars using the Consumer Price Index estimates compiled by the Federal Reserve Bank of Minneapolis. *Consumer Price Index (Estimate) 1800–*, FED. RES. BANK MINNEAPOLIS, https://www.minneapolisfed.org/community/teaching-aids/cpi-calculator-information/consumer-price-index-1800 (last visited Aug. 11, 2017) [https://perma.cc/F4QP-LWW2].

31. *See* Thomas D. Russell, *South Carolina's Largest Slave Auctioneering Firm*, 68 CHI.-KENT L. REV. 1241, 1245 (1993) ("The conduct of sales was among a sheriff's important duties. Most of these sales were execution sales: sales connected with execution of a court's judgment. Execution sales nearly always involved debt.").

32. *See* STEVEN DEYLE, CARRY ME BACK: THE DOMESTIC SLAVE TRADE IN AMERICAN LIFE 296 (2005).

33. *See, e.g.*, Russell, *supra* note 31, at 1253:

> In 1845 and 1846, in just over 100 sales at the beginning of twenty-two different months, Fairfield District Sheriff Jeremiah Cockrell sold 311 slaves . . . and a variety of other personal property of between 80 and 90 debtors, and then distributed the total proceeds of $127,589.50 to more than 225 creditors . . . . [T]he 311 slaves that Sheriff

One might be tempted to situate the Morrell case squarely at the intersection of these two well-worn paths in American history, concluding that the story is new in form, yet old in substance.[34] But such a conclusion would be improvident. Failing to reckon with the episode of American history of which the Morrell case is part and parcel—the sale of slaves through the federal bankruptcy process—would perpetuate what New Orleans Mayor Mitch Landrieu described, in his May 2017 remarks addressing the removal of the city's Confederate monuments, as "[o]ne story forgotten or maybe even purposefully ignored."[35]

Unfortunately, historians and legal scholars to date have overlooked the sale of slaves in bankruptcy.[36] Almost all of the history on both the domestic slave trade as well as on U.S. bankruptcy law fails to mention this institutional vestige of American slavery. The few scholars who have acknowledged bankruptcy slave sales have done so only fleetingly, thus failing to recognize how and why these sales constituted a crucial component of the federal government's complicity in propping up slavery in antebellum America.

This Article begins the process of revealing the forgotten and untold history of bankrupted slaves—that is, the black men, women, and children who found themselves subjected to sale through the federal bankruptcy process as a result of the desire of their indebted

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> Cockrell sold during the two-year period comprised 2.3% of the district's total slave population in 1845.

A treatise from the 1850s on the law of slavery set forth the following proposition in its chapter titled "Of the Incidents of Slavery": "The slave is at all times liable to be sold, by process of law, for the satisfaction of the debts of a living or the debts and bequests of a deceased master, at the suit of creditors or legattees." GEORGE M. STROUD, SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 9, 34 (Negro Univs. Press 1968) (2d ed. 1856).

34. *Cf., e.g.*, WADE, *supra* note 26, at 284 ("[T]he historian who writes about slavery quickly learns he is not engaged in a pioneering enterprise. The trail along the way is well marked and the footprints clear and often big."); Gavin Wright, *Foreword* to RICHARD HOLCOMBE KILBOURNE, JR., DEBT, INVESTMENT, SLAVES, at xi, xi (1995) ("[S]lavery has been the object of prodigious historical research, including several massive and well-known quantitative projects.").

35. *Mitch Landrieu's Speech on the Removal of Confederate Monuments in New Orleans*, N.Y. TIMES (May 23, 2017), https://www.nytimes.com/2017/05/23/opinion/mitch-landrieus-speech-transcript.html [https://perma.cc/V9UX-7ZPF]; *cf., e.g.*, Bonnie Martin, *Slavery's Invisible Engine: Mortgaging Human Property*, 76 J.S. HIST. 817, 820 (2010) (discussing "reasons that the mortgaging of people has slipped from our collective memory and the history of slavery").

36. *See infra* Section I.C.1; *cf.* HERBERT G. GUTMAN, SLAVERY AND THE NUMBERS GAME 12–13 (paperback ed. 2003) ("Although many monographs and specialized studies have been written about the enslaved Afro-American, an entire range of critical subjects—some inadequately studied and others still unstudied—needs fresh empirical examination. New work is needed on such subjects as . . . the sale of slaves . . . ."); Wright, *supra* note 34, at xi:

> Yet the financial aspects of slavery have been neglected. Even those historical economists who have given a prominent interpretive place to the implications of slave property as a form of wealth . . . have done so more on the basis of theory than on a detailed examination of portfolios and credit relationships.

owners to attain financial freedom from the debts that drove them into bankruptcy. Though the term "bankrupt" under the 1841 Act referred to a debtor whom a federal court had decreed to be eligible to seek a discharge of his or her debts,[37] and though slaves themselves did not file for bankruptcy, I use the term "bankrupted slave" (or its plural form) throughout this Article to remind the reader of the awful reality that "slaveholders' identities were merged with those of their slaves."[38] As such, once a court decreed a slaveowner to be a bankrupt, his slaves acquired the status of bankrupted slaves, subjected to a specific type of subordination by the federal government, which would finally culminate in a bankruptcy slave sale.

But why is it that the bankruptcy slave sale must be substantively distinguished from the myriad nonbankruptcy slave sales, in particular those conducted under the auspices of judicial process that were a core feature of commercial life in antebellum America?[39] The answer to that question lies in one of the defining features of the 1841 Act. To effectuate the financial freedom of individuals who sought bankruptcy relief, Congress designed the system to demarcate the beginning of that new life once a federal district court ordered that the individual be declared a bankrupt. Such a declaration terminated all of the bankrupt's interests in his or her property, with all rights and title to such property automatically vesting in the assignee, who was the representative appointed to administer the bankrupt's estate, a federally created *res*.[40] In other words, the bankrupt's prebankruptcy property became the federal government's property, including any slaves in which the bankrupt had an interest.

Accordingly, for a brief window in this nation's history, bankruptcy legislation made the federal government a widespread holder of property interests—usually a full ownership interest—in slaves. In stark contrast, the other nonbankruptcy judicial processes that resulted in slave sales during the antebellum period generally did not entail the federal government becoming the holder of such interests. The bankrupted slave thus represents extremely entrenched involvement by the federal government in the domestic slave trade—to

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37. *See infra* notes 64–69 and accompanying text.

38. WALTER JOHNSON, SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET 200 (1999).

39. On the prominence of judicial slave sales, see, for example, Russell, *supra* note 31, at 1241 ("The South Carolina courts of law and equity acted as the state's greatest slave auctioneering firm . . . . [M]ost slave auctions took place on the courthouse steps."); Judith Kelleher Schafer, *New Orleans Slavery in 1850 as Seen in Advertisements*, 47 J.S. HIST. 33, 33 (1981) (stating that "[m]ost of the [slave] sales [in New Orleans in 1850] were auctions occasioned by a legal procedure").

40. Act of Aug. 19, 1841, ch. 9, § 3, 5 Stat. 440, 442 (repealed 1843).

wit, frequently becoming the owner of slaves until they could be sold to a third-party purchaser at a bankruptcy sale.[41]

In large part, this Article centers on providing an account of the bankruptcy slave trade for the sake of uncovering the role of bankruptcy law—a prominent and permanent feature of modern law that has provided financial relief to millions upon millions of individuals—in furthering slavery in antebellum America. But this Article also provides an opportunity to respond to the clarion call sounded by historians Eugene D. Genovese and Elizabeth Fox-Genovese in 1984. They noted the lack of "an adequate history of antebellum southern law apart from the law of slavery and, to some extent, the criminal law,"[42] and thus urged that legal historians ask "to what extent slavery, considered as a social system, shaped the development of commercial, contract, and tort law."[43] Since then, historians have begun to answer that call.[44] But again, no one has yet examined how slavery may have shaped the development of bankruptcy law, which falls under the umbrella of commercial law, or for that matter how bankruptcy law may have affected slavery. While this Article does not purport to a be an exhaustive account examining these potentially causal relationships, its detailed history provides the much-needed springboard for launching continued inquiry into the significance of the bankruptcy slave trade.

This Article proceeds in four parts. Part I describes the key provisions of the 1841 Act, outlines the salient features of the domestic slave trade in antebellum America, and finishes with a discussion of how these two institutions inevitably collided to form the bankruptcy slave trade, pursuant to which the federal government itself became a

41. *Cf.* Russell, *supra* note 31, at 1241 ("[T]hrough the operation of law, many additional actors, institutions, and norms joined the relationship of slaveowner and slave.").

42. Eugene D. Genovese & Elizabeth Fox-Genovese, *Slavery, Economic Development, and the Law: The Dilemma of the Southern Political Economists, 1800–1860*, 41 WASH. & LEE L. REV. 1, 2 (1984).

43. *Id.* at 3; *see also* James W. Ely, Jr., Book Review, 1975 WASH. U. L.Q. 265, 265–66 (reviewing ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975)) ("Slavery in America has long been a subject of intense scrutiny by historians. . . . Much, however, is left to be done. The treatment of slaves at the trial court level remains largely untouched, as does the consideration of slavery in property, estate, commercial, and tort law." (footnotes omitted)).

44. One example is the work of Thomas Morris, which explores a multitude of topics on the intersection of antebellum law and slavery, among them (1) slavery and the law of successions and (2) contract law in the sale and mortgaging of slaves. THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860, at 81–131 (1996); *see also* JUDITH KELLEHER SCHAFER, SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA, at xiv (1994) ("The goal of this book is . . . to examine the operation of Louisiana law on slavery as seen in the decisions of the Supreme Court of Louisiana and, conversely, to discover the effect of the institution of slavery on the development, and in some instances the 'Americanization,' of Louisiana law.").

slaveowner in the process of extending financial freedom to certain debtors. The remainder of the Article explores how the bankruptcy slave trade functioned in the Eastern District of Louisiana (the "Eastern District"), home to New Orleans, antebellum America's largest slave market. Part II sets the evidentiary backdrop for this Article's case study, describing the sources and dataset used to document the history of the Eastern District's bankruptcy slave trade. Part III provides an account of the victims of that trade, exploring across various dimensions the experience of the 480 black men, women, and children (and then some) who found themselves ensnared by the federal bankruptcy process because of their owners' desire for relief from financial distress. Part IV then shifts focus to examining the perpetrators of and profiteers from the Eastern District's bankruptcy slave trade, documenting their complicity in making the sale of human beings a key feature of the process for forgiving the debts of bankrupt slaveowners. This Article concludes that we must never forget that the 1841 Act, the forbearer of modern bankruptcy law, caused great harm and suffering to the black men, women, and children forced into the condition of bankrupted slaves.

I. THE INTERSECTION OF BANKRUPTCY AND THE DOMESTIC SLAVE TRADE IN ANTEBELLUM AMERICA

The bankruptcy slave trade provides a new lens for looking at two familiar subjects: the foundations of U.S. bankruptcy law and the domestic slave trade in antebellum America. Much has been written about both, and exponentially more about the latter. But no scholarship to date has ever systematically explored the bankruptcy slave trade.[45] Perhaps this can be attributed to the fact that, during the antebellum period, bankruptcy legislation was evanescent, with both the 1800 and 1841 Acts suffering quick repeals,[46] thus failing to capture the attention of historians interested in the domestic slave trade. And, in the postbellum period, with the abolition of slavery,[47] no longer would the collision of bankruptcy and slavery be a possibility.[48]

Given that historical conditions channel any study of the bankruptcy slave trade toward the 1800 and 1841 Acts, why focus on

45. *See infra* Section I.C.1.

46. *See supra* notes 1, 15 and accompanying text.

47. *See* U.S. CONST. amend. XIII, § 1.

48. However, in the aftermath of the Civil War, the Bankruptcy Act of 1867, Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878), played a pivotal role in "cater[ing] to white southerners' economic needs at the height of Radical Reconstruction," ELIZABETH LEE THOMPSON, THE RECONSTRUCTION OF SOUTHERN DEBTORS: BANKRUPTCY AFTER THE CIVIL WAR 4 (2004).

the latter as the starting point of an inquiry into this unexplored chapter of history? Simply put, the 1841 Act had much broader reach than the 1800 Act by virtue of (1) making the relief available to a much larger class of individuals, (2) allowing individuals to seek such relief voluntarily, and (3) having operative effect at a time when the nation consisted of more states (including ones that permitted slavery) and more people.[49] The confluence of these factors produces a more ideal historical moment, two decades before the outbreak of the Civil War, for studying the intersection of the bankruptcy system and the domestic slave trade, particularly when one considers that the historical record for the 1841 Act is much larger than that for the 1800 Act.[50]

This Part sets the stage for this Article's case study of the Eastern District's bankruptcy slave trade. Section I.A introduces the reader to the provisions of the 1841 Act that featured prominently in the operation of the bankruptcy system. Section I.B then turns to a brief discussion of the domestic slave trade, focusing on the importance of court-ordered slave sales to that system. Section I.C then explores how these two systems collided to form the bankruptcy slave trade, first commenting on the widespread failure of scholars to notice the collision. Section I.C finishes by returning to the 1841 Act, pointing out how it transferred ownership of slaves from their bankrupt slaveowners to the federal government, thereby making it the key participant in the bankruptcy slave trade.

A. The Bankruptcy Act of 1841

This Section provides an overview of the process by which a bankruptcy case unfolded under the 1841 Act. For the reader already familiar with the operation of the present-day system under the Bankruptcy Code,[51] the general principles covered here will be familiar ground. The salient differences pertain to the specific content of the law effectuating these principles. For the reader unfamiliar with

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49. The 1800 Act limited bankruptcy relief to a limited class of individuals engaged in commerce (i.e., merchants, bankers, brokers, factors, underwriters, and marine insurers), and further provided that such relief would be creditor-initiated (i.e., involuntary from the perspective of the debtor). *See* Act of Apr. 4, 1800, ch. 19, §§ 1–2, 2 Stat. 19, 20 (repealed 1803). For a discussion of the more robust nature of bankruptcy relief under the 1841 Act, see *infra* Section I.A.

50. *See* James K. Owens, *Documenting Regional Business History: The Bankruptcy Acts of 1800 and 1841*, 21 PROLOGUE 179, 185 (1989) ("Because of the more comprehensive nature of the 1841 act, the records serve as an even more valuable source for business history. In addition, the records are considerably more voluminous."). *Compare* Karen Gross et al., *Ladies in Red: Learning from America's First Female Bankrupts*, 40 AM. J. LEGAL HIST. 1, 24 (1996) (suggesting that there were roughly 914 bankruptcy filings under the 1800 Act), *with* Pardo, *supra* note 11, at 86 tbl.1 (indicating that there were roughly 44,790 bankruptcy filings, if not more, under the 1841 Act).

51. *See* 11 U.S.C. §§ 101–1532 (2012).

bankruptcy law, the sketch that follows will be sufficient to provide a sense of the goals of the 1841 Act and how it functioned.

Generally speaking, bankruptcy represents one type of legal response to the problem that arises when a debtor has insufficient assets and income to repay his or her creditors in full.[52] To address the individual's financial failure, the law must tackle four broad issues: (1) the class of individual who should be eligible for bankruptcy relief; (2) the scope of that relief—for example, whether all, some, or none of the debtor's prebankruptcy debts should be forgiven; (3) what the debtor must give up in exchange for that relief—for example, certain prebankruptcy assets or a portion of future income; and (4) how to allocate among the debtor's creditors what the debtor relinquished in exchange for relief. The remainder of this Section discusses key features of the 1841 Act that touched upon each of these issues with respect to voluntary bankruptcy cases.[53]

1. Bankruptcy Eligibility and Discharge Eligibility

The 1841 Act represented a seminal moment in reorienting bankruptcy law as a mechanism for debtor relief,[54] shifting the focus away from its origins primarily as a creditor-collection device.[55] One of the primary factors effectuating this shift was the ability of debtors to seek bankruptcy relief voluntarily. Up until this point in time, debtors lacked such control,[56] instead subject to the will of their creditors who would determine if and when bankruptcy proceedings should be instituted against the debtor.[57] But rather than limit relief to a narrow

52. The 1841 Act did not extend bankruptcy relief to legal entities, such as corporations. *See* Act of Aug. 19, 1841, ch. 9, § 1, 5 Stat. 440, 440 (specifying persons eligible for bankruptcy relief) (repealed 1843); *see also* KENNETH N. KLEE & WHITMAN L. HOLT, BANKRUPTCY AND THE SUPREME COURT: 1801–2014, at 316 (2015) ("The Bankruptcy Acts of 1800 and 1841 included no provision for bankruptcy cases regarding corporate entities."); NOEL, *supra* note 3, at 138 (stating that the 1841 Act's "only limitation in application was to natural persons"). Accordingly, the discussion in the main text is limited to individual debtors (i.e., natural persons).

53. There were few involuntary cases under the 1841 Act. *See, e.g.*, H.R. DOC. NO. 29-223, at 6 (1846) (reporting that 1,510 voluntary petitions and 27 involuntary petitions were filed in the District of Connecticut under the 1841 Act); *id.* at 8 (reporting that 2,466 voluntary petitions and 84 involuntary petitions were filed in the Southern District of New York under the 1841 Act).

54. *See* NOEL, *supra* note 3, at 138 (noting that "[t]he [1841 Act] was substantially for the benefit of debtors").

55. PETER CHARLES HOFFER ET AL., THE FEDERAL COURTS: AN ESSENTIAL HISTORY 113 (2016) ("The [1841] Act 'shifted' the balance of power in court, through the mechanism of the voluntary confession of bankruptcy, from the creditor to the debtor, a shift that has characterized the federal law to this day.").

56. *See* NOEL, *supra* note 3, at 138 (noting that the 1841 Act "introduced the principle of voluntary bankruptcy into our legislation").

57. *See* Act of Apr. 4, 1800, ch. 19, §§ 1–2, 2 Stat. 19, 21–22 (repealed 1803).

class of individual,[58] Congress under the 1841 Act classified "[a]ll persons whatsoever, residing in any State, District or Territory of the United States, owing debts" as potentially eligible for relief.[59] Moreover, only a narrow class of individual faced the threat of involuntary bankruptcy proceedings.[60] Accordingly, under the 1841 Act, the overwhelming majority of debtors could initiate on their own terms the process for obtaining forgiveness of debt with the hope of regaining their financial freedom.

Of course, the ability to seek bankruptcy relief did not necessarily ensure access to that relief. For example, just as the direct costs of filing for bankruptcy (i.e., court fees and attorneys' fees) have been a barrier to relief for present-day debtors,[61] so too did debtors under the 1841 Act confront such barriers.[62] Despite this qualification,

58. The 1800 Act's involuntary bankruptcy scheme applied only to a "merchant, or other person residing within the United States, actually using the trade of merchandise, by buying and selling in gross, or by retail, or dealing in exchange, or as a banker, broker, factor, underwriter, or marine insurer" who committed one of the acts of bankruptcy enumerated in the statute. § 1, 2 Stat. at 20–21.

59. Act of Aug. 19, 1841, ch. 9, § 1, 5 Stat. 440, 441 (repealed 1843). The 1841 Act's eligibility provision seemingly classified as ineligible for bankruptcy relief an individual whose debts had resulted from defalcation by the debtor while acting as a public officer or in a fiduciary capacity. *See* § 1, 5 Stat. at 441 (providing that "[a]ll persons whatsoever, . . . owing debts, which shall not have been created in consequence of a defalcation as a public officer; or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, . . . shall be deemed bankrupts within the purview of this act"); NOEL, *supra* note 3, at 138 (noting that the 1841 Act's "advantages extended to all persons residing in the United States and not owing debts contracted in a fiduciary capacity"). The Act's discharge provision, however, specified that all individuals whom the court had declared to be bankrupts would be entitled to a discharge, with the exception of individuals who had engaged in certain misconduct or fraud, including "any person who, after the passing of this act, shall apply trust funds to his own use." § 4, 5 Stat. at 443–44. Examining the interplay of these two provisions, the Supreme Court held that an individual who had incurred fiduciary debts prior to enactment of the 1841 Act would be eligible to be declared a bankrupt and receive a discharge, but that the scope of discharge would exclude the bankrupt's fiduciary debts. *See* Chapman v. Forsyth, 43 U.S. (2 How.) 202, 207–08 (1844); *see also* KLEE & HOLT, *supra* note 52, at 328 (stating that, "[b]eginning with the Bankruptcy Act of 1841, debts for defalcation in a fiduciary capacity have been included in the categories of nondischargeable debts" and discussing *Chapman*). Presumably, an individual who had incurred fiduciary debts subsequent to the 1841 Act would have been eligible to be declared a bankrupt, but would have been ineligible for discharge.

60. *See* § 1, 5 Stat. at 441–42 (providing for involuntary bankruptcy proceedings under a limited set of circumstances against merchants, retailers of merchandise, bankers, factors, brokers, underwriters, and marine insurers).

61. *See* Rafael I. Pardo, *Taking Bankruptcy Rights Seriously*, 91 WASH. L. REV. 1115, 1123–24 (2016).

62. *See* EDWARD J. BALLEISEN, NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA 138, 268 n.15 (2001); *see also, e.g.*, RULES AND REGULATIONS IN BANKRUPTCY, ADOPTED BY THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF NORTH CAROLINA 9–11 (Fayetteville, Edward J. Hale 1842) [hereinafter N.C. BANKRUPTCY RULES] (setting forth table of bankruptcy fees under the 1841 Act in the District of North Carolina). The 1841 Act provided that

the fact remains that the introduction of voluntary bankruptcy relief on such a wide scale constituted a radical departure from prior bankruptcy law, both within and outside of the United States.[63]

Procedurally, for debtors to access the bankruptcy forum, the 1841 Act required that they file a petition with the district court located in the federal judicial district where they resided or had their principal place of business at the time of filing the petition.[64] In the bankruptcy petition, debtors would request that the district court issue a decree declaring them to fall within the class of individual eligible to pursue the relief available under the 1841 Act.[65]

A debtor's eligibility for a bankruptcy decree hinged on the satisfaction of certain conditions—specifically, (1) a declaration by the debtor stating his or her inability "to meet [his or her] debts and engagements"[66] and (2) financial disclosures regarding the debtor's liabilities and assets.[67] The disclosure requirements served the purpose, among others, of providing the court and its officers adequate information to perform the marshalling and distribution functions entailed in allocating whatever the debtor had given up in exchange for bankruptcy relief.[68] Provided that the debtor complied with these

> the [district] courts shall, from time to time, prescribe a tariff or table of fees and charges to be taxed by the officers of the court or other persons, for services under this act, or any other on the subject of bankruptcy; which fees shall be as low as practicable, with reference to the nature and character of such services.

§ 6, 5 Stat. at 446.

63. By way of comparison, English bankruptcy law first allowed voluntary bankruptcy for merchants in 1844 and for nonmerchants in 1861. Tabb, *supra* note 3, at 353–54. *But see* NOEL, *supra* note 3, at 138 (stating, without citation to any source, that the 1841 Act "introduced the principle of voluntary petitioning, eight years before the same doctrine entered the English laws").

64. § 7, 5 Stat. at 446.

65. *See* § 1, 5 Stat. at 441 (stating that, upon the satisfaction of certain conditions, debtors "shall be deemed bankrupts within the purview of this act, and may be so declared accordingly by a decree of such court"); *see also, e.g.*, Petition of Charles Edward Forstall to Be Declared Bankrupt at 1, *In re* Forstall, No. 393 (E.D. La. Sept. 10, 1842) ("Respectfully represents Charles Edward Forstall . . . that he is unable to meet his debts and engagements, . . . and prays that after due proceedings had, he may be declared by a decree of the Court to be a Bankrupt, within the purview of the said Act . . . .").

66. § 1, 5 Stat. at 441.

67. *Id.* (setting forth requirement that a debtor provide "a list of . . . creditors, their respective places of residence, and the amount due to each, together with an accurate inventory of . . . [the debtor's] property, rights, and credits, of every name, kind and description, and the location and situation of each and every parcel and portion thereof"). These financial disclosures were to be "verified by oath" or alternatively "by solemn affirmation" if the debtor were "conscientiously scrupulous of taking an oath." *Id.*

68. *See, e.g.*, *In re* Plimpton, 19 F. Cas. 874, 874 (S.D.N.Y. 1842) (No. 11,227):

> As the petitioner thus sets forth the amount of part of his furniture, and sets forth that more of it is mortgaged, and to whom, I apprehend he complies with the act, as the assignee can be under no difficulty in relation to it, and can see what part of it is under incumbrance and what is not.;

conditions, the district court would declare him or her to be a bankrupt,[69] thereby opening the gates to the bankruptcy forum and providing the bankrupt an opportunity to request a discharge from his or her debts. In other words, the bankruptcy decree did not guarantee that the bankrupt would obtain a discharge.

Upon obtaining a bankruptcy decree, the bankrupt could petition the district court for a discharge.[70] To qualify for a discharge, the bankrupt had to satisfy several conditions. First, the 1841 Act required the bankrupt to surrender all of his or her property existing as of the date of the bankruptcy decree, with the exception of a limited amount of property necessary for the support of the bankrupt (and, if applicable, his wife and children).[71] Second, the bankrupt had to have complied with all orders issued by the court.[72] Finally, the bankrupt had to fall outside a particular class of individual—specifically, a class defined mostly by reference to a limited set of circumstances relating to a bankrupt's fraud or misconduct in connection with the bankruptcy case.[73] If the bankrupt satisfied these discharge-eligibility rules,[74] the Act required the court to grant the bankrupt a discharge certificate.[75]

In re Malcom, 16 F. Cas. 540, 540 (S.D.N.Y. 1842) (No. 8,986) ("Another objection is, that the schedule is not sufficiently definite. . . . It is not necessary that the petitioner should set forth a perfect and complete exhibit of every article. But it must be so explicit that the assignee or his agent may be enabled to find the property if necessary."); *In re* Frisbee, 9 F. Cas. 959, 960 (S.D.N.Y. 1842) (No. 5,130) ("Counsel must thus see the importance attached to the inventory. By the act, the assignee must have such a description of the property as would fix its location and enable him to identify it.").

69. *See, e.g.*, *Plimpton*, 19 F. Cas. at 874 ("Another objection is, that the petitioner does not set out an accurate inventory of his property and every portion of it. This is a question of fact, and if he has not set it out properly, it would be fatal to his application.").

70. *See* § 4, 5 Stat. at 443.

71. *See* §§ 3–4, 5 Stat. at 442–43. This surrender of property constituted what the bankrupt had to relinquish in exchange for a discharge, which will be further addressed in the discussion below on the scope and price of discharge. *See infra* Section I.A.2.

72. *See* § 4, 5 Stat. at 443.

73. *See id.* at 443–44. To prevent abuse of the bankruptcy system by repeat filers, the 1841 Act also precluded a court from grating a discharge if the bankrupt had previously received a discharge in a prior case, unless the proceeds from the liquidation of the bankrupt's estate were sufficient to pay all creditors 75% of their claims. § 12, 5 Stat. at 447.

74. For a discussion of the modern-day distinction between "bankruptcy eligibility rules" and "discharge eligibility rules," see Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 416–17 (2005).

75. § 4, 5 Stat. at 443. It should be noted that the 1841 Act enabled creditors to prevent the court from granting the bankrupt a discharge if "a majority, in number and value, of the creditors" who had proved their debts filed at the discharge hearing "their written dissent to the allowance of a discharge." *Id.* at 444. If that occurred, the bankrupt could demand a trial by jury (or alternatively appeal to the circuit court). *Id.*; *see also* BANKR. D. MASS. R. XIII (1842):

> But if a majority in number and value of the creditors, who have proved their debts shall appear at such hearing and file their written dissent thereto, they shall state their objections in writing; then, . . . the bankrupt may demand a trial by jury, and the proper

2. The Scope and Price of Discharge

The most expansive form of discharge would have provided a bankrupt under the 1841 Act with a release from all of his or her prebankruptcy debts, notwithstanding the identity of the creditors or the circumstances under which the debts had been incurred. On the surface, this is what the 1841 Act's discharge provision purported to do—that is, to provide the bankrupt "a full discharge from all his debts, to be decreed and allowed by the court which has declared him a bankrupt, and a certificate thereof granted to him by such court accordingly."[76] The Supreme Court, however, interpreted the Act to except from discharge any debt resulting from defalcation by the debtor while acting as a public officer or in a fiduciary capacity.[77] Additionally, courts appear to have been split on the issue of whether a discharge under the Act applied to debts owed to government creditors.[78] Aside

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> issue will be directed by the court, and the trial and other proceedings had thereon in the manner prescribed by the Act of [C]ongress.

(repealed), *reprinted in* P.W. CHANDLER, THE BANKRUPT LAW OF THE UNITED STATES 47 (Boston, James H. Weeks 1842). The 1841 Act provided that, if the jury found that the bankrupt had "made a full disclosure and surrender of all his estate, as by this act required, and has in all things conformed to the directions thereof, the court shall make a decree of discharge, and grant a certificate." § 4, 5 Stat. at 444.

In addition to the aggregate creditor-dissent mechanism, creditors could, of course, object to the bankrupt's discharge on independent grounds, such as the bankrupt's failure to surrender all of his or her property. *See*, *e.g.*, BANKR. D. MASS. R. XIII:

> Whenever any creditors less than a majority in number and value, who have proved their debts, . . . shall appear at the hearing of the petition of the bankrupt for his discharge and a certificate thereof, and object thereto, they shall file their objections in writing; and the court will thereupon proceed to examine and decide upon the same . . . having regard to the nature of the objections and the proofs required in support thereof.

reprinted in CHANDLER, *supra*, at 47.

76. § 4, 5 Stat. at 443. Bankrupts in their discharge petitions requested relief in the nature of a full discharge. *See, e.g.*, Petition of George A. Botts Bankrupt, for a Discharge at 1, *In re* Botts, No. 545 (E.D. La. Feb. 7, 1843) ("He therefore prays that after due notice and proceedings to be had in the premises, He may be decreed by the Court to have a *full discharge from all his debts* provable under the said Bankruptcy, and a certificate thereof granted according to the Act of Congress." (emphasis added)).

77. *See supra* note 59.

78. The Pennsylvania Supreme Court, for example, held that "debts due the commonwealth [we]re not barred by the bankrupt certificate" issued under the 1841 Act. Commonwealth v. Hutchinson, 10 Pa. 466, 467–68 (1849). The court based its holding on English bankruptcy practice, U.S. bankruptcy practice under the 1800 Act, and the language of the 1841 Act, emphasizing the principle that a bankruptcy discharge would not apply to a government creditor, absent an express provision in the statute to that effect, due to the government's status as a sovereign. *See id.* at 468. Quite glaringly, the court failed to mention, *see id.* at 468–69, that the 1800 Act had expressly excepted from discharge debts owing to government creditors, *see* Act of Apr. 4, 1800, ch. 19, § 62, 2 Stat. 19, 36 (repealed 1803). The court also refused to answer whether the discharge would apply to a government creditor that proved its debt in order to participate in the distribution from the bankrupt's estate, *see* § 5, 5 Stat. at 444, which the *Hutchinson* state creditor had not done, *see Hutchinson*, 10 Pa. at 468.

from these limited exceptions, a bankrupt's discharge under the 1841 Act encompassed all prebankruptcy debts, thus representing a very robust form of relief.[79]

The discharge marked the beginning of the bankrupt's new financial life, unfettered by his or her prebankruptcy debts. By cutting off a creditor's ability to recover such debts as a personal liability of the bankrupt,[80] the 1841 Act severely limited a creditor's postbankruptcy

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The *Hutchinson* court, however, was not unanimous in its holding, with Justice Coulter adopting the dissenting view "that the state having yielded her sovereignty, so far as the passage of the act of bankruptcy is concerned, is bound like individuals by its terms." *Id.* at 468. Additionally, seven years after the *Hutchinson* decision, the U.S. District Court for the Southern District of New York held that a discharge under the 1841 Act extended to debts owed to the federal government, basing its decision on both the Act's express provisions and its legislative history. *See* United States v. Zerega, 28 F. Cas. 804, 805 (S.D.N.Y. 1856) (No. 16,786). Unlike the state creditor in *Hutchinson*, the federal creditor in *Zerega* had proven its debt in the bankruptcy case. *Id.* This fact did have some significance for the court. *See id.* at 805–06 ("This strongly implies the understanding of the government that the certificate of discharge was to bar public debts, alike with private ones."). But what seems to have struck the court the most is (1) that the express language of the 1841 Act was quite expansive in "declar[ing] [that] the certificate and discharge of the bankrupt, when duly granted, shall . . . be deemed a full and complete discharge of all debts . . . which are provable," and (2) that, unlike the 1800 Act, Congress had failed to create under the 1841 Act an express discharge exception for government debts. *Id.* at 805. On this basis the court presumed that Congress had changed its intent. *See id.* ("The presumption . . . is exceedingly forcible that the intention of the enactment was that it should operate alike upon debts due the United States and individuals.").

