I shall forgive that South much in its judgment day. I shall forgive its slavery, for slavery is a world old habit .... I shall forgive its so-called pride of race.... but one thing I shall never forgive, neither in this world, nor the world to come, is its wanton and continued and persistent insulting of the Black womanhood which it sought and seeks to prostitute to its lust.1

During the last quarter of the 17th century, African slaves were “imported” into the Americas in unprecedented numbers.2 This enlargement of the slave population represented a deep commitment to, and investment in, slavery. Slavery was to become commonplace and thus demanded moral, religious, and legal justification.

Systematic colonization utilized European legal systems, which rationalized the existence of slavery by providing normative legitimization.3 Throughout the duration of slavery, jurisprudence functioned as a sword employed against enslaved Africans, and not as a shield, as it is traditionally envisioned.4 This contradiction in legal imperative operated not only along racial lines, but also along sexual and gendered lines. Female slaves were impacted differently and disparately. They were exploited, not only because of their race, but also because their sex could be used as a means of both wealth and property accumulation, thereby rendering them particularly vulnerable to external manipulation and cooptation of their sexual and reproductive agency.5 This article explores the manner in

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2 See Philip D. Curtin, The Atlantic Slave Trade: A Census (1969) (Figure 14 on page 213 indicates that the vast majority of slaves were taken to Brazil and the French and English Caribbean for a total that is estimated to exceed 6,000,000. Table 65 on page 216 illustrates a breakdown of the slave trade by country).


4 See Tushnet, supra note 3, at chapter IV.

which the legal system’s endorsement of the notion of racially b(i)ased proprietary interests in female slaves as “breeders” of property created powerful norms of social control over the bodies of black women. These norms exacted a premium on enslaved women by facilitating the capture of their agency. If, as Catherine MacKinnon suggests, “gender socialization is the process through which women come to identify themselves as sexual beings, as beings that exist for men,” then not only is patriarchy reified, but white supremacy is similarly institutionalized through the exacting of black “female sexual submission.”

Therefore, while “sexuality is the linchpin of gender inequality,” it is also the lynch-pin of racial injustice for black women. The centrality of American Husbandry is revealed by the systemic imperatives of reproduction which reveal that “Control of black fertility became a particularly effective and degrading tool of white domination.”

The normative legal structure established complete control over female slaves by sanctioning their subjugation to conditions and practices necessary to further the objective of profit maximization and social domination. For example, the criminal law denied the “rapeability” of slave women, while the legal doctrine of partus sequitur ventrum mandated, contrary to the common law, that the legal status of children born of slave women track the mother’s status. As a result, the law not only denied black

Gender socialization is the process through which women come to identify themselves as sexual beings, as beings that exist for men... According to this revision, one "becomes a woman" - acquires and identifies with the status of female - not so much through physical maturation or inculcation into appropriate role behavior as through the experience of sexuality... Women and men are divided by gender, made into the sexes as we know them, by the social requirements of heterosexuality, which institutionalizes male sexual dominance and female sexual submission. If this is true, sexuality is the linchpin of gender inequality.

Id.


7 See MacKinnon, supra note 5, at 531-533.

8 Id.


11 Rule of hypodescent ensuring that the status of the child follows the status of the mother, free or slave, regardless of the status of the father. In this way, children fathered by White men upon slave women would be slaves according to their mother’s enslaved status. MARVIN HARRIS, PATTERNS OF RACE IN THE AMERICAS 56 (1964); A. LEON HIGGINbothAM J.R., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS 43 (1978) [hereinafter IN THE MATTER OF COLOR], See also Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. (581) (exploring the disparate reality facing black women in great detail.)

12 A.Leon Higginbotham Jr. and F. Michael Higginbotham, Yearning to Breath Free: Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia, 68 N.Y.U.L. REV. 1213, 1216 (“It was contrary to English common law for children to inherit the status of their mothers, but since the children for whom slave status was even a question were almost always mixed-race and illegitimate, it may also have contradicted English tradition for them to inherit a position or status from their fathers. Indeed, the inheritance of slave status was itself anomalous in English law of that era. When the practice of villeinage -- servitude to a feudal lord--had existed, servent status had been heritable in the male line. However, villeinage had since died out, and all English men and women of the 17th century, whether legitimate or not, were considered free born.”) See also Jason A. Gillmer, Suing For Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary and Antebellum South, 82 N.C. L. REV. 535, 561 (“Although the status of the very first mulattoes was uncertain, planter elites quickly settled on the rule that the
female slaves any socially or legally protected autonomy or agency over their own bodies. This system ensured that slave women held no property interest in their own bodies or their own offspring. The law similarly maintained an environment where sexual abuses and reproductive interference with female slaves was both profitable and condoned.  

Such norms created the atmosphere in which persons like Dr. J. Marion Sims, known as the “Father of Gynecology,” could flourish. Dr. Sims, a pioneer in reproductive surgeries, perfected his techniques by performing repeated, unanaesthetized experimental surgeries on slave women in his makeshift hospital. The slave women in Dr. Sims’s care all suffered from reproductive impairments that decreased their property values, rendering them unfit for their reproductive duties, and vulnerable to such medical experimentation. Slavery provided Dr. Sims with these human subjects for medical and surgical experimentation; moreover, slavery provided Dr. Sims with a legally normalized culture that degraded humans, and that subjected black females to the most intrusive forms of interference with their

children would follow the condition of the mother. This rule—known as the rule of partus sequitor ventrem—was adopted despite the English common law tradition that the child followed the status of the father. The issue arose, in other words, because white men were fathering children with black women, creating a pressing social problem as Virginia eased into a society in which blackness meant slavery and whiteness meant freedom. As William M. Wieck perceptively observes: To permit these mulatto offspring to take the status of their father would not only be an anomaly—a slave woman raising her children to freedom presented obvious difficulties—but it would also lead to an unthinkable blurring of racial and social lines in a society that viewed miscegenation as a "stain and contamination" to white racial purity."

13 Paula C. Johnson, At the Intersections of Injustice: Experiences of African American Women in Crime and Sentencing, 4 AM. U. J. GENDER & LAW 1 14,15 (1995) (“The experiences of enslavement were different for African American women and men. Enslaved African American women were exploited for their physical labor and reproductive capacities; "their job was to work and to produce workers." Their reproductive function was crucial to the economic interests of the slaveholders, especially after 1801, when Congress outlawed the importation of slaves from Africa into the United States. The exploitation of African American women’s sexuality was also a means of terrorizing the entire slave community.”) (citations omitted)


15 See infra note 200 for an exploration of the available options for anesthesia at the time. See J. MARION SIMS, THE STORY OF MY LIFE 236 (1894). The following passage indicates the zeal with which Dr. Sims undertook to find suitable subjects. This enthusiasm relates to the utilitarian ends of the project – the goals set were for fame, fortune and technological advancement, not to end the suffering of the lowly female slave. Dr. Sims candidly spoke about his finding suitable slave women as follows:

“I ransacked the country for cases, told the doctors what had happened and what I had done, and it ended in my finding six or seven cases of vesico-vaginal fistula that had been hidden away for years in the country because they had been pronounced incurable. I went to work to put another story on my hospital, and this gave me sixteen beds; four beds for servants, and twelve for the patients. Then I made this proposition to the owners of the negroes…”

Id.

16 See id. at 227 (Sims informs Anarcha’s master that she was unfit for her duties); See also DEBORAH KUHN MCGREGOR, FROM MIDWIVES TO MEDICINE – THE BIRTH OF AMERICAN GYNECOLOGY 40 (1998) (discussing the fact that the value of a slave woman was directly related to her ability to reproduce). See Valerie J. Riley and John Spurlock, Vesticovaginal Fistula (March 2005) at sec. 7 available http://www.emedicine.com/med/topic3321.htm (last visited March 15, 2006) (stating the authors recommend cesarean delivery for subsequent pregnancies).
While slave women were legally dehumanized, by their definition as three-fifths human, which vitiated principles of consent and decreased concerns for slave welfare or autonomy, the fact of their sex and gender conveniently rendered them sufficiently similar for the transfer of medical technologies from their bodies to white women. While white women ultimately benefited from the perfecting of these surgical techniques, even their improved situation was likely tangential, the ultimate goals being the advancement of medical technologies, fame and profit. The law thus set the stage for a lapse in ethics – medical, religious, and legal – whereby notions of liberty, agency and autonomy, and the principles of consent generated therefrom, were disregarded. Nonetheless, Dr. Sims was considered by his peers to be a fine gentleman and consummate professional. Indeed, Dr. Sims’s acclaim would ultimately take him to new heights – he would become president of the American Medical Association, honored with statues in Alabama’s Capital grounds and Central Park in New York.

American medicine has yet to acknowledge the effect of legal norms that encouraged the sexual and reproductive interference with enslaved women. However, this history of reproductive and sexual interference forms part of a historical continuum which should not be ignored – from Nazi Germany to the Tuskegee Syphilis experiments – the powerful have sought to advance medical technology and science, coercively and without consent, at the expense of the powerless. Given that a “reproductive cure” would have allowed for continued (re)productive initiatives directed at slave women, such as breeding practices, it is important to note that the question of whether these women wanted to be treated was never a matter of consideration. While heinous medical experimentation has been condemned since the Nuremberg Trials, the appropriate furor over the Nazi doctors, who analogously experimented upon and tortured human subjects for scientific gain, has not yet been replicated as far as medical and surgical experimentation on black women is concerned. Indeed, long before the horrors of the Tuskegee syphilis experiments, American medicine has yet to acknowledge the effect of legal norms that encouraged the sexual and reproductive interference with enslaved women. However, this history of reproductive and sexual interference forms part of a historical continuum which should not be ignored – from Nazi Germany to the Tuskegee Syphilis experiments – the powerful have sought to advance medical technology and science, coercively and without consent, at the expense of the powerless.

17 I use the term (re)productivity to highlight socio-political and socio-legal interferences with women’s reproduction. Typically understood, reproduction relates to the biological and anatomical capacity for childbearing – it is the sexual or asexual procreative capacity of organisms to regenerate. (Re)productivity, however, focuses upon the element of production involved in reproduction – the contextual incentives and processes of producing, in this case, offspring. I have attempted throughout this article to distinguish my use of these two related terms.

18 See Judy Oliver, The Second Statue on the Right, MONTGOMERY LIVING ONLINE MAGAZINE (2000), http://www.montgomeryliving.com/alabama/statue.html for a discussion of the respect that Sims still commands in the profession. (Oliver’s article cites an article in the 1994 issue of Rock Island Medicine in which Stanley Aronson, M.D. states, “Sims was a complex man, not easily understood; but no one appreciative of the devastating effects of incontinence could possibly diminish his contributions to the health and dignity of women.”) available at http://www.english.uiuc.edu/maps/poets/m_r/moss/sims.htm.


21 See Volker Roelcke, Nazi Medicine and Research on Human Beings, 364 THE LANCET, MEDICINE, CRIME AND PUNISHMENT (Dec. 2004) at 6. (exploring the context of Nazi experimentation on human subjects and stating “in a context of unlimited access to unconsenting people who were defined as “biologically inferior,” the research programme was accompanied by complete disregard for the victims, and many cruelties ensued.”) See also William E. Seidelman, Nuremberg Lamentation: for the forgotten victims of medical science, 313, 1463 BRITISH MED. J. (Dec. 7, 1996); Robert N. Proctor, Nazi Science and Nazi Medical Ethics: Some Myths and Misconceptions, Perspectives 43:3 BIOLOGY AND MEDICINE (Spring 2000) at 335.
tragedies, the bodies of slave women became the site of exploration in the name of medical and surgical progress. Dr. Sims, widely credited with having developed surgical techniques and gynecological tools, including the speculum and silver sutures, from his experimentation on slave women provides one such example.

This haunting history should be used to inform contemporary interference in the (re)productivity of marginalized women. While human rights activists are inclined to recognize the salience of such power-politics culminating in reproductive interference in the developing world, where even fewer safeguards against racially based sexual predation may be operative, domestically there are similar issues. Given the pace of medical and scientific advancement, such controversies are seldom, or under-, explored domestically. Specifically, the tragedy of legalized slavery remains a touchy subject in contemporary America. The combination of race, sex, interracial sex, and slavery interact to produce extreme reluctance to participate in open and honest discussion. This avoidance is troubling as we have much to learn from our shared history of slavery and its consequences. Specifically, contemporary interference in, and manipulation of, the reproductive capacity of women of color and poor women continues as a legacy of America’s long involvement with (re)productive interference of the vulnerable.

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24 For example, medical historian John Duffy described the situation governing the use of Caesarian sections before the Civil War. His scholarship reveals the nexus of race and gender in antebellum Southern medicine.

The fear of abdominal incisions was so great that it was generally considered much safer to destroy the child than sacrifice the life of the mother. The high risk which was involved in any abdominal surgery makes it more than a coincidence that so many of these early patients were slaves, and clearly indicates that southern surgeons and physicians were far more willing to try new procedures upon slaves than upon other women.


25 Brinker, supra note 14.

26 For further examples see Randall, supra note 20, at 195-200.

27 See Bernier, supra note 20, at 117-121 (discussing the experimentation and interference endured by enslaved women as part of a continuum of reproductive interference); see also Terri Kapsalis, Public Privates: Performing Gynecology from Both Ends of the Speculum 42-45 (1997).


There is virtue in the act of naming especially where the imperatives of the privileged conspire to claim property interests in the wombs of the marginalized. A Critical Race Feminist intervention reveals the hidden norms of both white supremacy and patriarchy. Using the narrative genre of critical race theory, this article will revisit the sexual realities of slave women with the goal of encouraging the reproductive rights movement to “embrace a vision of social justice”\textsuperscript{30} which is informed by the socio-legal history of slavery; using Feminism’s “consciousness-raising,” this article seeks to “expose dominant realities and shar[ed] subordinated ones”\textsuperscript{31} to advocate for reproductive freedom and equality for women of color.

Focusing on black female slaves as racially sexualized property, this article will explore the notion of legal norms as constitutive of, and imbedded within, an environment in which slave owners and persons like Dr. Sims could harness and manipulate slave women’s (re)productivity. Part I examines the normative role of the law in legitimizing slavery through legal discourse. Emphasis is placed upon the law’s paradoxical conflation of person and property, which allowed slave owners to treat slaves as a type of property for which husbandry and other such breeding techniques were valid options.\textsuperscript{32} Slave breeding can thus be conceptualized as a type of animal husbandry wherein the slave owner, much like a breeder of animals, controls and manages reproduction in order to maximize profits from his initial investment through the sale or use of the resulting animals.\textsuperscript{33} Part II focuses specifically on the lives of female slaves, and the reality of either actual or potential sexual exploitation, which often extended to rape and, what would today be considered, child molestation. Central to this analysis is the decriminalization of, or refusal to criminalize, sexual abuse of Black women and children. Part III examines the tragic history of reproductive surgeries performed, without consent or anesthesia, on slave women. Part IV concludes with calls for increased attention to this history of abuse, because interference in, and manipulation of, the reproductive capacity of women of color and poor women continues today. The imperatives of the privileged persistently seek enhancement of their status through control of the (re)productivity of the marginalized.