Viewed through the lens of the Supreme Court's modern bankruptcy jurisprudence, the Pennsylvania Supreme Court's holding in *Hutchinson* was incorrect. *See* Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 448–49 (2004):

> Under our longstanding precedent, States, whether or not they choose to participate in the proceeding, are bound by a bankruptcy court's discharge order no less than other creditors. . . . [W]hen the bankruptcy court's jurisdiction over the res is unquestioned, our cases indicate that the exercise of its *in rem* jurisdiction to discharge a debt does not infringe state sovereignty.

(citation omitted), *quoted with approval in* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 364 (2006).

79. For a brief discussion of how Congress has dramatically reduced the scope of bankruptcy discharge over time, see Jonathan Remy Nash & Rafael I. Pardo, *Does Ideology Matter in Bankruptcy? Voting Behavior on the Courts of Appeals*, 53 WM. & MARY L. REV. 919, 937–39 (2012). Any increase in discharge exceptions increases the likelihood that "the debtor will exit bankruptcy with a greater amount of nondischarged debt, thereby increasing the likelihood that bankruptcy relief will fail to restore the debtor to economic productivity." *Id.* at 939–40.

80. *See* § 4, 5 Stat. at 444 (providing that the "discharge and certificate . . . shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever"). Because the bankruptcy discharge had to be pleaded as an affirmative defense to a judicial collection effort by a creditor, the possibility existed that the defense would be waived if not properly raised, thus negating the benefit of discharge with respect to that creditor. *See, e.g.*, Fellows v. Hall, 8 F. Cas. 1132, 1133 (C.C.D. Mich. 1843) (No. 4,722) ("If the discharge were obtained before the answer was filed, it should be set forth in the answer, or be made the subject matter of a plea. If after answer filed, then special leave should be given to the defendant, that he may plead it.").

recourse to collect any unpaid, prebankruptcy amounts owed by the bankrupt.[81]

As previously mentioned, in order to obtain a discharge, the bankrupt had to surrender all of his or her nonexempt property existing on the bankruptcy-decree date.[82] The 1841 Act provided that a bankrupt could keep "necessary household and kitchen furniture, and such other articles and necessaries of such bankrupt," as designated by the assignee on the basis of "the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value . . . the sum of three hundred dollars."[83] Additionally, the bankrupt would be allowed to keep his "wearing apparel . . . and that of his wife and children."[84] In summary, the bankrupt's exempt property would be limited to his necessary goods, not exceeding a value of $300 in the aggregate (about $7,595 in today's dollars), and his clothes and the clothes of his wife and children.

When considering the scope and price of discharge, one can conceive of the "net financial benefit" obtained by a bankrupt under the 1841 Act as the difference between (1) the total amount of discharged debt and (2) the sum of the bankrupt's direct costs of obtaining bankruptcy relief (e.g., court fees and attorneys' fees) and the value of the bankrupt's nonexempt assets.[85] Many cases under the Act were no-asset cases—that is, cases in which the bankrupt did not have any nonexempt assets for liquidation and distribution to creditors.[86] Accordingly, to many creditors it must have seemed that the typical bankrupt obtained forgiveness of debt without having to pay much of a price.[87]

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81. Some possibilities for postbankruptcy collection on a discharged debt included informal voluntary payments by the former bankrupt to the creditor, or alternatively a formal agreement (i.e., a contract) between the parties that the former bankrupt would repay the debt. *See* BALLEISEN, *supra* note 62, at 124–28.

82. *See supra* note 71 and accompanying text.

83. § 3, 5 Stat. at 443.

84. *Id.*

85. *See* Michelle J. White, *Why It Pays to File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change*, 65 U. CHI. L. REV. 685, 700 (1998).

86. *See infra* notes 261–262 and accompanying text. For a bankrupt who was especially earnest in announcing his no-asset case, consider the schedule of liabilities and assets filed by John Shaw Kennedy from New Orleans, indicating in the schedule's asset section, "None! All having been used in the payment of my debts and Current Expenses." Schedule of Liabilities & Effects of J.S. Kennedy at 1, *In re* Kennedy, No. 383 (E.D. La. Sept. 2, 1842).

87. *See* BALLEISEN, *supra* note 62, at 119. In a no-asset case, the price for discharge would have been limited to the bankrupt's direct costs of obtaining bankruptcy relief. *See supra* text accompanying note 86. Balleisen notes that, depending on the federal judicial district, court fees under the 1841 Act could range from fifteen to fifty dollars for a simple case (i.e., one not raising litigable issues). *See* BALLEISEN, *supra* note 62, at 138; *see also, e.g.*, H.R. DOC. NO. 27-172, at 17–

3. Creditor Repayment

In the event that an assignee's liquidation of the bankruptcy estate generated proceeds for distribution,[88] creditors had to prove their debts in order to receive payment from the estate.[89] The court could disallow a creditor's claim against the estate if the debt underlying the claim was based on "fraud, imposition, illegality, or mistake."[90] The assignee would distribute the estate's proceeds on a pro rata basis to all creditors who had proved their debts.[91] As a general matter, the 1841 Act did not arrange creditors into distinct classes for purposes of ascertaining priority entitlement to the estate's proceeds.[92] There were, however, some exceptions to this rule.

First, the Act did not "annul, destroy, or impair . . . any liens, mortgages, or other securities on property" that were valid under state law and undisplaced by specific provisions of the Act.[93] Accordingly, if a creditor had a valid, undisplaced lien on a particular piece of estate property, that lien would give priority to the secured creditor over any unsecured creditor to the proceeds generated from the sale of that property.

Second, the Act did confer priority status to three types of unsecured claims: (1) federal government claims, (2) certain surety claims, and (3) certain wage claims not exceeding twenty-five dollars.[94] Accordingly, for those cases in which there were insufficient proceeds to fully pay all unsecured creditors, priority unsecured creditors received a distribution before any distributions were made to nonpriority unsecured creditors. If there were insufficient proceeds to fully pay the priority unsecured creditors, then the nonpriority unsecured creditors did not receive any distribution.

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18 (1843) (setting forth a table of fees under the 1841 Act for a no-opposition bankruptcy case in the U.S. District Court for the Eastern District of Pennsylvania, administered in the city or county of Philadelphia, and listing a total amount of $30.45). Attorneys' fees for such a case would not likely have exceeded twenty-five dollars. *See* BALLEISEN, *supra* note 62, at 140.

88. *See* § 10, 5 Stat. at 447 (setting forth provisions on the liquidation of the bankruptcy estate).

89. § 5, 5 Stat. at 444.

90. *Id.* at 445.

91. *Id.* at 444.

92. *See id.*

93. § 2, 5 Stat. at 442.

94. § 5, 5 Stat. at 444–45. For a brief discussion on the structuring of suretyship transactions in antebellum America, see Thomas D. Russell, *The Antebellum Courthouse as Creditors' Domain: Trial-Court Activity in South Carolina and the Concomitance of Lending and Litigation*, 40 AM. J. LEGAL HIST. 331, 335–36 (1996).

Finally, while the Act indicated that administrative expenses associated with the case would be charged against the estate,[95] it did not specify whether such expenses would be entitled to priority. The practice, however, was that administrative expenses would be paid before any distributions were made to priority or nonpriority unsecured creditors.[96] Accordingly, for those cases in which there were insufficient proceeds to fully pay the estate's administrative expenses, priority and nonpriority unsecured creditors did not receive any distribution.

Pursuant to these distribution rules, any amounts owed to creditors that remained unpaid after the assignee had distributed the estate's proceeds would be discharged, unless the debt was nondischargeable.[97] Bankruptcy case statistics, which clerks of the various federal district courts reported to Congress, reveal that creditor dividends under the 1841 Act were quite paltry.[98] Thus, while the Act conferred substantial relief to bankrupts, the overwhelming majority of whom received a discharge,[99] it proved to be of little benefit to creditors.[100]

B. The Domestic Slave Trade

At the same time that tens of thousands of debtors sought financial freedom under the 1841 Act,[101] hundreds of thousands of black men, women, and children were sold into bondage.[102] As described by

95. *See* § 6, 5 Stat. at 446 (requiring district courts to "prescribe a tariff or table of fees and charges to be taxed by the officers of the court or other persons, for services under this act, or any other on the subject of bankruptcy").

96. *See, e.g.*, BANKR. D.D.C. R. 41 (1842) ("The assignee shall be entitled to deduct in the first instance, from moneys of the estate in his hands, all necessary expenditures and responsibilities incurred by him, and allowed and certified by the court.") (repealed), *reprinted in* RULES AND REGULATIONS IN BANKRUPTCY, ADOPTED BY THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA 10 (Washington, D.C., Peter Force 1842) [hereinafter D.C. BANKRUPTCY RULES]; BANKR. D.N.C. R. 44 (1842) (same) (repealed), *reprinted in* N.C. BANKRUPTCY RULES, *supra* note 62, at 7; BANKR. D. VT. R. 57 (1842) (same) (repealed), *reprinted in* RULES AND REGULATIONS IN BANKRUPTCY, ADOPTED BY THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES, FOR THE DISTRICT OF VERMONT 10 (Rutland, White & Guernsey 1842) [hereinafter VT. BANKRUPTCY RULES]; BANKR. S.D.N.Y. R. 58 (1842) (same) (repealed), *reprinted in* RULES AND REGULATIONS IN BANKRUPTCY, ADOPTED BY THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW-YORK 12 (New York, John S. Voorhies 1842).

97. *See supra* notes 76–79 and accompanying text.

98. *See* H.R. DOC. NO. 29-99, at 8 (1847); H.R. DOC. NO. 29-223, at 30–31 (1846).

99. *See* H. R. DOC. NO. 29-99, at 8; H.R. DOC. NO. 29-223, at 30–31; *supra* note 16.

100. Unlike creditors, however, the individuals involved in the administration of bankruptcy cases fared quite well, *see* BALLEISEN, *supra* note 62, at 137–39, including in cases with bankruptcy slave sales, *see infra* Section IV.B.

101. *See* Pardo, *supra* note 11, at 84 tbl.1 (presenting statistics on bankruptcy cases under the 1841 Act).

102. It has been estimated, for example, that 57,716 slaves were sold in South Carolina alone during the 1840s. DEYLE, *supra* note 32, app. B at 295 tbl.A.1.

Steven Deyle, "[t]he domestic trade . . . was the lifeblood of the southern slave system, and without it, the institution would have ceased to exist."[103] To place this observation into context (at least for purposes of this Article's case study), three factors should be considered: (1) Southerners' financial investment in slaves, (2) the centrality of the domestic slave trade to the Southern economy, and (3) the centrality of courts to the domestic slave trade.

The economic scale of the South's commitment to slavery was massive: it has been estimated that the value of the South's total slave population by 1860 amounted to $3 billion,[104] an amount eclipsing the value of all major types of U.S. assets and expenditures (e.g., livestock, farm implements, machinery, capital investments in manufacturing, railroads, and banks), with the exception of the assessed value of real estate in the free states, which amounted to approximately $4.5 billion.[105] Based on these numbers, it is quite clear that slaves constituted the South's "primary source of wealth."[106]

The economic magnitude of slavery went hand in hand with a "slave market [that] was everywhere in the antebellum South"[107] and that "made the buying and selling of men, women, and children a regular part of everyday life."[108] Like the scale of financial investment in slaves, the number of slaves sold, both across and within state lines, is staggering: "Between 1790 and 1860 Americans transported more than one million . . . slaves from the Upper South to the Lower South; approximately two-thirds of these slaves arrived there as a result of sale. Moreover, twice as many individuals were sold locally."[109]

All of this brings us to our last factor, the role of courts in the domestic slave trade. Relying on the work of Michael Tadman on the interregional slave trade[110] and Thomas Russell on court-ordered slave

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103. Steven Deyle, *The Domestic Slave Trade in America: The Lifeblood of the Southern Slave System*, *in* THE CHATTEL PRINCIPLE: INTERNAL SLAVE TRADES IN THE AMERICAS 91, 93 (Walter Johnson ed., 2004).

104. *See id.* at 95 ("According to economic historians, the total value of slave property in 1860 was at least $3 billion. This figure assumes an average price of only $750 per slave, which most recent studies have indicated is probably too low.").

105. *See id.* at 96 tbl.5.1.

106. *Id.* at 106; *see also, e.g.*, Roger Ransom & Richard Sutch, *Capitalists Without Capital: The Burden of Slavery and the Impact of Emancipation*, 62 AGRIC. HIST. 133, 138–39 (1988) ("Slave capital represented 44 percent of all wealth in the major cotton-growing states of the South in 1859 . . . .").

107. JOHNSON, *supra* note 38, at 115.

108. DEYLE, *supra* note 32, at 144.

109. Deyle, *supra* note 103, at 93.

110. MICHAEL TADMAN, SPECULATORS AND SLAVES: MASTERS, TRADERS, AND SLAVES IN THE OLD SOUTH (1989).

sales in South Carolina pursuant to state law,[111] Deyle has estimated that court-ordered slave sales in South Carolina constituted approximately 45% of all slave sales in the state from 1820 to 1860.[112] Regardless of whether that estimate is representative of the level of court involvement in the domestic slave trade throughout the South,[113] it is evident that courts did in fact play a pivotal role: they helped facilitate the liquidity of the slave market,[114] thereby "creating and generating . . . norms of transactional life" in the domestic slave trade.[115] Moreover, as corroborated by the evidence from this Article's case study on the bankruptcy slave trade,[116] court-ordered slave sales generated profits for the legal institutions and actors orchestrating those sales,[117] thus requiring us to rethink the nature and extent of the judicial branch's complicity in propping up slavery.

C. The Bankruptcy Slave Trade

During the 1840s, two major institutions of antebellum America, the bankruptcy system and the domestic slave trade, found themselves on a collision course. Some slaveowners would predictably seek bankruptcy relief,[118] which would be granted to them only if they paid the price of discharge—that is, surrendering all of their prebankruptcy property.[119] And because state law defined their slaves as property,[120] those slaves would have to be surrendered and ultimately sold as part of the bankruptcy process, with the sale proceeds distributed among the various claimants in the slaveowners' bankruptcy cases.[121]

Whether aware of it or not, Congress—in passing the 1841 Act—and President Tyler—by signing the Act into law—had set the stage for the emergence of the bankruptcy slave trade. Over a period that would last more than a decade,[122] the federal government would be in the

111. Russell, *supra* note 31.

112. DEYLE, *supra* note 32, app. B at 293–95, 295 tbl.A.1.

113. Deyle raises concerns on this point. *See id.* app. B at 295–96.

114. *See* Russell, *supra* note 31, at 1276.

115. *Id.* at 1277.

116. *See infra* Section IV.B.

117. *See* Russell, *supra* note 31, at 1277.

118. *Cf.* BALLEISEN, *supra* note 62, at 247 n.32 ("[S]laveowners were more likely to deprive themselves and their families of 'comforts' in order to buy more land and slaves. Insolvency appears to have resulted more frequently from the latter pursuit than the former [i.e., overconsumption].").

119. *See supra* note 71 and accompanying text.

120. *See* STROUD, *supra* note 33, at 11 ("[T]he cardinal principle of slavery—that the slave is to be regarded as a thing,—is an article of property,—a chattel personal,—obtains as undoubted law in all of these states." (footnote omitted)).

121. *See supra* Section I.A.2.

122. *See infra* text accompanying note 279.

business of owning and selling bankrupted slaves. Surprisingly, this significant chapter in the history of bankruptcy and slavery has received virtually no mention in the literature. This Section begins by describing that gap and then discusses why the bankruptcy slave trade substantively differed from other types of slave sales conducted both by the federal government and state governments.

1. The Literature Gap

At the risk of oversimplification, the history of the bankruptcy slave trade is a story about a specific type of court-ordered sale—specifically, the sale of bankrupted slaves ordered by a federal district court. The story, of course, is a much more intricate one with far-reaching effects. But thinking about the kernel of that story tightly focuses how one ought to approach the two major bodies of extant literature relevant to this project, one of which is substantially more voluminous. The smaller body of work pertains to the history of U.S. bankruptcy law. The much larger body of work, by orders of magnitude, addresses slavery in antebellum America. Review of the latter can be made a bit more manageable by concentrating on work that has touched upon the domestic slave trade, both its interregional and intrastate aspects.

Virtually all of the relevant literature has no mention whatsoever about bankruptcy slave sales. For the few works that allude to a bankruptcy slave sale, such mentions are fleeting references with no in-depth commentary on the nature or significance of such a sale. As such, by systematically examining federal district court records from the 1841 Act to tell the story of bankruptcy slave sales, this study "reflects a history that has remained invisible to many historians."[123]

For the body of work on the history of U.S. bankruptcy law, I am aware of only two published studies that have examined bankruptcy case files related to the 1841 Act. One is a book-length study by Edward Balleisen, which relies on case files solely from the Southern District of New York.[124] The other is an article-length study about women who sought bankruptcy relief under the 1800 and 1841 Acts (the "Gross Study").[125] Each study will be discussed in turn.

Setting the stage for his study, Balleisen begins by emphasizing the significance of the 1841 Act, noting that "it coincided with and emanated from power transformations in the scope and character of

123. JOHNSON, *supra* note 38, at 171.

124. *See* BALLEISEN, *supra* note 62, at 4, 229.

125. Gross et al., *supra* note 50, at 5–6.

American capitalism."[126] He then points to the salience of his sample of 503 debtors who sought bankruptcy relief in the Southern District of New York, observing that "[t]he commercial endeavors that brought these individuals to bankruptcy court spanned nearly the full gamut of the antebellum economy."[127] Balleisen further observes that over 20% of his sample involved individuals whose financial failures occurred outside of the district "in every region of the country and in nearly every state."[128]

As previously discussed, the domestic slave trade was a significant component of the antebellum economy.[129] And yet Balleisen does not really address the intersection of the 1841 Act with that trade. To be sure, he does acknowledge that slavery loomed large on the national psyche during this time period. For example, he refers to "a nation so dominated by the realities of slavery";[130] he observes that "national politics [were] consumed by the question of slavery extension";[131] and he points the reader to scholarship on "the cultural linkages among bankruptcy, slavery, and emancipation."[132] Balleisen even briefly mentions the financial distress of slaveowners[133] that could ultimately lead to the sale of their slaves.[134] But his study does not address bankrupted slaves or the bankruptcy slave trade.[135]

The same can be said of the Gross Study, which makes two fleeting references to the intersection of bankruptcy and slavery, first

126. BALLEISEN, *supra* note 62, at 4.

127. *Id.* at 7.

128. *Id.* at 8. Balleisen identifies for the reader the geographic origin of the failures of these "migratory bankrupts," *id.*, in a map, which indicates that several failures occurred in the South, including New Orleans, *see id.* at 10–11.

129. *See supra* notes 104–106 and accompanying text.

130. BALLEISEN, *supra* note 62, at 49.

131. *Id.* at 124.

132. *Id.* at 274 n.6.

133. *See id.* at 246 n.32. He does not mention, however, the possibility of financial distress by slave traders, who may have ended up seeking bankruptcy relief. *See* DEYLE, *supra* note 32, at 121 ("As in any speculative endeavor, the business [i.e., the slave trade] was filled with risks, any one of which could wipe out a season's profits, lead to bankruptcy, or worse."); JOHNSON, *supra* note 38, at 52–53 ("The legal form of brokerage could allow [slave] traders who had been legally bankrupted to stay in business.").

134. *See* BALLEISEN, *supra* note 62, at 167 ("When southern slaveowners failed, their slaves went onto the auction block. . . . Indeed, legal actions for debt may have accounted for as many as one-half of all antebellum slave sales."); *see also id.* at 38 ("Debtors looked to sell whatever they owned in order to make payments to their creditors. Real estate, stocks, *slaves*, commercial paper, and furniture all poured onto the nation's markets, as hundreds of thousands of Americans struggled to avoid a liquidity crisis." (emphasis added)).

135. Balleisen briefly observes that, "[u]nder the 1841 act, federal marshals and assignees took possession of essentially every kind of movable property known to antebellum America," *id.* at 151, including, "in the South, slaves," *id.* at 152. Aside from this fleeting mention of bankrupted slaves, his work does not acknowledge them elsewhere.

noting that "some [bankrupt women] owed money for slaves,"[136] and subsequently noting that "[s]everal women debtors owned slaves."[137] Aside from providing brief examples of each of these scenarios,[138] the rest of the study discusses neither bankrupted slaves nor bankruptcy slave sales.

Broad histories of U.S. bankruptcy law do not mention bankrupted slaves,[139] nor does a study that examined bankruptcy case files related to the 1800 Act.[140] Even scholarship on the history of federal courts, which could potentially examine their role in the domestic slave trade as a result of the antebellum bankruptcy acts, fails to acknowledge the bankruptcy slave trade,[141] with one notable exception.

In his mammoth work on the history of the federal courts in the mid-Atlantic South during the antebellum period, Peter Fish devotes most of a chapter to examining the experience of those courts in administering the 1841 Act.[142] In discussing the topic of creditors' use of the Act to invalidate fraudulent transfers by bankrupts, the main example used by Fish involved the sale by a Virginian of his entire estate, including three slaves (i.e., a mother and her two children), to his son-in-law seven years before seeking bankruptcy relief.[143] The bankruptcy assignee in that case sought to undo the transfer and recover the slaves, ultimately obtaining a ruling from the federal district court that title to the slaves (including three additional slaves that had been born to the mother subsequent to the transfer) had vested in the assignee, but that their possession would not be transferred to the assignee unless the sale proceeds from the bankrupt's remaining assets were insufficient to satisfy his debts.[144] While the historical record remains unclear whether the assignee ultimately sold the

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136. Gross et al., *supra* note 50, at 18.

137. *Id.* at 19.

138. *See id.* at 18, 19.

139. *See, e.g.*, SKEEL, *supra* note 3; WARREN, *supra* note 7; Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995).

140. *See* BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE (2002).

141. For example, one comprehensive history of the federal courts makes no mention of bankrupted slaves or the bankruptcy slave trade when discussing the 1800 Act and the 1841 Act. *See* HOFFER ET AL., *supra* note 55, at 92–93, 113. Moreover, in its sections examining slavery in the federal courts during the time periods of 1801 to 1836 and 1836 to 1860, that history does not discuss the involvement of federal courts in the sale of bankrupted slaves. *See id.* at 101–05, 123–42.

142. PETER GRAHAM FISH, FEDERAL JUSTICE IN THE MID-ATLANTIC SOUTH: UNITED STATES COURTS FROM MARYLAND TO THE CAROLINAS, 1836–1861, at 435–46 (2015).

143. *See id.* at 442–44.

144. *See id.* at 444–45.

mother and her five children,[145] Fish clearly recognized the situation of bankrupted slaves and their potential to be sold as part of the bankruptcy process.[146] But aside from this one example, Fish's work does not engage in any analysis of the bankruptcy slave trade.

Pivoting to the literature on slavery in antebellum America, other historians have pointed out that the literature has generally remained silent on aspects of the domestic slave trade that feature prominently in the story about the bankruptcy slave trade. First, Steven Deyle has been critical of the dearth of historical scholarship on the local slave trade, which constituted the bulk of the domestic slave trade:

> Of the more than 2 million slaves who were sold in America between 1820 and 1860, more than two-thirds were sold to local buyers. This includes intrastate sales between planters, commercial sales through agents or brokers, and *court-ordered sales*. Local sales have not typically been treated, or even generally thought of, as being part of the domestic trade. In all of the published works on American slavery, few have paid more than passing notice to this crucial aspect of the trade, and not one, including those specializing in the interregional trade, have examined it in any depth. By focusing primarily on professionally transacted interregional sales, however, it is easy to forget the crucial role that the local slave trade played in southern society. Without this fundamental ability to transfer property from one owner to another, the southern slave system could never have functioned.[147]

We see that Deyle's critique places the local slave trade at the heart of slavery in antebellum America, with court-ordered sales a key feature of that trade.[148] Thomas Russell, in turn, has critiqued slavery historians for having failed to address or having paid insufficient attention to court-ordered slave sales,[149] given their prevalence among all types of slave auctions.[150] He has thus called for a "new image [of the slave trade that] gives legal institutions a visible and prominent role in constituting and ordering slave auctions."[151]

145. *See id.* at 445.

146. *See id.* at 443–44 ("The saga of 'Slave Susan' and her children marked the operation of a national Bankruptcy Act that provided no exceptions for personal property in slaves."); *id.* at 445 ("Meanwhile, Susan and her children remained in limbo, presumably awaiting final distribution . . . of the bankrupt's other assets . . . .").

147. DEYLE, *supra* note 32, at 157 (emphasis added).

148. *Id.* at 172 (stating that "court sales [were] a *major component* in the domestic slave trade" (emphasis added)).

149. Thomas D. Russell, *A New Image of the Slave Auction: An Empirical Look at the Role of Law in Slave Sales and a Conceptual Reevaluation of Slave Property*, 18 CARDOZO L. REV. 473, 481–88 (1996).

150. *See id.* at 481 ("[C]ourt sales comprised a majority of all of South Carolina's slave auctions. Whether other states followed a pattern similar to South Carolina's is presently impossible to say with certainty. There is, however, no reason to think that any state would have differed substantially.").

151. *Id.* at 477.

In all likelihood, the bankruptcy slave trade was a subset of the local slave trade.[152] Moreover, bankruptcy slave sales constituted a specific type of court-ordered slave sale.[153] Accordingly, given the inattention of slavery historiography to these two aspects of the domestic slave trade (i.e., local sales and court-ordered sales), we can expect that the bankruptcy slave trade will have received no more than a brief mention, if any at all, in that literature. And in fact, the works of Deyle and Russell corroborate this proposition. While both have addressed court-ordered slave sales under state law, neither has addressed the bankruptcy slave trade.[154] Somewhat similarly, while Judith Schafer's work on Louisiana slavery and Richard Kilbourne's study of credit transactions in Louisiana's East Feliciana Parish during the 1800s have discussed slave sales under state insolvency law,[155] that scholarship has not examined the bankruptcy slave trade.[156]

The bankruptcy slave trade is conspicuously absent from the relevant historical literature.[157] Having exposed this gap, I now discuss why the bankruptcy slave trade substantively differed from other types of slave sales conducted both by the federal government and state governments.

152. *See infra* Section III.B.

153. *See infra* notes 400–406 and accompanying text.

154. *See, e.g.*, DEYLE, *supra* note 32, at 166–72 (discussing various types of court-ordered slave sales under state law); Russell, *supra* note 31 (examining the sale of slaves at sheriffs' sales, probate court sales, and equity court sales under South Carolina law).

155. *See, e.g.*, KILBOURNE, *supra* note 34, at 64 ("Of the thirteen credit sales of slaves in 1841, no less than nine were sales by syndics for insolvent debtors. These were the so-called voluntary surrenders of property for the benefit of creditors . . . ."); SCHAFER, *supra* note 44, at 173 ("Slaves could be and often were converted into cash to satisfy debts of their owners, adding to the intrastate slave trade. . . . If hope of financial equilibrium was dim, the slaveowner might declare insolvency, necessitating the sale of all of his slaves."). In discussing the possibility that Louisiana slaveowners might "declare insolvency," *id.*, Schafer cites to provisions of Louisiana's Civil Code that did not pertain to the state's insolvency law providing relief to debtors, but rather to the Civil Code's provisions that created a cause of action allowing a creditor, under certain circumstances, to annul a contract of its debtor with a third party as a result of the debtor's insolvency, *see id.* n.36 (citing LA. CIV. CODE arts. 1980–89 (1825) (current version at LA. CIV. CODE ANN. arts. 2036–2043 (2017))). For further discussion on Louisiana's insolvency law during the antebellum period, see *infra* notes 169–177 and accompanying text.

156. In her work on New Orleans slavery viewed through the lens of newspaper advertisements, Schafer makes a single passing mention to bankruptcy slave sales. *See* Schafer, *supra* note 39, at 41 ("Sixty-eight percent of all slave sales reported in the New Orleans newspapers were the result of some legal action. . . . Other legally caused auctions were for liquidation of partnership, divorce, settlement of a lawsuit of any type, settlement of debt, or *bankruptcy*." (emphasis added)).

157. Empirical scholarship on slave auctions in Mauritius during the 1820s and 1830s touches upon the sale of slaves under that country's then-existing bankruptcy laws, but without any extended discussion or analysis of the bankruptcy slave trade. *See* Shirley Chenny et al., *Slave Prices from Succession and Bankruptcy Sales in Mauritius, 1825–1827*, 40 EXPLORATIONS ECON. HIST. 419 (2003); Georges Dionne et al., *Asymmetric Information and Adverse Selection in Mauritian Slave Auctions*, 76 REV. ECON. STUD. 1269 (2009).

2. Bankrupted Slaves as Federal Property

A bankruptcy slave sale mostly resembled other court-ordered slave sales under federal nonbankruptcy law and state law. All of these sales shared a similar goal: transferring title to a slave from the owner to a third-party purchaser for a price. Moreover, the judiciary and its officers, whether at the federal or state level, orchestrated all of these sales. But the bankruptcy slave sale differed from other court-ordered slave sales in one fundamental regard: the federal government owned all of the bankrupted slaves that it sold, whereas the other court-ordered slave sales generally did not involve government-owned slaves. The remainder of this Section analyzes this crucial difference by comparing the bankruptcy slave sale to its analogues under federal nonbankruptcy law and state law,[158] using Louisiana as a point of reference given this Article's case study of the bankruptcy slave trade in the Eastern District of Louisiana.[159]

As set forth in the Section discussing the functional operation of the 1841 Act, Congress structured a collective proceeding in which creditor claims against the bankrupt would be satisfied using the proceeds obtained from liquidation of the bankrupt's prebankruptcy property.[160] Accordingly, when thinking about analogues to bankruptcy asset sales, we should look to nonbankruptcy judicial processes for the satisfaction of creditor claims against a debtor that were contemporaries with the 1841 Act.

Outside of bankruptcy, a creditor owed money by a debtor who refused to pay could seek individual recourse through the courts, suing the debtor for the money owed and obtaining a judgment entitling the creditor to collect the debt from the debtor's property using the state's coercive power.[161] Depending on the facts and circumstances, that litigation could have taken place in state court or federal court. As such,

158. To be clear, the discussion in the main text addresses sales of slaves ordered by courts as a result of some judicial process (e.g., bankruptcy proceedings, probate proceedings, the enforcement of monetary judgments). It is beyond the scope of this Article to explore slave sales initiated by governments that had voluntarily purchased slaves and subsequently sought to sell them. While the historical record demonstrates that state and local governments did purchase and sell slaves, *see* DEYLE, *supra* note 32, at 166 ("[S]laves were also sold by southern states and municipalities. Sometimes these political entities bought slaves for public projects and then had to sell them again when they were no longer needed."), court-ordered slave sales under state law played a much more prominent role in the domestic slave trade, *see id.* ("The largest source of state-sponsored slave selling, however, came from sales ordered by southern courts of law.").

159. *See infra* Part II.

160. *See supra* Section I.A.2.

161. *See, e.g.*, Douglas G. Baird, *Blue Collar Constitutional Law*, 86 AM. BANKR. L.J. 3, 4 (2012) ("The creditor can use her powers of persuasion to collect the debt, but if these prove insufficient, she needs a judgment. A judgment allows her to call on the state to reach the debtor's assets.").

individual creditors would have sought to enforce money judgments both through the state system and the federal system.[162]

Under either system, one way to enforce the money judgment would have been through the writ of *fieri facias* ("*fi. fa.*"),[163] a court order (1) that instructed a government official—for example, a sheriff in the case of a state judgment and a U.S. Marshal in the case of a federal judgment[164]—"to cause the judgment to be satisfied out of the judgment debtor's goods and chattels" and (2) that "was executed by seizure and sale" of the property.[165] Such executed property could have included the debtor's slaves,[166] as evidenced in a *New-Orleans Commercial Bulletin* advertisement announcing that Algernon Sidney Robertson, the U.S. Marshal for the Eastern District of Louisiana, would sell at public auction forty slaves that had been seized pursuant to various *fi. fa.* writs.[167] Importantly, seizure of the property by the government official (referred to as "levy") did not make the government the property's owner, but rather merely the custodian of the property until its sale or other disposition.[168]

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162. Empirical work has documented that much of the work of antebellum state courts involved the enforcement of money judgments. *See* Russell, *supra* note 94, at 347; Russell, *supra* note 31, at 1245. Likewise, the enforcement of money judgments lay at the heart of the federal judicial power. *See* Baird, *supra* note 161, at 7–8 ("Diversity jurisdiction was included within the scope of the judicial power in large part to enable foreign creditors to collect what they were owed.").

163. The writ of *fieri facias* was also referred to as a *fi. fa. See, e.g.*, Griffin v. Thompson, 43 U.S. (2 How.) 244, 245 (1844).

164. *See, e.g.*, Hagan v. Lucas, 35 U.S. (10 Pet.) 400, 400 (1836) (describing sheriff's enforcement of judgment issued by Alabama state court and U.S. Marshal's enforcement of judgment issued by federal district court in Alabama).

165. Stefan A. Riesenfeld, *Collection of Money Judgments in American Law—A Historical Inventory and a Prospectus*, 42 IOWA L. REV. 155, 157 (1957).

166. *See, e.g.*, *Hagan*, 35 U.S. (10 Pet.) at 400.

167. NEW-ORLEANS COM. BULL., June 18, 1842, at 2; *see also* NEW-ORLEANS COM. BULL., July 6, 1842, at 4 (announcing public auction of eleven slaves seized by Algernon Sidney Robertson, the U.S. Marshal, to satisfy a money judgment rendered in the U.S. District Court for the Eastern District of Louisiana). The city marshal of New Orleans, C. Claiborne, who among other duties sold the property of judgment debtors pursuant to *fi. fa.* writs issued under nonfederal law, *see, e.g.*, NEW-ORLEANS COM. BULL., Dec. 1, 1844, at 1 (announcing public sale of land "[b]y virtue of a writ of fi fa to me directed by the Hon G Preval, associate judge of the City Court of New Orleans"), would also sell slaves pursuant to such writs, *see, e.g.*, NEW-ORLEANS COM. BULL., Aug. 17, 1842, at 4 ("By virtue of a writ of fi fa to me directed by the Hon Thos J Cooley, Senior Presiding Judge of the City Court of New Orleans, I shall expose at public sale . . . [t]he slave GILBERT . . . [s]eized to satisfy the judgment rendered in the above case."). Similarly, J.L. Thielen, sheriff of the District Court of the First Judicial District of the State of Louisiana, sought to sell at public auction forty slaves that he had seized pursuant to "an order of seizure and sale" in a suit involving the State of Louisiana against the New Orleans and Nashville Railroad Company. NEW-ORLEANS COM. BULL., Aug. 13, 1842, at 4.

168. *See, e.g.*, *Hagan*, 35 U.S. (10 Pet.) at 403 ("The marshal or the sheriff, as the case may be, by a levy, acquires a special property in the goods, and may maintain an action for them. . . . [P]roperty once levied on, remains in the custody of the law . . . ."); Moore v. Withenburg, 13 La. Ann. 22, 23 (1858):

The other major nonbankruptcy judicial process for the satisfaction of creditor claims would have been state insolvency laws. Louisiana's insolvency law, referred to as a "cession of property"[169] or "surrender of property,"[170] could be voluntary or involuntary[171] and was defined as "the relinquishment that a debtor ma[de] of all his property to his creditors, when he f[ound] himself unable to pay his debts."[172] Importantly, surrendering the property did not transfer its title to the creditors.[173] Rather, "the debtor preserve[d] his ownership of the property surrendered"[174] and maintained the right to redeem it at any point prior to its sale.[175] In 1842, the Louisiana Supreme Court, "[o]n an attentive examination of the whole statute," reaffirmed these principles, declaring that "the creditors acquire[d] no real right of ownership or dominion over" the surrendered property and further emphasizing that "the real ownership . . . remain[ed] in the debtor, who [could] take back all his property on depositing in court a sum sufficient to cover all his debts."[176] Accordingly, under Louisiana insolvency law,

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> The evidence shows that there never was any actual seizure of the steamboat Union by the Sheriff under defendants' attachment. When that writ issued, the Union was already in the hands of the United States Marshal. She was beyond the reach of the State process, so long as the Marshal's possession lasted. And the Marshal's possession lasted . . . until the Union was sold by him . . . .

(citations omitted); *see also Special Property*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining special property as "[p]roperty that the holder has only a qualified, temporary, or limited interest in, such as (from a bailee's standpoint) bailed property").

169. LA. CIV. CODE book III, tit. IV, ch. 5, sec. I, § 5 (1825) (amended 1870 and repealed 1978).

170. *Id.* art. 2166.

171. *Id.* art. 2167.

172. *Id.* art. 2166.

173. *See id.* art. 2171 ("The surrender does not give the property to the creditors; it only gives them the right of selling it for their benefit, and receiving the income of it, till sold.").

174. *Id.* art. 2174.

175. *Id.* (stating that the debtor "may divest the creditors of their possession of the [surrendered property], at any time before they have sold it, by paying the amount of his debts, with the expenses attending the cession").

176. Rivas v. Hunstock, 2 Rob. 187, 194 (La. 1842). I recognize that, under other state-law insolvency systems, the representative for the creditors (e.g., an assignee) may have been deemed to be the owner of the debtor's property. *See, e.g.*, MASS. REV. STAT. ch. 163, § 5 (1838) (Boston, Dutton & Wentworth 1849):

> The said judge shall . . . assign and convey to the person or persons chosen or appointed assignees . . . all the estate, real and personal of the debtor . . .; which assignment shall vest in the assignees all the property of the debtor, both real and personal, . . . and such assignment shall be effectual to pass all the said estate . . . .

(repealed). Nonetheless, the point remains that Congress chose to implement a statutory design that would make the federal government the owner of slaves, instead of following an alternative path, such as the Louisiana example.

debtors remained the owners of their property, including their slaves, until sold at public auction by the syndic in charge of that process.[177]

Returning to federal bankruptcy law, recall that debtors had to surrender all of their property as a condition to being declared a bankrupt and thus gaining the opportunity to petition for relief in the form of discharge.[178] Upon a federal district court declaring a debtor to be a bankrupt through the issuance of a bankruptcy decree, the assignee, as representative of the federally created bankruptcy estate, acquired all of the bankrupt's property rights.[179] In the language of the 1841 Act,

> [A]ll the property, and rights of property, of every name and nature, and whether real, personal, or mixed, of every bankrupt . . . who shall, by a decree . . . be declared to be a bankrupt . . . shall, by mere operation of law, ipso facto, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment, or other

177. LA. CIV. CODE. art. 2180 (stating that "the sale [of surrendered property] is made by the syndics, or some person appointed by them, at public auction"). The historical record clearly indicates that syndic sales included slaves. *See, e.g.*, NEW-ORLEANS COM. BULL., May 1, 1843, at 2 (advertising syndic sale of property surrendered by Nathan Nichols, including five slaves); NEW-ORLEANS COM. BULL., Aug. 13, 1842, at 2 (advertising syndic sale of property surrendered by Pierre Crocker, including one slave).

An issue worth considering here is the effect that the 1841 Act had in preempting state insolvency laws, including Louisiana's system for the cession of property by debtors. The Louisiana Supreme Court took the view that, when the 1841 Act became operative, it suspended the state's insolvency law with respect to the commencement of new proceedings under that law, but that the 1841 Act did not affect state insolvency proceedings that had been commenced prior to the 1841 Act taking effect. *See* Beach v. Miller's Testamentary Ex'rs, 15 La. Ann. 601, 602 (1860) (citing Sturges v. Crowinshield, 17 U.S. (4 Wheat.) 122 (1819)). Justice Story took a similar view in one of his rulings as a circuit justice. *See Ex Parte* Eames, 8 F. Cas. 236, 237 (C.C.D. Mass. 1842) (No. 4,237) (citing *Sturges*). It appears that many debtors in the Eastern District of Louisiana had availed themselves of the state's insolvency law prior to seeking bankruptcy relief. *See* H.R. DOC. NO. 29-99, at 7 (1847) (setting forth statement by the clerk of the U.S. District Court for the Eastern District of Louisiana that

> in many instances, . . . the applicants had taken the benefit of the insolvent laws of the State; [that] they filed similar schedules upon their application for the benefit of the bankrupt law; [and that] hence more than half the amount of assets included [in the table of statistics] . . . may be considered a mere nominal surrender, the property having been disposed of and divided among the creditors, under the State laws).

The possibility thus arises that some Eastern District slaveowners who filed for bankruptcy relief may have had their slaves sold by a syndic under Louisiana's insolvency law rather than by a bankruptcy assignee under the 1841 Act. *Compare, e.g.*, 1 U.S. DIST. COURT FOR THE E. DIST. OF LA., BANKRUPTCY ACT OF 1841 DOCKETS, 1842–1843, at 233 (located in Record Group (RG) 21, The National Archives at Fort Worth, Texas) [hereinafter EDLA DOCKETS] (setting forth the docket for the bankruptcy case filed by Morton P. Levy on May 25, 1842), *with* NEW-ORLEANS COM. BULL., July 21, 1842, at 3 (announcing that, with "the consent of the Syndic of the creditors of Morton P Levy," P.E. Tricou would sell "slaves surrendered by said bankrupt to his creditors"—Betsy, Elizabeth, and Mary—at the St. Louis Exchange on August 13, 1842).

178. *See supra* note 71 and accompanying text.

179. *Cf., e.g.*, BALLEISEN, *supra* note 62, at 272 n.56 (stating that, "for a foreclosure of property surrendered by a bankrupt to stand, the mortgagee had to name the assignee, and not the bankrupt as the owner").

> conveyance whatsoever; and the same shall be vested, by force of the same decree, in such assignee as . . . shall be appointed.[180]

The 1841 Act further provided that the assignee would "be vested with all the rights, titles, powers, and authorities, to sell, manage, and dispose of the [bankrupt's property]."[181] Accordingly, if the federal court declared a slaveowner to be a bankrupt, then the assignee, as representative of the bankruptcy estate, became the owner of the slaves, with the duty to sell them.[182] Notwithstanding the assignee's discretion to designate "the necessary household and kitchen furniture, and such other articles and necessaries of [the] bankrupt" as exempt from sale,[183] it seems highly unlikely that an assignee would have designated any slaves owned by the bankrupt as exempt from sale, for two reasons. First, the assignee would likely have construed the specific statutory language "necessary household and kitchen furniture" to limit the scope of the general statutory language, "and such other articles and necessaries," to exclude slaves.[184] Second, because the assignee's compensation for his services was based on a percentage of the proceeds disbursed to creditors in the case,[185] and because slaves likely constituted a significant portion of a bankrupt slaveowner's assets,[186]

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180. Act of Aug. 19, 1841, ch. 9, § 3, 5 Stat. 440, 442–43 (repealed 1843).

181. *Id.* at 443.

182. § 10, 5 Stat. at 447 ("[I]n order to ensure a speedy settlement and close of the proceedings in each case in bankruptcy, it shall be the duty of the court to order and direct a collection of the assets, and a reduction of the same to money, and a distribution thereof at as early periods as practicable, consistently with a due regard to the interests of creditors[.]").

183. § 3, 5 Stat. at 443; *see also supra* notes 82–84 and accompanying text (discussing exempt property under the 1841 Act).

184. *Cf.* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992) ("But it is a commonplace of statutory construction that the specific governs the general . . . ."). This would have especially been the case in Louisiana where state law defined slaves as real property rather than personal property. *See infra* note 212. For further discussion of state laws that defined slaves as realty, see MORRIS, *supra* note 44, at 66–77.

To illustrate an assignee's decisionmaking regarding exempt property, consider the case of John Baptiste Lamothe, who filed for bankruptcy relief in September 1843 in the Eastern District of Louisiana. Petition of John Baptiste Lamothe to Be Declared Bankrupt, *In re* Lamothe, No. 385 (E.D. La. Sept. 5, 1842). His schedule of assets listed two slaves, Mary—who was thirty-six years old and valued at $600—and Charlotte—who was sixty years old and valued at $300. Schedule of J.B. Lamothe, *In re* Lamothe, No. 385 (E.D. La. Sept. 5, 1842). The assignee determined that Lamothe, his wife, and five children should be entitled to keep $271 worth of exempt property, including "24 Old & assorted chairs," "4 Assorted Tables (old)," "2 Old Bedsteads with matrasses [sic]," "1 Old Toilet," and "2 Old Armoirs." List of Furniture Given to the Bankrupt, *In re* Lamothe, No. 385 (E.D. La. Oct. 24, 1842). None of the exempt property, however, included Mary or Charlotte. *Id.* Instead, the U.S. Marshal sold them in December 1842, Mary for $300 and Charlotte for $145. Account Sales, *In re* Lamothe, No. 385 (E.D. La. Dec. 3, 1842).

185. *See, e.g.*, BANKR. D.D.C. R. 42 (1842) (repealed), *reprinted in* D.C. BANKRUPTCY RULES, *supra* note 96, at 10.

186. *See infra* note 495 and accompanying text.

the assignee would have had a powerful economic incentive to sell a slave rather than exempt him or her from sale.[187]

Nothing in the plain language of the 1841 Act adverted to the inevitable collision between bankruptcy law and the slave trade. But Southern legal stationers who published preprinted forms for use in bankruptcy cases certainly saw the connection,[188] as evidenced by the fact that they expressly included references to slaves in their sample forms for the bankrupt's schedule of assets.[189] Federal district courts in the South also recognized that the 1841 Act would draw them into the slave trade: one court went so far as to promulgate a rule for the sale of bankrupted slaves that was distinct from rules for the sale of other bankruptcy assets, requiring a longer notice period for the sale of bankrupted slaves.[190]

With the 1841 Act, Congress ultimately designed a system for creditor repayment in which the federal government would not only be actively involved in the slave-selling business, but also the slave-owning business. To be sure, it is not as if the phenomenon of court-ordered sales of slaves owned by the government was unique to the federal bankruptcy process. For example, state probate courts sold many slaves.[191] Some of those sales may have involved estates that had

187. *Cf.* BALLEISEN, *supra* note 62, at 139 (discussing how "the bankruptcy system provided hundreds of court officials . . . with substantial income," including assignees).

188. *See* Pardo, *supra* note 11, at 105 n.169 (discussing legal stationers).

189. *See, e.g.*, BANKR. D. KY. INVENTORY ("Slave P. about — years old, and W. about — years old: Title by bill of sale from S. D. (on Catalogue, No. 10) in adversary possession of —: suit against him in — court: see brief: but both fugitives in State of —. See letters of —, in packet No. —, on Catalogue—worth each, I suppose, about $500[.]"), *reprinted in* RULES, REGULATIONS, AND FORMS OF PROCEEDINGS, IN MATTERS OF BANKRUPTCY, IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE KENTUCKY DISTRICT 26–27 (Frankfort, Wm. M. Todd 1842) [hereinafter KY. BANKRUPTCY RULES]; BANKR. D.N.C. FORM NO. 3 (SCHED. B) ("The property of the Petitioner consists of the following particulars, viz: . . . slaves, [describe;] . . . ." (brackets in original)), *reprinted in* N.C. BANKRUPTCY RULES, *supra* note 62, at 12.

190. The U.S. District Court for the Middle District of Alabama promulgated a series of rules on May 30, 1842. *See* U.S. DIST. COURT FOR THE MIDDLE DIST. OF ALA., BANKRUPTCY ACT OF 1841 RECORD BOOKS, 1842–1844, at 51–53 (located in Record Group (RG) 21, The National Archives at Atlanta, Georgia). One of those rules provided "that all personal property, *except negroes*, may be sold by the assignee, upon giving *three day's* [sic] *notice* thereof by advertisement in the Independent Monitor, a paper published in the city of Tuskaloosa [sic]." *Id.* at 51 (emphasis added). For the sale of bankrupted slaves, the court promulgated a rule providing that "*all sales of slaves* shall be made upon a *notice of at least ten days*, by two advertisements in the Independent Monitor, a paper published in the city of Tuskaloosa [sic]." *Id.* (emphasis added). These rules appeared on the front page of the Independent Monitor on June 8, 1842. *District Court of the United States for the Middle District of Alabama*, INDEP. MONITOR (Tuscaloosa), June 8, 1842, at 1. For more information on the record books from the Middle District of Alabama, see *Bankruptcy Act of 1841 Record Books, 1841–1844*, NAT'L ARCHIVES CATALOG, https://catalog.archives.gov/id/4576712 (last visited Mar. 1, 2018) [https://perma.cc/N9G6-J52N].

191. *See* Russell, *supra* note 31, at 1247 tbl.1.

escheated to the state,[192] thus making the state the owner of the decedent's property, including any slaves. But the key difference is that such a scenario involved the *state* government as a slaveowner. I am unaware of a legal process—other than the federal bankruptcy slave sales described in this Article—that consistently and widely made the *federal* government a slaveowner with a mandate to actively engage in the domestic slave trade.[193]

And that is the tragic legacy of the 1841 Act staining our history. When we think of the spectrum of individual and institutional complicity in legitimating and bolstering slavery in antebellum America,[194] the bankruptcy slave trade stands out as a muscular exercise of federal power[195] that facilitated financial relief for slaveowners at the expense of the hundreds, if not thousands, of black men, women, and children who were the victims of that trade.[196] Put another way, the bankruptcy slave trade is yet another poignant example of how "the history of law and the issues of race are necessarily and intimately linked."[197]

II. A CASE STUDY OF THE BANKRUPTCY SLAVE TRADE: THE EASTERN DISTRICT OF LOUISIANA

Having established the importance of historically examining the bankruptcy slave trade, this Article now turns to its case study on the topic, which focuses on the sale of bankrupted slaves in the Eastern District of Louisiana under the 1841 Act. Before presenting the study,

192. *See generally, e.g.*, JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 89 (10th ed. 2017) ("If an intestate decedent leaves no survivors entitled to take under the intestacy statute, her probate property *escheats* to the state . . . .").

193. The possibility exists that an owner of slaves in the antebellum territories could have died without heirs. In that scenario, the decedent's estate presumably would have escheated to the federal government, but only if the territorial legislature had failed to make an alternate arrangement. *Cf.* Christianson v. Cty. of King, 239 U.S. 356, 365 (1915) ("The distribution of and the right of succession to the estates of deceased persons are matters exclusively of state cognizance, and are such as were within the competence of the territorial legislature to deal with as it saw fit, in the absence of an inhibition by Congress.").

194. *See* JOHNSON, *supra* note 38, at 216 (stating that "the slave trade . . . played a crucial role in the reproduction of the slaveholding regime over time").

195. *Cf.* Tabb, *supra* note 3, at 350 ("[T]he radical nature of the 1841 law precipitated a firestorm of controversy involving the leading political figures of the day. Many alleged that such a law was not only bad policy but also unconstitutional.").

196. *Cf.* Russell, *supra* note 31, at 1278 ("Slave sales by operation of law expressed social disregard for black families and slave humanity. Slaves thus sold experienced contradictions of American liberalism: racism and economics at odds with both their individuality and their place in families and communities.").

197. *Id.* at 1242.

an explanation is warranted of why the first up-close look at the bankruptcy slave trade should target this federal judicial district.

During the entire period of the 1841 Act's operative effect (i.e., from February 1, 1842, to March 3, 1843),[198] the nation consisted of twenty-six states and the District of Columbia, among which there were thirty-eight federal judicial districts.[199] Of these districts, what makes the Eastern District of Louisiana stand out as a prime candidate for a case study on the bankruptcy slave trade?[200]

As an initial matter, one can immediately rule out fifteen of the thirty-eight federal judicial districts given their location within states that had prohibited slavery.[201] Of the remaining twenty-three federal judicial districts, the Eastern District immediately leaps out because it was (and remains) the home to New Orleans, which not only had the third-largest population of any U.S. city in 1840,[202] but which is also considered to have been antebellum America's largest slave market.[203]

198. *See supra* notes 10, 15 and accompanying text.

199. *See* Pardo, *supra* note 11, at 75.

200. During this time period, the nation also consisted of three federal territories—Florida, Iowa, and Wisconsin—in which the territorial courts administered the 1841 Act. *See id.* n.13. A couple of reasons exist to exclude these territories as prime candidates for an initial case study of the bankruptcy slave trade. First, two of the three territories (Iowa and Wisconsin) prohibited slavery. Second, although the Territory of Florida permitted slavery, thus potentially making it a viable candidate for the study of the bankruptcy slave trade, very few of its citizens sought relief under the 1841 Act. *See* H.R. DOC. NO. 29-223, at 30–31 (1846) (reporting forty-six as the total "[n]umber of applicants for relief under the act" in three of the five judicial districts of the Territory of Florida).

201. Those states were Connecticut, Illinois, Indiana, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, and Vermont. *See* 1 SLAVERY IN THE UNITED STATES: A SOCIAL, POLITICAL, AND HISTORICAL ENCYCLOPEDIA, at xxx (Junius P. Rodriguez ed., 2007) (setting forth map of free states). It should be noted that these states took different approaches to prohibiting slavery, with some abolishing it outright and others gradually abolishing it. *See, e.g.*, *Revolutionary Ideology, Citizenship, and Slavery*, *in* 1 SLAVERY IN THE UNITED STATES, *supra*, at 92, 98–99; Junius P. Rodriguez, *Gradualism*, *in* 1 SLAVERY IN THE UNITED STATES, *supra*, at 318. Accordingly, during the period of the 1841 Act's operative effect, some of these states undoubtedly had slaves among their citizens, as evidenced by data from the 1840 census indicating a total of 1,102 slaves in the thirteen free states at that time. *See* DEP'T OF STATE, COMPENDIUM OF THE ENUMERATION OF THE INHABITANTS AND STATISTICS OF THE UNITED STATES (Washington, D.C., Thomas Allen 1841). These data have been compiled in a dataset made available through the Inter-University Consortium for Political and Social Research. *See* Michael R. Haines, *Historical, Demographic, Economic, and Social Data: The United States, 1790–2002*, INTER-U. CONSORTIUM FOR POL. & SOC. RES. (ICPSR No. 2896, 3d ver. 2010), https://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/2896/version/3 [https://perma.cc/P6DH-QKSD].

202. *See* U.S. BUREAU OF THE CENSUS, POPULATION OF THE 100 LARGEST URBAN PLACES: 1840 (June 15, 1998), https://www.census.gov/population/www/documentation/twps0027/tab07.txt [https://perma.cc/NB4K-49HJ].

203. *See, e.g.*, DEYLE, *supra* note 32, at 153; JOHNSON, *supra* note 38, at 1–2; MCINNIS, *supra* note 29, at 164; WADE, *supra* note 26, at 198–99.

Much historiography has examined the New Orleans slave trade,[204] thus providing a crucial backdrop for comparative analysis with the bankruptcy slave trade in the Eastern District. Finally, the 1841 Act records from the Eastern District are quite extensive and highly detailed,[205] thus facilitating a comprehensive and fine-grained account of the bankruptcy slave trade in a particular federal judicial district.[206]

In using the Eastern District case study to create a portrait of the bankruptcy slave trade, I do not claim, in any way whatsoever, that the portrait is representative of the bankruptcy slave trade in other federal judicial districts under the 1841 Act. To be sure, qualitative and quantitative differences existed between the Eastern District and other districts during this time period. I mention some of these so that the reader can gain a better sense of ways in which the Eastern District experience may have been unique from that in other districts.

On the qualitative front, surely there were many differences. Here are just a few. For starters, the highly urban nature of the Eastern District would likely have translated into a very different experience for its bankrupted slaves than for those from rural judicial districts.[207] Moreover, there would have been differences across urban judicial districts. For example, despite the fact that New Orleans and Richmond were "the two largest slave-trading markets in the United States in the 1840s and 1850s,"[208] Maurie McInnis has meticulously analyzed how "the cultural dimensions and the physical experience of the trade in the two cities were quite distinct."[209] Accordingly, we might expect the experiences of bankrupted slaves in the Eastern District of Louisiana—home of New Orleans—to have been different than that of bankrupted slaves from the Eastern District of Virginia—home of Richmond.

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204. *See, e.g.*, FREDERIC BANCROFT, SLAVE TRADING IN THE OLD SOUTH 312–38 (1931); JOHNSON, *supra* note 38; MCINNIS, *supra* note 29; Jonathan B. Pritchett & Richard M. Chamberlain, *Selection in the Market for Slaves: New Orleans, 1830–1860*, 108 Q.J. ECON. 461 (1993); Schafer, *supra* note 39.

205. *See infra* Section II.A.

206. Unfortunately, 1841 Act case files no longer exist for certain federal judicial districts, either having been lost or destroyed. For example, when looking to the Deep South, the U.S. National Archives and Records Administration, which maintains the records from the 1841 Act, does not have in its holdings any case files from the District of South Carolina, the Northern District of Mississippi, and the Southern District of Mississippi. *See* E-mail from Jennifer Audsley-Moore, Archivist, Nat'l Archives at Kan. City, to author (Apr. 18, 2017, 11:13 AM EDT) (on file with author); *cf. also* SCHAFER, *supra* note 44, at xv, 305 (stating that, in her study of Louisiana slavery "based on the manuscript records of the Supreme Court of Louisiana," some cases "disappeared in the chaos during and following the Civil War").

207. *See infra* notes 319–326.

208. Maurie D. McInnis, *Mapping the Slave Trade in Richmond and New Orleans*, BUILDINGS & LANDSCAPES, Fall 2013, at 102, 102.

209. *Id.* at 103.

In terms of substantive differences in the law, statutory gaps in the 1841 Act would have created ample opportunity for the federal district courts to engage in residual bankruptcy policymaking,[210] thereby giving rise to nonuniformity in the law's implementation across districts.[211] Additionally, given that Louisiana entered the Union as a civil law jurisdiction, followed by a period of adaptation to common law concepts throughout the antebellum period, it very well might be that substantive differences in Louisiana law yielded a bankruptcy slave trade in the Eastern District unlike any other.[212]

On the quantitative front, the Eastern District of Louisiana was also statistically significantly different than other federal judicial districts located in slave states and the District of Columbia. Here, two examples will suffice: (1) the ratio of slaves to the district's total

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210. *See* Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 387, 445 (2012) (stating that "courts function as lawmakers in the bankruptcy arena because of their delegated policymaking powers" and observing "that, from the earliest days of the Republic and with every iteration of the bankruptcy laws, Congress has tasked the federal courts with administration of the bankruptcy system").

211. *See* BALLEISEN, *supra* note 62, at 111:

> The tendency to protect debtors also found wide acceptance in the interpretation of what constituted an illegal preference or conveyance "in contemplation of bankruptcy." Federal judges in Maine, Rhode Island, the southern and northern districts of New York, the eastern district of Pennsylvania, Ohio, and Maryland . . . all gave relatively narrow scope to these crucial terms.;

CHANDLER, *supra* note 75, at 11 n.1:

> It is obviously the meaning of the Act, that the petitioner should set forth his actual pecuniary condition with great particularity; but the degree of strictness required in this particular, varies in different parts of the country, and depends somewhat upon the rules which have been adopted by the several district and circuit courts.

The cover to Chandler's treatise identifies him as having been "one of the commissioners of bankruptcy in Massachusetts" under the 1841 Act. *Id.* For a discussion on how "officers of the bankruptcy court," among other insiders of the system, "had especially good access to bankruptcy news, and so enjoyed entrepreneurial opportunities not readily available to other Americans," see BALLEISEN, *supra* note 62, at 145.

212. *Cf.* SCHAFER, *supra* note 44, at xiv:

> A continuous influx of American influence, intensified by the immigration to Louisiana of scores of attorneys trained in the common law, . . . caused Louisiana slave law to be steadily "Americanized" to the extent that by the eve of the Civil War, slave law in Louisiana closely resembled the law of slavery in the other states that would soon leave the federal union. Americanization, however, was not a straight-line process. In several unique and fundamental areas of Louisiana law, change came slowly, if at all.

By way of example, Louisiana law defined slaves as real property rather than personal property. *See, e.g.*, LA. CIV. CODE art. 450 (1825) ("Private estates and fortunes are those things which belong to individuals.") (amended 1870 and 1978); *id.* art. 453 ("Immoveable things are in general, such as cannot either move themselves or be removed from one place to another.") (amended 1870 and repealed 1978); *id.* art. 461 ("Slaves, though moveables by their nature, are considered as immoveables, by the operation of law."), *invalidated by* U.S. CONST. amend. XIII, § 1. It is beyond the scope of this Article to examine how differences in state law may have affected the bankruptcy slave trade.

population (the "slave ratio"), and (2) the ratio of filed bankruptcy cases to the district's total nonslave adult population (the "bankruptcy ratio").

First, consider the slave ratio, which I have calculated for each federal judicial district using data from the 1840 census.[213] While these data predate the beginning of the 1841 Act's operative period by a couple of years,[214] they nonetheless provide a useful benchmark for thinking about the composition of the South's federal judicial districts on the eve of the bankruptcy slave trade. Recall that the thirteen slave states and the District of Columbia consisted of a total of twenty-three federal judicial districts (the "slave districts").[215] For this group of jurisdictions, the median and mean slave ratios (rounded to the nearest thousandth) were, respectively, 0.325 and 0.302; and the minimum and maximum ratios were, respectively, 0.033 for the District of Delaware and 0.581 for the Southern District of Mississippi.[216] The slave ratio for the Eastern District of Louisiana was 0.462, which was statistically significantly different than the mean slave ratio of 0.319 for the other twenty-two slave districts.[217]

Second, consider the bankruptcy ratio.[218] I calculated the total nonslave adult population for each district—that is, the population overwhelmingly likely to have filed for bankruptcy relief—using data from the 1840 census.[219] Because that census predominantly used nonuniform age categories across races when reporting population statistics, the only way to maintain uniformity was to calculate the total nonslave adult population for each district as the sum of the total number of whites and free blacks who were ten years old or older.[220] Of

213. DEP'T OF STATE, *supra* note 201. According to data from the 1840 census, there were a total of 2,460,509 slaves in the thirteen slave states and the District of Columbia at that time. *See id.*

214. *See supra* text accompanying note 198.

215. *See supra* notes 201–202.

216. Various tests of normality confirm that the slave ratio is a normally distributed interval variable for this set of twenty-three observations.

217. A one-sample t-test reveals that the mean slave ratio of the other twenty-two slave districts was statistically significantly different ($n = 22$, $t = -4.0237$, $p = 0.0006$) than a slave ratio with a value of 0.462 (i.e., the slave ratio for the Eastern District of Louisiana).

218. I derived the data on the total number of bankruptcy filings in each slave district pursuant to the methods set forth in Pardo, *supra* note 11, at 74–84.

219. While the 1841 Act did not establish age criteria as an eligibility rule for seeking relief, *see supra* Section I.A.1, it seems reasonable to conclude that children and teenagers would have been very unlikely to file for bankruptcy relief.