I. THE LAW’S NORMATIVE LEGITIMIZATION OF SLAVERY

\textit{...[T]he motivating principle of bourgeois law is an undifferentiated individualism. ... In slave law, then, we should find a reluctance to treat all forms of property, and especially slaves, as reducible to a common measure in money and an acceptance of social control of the master’s choices. The insertion of slave law into a bourgeois framework therefore causes new problems, as bourgeois principles must accommodate the incompatible principles of slave law.}\textsuperscript{34}
At common law, slaves were alternatively classified as real\textsuperscript{35} or chattel\textsuperscript{36} property. In the American colonies the usual categorization was as chattel property.\textsuperscript{37} As such, slaves were adjudged in law to be chattels personal, subject to their owners, administrators or assigns “to all intents, constructions, and purposes whatsoever.”\textsuperscript{38} The classification of slaves as property resulted from deliberate legal orchestration. The inherent contradiction in the contrived categorization of humans as property belied even the most determined efforts of the judiciary and legislative assemblies. As legal doctrine addressing issues of slaves as property was no different from doctrine addressing non-human property, courts frequently rendered opinions in cases involving the transfer, lease, taxation, depreciation, and bequest of slaves.\textsuperscript{39}

In property law, the owner of an animal owns the offspring.\textsuperscript{40} So too, the owner of a female slave owns the offspring. Therefore, the conception of slaves as personal property created a conceptual legal bridge by which techniques of animal husbandry could gain a foothold, given the complete agency exercised by the master/owner over his slave property.

Agency and autonomy are connected terms in liberal theory.\textsuperscript{41} “Agency means the capacity to direct one’s own life through individual actions and choice.”\textsuperscript{42} Total victimization is dichotomized as the antithesis of autonomous action. A survey of feminist legal theory indicates a shift in feminist discourse from such polarities to the recognition that many women do exercise agency in their lives and are not entirely “consumed by male domination.”\textsuperscript{43} This template of autonomy is useful in exploring the sexual abuses of slave women. If there were a spectrum of agency, slave women’s autonomy would be minimal, but not entirely non-existent. As the following case reveals, courts strategically recognized the humanity of slaves -- this was the point of departure for strategic appeals to slave humanity or coercion to sacrifice reproductive autonomy. In this sense, slave women might be said to have faced “constrained choices under oppressive conditions,” or what has come to be known as “partial agency.”\textsuperscript{44} However, the plight of

\textsuperscript{35} Real property is typically that which is fixed and immovable such as land. ROBERT MALCOM NAPIER, THE STUDENT’S BLACKSTONE: BEING THE COMMENTARIES ON THE LAWS OF ENGLAND OF SIR WILLIAM BLACKSTONE, KNT.: ABRIDGED AND ADAPTED TO THE PRESENT STATE OF THE LAW 10TH ED. 115 (W. Clowes and Sons 1887).

\textsuperscript{36} Id.

\textsuperscript{37} See GOODELL, supra note 32, at 63-76.

\textsuperscript{38} See id. at 23

\textsuperscript{39} IN THE MATTER OF COLOR, supra note 11, at 11,12 (1928). For examples of litigated cases involving slaves see JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO, VOL.1 87-101 (Helen Tunnicliff Cattera ed.1968).

\textsuperscript{40} Felix S. Cohen, Dialogue on Private Property, 9 Rutgers L. Rev. 357 at 366-369 (1954) (“F. Well, it does seem to be in accordance with the laws of nature that the progeny of the mother belong to the owner of the mother. ...C. Could we sum up this situation...[T]his particular rule of property law...has appealed to many different societies across hundred [sic] of generations because this rule contributes to the economy by attaching a reward to planned production; is simple, certain, and economical to administer; fits in with existing human and animal habits and forces; and appeals to the sense of fairness of human beings in many places and generations?)

\textsuperscript{41} MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 96 (2005).

\textsuperscript{42} Id

\textsuperscript{43} Id. At 96-97 (recognizing that feminist theoretist such as Kathryn Abrams, Elizabeth Schneider, and Martha Mahoney, recoiled from the “fixation with victimization” and developed “more realistic, dignified account[s] of women’s resistance to male domination, without minimizing the harm done by oppression.”)

\textsuperscript{44} Id. at 98-99.
slave women was so tenuous, given the other two-fifths categorization of their existence as non-human, that their particular victimization resulted in what I will call captured agency. Captured agency conceptualizes the socio-legal encumbering of agency to promote external ends. It is calculated to result in submission and serves utilitarian goals. The point is not to define female slaves solely according to their victimhood, for as Angela Harris has recognized, black women by “creative action” have forged self-conceptions in opposition to dominant forces and have found solidarity thereby.45 Rather, by contextualizing the forces of coercion and oppression operative in the lives of slave women, the socio-legal factors reveal that empowerment of marginalized women shall not be obtained by the piece-meal disruption of negative influences in an individual woman’s life, but rather by reformulating the socio-legal conditions of women’s existence on a structural and systemic level.46

The case of Erwin v. Henry,47 which arose from a dispute over the emancipation of the slave Cynthia in the will of Malcolm Henry, provides a good example of the peculiar property status of black slaves. This Missouri decision additionally indicates the capture of agency through the legal process. The decision underscores the courts willingness to buttress captured agency by reference to both the legal dehumanization of slaves and through an ironic recognition of slave humanity. The opportunistic engagement with these seemingly inconsistent theories of slavery operated to ensure a system where a slave woman’s very existence was primarily at the mercy of her owner, and secondarily the legal system.

During the four years Cynthia was required to serve the executor before being emancipated, she had a baby girl named Adaline.48 Elenor Erwin, as beneficiary entitled to the estate residue, claimed Adaline as her property.49 In ruling that in the absence of corresponding descriptions of personal property the residuum “cannot reach slaves, a species of property as distinctive in its character as real estate,”50 the court denied Elenor Erwin’s request. The court continued, stating, “Slaves are by our law personal property, but of a distinctive and peculiar character,”51 thereby constructing slaves not simply as property, but rather as a paradoxical conflation of person and property.

45 Id. at 98 citing Angela Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 612 (1990).


47 Erwin v. Henry, 5 Mo. 469 (1838).

48 Id. at 471.

49 Id.

50 Clark v. Henry's Adm'r, 9 Mo. 336, 342-343 (1845).

51 Clark v. Henry's Adm'r, 9 Mo. 336, 342-343 (1845).
Indeed, the court in Erwin emphasized that the valuation of slaves hinged upon their distinguishable human characteristics, capacities and aptitudes. This conflation of person and property meant that the concentric circles of the slave’s experience included a concession that their humanity overlapped significantly with their legal status as property, either real or personal. This conflation is exemplified by the fact that slave owners routinely employed techniques of animal husbandry upon their slave property, while also routinely appealing to the human desires and weaknesses of their slaves in an effort to control their behavior. In this sense, American husbandry was necessarily both cognizant of and dismissive of the human characteristics possessed by those who were subjected to its technologies of (re)production. The irony of the strategic utilization of slave humanity was not lost on the court in Erwin:

The age, health and disposition of slaves, their aptitude for particular employments, the length of time during which their owners or their owners ancestors have possessed them, their matrimonial connections and other like circumstances contribute to fix the degree of estimation in which... they can be converted in the market... Theoretically, one sees the fleshing out, at law, of orchestrated agency capture, the simultaneous deployment of the law to create doctrinal fixity with the manipulation of humanity for externally articulated ends. In this context, captured agency works to create gender, and its implicit subjugation, via the diminishment of female autonomy; it also simultaneously works for the literal and legal capture of racial autonomy through the construction of intersectional submission. Nothing could be more completely degrading as a black female slave lacking agency over her body and its produce. The Erwin court’s observations were, therefore, particularly salient for female slaves because an essential part of the quantification of their market value was contingent upon their health, disposition towards (re)production and their fecundity, the ability to produce future generations of the perpetually enslaved. The (re)productivity of female slaves increased their market value, and the benefits of increased market valuation accrued to their owner. As a result, reproductive autonomy and proprietary agency were unknown to the slave who was denied an interest in herself and her off-spring. That a child could even conceivably be declared residuum, capable of separation from her mother, indicates the total denial of personhood in the name of legally protected property interests. That another woman, Elenor Erwin, would

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52 See animal husbandry definition, supra note 27.
53 See Bridgewater, supra note 10, at 16-18 (discussing the correlation between the level of slave reproduction and the level of punishment inflicted, and receipt of gifts such as dresses and more food as incentives for (re)production).
54 Clark, 9 Mo at 341-342.
55 See Fair v. Gist, 1 Rich. 68, 72 (1844) as cited in Ariela Gross, Double Character: Slavery and Mastery in the Antebellum Southern Courtroom 128-129 (2000) (discussing a case in which the plaintiff based his claim upon an allegation that eating dirt “rendered [the slaves] unprofitable as breeding women.”)
56 Bridgewater, supra note 10, at 17; see also Cohen, supra note 40, at 368 (“F. I think that livestock owners wouldn’t be so likely to breed their mares or cows if anybody else could come along and take title to the offspring. C. You think then that the rule that the owner of the mare owns the mule contributes to economic productivity? F. Yes”)
57 For a discussion on enslaved women’s attempts to protect themselves and their children see Deborah Gray White, Ar’n’t I a Woman: Female Slaves in the Plantation South 77-78 (1985). See also infra Part III.
litigate to acquire such property as a child bespeaks the viciousness of the peculiar institution.\(^{58}\) Solidarity along the lines of gender or sexuality was mitigated by the racism of the day.

The tension between person and property inherent in cases like *Erwin* also percolated through the political debates of the Americas. For instance, framing a national constitution forced politicians to say it outright: the Black slave was but three-fifths a person.\(^{59}\) It would seem, however, that the fractional breakdown settled upon by politicians was generous. In the legal forum, the judiciary was often less concerned with the humanity of slaves than with their character as property.\(^{60}\) This lack of concern stemmed from the fact that recognizing property interests in slaves legitimated market transactions and supported economic imperatives driving slave production and (re)production.\(^{61}\) Reflection upon these concepts reveals the fundamental problem posed by slavery – the inherent contradiction between the simultaneous legal classification of slaves as property, with their corresponding treatment as possessions, and their undeniable humanity and will, which slave owners determined required subjugation or manipulation.

Indeed, the recognition of slaves as persons was not meant to change their legal circumstances. Slaves were still denied the opportunity for legally recognized marriage, and protection of their families and children.\(^{62}\) Despite its recognition of slaves’ humanity, the law refused to honor and dignify that

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\(^{58}\) Indeed, in the *Erwin* case, the crucial feature of the will was the testamentary ambiguity. Had Mr. Henry expressly stated that the offspring of his slaves were to be considered residuum, Elenor Erwin would have received ownership of Adaline, Cynthia’s baby. However, in construing the relevant provision, the court recognized the dissimilarity of slaves, as a species of property, from the other specified examples of residue. The key to such a transfer, therefore, was not whether it was morally legitimate, but structuring the transaction in such a way that the intention was obvious and hence sustainable at law. *Erwin v. Henry*, 5 Mo. 470-72 (1838).

\(^{59}\) James Madison explained the dual nature of slaves as persons and legal property in the Federalist Papers as follows:

> In being compelled to labour not for himself, but for a master; in being vendible by one master to another master; and in being subject at all times to be restrained in his liberty, and chastised in his body, by the capricious will of another, the slave may appear to be degraded from the human rank, and classed with those irrational animals, which fall under the legal denomination of property. In being protected on the other hand in his life and in his limbs, against the violence of all others, even the master of his labour and his liberty; and in being punishable himself for all violence committed against others; the slave is no less evidently regarded by the law as a member of the society; not as apart of the irrational creation; as a moral person, not as a mere article of property. *The Federal Constitution therefore, decides with great propriety on the case of our slaves, when it views them in the mixt character of persons and of property. This is in fact their true character.*


\(^{60}\) See Goode, supra note 32, at 77 (“Property is that which may be *used* by the owner. ‘The slave is one who is in the power of a master, to whom he belongs.’ ‘Goods they are, and as goods they are esteemed.’ This is the law of the relation. ‘As goods,’ therefore, they may be *used*, while like other goods, they ‘perish with the using’”); See also Tushnet, supra note 3, Chapter IV (in particular see the cases speaking to the rationalization of slaves as fungible property.)

\(^{61}\) See discussion *infra* Part III

humanity -- to do so would create a precedent of enforceable agency interests which would clearly undermine the lucrative slave system. Moreover, by facilitating the transfer of slaves by deed, auction, mortgage, or will, the law normalized masters’ lack of concern for slave families, and readily allowed for the annihilation of slave family structures. For instance, by holding that slave marriages had no legal standing, and by denying the rapeability of female slaves, the law allowed slave owners to treat slave couples as breeding animals, and slave women as sexual property existing for the benefit of others. As with other notions of relational autonomy, the notion of captured agency makes “visible the ways in which autonomy is affected by social forces, especially oppression,” and reveals the complicity of the law, as the preeminent socio-legal mechanism of such capture.

The law’s conception of slaves as an amalgamation of person and property thus not only dishonored their essential humanity, and inherent agency, but also facilitated manipulation, coercion, compulsion, coaxing and other forms of abuse that ironically appealed to that humanity. Nowhere was such compulsion more evident than in the pressures brought to bear on female slaves who lacked autonomy over their own bodies. Slave women were alternately forced, coerced, or manipulated into practices that allowed the slave owning class to appropriate the most intimate features of their persons for profit and pleasure.

Defined as beyond “other,” as “object,” slave women occupied the sui generis status of racially sexualized property. Legal categorization of slave women as property conveniently situated them as particularly vulnerable – one can do what one chooses with one’s property, even have sex with her. This

63 See THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW 1619-1860 76-77, 83, 96, 437-438 (1996) (giving examples of legally enforced family separations, and explaining that the desire to respect slave families, protect slave marriages and preserve the relations between slave parents and their children was essential to the late antebellum reform movement).

64 For examples discussing the extent to which slaveholders had control over their property, see GOODELL, supra note 32, at 82-83 (quoting Mr. Gholson’s speech in front of the Legislature: “If the owners of lands, of orchards, and of brood mares had a right to their products, why had he not a right to the products of the slave women he had purchased? Had not the Slave Code, the legislatures and the courts secured to him his claim upon them as “chattels personal, to all intents, constructions and purposes whatsoever?”) See also MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 129 (1985) (discussing the manner in which the antebellum slave codes prohibited marriage such that slave nuptual rights suffered from racism).

65 EDs IRA BERLIN, MARC FAVREAU AND STEVEN F. MILLER, REMEMBERING SLAVERY: AFRICAN AMERICANS TALK ABOUT THEIR PERSONAL EXPERIENCE OF SLAVERY AND FREEDOM 122 (1998) (“In law, the masters’ power to transgress the boundaries of the slave family was nearly limitless. Slave marriages had no legal standing. The unions were mere couplings that could be sundered by their owners, and any children produced, like the slaves’ labor, could be employed at the owner’s pleasure. In the eyes of the law, slaves could not exercise the authority of husbands, wives, fathers, or mothers. Since the slaveholders’ rights were preeminent, slave parents lacked authority to discipline their children or sustain their own aged parents. Slaveholders had no legal obligation to respect the sanctity of the slave’s marriage bed, and slave women – married or single – had no formal protection against their owners’ sexual advances”).

66 See Carolyn McLeod & Susan Sherwin, supra note 46, at 259.

67 For a discussion see infra Part III.

68 See Bridgewater, supra note 10, at 15 (explaining the economic model of slavery as “premised on the understanding that slave owners, concerned with maximizing profits, were aware that their slaves, as chattel, could be subjected to whatever conditions, practices, or processes were necessary to achieve their economic objectives and solidify their domination”) See also WHITE, supra note 57, at 31 (1985) (“American slavery was dependent on natural increase of the slave population, and through the use of innumerable incentives, planters made sure that slave women were prolific.”)
sort of obvious legal duplicity begs the question – if slave women were less than human, and simply some amalgamation of person and property, why would any white men have sex with them? Racial power-politics animate such sexual predation, and the legal conspiracy which supported these practices begs examination. Returning to MacKinnon, while this experience of racialized heterosexuality reinforced female subjugation and male dominance, it also reinforced the race based system of American slavery and white supremacy.