220. For free whites, the age categories at the younger end are (1) under five years, (2) five years and under ten years, (3) ten years and under fifteen years, and (4) fifteen years and under twenty years. *See, e.g.*, DEP'T OF STATE, *supra* note 201, at 60–61 (reporting population statistics by age category for free white males and females in the Eastern and Western Districts of Louisiana). For free blacks, the age categories at the younger end are (1) under ten and (2) ten and under twenty-four years. *See, e.g.*, *id.* at 61 (reporting population statistics by age category for free black males and females in the Eastern and Western Districts of Louisiana).

course, this approach has the effect of overreporting the number of nonslave adults (i.e., artificially increasing the denominator in the bankruptcy ratio), thus potentially making the bankruptcy ratio smaller than it should be.[221]

With that caveat in mind, sufficient data exist to calculate the bankruptcy ratio for twenty of the twenty-three slave districts.[222] For this group of jurisdictions, the median and mean bankruptcy ratios (rounded to the nearest thousandth) were both 0.006; and the minimum and maximum ratios were, respectively, 0.001 for the District of Georgia and 0.014 for the Southern District of Mississippi.[223] The bankruptcy ratio for the Eastern District of Louisiana was 0.008, which was statistically significantly different than the mean bankruptcy ratio of 0.006 for the other nineteen slave districts.[224]

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221. I say "potentially" because there is, of course, a temporal mismatch in calculating the bankruptcy ratio—that is, using bankruptcy filing data from most of 1842 and the start of 1843 and using population data from 1840. It seems safe to conclude that the nonslave adult population in most, if not all, jurisdictions increased from 1840 to 1842. Any such growth would offset the number of free children aged ten and older from 1840 currently included in the denominator of the bankruptcy ratio, thus bringing the ratio more in line with the nonslave adult population from 1842.

222. For a discussion regarding the missing values, see Pardo, *supra* note 11, at 74–84.

223. Various tests of normality confirm that the bankruptcy ratio is a normally distributed interval variable for this set of twenty observations.

224. A one-sample *t*-test reveals that the mean bankruptcy ratio of the other nineteen slave districts was statistically significantly different ($n = 19$, $t = -2.6597$, $p = 0.0160$) than a bankruptcy ratio with a value of 0.008 (i.e., the bankruptcy ratio for the Eastern District of Louisiana). The various bankruptcy ratios reported in the main text are larger than the national bankruptcy ratio for the 1841 Act reported by the Gross Study. *See* Gross et al., *supra* note 50, at 25 n.126. The difference can be attributed to a variety of factors. First, the Gross Study uses 33,700 as the number of bankruptcy filings, *id.*, a number that is off approximately by at least 11,000 filings, *see* Pardo, *supra* note 11, at 86 tbl.1. Second, the Gross Study uses 17,733,000 as its population estimate, without explaining the source of that figure. *See* Gross et al., *supra* note 50, at 25 n.126. According to the data from the 1840 census, the total population (i.e., free and slave) in the United States and its territories at that time was 17,063,353. DEP'T OF STATE, *supra* note 201. Based on the Gross Study's higher figure, it appears that the authors may have estimated a post-1840 total population figure, although they provide no explanation for their figure. Considering these two factors, the Gross Study implemented too low of a numerator (i.e., undercounted bankruptcy filings) and too high of a denominator (i.e., including population subgroups who could not file for bankruptcy relief, such as slaves), thus producing a smaller national bankruptcy ratio than the ratio that would have resulted using the higher number of bankruptcy filings and a lower population figure. Finally, in reporting the national bankruptcy ratio, the Gross Study states that it has presented the "filings as a *percentage* of population" and then lists those figures in a column that has a percent symbol at its head. Gross et al., *supra* note 50, at 25 n.126 (emphasis added). The study reports the national filing percentage as 0.0019, *id.*, which would mean that the national bankruptcy ratio in its decimal form, before conversion to percent form by multiplying the decimal form by 100, would be 0.000019, an infinitesimally small figure. It is clear from the figures used by the Gross Study, however, that the authors reported the bankruptcy ratio in decimal form, *without* converting the ratio to percent form: dividing 33,700 by 17,733,000 yields approximately 0.0019, which is the figure that the Gross Study reports as the national filing percentage. Had they multiplied this figure by 100, the percentage reported would have been 0.19. The Gross Study commits the same error in reporting the national filing percentages for the 1800 and 1867 Acts,

Despite the qualitative and quantitative differences discussed here, and having emphasized that I do not purport to provide either a definitive or exhaustive account of the bankruptcy slave trade, let me emphasize the importance of this case study. It presents a great deal of valuable information about a crucial aspect of the domestic slave trade that has heretofore gone unnoticed or ignored. By gaining a concrete sense of the contours of bankruptcy slave sales in a particular federal judicial district, particularly the one that was home to the largest slave market in antebellum America, our knowledge about the bankruptcy slave trade can move away from theorization and abstraction, thereby opening up fruitful lines of future inquiry.

The remainder of this Part sets forth the design of my case study exploring the bankruptcy slave trade in the Eastern District of Louisiana. I describe the sources consulted and the original dataset created from the information in those sources.

A. Sources

To investigate and tell the story of the bankruptcy slave trade in the Eastern District, the research for this Article has primarily examined federal district court records in manuscript form from the 1841 Act, which are located throughout the country at various regional facilities of the U.S. National Archives and Records Administration.[225] More specifically, the Article predominantly relies on seven sources to document the bankruptcy slave trade under the 1841 Act in the Eastern District of Louisiana:

(1) the bankruptcy sales record books maintained by the U.S. Marshal for the Eastern District (the "Eastern District sales books"),[226] which "contain[ ] records of land, stock household furnishings, and personal possessions which were sold to

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and its calculations for filings under the 1898 Act and 1978 Bankruptcy Code are erroneous, constituting neither the decimal form nor the percent form of the bankruptcy ratios that result from using the filing and population figures that the study's authors report. *See id.*

225. For a brief description of these types of records, see Owens, *supra* note 50, at 185. For further discussion on the archival records of the federal district courts generally, see HOFFER ET AL., *supra* note 55, at 515–16.

226. U.S. DIST. COURT FOR THE E. DIST. OF LA., BANKRUPTCY ACT OF 1841 SALES RECORD BOOKS, 1842–1853 (located in Record Group (RG) 21, The National Archives at Fort Worth, Texas) [hereinafter EDLA SALES BOOKS]; *see also* H.R. DOC. NO. 29-99, at 7 (1847) (referring to "the sales book of the marshal" consulted by the Eastern District's clerk of court, N.R. Jennings, in reporting to Congress "[t]he amount realized from the sales of property" in Eastern District bankruptcy cases).

satisfy the claims of creditors" in Eastern District bankruptcy cases;[227]

(2) the documents filed in the bankruptcy cases before the U.S. District Court for the Eastern District of Louisiana (the "Eastern District case files"),[228] which include "petitions, inventories of the petitioner's property, orders, petitions for the discharge of the bankrupt, reports of the assignee who administered the estate, proofs of debts, depositions, petitions by creditors for the appointment of an assignee, rules, notices, schedules listing the assets and liabilities of the petitioner, motions, oppositions, and attachments";[229]

(3) the docket books corresponding to the bankruptcy cases filed in the Eastern District (the "Eastern District docket books"),[230] which set forth "the case number, name of the petitioner, and a brief abstract of papers filed and actions taken" in each case;[231]

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227. *Bankruptcy Act of 1841 Sales Record Books, 1842–1853*, NAT'L ARCHIVES CATALOG, https://catalog.archives.gov/id/4513390 (last visited June 26, 2017) [https://perma.cc/62FX-MVRP].

228. U.S. DIST. COURT FOR THE E. DIST. OF LA., BANKRUPTCY ACT OF 1841 CASE FILES, 1842–1843 (located in Record Group (RG) 21, The National Archives at Kansas City, Missouri).

229. *Bankruptcy Act of 1841 Case Files, 1842–1843*, NAT'L ARCHIVES CATALOG, https://catalog.archives.gov/id/4513381 (last visited June 26, 2017) [https://perma.cc/FMY4-CK3S].

230. EDLA DOCKETS, *supra* note 177.

231. *Bankruptcy Act of 1841 Dockets, 1842–1843*, NAT'L ARCHIVES CATALOG, https://catalog.archives.gov/id/4513372 (last visited June 26, 2017) [https://perma.cc/K94J-XCRP]. The reports contained in the Eastern District docket books are arranged in chronological order by case number, with each case number seemingly having been assigned based on the date of filing of the bankruptcy petition. This organizational system is consistent with the system employed by other federal judicial districts to maintain their bankruptcy docket books under the 1841 Act. *See, e.g.*, BANKR. D. MASS. R. III (1842) (providing that "[a]ll petitions in bankruptcy shall be entered by the clerk, in a docket and register book, kept exclusively for matters in bankruptcy, in the order of time and with the dates affixed in which they are filed in the office") (repealed), *reprinted in* CHANDLER, *supra* note 75, at 40; *see also* Act of Aug. 19, 1841, ch. 9, § 13, 5 Stat. 440, 448 (stating "[t]hat the proceedings in all cases in bankruptcy . . . shall be carefully filed, kept, and numbered, in the office of the court, and a docket only, or short memorandum thereof, with the numbers, kept in a book by the clerk of the court") (repealed 1843). While I have located excerpts of bankruptcy rules promulgated by the U.S. District Court for the Eastern District of Louisiana, none of the excerpted rules pertains to the court's procedure for maintaining the Eastern District docket books. *See* Transcript of Record at 94, Houston v. City Bank of New Orleans, 47 U.S. (6 How.) 486 (1847) (No. 144) [hereinafter *Houston* Record Transcript] (setting forth excerpt of bankruptcy rules promulgated under the 1841 Act by the U.S. District Court for the Eastern District of Louisiana); Transcript of Record at 18–19, Nugent v. Boyd, 44 U.S. (3 How.) 426 (1845) (No. 158) [hereinafter *Nugent* Record Transcript] (same). To date, I have been unable to locate a complete set of the Eastern District bankruptcy rules.

(4) the index listing the name and case number of the individuals whose bankruptcy cases were commenced in the Eastern District (the "Eastern District name index");[232] and

(5) the *Commercial Bulletin*,[233] the *Picayune*, and the *New-Orleans Bee*,[234] three of the New Orleans newspapers that published legal notices regarding Eastern District bankruptcy cases, such as notices of bankruptcy sales conducted by the U.S. Marshal.[235]

These sources, with the exception of the newspapers, are archival materials for which electronic access does not exist.[236] Much of the research for this Article has focused on the information that appears in the Eastern District sales books.[237] I am unaware of any published scholarship that has systematically analyzed those records.[238]

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232. The 1841 Act records located at the National Archives at Fort Worth, Texas, include the minute books corresponding to the bankruptcy cases filed in the Eastern District. U.S. DIST. COURT FOR THE E. DIST. OF LA., BANKRUPTCY ACT OF 1841 MINUTES, 2/1843–1/1861 (located in Record Group (RG) 21, The National Archives at Fort Worth, Texas). One of the minute book volumes consists of the Eastern District name index. *See Bankruptcy Act of 1841 Minutes*, NAT'L ARCHIVES CATALOG, https://catalog.archives.gov/id/4510563 (last visited June 26, 2017) [https://perma.cc/25C9-69RE] (stating that "[t]he volume for February-December 1843 contains an index to petitioners"). The maintaining of a name index in bankruptcy cases under the 1841 Act appears to have been a practice that prevailed in other federal district courts. *See, e.g.*, BANKR. D.N.C. R. 18 (1842) (providing that "[t]he clerks shall also prepare and keep in the respective offices, *with alphabetical indexes thereto*, suitable registers, into which shall be transcribed the dockets of each case in bankruptcy, and such registers shall be preserved as a record of all proceedings in bankruptcy" (emphasis added)) (repealed), *reprinted in* N.C. BANKRUPTCY RULES, *supra* note 62, at 4.

233. For background information on the *Bulletin*, see REINDERS, *supra* note 4, at 227.

234. For background information on the *Bee*, see REINDERS, *supra* note 4, at 232.

235. The 1841 Act required publication of notices relating to a variety of matters in a bankruptcy case in at least one public newspaper. *See* §§ 4, 7, 10–11, 5 Stat. at 443, 446–47. The U.S. District Court for the Eastern District of Louisiana, pursuant to its authority granted to engage in bankruptcy rulemaking, *see* § 6, 5 Stat. at 445–46 (stating that "it shall be the duty of the district court in each district, from time to time, to prescribe suitable rules and regulations, and forms of proceedings, in all matters of bankruptcy"), promulgated a set of local rules governing petitions by assignees to sell estate property, which included the requirement that the assignee provide public notice of his request in two newspapers, *see Nugent* Record Transcript, *supra* note 231, at 18 ("This application for sale shall be notified to the creditors in general, by ten days' advertisement, to be inserted, at least three times, in two newspapers, unless specially ordered otherwise."). For further discussion regarding newspapers published in New Orleans during the time period of the 1841 Act regime, see Pardo, *supra* note 11, at 99 n.144.

236. *See* Pardo, *supra* note 11, at 91–109.

237. *See id.* at 91–93.

238. Edward Baptist's work on slavery and American capitalism very briefly discusses the 1841 Act. *See* EDWARD E. BAPTIST, THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM 279 (2014). In that discussion, he provides the example of five slaves being sold in the bankruptcy case of Samuel Thompson and Richard Charles, partners in trade who operated a commercial firm in New Orleans. *See id.*; *see also* Statement of the Individual Affairs of Samuel Thompson at 1, *In re* Thompson & Co., No. 12 (E.D. La. Feb. 2, 1842) (stating that "Richard Charles has no individual Property or other Assets nor any individual Liabilities"). Baptist draws the example from the Eastern District sales books, *see* BAPTIST, *supra*, at 487 n.39,

To augment the information from the sales books, I have surveyed the records from approximately 41% (i.e., 36 of 88) of the Eastern District case files corresponding to those cases that involved bankruptcy slave sales.[239] Of the two published studies examining bankruptcy case files related to the 1841 Act,[240] Balleisen's work analyzes case files solely from the Southern District of New York,[241] and the Gross Study entailed an initial review of "26,310 files under the Act of 1841,"[242] including "763 files in Louisiana" relating to that bankruptcy regime.[243] Given the Gross Study's focus on the experience of women debtors, of whom there were few,[244] that study analyzes a

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mistakenly reporting the total amount paid by the purchasers of the five slaves, *compare id.* at 279 (stating that "Thomas, Henry, Peter, and Evelina and her son James . . . brought only $1,125 on the block"), *with* Account Sales at 1, *In re* Thompson & Co., No. 12 (E.D. La. Aug. 16, 1842) (reporting that the U.S. Marshal sold Thomas, Henry, Peter, and Evelina and her son James for the total amount of $1,265). Aside from this example, Baptist's work does not reference the Eastern District sales books.

239. *See* Pardo, *supra* note 11, at 103.

240. *See supra* notes 124–138 and accompanying text.

241. *See supra* text accompanying note 127.

242. Gross et al., *supra* note 50, at 8.

243. *Id.* at 27. The Gross Study does not identify the women debtors according to the federal judicial districts in which the bankruptcy cases were administered. Instead, the study (1) groups the debtors by the regions corresponding to the six federal regional archives that, at the time of the study, held bankruptcy case files from the 1800 Act and 1841 Act, *see id.* at 7 & n.34, 15 tbl., and (2) identifies "the states in which the women filed for bankruptcy," *id.* at 1 n.2. At first blush, the study's reference to a review of "763 files in Louisiana" in connection with the 1841 Act, *id.* at 27, suggests that the study confined its review in that state to the Eastern District, where 763 cases were filed under the 1841 Act, *see* Pardo, *supra* note 11, at 109 n.182. However, the study's list of women debtors from the 1841 Act, *see* Gross et al. *supra* note 50, at 10 & n.56, app. 2 at 40—which, incidentally, fails to identify one of the eleven women debtors who filed in the Mid-Atlantic Region, *compare id.* at 10 (noting "the most filings (eleven) in the Mid-Atlantic Region"), *with id.* app. 2 at 40 (providing the names of ten debtors for the Mid-Atlantic Region)—suggests that the study also reviewed case files from the Western District of Louisiana. The Gross Study's list of 1841 Act debtors identifies eight individuals from Louisiana. *See id.* app. 2 at 40. The names of seven of those individuals appear in the Eastern District name index. While the name index fails to include the names of three individuals who filed for bankruptcy relief in the Eastern District, those individuals have been identified, thus allowing for a full accounting of the 763 case files from the Eastern District. *See* Pardo, *supra* note 11, at 109 n.182. Importantly, none of those case files corresponds to an individual named Catherine Isabelle de Alpruente, whose name is included in the Gross Study among the Louisiana women debtors under the 1841 Act. *See* Gross et al., *supra* note 50, at 19, app. 2 at 40. If de Alpruente's bankruptcy case was administered in Louisiana, it would suggest that the Gross Study reviewed case files from the Western District of Louisiana, of which there are 114. *See Bankruptcy Act of 1841 Case Files, 1842–1844*, NAT'L ARCHIVES CATALOG, https://catalog.archives.gov/id/23811272 (last visited July 10, 2017) [https://perma.cc/ECP3-97PJ] (stating that the 1841 Act bankruptcy case files from the Western District of Louisiana are "[a]ranged numerically by case number, 1-114").

244. The Gross Study identified a combined total of forty-nine cases involving only bankrupt women under either the 1800 Act or the 1841 Act—specifically, one woman under the former and forty-eight women under the latter. *See* Gross et al., *supra* note 50, at 10. To identify these cases, the study relied on docket books and case files. *See id.* at 8. The study's authors emphasized that their case tally likely undercounted the number of cases filed by or against women under both acts. *See id.* at 8 n.38, 10–11. Among the various explanations for the possibility of undercounting, the

limited number of bankruptcy case files,[245] only eight of which were from Louisiana.[246]

Accordingly, nearly all of the research presented in this Article constitutes original historiography.[247] The analyzed materials tell both quantitative and qualitative stories about the scope and nature of the bankruptcy slave trade in a specific Southern jurisdiction, ultimately providing us with a granular view of how the bankruptcy system and its officials intervened in and took control over the lives of black men, women, and children.

B. Dataset

The statistics presented in the remainder of this Article are derived from an original dataset created from the information found in the previously described sources,[248] with most of the information originating from the Eastern District sales books. Accordingly, the unit of observation in the dataset is a U.S. Marshal report on a bankruptcy slave sale in a given case—that is, a bankruptcy asset sale conducted by the U.S. Marshal that involved the sale of some property interest in a slave, whether or not the sale of nonslave assets also occurred.[249] Pursuant to this coding protocol, the dataset excludes information from any sale that did not involve the sale of some property interest in a slave.

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authors noted that "human error might have caused us to miss some easily identified women's names." *Id.* at 8 n.38. Research for this Article has uncovered evidence of Southern women who filed for bankruptcy relief under the 1841 Act and who are unaccounted for by the Gross Study. In the Eastern District of Louisiana, Mrs. Widow Felix de Armas (listed as such in the Eastern District docket books), Mary Chochrane, and Eliza A.D. Miller voluntarily filed for bankruptcy. *See In re* Miller, No. 339 (E.D. La. filed July 27, 1842); *In re* de Armas, No. 229 (E.D. La. filed May 24, 1842); *In re* Cochrane, No. 188 (E.D. La. filed Apr. 29, 1842). Outside of the Eastern District, Ann Christian and Harriet Herbert from the Middle District of Alabama and Margaret Love and Sarah Motta from the District of South Carolina also sought bankruptcy relief. *See In re* Christian, No. 627 (M.D. Ala. filed Mar. 7, 1843); *In re* Love, No. 203 (D.S.C. filed Dec. 21, 1842); *In re* Herbert, No. 178 (M.D. Ala. filed Apr. 26, 1842); *In re* Motta, No. 26 (D.S.C. bankruptcy decree ordered Mar. 16, 1842).

245. *See* Gross et al., *supra* note 50, at 8–9 (discussing methodology for review of bankruptcy case files and categories of demographic data obtained from them); *id.* at 10 n.53 ("All the information about the women debtors, unless specifically identified, is derived from documents within the actual bankruptcy files.").

246. *Id.* at 27 n.144. It appears that seven of the eight bankruptcy case files were from the Eastern District of Louisiana. *See supra* note 243.

247. To the extent that there is overlap with the Gross Study, it is extremely limited. Other than briefly mentioning bankrupted slaves, the study does not discuss them or, for that matter, bankruptcy slave sales. *See supra* notes 136–138 and accompanying text.

248. *See supra* Section II.A.

249. The reader should note that there is one instance in the dataset involving a deviation from this coding protocol. *See infra* notes 254–257 and accompanying text.

For nearly all of the reports recorded by the U.S. Marshal in the Eastern District sales books, he limited each report to a sale in a single bankruptcy case.[250] As such, each report from the Eastern District sales books usually generated a single observation in the dataset. On certain occasions, however, the U.S. Marshal memorialized the results of bankruptcy sales in multiple cases in a single report. In all but one of those instances, the report nonetheless generated a single observation because only one of the bankruptcy sales involved the sale of some property interest in a slave.[251]

One report memorialized the results of bankruptcy sales in two separate cases, those of Julien Bossie and Widow Benjamin Bossie,[252] each of which involved the sale of slaves.[253] In that report, the U.S. Marshal described, in relevant part, the first item of property sold as

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250. Keep in mind, however, that the U.S. Marshal did not always liquidate a bankrupt's entire estate at a single sale, but rather did so over time in multiple sales. Accordingly, a single bankruptcy case could generate multiple sale reports by the U.S. Marshal in the Eastern District sales book.

251. For example, the U.S. Marshal's report regarding the sale of assets from four separate bankruptcy cases on June 17, 1845, indicates that only one of those cases, *In re Hunt*, involved the sale of a slave. *See* 2 EDLA SALES BOOKS, *supra* note 226, at 373 (setting forth account sales report for "the Estates of J. Berry No. 468, G Clark Bogart No. 445, John F. Hunt No. 452, & Moss & Harris No. 472"). Accordingly, that report generated a single observation in the dataset.

In another example, the U.S. Marshal's report regarding the sale of assets from two separate bankruptcy cases, *In re Cammack* and *In re Dixon*, indicated that he had sold two slaves, "Slave Charlotte" and "Slave Margaret," without specifying to whom the slaves belonged. *See id.* at 38–40 (setting forth account sales report for the estates of Horace C. Cammack and Thomas Dixon). Unfortunately, financial and time constraints precluded consultation of the *Cammack* and *Dixon* case files to ascertain the nature of the property interests in the slaves. The U.S. Marshal report, however, listed "Mrs. Cammack," presumably Horace's wife or a relative of his, as the purchaser of both slaves. *Id.* at 39. On the basis of this information, it was inferred that both slaves had belonged to Horace Cammack. *Cf.* BALLEISEN, *supra* note 62, at 154 ("Relatives . . . of bankrupts also made their presence known at bankruptcy sales . . . . These individuals often knew a good deal about the affairs of a bankrupt, and thus had an advantage in recognizing assets that were worth purchasing."); DEYLE, *supra* note 32, at 166 ("Southerners also sought protection by buying their slaves through local dealers, brokers, and auctioneers . . . . [T]hese traders offered many of the same benefits that came from local buying: the knowledge that an owner could purchase a slave at a good price with confidence and trust."). As such, the report on the asset sales in *Cammack* and *Dixon* generated a single observation. The possibility exists, of course, that both Cammack and Dixon may have held partial interests in both slaves, thus warranting the inclusion of two observations in the dataset from the single report. Given this possibility, the dataset may undercount the number of cases from the Eastern District involving bankruptcy slave sales.

252. *In re* Bossie, No. 221 (E.D. La. filed May 19, 1842) (Widow Benjamin Bossie); *In re* Bossie, No. 162 (E.D. La. filed Apr. 9, 1842) (Julien Bossie). All of the archival materials consulted for this Article, including the records from the relevant bankruptcy case file, fail to provide Widow Benjamin Bossie's first name, instead referring to her as "Widow Benjamin Bossie." *See, e.g.*, Petition of R.P. Gaillard Assignee of Widow Benjamin Bossie, *In re* Bossie, No. 221 (E.D. La. Oct. 10, 1842). The Gross Study, which examined the case file for Widow Bossie, made a similar observation. *See* Gross et al., *supra* note 50, at 9 n.42 (noting that "Mrs. Benjamin Bossie's file does not include her first name").

253. *See* 1 EDLA SALES BOOKS, *supra* note 226, at 160 (setting forth account sales report for "the Estates of Julien Bossie and Widow Benjamin Bossie").

"[o]ne sugar plantation situated in the Parish of St. John the Baptist . . . together with 19 slaves belonging to the Partnership, two other slaves, the private property of Julien Bossie and twelve other slaves the private property of Widow B. Bossie."[254] Given that, of the slaves sold, two belonged to Julien and twelve belonged to Widow Bossie, and thus separately constituted property of their individual estates, this description generated two observations for the dataset (i.e., one corresponding to Julien's bankruptcy case and one corresponding to Widow Bossie's bankruptcy case).

In addition to these two observations, the U.S. Marshal's report on the asset sales from the Bossie estates generated a third observation. The report's reference to the "Partnership"[255] appears to have been to a joint venture between Julien and Widow Bossie in running a sugar plantation.[256] Because neither the report nor the records from the bankruptcy case files identified the nature of the interest held by the parties in the venture's slaves (e.g., a half-ownership interest held by each party or a full-ownership interest in only certain slaves held by the respective parties), it was not possible to account for this portion of the sale in the separate observations corresponding to Julien's case and Widow Bossie's case. Accordingly, an observation relating to the Bossie venture was created in the dataset, even though no bankruptcy case existed for that venture.[257]

Finally, on two occasions, the first volume of the Eastern District sales books contained a report duplicating another report on a bankruptcy slave sale that had appeared earlier in the same volume. In both scenarios, which arose in *In re Brander*, *McKenna & Wright* and *In re Green*, one of the reports was excluded from the dataset. Importantly, in both instances, the duplicate report was not a mirror image of the other report. In *Brander*, however, the differences between the first report and the subsequent duplicate report were

254. *Id.*

255. *See supra* text accompanying note 254.

256. *See* Petition of R.P. Gaillard Assignee . . . Praying for an Order of Sale at 2, *In re* Bossie, No. 221 (E.D. La. July 9, 1842) (describing the sugar plantation and nineteen slaves mentioned in the U.S. Marshal's report as "[p]roperty belonging to the partnership of W[idow] Benjamin Bossie & Julien Bossie").

257. Legal entities, such as corporations, were not eligible for relief under the 1841 Act. *See supra* note 52. Accordingly, if the Bossie venture involved such an entity, bankruptcy relief would not have been available to it. Moreover, while the Act provided for a joint case involving "partners in trade," Act of Aug. 19, 1841, ch. 9, § 14, 5 Stat. 440, 448 (repealed 1843); *cf.* H.R. DOC. NO. 29-99, at 7 & n.* (1847) (setting forth statistics for Eastern District bankruptcy cases commenced under the 1841 Act and noting that "[t]here were 759 petitions filed in court, in which several members of a commercial firm being joined, made the whole number of applicants 818"), Julien Bossie and Widow Bossie did not file such a case, and their creditors did not file such a case against them.

nonsubstantive. Put another way, the key pieces of information—for example, the sale date, the property sold, the purchasers, the amount paid by the purchasers, and the charges to the estate—were substantively the same.[258] Thus, for the *Brander* observation, it did not matter which report I coded and which report I excluded from the dataset.

But in *Green*, some of the differences between the first report and the subsequent duplicate report were substantive. The key pieces of information in both reports were nearly all substantively the same—specifically, the sale date, the property sold, the purchasers, and the amount paid by the purchasers.[259] The first report, however, listed fewer charges to the estate than the subsequent duplicate report, thus resulting in a lower amount of charges to the estate and a higher amount of net proceeds than the duplicate report.[260] It may have been that the U.S. Marshal committed an oversight in the first report, failing to include costs that he incurred in conducting the sale. For example, the first report did not include a charge for mileage, whereas the second report did include such a charge in the amount of $38.75. Perhaps, then, the U.S. Marshal filed the subsequent duplicate report to ensure proper reimbursement from the estate. On the rationale that the subsequent duplicate report more accurately represents the true costs of sale, the *Green* observation consists of data coded from the duplicate report and not the first report.

The information from the Eastern District sales books reveals that approximately 38% (293 of 763) of the district's bankruptcy cases involved at least one asset sale conducted by the U.S. Marshal. Put another way, a majority of the bankruptcy cases from the Eastern District likely did not entail any distribution of proceeds to the bankrupt's creditors,[261] a state of affairs consistent with the trend under the 1841 Act for creditor distributions in bankruptcy cases

258. *Compare* 1 EDLA SALES BOOKS, *supra* note 226, at 46 (reporting that (1) the sale in *In re Brander, McKenna & Wright*, No. 100 (E.D. La. June 17, 1842), took place on June 17, 1842; (2) the property sold, including "Slave Charles," generated $541 in gross proceeds; (3) there were two purchasers at the sale; (4) the charges to the estate amounted to $136.07; and (5) the net proceeds amounted to $404.93), *with id.* at 206 (same).

259. *Compare id.* at 47 (reporting that (1) the sale in *In re Green*, No. 68 (E.D. La. June 17, 1842), took place on June 17, 1842; (2) the property sold, including "Slave Jim," generated $324.81 in gross proceeds; and (3) there were eight purchasers at the sale), *with id.* at 207 (same).

260. *Compare id.* at 47 (reporting (1) six distinct charges to the estate totaling $27.27; and (2) net proceeds in the amount of $297.54), *with id.* at 207 (reporting (1) nine distinct charges to the estate totaling $74.02; and (2) net proceeds in the amount of $250.97).

261. In some instances, individuals other than the U.S. Marshal sold assets from bankruptcy estates. *See* Pardo, *supra* note 11, at 100–03.

nationwide.[262] Based on the coding protocols discussed earlier in this Section, of the 293 bankruptcy cases in which the U.S. Marshal conducted an asset sale, approximately 30% (88 of 293) of those cases involved a bankruptcy slave sale.

Accordingly, the overwhelming majority of bankruptcy cases in the Eastern District—that is, approximately 88% (675 of 763)—did not involve a slave sale by the U.S. Marshal. It would be a mistake for the reader, however, to conclude that the bankruptcy slave sale was nothing more than a statistical sideshow. The remainder of this Article digs deeper into the numbers, which reveal that the bankruptcy slave sale was a crucial part of the story of the 1841 Act in the Eastern District of Louisiana.

III. THE VICTIMS OF BANKRUPTCY SLAVE SALES

"Martha aged 4 years."[263] "Slave Mortimer aged about 60 years."[264] "Robert and his son William."[265] "Slave Louisa aged 24 years and her daughter Marcelain aged about 8 years."[266] "Rosalie negress aged about 40 years sickly & subject to Rheumatism."[267] "Julia the runaway slave."[268] These are just a few of the descriptions recorded by the U.S. Marshal in his reports of the bankruptcy slave sales that he conducted. The pages of the Eastern District sales books abound with these descriptions. The bankruptcy slave sale knew no limits. Four hundred eighty souls sold (and then some[269]): young, old, father and son, mother and daughter, infirm, and escaped.

The remainder of this Part gives the reader preliminary insights into the number of bankrupted slaves in the Eastern District and their backgrounds. By no means does this Part constitute an exhaustive treatment on these matters. As will become apparent to the reader from what follows below, future research on these topics will be required to fully tell this multifaceted story. That said, we can begin to map the

262. *See* BALLEISEN, *supra* note 62, at 120 ("In jurisdictions all over the country, the estates of most bankrupts generated *nothing* for their creditors."); *cf. id.* at 263 n.51 (stating that "most southern New York bankruptcies did not result in the payment of any dividends").

263. Account Sales, *In re* Botts, No. 545 (E.D. La. Nov. 14, 1843) [hereinafter Botts Account Sales].

264. Account Sales, *In re* Brander, McKenna & Wright, No. 100 (E.D. La. Aug. 4, 1842).

265. Account Sales, *In re* Brown, No. 457 (E.D. La. Jan. 12, 1843).

266. Account Sales, *In re* Cucullu, No. 464 (E.D. La. Mar. 8, 1843).

267. Account Sales, *In re* Tricou, No. 705 (E.D. La. July 12, 1843).

268. Account Sales, *In re* Sauton, No. 228 (E.D. La. Aug. 13, 1842).

269. *See* Pardo, *supra* note 11, at 110 (explaining coding protocol for excluding the sale of fractional ownership interests in slaves from dataset documenting the Eastern District bankruptcy slave trade).

avenues for that research using the information presented here as a reference point.

Section III.A quantifies the scope of victimization that occurred under the Eastern District bankruptcy slave trade by detailing the number of bankrupted slaves sold and the rate at which the U.S. Marshal sold them. Section III.B discusses how the Eastern District bankruptcy slave trade is mainly a story about urban slavery. Section III.C explores the experience of the slaves while awaiting their sale at auction—that is, the event that would terminate their status as bankrupted slaves by transferring ownership from the federal government to the auction purchasers.

A. The Scope of the Eastern District Bankruptcy Slave Trade

Having explained the various ways that the original dataset for this Article undercounts the number of bankrupted slaves in the Eastern District, this Article now provides a quantitative account (albeit incomplete) of the victims of the bankruptcy slave trade. The dataset consists of 101 observations derived from (1) ninety-eight bankruptcy reports on bankruptcy slave sales conducted by the U.S. Marshal,[270] with one of those reports generating two additional observations;[271] and (2) a notice published in the *Commercial Bulletin* announcing a bankruptcy slave sale conducted by the U.S. Marshal for which no corresponding report exists in the Eastern District sales books.[272] Ninety-eight percent (99 of 101) of the observations in the dataset include values for the number of slaves sold at each sale,[273] subject to the previously discussed limitations. Unless stated otherwise, the statistics presented in this Section correspond to these ninety-nine observations.

Under the 1841 Act, the U.S. Marshal for the Eastern District of Louisiana sold 480 slaves in bankruptcy slave sales. In approximately 45% of those sales, he sold only one slave; and in approximately 83% of those sales, he sold six slaves or less. While the median number of slaves sold per bankruptcy slave sale was two slaves, the U.S. Marshal sold, on average, approximately five slaves per bankruptcy slave sale.[274]

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270. *See supra* notes 248–251 and accompanying text.

271. *See supra* notes 252–257 and accompanying text.

272. *See* Pardo, *supra* note 11, at 99.

273. Two U.S. Marshal reports indicate that the only interest in a slave sold by him was a fractional ownership interest. *See id.* at 110 n.188. Because the dataset excludes such interests from the value recorded for the number of slaves sold at each sale, there are two missing values for that variable in the dataset.

274. The median and mean number of slaves sold would not have substantively changed had artificial values been provided for the two observations with missing values for that variable. *See*

The fact that the average number of slaves sold at such sales exceeded the median can be attributed to several sales involving a large number of slaves—for example, forty slaves in the bankruptcy slave sale conducted in George Botts' case;[275] forty-five slaves in the bankruptcy slave sale in the joint case of Louis Alfred Ducros and Ernest Morphy;[276] and fifty-six slaves in the bankruptcy slave sale in John S. Armant's case,[277] the most slaves sold by the U.S. Marshal at any bankruptcy slave sale in the Eastern District.[278] Figure 1 illustrates the right-skewed distribution of the number of slaves sold per bankruptcy slave sale.

supra note 273 (discussing observations with missing values for the number of slaves sold). Those artificial values could have been generated by multiplying the bankrupt's fractional ownership interest by the number of slaves in which he had such an interest. Pursuant to this method, the observation corresponding to the bankruptcy slave sale in *In re Stewart & Macy* could have been coded as involving the sale of three slaves (i.e., a one-third interest multiplied by nine slaves), and the observation corresponding to the bankruptcy slave sale in *In re Pilcher* could have been coded as involving the sale of ten slaves (i.e., a one-half interest multiplied by twenty slaves). *See* Pardo, *supra* note 11, at 110 n.188. Had these two figures been provided as the missing values, the median number of slaves sold would have remained two slaves, and the mean number of slaves sold would have dropped very slightly from 4.87 slaves to 4.84 slaves.

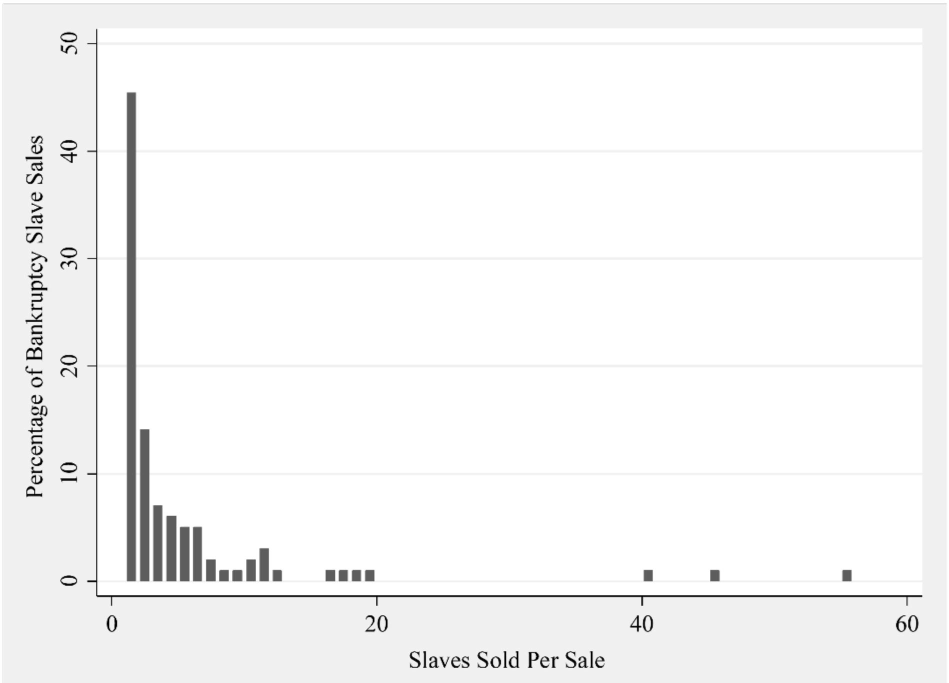
275. Botts Account Sales, *supra* note 263.

276. Account Sales, *In re* Ducros & Morphy, No. 61 (E.D. La. June 22, 1842) [hereinafter Ducros & Morphy Account Sales]. It should be noted that, although the citation to the U.S. Marshal's report in *In re Ducros & Morphy* provides a single sale date, the report's title indicates that the sale took place over a two-day period (i.e., June 22–23, 1842). *See id.*

277. Account Sales, *In re* Armant, No. 688 (E.D. La. June 8, 1843).

278. *See* Pardo, *supra* note 11, at 115 tbl.2 (tabulating the distribution of slaves sold in Eastern District bankruptcy slave sales).

FIGURE 1: DISTRIBUTION OF SLAVES SOLD IN EASTERN DISTRICT BANKRUPTCY SLAVE SALES



Beyond the absolute number of slaves sold, we can focus on what the federal government's engagement in the bankruptcy slave trade looked like over time. The first and last bankruptcy slave sales in the Eastern District occurred, respectively, on April 11, 1842, and February 5, 1853,[279] the latter constituting the sale of James in Arthur Morrell's bankruptcy case.[280] During this period of ten years and nearly ten months—or more precisely, a period of 3,953 days—the U.S. Marshal sold full ownership interests in 480 slaves. Thus, in just the short, thirteen-month period during which debtors could file for relief under the 1841 Act,[281] slaveowners forced enough slaves into the bankruptcy system to keep the federal government firmly entrenched in the bankruptcy slave trade for over a decade in the Eastern District.[282]

279. Morrell Account Sales, *supra* note 29; Account Sales, *In re* Bergamini & Cestia, No. 3 (E.D. La. Apr. 11, 1842).

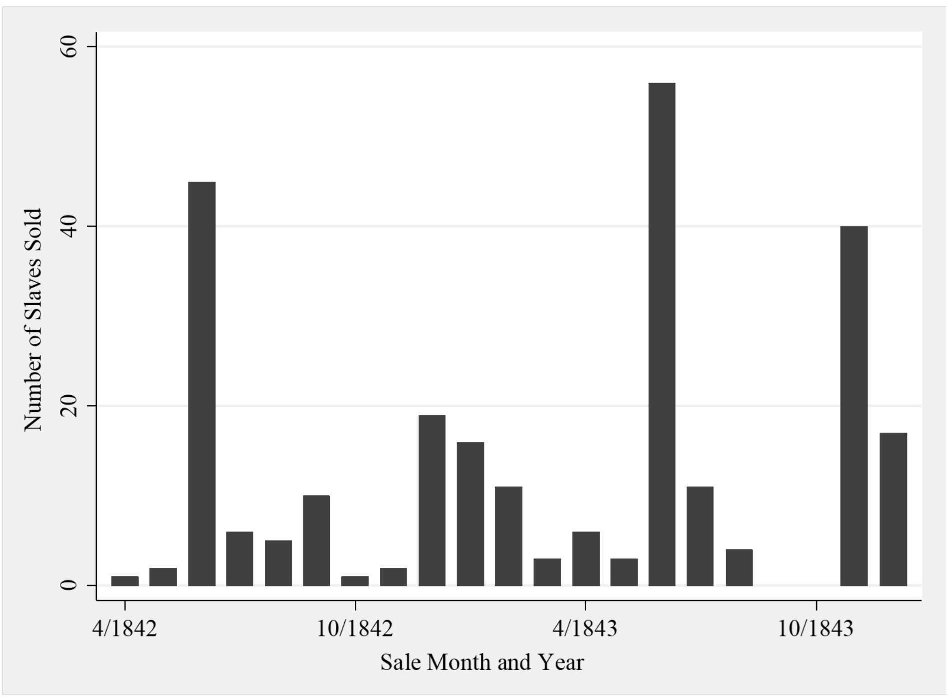
280. *See infra* note 499 and accompanying text.

281. *See supra* note 15 and accompanying text.

282. Notwithstanding repeal of the 1841 Act, Congress provided that any unresolved bankruptcy cases at the time of repeal would remain unaffected and could "be continued to . . . final consummation." Act of Mar. 3, 1843, ch. 82, 5 Stat. 614, 614.

We can go even a step further by focusing on the rate at which the federal government sold slaves in the Eastern District under the 1841 Act. From the first bankruptcy slave sale in April 1842 to the last sale in February 1853, a period encompassing approximately 130 months, the U.S. Marshal sold slaves at a rate of approximately four slaves per month.[283] Because bankruptcy slave sales in the Eastern District sharply tapered off beginning in 1844—to wit, only eleven such sales occurred between January 1844 and February 1853—the sale rate of four slaves per month obscures the rapid rate at which the federal government sold bankrupted slaves during the first two calendar years of the 1841 Act's operation.[284] Figure 2 illustrates the number of bankrupted slaves sold by the U.S. Marshal during 1842 and 1843.

FIGURE 2: NUMBER OF BANKRUPTED SLAVES SOLD IN THE EASTERN DISTRICT BY MONTH AND YEAR, APRIL 1842 THROUGH DECEMBER 1843



283. The sale of 480 slaves over a period of 130 months results in a figure, rounded to the nearest tenth, of 3.7 slaves per month.

284. *Cf.* BALLEISEN, *supra* note 62, at 152 (observing that "[b]ankruptcy auctions . . . primarily occurred between the spring of 1842 and the end of 1844").

The U.S. Marshal sold the overwhelming majority of bankrupted slaves in 1842 and 1843—that is, approximately 96% (461 of 480) of the total number sold. From the first bankruptcy slave sale in April 1842 to the last sale in December 1843,[285] a period encompassing twenty-one months, he sold slaves at a rate of approximately twenty-two slaves per month.[286] Or put another way, the U.S. Marshal sold the equivalent of about two slaves every three days while the 1841 Act was in full swing. During this concentrated period of time, the federal government orchestrated a highly active bankruptcy slave trade in the Eastern District.

To place the sale rate for bankrupted slaves in perspective, we can look to the sale rate of slaves in other types of court-ordered sales. Based on "data . . . from the sale books of sheriffs, masters in chancery, and probate courts in five different South Carolina districts," Thomas Russell has empirically examined the sale of "about 2,100 slaves between 1823 and 1865."[287] More specifically, his data sample consists of the sale of 2,107 slaves over a period of 1,168 months.[288] The Russell data therefore yield a slave-sale rate of approximately two slaves per month,[289] one that is approximately half the rate of sale of Eastern District bankrupted slaves under the 1841 Act.[290]

To be sure, comparing the nonbankruptcy slave-sale rate from the Russell data to the bankruptcy slave-sale rate from the Eastern District is an apples-to-oranges comparison. The Russell data are derived from a nonrandom sample of court-ordered slave sales conducted under South Carolina law over an approximately four-decade period in five rural districts.[291] On the other hand, the Eastern District data are derived from a nonrandom sample—albeit one likely close in number to the total population—of court-ordered slave sales conducted under federal bankruptcy law over an approximately eleven-year period in a single federal judicial district that, at the time, was home to one of the country's largest cities and the country's largest slave market.

285. Recall that the 1841 Act did not take effect until February 1, 1841. *See supra* note 10 and accompanying text.

286. For a tabulation of the number of bankruptcy slave sales and the number of bankrupted slaves sold in the Eastern District by sale month and year, from April 1842 through December 1843, see Pardo, *supra* note 11, at 116 tbl.3.

287. Russell, *supra* note 31, at 1247.

288. *See id.* at 1247 tbl.1.

289. The sale of 2,107 slaves over a period of 1,168 months results in a figure, rounded to the nearest tenth, of 1.8 slaves per month.

290. *Compare supra* note 289 (nonbankruptcy slave-sale rate of 1.8 slaves per month), *with supra* note 283 (bankruptcy slave-sale rate of 3.7 slaves per month).

291. *See* Russell, *supra* note 31, at 1248–52.

These differences, some of which are surely substantive,[292] warrant caution in drawing any conclusions about the extent of victimization produced by the bankruptcy system on slaves in the Eastern District. Nonetheless, the fact that the system resulted in the sale of bankrupted slaves at what appears to be a highly amplified rate underscores the need for further lines of inquiry that will facilitate a more concrete understanding of the federal government's complicity in the domestic slave trade.

B. The Urban Nature of the Eastern District Bankruptcy Slave Trade

Before turning to a discussion about the experience of bankrupted slaves while they awaited their sale, I provide a preliminary analysis of the Eastern District bankruptcy slave trade as mainly a story about urban slavery. Slaves, by virtue of being the property of their slaveowners, generally found themselves physically confined to the geographical orbit of their slaveowners, although opportunities existed for slaves to move beyond that orbit for varying periods of time, depending on myriad contextual factors.[293] Placing aside the possibility of such opportunities, we can gain a sense of where the Eastern District's bankrupted slaves likely resided by looking to the geographic orbit of their bankrupt slaveowners.

During the time when the 1841 Act was in effect and individuals could thus file for bankruptcy relief,[294] the Eastern District consisted of twenty-four parishes,[295] among them the parish that was home to New

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292. *See supra* notes 207–224 and accompanying text (discussing unique nature of New Orleans and the Eastern District). In addressing whether his data on "South Carolina courts' slave sales were representative of the rest of the South," Russell acknowledges that differences in Louisiana's laws and legal institutions would preclude the conclusion that the South Carolina experience was comparable to the Louisiana experience. *See* Russell, *supra* note 31, at 1252.

293. One such opportunity occurred when slaveowners hired out their slaves to third parties. *See, e.g.*, WADE, *supra* note 26, at 38 (" 'Hiring out' in its plainest form generally involved a contract which included the price, length of service, some assurances on treatment, and the nature of the work to be performed. Arrangements varied, some lasting only a week or for the duration of the job, others for five years."); *id.* at 43 ("Hiring out, . . . whether publicly organized or privately facilitated, sprung urban bondage out of the narrow confinements of the master-slave relationship . . . ."); *see also* JOHN W. BLASSINGAME, BLACK NEW ORLEANS, 1860–1880, at 2 (1973) (noting that "the return on skilled labor was so high that many masters paid white artisans to train their slaves and then hired them out"); MORRIS, *supra* note 44, at 132 ("Estimates of the number of slave hires during the nineteenth century vary from 5 to 15 percent of the total annual slave population."). The hiring out of slaves appears to have been a prevalent practice with respect to municipal projects in New Orleans. *See* WADE, *supra* note 26, at 44–45.

294. Specifically, that period of time was February 1, 1842, through March 3, 1843. *See supra* notes 10, 15 and accompanying text.

295. Although Louisiana's political subdivisions are known today as parishes, this has not always been the case. When Congress organized the state into two federal judicial districts in 1823, it specified that "[t]he *counties* of Attakapas, Opelousas, Rapide, Natchitoches, and Ouachita, shall

Orleans.[296] Because the Act's venue provision required that individuals seeking bankruptcy relief file their petitions in the district where they resided or had their principal place of business at the time of filing,[297] only individuals residing or having their principal place of business in one of the Eastern District's twenty-four parishes could file a petition for bankruptcy relief in the district's federal district court. The 1841 Act further provided that notice of such a filing be published in at least one newspaper printed in the district.[298]

Individuals in the Eastern District filed their petitions for bankruptcy relief on forms preprinted by legal stationers,[299] as well as on blank pieces of paper on which the request for relief had been entirely handwritten.[300] Of the bankruptcy petitions consulted from the Eastern District case files, those petitions almost always identified the individual's residence or principal place of business,[301] regardless of the manner in which the individuals presented their bankruptcy

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compose one district, to be called the western district of Louisiana; and all the remaining part of the said state shall compose another district, to be called the eastern district of Louisiana." Act of Mar. 3, 1823, ch. 44, 3 Stat. 774, 775 (emphasis added) (current version at 28 U.S.C. § 98 (2012)). The 1840 census, which aggregated data according to federal judicial district, likewise referred to the counties in each district of Louisiana. *See* DEP'T OF STATE, *supra* note 201, at 60 (referring to the "counties and principal towns" in the Eastern and Western Districts of Louisiana). For a discussion of Louisiana's transition from the county designation to the parish designation, see Richard Campanella, *Investigating Louisiana's Change from Counties to Parishes*, KNOW LA. (Spring 2017), http://www.knowlouisiana.org/a-mysterious-switch [https://perma.cc/VCY8-XF9Q].

296. The 1840 census referred to the county in which New Orleans was located as "New Orleans city and parish." DEP'T OF STATE, *supra* note 201, at 60.

297. Act of Aug. 19, 1841, ch. 9, § 7, 5 Stat. 440, 446 (repealed 1843).

298. *See id.* ("And upon every such petition, notice thereof shall be published in one or more public newspapers printed in such district, to be designated by such court at least twenty days before the hearing thereof . . . .").

299. *See, e.g.*, Petition of Elizabeth Norton Wife of Harvey Norton to Be Declared a Bankrupt, *In re* Norton, No. 203 (E.D. La. May 9, 1842) [hereinafter Norton Bankruptcy Petition] (preprinted bankruptcy petition). For a discussion of forms preprinted by legal stationers, see Pardo, *supra* note 11, at 105 n.169.

300. *See, e.g.*, Petition of Calvin Tate, *In re* Tate, No. 60 (E.D. La. Feb. 18, 1842) [hereinafter Tate Bankruptcy Petition] (handwritten bankruptcy petition).

301. Additionally, other documents in the bankruptcy case files appearing on preprinted forms— such as the discharge petitions filed by bankrupts and the petitions to sell estate property filed by assignees—almost always identified the bankrupt's residence or principal place of business. *See, e.g.*, Petition of James A Chase, Bankrupt, for a Discharge at 1, *In re* Chase, No. 672 (E.D. La. Mar. 20, 1843) [hereinafter Chase Discharge Petition] ("Respectfully represent [sic] James A. Chase of New Orleans in the Parish of Orleans and District of Louisiana that on the 10th day of March last past he was duly declared Bankrupt . . . ."); Petition of L. Hermann Assignee of the Estate of C.E. Forstall to Sell Property at 1, *In re* Forstall, No. 393 (E.D. La. Nov. 18, 1843) ("Respectfully shows Lucien Hermann of N Orleans Assignee of the estate of Charles E. Forstall of N Orleans declared by this Court as Bankrupt, that the said Charles E. Forstall at the time of his Bankruptcy was seized and possessed of the estate and property in the schedule hereto annexed . . . .").

petitions.[302] Likewise, the legal notices in the New Orleans newspapers that announced the filing of bankruptcy petitions almost always identified the residence or principal place of business of the individual seeking relief.[303]

By reference to some of the bankruptcy petitions (and other documents)[304] from the Eastern District case files and legal notices from the New Orleans newspapers, I identified the residence or principal place of business of the bankrupt in approximately 84% (74 of 88) of the cases with a bankruptcy slave sale.[305] Within that subset of cases, the U.S. Marshal conducted eighty-five bankruptcy slave sales. Of those sales, approximately 84% (71 of 85) occurred in cases involving a bankrupt whose residence or principal place of business was in New Orleans. For the approximately 16% (14 of 88) of cases for which I could not identify the bankrupt's residence or principal place of business from case file documents or from newspaper notices, reference to a New Orleans directory from 1842 suggests that twelve of the fourteen cases very likely involved bankrupts whose residence or principal place of business was New Orleans.[306] Accordingly, it would appear that

302. *See, e.g.*, Norton Bankruptcy Petition, *supra* note 299, at 1 ("Respectfully represents Elizabeth Norton wife of Harvey Norton that she is separate in property & resides in the Parish of Jefferson and State of Louisiana . . . ."); Tate Bankruptcy Petition, *supra* note 300, at 1 ("The petition of Calvin Tate, respectfully sheweth, that your petitioner is a resident of the city of New Orleans, in the State of Louisiana . . . .").

303. *See, e.g.*, NEW-ORLEANS COM. BULL., Nov. 15, 1842, at 2 ("Notice is hereby given, that James Allen, of New Orleans, has filed in this Court his petition to be declared a bankrupt . . . .").

304. *See supra* note 301.

305. It should be noted that, on occasion, court documents and newspaper notices from the same case did not provide the same location for the bankrupt's residence or principal place of business. For example, in *In re Norton*, Elizabeth Norton's bankruptcy petition and discharge petition, as well as a petition by the assignee in her case to sell estate property, all declared that she was from Jefferson Parish. *See* Petition of R. Nugent Assignee of Elizabeth Norton at 1, *In re* Norton, No. 203 (E.D. La. June 23, 1842); Petition of Elizabeth Norton Bankrupt for a Discharge at 1, *In re* Norton, No. 203 (E.D. La. June 20, 1842); Norton Bankruptcy Petition, *supra* note 299, at 1. In contrast, the *Commercial Bulletin* notice announcing that Elizabeth had filed a bankruptcy petition indicated that she was from New Orleans. *See* NEW-ORLEANS COM. BULL., May 23, 1842, at 1. In such instances, I recorded the information provided in the court documents rather than the information provided in the newspaper notices. This approach reflects an assumption that the parties to the case were more likely to be accurate in providing information in court documents than were the third parties who published notices in their newspapers (i.e., noncourt documents).

306. For example, the caption to the U.S. Marshal's report on the bankruptcy slave sale in *In re Ducros & Morphy* refers to the "Estate of Louis Alfred Ducros, Ernest Morphy, and Ducros and Morphy." Ducros & Morphy Account Sales, *supra* note 276, at 1. A New Orleans directory from 1842, the same year that Ducros and Morphy filed their joint bankruptcy petition, *see* 1 EDLA DOCKETS, *supra* note 177, at 61 (indicating that Ducros and Morphy filed their joint bankruptcy petition on February 18, 1842), has only one listing for "Ducros & Morphy, commission merchants, 10 Conti street," NEW ORLEANS DIRECTORY, *supra* note 17, at 127. Moreover, that directory lists "Ducros, L. A. of above firm [i.e., Ducros & Morphy], sheriff of the Commercial court, residence 393 Royal street," *id.*, as well as "Morphy, Ernest firm of Ducros & Morphy, res. St. Philip between

approximately 94% (83 of 88) of the Eastern District cases with a bankruptcy slave sale involved bankrupts who resided or had a principal place of business in New Orleans.

All of this suggests that the Eastern District bankruptcy slave trade may very well have been an integral component of the New Orleans slave market, which Laurence Kotlikoff has characterized as having been "primarily a local slave market throughout the nineteenth century."[307] Kotlikoff substantiates his descriptive claim by reference to statistics regarding the residence of the slaves sold and the residence of their purchasers:[308]

> Over two-thirds of the slaves sold in the market in any given year were slaves already residing in Louisiana, and over 90 percent of slaves purchased were purchased by Louisiana residents. The market was dominated by residents of New Orleans and its immediate surrounding counties; 70 percent of slaves sold to Louisiana residents were purchased by citizens of New Orleans . . . .[309]

Two caveats, however, suggest that we ought to proceed with caution before definitively making claims about the relationship between the Eastern District's bankruptcy slave trade and the New Orleans slave market. First, the fact that the bankrupt's residence or principal place of business was in New Orleans does not necessarily mean that his or her slaves resided in New Orleans. For example, in the joint case of Louis Alfred Ducros and Ernest Morphy, all of the slaves sold by the U.S. Marshal, a total of forty-five, belonged to Ducros.[310] The report from the Eastern District sales books indicates that twenty-three of the forty-five slaves were sold as part of "[a] certain Sugar Plantation situated in the Parish of St. Bernard," without

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Rampart and St. Claude streets," *id.* at 296. This evidence strongly suggests that Ducros and Morphy resided *and* conducted their principal business in New Orleans.

307. Laurence J. Kotlikoff, *Quantitative Description of the New Orleans Slave Market, 1804 to 1862*, *in* 1 WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY 31, 33 (Robert William Fogel & Stanley L. Engerman eds., 1992); *cf.* DEYLE, *supra* note 32, at 157 ("Of the more than 2 million slaves who were sold in America between 1820 and 1860, more than two-thirds were sold to local buyers. This includes intrastate sales between planters, commercial sales through agents or brokers, and court-ordered sales.").

308. Kotlikoff "analyzes the Fogel and Engerman sample of New Orleans invoices that represent over 5,700 slaves sold during the years 1804 to 1862." Kotlikoff, *supra* note 307, at 32 (citing ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY (1974)).

309. *Id.* at 33; *see also* Herman Freudenberger & Jonathan B. Pritchett, *The Domestic United States Slave Trade: New Evidence*, 21 J. INTERDISC. HIST. 447, 461 (1991):

> [A]lmost half (49.8 percent) of the slaves sold to Louisiana residents [in 1830] were sold to residents of New Orleans. . . . That such a large percentage of the sales was to residents of New Orleans raises questions about the assumption that that city was a center for the regional slave trade in 1830.

310. *See* Ducros & Morphy Account Sales, *supra* note 276, at 1–2 (listing slaves sold under heading titled "Surrendered by L. A. Ducros").

individually identifying any of those slaves.[311] The report then individually identifies the remaining twenty-two slaves sold by the U.S. Marshal, but without providing any information regarding their residence.[312] Thus, notwithstanding that Ducros appears to have resided and had his principal place of business in New Orleans,[313] we witness that slightly more than half of his slaves resided outside of New Orleans in St. Bernard Parish at the time of the bankruptcy slave sale. This example thus illustrates how the bankrupt's residence or principal place of business is an imperfect proxy for ascertaining the residence of bankrupted slaves.

Moreover, if we define a slave market to be local based on a certain threshold of slaves and purchasers residing in the same locale as the market, it is necessary to know the purchaser's residence. Systematically ascertaining such information was beyond the scope of this Article. Nonetheless, evidence exists suggesting that some purchasers of bankrupted slaves resided in New Orleans. For example, the U.S. Marshal sold "Slave Elizabeth" to an "S. W. Nye" for $495 on September 13, 1842.[314] An 1842 New Orleans directory sets forth only two listings for individuals with the last name of Nye: (1) Seth W. Nye, a "customhouse officer" residing at 2 Rampart Street; and (2) Samuel Nye, a customs inspector, also with an address at Rampart Street.[315] Of course, more information is needed to confirm that one of these individuals was the same S.W. Nye who purchased Elizabeth. Even so, it seems reasonable to conclude that some purchasers at bankruptcy slave sales resided in New Orleans,[316] especially considering that most

311. *See id.* at 1; *see also* Report & Account of Joseph Reynes Assignee at 1, *In re* Ducros & Morphy, No. 61 (E.D. La. Sept. 26, 1842) (setting forth the monies and notes "received for a Sugar plantation situated in the Parish of St. Bernard, together with . . . 23 Slaves").

312. *See* Ducros & Morphy Account Sales, *supra* note 276, at 2.

313. *See supra* note 306.

314. Account Sales, *In re* Bridge, No. 259 (E.D. La. Sept. 13, 1842).

315. NEW ORLEANS DIRECTORY, *supra* note 17, at 307.

316. For yet another example, consider that "J. R. Jennings" purchased "Slave Milly" for $400 at a bankruptcy slave sale on New Year's Eve in 1842. Account Sales, *In re* Walden, No. 274 (E.D. La. Dec. 31, 1842). At least as of February 1843, James R. Jennings was a deputy clerk of the Eastern District's federal district court. *See* NEW-ORLEANS BEE, Feb. 22, 1843, at 1 (setting forth many bankruptcy notices with James R. Jennings listed as "Dep'y Clerk of the U.S. District Court" or "Dy. Clerk of the U.S. District Court"); *see also* H.R. DOC. NO. 29-223, at 37 (1846) (excerpting a letter by N.R. Jennings, the clerk of the U.S. District Court for the Eastern District of Louisiana, dated July 17, 1846, which describes "James R. Jennings, the former deputy clerk of this court"). Also, a J.U. Lavillebeuvre returned "Slave Betsy" after purchasing her at one of the bankruptcy slave sales conducted in *In re Vairin & Kelly*. *See* Pardo, *supra* note 11, at 110–11. A contemporaneous directory of New Orleans lists J.U. Lavillebeuvre as a commission merchant, with his business located at 28 Common Street and his residence located at 9 Circus Street. NEW ORLEANS DIRECTORY, *supra* note 17, at 239.

bankruptcy slave sales involved the sale of few slaves,[317] which is consistent with the pattern of slaveownership in Southern cities during the antebellum period.[318]

Whether or not the Eastern District bankruptcy slave trade can be characterized as having been a specialized subset of the highly local New Orleans slave market, it is clear that a great deal of the Eastern District bankrupt slaveowners resided or had their principal place of business in New Orleans.[319] As such, it is a fair inference that a good deal of the bankrupted slaves resided or worked in New Orleans. This matters because "slavery as an urban institution differed greatly from its rural counterpart,"[320] particularly the potential for "[t]he development of an extensive life outside the immediate surveillance of the owner."[321]

The increased freedom of movement for urban slaves, which New Orleanian newspaper editors sharply criticized,[322] gave rise to a unique set of restraints for controlling slaves in Southern cities—namely, a "legal framework for urban slavery"[323] that tended "toward more rules rather than less, toward complexity rather than simplicity, toward harshness rather than leniency."[324] Enforcement of that framework relied heavily on the hegemony of local legal control,

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317. *See supra* note 274 and accompanying text. Of the eighty-eight cases with a bankruptcy slave sale, approximately 86% (76 of 88) of those cases involved only a single bankruptcy slave sale, thereby making it highly likely that the slaves sold at that sale constituted all of the slaves owned by the bankrupt. Of the seventy-six cases involving a single bankruptcy slave sale, approximately 76% (58 of 76) of those cases were nonjoint cases—that is, the case involved a single bankrupt. Because one of those cases, *In re Pilcher*, involved only the sale of a fractional interest in a slave, *see* Pardo, *supra* note 11, at 110 n.188, the number of slaves sold has been recorded for fifty-seven of the fifty-eight nonjoint cases in which a single bankruptcy slave sale occurred. That group of cases accounts for approximately 56% (57 of 101) of the Eastern District bankruptcy slave sales. For those sales, approximately 49% (28 of 57) of them involved the sale of only one slave, and approximately 74% (42 of 57) of them involved the sale of four or fewer slaves. When using case file documents and newspaper notices to document the bankrupt's residence or principal place of business, *see supra* notes 299–303 and accompanying text, approximately 88% (50 of 57) of the bankrupts in the above-referenced fifty-seven cases resided or had their principal place of business in New Orleans. The percentage of New Orleanian bankrupts in this group of cases rises to 98% (56 of 57) when also using a New Orleans directory to document residence or principal place of business. *See supra* note 306 and accompanying text.