II. THE PLIGHT OF BLACK FEMALE SLAVES

The crushing weight of slavery fell on black women. Under it there was no legal marriage, no legal family, no legal control over children. To be sure, custom and religion replaced here and there what the law denied, yet one has but to read advertisements . . . to see the hell beneath the system.

Due to the preeminent importance of property, and its accumulation, in Western society, the classification of slaves as property enabled White slave owners to advocate for the acquisition and “generation/production” of slaves. Further, defining slaves as property encouraged the notion that husbandry was suitable for slaves as a means of property accumulation and wealth generation. At its core, one of the essential distinctions made between animals and humans revolves around the concept of agency. From the earliest Judeo-Christian teachings, this concept of agency was asserted as man’s birthright. The contortion of religious teaching was a convenient legal leap which ensured the slavocracy maintained both its gendered privilege and its race privilege. In this way, as racially sexualized property, Black female slaves were encouraged to breed, and proprietary interests were taken in their sexuality, (re)productivity, and offspring.

A. Enhanced Valuation of Slave Women and their Issue

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69 See infra note 5.

70 DU BOIS, supra note 1, at 169.


72 GOODELL, supra note 32, at 82-83.

73 See Genesis 1:26 (King James).

And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.

74 See McCoin, supra note 6, at 237.
During the period of slavery, most Whites expected that Blacks would be held as slaves in perpetuity.\(^{75}\) This belief furthered the normative construction of slave women as actual or potential breeders, because slave women’s distinctive reproductive capacity meant not only that the women themselves were treated as property, but also that their offspring were to be so classified for eternity.\(^{76}\) It was therefore common to find clauses and provision like the following: “William Whittington sold a ten-year-old black girl named ‘Jowan’ to John Pitt and his ‘heyers, Exors. Adms. or Assigns’….\(\textit{together with} \) her Issue and Produce . . . \(\textit{and their services forever.}^{77}\) [Emphasis added]

As the (re)producers of the labor force, enslaved women were valued as one might any animal capable of generating further valuable units of production.\(^{78}\) The economic impetus behind the exertion of such control over women’s reproductive capacities has a long and infamous history.\(^{79}\) As Professor Bridgewater has observed:

Frederick Law Olmsted….received a letter from a Virginia slave owner who stated that “his women were uncommonly good breeders; he did not suppose there was a lot of women anywhere that bred faster than his. He never heard of babies coming so fast as they did on his plantation. In another letter, Olmsted recounts that a Southerner explained that his “girls and women (married or unmarried) [were commanded to have] children . . . a breeding woman is worth . . . more than one that does not breed.”\(^{80}\)

The “breeding” of slave women, as recounted by Olmsted, was made economically viable by the American legal system’s recognition of slaves as property with manipulable human characteristics.\(^{81}\) Traditionally, for instance, such animal husbandry techniques, as practiced on animals rather than humans, were made possible by western legal conceptions of property.\(^{82}\) The legal conflation of slaves as property allowed for their equivalence with livestock or animals. As with the reproduction of animals,

\(^{75}\) WINTHROP JORDAN, THE WHITE MAN’S BURDEN: HISTORICAL ORIGINS OF RACISM IN THE UNITED STATES 31 (1974) (indicating that slavery was thought of as perpetual for two reasons: first since slavery was conceived of as a life long condition and secondly, since slavery was thought of as hereditary).

\(^{76}\) See A. LEON HIGGINBOTHAM JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 43 (1996) See also Cohen, supra note 40, at 366-368 (This theory would hold that since slavery was an inherited lifelong condition, the heredity tracked the mother, just as the status of the foal tracked that of the mare. Essentially, the perpetual ownership of slaves flowed through, and was contingent upon, the status of the mother).

\(^{77}\) JOSEPH BOSKIN, INTO SLAVERY: RACIAL DECISIONS IN THE VIRGINIA COLONY 43 (1979).

\(^{78}\) See GOODELL, supra note 32, at 51; Bridgewater, supra note 10, at 18.

\(^{79}\) Tessie Liu, Teaching the Differences Among Women from a Historical Perspective: Rethinking Race and Gender as Social Categories, 14(4) WOMEN’S STUD. INT’L F. 265 (1991).


\(^{81}\) See GOODELL, supra note 32, at 82-83; see also GROSS, supra note 55, at 128-129.

\(^{82}\) See Cohen, supra, note 40, at 363-368 (discussing the underpinnings of property law as it impacts the ownership of chattel property, including animals).
slaves were subject to manipulation for capital maintenance and profit maximization. Property law principles applied such that incentives to breed were normatively built into the legal system as “livestock owners would not be so nearly likely to breed their mares or cows if anybody else could come along and take title to the offspring.”

Property law provided the conduit through which the slave could be legally substituted for the mare, the child for the foal. Accordingly, the “breeding” of slave women was fully consistent with the norms and imperatives of the legal order, a legal order that not only facilitated the physical capture of slaves, but which also ensured the capture of their agency as well. The language of “breeding” is inherently distasteful and offensive; however, those practices, as used on both slaves and animals, were unquestionably supported by American legal and economic norms – American husbandry, encouraging the (re)productivity of humans, rather than animals, was practiced with the complicity of the legal system. Perhaps this legal support stemmed from the fact that many members of the judiciary and the legislature were also slaveholders. This proposition should not strain credulity as even revered American President Thomas Jefferson owned slaves - this was the order of the day. If they were not slave owners, it is reasonable to surmise that those judges were likely of the same class as slave owners. For instance, evidence of this phenomenon of affinity for and connection to the Slavocracy is found in the judgment of Justice Fleming, who had no qualms about acknowledging his own support for, and interest in, slave breeding in one family law case;

... a just and reasonable allowance ought to be made her, for the support and maintenance of the aged, the children and others that were unprofitable ... and for other incidental expenses which she may have incurred on their account; as I have been taught by experience, that the maintenance of a parcel of negroes, where a considerable proportion of them are breeding women, is rather expensive...

83 Id. at 368.
84 See Goodell, supra note 32, at 82-83; see also Gross, supra note 55, at 129.
85 See Goodell, supra note 32, at 51. “Thus, when the judge, the lawyer, or the law compiler or author would lay down the legal rule by which the decision should be made in a litigated case,...he looks up the precedents and rules originally occurring or laid down in respect to “a mare” or “a colt”...the express language of the judges, placing the issue of female slaves, when hired out for five years, upon the same footing, and to be awarded upon the same rules, as in the case of the increase of “brood mares” or other “female animals”) id. at 85.
86 See comments of Justice Fleming in Upshaw v. Upshaw, 12 Va. 381, 393-394 (1808); see also James Oakes, The Ruling Race: A History of American Slaveholders 144 (1982) (noting that three-quarters of magistrate level judges in Kentucky were slaveholders, compared only one-third of the general population); see generally Ralph A. Wooster, Politicians, Planters, and Plain Folk: Courthouse and Statehouse in the Upper South , 1850-1860 (1975) (listing numerous influential judges and legislators as slaveholders).
88 Defined as a “ruling group of slaveholders or advocates of slavery, as in the southern United States before 1865” see The American Heritage College Dictionary 3rd Ed. (1993).
89 Upshaw v. Upshaw, 12 Va. 381, 393-394 (1808).
In this environment, slave owners were free to use animal husbandry to control and manage (re)production in order to maximize profits from initial investments. Since the slave was the property of the master – much like work animals – the same husbandry techniques were available to a master in order to increase his investment portfolio. Husbandry techniques included the stripping and herding of boys and girls, over thirteen years of age, into barns overnight. This forced naked interaction often yielded as many as sixty babies for the masters.

Autobiographies of ex-slaves furnish ample evidence of slave breeding. It is reported that quite often a master would buy one female and one male slave and put them together as though they were cattle. Some masters had breeding farms and “raised slaves,” as breeding is most generously denominated, to sell on an order basis. For instance, “James Roberts reported that, on his plantation, fifty to sixty females were kept solely for breeding.” Twenty to seventy-five children, which were sold as soon as they were ready for the market, were bred annually on this plantation. Indeed, Du Bois pointed out that slave-breeding became an important industry in many Border States: “The deliberate breeding of a strong, big field-hand stock could be carried out by selecting proper males, and giving them the run of the likeliest females. This in many Border States became a regular policy and fed the slave trade.”

The higher market price for young pregnant women provides corroborative evidence of slave breeding. Commentators have remarked on the value of “prime field wenches,” meaning women

90 See AUGUSTIN COCHIN, RESULTS OF SLAVERY 13 (1863) stating (“Negroes were raised like horses elsewhere, one male to ten females, reproduction was stimulated by every means, products were multiplied, then sold. Like our counties devoted to the raising of cattle, a number of States received the name of slave-raising States.”)

91 See Richard Sutch, The Breeding of Slaves for Sale and the Westward Expansion of Slavery, 1850-1860, in RACE AND SLAVERY IN THE WESTERN HEMISPHERE: QUANTITATIVE STUDIES 174-175 (Stanley L. Engerman & Eugene D. Genovese eds., 1975); See also Cohen, supra, note 40, at 363-368 (detailing the manner in which property law encourages the (re)productivity of livestock).

92 Bridgewater, supra note 10, at 19.
93 Id.


95 See GOODELL, supra note 32, at 55 (“It is believed that no where in the farming portion of the United States, would slave labor be generally employed, if the proprietor were not tempted to RAISE slaves, by the HIGH PRICE of the SOUTHERN MARKET which keeps it up in his own.”) [Emphasis in original]. See note 89 referring to slave-raising states.

96 FONER, supra note 94, at 52.
97 Id. at 52.

98 W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 44 (1992) [hereinafter BLACK RECONSTRUCTION].

capable of bearing between five and ten “marketable” children, being from one-sixth to one-fourth more than that of slave women who were infertile.\textsuperscript{100}

In accordance with the premium placed on female “breeders,” advertisements in the South for “Negro wenches” prominently featured the value placed upon the fecundity and child-rearing qualities of young female slaves.\textsuperscript{101} For example, advertisements used marketplace descriptions such as “breeding slaves, child bearing woman, breeding period, too old to breed,” all of which focused on the (re)productivity of female slaves.\textsuperscript{102} Indeed, numerous advertisements highlighted the “generating” capacities of female slaves:

NEGROES FOR SALE – A girl, about 20 years of age, (raised in Virginia,) and her two female children, one four, and the other two years old – is remarkably strong and healthy – never having had a day’s sickness, with the exception of the small-pox, in her life. The children are fine and healthy. \textit{She is very prolific in her generating qualities, and affords a rare opportunity to any person who wishes to raise a family of healthy servants for their own use.}\textsuperscript{103} [Emphasis added]

Conversely, the inability to reproduce negatively impacted the market value of, and hence demand for, female slaves.\textsuperscript{104} In addition, the type, severity, and frequency of punishments received by female slaves were related to the economic interest in slave (re)productivity.\textsuperscript{105} For instance, female slaves were punished more severely when they refused to submit to, or when they could not fulfill, their owner’s (re)productive goals.\textsuperscript{106}

In addition to the fact of enslavement, therefore, the emphasis upon reproductive capacity placed slave women and their families in particularly vulnerable positions. Hence a disparate and gendered aspect of slavery related to the reproductive valuation and assessment to which slave women were subjected. Arguably, one could toil, pick, or hoe faster, but one has only limited control over one’s

\begin{thebibliography}{10}
\bibitem{100} {Foner, supra note 94, at 53. \textit{See also} Herbert G. Gutman, \textit{The Black Family in Slavery and Freedom}, 1750-1925 77-78 (1976) (quoting the calculation of one slave owner: “I own a woman who cost me $400.00 when a girl in 1827. Admit she made me nothing—only her victuals and clothing. She now has three children, worth over $3000.00…I would not this night touch $700.00 for her. Her oldest boy is worth $1250.00 cash and I can get it”).

\bibitem{101} See \textit{Goodell}, supra note 32, at 84-87.


\bibitem{103} \textit{Goodell, supra} note 32, at 84.

\bibitem{104} \textit{See} Bridgewater, \textit{supra} note 10, at 23 (“Descriptions used in advertisements of the day include “breeding slaves, child bearing woman, breeding period, too old to breed””) “Further, slaves purchased for breeding who could not fulfill their intended purpose were considered an economic loss. In an effort to regain their initial investment costs, many displeased slave owners sold infertile slaves to unsuspecting buyers”. \textit{Id.} at 17. \textit{For further discussion see also} Kaytal, \textit{supra} note 87, at 794. \textit{Gross, supra} note 55, at 129.

\bibitem{105} Bridgewater, \textit{supra} note 10, at 16.

\bibitem{106} Bridgewater, \textit{supra} note 10, at 16 (discussing the techniques used by slave owners including positive reward such as gifts and threats to encourage their slaves to breed). \textit{See also} Hooks \textit{supra} note 130, at 40-41 and \textit{White, supra} note 57, at 99-101 (discussing the separation and sale of barren women from their husbands).
\end{thebibliography}
reproductive capacities. Accordingly, slave women could at best exercise limited agency over the protection of their sexuality and reproductive autonomy.

I. The Doctrine of Partus Sequitur Ventrum

Slave women were especially prized because their offspring could be held perpetually. Slave women’s (re)productivity was so central to the slave system that the law provided that children born of black women, no matter who the father was, would inherit her status – the status of a slave. The notion that legal status was inherited from the mother directly contradicted traditional English law, but was consistent with the laws governing animal husbandry and the rearing of livestock. Furthermore, this law enabled a shrewd master to save the cost of buying new slaves by impregnating his slaves, or by having any man impregnate them, and subsequently claiming the economic benefits from (re)production.

The legal doctrine of partus sequitur ventrum, which provided that children born of black women inherited the status of their mothers, was created when legislative assemblies, troubled by the status of mixed-race slaves born of such unions, reversed the established law that the child inherits the status of the father. One such Act read:

WHEREAS some doubts have arisen whether children got up by an Englishman upon a negro woman should be slave or free. Be it therefore enacted and declared by this present grand assembly, that all children borne in this county shall be held bond or free only according to the condition of the mother. (emphasis in original)

By reversing the traditional common law rule, the doctrine of partus sequitur ventrum thus provided for enslavement through control of black women’s reproductivity. Perhaps one of the most debilitating aspects of slavery was the legally supported notion that slaves were born into unqualified hereditary servitude. While uncompromising, such harshness was consistent with the prevailing sense that slavery was the foreordained status of Blacks.