318. *See* WADE, *supra* note 26, at 21–22.

319. *See, e.g.*, *supra* note 317.

320. WADE, *supra* note 26, at 27.

321. *Id.* at 145; *see also* BLASSINGAME, *supra* note 293, at 2 ("The anonymity available in a large seaport and the sizeable number of free Negroes made it impossible for New Orleans slaveholders to maintain the same kind of rigid control over their 14,484 bondsmen as did planters who had a readily identifiable and largely immobile labor force.").

322. *See* WADE, *supra* note 26, at 48–49, 51–52, 92.

323. *Id.* at 109.

324. *Id.* at 106.

exercised both by a large police force,[325] and especially by the local judiciary.[326] Given this backdrop, we might expect that many of the Eastern District's bankrupted slaves, prior to being thrust into the bankruptcy system by the caprice of their owners, had to contend on a daily basis with the law—whether having to conform their behavior because of the law's long shadow or whether having been directly confronted by the law's reification in the form of the police and the municipal courts. A slaveowner's bankruptcy filing represented an added layer of legal complexity and harshness, this time in the form of federal law, which would run further roughshod over the lives of bankrupted slaves.

C. Waiting for Bankruptcy Auction Day

What happened to a bankrupted slave between the time that the court entered the decree declaring his or her owner to be a bankrupt and the time that the U.S. Marshal sold the slave at auction to a new owner?[327] The reports from the Eastern District sales books do not provide any information on this front. Some of the documents from the Eastern District case files, however, suggest that some of the slaves may have been jailed while awaiting sale. Before turning to that evidence, it is worth clarifying a brief observation about slaves and

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325. In his discussion of the "elaborate police systems" established by Southern cities to control their slave population, Wade notes that "travelers were often astonished at their extent." *Id.* at 98. James Stuart, a European who visited New Orleans in March and April 1830, commented on the city's "corps of mounted *gens d'armes*," noting that "the appearance of an armed police" rendered New Orleans unlike "the free cities of America." 2 JAMES STUART, THREE YEARS IN NORTH AMERICA 194, 202 (Edinburgh, Robert Cadell 1833), *discussed and quoted in* WADE, *supra* note 26, at 98–99. Toward the end of the 1850s, "New Orleans . . . had a complement of 300 day and night policemen under a chief, four lieutenants, and ten sergeants." WADE, *supra* note 26, at 100, 302 n.70. To place the size of the police force in context, consider the following: According to U.S. census data, during the two-decade period spanning 1840 to 1860, while the total population of New Orleans increased from 102,193 to 168,675, its slave population decreased from 23,448 to 13,385. *Id.* app. at 325–26. Or put another way, while the total population grew by approximately 65%, the slave population decreased from approximately 23% to approximately 8% of the total population. This pattern is emblematic of the demographic shift that occurred in Southern cities during the antebellum era. *See id.* at 16.

326. *See* WADE, *supra* note 26, at 105:

> Municipal courts were . . . the judicial centers of urban slavery. In them lay the final power of discipline over bondsmen outside the master's premises. . . . This meant that authority, so clearly focused on the master in the country, would be at least shared if not dominated by a public tribunal. . . . This diffusion of power was a unique feature of bondage in the towns.;

see also KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 192 (6th prtg. 1968) ("Courts, police, and militia were indispensable parts of the machinery of control.").

327. Most of the Eastern District's bankrupted slaves were sold at public auction. *See infra* text accompanying notes 404–405.

bankruptcy made by Richard Wade in his work on slavery in Southern cities during the antebellum period.

Discussing the jailing of urban slaves when they violated the law, Wade notes that they "would not languish [in prison] long" as a result of intervention by their owners, who "insisted that their property not be detained needlessly."[328] He then contrasts this scenario (in an endnote) to the imprisonment of slaves as a result of the bankruptcy process: "In bankruptcy cases, of course, the opposite occurred. Slaves might remain in jail until the courts disposed of the property."[329] To support this claim, Wade refers to the observations made by Fredrika Bremer, a Swedish writer, during her travels in America from 1849 through 1851,[330] whom Wade describes as having "r[u]n across a group of women slaves in a New Orleans jail who claimed to have been there for two years."[331] Wade unfortunately fails to include any other details regarding Bremer's encounter with the female slaves. A closer look at Bremer's recounting of the experience, however, reveals that she very likely did not encounter bankrupted slaves.[332]

Bremer visited the New Orleans jail on January 4, 1851.[333] She described her encounter with the female slaves, in part, as follows:

> There sat under this piazza a group of negro women, apparently enjoying the sun, which was then shining warmly. They looked so good and quiet, and they all, especially two young girls, bore so evidently the stamp of innocence and of good disposition, that I asked, with no small degree of astonishment:
>
> "Why are these here? What crimes have they committed?"
>
> "They have committed no offense whatever," was the reply. "But their master having given security for a person who is now bankrupt, they are brought in here to prevent their being seized and sold by auction to cover the demand; and here they will remain till their master finds an opportunity of recovering them."[334]

Bremer's account clearly reveals that the owner of the imprisoned women was distinct from the individual described to be

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328. WADE, *supra* note 26, at 185.

329. *Id.* at 312 n.18.

330. *See* Adolph B. Benson, *Introduction* to AMERICA OF THE FIFTIES: LETTERS OF FREDRIKA BREMER, at vii, ix, xvi (Adolph B. Benson ed., 1924).

331. WADE, *supra* note 26, at 312 n.18 (citing AMERICA OF THE FIFTIES, *supra* note 330, at 272–74).

332. Concerns exist about relying on accounts by travelers to depict the domestic slave trade. *See, e.g.*, 1 ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY 51 (new ed. 1995) ("Most so-called observations or travel accounts were actually polemics against or for slavery."); WADE, *supra* note 26, at 285 ("Visitors usually spent only a few days in each city, talked to a limited number of people, and came to the South with fixed views on the Negro and slavery. But some, like Frederick Law Olmstead, convey an enormous amount of information as well as many perceptive insights.").

333. *See* AMERICA OF THE FIFTIES, *supra* note 330, at 272.

334. *Id.* at 273.

"bankrupt" by the person who showed Bremer the jail—specifically, the mention that the slaveowner gave security for the "bankrupt" individual. This suggests the possibility that a creditor loaned money to the individual, before he became bankrupt, on the condition that the slaveowner would guarantee the individual's debt—that is, if the individual failed to pay the debt, the creditor would have the right to seek repayment of the debt from the slaveowner.[335] Or perhaps the creditor loaned the money to the individual on the condition that the slaveowner offer his slaves as collateral for the individual's debt—that is, if the individual failed to pay, the creditor would have the right to seize the slaveowner's slaves, sell them, and use the sale proceeds to satisfy the individual's debt.[336] Whatever the credit arrangement may have been, it is clear that the slaveowner had not been declared a bankrupt and thus that the imprisoned women did not fall within the category of "bankrupted slaves" as defined in this Article.[337]

Judith Schafer, in her study of slave sales advertised in New Orleans newspapers in 1850, notes that most were court-ordered sales and that "[i]n many of these auctions, the slave was seized and imprisoned until the date of auction."[338] Similarly, in her study of Louisiana slavery, she observes that, "[a]s soon as a creditor filed . . . a suit [in a debt-seizure case], the court in which the creditor filed issued

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335. *Cf.* KILBOURNE, *supra* note 34, at 3 (noting that the "pattern of contingent guaranties, which emerged in the early decades of the nineteenth century, was decisive in the evolution of the credit system and was repeated countless times as the economy of the region grew and credit markets consolidated in places such as New Orleans").

336. For a discussion of antebellum credit transactions involving slaves as collateral, see *id.* at 49–74; MORRIS, *supra* note 44, at 121–31; Martin, *supra* note 35. For a general discussion of the different types of antebellum financial transactions involving a creditor's demand of security, see BALLEISEN, *supra* note 62, at 30–31.

337. The credit arrangement between the parties does illustrate the nature of the "interlinked strands within the credit system" of antebellum America where "the economic fortunes of antebellum proprietors were inextricably bound up with one another." BALLEISEN, *supra* note 62, at 31. Accordingly, one might be tempted to argue that, although the Bremer example did not involve bankrupted slaves, the bankruptcy process did set off a chain reaction that eventually led to the imprisonment of the women in the New Orleans jail. The Bremer account, however, does not provide sufficient detail to conclude that a court had declared the individual, for whom the slaveowner gave security, to be a bankrupt. As Balleisen has noted, Americans in the 1800s used the terms " 'bankrupt' and 'insolvent' interchangeably . . . in their everyday speech" when "refer[ing] to individuals who could not pay their just debts, whose creditors would not grant extensions in the time of payment, and who, as a result, had to stop the transaction of business on their own responsibility." *Id.* at 234 n.3. Put another way, use of the term "bankrupt" did not necessarily mean that a court had decreed an individual to be a bankrupt under the 1841 Act. Given that Congress repealed the 1841 Act on March 3, 1843, Act of Mar. 3, 1843, ch. 82, 5 Stat. 614, and given that the female slaves whom Bremer encountered in January 1851 told her that they had been in the jail for two years, *see* AMERICA OF THE FIFTIES, *supra* note 330, at 274, it seems highly unlikely that the "bankrupt" individual in the Bremer account had been declared a bankrupt. Any case commenced after March 3, 1843, let alone in 1849, would have been improper, and thus a court would not have entered a bankruptcy decree in such a case.

338. Schafer, *supra* note 39, at 41.

an order of sequestration for the slave or slaves involved, which meant imprisonment in the parish jail pending the outcome of the suit."[339] Courts issued such orders with the goal of "prevent[ing] debtors from leaving the state with their property."[340]

All of this brings us back to the question of what the experience of the Eastern District's bankrupted slaves may have been while awaiting sale on bankruptcy auction day. Recall that, upon the district court declaring a debtor to be a bankrupt, the bankrupt's property and property interests vested in the assignee, whom the 1841 Act tasked with liquidating the bankruptcy estate.[341] In furtherance of this goal, federal district courts promulgated local rules commanding or enabling the assignee to "take . . . possession and control of the estate."[342] What did assignees in the Eastern District do with bankrupted slaves? Did such slaves, like the slaves in the nonbankruptcy debt-seizure cases described by Schafer, find themselves routinely jailed?

We have already seen in the case of Arthur Morrell that the federal district court issued various writs of possession with regard to Morrell's slaves upon the requests of James Bach, the appointed assignee.[343] For one of those requests, Judge McCaleb ordered, "[L]et a writ of possession issue directed to A S Robertson marshal of this Court to seize the slaves in said petition in possession of the Bankrupt & his wife, *and keep them in his custody until the further order of this Court*."[344] When Bach sought permission from the court to sell two of the slaves seized by the U.S. Marshal, Drake and China, the assignee's sale petition indicated to the court that "both [slaves were] in the Parish jail of the Parish of Orleans."[345]

Additional records from the Eastern District confirm that other bankrupted slaves, like Drake and China, were imprisoned.[346] For

339. SCHAFER, *supra* note 44, at 171.

340. *Id.*

341. *See supra* notes 179–181 and accompanying text.

342. BANKR. D. KY. R. LX (1842) (repealed), *reprinted in* KY. BANKRUPTCY RULES, *supra* note 189, at 36; *see also, e.g.*, BANKR. D.D.C. R. 40 (1842) ("[T]he assignee on proper evidence and by motion to the court, may have the requisite order or process of the court, to put him in possession of the bankrupt's estate . . . .") (repealed), *reprinted in* D.C. BANKRUPTCY RULES, *supra* note 96, at 10; BANKR. D. VT. R. 53 (1842) (same) (repealed), *reprinted in* VT. BANKRUPTCY RULES, *supra* note 96, at 10.

343. *See supra* notes 21–25 and accompanying text.

344. Bach Petition for Slave Seizure, *supra* note 18, at 1 (emphasis added).

345. Bach Petition to Sell Slaves Drake and China, *supra* note 22, at 3.

346. Also, New Orleans newspaper advertisements announcing bankruptcy slave sales sometimes indicated the jailing of bankrupted slaves. *See, e.g.*, NEW-ORLEANS BEE, Jan. 9, 1843, at 2:

> By virtue of an order of court, issued from the honorable the District Court of the United States . . ., I will expose at public sale . . . the following described property and slaves,

example, in the joint case of Justus Vairin and James J. Kelly, Richard Nugent, the assignee, reported having "Paid Jail fees of Slave Alfred $16.50 to Jailor."[347] In the case of François Coulon Jumonville, the U.S. Marshal conducted an asset sale in March 1846, at which he sold "Mariah, . . . aged about 28 years, said to be a good subject," and no other property.[348] Against the $275 paid by Joseph Moss for Mariah, the U.S. Marshal charged the estate "jail fees" in the amount of $12.00.[349] Finally, in the case of James Grice, who surrendered Burrell, a "valuable cook," and Robertson, an "Engineer," upon filing for bankruptcy,[350] the assignee in the case, William H. White, charged the estate $8.87 for "[j]ail fees of Slave Robertson," and $35 for "[k]eeping negroes Robertson and Burrell and clothes."[351]

Without systematically reviewing all of the records in the Eastern District case files for those cases in which a bankruptcy slave sale occurred,[352] I cannot make any claim regarding how frequently bankrupted slaves were jailed. Yet evidence has shown us that the bankruptcy process did cause some bankrupted slaves to be

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> viz: . . . The right, title and interest of the bankrupts in and to the mulatto Easton, about 45 years, now in jail.

347. Amended Report of Assignee at 1, *In re* Vairin & Kelly, No. 89 (E.D. La. Dec. 9, 1842).

348. Account Sales, *In re* Jumonville, No. 611 (E.D. La. Mar. 21, 1846).

349. *Id.*

350. Schedule of J.M. Grice, *In re* Grice, No. 184 (E.D. La. Apr. 24, 1842).

351. Assignee's Report at 2, *In re* Grice, No. 184 (E.D. La. Dec. 26, 1842). For a discussion of the daily cost of jail fees for slaves in Ascension Parish, see SCHAFER, *supra* note 44, at 171 n.33.

Other slave-related expenses paid by assignees included medical expenses for and municipal taxes on slaves. For an example of medical expenses for slaves, Joseph B. Marks, the assignee in the joint case of William and Samuel Stackhouse, reported a payment to "Campbell & Mackie for medical services to slave Solomon" in the amount of $51.00. Account Filed by the Assignee at 1, *In re* Stackhouse & Stackhouse, No. 76 (E.D. La. July 19, 1842). A New Orleans directory from 1842 includes listings for Dr. Campbell, located on Camp Street between Girod and Julia Streets, and for Dr. J.M. Mackie, located at 43 Natchez Street. NEW ORLEANS DIRECTORY, *supra* note 17, at 62, 259. For an example of municipal taxes on bankrupted slaves, the case file for Louis Germain Sassinot, *In re* Sassinot, No. 153 (E.D. La. Apr. 4, 1842), includes a group of receipts bounded by a piece of paper listing at the top "No. 153, L. G. Sassinot, Bankrupt," followed by a caption titled "Bills paid by Th[eophile] Barbancey assignee," and last followed by the year, 1842. Included within those receipts is a receipt (in French) dated May 1, 1842, for the amount of $7.50, issued by the police department for the First Municipality of New Orleans, indicating that the payment received was in connection with the assessment of an 1841 property tax. The back of the receipt indicates that the $7.50 was paid on account of five slaves ("5 Esclaves — $7.50"). The U.S. Marshal sold a total of five slaves in Sassinot's bankruptcy case. *See* Account Sales, *In re* Sassinot, No. 153 (E.D. La. Aug. 22, 1842) (indicating that the U.S. Marshal sold "Slave Tom"); Account Sales, *In re* Sassinot, No. 153 (E.D. La. July 21, 1842) (indicating that the U.S. Marshal sold "Slave Ann or Hannah," "Slave John," "Slave Gibson," and "Slave Sarah").

352. *See* Pardo*, supra* note 11, at 103–09 (discussing scope of review of Eastern District case files).

incarcerated.[353] What, then, might have been the living experience of incarcerated bankrupted slaves?

In his discussion of antebellum prison conditions encountered by urban slaves, Wade begins by noting that European travelers tended to comment favorably on those conditions, pointing to the commentary by Karl Bernhard on the "remarkable neatness" of a Charleston jail.[354] Along similar lines, recall Fredrika Bremer,[355] who visited various New Orleans prisons, describing their "outward management" to be "excellent," with "[o]rder and cleanliness prevail[ing] throughout."[356] Or, for a local view, consider the observations made in the 1845 guidebook, *Norman's New Orleans and Environs*, with its inherent boosterism of the city, describing the living conditions in the Second Municipality's prison:

> The prisoners are kept at constant labor; and their food, though not luxurious, is of a wholesome nature, which may, when their abstinence from intemperate habits is taken into consideration, account for the excellent state of their health. It would not be hazarding much to say that many here were never before accustomed to so many of the comforts of life . . . for they lodge upon clean and comfortable bedding, surrounded by moscheto bars; and, once a week, at least, can enjoy the luxury of a bath.[357]

Wade does quick work of eviscerating any notion that prison conditions would have been humane. They were nothing short of appalling, he argues, noting that conditions were the worst for black prisoners.[358] He makes his case by focusing on the conditions of jails in New Orleans, recounting how "a committee of the First Municipality

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353. Other evidence from this study supports further inferences regarding the incarceration of bankrupted slaves. It has been observed that "[s]laves sold at auction at the St. Louis and St. Charles Hotels [in New Orleans] were held nearby in slave jails." McInnis, *supra* note 208, at 115. As discussed further below, all of the bankruptcy slave sales held in New Orleans were public auctions, with the majority of slaves from that group of sales sold at the St. Louis Hotel. *See infra* text accompanying notes 411, 416. Consistent with the practice of slaveowners hiring out their slaves to third parties, *see supra* note 293, the possibility also exists that some assignees may have hired out bankrupted slaves. *Cf.* EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 390–91 (First Vintage Books 1976) (1972):

> Between 5 and 10 percent of the slaves of the South could expect to be hired out during any given year in the late antebellum period. . . . These slaves came from relatives of deceased slaveowners, who were settling the estate; *from authorities who were sorting out bankruptcy*; from mobile planters who were setting up new plantations and needed time to get ready for a full work force; and from settled planters who had bought a large group of slaves and could not absorb it immediately.

(emphasis added).

354. WADE, *supra* note 26, at 184, 312 n.14.

355. *See supra* notes 330–334 (discussing Fredrika Bremer, a Swedish writer who traveled in America from 1849 through 1851).

356. AMERICA OF THE FIFTIES, *supra* note 330, at 272.

357. BENJAMIN MOORE NORMAN, NORMAN'S NEW ORLEANS AND ENVIRONS 131–32 (Matthew J. Schott ed., La. State Univ. Press 1976) (1845).

358. *See* WADE, *supra* note 26, at 184.

issued a sharp rebuke to its jailor when it found the walls without whitewash, great overcrowding, [and] sick slaves mingling with the healthy."[359]

Wade also discusses a New Orleans grand jury report from 1837, which described two of the city's three jails as "worse than 'dreadful' accounts had indicated," including the Second Municipality's prison (i.e., the one described in such glowing terms in *Norman's New Orleans and Environs*), where black prisoners "were kept in five 'dens' which measured ten feet square with a small door fifteen inches wide providing the only outlet," during which time "[t]he temperature outside was between 90 and 95 degrees, while the rooms were much hotter and filled with 'filth and abominable odors.' "[360]

These are the types of conditions that would have awaited the Eastern District's bankrupted slaves who were incarcerated as a result of being swept into the federal bankruptcy process, and all as a result of their bankrupt slaveowners' desire for financial freedom. In extreme circumstances, it was not unheard of for Louisiana slaves incarcerated in debt-seizure cases to die in custody as a result of horrendous prison conditions.[361] And at least one Eastern District bankrupted slave, Felicité, died before the U.S. Marshal could sell her.[362] Having been unable to consult the associated case file, I do not know whether she was incarcerated at the time of her death. Regardless, given that incarceration of bankrupted slaves in terrible prison conditions occurred in the Eastern District, it seems reasonable to conclude that some bankrupted slaves from other judicial districts may have similarly been incarcerated and thus possibly have met their demise while jailed.

Finally, we might ask how long the status of bankrupted slave lasted for the black men, women, and children owned by the federal government as a result of the 1841 Act. The duration of that status can be measured by calculating the number of elapsed days from the date that the district court decreed the bankrupted slave's owner to be a bankrupt to the date of the sale at which the bankrupted slave was sold. Recall the significance of these two dates: on the bankruptcy decree date, the federal government would become the owner of the bankrupted slave; and on the sale date, the federal government would cease to be the owner.[363] Accordingly, the duration of bankrupted slave

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359. *Id.*

360. *Id.* (quoting NEW-ORLEANS BEE, July 13, 1837, at 2).

361. SCHAFER, *supra* note 44, at 171–72 ("David Cox seized Jim, a slave belonging to John Myers, and had him jailed because Myers had failed to pay Cox $307 for rent of land and slaves. The twenty-two-year-old slave died in the unheated jail . . . .").

362. *See* Pardo, *supra* note 11, at 112.

363. *See supra* Section I.C.2.

status signified the duration of the federal government's ownership of the bankrupted slaves. And, for some of those individuals, that period of time (or a portion thereof) represented a period of incarceration.

Based on information from the Eastern District docket books, the Eastern District case files consulted for this study, and the Eastern District sales books, I have been able to calculate the duration of bankrupted slave status for the slaves sold in nearly 60% (60 of 101) of the Eastern District's bankruptcy slave sales. That set of sales involved approximately 65% (313 of 480) of the Eastern District bankrupted slaves. For this group of individuals, the median and mean durations of bankrupted slave status were, respectively, 125 days and 276 days. The shortest duration occurred for Alfred and Betsy, whom the U.S. Marshal sold forty days after the district court declared Justus Vairin and James Kelly to be bankrupts;[364] and the longest duration occurred for James, whom the U.S. Marshal sold 3,997 days after the district court declared Arthur Morrell to be a bankrupt.[365]

364. *Compare* Account Sales, *In re* Vairin & Kelly, No. 89 (E.D. La. May 23, 1842) (reporting bankruptcy slave sale of Alfred and Betsy), *with* 1 EDLA DOCKETS, *supra* note 177, at 89 (indicating that the court decreed Vairin and Kelly to be bankrupts on April 13, 1842).

365. *Compare* Morrell Account Sales, *supra* note 29, at 1 (reporting bankruptcy slave sale of James), *with* Petition for Writ of Possession, *supra* note 11, at 1 (stating that "the said A Morrell filed in this Honl Court, his petition on the 3rd of February 1842, praying to be declared a Bankrupt").

FIGURE 3: DURATION OF BANKRUPTED SLAVE STATUS

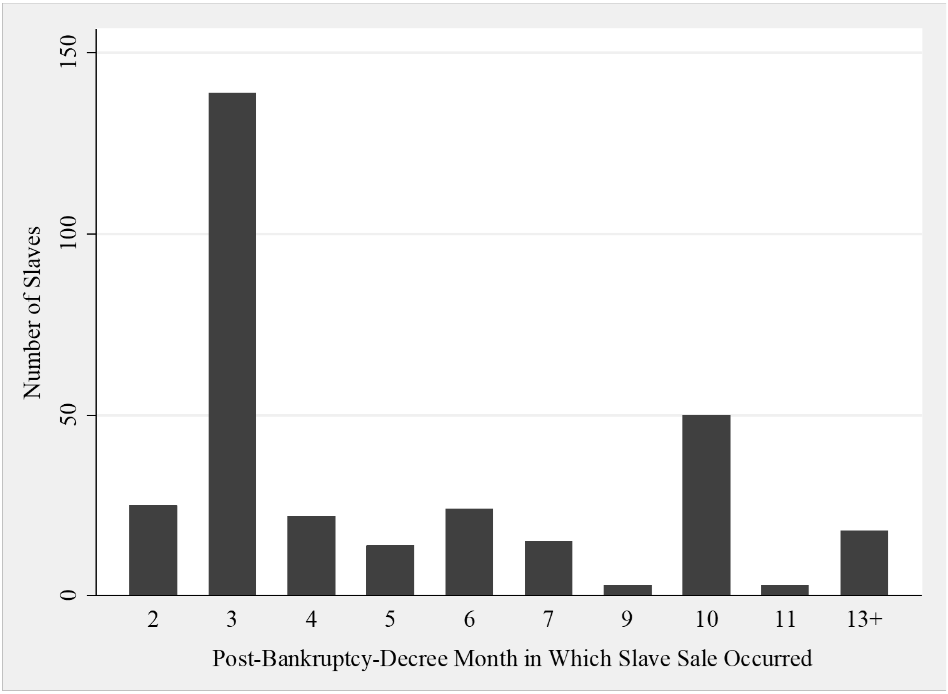

Figure 3 depicts the distribution of the duration of bankrupted slave status based on the month in which the bankruptcy slave sale occurred following the bankruptcy decree date of the bankrupted slave's owner.[366] For example, we see that the U.S. Marshal sold approximately 45% (139 of 312) of the slaves in the third month following the date of the bankruptcy decree for the owners of those slaves—that is, anywhere from sixty-one to ninety days after the bankruptcy decree date.[367] Additionally, the U.S. Marshal sold approximately 29% (89 of 312) of these slaves at least six months after they had attained bankrupted slave status.

366. Although I was able calculate the duration of bankrupted slave status for the slaves sold in approximately 59% (60 of 101) of the Eastern District bankruptcy slave sales, one of those sales, which occurred in *In re Pilcher*, involved the sale of a fractional interest in a slave. *See* Pardo, *supra* note 11, at 110 n.188. Because the sales of such interests were not included when coding the number of slaves sold at a bankruptcy slave sale, *see id.* at 110, and because the U.S. Marshal sold no other slaves in *Pilcher*, *see id.* at 110 n.188, the data illustrated in Figure 3 represent the fifty-nine observations for which there were no missing values for the number of slaves sold and the number of days that elapsed from the bankruptcy decree date to the slave sale date.

367. For purposes of illustrating the duration of bankrupted slave status, elapsed months were measured in thirty-day increments to avoid rounding issues.

The 1841 Act called for a "speedy settlement and close of the proceedings in each case in bankruptcy," which entailed, among other things, reducing the estate's assets "to money . . . at as early periods as practicable."[368] The Act also set forth a two-year benchmark, measured from the bankruptcy decree date, as the period of time within which an entire case should be administered, "if practicable."[369] Judged by these standards, apologists for assignees involved in the bankruptcy slave trade might say that Figure 3 demonstrates that they made the best of a terrible situation, expeditiously carrying out their duties with respect to most of the Eastern District's bankrupted slaves. But such an observation would be misguided for two reasons.

First, complicity is complicity. Whether the federal government's ownership of slaves lasted one day, one week, one month, or one year, any one of those time periods represents an abomination. Second, using the 1841 Act's estate-administration standards to evaluate the government's temporal ownership of bankrupted slaves obfuscates the true extent of the duration. Evaluating institutions, such as courts, according to collective temporal metrics can provide useful analytical frames.[370] Accordingly, why not use a similar approach in analyzing the 1841 Act's capacity to inflict harm? The collective number of days that black men, women, and children suffered the status of bankrupted slaves in the Eastern District totals 58,462 days.[371] Put another way, from the aggregate perspective, the federal government was the owner of Eastern District bankrupted slaves for, *at a minimum*, approximately 160 collective years.[372] Add to that figure the collective years from the other twenty-two slave districts,[373] whatever that number might be, and one can then begin to gain an actual sense of the temporal scope of the federal government's slaveowner status.

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368. Act of Aug. 19, 1841, ch. 9, § 10, 5 Stat. 440, 447 (repealed 1843).

369. *Id.*

370. *See, e.g.*, Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137, 1148 (2012) ("One hundred twelve out of 114 Supreme Court Justices have had at least some private practice experience. Collectively, those 112 Justices spent 1,898 years in the practice of law before joining the Court, almost seventeen years per Justice.").

371. This figure is based on the fifty-nine observations for which there were no missing values for the number of slaves sold and the number of days that elapsed from the bankruptcy decree date to the slave sale date. *See supra* note 366.

372. Recall that the duration of bankrupted slave status was not calculated for 167 Eastern District bankrupted slaves. Had their duration status been included, the collective number of days would clearly have been higher.

373. *See supra* notes 201–202 and accompanying text.

IV. THE PERPETRATORS OF AND PROFITEERS FROM BANKRUPTCY SLAVE SALES

In his work on the 1841 Act, Balleisen has observed that "the bankruptcy system provided hundreds of court officials and dozens of newspapers with substantial income,"[374] much of that income being derived from the proceeds of liquidated estate property,[375] which would subsequently be paid out in one form or another (e.g., court fees) to those involved in the administration of bankrupt estates.[376] The rise of this profiteering network within the bankruptcy system reflected, according to Balleisen, "the capacity of America's capitalist culture to extend the entrepreneurial impulse—to find, even in the very occurrence of commercial catastrophe, the raw materials for profit."[377]

In the abstract, availing oneself of economic opportunities created by legal systems may be all very well and good. But when the "raw materials for profit" are human beings, we need to assess quite differently what was happening in the antebellum bankruptcy system. As Russell has argued in his work on court-ordered slave sales under state law in antebellum South Carolina, the courts there "operated much like commission-merchant firms," with a profit motive driving the work of the judicial system.[378] Ultimately, those courts came to represent "a statewide auctioneering firm . . . that coordinated a large assembly of sheriffs, masters in chancery, ordinaries, and other state officials . . . who . . . drew profit from sales [of slaves] by operation of law."[379]

Eventually, the day arrived when bankrupted slaves were to be sold. As we will see, the 1841 Act gave the U.S. District Court for the Eastern District of Louisiana and its officials "a visible and prominent role in constituting and ordering slave auctions."[380] To have arrived at

374. BALLEISEN, *supra* note 62, at 139; *cf. Astounding Facts*, LE COURRIER DE LA LOUISIANNE (New Orleans), Aug. 23, 1841, at 3 (reporting that, during the debate on the bankruptcy bill on August 10, 1842, "[Senator] Pope said the bill should be entitled 'An act for the benefit of lawyers, commissioners, assignees, clerks, marshals, and their dependents.' These would be the persons who would make the most of it . . . .").

375. *Cf.* BALLEISEN, *supra* note 62, at 151 ("Of all the economic opportunities created by the 1841 Bankruptcy Law, those with the greatest potential lay with the property relinquished by bankrupts.").

376. *See supra* note 62 (discussing 1841 Act provision on fees and charges). For a description of the fees paid to court clerks, bankruptcy assignees, and U.S. Marshals and the payments made to newspapers for publishing legal notices in connection with 1841 Act cases, see BALLEISEN, *supra* note 62, at 137–39.

377. BALLEISEN, *supra* note 62, at 136.

378. Russell, *supra* note 31, at 1273.

379. *Id.* at 1275.

380. Russell, *supra* note 149, at 477.

the date of the bankruptcy slave sale required the concerted action of various participants in the bankruptcy system—bankrupt slaveowners, bankruptcy assignees, the federal district court, New Orleanian newspapers that published bankruptcy notices, and U.S. Marshals, among others. Similar to the antebellum South Carolina courts, the U.S. District Court for the Eastern District of Louisiana operated like a slave auctioneering firm. This Part describes the nature of the involvement of some of the principal perpetrators of and profiteers from the Eastern District's bankruptcy slave trade, focusing on the role of the federal district court, the bankruptcy assignees, and the U.S. Marshals.