The doctrine of partus sequitur ventrum was fueled not only by White conceptions of slavery and Blacks, but also by the end of the international slave trade. Shrewd slave owners realized they could

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108 See infra note 9. See also Shaw, supra note 107, at 44-51 and Cohen, supra, note 40, at 363-368.
109 See Shaw, supra note 107, at 47.
111 Id.
112 Shaw, supra note 107, at 43 (discussing the “fore-ordained” notions of African Slavery).
113 See id. at 42-43 (discussing numerous Acts abolishing the international slave trade, such as the Act of 1807, which prohibited the importation of slaves after 1808, the Act of 1820, which declared the international slave trade a form of piracy, and individual state acts, which similarly prohibited the importation of slaves). But cf. id at 207 (noting that, in 1803, South Carolina reopened the international slave trade, and Louisiana was acquired under laws that allowed, for a short time, the continuation of international slave trade).
breed and raise slaves faster than they would need them for themselves.\footnote{See W. Michael Byrd & Linda A. Clayton, An American Health Dilemma: A Medical History of African Americans and the Problem of Race: Beginnings to 1900 289 (2000) (addressing the labor needs of the expanding Cotton Kingdom as implicating slave breeding practices.); Goodell, supra note 32, at 56 (noting that the Editor of the Virginia Times in 1836 calculated that 40,000 slaves were independently sold out of that state representing millions of dollars in income.)} For example, Maryland, Virginia, South Carolina, and North Carolina, became the main exporting states – together these states supplied over 85 percent of the migrant slaves.\footnote{Robert William Fogel & Stanley Engerman, Time on the Cross: The Economics of American Negro Slavery 47 (1974).} Thus, with the abolition of the slave trade, maintenance of slavery required that the existing domestic slave labor force reproduce itself.\footnote{See Byrd & Clayton, supra note 114, at 282. See also Shaw, supra note 107, at 43.} In fact, during the tumultuous last decade of slavery, the domestic slave trade reached its height.\footnote{See Black Reconstruction, supra note 94, at 43.} Again the convenient doctrine of partus sequitur ventrum focused the attention of those desiring a domestic slave trade upon female slaves. As one slave-owner explained,

> The legal maxim ‘Partus sequitur ventrum’ is coeval with the existence of the rights of property, and is founded in wisdom and justice. It is on the justice and inviolability of this maxim that the master foregoes the service of his female slave; has her nursed and tended during that period of her gestation, and raises the helpless and infant offspring. The value of the property justifies the expense, and I do not hesitate to say that in its increase consists much of our wealth. [Emphasis added]\footnote{Goodell, supra note 32, at 83 (speech of slave-owner, Mr. Gholson, in Virginia Legislature) (citing Scott v. Dobson, 1 H. & McH. 160, 352 (Md. Prov. 1749); Standiford v. Amoss, 1 H. & J. 526 (Md. Gen. 1804); Ex’r of Davis v. Wilkinson, 1 Hayw. 334 (N.C. 1796)).}

In addition to the end of the Atlantic slave trade, the increased emphasis on slave-raising and black women’s (re)productivity was fueled by American expansionism.\footnote{See Foner, supra note 94, at 51. See generally Goodell, supra note 32, at 78-88.} For instance, in 1832, Thomas R. Drew, a prominent slave-owner stated that western migration “induced the master to attend to the Negroes to encourage breeding and to cause the greatest number possible to be raised.”\footnote{Foner, supra note 94, at 51. See Harriet Jacobs, Incidents in the Life of a Slave Girl: Contexts, Criticism 31 (Nellie Y. McKay and Frances Smith Foster eds. 2001).} Because of this emphasis on (re)productivity, Drew stated bluntly, “Virginia is, in fact, a Negro raising state.”\footnote{Foner, supra note 94, at 51. See Frederic Bancroft, Slave-Trading in the Old South 71 (1931) (quoting Thomas Drew, a prominent slave-owner).}

The secrets of slavery are concealed like those of the Inquisition. My master was, to my knowledge, the father of eleven slaves. But did the mothers dare to tell who was the father of their children? Did the other slaves dare to allude to it, except in whispers among themselves? No, indeed! They knew too well the terrible consequences.

> Id.
observation is echoed in the comments of a Virginia state legislator, who declared that “Virginia had been converted into one grand menagerie, where men are reared for market, like oxen for the shambles.” Of course, such language had disparate and overwhelming implications for slave women, who were considered “brood mares,” capable of generating issue for the domestic slave market. For instance, as Mr. Gholson proclaimed in a speech before the Virginia State Legislature, “[T]he owner of land had a reasonable right to its annual products, the owner of brood mares to their product, and the owner of female slaves of their increase.” In other words, for many members of the slave owning class, the application of animal husbandry techniques to female slaves was both right and profitable. Capturing slave women’s agency was a lucrative business, justified by political expediency and force of law.

Accordingly, there was certainly a pervasive, yet perverse, economic rationale for the criminal law’s failure to protect female slaves from such sexual abuse. Unhindered sexual access to slave women could result in offspring. Offspring from slaves, like the offspring from livestock, were the property of the owner. Thus, in holding that “rape committed upon a female slave is an offense not recognized by law,” the law gave primacy to the economic interests of the slave owning class – the law normatively preferred the generative capacity of the slave to the sanctity of their personal, sexual and reproductive autonomy. As will be demonstrated below, the sordid legacy of Dr. Sims exemplifies how the economic interests of the slave owning class engendered preoccupation with the (re)productivity of female slaves. Clearly, female slave status as racialized sexual property disparately impacted them and their families:

The story of the planter who boasted of creating his entire plantation workforce of 50 to 60 from the issue of one enslaved woman “in the course of the lifetime of the original producers” leads one, inevitably, to speculate about how slave women must have felt to see themselves used as a return on capital, a means of reproduction, to see their children born into slavery, children they may well not have wanted, often fathered by rape or legitimised coercion. Under such circumstances, what does one do? To love, or not to love? To abort, to suicide, to poison, to murder? What would any of us do?

The legal doctrine of partus ventrum sequitur aided the imposition of human husbandry, American husbandry, on slaves by rendering those techniques economically viable, if not highly

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122 Foner, supra note 94, at 51.

123 Goodell, supra note 32, at 85. “Thus, when the judge, the lawyer, or the law compiler or author would lay down the legal rule by which the decision should be made in a litigated case,...he looks up the precedents and rules originally occurring or laid down in respect to “a mare” or “a colt”...Id. at 51. “...the express language of the judges, placing the issue of female slaves, when hired out for five years, upon the same footing, and to be awarded upon the same rules, as in the case of the increase of “brood mares” or other “female animals”) Id.at 85.

124 Id. at 55-56.

125 Id. at 86 (quoting MSS by Judge Jay). See infra Part IV(c) for a further discussion of criminal law norms.

lucrative. 127 While some have challenged exactly how widespread the practice of breeding actually was, 128 there can be no doubt that the force of this legal doctrine created norms facilitating at least the concept, if not the practice, of husbandry techniques to breed slaves. The overlay of property law principles as applied to the “issue” of female slaves served to further commodify female slaves as sites of potential property generation.

2. “Incentives” to Breed

Slavery was based upon the law’s dehumanizing construction of slaves as property; however, consistent with the conflation of person and property, slave owners remained aware of the inherent humanity of their property. 129 Accordingly, the most common method of American husbandry appealed to human desires and weaknesses. 130 Female slaves could be manipulated by playing on their desire to avoid severe punishments, to earn rewards, or to improve the situation of their families. 131 Moreover, slave women were cognizant of the range of possibilities that confronted their (re)productivity and sexual autonomy, including violent sexual assault, sexual harassment, maternity prizes, incentives for (re)production or sexual access, and forced mating. 132 This awareness led some female slaves to seek improvement of their lot in life by exploiting or sacrificing their (re)productivity as a way of exerting their agency, however constrained. 133

127 Edmund Ruffin, a Virginia agricultural reformer, insisted, “the cultivations of eastern Virginia derive a portion of their income from a source quite distinct from their tillage... This source of income is the breeding and selling of slaves.” FONER, supra note 94, at 51.


129 Bridgewater, supra note 10, at 16. As discussed in several preceding footnotes, the recognition slaveholders had of the humanity of their property led them to reward or punish their slaves (property) according to each slave’s success in procreating.

130 Id. See also BELL HOOKS, AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM 33-45 (South End Press 1981).

131 See Bridgewater, supra note 10, at 16-17.

132 Id. at 16-17.

133 See HOOKS, supra note 130, at 24-26.

Those women who did not willingly respond to the sexual overture of masters and overseers were brutalized and punished. Any show of resistance on the part of enslaved females increased the determination of white owners eager to demonstrate their power. In an account of her slave experience, Ann, a young mulatto woman, documents the struggle for power enacted by white masters, overseers, whippers, and the female slave. In her case it was the paid whipper who planned to rape her. He demanded that she remove all her clothing prior to the whipping. When Ann realized that he intended to rape her, she struggled. Her resistance angered him and he responded, “Girl, you’ve got to yield to me. I’ll have you now: if it’s only to show you that I can... You’ve got to be mine. I’ll give you a fine calico dress and a pretty pair of ear-bobs!”

Id. at 26.
Female slaves were often conscripted to sacrifice their sexual autonomy through a system of exchange.\textsuperscript{134} For example, maternity prizes were used as incentives for female slaves to breed.\textsuperscript{135} Rather than exclusively using systems of punishment to coerce (re)productivity, slave-owners instituted maternity rewards systems, offering dresses, food, or reprieves from work.\textsuperscript{136} Further, some slave owners made good on their promises to free female slaves after the slaves gave birth to a certain number of children. For example, John Guthrie, in 1761, provided in his will that if his slave Jenny “bring 10 live children, that she shall be at her liberty . . . ”\textsuperscript{137} Similarly, Mr. B. Talbert stated that when his slave girl Jenny “should have a child for every one of his (he then having five) he would set her free.”\textsuperscript{138} Such incentives to breed not only reflect slave-owners’ economic desire to increase the slave population, but also slave women’s understandable desires to avoid punishment and improve their lives and their families by whatever means, including the strategic utilization of sexuality and (re)productivity as a method of resisting the capture of their agency.\textsuperscript{139} However, slave women could only achieve the ends by surrendering their (re)productivity.\textsuperscript{140}

These systems of exchange encouraging (re)productivity can therefore be viewed as a kind of sexual terrorism – they coerced women into surrendering their bodies, and thus became an efficient tool of racialized female suppression.\textsuperscript{141} Moreover, given the notorious sexual excesses for which many planters and their agents became infamous,\textsuperscript{142} the agency of slave women over their bodies and (re)productivity was constrained at best, non-existent at worst. For those slave women situated to manipulate their sexuality, the “choices” available to them were undesirable. Conceding to sexual exploitation can best be described as a “damned if you do damned if you don’t” Pandora’s Box. This dilemma was exacerbated by the fact that the inevitable sexual advances of white males contributed to a pervasive vindictiveness on the part of many white mistresses, thereby undermining gender-based abolitionist coalition building.\textsuperscript{143}

\textsuperscript{134} See Bridgewater, supra note 10, at 16-17.

\textsuperscript{135} Id. (maternity prizes might include the promise of additional food or clothing i.e. a new dress); WHITE, supra note 57, at 99 – 101 (discussing inducements and incentives to reproduce including lightened labor, greater attention, days off, more food rations, new clothing or money); KAPSALIS, supra note 27, at 35 (acknowledging that breeding women were often entitled to special privileges such as a preferred job in the master’s house, as opposed to the field).

\textsuperscript{136} Bridgewater, supra note 10, at 17.

\textsuperscript{137} Fairclaim v. Guthrie (April 1897), 1 Call 7.

\textsuperscript{138} Talbert v. Jenny 27 Va. 159 (Va. 1828) 159.

\textsuperscript{139} Bridgewater, supra note 10, at 16-17.

\textsuperscript{140} Id. at 17.

\textsuperscript{141} ANGELA DAVIS, WOMEN, RACE AND CLASS 20 (Random House 1981) (in such a world, the element of free choice and true consent is virtually absent).

\textsuperscript{142} See WHITE, supra note 57, at 152-153, 164-165 (discussing the sexual abuse of slave women.) See also JACOBS, supra note 120, at 26.

\textsuperscript{143} JACOBS, supra note 120, at 26.

Even the little child, who is accustomed to wait on her mistress and her children, will learn, before she is twelve years old, why it is that her mistress hates such and such a one among the
3. Stereotypes and the Lack of Criminal Protection

In the White public imagination, female slaves were without decency, and were overtly sexual – these stereotypes played an important role in the facilitation of slave breeding. Female slaves were forced to pose nude, and were even subjected to intrusive private examinations to assess their slaves. Perhaps the child’s own mother is among those hated ones. She listens to violent outbreaks of jealous passion, and cannot help understanding what is the cause. She will become prematurely knowing in evil things. She will learn to tremble when she hears her master’s football. She will be compelled to realize that she is no longer a child. If God has bestowed beauty upon her, it will prove her greatest curse.

Harriet Jacobs recognized the predicament in which many White women found themselves with respect to their husbands’ illegitimate slave children. She further recognized the unfortunate remedy which was often taken.

Southern women often marry a man knowing that he is the father of many little slaves. They do not trouble themselves about it. They regard such children as property, as marketable as the pigs on the plantation: and it is seldom that they do not make them aware of this by passing them into trader’s hands as soon as possible, and thus getting them out of their sight.

Id. at 32.

144 Cheryl I. Harris, Bondage, Freedom & The Constitution: The New Slavery Scholarship and Its Impact on Law and Legal Historiography: Private Law and United States Slave Regimes: Article: Finding Sojourner’s Truth: Race, Gender, and the Institution of Property, 18 CARDOZO L. REV. 309, 313-314 (1996). See WHITE, supra note 57, at 28-29 (“One of the most prevalent images of black women in antebellum America was of a person governed almost entirely by her libido, a Jezebel character. In every way Jezebel was the counterimage of the mid-nineteenth-century ideal of the Victorian lady. She did not lead men and children to God; piety was foreign to her. She saw no advantage in prudery, indeed domesticity paled in importance before matters of the flesh. How white Americans and Southerners in particular, came to think of black women as sensual beings has to do with the impressions formed during their initial contact with Africans, with the way black women were forced to live under chattel slavery, and with the ideas that Southern white men had about women in general.”).
(re)productivity. As Professor Bridgewater has stated, “[w]ith this understanding of female slave sexuality, sexual abuse was considered justified by the perpetrators and desired by the victims.”

In narrating her experience in slavery, Linda Brent, writing as Harriet Jacobs, detailed the sexual exploitation of slave women that often commenced before puberty. It is difficult to contemplate this oppressive regime of sexual terrorism, the threat of which would have hung over slave women from an early age.

I turned from him with disgust and hatred. But he was my master. I was compelled to live under the same roof with him – where I saw a man forty years my senior daily violating the most sacred commandments of nature. He told me I was his property; that I must be subject to his will in all things. My soul revolted against the mean tyranny. But where could I turn for protection? No matter whether the slave girl be Black as ebony or as fair as her mistress. In either case, there is no shadow of law to protect her from insult, from violence, or even from death.

Neither the terminology of child molestation, nor statutory rape would resonate in aid of slave girls confronting such sexually abusive situations unless her master chose to pursue such legal recourse for damage to his property. The innate abusiveness of (re)productivity was not confined to adult slave women; a slave girl was expected to have children as soon as possible. Some slave girls had children at the age of twelve and thirteen years old. As one former slave observed, “Negro men six feet tall went

\[ Id. \text{ (citations omitted)} \]

\[ 145 \text{ WHITE, supra note 57, at 32.} \]

\[ 146 \text{ Bridgewater, supra note 10, at 18.} \]

\[ 147 \text{ See JACOBS, supra note 120, at 26.} \]

\[ 148 \text{ Id.} \]

\[ 149 \text{ MORRIS, supra note 63, at 306-307; See also Paul Finkelman, Thomas R. R. Cobb and the Law of Negro Slavery, 5 ROGER WILLIAMS U. L. REV. 75, 96-104(1999).} \]

\[ 150 \text{ See JACOBS, supra note 120, at 25-44; See WHITE, supra note 57, at 152-153, 164-165 (discussing the sexual abuse of slave women.)} \]

\[ 151 \text{ BULLWHIP DAYS; THE SLAVES REMEMBER 147 (James Mellon ed., 1988) [hereinafter BULLWHIP DAYS].} \]
to some of these children." 152 This issue of child molestation was framed by the court in *George v. State* as "whether the carnal knowledge of a female slave, under ten years of age, by a negro man slave is a capital offence, under the laws of this State." 153 In holding that such a violation would not be deemed rape, the Georgia court emphasized the unassailable dominion of the master,

Of the three great absolute rights guaranteed to every citizen by the common law, viz., the right of personal security, the right of personal liberty, and the right of private property, the slave, in a state of pure slavery, is absolutely deprived, being, as to these, under the dominion of his master; so that infringements of these rights, even by third persons, could be remedied and punished only at the suit of the master, for the injury done him in the loss of service, or the diminution in value of his slave. 154 [Emphasis added]

The motivations for the denial of such criminality were economic. 155 Provided the physical property of the slave was not injured by such sexual abuse, the owner could reap profits from sexual interference with his slaves. 156 If slave women and girls could be legally protected from sexual interference from other slaves, a slippery slope argument could be made which would be treacherous to the slavocracy. Specifically, would not the slave woman and child have similar autonomy interests vis-à-vis white men as well? To recognize this agency interest would imperil the entire system of slavery. There was money to be made; if such bottom-line concerns were to be preserved by allowing for the rape of a 10 year old girl, so be it. Victorian norms of prudery and decency were inapplicable to slave women and girls and would not serve to protect them. As explained by a former slave, sex with young girls was not frowned upon even if they were not married, so long as the sex was with white men, with the owner’s permission, or would result in a birth. 157

Criminal law theories of punishment, specifically deterrence, retribution, and incapacitation, were of no force when considering possible criminalization of sexual interference with female slaves. 158 In

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152 Id.

153 See *George v. State* 37 Miss. 316 (1859). (holding that there is no act which embraces either the attempted or actual commission of a rape by a slave on a female slave.)

154 Id.

155 Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV., 1193, 1198-1199 (1985); see also Goodell, *supra* note 32, at 82-83; *State v. Mann* 13 NC 263 (1829); and Bridgewater, *supra* note 10, at 25 ("Since slave owners had unfettered sexual access to their slaves, a slave owner was able to be the biological father and owner of many slave children. This state of the law made sexual assault a wise investment strategy for a cash-strapped slave owner who was interested in increasing the number of his slaves. In order to create a viable slave system supported by the reproductive capacities of female slaves, it was necessary to deny legal protection against sexual assault to female slaves.").

156 Goodell, *supra* note 32, at 78-82; see also Cohen, *supra* note 40, 360-369 (referencing the fact that the offspring of livestock form part of the ownership portfolio of the master. Similarly, the slave does not own their offspring. Rather such offspring accrues to the benefit of the owner of the slave woman.)


158 Morris, *supra* note 63, at 305 (noting that every sate that adopted penal statutes to punish rapes committed by slaves specified that the victim could only be white and that no white person could ever be convicted of raping a slave woman).
other words, regardless of whether a slave woman was raped by a free black man, an enslaved black man or a white man, the law did not recognize this act as a crime.\(^{159}\) Such a prosecution would have been unheard of – female slave autonomy, short of life versus death, did not engage criminal sanctions.\(^{160}\) This absence of rights stemmed from the classification of slaves as property, for once the validity of ownership was established, the right to complete use of slaves followed naturally. In other words, as property, slaves could be used absolutely by their owners, whether for profit or pleasure.\(^{161}\)

Describing the complete agency of the master, Judge Ruffin in the infamous assault and battery case of the slave Lydia, \textit{State v. John Mann}, stated “…this dominion is essential to the value of slaves as property, to the security of the master, and the public tranquility, greatly dependent upon their subordination; and as most effectually securing the general protection and comfort of the slaves themselves.”\(^{162}\) In this way, the norms created by the criminal law, tort law, and property law intersected to facilitate and reinforce the abuse of black slave women. The words of Judge Ruffin, while haunting, are as candid a description of the institution of slavery as can be found: “[t]he end is the profit of the master, his security and the public safety...The power of the master must be absolute, to render the submission of the slave perfect.”\(^{163}\) Such absolute agency included absolute sexual power over female slaves and their bodies.

\(^{159}\) \textit{Id.} at 306 (“Generally black women, whether bond or free, were not protected by the law in the same way as white women were.”) See \textit{State v. Charles}, a slave, 1 Fla. 298 (1847), \textit{Commonwealth v. Jerry Mann}, 4 Va. (Va. Cas.) 210 (1820); \textit{George v. State}, 37 Miss. 316 (1859) (as cited by Jennifer Wriggins, \textit{Note, Rape, Racism, and The Law}, 6 HARV. WOMEN’S L. J. 103, 106 (1983) stating that the rape of Black women by white or black men, was legal; further, indictments were sometimes dismissed for failure to allege the victim was white.)

\(^{160}\) \textit{Finkelman, supra} note 149, at 104 (1999).

But, to punish masters for the rape of a slave would imply that slaves had rights. This would have opened up a Pandora’s Box of problems for the Southern legal system. The law could give the slave “no rights or privileges except such as are necessary to protect [his] existence.” Obviously, rape did not threaten the existence - the lives - of slaves. Furthermore, the effective enforcement of laws punishing whites for raping slaves would have required that slaves testify against whites, even against their own masters. And this simply was not possible under the slave regime. Moreover, since blacks were naturally “mendacious,” their testimony would have been deemed worthless when offered against whites.

\textit{Id.}

\(^{161}\) \textit{See State v. Mann, supra} note 155, at 267 (stating “We cannot allow the right of the master to be brought into discussion in the Courts of Justice. The slave, to remain a slave, must be made sensible, there is not appeal from his master...”) Judge Ruffin’s holding for the Defendant:

I repeat, that I would gladly have avoided this ungrateful question. But being brought to it, the Court is compelled to declare, that while slavery exists amongst us in its present state, or until it shall seem fit to the Legislature to interpose express enactments to the contrary, it will be the imperative duty of the Judges to recognize the full dominion of the owner over the slave, except where the exercise of it is forbidden by statute.

\textit{Id.} at 268.

\(^{162}\) \textit{Id} at 268.

\(^{163}\) \textit{Id} at 266.
Indeed, particularly after the abolition of the international slave trade, breeding slaves for the “southern market” was a valuable aspect of the economy of slavery.\(^{164}\) So valuable was this market that prominent businessmen proudly proclaimed their personal “attention” to their female slaves.\(^ {165}\) Such “attention,” however, was a most generous reference to sexual molestation and rape, no matter the “nobility” of the abusers.\(^ {166}\) The articulations of Professor Dews, who would later become President of William and Mary University in Virginia, attest to the emphasis, if not the pride, of slave owners in their breeding practices and husbandry techniques:

> It furnishes every inducement to the master to attend to his Negroes, to encourage breeding, and to cause the greatest number of slaves to be raised. Virginia is, indeed, a Negro-raising State for other States. To which may be added the far-famed announcement -'The noblest blood of Virginia runs in the veins of slaves.'\(^ {167}\)

The absence of criminal law protection of slave women should be analyzed from two vantage points. First, doctrinally, the person of a female slave suffered no cognizable harm from sexual abuse because she was not a legally recognized human being.\(^ {168}\) Moreover, while a slave-owner could agitate for a criminal prosecution, arguably his concerns could be satiated if a child was produced by the sexual interference – in essence, the master could gain another slave for free.\(^ {169}\) In accordance with this vision of black women as (re)productive property not worthy of the protection accorded to Whites, actual physical injury to the slave woman was handled by civil law as trespass or damage to property.\(^ {170}\) Second, because it behooved a master to “attend” to his slave women, he could exercise complete control and authority

\(^{164}\) Henry Clay, in his speech before the Colonization Society in 1829, said: “It is believed that no where, in the farming portion of the United States, would slave labor be generally employed, if the proprieor were not tempted to raise slaves, by the high price of the Southern Market which keeps it up in his own.” GoodeLL, supra note 32, at 55. See also, Sutch, supra note 91, at 178-190.

\(^{165}\) Recalling words of prominent slave-owner Thomas Drew stating that the imperatives of western migration “induced the master to attend to the Negroes to encourage breeding and to cause the greatest number possible to be raised.” Foner, supra note 94, at 51.

\(^{166}\) See Bridgewater, supra note 10, at 19 (“Their perceived heightened desire, and their slave owners’ interest in increased births, led to sanctioned rapes, polygamy and promiscuity among female slaves. Public opinion supported the slave owners’ interest in increased births and female slaves’ vulnerability to sexual abuse.”).

\(^{167}\) GoodeLL, supra note 32, at 84 (quoting Professor Dews, later President of William & Mary University, speaking of the slave trade from Virginia).

\(^{168}\) GoodeLL, supra note 32, at 83 (discussing the nature of chattels personal which allows the master to manifest his full intentions, “constructions and purposes whatever” regarding his slaves with out limitation”); see Morris, supra note 63, at 306 (discussing the advocacy of attorney John D. Freeman in George (a slave), v. State, 37 Miss. 319-20 (1859), a prosecution for the rape of a ten year old slave girl, where he stated that “our laws recognize no marital rights as between slaves; their sexual intercourse is left to be regulated by their owners.”)

\(^{169}\) See Bridgewater, supra note 10, at 19.

\(^{170}\) Shaw, supra note 107, at 158.
over that which was his own. As a result, rape of a female slave by her owner would have been considered a legal oxymoron. Clearly, the racially sexualized property interest in female slaves made sexual assault a financially lucrative occurrence for slave owners interested in inexpensively increasing the number of their slaves.

III. DR. SIMS AND THE BLACK FEMALE BODY AS THE SITE OF MEDICAL EXPERIMENTATION

And if in these days a moment can be spared for sentimental reverie, look again, I beg, at the curious speculum, and gazing through the confused reflections from its bright curves, catch a fleeting glimpse of an old hut in Alabama and seven negro women who suffered, and endured, and had rich reward.

Medical historians have noted that, in a strictly pragmatic sense, use of Black female slaves as the sites of medical experimentation fulfilled the shared interests of the physician and the slave, while serving to further medical progress. According to this cold logic, “…[t]he young Southern physician found in slavery a means to an early start…while at the same time, the slaves found in the system a sort of health insurance.” Be that at it may, the slave woman’s body and agency remained captured for ends determined without her autonomous well-being in mind – she was but the site at which scientific advancement took place.

Any benefits for slaves, were offset by the dehumanization slaves suffered as objects lacking autonomy over their own bodies. Legally designated as their masters’ property, slaves were completely vulnerable to their masters’ determinations concerning use of their bodies. Pursuant to this legal

171 In narrating the manner in which her master took a racially sexualized property interest in her, Harriet Jacobs alluded to the sexual abuses to which she was subjected:

My master met me at every turn, reminded me that I belonged to him, and swearing by heaven and earth that he would compel me to submit to him….The other slaves in my master’s house noticed the change. Many of them pitied me; but none dared to ask the cause. They had no need to inquire. They knew too well the guilty practices under that roof; and they were aware that to speak of them was an offence that never went unpunished.

JACOBS, supra note 120, at 27.


173 See richard harrison shryock, medicine in america: historical essays 64 (1966). see also byrd and clayton, supra note 114, at 270 (“For African Americans locked in the slave health subsystem and the few free Blacks having access to even less health care, this progress had a hollow ring with ominous overtones.”)

174 SHRYOCK, supra note 173, at 64 (This theory would hold that but for the provision of such experimental medicine, the slave would have no access to health care. In this way, both the slave and the physician are receiving a supposed benefit – the slave health care and the physician an experimental subject.)

175 See Roberts, supra note 9, at 1969 (in reviewing the criminalization of reproductivity Professor Roberts states that such criminalization is made possible by the degrading of humans into objects which can be manipulated for the “dominant society’s good.”)

176 see id. at 66, 166-167.
designation, Dr. Sims owned his patients, or was given complete authority over them by their owners, and thus had carte blanche access to do what he would with them to further medical science.\textsuperscript{177} Thus it is not unreasonable to assert that the slave women “treated” by Dr. Sims were not really patients at all. Rather, they were dehumanized objects, or medical subjects, lacking in agency, both in Dr. Sims’s eyes and at law. Patients, generally, have the legal ability, which is medically respected, to control and participate in the terms of their medical care and, as such, may forgo experimental procedures at their discretion.\textsuperscript{178} In short, patients have the agency which objects and subjects lack. To be sure, Dr. Sims would not have found equivalent access to white women or men, as they were patients in the true sense – persons who could assert their autonomy and agency by virtue of their essential “ownership” of their own bodies.\textsuperscript{179}

Indeed, in expressing his concern for upper-class white patients, Dr. Sims was reluctant to proceed in the face of uncertainty: “An untried process was not justifiable on one in [their] position in social life,” he argued, “the Hospital being the legitimate field for experimental observation.”\textsuperscript{180} Accordingly, gynecological experimentation outside this racialized space would have been outrageous and undoubtedly would have been met with criticism.\textsuperscript{181}

As demonstrated in Parts I and II, because slave owners derived economic benefits from slave women’s status as \textit{sui generis} property, the value of slave women was often contingent upon their (re)productivity and sexualization.\textsuperscript{182} Indeed, when Dr. Sims’s reproductive experiments are (re)viewed in this light, it is apparent that slave owners were unyielding in their economic interest in enhancement of female slave (re)productivity.\textsuperscript{183} As such, reproductively-challenged female slaves were subjected to medical techniques as last ditch efforts to recoup the master’s investment.\textsuperscript{184} Accordingly, the gynecological experimentation of Dr. Sims becomes particularly salient when connected to the legal and economic norms underpinning slavery.

Frequent child-birth was encouraged through incentive systems, coercion, and physical violence.\textsuperscript{185} But as a result of this premium placed on reproduction, gynecological disorders worked disparate hardships upon slave women.\textsuperscript{186} For example, the smell of urine and feces, common indicia of

\textsuperscript{177} MCGREGOR, supra note 16, at 61.

\textsuperscript{178} See id. at 60- 61.

\textsuperscript{179} Id. Indeed, at this time many doctors dared not visually examine a female patient internally – such crude observation was shunned and palpation was the preferred method of internal examination. \texttt{http://www.english.uiuc.edu/maps/poets/m_r/moss/sims.htm} (last visited March 15, 2006).

\textsuperscript{180} Id. at 2 (quoting J. Marion Sims, “On Vaginismus,” \textit{Bulletin of the New York Academy of Medicine} 1 (April 1862), 429).

\textsuperscript{181} See id.

\textsuperscript{182} For a discussion on the relationship between a slave woman’s ability to have children and her value see Kaytal, supra note 89, at 4, 18; see also GOODELL, supra note 32, at 84-88.

\textsuperscript{183} BYRD & CLAYTON, supra note 114, at 289. (discussing the manner in which commercial matters sealed the fate of slave women as breeders thus impacting antebellum slavery’s health agenda).

\textsuperscript{184} See KAPSALIS, supra note 27, at 39-40.

\textsuperscript{185} See BYRD & CLAYTON, supra note 114, at 282.

\textsuperscript{186} Id. at 229. (Discussing how maternal and infant death rates amongst slaves reflected obstetrical and gynecological deficiencies but also resulted from the conditions under which slaves were forced to work and reproduce.)
vaginal tears, also known as vesico-vaginal fistulas, undermined the value of slave women whose (re)productivity would thus be greatly compromised.\textsuperscript{187} In order to restore that value, slave owners agreed to invasive surgical experimentation on their slave women.\textsuperscript{188} Therefore, in an ironic twist of fate, the slave owners themselves, by encouraging or forcing higher birth rates at a young age, might have contributed to the high incidence of gynecological conditions in their slaves.\textsuperscript{189} And rather than ceasing their sexual interference with female slaves, masters continued their sexual violations by facilitating medical techniques meant to increase slave (re)productivity.\textsuperscript{190}

Dr. Sims capitalized on slave-owners’ willingness to interfere with their female slaves’ (re)productivity and, through his experiments on these women, Dr. Sims is credited with having accomplished the first successful repair of a vesico-vaginal fistula in 1849 by use of silver sutures.\textsuperscript{191} In addition, Dr. Sims is remembered for developing his double-ended speculum\textsuperscript{192} in 1866, and for introducing the Sims’s position for gynecological examination.\textsuperscript{193} Dr. Sims has since been embraced as

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Encouragement of pregnancy was one of the distinguishing characteristics of English North American slavery. By the mid-eighteenth century, Black slave populations increased dramatically. Legal closure of the Atlantic slave trade by the British Parliament in 1807 and the United States Congress in 1808 increased the necessity of the internal or domestic slave trade. Slave breeding became profitable and necessary to perpetuate the institution of slavery. Thus, casual fornication was encouraged, if not forced. The older, upper South states such as Virginia became slave exporters to new slave states in the west and lower south. As slavery became big business, the domestic slave trade transformed into a massive infrastructure.