A. Judge McCaleb and the Eastern District's Bankruptcy Assignees

Writing on the role of judges and court officials in court-ordered slave sales, Russell has observed that we cannot consider the former "merely complicit bystanders in the institution of slavery" given that "they occupied managerial roles" in structuring and supervising such sales.[381] Rather, judges, with the help of court officials, "strengthened and legitimized the institution of slavery."[382]

Looking to the Eastern District, those primarily responsible for orchestrating the bankruptcy slave trade were Judge Theodore Howard McCaleb and the group of individuals who served as assignees in the cases involving bankrupted slaves. Judge McCaleb, a Mississippian educated at Phillips Exeter Academy and Yale College,[383] received a commission to serve as the only U.S. District Judge for both the Eastern and Western Districts of Louisiana on September 3, 1841, having been nominated by President Tyler on the first of that month.[384] He remained the Eastern District's federal district judge through 1861,[385] thus making him the overseer of the district's bankruptcy slave trade for its entire duration from April 1842 through February 1853.[386]

While on the bench, Judge McCaleb served as one of the four original faculty members of the University of Louisiana's law school,

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381. *Id.*

382. *Id.* at 479.

383. Paul Brosman, *The First Hundred Years*, 22 TUL. L. REV. 543, 544 (1948); *see also* NATHANIEL CHEAIRS HUGHES JR., YALE'S CONFEDERATES: A BIOGRAPHICAL DICTIONARY 137 (2008).

384. *McCaleb, Theodore Howard*, FED. JUD. CTR., https://www.fjc.gov/history/judges/mccaleb-theodore-howard (last visited Aug. 9, 2017) [https://perma.cc/Z4QV-DZ5A]. When Congress organized Louisiana into two federal judicial districts in 1823, it authorized only a single judgeship to serve both districts. *See* Act of Mar. 3, 1823, ch.44, § 1, 3 Stat. 774, 775.

385. *McCaleb*, *supra* note 384.

386. *See supra* text accompanying note 283.

which would one day become Tulane Law School, holding the title of Professor of Admiralty and International Law,[387] and eventually serving as the school's dean.[388] Judge McCaleb, responsible for having trained a cadre of future lawyers,[389] and described by Tulane Law School's dean in 1948 as having authored opinions that "were highly respected by the bar" and as being "accomplished as an orator and public lecturer,"[390] was the same person who, "embrac[ing] the Confederate cause,"[391] resigned his position on the district court upon Louisiana's secession from the Union. Make no mistake about it: Judge McCaleb was a willing, able, and active participant in the Eastern District's bankruptcy slave trade.

Judge McCaleb, of course, could not operate autonomously in directing bankruptcy slave sales. Rather, someone had to prompt him into action. Those who did so were the bankruptcy assignees tasked with the duty to liquidate the Eastern District's bankruptcy estates that included bankrupted slaves. The assignees responsible for administering the eighty-eight cases involving bankruptcy slave sales consisted of thirty-five individuals. Among them were some noteworthy persons, such as James R. Jennings, the deputy clerk of the federal district court,[392] and Thomas Slidell, who would ultimately serve as chief justice of the Louisiana Supreme Court from 1853 to 1855.[393] But perhaps the most noteworthy of them all was Judah Phillip Benjamin (also known as J.P. Benjamin),[394] "who would emerge as the most prominent New Orleanian of his century,"[395] serving as one of Louisiana's U.S. Senators,[396] declining a nomination to serve on the

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387. Brosman, *supra* note 383, at 543–44.

388. *See McCaleb*, *supra* note 384.

389. *See* REINDERS, *supra* note 4, at 140–41:

> They [i.e., the faculty of the University of Louisiana's law school, including Judge McCaleb] forced their charges into a dawn-to-dark routine of lectures, preparing of briefs, and conducting cases in moot courts. From these superbly trained students came lawyers who later attained outstanding recognition in politics and at the bar.

390. Brosman, *supra* note 383, at 544; *cf.* REINDERS, *supra* note 4, at 140 (describing Judge McCaleb as one "of the outstanding jurists in the Crescent City").

391. *Id.*

392. *See supra* note 316.

393. SCHAFER, *supra* note 44, at 44.

394. In his role as assignee, Benjamin directed approximately 8% (8 of 101) of the Eastern District's bankruptcy slave sales. At those sales, the U.S. Marshal sold approximately 6% (30 of 480) of the Eastern District's bankrupted slaves. One of those sales also involved a bankrupt's one-quarter interest in 100 slaves, *see* Account Sales, *In re* Fortier, No. 567 (E.D. La. June 13, 1843), a figure not included in the total number of the Eastern District's bankrupted slaves, *see* Pardo, *supra* note 11, at 110.

395. ROBERT DOUTHAT MEADE, JUDAH P. BENJAMIN: CONFEDERATE STATESMAN 44 (1943).

396. *Id.* at 86.

U.S. Supreme Court,[397] and serving as Attorney General, Secretary of War, and Secretary of State for the Confederacy at different points during the Civil War.[398] We thus witness the participation of leading members of the Eastern District's legal community in running the bankruptcy slave trade, which perhaps is not surprising given that "[t]he characteristics of individuals who profited from the 1841 Bankruptcy Act were usually those of insiders—either to the workings of the bankruptcy system in a given place, or to the particular circumstances of individual bankruptcies."[399]

In thinking about Judge McCaleb and the Eastern District's assignees as some of the main perpetrators of the district's bankruptcy slave trade, we need to know how the 1841 Act choreographed their actions in order to better understand their respective complicities. The Act did not specify the conditions pursuant to which the assignee was to sell estate property, instead merely instructing that "it . . . [was] the duty of the court to order and direct a collection of the [estate's] assets, and a reduction of the same to money, . . . consistently with a due regard to the interests of the creditors."[400] Accordingly, Congress granted the courts wide latitude in structuring bankruptcy asset sales—in terms of time, place, and manner—so long as the arrangements comported with the best interests of the creditors in achieving liquidation and distribution of the bankruptcy estate.

Some district courts, relying on their rulemaking authority under the Act,[401] promulgated rules establishing a default structure for asset sales that would entail public auction of estate assets for cash.[402] The U.S. District Court for the Eastern District of Louisiana, on the other hand, opted to promulgate a rule that, while recognizing the court's ultimate authority to approve assignee sale petitions, nonetheless deferred in the first instance to the business judgment and

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397. *Id.* at 84–85.

398. *Id.* at 161, 208, 235. For a more recent biography of Benjamin, see ELI N. EVANS, JUDAH P. BENJAMIN: THE JEWISH CONFEDERATE (1988).

399. BALLEISEN, *supra* note 62, at 158. A professional network clearly existed among those who served as Eastern District assignees. For example, Benjamin collaborated with Slidell in 1834 to compile a digest of decisions by the Louisiana Supreme Court. *See* MEADE, *supra* note 395, at 37. And in the 1850s, Benjamin's law partners were Edward A. Bradford and William C. Micou, *id.* at 85, both of whom directed Eastern District bankruptcy slave sales as assignees under the 1841 Act. Like Benjamin, Bradford and Micou received nominations to serve on the U.S. Supreme Court. *See id.* at 85.

400. Act of Aug. 19, 1841, ch. 9, § 10, 5 Stat. 440, 447 (repealed 1843).

401. *See supra* note 235.

402. *See, e.g.*, BANKR. D.N.C. R. 47 (1842) ("The sale of the bankrupt's estate shall be at public auction, and for cash, unless on the report of the assignee, or with his assent, it is otherwise specially ordered by the court.") (repealed), *reprinted in* N.C. BANKRUPTCY RULES, *supra* note 62, at 7; BANKR. D. VT. R. 60 (1842) (same) (repealed), *reprinted in* VT. BANKRUPTCY RULES, *supra* note 96, at 10.

expertise of assignees in structuring sales that would maximize asset values for the benefit of creditors.[403]

From the historical evidence, the Eastern District's assignees, with the district court's blessing, overwhelmingly deemed public auction, rather than private sale, to be the ideal method for selling bankrupted slaves.[404] For approximately 81% (82 of 101) of the observations in the case study's dataset, sufficient information was unearthed to document some characteristics of the Eastern District bankruptcy slave sales. Among that subset of sales, approximately 94% (77 of 82) of them definitively involved public auction, as confirmed by descriptions in the Eastern District sales books and the legal notices in New Orleans newspapers.[405] Thus, we witness that the Eastern District's assignees and Judge McCaleb, through their coordinated efforts, made the act of purchasing a bankrupted slave "a public occasion—a spectacle."[406]

Russell's conceptualization of slave auctions provides a very useful frame for thinking about the significance of assignees' recurring recommendation and Judge McCaleb's repeated approval to structure bankruptcy slave sales as public auctions:

> Auctions represented perfectly the relational nature of property in slaves. . . . These public sales took place before a number of spectators and bidders. The persons who viewed the sales and participated in the bidding were, of course, interested in the sales as events or spectacles and also as opportunities to purchase. But the spectators and viewers might also be interested—in the legal sense—in the outcome of the auctions, as the sales reconfigured existing property interests in the slaves being sold. With each sale, new constellations of persons holding property interests formed. . . . *Considered conceptually, slave auctions were one of the mechanisms by which Southerners distributed and shared their stake in slavery. Slave property, as a social relationship, was an expression of that distributed commitment to the institution.*[407]

In light of this framing, we should look to answer two key questions. First, how did Eastern District bankruptcy slave auctions differ as events or spectacles, if at all, from nonbankruptcy court-

403. *See Nugent* Record Transcript, *supra* note 231, at 18 (reproducing Eastern District bankruptcy rule providing that an assignee's sale petition "in all cases, [had to] be accompanied by a schedule, which shall contain . . . a suggestion of the terms and conditions, the time and place of the sale, which, in the assignee's opinion, shall be most suitable for the interest of the *conditions*").

404. *Cf.* McInnis, *supra* note 208, at 112 ("Much of that commerce in slaves [in New Orleans] took place at auctions. Auctions were a vital part of the city's economy . . . .").

405. *See, e.g.*, NEW-ORLEANS COM. BULL., Aug. 1, 1843, at 4 ("By virtue of an order of court issued from the honorable the District Court of the U S for the Eastern District of Louisiana, I will expose *at public sale* . . . the following described property: The slave Julia or Juliet Ann, a negress, aged 43 years." (emphasis added)).

406. JOHNSON, *supra* note 38, at 201; *cf.* Russell, *supra* note 149, at 477 ("The dehumanization and subordination of the slave auction had direct support from legal officials and institutions.").

407. Russell, *supra* note 149, at 480–81 (emphasis added).

ordered slave auctions? And second, how did the Eastern District's assignees and Judge McCaleb use the 1841 Act to reconfigure existing property interests in bankrupted slaves?

1. The Spectacle of Bankruptcy Slave Auctions

When thinking about court-ordered slave auctions, scholars have submitted that the accurate image is that of a sale that occurred on courthouse steps.[408] Put another way, "the usual image conjured by the phrase 'slave auction'—that of a commercial sale taking place in a large city such as Charleston, South Carolina or Richmond, Virginia—is misleading."[409] Accordingly, the conventional wisdom has been that an "auction image from the commercial slave marts" should not be part of the story of court-ordered slave sales.[410]

And yet, the conventional wisdom does not hold when shifting the focus to bankruptcy slave auctions in the Eastern District. If we consider the eighty-two observations from the case study's dataset with sufficient information to document some characteristics of the Eastern District bankruptcy slave sales, *all* of the New Orleans sales—a total of seventy-three observations (i.e., approximately 89% of the eighty-two observations)—involved the public auction of 318 bankrupted slaves, or approximately 66% (318 of 480) of the Eastern District's bankrupted slaves. And crucially, as described below, *all* of these public auctions took place at three of the city's various commercial exchanges. Thus, when we think of the Eastern District's bankruptcy slave auctions, the spectacle played out as a series of commercial sales in New Orleans, America's third-largest city in 1840 and its largest slave market.[411]

I obtained information on the location of the Eastern District's bankruptcy slave sales from three sources: the U.S. Marshal's reports in the Eastern District sales books, assignee sale petitions, and legal notices of those sales published in New Orleanian newspapers. For the seventy-three observations involving sales in New Orleans, each was identified as being held in one of the following locations: (1) Banks

408. *See* DEYLE, *supra* note 32, at 168 ("The most common venues for court-ordered sales, however, were the monthly auctions held on the front steps of virtually every county courthouse across the South."); Russell, *supra* note 31, at 1278 ("The site of these [court-ordered slave] sales was not an auction block beside an urban wharf, but rather the steps of any district's courthouse."); *cf.* McInnis, *supra* note 208, at 102 ("The slave trade took place in nearly every town and city in the South. In most, however, the trade did not have a permanent physical location. Commonly, slaves were sold on court days, usually outdoors at a location near the courthouse . . . .").

409. Russell, *supra* note 31, at 1278.

410. *Id.*

411. *See supra* notes 202–203.

Arcade,[412] (2) the City Exchange, (3) Hewlett's Exchange, and (4) the St. Louis Exchange. It is important to note that references to the City Exchange and to the St. Louis Exchange were to the same location—that is, the St. Louis Exchange, which was located in the St. Louis Hotel,[413] "was originally known as the City Exchange."[414] Accordingly, the bankruptcy slave auctions in New Orleans took place in one of three locations: Banks Arcade, Hewlett's Exchange, and the St. Louis Exchange.

In discussing the New Orleans bankruptcy slave auctions, I will focus my commentary on auctions at Banks Arcade, for three reasons. First, Hewlett's Exchange did not feature prominently in the Eastern District bankruptcy slave trade: only a single bankruptcy slave auction took place there.[415] Second, the remaining bankruptcy slave auctions in New Orleans were evenly split between the St. Louis Exchange and Banks Arcade, with thirty-six auctions at each. While the U.S. Marshal sold more bankrupted slaves at the former (i.e., 223 slaves) than at the latter (i.e., ninety-three slaves), therefore possibly suggesting that the focus should be on the St. Louis Exchange, the literature on the New Orleans slave market has already discussed that location extensively[416] but has given Banks Arcade only a passing mention.[417] Accordingly, to add a new dimension to our understanding of the New Orleans slave market, I have chosen to tell the story of the bankruptcy slave auction through the lens of Banks Arcade. And third, as will shortly be revealed,

412. Banks Arcade is named after its original owner, Thomas Banks. *See Architectural Inventory*, *in* 2 NEW ORLEANS ARCHITECTURE 93, 183 (Mary Louise Christovich et al. eds., 2d prtg. 1978); Mary Louise Christovich & Roulhac Toledano, *Banking and Commerce*, *in* 2 NEW ORLEANS ARCHITECTURE, *supra*, at 65, 70. Like others, I have chosen not to use the possessive (i.e., Banks'), instead referring to the location as "Banks Arcade." *E.g.*, REINDERS, *supra* note 4, at 210; Christovich & Toledano, *supra*, at 70. Some scholars have used the possessive incorrectly, thus altering the last name of Thomas Banks. *See* BANCROFT, *supra* note 204, at 324 ("Bank's Arcade"); DEYLE, *supra* note 32, at 154 (same); WADE, *supra* note 26, at 199 (same).

413. *See, e.g.*, MCINNIS, *supra* note 29, at 164, 168.

414. 2 JOHN SMITH KENDALL, HISTORY OF NEW ORLEANS 687 (1922).

415. *See* Account Sales, *In re* Chase, No. 672 (E.D. La. Dec. 27, 1843) [hereinafter Chase Account Sales]. Hewlett's Exchange was located at the corner of Camp and Common Streets. Christovich & Toledano, *supra* note 412, at 71. A map of New Orleans produced for an 1845 guidebook, *Norman's New Orleans and Environs*, marks the exchange's location. That map appears as an inset in the back of the 1976 facsimile reproduction of the guidebook, *see* NORMAN, *supra* note 357, and can also be viewed online, *Norman's Plan of New Orleans & Environs, 1845*, LIBR. CONGRESS, https://www.loc.gov/resource/g4014n.ct000243/ (last visited Mar. 6, 2017) [https://perma.cc/8VX5-8DNH].

416. *See, e.g.*, BANCROFT, *supra* note 204, at 333–37; MCINNIS, *supra* note 29, at 164–71; WADE, *supra* note 26, at 201.

417. BANCROFT, *supra* note 204, at 324 (describing Banks Arcade as "one of the five or six most popular [slave] marts"); DEYLE, *supra* note 32, at 154 ("One visitor described Bank's [sic] Arcade, a prominent slave mart on Magazine Street, as 'lighted from above by a large sky-light, and paved with marble.' "); WADE, *supra* note 26, at 199 ("On the same day J. B. Phillips offered 'a number of negroes' at Bank's [sic] Arcade . . . .").

the bankruptcy slave auctions at Banks Arcade can be characterized by a cruel hypocrisy unique to that location, which warrants discussion.

In her work documenting the geography and architecture of the Southern slave trade, Maurie McInnis identifies various distinctions that made the New Orleans slave trade sui generis. Because of the massive scope of the trade in New Orleans, the city found itself among a select group of "cities with a large slave market [that] had a significant infrastructure dedicated to the buying and selling of humans," such as Richmond, in contrast to most other Southern towns and cities where "the trade did not have a permanent physical location."[418] The New Orleans slave trade further distinguished itself from the cities with a dedicated slave-trade infrastructure by "boldly assert[ing] itself as part of the competitive commercial landscape," in contrast to, for example, the Richmond slave trade, which was "tucked away" and "occupied a shadow landscape, largely unseen by the city's elite residents."[419] In short, the New Orleans slave trade was "the most conspicuous" of all the major markets,[420] "tak[ing] place in grand public spaces," such as "in the octagonal bar at the St. Charles Hotel and in the rotunda of the St. Louis Hotel."[421]

As previously mentioned, all but one of the New Orleans bankruptcy slave auctions took place at the St. Louis Exchange and Banks Arcade. And just like the St. Louis Exchange, Banks Arcade featured prominently in the Crescent City's commercial landscape. Designed by architect Charles F. Zimpel, Banks Arcade was constructed in 1833 on Magazine Street and ran the entire block between Natchez and Gravier Streets, consisting of a continuous three-story edifice made of red brick "with granite pillars at the first level and a parapet with central pediment."[422] Stores occupied the front of the building on Magazine Street, "behind which [a] glass pedestrian arcade extended through the block."[423] Within the building were "a hotel, offices, the armory of the Washington Artillery (Armory Hall), saloons, a restaurant, and the Toutine, a spacious, lushly decorated coffee

418. McInnis, *supra* note 208, at 102; *see also id.* at 103 ("What was particularly distinctive in these larger markets is that cities had dozens of permanent business establishments, both buildings and persons, dedicated to the trade.").

419. *Id.* at 112.

420. MCINNIS, *supra* note 29, at 164.

421. McInnis, *supra* note 208, at 113.

422. *Architectural Inventory*, *supra* note 412, at 183; *see also* REINDERS, *supra* note 4, at 210–11 (describing Banks Arcade in similar terms). A map of New Orleans produced for an 1845 guidebook, *Norman's New Orleans and Environs*, marks the location of Banks Arcade. *See supra* note 415.

423. *Architectural Inventory*, *supra* note 412, at 183.

house."[424] Additionally, the *Commercial Bulletin* had its office in the building, located at the corner of Gravier Street.[425]

Based on this description, it should be apparent that Thomas Banks, the owner of Banks Arcade, at one point had fulfilled his vision of creating a premier commercial venue,[426] one that would become, whether by design or not, "one of the five or six most popular [slave] marts" in New Orleans.[427] As a result, Banks Arcade constituted one of New Orleans's "very public places [in which] . . . the disparity between the refinement that Southern riches allowed and the barbarity of the slave trade on which Southern riches depended was most conspicuously contrasted."[428] But with the bankruptcy slave auctions recommended by the Eastern District's assignees and authorized by Judge McCaleb, a new variable was introduced into this equation—namely, a very public display of how the Southern riches of bankrupt slaveowners had crumbled away in financial ruin, of how that ruin had prompted them to seek bankruptcy relief, and of how that decision ultimately necessitated the auctioning of their slaves as the price of discharge, thus exposing them to the cruelty of the slave trade. Accordingly, bankruptcy slave auctions starkly juxtaposed the bankrupt's financial freedom with the continued enslavement of his or her slaves, with the barbarous spectacle of public auction as a transfer point.

While one can say that the hypocrisy permeating this juxtaposition was inherent in any bankruptcy slave auction (or, for that matter, any slave auction or private slave sale to pay the debts of a slaveowner), that hypocrisy was especially exacerbated in the context of bankruptcy slave auctions at Banks Arcade. You see, Thomas Banks was one of the Eastern District's bankrupt slaveowners who found himself in financial ruin, in his case "because of his support of the Texas Revolution and financial speculations in New Orleans."[429] The same Thomas Banks who not only owned Banks Arcade when he filed for

424. REINDERS, *supra* note 4, at 211.

425. *Architectural Inventory*, *supra* note 412, at 183.

426. *See id.* (stating that Banks Arcade "was intended to be a gathering place for merchants and to serve the community above Canal [Street] in the same manner as Maspero's Exchange did below Canal"); Christovich & Toledano, *supra* note 412, at 70–71 (stating that "Banks Arcade . . . was envisioned by its promoter, Thomas Banks, as a commercial center on Magazine Street to compete with Maspero's Exchange in the French Quarter").

427. BANCROFT, *supra* note 204, at 324.

428. MCINNIS, *supra* note 29, at 164.

429. *Architectural Inventory*, *supra* note 412, at 183.

bankruptcy relief,[430] but also the one who lived there.[431] The same Thomas Banks accused by Francis Conrad, the assignee in his case, of having made a fraudulent gift of three slaves, Maria, Ben, and Mary, to his sister-in-law, Ann Fogarty, on the eve of filing for bankruptcy.[432] The same Thomas Banks in whose bankruptcy case the U.S. Marshal sold a total of eight bankrupted slaves at two public auctions at Banks Arcade, including Maria, Ben, and Mary.[433]

Not only did Thomas Banks' eight slaves suffer the indignity of public auction at a time when their former owner had been granted his financial freedom,[434] they also experienced that suffering within a venue that, as Banks' prebankruptcy asset, had been instrumental in purchasing his financial freedom. And so too did the other eighty-five bankrupted slaves publicly auctioned at Banks Arcade. For a period of time, then, this commercial center on Magazine Street represented the full array of the Eastern District's bankruptcy slave trade, serving as (1) the home of a bankrupt slaveowner, (2) the headquarters of one of the main New Orleans newspapers that printed hundreds of legal notices announcing bankruptcy slave sales, and (3) the setting where the U.S. Marshal subjected many of the Eastern District's bankrupted slaves to the dehumanizing ritual of the slave trade.

Finally, we should return to my claim that Judge McCaleb and the Eastern District's assignees, working in tandem, made the act of purchasing a bankrupted slave a public spectacle. I have made the case that the district's bankruptcy slave sales were conspicuously public, but I have yet to substantiate that these sales were a spectacle. On this score, a description by a European traveler's visit to Banks Arcade should suffice:

430. *See Houston* Record Transcript, *supra* note 231, at 90–91 (reproducing documents from Banks' bankruptcy case, including his bankruptcy petition, filed on July 30, 1842, and an excerpt from his schedule of assets, also filed on that date, stating that Banks owned "[t]he block of three story brick buildings, forming the entire front of Magazine street, between Gravier and Natchez streets, with rear block known as the Arcade Exchange, valued at $350,000.00"). In today's dollars, the value provided by Banks for Banks Arcade in his schedule of assets would have been approximately $8.86 million. *See supra* note 30 (discussing adjustment of dollar figures to present-day dollars).

431. *Architectural Inventory*, *supra* note 412, at 183. ("Thomas Banks resided in his arcade at No. 19 Natchez."). A New Orleans directory from 1842 includes a listing for Thomas Banks at 19 Natchez Street. NEW ORLEANS DIRECTORY, *supra* note 17, at 19.

432. *See* Transcript of Record at 2–3, 8, 25–26, Forgay v. Conrad 47 U.S. (6 How.) 201 (1848) (No. 147) [hereinafter *Forgay* Record Transcript].

433. Account Sales, *In re* Banks, No. 353 (E.D. La. July 22, 1846) (reporting on sale of three bankrupted slaves, Maria, Ben, and Mary, and no other assets); Account Sales, *In re* Banks, No. 353 (E.D. La. Feb. 15, 1843) (reporting on sale of five bankrupted slaves and other assets).

434. Judge McCaleb granted Thomas Banks a discharge on December 5, 1842. *See Forgay* Record Transcript, *supra* note 432, at 24. The U.S. Marshal sold Banks' former slaves in February 1843 and July 1846. *See supra* note 433.

> To the stranger, one of the most interesting places in the city is the auction-mart in Bank's [sic] Arcade, where negroes are disposed of in the same manner that animals are in England. . . . The auction-mart is a large room, about 150 feet long by 35 feet wide, well lighted, and provided with seats for the slaves, desks for the transaction of business, and an auctioneer's stand. The negroes are placed upon an elevated platform immediately in front of the crier . . . . The auctioneer commenced by reading a printed description of the negro first put up . . . . [T]he bidders caused him to strip his coat off, and began to examine his person. One felt the muscles of his arm; another opened his mouth, and inspected his teeth, as you would those of a horse; and then his joints and bones were examined, to see whether he was in all respects sound. . . . Jests were bandied about at the expense of the poor creature; and after a determined effort on the part to make the most of his man, the boy was sold to the highest bidder and removed from the platform.[435]

The manner of conducting a bankruptcy slave auction and a nonbankruptcy slave auction probably did not differ all that much. At bottom, "the sale of slaves by a leading auctioneer was . . . a storytelling and physical performance[ ]"[436] that revoltingly disregarded the humanity of those being sold.[437]

2. Reconfiguring Property Interests in Bankrupted Slaves

Having considered the manner in which the Eastern District's bankruptcy slave auctions differed from nonbankruptcy court-ordered slave auctions, the question remains of how the district's assignees and Judge McCaleb used the 1841 Act to reconfigure property interests in bankrupted slaves. In the simplest case, a bankruptcy slave sale would reconfigure existing property interests in bankrupted slaves in a very straightforward fashion. To illustrate, imagine a debtor who filed for bankruptcy relief and who fully owned a slave at that time, with no other individual or entity having an interest in the slave. Upon being decreed a bankrupt, the bankrupt's ownership interest in the slave would vest in the bankruptcy estate, making it the owner while simultaneously divesting the bankrupt of his prior ownership interest.[438] This constituted the first reconfiguration of the property interest in the slave.

Subsequently, the assignee would look to sell the slave with the district court's approval.[439] Sale of the slave to a third-party purchaser

435. *New Orleans*, 18 CHAMBERS'S EDINBURGH J. 314, 315 (1853).

436. McInnis, *supra* note 208, at 115.

437. *Cf.* JOHNSON, *supra* note 38, at 255–56 n.7:

> Auction houses had the same sort of lay-out and made the same sort of provisions for buyers to inspect slaves as did traders. This meant that the same daily reproduction of racial knowledge on the part of slave holders . . . characterized auction sales as other sales even though the mechanism of sale—especially in its presentation of buying a slave as a competition between white men—was more exaggerated.

438. *See supra* notes 179–180 and accompanying text.

439. *See supra* note 182 and accompanying text.

would have the effect of transferring title from the bankruptcy estate to the purchaser,[440] thus constituting the second reconfiguration of the property interest in the slave. Provided the slave had been purchased with cash, and provided the slave could not be returned to the assignee,[441] the sale would signify the termination of the federal government's interest in the slave.

But of course, things are often more complex than the simplest case, and bankruptcy slave sales were no exception. It is beyond the scope of this Article to provide a comprehensive account of the permutations that could produce varied reconfigurations of property interests in bankrupted slaves. Nonetheless, I will briefly discuss two variations on the simplest case to illustrate how matters could become more complicated. The first scenario involves a debtor who filed for bankruptcy while owning a mortgaged slave, and the second scenario involves a third-party purchaser who could not afford to pay the full purchase price in cash.

Broadly speaking, a mortgage involves a transaction pursuant to which a debtor agrees to give an interest in some of his or her

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440. *See* Act of Aug. 19, 1841, ch. 9, § 3, 5 Stat. 440, 443:

> [T]he assignee . . . shall be vested with all the rights, titles, powers, and authorities to sell, manage, and dispose of the same [i.e., the property vested in him], . . . as fully, to all intents and purposes, as if the same were vested in, or might be exercised by, such bankrupt before or at the time of his bankruptcy declared . . . .

(repealed 1843).

441. *Cf.* JOHNSON, *supra* note 38, at 131:

> Louisiana had strong warranty laws designed to rebalance the relationship between seller and buyer. The asymmetry of information in the slave market had been addressed in the Louisiana *Civil Code* by the law of redhibition . . . . Specific provisions of the *Civil Code* limited actions for redhibition to those cases in which the problem was not apparent upon 'simple inspection' and not explicitly exempted from the general warranty. The sales of slaves (and animals) could be voided for 'vices' of either body or character.

(footnote omitted). My review of the Eastern District case files and associated court records generally did not uncover evidence of "specific declarations, which took the form of either a written statement of the maladies or 'vices' that were specifically excepted from . . . warranty or simply a clause voiding the standard form of warranty ('guaranteed against the vices and maladies prescribed by law')." *Id.* This appears consistent with Johnson's observation that "[s]uch provisions . . . were comparatively rare, appearing on only six percent of the Acts of Sale notarized by buyers in the New Orleans market." *Id. But see* Kotlikoff, *supra* note 307, at 37, 46 (finding that, "for [a] sample of 3,024 individual slaves sold during the years 1804 to 1862" in New Orleans, "84.3 percent were fully guaranteed").

That said, recall the sale of Drake and China in the case of Arthur Morrell. *See supra* text accompanying note 345. The legal notice in the *Commercial Bulletin* announcing that sale stated that the U.S. Marshal would sell "at Banks' Arcade . . . China, a woman aged about 49, and Drake, a boy aged about 16 years." NEW-ORLEANS COM. BULL., June 24, 1843, at 3. The notice further stated as follows: "[B]oth slaves will be sold together, as the boy is an idiot and has been taken care of by the woman. *They will be sold without guarantee whatsoever*." *Id.* (emphasis added).

For an example of the return of a slave purchased at a bankruptcy slave sale, see Pardo, *supra* note 11, at 110–11.

property (i.e., the collateral) to a creditor in order to secure repayment of debt owed to the creditor. As a result of the transaction, the creditor acquires a right to have the collateral seized and sold in the event of the debtor's failure to comply with the repayment terms—that is, a right contingent on the debtor's default. Upon sale of the collateral, the creditor can apply the sale proceeds to satisfy the debt. Furthermore, sale of the collateral transfers its title from the debtor to the third-party purchaser.

Returning to the scenario of a case under the 1841 Act, imagine a debtor who filed for relief and at the time owned a slave. Further imagine that, long before seeking bankruptcy relief, the debtor had mortgaged the slave,[442] and that the debtor had defaulted on the mortgage shortly before the bankruptcy filing. Upon being decreed a bankrupt, the slaveowner's property interest in the slave would vest in the bankruptcy estate (again, the first reconfiguration of the property interest in the slave). Unlike the simple case, however, the estate would have taken the slave subject to the mortgagee's *noncontingent* interest (given the debtor's prebankruptcy default) to have the slave seized and sold.[443] This scenario thus raises the issue of the assignee's power, if any, to sell the bankrupted slave encumbered by a mortgage.

While modern bankruptcy law expressly provides a bankruptcy trustee (i.e., the present-day analogue to the 1841 Act assignee) the authority to sell estate property free and clear of any interest in the property, including a mortgage, if certain conditions are satisfied,[444] the 1841 Act was unclear on the matter. Recall that the Act did not "annul, destroy, or impair . . . any liens, mortgages, or other securities on property" that were valid under state law and undisplaced by specific provisions of the Act.[445] One federal district court opined that this language clearly reflected Congress's "intention . . . that such

442. *See* KILBOURNE, *supra* note 34, at 56:

> Louisiana law classified slaves as immovable for purposes of conveyancing. The creation of a valid security interest in a slave could only be accomplished with a mortgage instrument in notarial form. The instrument obtained its ranking vis-à-vis third parties according to time of filing in the parish mortgage office registry. Once recorded, the instrument preserved the creditor's security interest in the property described therein for a period of ten years, and it could be reinscribed for an additional ten-year period.