\textit{Id.} at 228.

\textsuperscript{187} KAPSALIS, \textit{supra} note 27, at 35-36; \textit{See also} BYRD & CLAYTON, \textit{supra} note 114, at 273 (describing vesicovaginal fistulae as “an abnormal opening between the urinary bladder and the vagina, then most often caused by traumatic childbirth.”) and http://www.hmc.psu.edu/healthinfo/uz/vesicovaginalfistula.htm for a description of the side effects related to vesico vaginal fistulas.

\textsuperscript{188} KAPSALIS, \textit{supra} note 27, at 36.

\textsuperscript{189} \textit{See id.} at 53.

\textsuperscript{190} BYRD & CLAYTON, \textit{supra} note 114, at 283 (discussing slave women as “breeding machines” whose health was negatively impacted by the imperatives of having numerous children and poor diets and overwork.)

\textsuperscript{191} MICHAEL J. O’DOWD & ELLIOT E. PHILIPP, THE HISTORY OF OBSTETRICS AND GYNECOLOGY 16 (1994). Vesico-vaginal fistula is an abnormal tube-like passage from the bladder into the vagina that “[m]ay be due to congenital incomplete closure of parts or may result from abscesses, injuries, or inflammatory processes.” \textit{TABER’S CYCLOPEDIC MEDICAL DICTIONARY} 675-76 (16th ed. 1989). There is some controversy in terms of the dates of this surgery, the American Urogynecological society indicates that “James Marion Sims repaired a vesicovaginal fistula in 1838” at www.augs.org/i4a/pages/index.cfm?pageid=307 last visited (Mar. 15, 2006).

\textsuperscript{192} The speculum is a device used “for opening to view a passage or cavity of the body.” \textit{DORLAND’S ILLUSTRATED MEDICAL DICTIONARY} 24\textsuperscript{19} ED. 1412-1413 (1965). The Sims speculum is a “double duck-billed vaginal” device. \textit{Id.}

\textsuperscript{193} O’DOWD & PHILLIP, \textit{supra} note 191, at 16. The Sims position entails the patient sitting on a table on all fours with her head and shoulders down, such that her rear-end is raised for viewing and examination. For an illustration of the Sims position see HOWARD KELLY, GYNECOLOGY Fig. 68 and 69 (1928).
the “Father of Gynecology,” “Father of Modern Gynecology,” and “Architect of the Vagina”\textsuperscript{194}—remembered as the savior of these slave women, and immortalized with statues in both New York’s Central Park and Columbia, South Carolina.\textsuperscript{195} However, Dr. Sims viewed his slave women as a means to an end; his ultimate goal was not to cure slaves, but, after perfecting his techniques on his enslaved subjects, to treat fully human patients, upper-class white women who were capable of paying for his services.\textsuperscript{196} Dr. Sims concedes as much in his autobiography, “The Story of My Life”:

> Full of the thought I hurried home and the patient, (with vesicovaginal fistula,) who was to have left the next day, was placed in the position described, with an assistant on each side to elevate and retract the nates. I cannot, nor is it needful to describe my emotions, when air rushed in and dilated the vagina to its greatest capacity, whereby its whole surface was seen at one view, for the first time by any mortal man. … I thought of

\textsuperscript{194} KAPSALIS, supra note 27, at 31.

\textsuperscript{195} Dr. Sims was entered into The Alabama Hall of Fame in 1953. The website maintained by the Alabama Department of Archives and History states, “His accomplishments in medicine, notably the development of techniques in the field of gynecology, contributed to the advancement of medical science and the alleviation of human suffering.” The full entry is as follows:

> James Marion Sims is recognized throughout the world as the founder of the field of gynecology. Dr. Sims’ unparalleled successes placed him in demand as far afield as the royal houses of Europe. He counted among his patients Napoleon III’s Empress Eugenie of France, Scotland’s Duchess of Hamilton and the Empress of Austria.

> Entering medicine when it was less a science than today, Sims early discovered the need for new techniques and thought unhampered by medical textbooks unchanged through a hundred years. Sims blazed a career of original operations and techniques seldom equaled in medical history. He established the first woman’s hospital in history in Montgomery in 1845. Later, in New York, he established the Woman’s Hospital, which became the forerunner and pattern for similar institutions around the world.

> Dr. Sims practiced for several years in Paris and London and accepted invitations to perform his unique operations before leading surgeons in a number of other cities. Several European governments honored him with their highest awards. New York claims Sims as its own by virtue of his work and death there. South Carolina claims him by reason of his birth in Lancaster, S.C., but Alabama was the scene of Sims’ early work and his initial successes that were to spring him into an honored spot in medical annals.


See also KAPSALIS, supra note 27, at 35 (quoting LYNDA NEAD, THE FEMALE NUDE: ART, OBSCENITY AND SEXUALITY 6 (1992); Michael Greger, Appendix 63-Dr. Sims, at http://upalumni.org/medschool/appendices/appendix-63.html (quoting R.S. Mendelsohn who stated "His memory the whole profession loves to honor, for by his genius and devotion to medical science he advanced it in its resources to relieve suffering as much, if not more, than any man who has lived within this century." (last visited March 15, 2006). See also D. HAYES AGNEW, LACERATIONS OF THE FEMALE PERINEUM AND VESICO-VAGINAL FISTULA 61 (1873) (stating “Such occasional cures, doubtless, tended to inspire a hope of the ultimate curability of this disgusting disease; but it was not, however, until about 1852, when Dr. [J]. Marion Sims, then of Montgomery, Alabama, gave to the profession the fruit of his labor and observation, by which this operation was removed from the category of probabilities, and crowned with a success which compared favorably with any of the established operations in surgery. For this he has placed the civilized world under a debt of gratitude.")

\textsuperscript{196} See MCGREGOR, supra note 16, at 49.
relieving the loveliest of all God’s creatures of one of the most loathsome maladies that can possibly befall poor human nature... Full of sympathy and enthusiasm, thus all at once I found myself running headlong after the very class of sufferers that I had all my professional life most studiously avoided.197 [Emphasis Added]

This passage from Dr. Sims’s autobiography provides insight into the racialized sexual politics of the day, and highlights the manner in which the “Father of Gynecology” distinguished his subjects from his patients – the objectified from the human. For instance, when describing “the loveliest of all God’s creations,” it is doubtful that Dr. Sims was referring to the slave women upon whom he experimented; he most certainly had not avoided this “peculiar” class of sufferers.198 Even as he experimented upon his female slaves, therefore, Dr. Sims, in all likelihood, was not thinking of their ultimate well-being.199 Rather, his medical and surgical goals were oriented toward the upper-class white women who would be able to afford the treatments derived from medical experimentation on slave women, and who would enjoy the benefits of anesthesia.200 Indeed, Dr. Sims seems a shrewd medical pioneer who knew the value

197  J. MARION SIMS, SILVER SUTURES IN SURGERY: THE ANNIVERSARY DISCOURSE BEFORE THE NEW YORK ACADEMY OF MEDICINE 51-52 (Samuel S. Wood 1858) [hereinafter SILVER SUTURES].

198  See SIMS, supra note 15, at 226-246. It seems to have been the practice of Dr. Sims, and the order of the day, to refer to white patients with the proper salutation (i.e., Mr., Miss, or Mrs.). By contrast, slaves were repeatedly referred to by their first names, or as patients or cases. Further, Dr. Sims, when describing his treatment of Mrs. Merrill, “a respectable woman” stated that “[i]f there was anything I hated, it was investigating the organs of the female pelvis.” He does not articulate such displeasure, but rather excitement for his numerous experiments on slave women – excitement at the prospect of generating a cure through his repeated experimental surgeries. He states,

I did not send Lucy home, and I wrote to her master that I would retain her there…. I saw Mr. Westcott, and I told him that I was on the eve of a great discovery, and that I would like him to send Anarcha back to my hospital. I also wrote to Dr. Harris , saying that I had changed my mind in regard to Betsey, and for him to send her back again.

Id. at 231, 235-236. See also HAROLD SPEERT, OBSTETRICS AND GYNECOLOGY IN AMERICA: A HISTORY 179 (1980) (stating In 1845 J. Marion Sims began his experiments on the new legendary slaves Anarcha, Betsy, and Lucy, victims of vesicovaginal fistulas. After repeated fruitless attempts, about 40 in all, to cure these wretched creatures, Sims ultimately succeeded, with the aid of silver sutures, improved exposure provided by the knee-chest position, and a vaginal speculum of his own design. [emphasis added]).

199  See SPEERT, supra note 198, at 179.

200  MCGREGOR, supra note 16, at 49. See infra footnote 239 referencing the criticisms leveled against Dr. Sims by a European contemporary, Dr. Simpson, for his failure to provide his slave subjects with anesthesia. Indeed, it appears that ether was being used, at least by 1847 in obstetric for Dr. James Simpson himself wrote, “Flattery from the Queen is perhaps not common flattery, but I am far less interested in it than in having delivered a woman [in childbirth] this week without any pain while inhaling sulphuric ether.”: Julie M. Fenster, ETHER DAY: THE STRANGE TALE OF AMERICA’S GREATEST MEDICAL DISCOVERY AND THE HAUNTED MEN WHO MADE IT 165 (2001). Even before the use of ether in obstetrics and surgery, physicians explored a plethora of options to ease the pain their patients experienced; these ranged from bleeding to delinquium animi (bleeding to the point to fainting), intoxicating the patient, choking off blood-flow to the area, icing, hypnosis, herbal remedies and opium. Id at pp. 23-26. Not only did Dr. Sims have access to opium, for he administered it to his patients post-operatively to keep them still. (see infra page 37 and footnote 250) he was also aware by the early 1840s of the anesthetic properties of ether. Id pp. 192- 195 (describing Dr. Sims as “an innovative southern doctor” who, together with a congressional delegation from Georgia, supported another southern doctor, Dr. Long, in his claim that he had had been the first to administer “sulfuric ether during minor operations as early as 1842.”) Dr. Long published his findings in the Southern Medical Journal. Interestingly, from the perspective of “slave medicine,” in July of 1842 Dr. Long is said to have administered ether to a black boy in order to amputate a toe; the point being ether was not unknown to southern doctors in their “treatment” of slaves. Id pp. 193. For a general history of
of his treatments for White patients. By his own account he became “the second wealthiest of all American physicians.”\textsuperscript{201} These women represented the class of sufferers upon whom he had avoided developing his experimental techniques.\textsuperscript{202} Dr. Sims was a man of his time\textsuperscript{203} whose medical exploits in his makeshift hospital were supported by the normative force of the law. Dr. Irwin H. Kaiser, M.D. noted that “Sims and the other gynecological surgeons made their money by applying the[se] hospital discoveries in private practice where they charged stupendous fees.”\textsuperscript{204}

While Dr. Sims eventually had notable success in treating women who suffered from gynecological disorders, the way in which he achieved this success is subject to criticism. Admittedly, the slave women upon whom he experimented were all suffering.\textsuperscript{205} It is questionable, however, whether the cure provided by Dr. Sims, repeated unanesthetized vaginal surgeries, was worse than the ailment, incontinence. First, there is some controversy surrounding whether the condition of his slaves was as grave as Dr. Sims reported.\textsuperscript{206} Second, had these slave women actually been cured, they might well have been placed right back into the sexually and (re)productively vulnerable positions they inhabited as racially sexualized property.\textsuperscript{207} Thus, for female slaves, having a gynecological impairment might have been an ironically liberating and, therefore, welcome development. The sequelae of vesico-vaginal fistulas include leaking urine and the consequent unappealing odor.\textsuperscript{208} While undoubtedly embarrassing, distressing, and uncomfortable, when balanced against the abuse of sexual violations and (re)productive subjugation, the double bind presented by this reproductive ailment is obvious – to be sexually and reproductively autonomous yet ill, or to be healthy, yet subject to sexual violation. Paradoxically, it is worth contemplating whether damage to female slave reproductivity might have meant alleviation of the conditions of sexual terrorism under which they existed, and the recapture of limited agency.\textsuperscript{209}


\textsuperscript{202} See KAPSA LIS, supra note 27, at 49.

\textsuperscript{203} Dr. Sims and his family were slave owners. He is known to have purchased slaves expressly for the purpose of medical experimentation when their masters resisted Dr. Sims’s solicitations. KAPSA LIS, supra note 27, at 35.

\textsuperscript{204} KAPSA LIS, supra note 27, at 187 endnote 3.

\textsuperscript{205} See DAVID H. NICHOLS AND CLYDE L. RANDALL, V AGINAL SURGERY FOURTH ED. 433 (1996) (for a discussion of the side effects of vesico-vaginal fistulas including uncontrollable urine leakage and continuous odor). See E-Medicine article by Valerie J. Riley, MD Director, Urogynecology and Pelvic Reconstructive Surgery, Department of Obstetrics and Gynecology, Easton Hospital and John Spurlock, MD, Director of Urogynecology and Pelvic Reconstructive Surgery, Department of Obstetrics and Gynecology, St Luke's Hospital of Bethlehem (*Vesicovaginal fistula (VVF) is a subtype of female urogenital fistula (UGF). VVF is an abnormal fistulous tract extending between the bladder and the vagina that allows the continuous involuntary discharge of urine into the vaginal vault. In addition to the medical sequelae from these fistulas, they often have a profound effect on the patient’s emotional well-being.”) available http://www.emedicine.com/med/topic3321.htm (last visited March 15, 2006)

\textsuperscript{206} See NICHOLS AND RANDALL, supra note 205, at 46; KAPSA LIS, supra note 27, at 43 (Dr. Sims referred to this condition as grave, while others have stated that the predominant side effect was discomfort resulting from incontinence).

\textsuperscript{207} See KAPSA LIS, supra note 27, at 39-40, 50.

\textsuperscript{208} AGNEW, supra note 195, at 57.

\textsuperscript{209} See KAPSA LIS, supra note 27, at 35-36.
A. Dr. Sims’s Experiments on Slave Women

In 1845, Dr. Sims began a series of gynecological experiments on his slaves, Anarcha, Betsey, and Lucy, all of whom suffered from vesico-vaginal fistulas. Until 1849, Dr. Sims performed countless gynecological operations on these enslaved women in his makeshift backyard hospital. According to his autobiography, Sims performed 30 such operations on Anarcha alone. These experiments were all done without the benefit of anesthesia or antiseptics.

To further these experimental pursuits, Dr. Sims approached slave owners seeking their consent to his surgical experimentation on their property. When slave owners resisted his solicitations, Dr. Sims also purchased slaves expressly for the purpose of experimentation. To Dr. Sims and the masters whom he convinced to turn over their slaves, these women could not properly perform their slave duties due to their gynecological condition. In this way, a deal was struck between Dr. Sims and slave owners whereby Dr. Sims agreed to keep the slave women, to operate on them for free, and to preserve their lives, while the masters agreed to pay their taxes and clothe them. Revealing their lack of agency, it is noteworthy that the slaves’ consent or lack thereof, was irrelevant – consent to such (re)productive experimentation was purely for the master, usually a male owner, to give. Such was the case with Anarcha.

Viewing black female bodies as capital, slave owners found this bothersome condition troubling indeed. In addition, slave women were frequently approached as receptacles of white male sexual power: white men “expected to exercise sexual freedom with women slaves. Especially within the planter class, relations with black women provided white men with both a sexual outlet and a means of maintaining racial dominance.”

Id. The smell of urine and bowl would undoubtedly undermine this particular means of maintaining power over slave women (“…Illness affecting slave women’s reproductive labor was not taken lightly because it seriously threatened a master’s earnings.”) Id. at 36.


211 BYRD & CLAYTON, supra note 114, at 271-274; KAPSALIS, supra note 27, at 40.

212 SIMS, supra note 15, at 244-245.

213 MCGREGOR, supra note 16, at 50; BYRD & CLAYTON, supra note 114, at 273.

214 SIMS, supra note 15, at 236 (describing the manner in which he came by his slave subjects stating, “I ransacked the country for cases…and it ended in my finding six or seven cases of vesico-vaginal fistula that had been hidden away …then I made this proposition to the owners of the negroes…”).


216 SIMS, supra note 15, at 226-230 (alternatively describing vesicovaginal fistulas as “absolutely incurable,” as “hopelessly incurable” as “an affliction that unfits [the slave woman] for the duties required of a servant”).

217 SIMS, supra note 15, at 226-230 (agreement providing that “I agree to perform no experiment or operation…to endanger their lives and will not charge a cent for keeping them, but you must pay their taxes and clothe them. I will keep them at my own expense”).
Anarcha, was one of 75 slaves on the Westcott plantation outside of Montgomery, Alabama.\textsuperscript{218} She had been in labor for three days without delivering when Dr. Sims was summoned.\textsuperscript{219} Despite having minimal experience using forceps, in an effort to expedite delivery, Dr. Sims applied forceps to the impacted head of the baby.\textsuperscript{220} While the baby was delivered, we do not know of its condition or, indeed, whether it survived. Anarcha, however, sustained vesico-vaginal fistulas resulting in incontinence.\textsuperscript{221} Apparently, Anarcha’s property value and ability to work were diminished, and Dr. Sims took possession of her.\textsuperscript{222} In his autobiography, Dr. Sims recreates his words to Anarcha’s master: “\textit{Anarcha has an affliction that unfits her for the duties required of a servant. She will not die, but she will never get well, and all you have to do is to take good care of her so long as she lives.”}\textsuperscript{223} [Emphasis added]

Dr. Sims’ first concern was Anarcha’s ability to perform the work expected of slave women. While the fistula made women smell of feces and urine, it would not have diminished strength or the ability to perform physical labor.\textsuperscript{224} Thus, one must query exactly what type of work Anarcha was incapable of easily performing. The comments of Dr. Sims can be interpreted as referencing the fact that slave women were racialized as sexual, and thus sexually accessible, property. Sexual or reproductive access to white women was certainly off limits for black men at the time; furthermore, any overtures to use the bodies of white women for medical experimentation further highlights the salience of constructions of race and class in granting intimate access to slave women.\textsuperscript{225} The bodies of slave women, however, were available for purchase and sale, inspection and experimentation, no matter if the experimentation was sexual or reproductive.\textsuperscript{226}

\begin{footnotes}
\item[218] MCGREGOR, supra note 16, at 45.
\item[219] Id.
\item[220] Id.
\item[221] Id.
\item[222] SIMS, supra note 15, at 236.
\item[223] Id. at 227.
\item[224] See AGNEW, supra note 195, at 57 for a discussion of the unpleasant side effects of vesico-vaginal fistula.
\item[225] See BYRD AND CLAYTON, supra note 114, at 274 (discussing experimentation on poor and Irish women as well as black women) But see generally PEREA ET AL, RACE AND RACES FOR A DIVERSE AMERICA 445-550 (2000) in this section the editors reproduce essays analyzing the manner in which the Irish, Italians and Jews became racialized as white. In other words, for a time the Irish, Italians are Jews were not considered to be white.)
\end{footnotes}
The slave woman’s “duties” of which Dr. Sims spoke refer not only to her physical labor, in terms of work in the fields or plantation house, but also to her reproductive duties and sexual accessibility to masters and others for the benefit of the owners. As infertility was thought to result from all manner of “female disease” and “gynecological disorder” it behooved the master to attempt repair of the fistulas and for Dr. Sims to be invested in its cure. With this “disgusting disease,” the slave woman would no longer be sexually accessible or reproductively intact to bear future generations of slave property.

Clearly, “[i]llness affecting slave women’s reproductive and sexual labor was not taken lightly because it seriously threatened a master’s earnings.” As discussed in Part III, slave women who could not reproduce had significantly diminished property values. As a result, it behooved a shrewd master to maintain his slave women’s (re)productivity. Dr. Sims requested such “patient-objects,” and they were also sent to him by concerned masters. Accordingly, together with Anarcha, two other young slave women, Betsey and Lucy, endured repeated intrusive surgical experiments at the hands of Dr. Sims and his assistants. In addition, it is estimated that between 1846 and 1849 Dr. Sims experimented surgically on as many as eleven slave patients at one time. His makeshift hospital housed approximately sixteen beds, and he created over 71 surgical implements for use in his surgical experiments. Together with other patients, these slave women came to be known as “inmates” in the Sims hospital until he closed it in 1849.

Considering that some duties of female slaves stemmed from their construction as sexual, *sui generis* property, Dr. Sims’s offers of free medical treatment must have seemed quite the bargain to their masters. In the slave owner’s mind, Dr. Sims would not deplete their slave capital, but would maintain and possibly repair it by returning the women to their original (re)productive value. The institution of slavery thus afforded Dr. Sims an ideal scenario in which to experiment and make a name for himself. By contrast, Dr. Sims’s European contemporaries could not practice their surgical techniques on dehumanized human beings, and instead practiced on animals or cadavers.

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227 *Byrd & Clayton*, supra note 114, at 229 (noting that gynecological conditions may have been a reason for the high rates of miscarriage and stillbirths amongst slaves and noting that infertility was often the reason why slave women were sold off or punished).

228 *Kapsalis*, supra note 27, at 35.

229 *Id.*

230 *Id.* at 36.


232 Betsey and Lucy were also young slave women who contracted fistulas giving birth. *McGregor*, supra note 16, at 43.

233 *Id.* at 48.

234 *Id.* See also *Kapsalis*, supra note 27, at 40.


236 *Kapsalis*, supra note 27, at 40.

surgical gynecological techniques. Significantly, Dr. Simpson berated Dr. Sims for his use of slaves as subjects of medical experimentation, and for his failure to provide them with anesthesia.

In America, unlike in Europe, the race, gender, and property status of female slaves ensured their status as medical subject and experimental object. With slave women lacking in agency Dr. Sims could intrude upon their most intimate areas – areas which would be controversial and inaccessible if the patient had dominion over her body, as would a respectable white woman. Further, Dr. Sims could explore these intimate areas not at the behest of his “patient-objects,” but at the will of their owners. As the property of another, Anarcha, Betsey, and Lucy did not own or control their bodies, and thus could not accept, reject or flee from Dr. Sims’s treatment independently of their owners.

Such sexual and (re)productive exploitation had ramifications for the health of slave women. The effects of multiple pregnancies, repeated at frequent intervals and under arduous conditions, inevitably took their toll on the physical and mental health of slave women. For slave women, pregnancy was not a time for bed-rest – generally, there were no work or dietary accommodations for pregnancy, and any benefits given the pregnant slave woman came only in her last trimester. Given that “female diseases and gynecological disorders worked special hardships on slave populations,” it is no accident that Dr. Sims had ample slave women upon whom to experimentally hone his medical and surgical techniques.

Significant developments in gynecology, the speculum and silver sutures for instance, were thus not only the product of 19th century medical advancements; they were also the product of captured agency which was defined by the exploitation of intersecting constructions of race and gender. Specifically, these developments, which allowed America to surpass the rest of the world in terms of reproductive technologies, were themselves “discovered” through the exploration of, and experimentation upon, slave women like Anarcha, Betsey, and Lucy. Without slavery it is doubtful whether American gynecological expertise would be what it is today. The site of these unprecedented medical discoveries was the physical embodiment of racially sexualized property interests – the place where race, ownership, class, gender, and sex were embodied in the female slave.

B. Pain and the Absence of Anesthesia

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239 Id. at 68.
240 Id. at 54.
241 For a discussion regarding the risks associated with frequent pregnancies see Byrd & Clayton, supra note 114, at 229, 283.
242 McGregor, supra note 16, at 40. See also Byrd & Clayton, supra note 114, at 229, 283. (discussing the threats to slave women’s reproductive health including strenuous work, poor diet, little medical attention and inadequate rest and noting that the rates of miscarriage and still births were particularly high amongst young slave women.)
243 Byrd & Clayton, supra note 114, at 229; McGregor, supra note 16, at 40.
244 Byrd & Clayton, supra note 114, at 229.
245 Kapsalis, supra note 27, at 38.
Other than physicians’ own decisions about whether to engage in surgical experimentation on female slaves, no legal norms existed to prevent such research trials being carried out upon female slaves – the law was not only completely ineffective in protecting slave women from such abuses, it was intentionally constructed to facilitate such abuse.\textsuperscript{246} The complicity of the law is revealed by the words of Judge Ruffin in \textit{State v. John Mann} that, “while slavery exists amongst us…it will be the imperative duty of the judge to recognize the full dominion of the owner over the slave…this dominion is essential to the value of slaves as property…”\textsuperscript{247} By strictly construing slaves as property, the law negated concerns flowing from their humanity, and created an environment in which the (re)productive nature of this peculiar property could be manipulated and experimented upon.

Consistent with this legal disregard, Dr. Sims never provided any anesthesia to the slave women he held captive for experimentation.\textsuperscript{248} The pain these women must have experienced during these unanaesthetized vaginal surgeries is hard to imagine. To make matters worse, after operating on Lucy for the first time, Dr. Sims failed to remove a sponge used during the procedure; she nearly died from the resulting infection.\textsuperscript{249}

Not to be accused of cruelty, Dr. Sims recognized the pain inflicted upon his slave subjects, and administered opium post-operatively.\textsuperscript{250} Accordingly, while Dr. Sims never administered anesthesia to his

\footnotesize{\textsuperscript{246} See generally \textsc{Goodell, supra} note 32, at 63-76. See also \textsc{Kapsalis, supra} note 27, at 34-38 (discussing the manner in which masters, as owners of slave property, did not take reproductive ailments lightly and were, accordingly, inclined to either “play doctor” or to retain a doctor to determine the status of slave women (re)productivity.)

\textsuperscript{247} See \textit{State v. Mann}, supra note 155, at 268.

\textsuperscript{248} See \textsc{Byrd & Clayton, supra} note 114, at 273. See \textit{infra} note 200 for an exploration of the relevance of the availability of anesthesia at the time.

\textsuperscript{249} \textsc{Kapsalis, supra} note 27, at 40.

\textsuperscript{250} See generally \textsc{McGregor, supra} note 16, at 51, and \textsc{Byrd & Clayton, supra} note 114, at 273-274. Examining Sims’s use of opium on slave women, McGregor argues,

\begin{center}
Perhaps Sims’s use of opium, administered only after surgery, motivated them at least in part. Opium did diminish pain, but addiction would result from long-term use. Since the patients were required to stay horizontal for nearly two weeks to enhance the process of healing, Sims gave them the narcotic medication for at least that long, often longer. He also found the complete constipation that accompanies the use of opium a necessity in the aftermath of surgery. As a consequence, Lucy, Anarcha, and Betsey were undoubtedly habituated to opium, at least to some degree. Its presence in their bodies represented some relief for their condition and was likely preferable to an unfortunate existence on a plantation.
\end{center}

\textsc{McGregor, supra} note 16, at 51. Similarly, Byrd and Clayton emphasize the beneficial effects resulting from Sims’s administration of opium, effects which raised a host of race and gender implications:

\begin{center}
Moreover, to manipulate their postoperative healing process he addicted them to opiates (equivalent to morphine or heroin) to modulate their bowel and bladder function. Medical exploitation of the Black slaves was accepted without comment. This would not have been acceptable medical ethical practice on upper-class white women. Significantly, his continuation of this pattern of gender-based hierarchical thinking, individualistic and self-serving medical ethics, and experimental surgical exploitation of Black, poor, and Irish women after his relocation to New York led to controversy and professional problems for Dr. Sims.
\end{center}

\textsc{Byrd & Clayton, supra} note 114, at 273-274.
female slave subjects before his experiments, he provided opium after the fact to keep them still, thereby aiding in the post-operative healing process. 251 However, habitual opium use results in constipation. 252 In the tender gynecological situations in which these slaves were kept, one can only imagine the horrible additional consequences flowing from constipation. To alleviate the constipation, Dr. Sims ordered that the female slaves be provided minimal food and water for two weeks after their surgeries. 253 Therefore, not only were these slave women literally captive, denied anesthesia and experimented upon, but they were also drugged, minimally fed, and inevitably became addicted to opium. Significantly, this treatment came at the hands of the future President of the American Medical Association.

Dr. Sims’s treatment highlights the racialized notions of (re)productivity that were the order of the day. For example, Black women were thought to have incredible pain thresholds, while White women were seen as having delicate constitutions. 254 Further, reproductive and sexual interference with slaves was consistent with the notion that slaves were overly sexual, “copulated freely,” and were bestial, even having intercourse with chimpanzees and orangutans. 255 Indeed, Dr. Sims expressed admiration of his female slave patients in terms of their ability to endure pain. He stated, “they implored me to repeat operations so tedious and at that time often so painful that none but a woman could have born them.” 256

By allowing his patients to suffer extreme pain and endure drug addiction, which would not have been condoned with white women, Dr. Sims not only demonstrated an utter disregard for Black women, but also revealed the premium that he and antebellum society placed upon Black women’s (re)productivity. 257 This premium, which superseded any concern for the well-being of Black women, ensured that female slaves continued to (re)produce slave capital. 258 The benefits that flowed from this disregard of Black women’s well-being and humanity were reserved for white women. 259 Despite being pathologized as animalistic and hyper-sexual, the anatomical “sameness” of Sims’s slave subjects allowed for ready transfer of his medical and surgical techniques for the benefit of White patients. 260

251 See Byrd & Clayton, supra note 114, at 273-274.
253 See McGregor, supra note 16, at 51.
254 See Byrd & Clayton, supra note 114, at 273-274.
255 Morris, supra note 63, at 306. See also White, supra note 57, at 30 (“Many antebellum Southerners found little in the black female’s character to compliment. Some were convinced that slave women were lewd and lascivious, that they invited sexual overtures from white men, and that any resistance they displayed was mere feigning.”).
256 McGregor, supra note 16, at 50-51 (“Gender, race, and class each contributed to medical notions determining the utility of anesthesia. In the case of the slave women, Sims apparently subscribed to a commonly held theory that blacks had a specific physiological tolerance for pain, unknown by whites. He never felt the need to anesthetize his black patients in Montgomery. White women with vesico-vaginal fistulas who came to Sims in 1849, to have what finally had become viable surgical therapy, were unable to withstand the same operation without anesthesia.”). See also Silver Sutures, supra note 182, at 52.
257 See Kapsalis, supra note 27, at 31-50; Byrd & Clayton, supra note 114, at 271, 283, 289.
258 See White, supra note 57, at 31-35.
259 See Kapsalis, supra note 27, at 42-45.
Unfortunately, this inherently racialized conception of (re)productivity also existed outside of Dr. Sims’s makeshift hospital – indeed, it was the order of the day.\footnote{Kapsalis, supra note 27, at 42-45 (“The slaves triple pathology allowed him to perform multiple operations. …Yet Sims’s experiments were also premised on an internal sameness, his invention of the speculum providing the tool that allowed such sameness to be examined. If he could successfully mend a slave woman’s fistula, then it was assumed that he would be able to repair any woman’s fistula.”)}

In light of these particulars, and the fact that everything Dr. Sims did to the slave women in his care was legal, it can be surmised that his meteoric rise from plantation doctor in Alabama to president of the American Medical Association and physician to European Queens, was made possible by and founded on the legal entrenchment of slavery.\footnote{See Byrd & Clayton, supra note 114, at 1-8, 251-321; see also, Todd L. Savitt, Medicine and Slavery: The Diseases and Health Care of Blacks in Antebellum Virginia 281-307 (1978).} In this way slavery helped define the proper object of medical experimentation as the “other” – whether such an outsider is marginalized based upon race and/or gender and/or class marginalization.\footnote{Kapsalis, supra note 27, at 31 (stating “Sims’s fame and wealth are as indebted to slavery and racism as they are to innovation, insight, and persisitence…”)} Not surprisingly, as is revealed by the legacy of disparate strategies around birth control, sterilization, welfare reform and ongoing reproductive experimentation, American society remains haunted by the construction of Black womanhood as a site of sexual and (re)productive interference.