443. *Cf. Ex Parte* Christy, 44 U.S. (3 How.) 292, 331 (1845) (Catron, J., concurring in part and dissenting in part) (incorporating opinion of Justice Baldwin, decided in his capacity as Circuit Justice of the Eastern District of Pennsylvania, which stated that the 1841 Act "vests all the property and the rights of property of the bankrupt in the assignee . . . [who] then stands in the position of the bankrupt before and at the time of his bankruptcy declared" (internal quotation marks omitted)).

444. *See* 11 U.S.C. § 363(f) (2012).

445. *See* Act of Aug. 19, 1841, ch. 9, § 2, 5 Stat. 440, 442 (repealed 1843).

mortgages should be protected as privileged liens."[446] Furthermore, the Act expressly gave the assignee the "full authority, by and under the order and direction of the proper court in bankruptcy, to redeem and discharge any mortgage . . ., upon any property, real or personal, . . . and to tender a due performance of the conditions thereof."[447] But nowhere did the Act expressly give the assignee the power to sell mortgaged property free and clear of the encumbering mortgage.

Forced to grapple with the issue of the assignee's sale power, federal courts engaged in residual bankruptcy policymaking to fashion limits on what the assignee could do in such a situation.[448] One district court took the view that, absent the mortgage creditor's consent, the only option available to the assignee to remove the mortgage from the collateral would be to exercise the redemption power expressly granted by the Act—specifically, by paying the mortgage creditor the balance of the debt owed to it.[449] Alternatively, the same court took the view that, if the creditor consented, "the court [could] order a sale of mortgaged premises, where the creditor applies to the court for that purpose, and that, under the decree ordering such sale, a good, valid, and sufficient legal title to the premises may be made to pass to the purchaser."[450] Finally, a federal circuit court held that the sale of mortgaged property by the assignee for an amount less than the amount owed to the mortgage creditor would fail to discharge the mortgage—that is, the third-party purchaser would take the property subject to the mortgage.[451]

The U.S. District Court for the Eastern District of Louisiana took a different approach than these courts, exercising its residual bankruptcy policymaking in the form of local bankruptcy rules to address the gap in the 1841 Act.[452] Moreover, its approach represented a muscular flexing of federal power at the expense of state law, which stood in stark contrast to the Supreme Court's dictum in an 1846 decision stating that, under the 1841 Act, mortgages were "to be held of

446. Yeadon v. Planters' & Mechs.' Bank, 30 F. Cas. 793, 794 (D.S.C. 1843) (No. 18,130).

447. § 11, 5 Stat. at 447.

448. *See supra* note 210 and accompanying text (discussing residual bankruptcy policymaking).

449. *See Yeadon*, 30 F. Cas. at 794 ("I understand the law to be that the court in bankruptcy cannot dispose of such security of a creditor *without his consent*, but that the assignee may, under the direction of the proper court in bankruptcy, redeem and discharge the same." (emphasis added)).

450. *Yeadon*, 30 F. Cas. at 794–95.

451. *See Ex Parte* Christy, 44 U.S. (3 How.) 292, 326, 332 (1845) (Catron, J., concurring in part and dissenting in part) (incorporating opinion of Justice Baldwin decided in his capacity as Circuit Justice of the Eastern District of Pennsylvania).

452. For a modern-day example of bankruptcy courts using their local rulemaking authority to engage in residual policymaking, see Pardo & Watts, *supra* note 210, at 436–38.

equal obligation and validity in the courts of the United States as they would be in the state courts."[453] The Eastern District's federal district court promulgated a rule that, upon the court's granting an order approving an assignee's petition to sell estate property, the court's order would

> *ipso facto annul the mortgages, liens, and privileges existing on the property ordered to be sold*; and the recorders of the mortgages shall, on the presentation of such order, cancel all inscriptions existing on their records against such property, and the mortgages, liens, and privileges shall attach to the proceeds of the sale in the same manner, to the same extent, and with the same effect, as to the property sold.[454]

We see that, irrespective of creditor consent, the Eastern District's federal district court fashioned a rule that would wipe out a creditor's mortgage on estate property and transfer it to the sale proceeds from that property—a decidedly different result than that reached by the Circuit Court for the Eastern District of Pennsylvania.[455] And while the U.S. District Court for the Eastern District of Louisiana promulgated a rule that would generally give mortgage creditors the power to dictate the sale terms for their collateral,[456] such a rule was tantamount to coerced consent. Put another way, mortgage creditors in the Eastern District of Louisiana did not have the choice to opt out of the bankruptcy process and instead exercise their state-law rights in the collateral.

An example of the operation of the rule for cancelling mortgages in the context of a bankruptcy slave sale illustrates how the residual policymaking by the U.S. District Court for the Eastern District of Louisiana reconfigured existing property interests in bankrupted slaves. On March 10, 1843, the district court declared James A. Chase a bankrupt.[457] At that time, Chase owned "a runaway negro man named Jack,"[458] who was subject to a mortgage held by Charles H. Taney securing debts totaling $541.66.[459] Chase owned no other property.[460]

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453. *Christy*, 44 U.S. (3 How.) at 316.

454. *Houston* Record Transcript, *supra* note 231, at 94 (emphasis added).

455. *See supra* note 451 and accompanying text.

456. *Houston* Record Transcript, *supra* note 231, at 94:

> Creditors by mortgage, lien, or privilege, shall in all cases be permitted to fix the terms of sale of the property subject to their claims; provided, that in no case shall they be permitted, in opposition to the assignee, to fix the terms of credit shorter than those to which the bankrupt himself was entitled.

457. *See* Chase Discharge Petition, *supra* note 301, at 1.

458. Petition to Sell Estate of Bankrupt at 2 sched. A, *In re* Chase, No. 672 (E.D. La. Nov. 8, 1843) [hereinafter Chase Assignee Sale Petition].

459. Proof of the Debt of C.H. Taney at 2, *In re* Chase, No. 672 (E.D. La. May 24, 1843).

460. Report of Assignee at 1, *In re* Chase, No. 672 (E.D. La. Feb. 13, 1846) [hereinafter Chase Assignee Report] (stating "that the only property surrendered by the bankrupt in this case was one runaway slave whom the assignee has not been able to find").

On November 8, 1843, J.P. Benjamin, the assignee appointed in Chase's case,[461] filed a petition to sell Chase's estate, consisting solely of Jack.[462] Two days later, Benjamin filed a petition to cancel the mortgage on Jack "so that he [could] convey a clear and unencumbered title to any purchaser," while simultaneously reserving Taney's rights in law to the proceeds of the sale of . . . [Jack], upon the final distribution thereof."[463]

On December, 27, 1843, at Hewlett's Exchange, Deputy U.S. Marshal J.P. Walden sold "all the Bankrupt's right title and interest in and to a Run Away negro man Jack" to an individual with the last name Butler, acting on Chase's behalf, who ended up "being the last and highest bidder for the sum of Twenty three Dollars" in cash.[464] Ultimately, the sale expenses of $32.96 exceeded Butler's payment of $23.00.[465] Given that those proceeds were subject to Taney's mortgage, securing his claim in excess of $500, no money would be distributed to Chase's other creditors, let alone Benjamin, the assignee.[466] Moreover, given that Taney's mortgage had been cancelled, he would have no right to have Jack seized and sold, should he ever be found, to satisfy the remaining debt owed to Taney (i.e., $518.66). Nor could Taney pursue Chase for this amount by virtue of the bankruptcy discharge.[467]

Significantly, the mortgage cancellation in *In re Chase* exemplifies how the Eastern District's local bankruptcy rule added a layer to the reconfiguration of property interests in bankrupted slaves. Following the first reconfiguration—that is, the transfer of ownership of the mortgaged slave from the bankrupt to the bankruptcy estate—mortgage cancellation further reconfigured the property interest by

461. *See supra* notes 394–399 and accompanying text (describing Benjamin's background).

462. *See* Chase Assignee Sale Petition, *supra* note 458.

463. Petition of J.P. Benjamin Assignee to Sell the Property & to Erase & Cancel the Mortgages at 1, *In re* Chase, No. 672 (E.D. La. Nov. 10, 1843).

464. Sale by the Marshal of Slave Jack at 1, *In re* Chase, No. 672 (E.D. La. Dec. 27, 1843). As Balleisen has noted, "[B]ankrupts regularly took advantage of their inside information, buying back the assets surrendered to the bankruptcy court." BALLEISEN, *supra* note 62, at 154. He further notes that "[w]hen bankrupts bought back assets soon after they received a discharge, they probably did so with funds borrowed from relatives or friends." *Id.* at 271 n.47. Based on the information contained in the Eastern District sales books, *see* Pardo, *supra* note 11, at 91–93 (discussing information contained in the Eastern District sales books), 29% (29 of 100) of the U.S. Marshal's reports on bankruptcy slave sales involved at least one third-party purchaser (1) who had the same full name or same last name as the bankrupt, or (2) who had a different last name than the bankrupt, but whom the U.S. Marshal's report indicated as buying the slave on behalf of someone with the same full name or same last name as the bankrupt. While more investigation is required into the identity of these purchasers, these circumstances suggest that, to a certain extent, bankrupts repurchased the slaves whom they had surrendered.

465. *See* Chase Account Sales, *supra* note 415.

466. *See* Chase Assignee Report, *supra* note 460, at 1 (stating "that said slave [i.e., Jack] is specially mortgaged for more than his value . . . & that there is consequently no prospect of any funds ever being received by [the] assignee").

467. *See supra* notes 79–81.

completely eliminating the mortgage creditor's interest in the bankrupted slave (i.e., the second property-interest reconfiguration). This reconfiguration, in turn, enhanced the liquidity of bankrupted slaves. A prospective purchaser would know that, if deemed the successful bidder at the bankruptcy slave auction, he or she would acquire *unencumbered* ownership of the slave (i.e., the third property-interest reconfiguration), thus alleviating any concerns of post-sale collection efforts by the former mortgage creditor—which would not have been the scenario under the holding established by the Circuit Court for the Eastern District of Pennsylvania.[468] Accordingly, through its residual policymaking, the U.S. District Court for the Eastern District of Louisiana promulgated a local bankruptcy rule that displaced state-law property rights and that, when applied in the context of bankruptcy slave sales, further entrenched the federal government's involvement in the domestic slave trade.[469]

Another instance in which bankruptcy slave sales reconfigured property interests in bankrupted slaves arose when a third-party purchaser could not afford to pay the full purchase price in cash. Of course, if the sale terms recommended by the assignee and approved by the court required the payment of cash,[470] then a prospective third-party purchaser who could not pay the full cash price would obviously not be the winning bidder. Setting cash-only sale terms would potentially have an adverse effect on the liquidity of a bankrupted slave by (1) limiting the pool of prospective purchasers to those with access to cash and (2) constraining the ceiling of bid amounts, which would be defined by the limits of cash accessible to prospective purchasers. On the other hand, a credit-based sale, pursuant to which a portion of the purchase price would be financed, could increase the liquidity of a bankrupted slave by expanding the pool of prospective purchasers and raising the ceiling of bid amounts.[471] These dynamics would have

468. *See supra* note 451 and accompanying text.

469. If, for example, the U.S. District Court for the Eastern District of Louisiana had taken the view that the 1841 Act limited an assignee to redeeming mortgaged property before it could be sold, surely there would have been cases in which assignees would have foregone that right based on a cost-benefit calculus (*In re Chase* being a prime example), instead allowing the mortgage creditor to exercise its rights in the collateral outside of the bankruptcy forum. In turn, this may have reduced the degree of the federal government's involvement in the domestic slave trade.

470. *See supra* note 403 and accompanying text (discussing process by which the U.S. District Court for the Eastern District of Louisiana established terms for the sale of estate property under the 1841 Act).

471. *See* Martin, *supra* note 35, at 818:

> Data collected from mortgages in the public records of Virginia, South Carolina, and Louisiana shows that, with the reassurance of slave mortgages, neighbor borrowed from neighbor and friends endorsed the debt contracts of friends. As a result, those buying slaves were able to expand their holdings in slaves more quickly because they did not

mattered very much to an assignee given that his compensation was based on the disbursements he made, with the fee calculated as decreasing percentages of increasing amounts of such disbursements.[472] In short, pecuniary self-interest would motivate an assignee to obtain and recover the highest possible price.

In financing the purchase of a slave, or any other asset for that matter, one concern for the assignee would be default by the third-party purchaser—that is, the purchaser's failure to comply with his or her payment obligation. One way to mitigate that concern would be to finance the purchase on a secured basis.[473] In the case of bankrupted slaves, the assignee could look to finance the purchase price, for example, by requiring some amount of cash down payment with the remaining balance to be paid over time and secured by a mortgage on the bankrupted slave. If the purchaser defaulted at some point, the assignee could have the bankrupted slave seized and sold to satisfy the unpaid obligation.

Before looking to the practice that prevailed in the Eastern District bankruptcy slave trade, we should consider the prevailing practice outside of bankruptcy. One study has concluded that, for slave sales in local markets, "the overwhelming tendency was to sell, not for cash, but for long credit (most often a down payment of about one third, and the balance with interest over one, two, or three years)."[474] Similarly, a study of Louisiana slavery observes that "[s]eldom were slave sales cash transactions" and that "[m]ore commonly, however, part of the purchase price was paid in cash, the remainder in two or three annual installments."[475] On the other hand, a study of East Feliciana Parish in Louisiana contends that "[c]ollateralized credit

> have to save the entire purchase price before making their acquisitions. For sellers, credit sales using mortgages expanded the pool of potential buyers . . . .

472. *See, e.g.*, BANKR. D.N.C. R. 46 (1842):

> The compensation to the assignee shall be . . . five per cent. on all moneys received and paid out, not exceeding one thousand dollars: two and a half per cent. upon the excess for sums exceeding one thousand and not exceeding five thousand dollars, and one per cent. for all sums above five thousand dollars.

(repealed), *reprinted in* N.C. BANKRUPTCY RULES, *supra* note 62, at 7; BANKR. D. VT. R. 58 (1842) (same) (repealed), *reprinted in* VT. BANKRUPTCY RULES, *supra* note 96, at 10. For the modern-day analogue of this compensation scheme, see 11 U.S.C. § 326(a) (2012).

473. Another possibility would be to arrange for a third party to guarantee the payment obligation of the purchaser. *See, e.g.*, Petition of M. Marigny Assignee of the Estate of Felix Lefebre, *In re* Lefebvre, No. 252, at 1 (E.D. La. July 9, 1842) ("He [i.e., the assignee] further prays that the real estate and slaves . . . be sold at a credit of 1 & 2 years for notes satisfactorily endorsed . . . ."). For a discussion regarding errors in the assignee's sale petition in *In re Lefebvre*, including omission of the letter "v" from the bankrupt's last name in the title of the petition, see Pardo, *supra* note 11, at 113.

474. TADMAN, *supra* note 110, at 137.

475. JOE GRAY TAYLOR, NEGRO SLAVERY IN LOUISIANA 27 (1963).

transactions probably represented only a small percentage of all credit arrangements in the antebellum period"[476] and further notes that "[t]he slave market was a cash market."[477] Finally, in terms of court-ordered slave sales, Deyle states that "slaves were normally sold on long credit" and that, "[w]hile numerous examples of judicial sales for cash exist, they were the exception and in some places apparently quite unusual."[478]

I obtained information regarding the terms of bankruptcy slave sales from the U.S. Marshal's reports in the Eastern District sales books, the petitions filed by assignees for a court order approving the sale of bankrupted slaves, and the legal notices published in the New Orleans newspapers. With this information, I ascertained the sale terms for approximately 71% (72 of 101) of the observations in the case study's dataset. Within that group, only 25% (18 of 72) of the sales involved credit sales of bankrupted slaves. Importantly, that group of eighteen sales involved approximately 38% (182 of 480) of the Eastern District's bankrupted slaves. The federal judiciary thus financed a significant portion of the Eastern District bankruptcy slave trade, helping prop up the market for slaves.

More critically, when assignees financed with court approval the purchase of bankrupted slaves, they often did so on a secured basis, taking a mortgage on the slaves. By approving such transactions, Judge McCaleb reconfigured property interests in those slaves in such a way as to further entrench the federal government's involvement in the bankruptcy slave trade.

Recall that a mortgage on a bankrupted slave created a contingent property interest in the slave—that is, upon the mortgage debtor's default, the mortgage creditor could exercise its right to have the slave seized and sold to satisfy the outstanding payment obligation secured by the mortgage. Accordingly, whenever an assignee executed a credit sale of a bankrupted slave on a secured basis, the property interests in that slave involved two reconfigurations: first, the transfer of ownership from the estate to the third-party purchaser; and second, the creation of the mortgage interest in favor of the bankruptcy estate. Until the purchaser fully paid off the payment obligation resulting from the credit sale, the bankruptcy estate's mortgage interest would continue in the slave, provided that the assignee took the proper steps

476. KILBOURNE, *supra* note 34, at 73.

477. *Id.* at 3. That study does observe, however, that, among the collateralized credit transactions in East Feliciana Parish, "[s]laves represented 80 percent of the security, even in transactions in which mortgages were executed on land and slaves." *Id.* at 73.

478. DEYLE, *supra* note 32, at 170.

to prevent that interest from lapsing.[479] As such, although no longer the owner of the slave, the federal government nonetheless retained a property interest in the slave—an interest that the government would have to protect through monitoring,[480] and an interest that the federal government might ultimately have to enforce in the event of the mortgage debtor's default.

An example from the case of John Richardson illustrates this point. In June 1842, U.S. Marshal Algernon Sidney Robertson sold, among other assets, ten bankrupted slaves that had belonged to Richardson, including Tom, Jacob, Squire, and Charlotte and her two children, Lucy and George.[481] Robertson sold the slaves on credit, "[o]ne third cash, the balance at six and twelve months after date of sale for approved endorsed notes, bearing mortgage upon the slaves, and if not punctually paid to bear an interest at the rate of ten per cent per annum from maturity."[482]

Apparently, the purchasers of Tom, Jacob, Squire, and Charlotte and her two children defaulted on their notes, thus prompting the seizure and resale of the slaves. In January 1843, U.S. Marshal Robertson once again sold Tom, Jacob, Squire, and "Charlotte and *her three children*,"[483] thus suggesting that Charlotte had been pregnant when originally sold and had given birth by the time of the second sale. Having experienced the sting of defaulting purchasers, the assignee set more stringent sale terms the second time around, requiring "two-thirds of the purchase money to be paid in cash, and the balance on the 6th of June, 1843, for approved endorsed notes, bearing mortgage upon the property sold."[484]

Even though the assignee demanded a larger down payment and a shorter repayment term for the second bankruptcy slave sale in *In re Richardson*, the fact remains that the sale involved secured financing, which had the effect of further multiplying the reconfiguration of property interests in the bankrupted slaves. When the court decreed Richardson a bankrupt, his ownership interest in the slaves vested in the bankruptcy estate (the first reconfiguration). When U.S. Marshal Robertson sold Tom, Jacob, Squire, and Charlotte and her children at

479. *See supra* note 442.

480. *See* Russell, *supra* note 149, at 518 ("Mortgages of slaves created . . . [a] monitoring incentive for the mortgagee. The mortgagee of a slave would want to be sure that the mortgagor managed the slaves in such a way that they would continue to be valuable if the mortgagee were to foreclose.").

481. Account Sales at 2, *In re* Richardson, No. 112 (E.D. La. June 6, 1842).

482. NEW-ORLEANS COM. BULL., June 4, 1842, at 4.

483. Account Sales, *In re* Richardson, No. 112 (E.D. La. Jan. 26, 1843) (emphasis added).

484. NEW-ORLEANS COM. BULL., Jan. 25, 1843, at 4.

the first sale on a secured basis, the third-party purchasers acquired an ownership interest in the slaves (the second reconfiguration), and the bankruptcy estate acquired a mortgage interest in them (the third reconfiguration). When Robertson sold this group of slaves at the second sale on a secured basis, the prior third-party purchasers lost their ownership interest (the fourth reconfiguration); the bankruptcy estate lost its original mortgage interest in the slaves (the fifth reconfiguration);[485] the new third-party purchasers acquired an ownership interest in the slaves (the sixth reconfiguration); and the bankruptcy estate acquired a new mortgage interest in them (the seventh reconfiguration). And until the new third-party purchasers finished paying the outstanding balance of the purchase price for the bankrupted slaves, the assignee would once again be tasked with monitoring and protecting the estate's mortgage interest in the slaves.

Russell has argued that "slaves, as objects of property, were surrounded by a web of legal interests or rights that tethered together nonslave parties,"[486] and that this conceptualization "offers the possibility of more insight into the complicated relationships of both slavery and Southern society."[487] The various examples of reconfigured property interests in bankrupted slaves that I have discussed demonstrate how the federal government interwove itself into the fabric of the domestic slave trade in ways that have, until now, gone unexamined. By orchestrating the sale of bankrupted slaves under the 1841 Act, Judge McCaleb and the Eastern District's assignees rooted slavery deeply into the operation of the bankruptcy system in that district. This account gives us a newfound vantage from which we can assess the federal government's complicity in legitimating slavery in antebellum America.

B. Profiting from Bankrupted Slaves: U.S. Marshal Robertson

The sale of bankrupted slaves generated proceeds that had to be distributed among the various parties to a bankruptcy case. Depending on the amount of proceeds, court officials—like the assignees and the U.S. Marshal—and creditors might receive some payment. And, of course, there were other parties in interest who might also be entitled to a distribution. Ultimately, all who received a distribution from such sales were recipients of money representing some fraction of the price

485. Recall that the Eastern District's local bankruptcy rule canceled, upon the issuance of the federal district court's order approving a sale of estate property, any existing mortgages on that property. *See supra* text accompanying note 454.

486. Russell, *supra* note 149, at 520.

487. *Id.* at 504.

of a human being. These proceeds constituted the traces of the black men, women, and children who had lived out part of their lives as bankrupted slaves. And for the court officials who received such proceeds, the payments also constituted part of the income derived from their occupations. In other words, they made a living, in part, by coordinating and running the bankruptcy slave trade.

To illustrate this point, I will focus on the commission earned by one of the Eastern District's U.S. Marshals, Algernon Sidney Robertson, as a result of selling estate property.[488] With one exception, I obtained the information on the identity of the U.S. Marshal conducting the bankruptcy slave sales and the amounts involved in the sale, including the U.S. Marshal's commission, from the Eastern District sales books.[489] That information indicates that Robertson conducted approximately 92% (93 of 101) of the Eastern District's bankruptcy slave sales.[490] For the ninety-four bankruptcy slave sales conducted from 1842 through 1844, Robertson conducted every one of those sales with the exception of one, which J.P. Walden, one of his deputies, conducted.[491] U.S. Marshals William F. Wagner and William S. Scott conducted the remaining seven sales. Wagner conducted three sales in 1845 and two sales in 1846, while Scott conducted one sale in 1851 and the Eastern District's last sale in 1853. Given that Robertson conducted nearly all of the Eastern District's bankruptcy slave sales, the discussion in this Section focuses on him.

President Tyler nominated Robertson to serve as the U.S. Marshal for the Eastern District on January 18, 1842, and the Senate

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488. *See* Pardo, *supra* note 11, at 93 (discussing the U.S. Marshal's commission).

489. *See id.* at 91–93 (discussing information contained in the U.S. Marshal's reports appearing in the Eastern District sales books). A report by J.P. Walden, a Deputy U.S. Marshal, which appeared in the bankruptcy case file for *In re Chase*, indicates that Walden conducted the bankruptcy slave sale in that case. *See supra* note 464 and accompanying text. The corresponding report in the Eastern District sales book, however, indicates that Algernon Sidney Robertson, the U.S. Marshal, had conducted the sale. *See* Chase Account Sales, *supra* note 415 (reporting "Account Sales of property in the . . . case and sold by A Sidney Robertson U.S. Marshal"). In this instance, I relied on the record in the case file and coded the Deputy U.S. Marshal as having conducted the bankruptcy slave sale.

490. It should be noted, however, that the reports in the Eastern District sales books would occasionally indicate in the signature section of the report that a Deputy U.S. Marshal had signed the report on the U.S. Marshal's behalf, even though the report itself indicated that the U.S. Marshal had conducted the sale. *See, e.g.*, Account Sales, *In re* Bridge, No. 259 (E.D. La. Sept. 13, 1842) (reporting "Account Sales of Property assigned in the . . . case, and sold by Algernon Sidney Robertson U.S. Marshal," and indicating at the bottom of the report "(Signed) for A. Sidney Robertson U.S. Marshal," followed by "J. E. Layet dy. U.S. Marshal"). Whether those deputies conducted the sale, or whether they received a portion of the U.S. Marshal's commission, *cf.* BALLEISEN, *supra* note 62, at 138 (stating that "the U.S. marshal and his deputies received payments for taking charge of bankrupts' assets and transporting them to the assignee"), I do not know. Given the information that I currently have, I assume that Robertson conducted these sales.

491. *See supra* notes 464, 489 and accompanying text.

confirmed Robertson's appointment on February 2, 1842,[492] one day after the 1841 Act took effect.[493] Accordingly, Robertson had been installed just in time to oversee the Eastern District's bankruptcy slave trade from the very beginning. During his tenure in that position, he sold approximately 97% (465 of 480) of the Eastern District's bankrupted slaves. Given this level of involvement, it is not too hard to imagine that, in the same way that "[s]ome sheriffs could be just as skillful in making [s]lave sales as professional auctioneers," so too might Robertson have become particularly proficient at auctioning bankrupted slaves.

To gain a more detailed sense of Robertson's financial stake in the Eastern District bankruptcy slave trade, consider the following figures. First, sufficient information existed in the Eastern District sales books to document the total amount of proceeds generated from the sale of bankrupted slaves (both for sales only involving slaves and for sales also involving other assets) for approximately 92% (86 of 93) of the bankruptcy slave sales conducted by Robertson. The median and mean nominal amount of slave proceeds (i.e., the amount recorded in the Eastern District sales books) generated at those sales were, respectively, $482.50 and $1,088.73. In today's dollars,[494] those respective amounts would have been approximately $12,559 and $28,049. Totaling the amount of slave proceeds generated at Robertson's sales, the nominal amount was $93,631, or approximately $2,412,187 in today's dollars.

How much did Robertson earn as a commission from the sale of bankrupted slaves? The manner of ascertaining Robertson's commission attributable to slave proceeds depended on whether the bankruptcy slave sale only involved the sale of slaves or whether Robertson sold other assets in addition to the bankrupted slaves. Approximately 96% (89 of 93) of the reports in the Eastern District sales books corresponding to bankruptcy slave sales conducted by Robertson listed the nominal amount of the sales commission that he earned at each sale. For sales only involving the sale of bankrupted slaves, the entire nominal amount of the listed commission could be attributed to slave proceeds.

On the other hand, for sales involving assets in addition to bankrupted slaves, only a portion of the nominal amount of the listed commission could be attributed to the slave proceeds. Unfortunately, I

492. *See* 6 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 12, 23 (Washington, D.C., Gov't Printing Office 1887).

493. *See supra* note 10 and accompanying text.

494. *See supra* note 30.

have not been able to locate a document indicating the compensation structure for the U.S. Marshal in the Eastern District of Louisiana during this period. To estimate the U.S. Marshal's commission attributable to slave proceeds in sales involving additional assets, I calculated the percent commission that the U.S. Marshal earned by dividing the nominal amount of his commission by the total amount of proceeds generated at the sale (i.e., the sum of the proceeds from the sale of both slaves and the other assets). I then multiplied the percent commission by the total amount of proceeds generated from the sale of the bankrupted slaves. That figure constituted the estimated amount of the commission attributable to the sale of the bankrupted slaves.

For the group of eighty-nine cases for which Robertson's percent commission could be calculated, the median and mean percentages for each bankruptcy slave sale were, respectively 1.9% and 1.8%—that is, Robertson's earned commission constituted 1.9% of the total proceeds in the median sale and 1.8% of the total proceeds in the mean sale. As for the proportion of the nominal amount of his commission that could be attributed to the proceeds from the sale of bankrupted slaves, which could be calculated for approximately 92% (86 of 93) of the sales that he conducted, the median and mean percentages were, respectively, approximately 47.4% and 51.2%. In other words, the sale of bankrupted slaves generated a significant amount of Robertson's commission.[495]

In terms of the amount earned by Robertson from the sale of bankrupted slaves, calculated for approximately 92% (86 of 93) of the sales that he conducted, the median and mean nominal amounts of his commission attributable to slave proceeds were, respectively, $9.64 and $16.19. And the total nominal amount of commissions that he earned attributable to slave proceeds was $1,392.11, of which he earned $707.41 from thirty-nine sales in 1842, $660.39 from forty-three sales in 1843, and $24.31 from four sales in 1844.

To place these figures in perspective, focus on the amounts that Robertson earned in 1842 and 1843. During the same time period, the nominal amount of Judge McCaleb's annual salary was $3,000.[496] Accordingly, from the commissions earned from slave proceeds in 1842 and 1843, Robertson earned the approximate equivalent of, respectively, 23.6% ($707.41/$3,000.00) and 22.0% ($660.39/$3,000.00)

495. *Cf.* Russell, *supra* note 31, at 1256 ("Slaves were the central assets of the Southern economy. At [court-ordered] sales, they were the most important assets sold; more important than the accumulated personal property of households; more important than the crops, farm implements, and livestock; and more important than the land itself.").

496. *Judicial Salaries: U.S. District Court Judges by State, 1789–1891*, FED. JUD. CTR., https://www.fjc.gov/history/judges/judicial-salaries-u.s.-district-court-judges-state-1789-1891# (last visited Aug. 11, 2017) [https://perma.cc/T4EY-F9QJ].

of Judge McCaleb's annual salary. Robertson clearly earned income from other sources, including commissions earned from nonslave proceeds in bankruptcy cases, as well as from fees earned from duties performed in nonbankruptcy cases.[497] It thus seems reasonable to conclude that Robertson profited considerably from his participation in the Eastern District's bankruptcy slave trade.

CONCLUSION

Returning to the story of James in Arthur Morrell's bankruptcy case, February 5, 1853, constituted a significant date for both James and for the history of the 1841 Act in the Eastern District of Louisiana. For James, the date signified the end of one chapter of subjugation—living for 3,997 days as a bankrupted slave—and the beginning of the next chapter of subjugation in his life—this time as George Clark's nonbankrupted slave.[498] As for the 1841 Act, James's sale in all likelihood constituted the last bankruptcy slave sale in the district,[499] thus marking the end of the bankruptcy slave trade in the Eastern District of Louisiana.

By telling the story of James and the stories of other bankrupted slaves, this Article has begun the long overdue examination of the role that the federal bankruptcy system played in the domestic slave trade of antebellum America. Whether unbeknownst to Congress or not, its design of the 1841 Act not only made the collision of bankruptcy and slavery inevitable, but it also set the stage for making the federal government a widespread slaveowner actively engaged in selling slaves. Furthermore, because the Act's statutory design contained many gaps, Congress created the opportunity for residual bankruptcy policymaking by courts, which further exacerbated, at least in one federal judicial district, the government's entrenchment in slavery. And notwithstanding the quick repeal of the 1841 Act, we witness that the bankruptcy slave trade subsequently continued in the Eastern District for approximately eleven years, claiming as its victims nearly 500 black men, women, and children. While the bankruptcy system has brought a great deal of relief from financial distress for millions upon millions of individuals over approximately the past 120 years, we should never lose sight of the fact that the forbearer of modern bankruptcy law, the

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497. *See supra* notes 166–167 and accompanying text (describing seizure and sale of slaves at public auction by U.S. Marshal Robertson in nonbankruptcy cases).

498. *See supra* notes 29–30, 365 and accompanying text.

499. *See* Pardo, *supra* note 11, at 96–103 (discussing how the limitations of certain archival sources consulted for this Article's case study preclude providing a complete account of the Eastern District's bankruptcy slave trade).

1841 Act, visited great harm and suffering on the black men, women, and children forced into the condition of bankrupted slaves.