IV. CONTINUING ISSUES IN RACE AND (RE)PRODUCTIVITY

...[T]he mutable identity of enslaved women under the antebellum sexual economy – producers of both laborers and capital, female breeding stock when convenient, “male” laborers when not – offers its own particular set of twists on slavery, twists that seem vital to an understanding of the whole.\footnote{Adrienne Davis, supra note 126, at 886.}

Dr. Sims’s surgical experimentation set an early precedent for medical involvement in racist, sexist and classist practices. His experimentation forms part of a long legacy of interference with the reproductive capacities of poor women of color. It would appear that Professor Roberts is correct in her assertion that, “The essence of black women’s experience during slavery was the brutal denial of autonomy over reproduction.”\footnote{See Deleso Alford Washington, “Every Shut Eye, Aint’t Sleep”: Exploring the Impact of Crack Cocaine Sentencing and the Illusion of Reproductive Rights for Black Women from a Critical race Feminist Perspective, 13 Am. U. J. Gender Soc. Pol’y & L. 123, 131 (2005); Kapsalis, supra note 27, at 31-34.} In an historical twist, contemporary technologies that limit (re)productivity are now aimed at poor women of color, while reproductive technologies that extend or promote fertility, such as \textit{in vitro} fertilization, are largely aimed at wealthy, White women.\footnote{Adrienne Davis, supra note 126, at 886.} The impetus to enhance or contain (re)productivity on the basis of outsider social status can be traced back to Dr.

\footnote{Kapsalis supra note 27, at 9, 1970.}
Sims’s early experiments on slave women. For marginalized women, their social construction continues to dictate the level and type of reproductive interference they encounter.267

A. Birth Control Pill & Sterilization

Long before the advent of Norplant,268 questionable techniques for the reduction of (re)productivity were directed at women of color due to their socially manufactured inability to curtail such intrusion.269 For instance, both family planning and birth control initiatives have stemmed from the historical and contemporary focus on controlling the growth of the African American population.270 The locations of the first publicly funded birth control clinics in the 1930s were strategically situated in the south with the goal of lowering the black birthrate.271 In fact, during the depression, birth control was often promoted as a means by which welfare costs could be decreased.272 A “Negro Project” was orchestrated by the Birth Control Federation of America in 1939 in order to limit the (re)productivity of Blacks who “still breed carelessly and disastrously, with the result that the increase among Negroes, even more than among whites, is from that portion of the population least intelligent and fit, and least able to rear children properly.”273 This language of breeding has historical resonance as it highlights the continual initiatives aimed at capturing the reproductive and sexual agency of people of color, and African Americans, in particular. It is the other side of American Husbandry.

Even, noted feminist Margaret Sanger, who is credited with being the “mother of family planning and reproductive freedom,”274 articulated that the birth control pill should be strategically directed towards those societal members whose reproduction was problematic. She stated, “More children from

267 KAPSALIS, supra note 27, at 49.

268 “Norplant consists of several match-sized silicon tubes which are surgically inserted beneath the skin of a woman’s arm. The tubes release a stream of a synthetic hormone which prevents conception for up to five years.” Darci Elaine Burrell, The Norplant Solution: Norplant and the Control of African-American Motherhood, 5 UCLA WOMEN’S L.J. 401, 402 (1995)

269 For a discussion see Ehrenreich, supra note 25, at 515, 516 (“African-American women, along with Latina (especially Puerto Rican) and Native American women, were subjected to forced sterilization in appalling numbers up through the 1970s, a practice that continues in "milder" forms today. Physicians felt justified in surgically removing these women's reproductive organs without consent because they believed them to be sexually promiscuous and either too irresponsible or too ignorant to use birth control. The supposedly rampant sexuality of such women was seen as posing a threat to the public fisc, given that many of them were, or were expected soon to be, relying on the welfare system for support.”). See also LAURIE NSIAH-JEFFERSON, REPRODUCTIVE LAWS, WOMEN OF COLOR, AND LOW-INCOME WOMEN, IN REPRODUCTIVE LAWS FOR THE 1990S 23, 48 (Sherrill Cohen & Nadine Taub eds., 1989) (describing overuse of hysterectomies); Charlotte Rutherford, Reproductive Freedoms and African American Women, 4 YALE J. L. & FEMINISM 253, 275-76 (1992).

270 Randall, supra note 20, at 202. (Detailing the use of family planning and involuntary sterilization as mechanism to reduce the Black population.)


272 Roberts, supra note 9, at 1970-71.


274 Id. at 281-83, 332-333.
the fit, less from the unfit – that is the chief issue of birth control.” 275 Sanger’s conception of birth control, as instrument of eugenics and reproductive filtration, was realized during the 1960s and 1970s, when the government subsidized family planning clinics with the goal of reducing the number of welfare recipients.276 Again, in a deliberate attempt to control the autonomy and capture the agency of marginalized women, the government itself became directly involved in their (re)productivity. As a result, the incidence of clinics in a given area was proportional to the number of Blacks and Latino/a in that area.277 Moreover, women who refused sterilization were often threatened with withdrawal of their welfare benefits.278 This nexus between race, welfare and family planning was compounded by those doctors who refused to deliver babies for, or refused to perform abortions on, pregnant black women, unless they agreed to sterilization.279

In the late 1990’s it was reported that 97% of obstetricians would support sterilizing unmarried mothers on welfare.280 With the controversy surrounding the nexus of race and welfare, the interference with black and latina women’s (re)productivity in recent history should not be surprising as many obstetricians favor drastic reproductive interference. Of course, women of color in America were historically subjected to forced sterilization in significant numbers – with black, latina and Native American women, physicians felt justified in removing women’s reproductive organs without their informed consent.281 The rationale for the overuse of hysterectomies on women of color was that these women were too promiscuous, too poor, or too ignorant to use birth control; accordingly, their (re)productivity would threaten the public purse. 282 Apparently, the longevity of strategic, yet stereotypical, depictions of black womanhood is disconcerting. During slavery such stereotypes as “the

275 Id. at 281.


277 Id.

278 Id. at 10-14.

279 Randall, supra note 20, at 203. (detailing the reproductive meddling of obstetricians and gynecologists who took it upon themselves to precondition their treatment of Black women upon their agreement to sterilization.)

280 Andrews, supra note 29, at 908-909 (“As earlier, biological explanations are now being set forth for why women are not suited to become full functioning members of society. In addition, the concern that poor women are producing inferior offspring out of wedlock is a common refrain today in the media and in policy discussions. An astonishing 97% of obstetricians favor sterilizing unmarried welfare mothers.”).

281 Ehrenreich, supra note 25, at 515. See also Rutherford, supra note 269, at 273-76; The Boston Women’s Health Book Collective, Our Bodies, Ourselves for the New Century 331 (Simon and Schuster ed. 1998) (stating that women living in poverty or who are Black, Puerto Rican, Chicana, or Native American, or who have limited English language ability, are more likely to be sterilized than white women from the same socio-economic class). See also Nikoukari, supra note 276, at 13-15 (“Some of the most grizzly sterilization abuses by physicians in the 1970’s and early 80’s were on Native American reservations due primarily to the lack of clear sterilization guidelines and regulations. Thus, it’s not surprising that in such medically destitute areas as the Navajo Reservation there were even less safeguards against coerced sterilization”).

282 Ehrenreich, supra note 25, at 492. See also Roberts, supra note 9, at 1971 (referencing a 1974 Alabama case where a Federal District Court judge determined that between 100,000 and 150,000 poor women were coercively sterilized annually under federally-funded programs. Receipt of their welfare benefits was conditioned upon their “agreeing” to the procedure.)
jezebel” facilitated sexual and (re)productive abuses. We have learned little from our past, as contemporary American society utilizes the same stereotypes, but with the goal of controlling what is deemed rampant out-of-control reproduction. In an ironic historical twist, the black reproducitvity which was valued and commodified in the antebellum age is now loathed and repressed in our contemporary society.

An essential distinction appears to be the difference between a medical patient and a medical subject/object. Today, when one conceptualizes the ideal medical patient, one tends to imagine a man who is “White, educated, mentally competent, physically able, thin, and heterosexual.” However, when vetting reproduction-diminishing technologies the converse appears to be the case as a research subject or a human object for experimentation is sought. Specifically, when the limits of contemporary reproductive autonomy are pushed, those who are marginalized are utilized and “the ideal shifts to poor women of color.” For instance, “some doctors conditioned delivering babies and performing abortions on black women’s consent to sterilization,” welfare payments have been threatened unless poor women submitted to sterilization, C-sections are disparately ordered on black women and limitations on (re)productivity have been ordered as probation conditions.

Indeed, judges are more likely to criminalize reproduction when the accused women have the intersecting identities of low socio-economic status and are racialized. Today, reproductive abuse continues by individual physicians who enforce

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283 WHITE, supra note 57, at 28-29, (‘One of the most prevalent images of black women in antebellum America was of a person governed almost entirely by her libido, a Jezebel character.)

284 KAPSALIS, supra note 27, at 6. (A paying patient is always preferred, as is a thin patient who will likely have fewer complications. Education and mental competence are beneficial patient qualities as it is assumed that an educated capable patient will understand and follow instructions. Societal preferences and prejudices undoubtedly inform our view of each other, including physician interpretations of patients.)

285 See also Bernier, supra note 20, at 122 (citing Howard University research documenting the experimental use of the Super Coil to induce abortions in poor young black women who were bussed from Chicago to Philadelphia for this experimental procedure on an out-patient basis. At the time the Super Coil was used on these women there was general medical consensus that it should not be used due to the uncontrollable bleeding and eventual shock it often induced).

286 Roberts, supra note 9, at 1971. See also Ehrenreich, supra note 25, at 516 (stating “[i]n the 1980s and 1990s, coercive control of the reproductive and sexual behavior of women of color has taken the form of forced Cesarian sections, other forced treatment during pregnancy, and prosecution for prenatal substance abuse or related offenses.”)

287 Id. (it was found that approximately 100,000 to 150,000 poor women were sterilized every year under a program funded by the Federal government.)

288 See Ehrenreich, supra note 25, at 501 (stating that “the vast majority of court-ordered C-sections have involved poor women of color.”).

289 People v. Johnson, No. 29390 as discussed in Roberts, supra note 9, at 1967 (discussing the case of Darlene Johnson, a black woman who upon pleading guilty to child abuse was given the choice of seven years in prison, or one year in prison plus probation with the condition that she agreed to be implanted with Norplant for three years. The presiding Judge had expressed his dual concerns that Ms. Johnson was on welfare and that she might become pregnant.). See also Ira J. Chasnoff et al. 322 NEW ENG. J. MED. 1202 (1990) (indicating that African-American mothers were ten times more likely to be screened and reported for substance abuse during pregnancy than white mothers, although the actual levels of drug use were comparable); Ideas and Trends: Punishing Pregnant Addicts: Debate, Dismay, No Solution, N.Y. TIMES, Sept. 10, 1989, at E5.

290 See Roberts, supra note 9, at 1968 n. 112 (1993) citing STEPHEN TROMBLEY, THE RIGHT TO REPRODUCE (1988) (which stated that in all of the 1960s cases in which probation was conditioned upon diminishing reproductivity, the defendants were black or Latina.). See also Roberts, supra note 9, at 1968 & n. 111 (1993) and Michelle Oberman, The Control of Pregnancy and the
personal beliefs that black women’s families are too large, that future generations of impoverished babies are being bred, or that Blacks irresponsibly use contraception to coerce sterilization or the acceptance of long-term birth control. Not only are private physicians interfering with the (re)productivity of marginalized women, but in the public sphere one sees the involvement of the government in capturing the reproductive agency of women on welfare by “making sterilization the only publicly-funded birth control method readily accessible to them” – the message that some reproduction is valued more than others is clear. As Professor Dorothy Roberts writes, “…American culture cannot conceive of black reproductive liberty. The new reproductive initiatives must be understood as part of the history of the systemic and institutionalized denial of black women’s reproductive freedom.”

Recently, in the case of *Diaz v. Hillsborough County Hospital Authority*, a group of approximately 5000 pregnant women brought a class action claiming that, while receiving prenatal care, they were subjected to research testing without their informed consent. Most of the subjects upon whom these research tests were performed were young, working class and poor women of color. Again we see the capturing of agency for utilitarian ends. These women were denied even the opportunity to acquiesce to medical testing, let alone consent based upon the provision of complete information. Despite now being considered fully autonomous human beings, they were denied agency over their own persons. Unfortunately, as history has borne out, such non-consensual intrusion into intimate spheres is consistent with the (re)productive abuses visited upon poor women of color in the United States. In testimony that echoes the agency rationale of the past, Dr. Pierce, in *Walker v. Pierce*, explained his sterilization policy as follows:

My policy was, with people who were unable to financially support themselves, whether they be on Medicaid or just unable to pay their own bills, if they were having a third child, to request they voluntarily submit to sterilization following the delivery of the third child.

*Criminalization of Femaleness, 7 BERKELEY WOMEN’S L.J. 1-6 & n. 23 (1992).*


293 Ehrenreich, *supra* note 25, at 492. See also Roberts, *supra* note 9, at 1971 (citing Relf v. Weinberger, 372 F. Supp. 1196, 1199 (D.D.C. 1974). For cases of what has been referred to as “manipulated consent” see Taunya Lovell Banks, *Women and Aids: Racism, Sexism, and Classism*, 17 N.Y.U. REV. L. & SOC. CHANGE 351, 361-363 (1990) (referring to the intersection of race and class in contributing to the disparate rates of tubal ligation performed on black women at a Boston clinic. Following the birth of their first child, forth-five percent of the patients at this clinic serving the black community “chose” to be sterilized in this manner).


295 *Diaz v.Hillsborough County Hosp. Auth.*, 2000 U.S. Dist. LEXIS 14061, at *1-2 (D. Fla. 2000) (the settlement included monetary payouts and required the hospital to agree to change its research procedures). *Id.* at *8-9


child. If they did not wish this as a condition of my care, then I requested that they seek another physician other than myself. 298

In reversing a jury verdict against Dr. Pierce and the $5.00 judgment entered against him, the Fourth Circuit upheld his right to practice medicine in accordance with his personal economic philosophy. 299 The decision is not surprising in light of the historic connections in America between economics and (re)productivity. While it is unfortunate, that Dr. Pierce’s gendered and classed economic philosophy was ultimately found to be legal, 300 the decision is entirely consistent with the historic external valuation of the (re)productivity of the marginalized. As this article has demonstrated, such a legal perspective is in keeping with the legacy of (re)productive abuses of women of color which has been, in the least, legally condoned and, at most, legally normalized through explicit doctrinal support. It is but another example of the manner in which women’s reproductive agency is externally manipulated based upon the priorities established by the privileged.

B. Norplant

Dr. Sims conducted his experiments at a time when the Slavocracy could benefit from the (re)productivity of slave women. 301 Conversely, Norplant has been developed as a response to the alleged need to control the (re)productivity of marginalized women. 302 It seems that women’s reproductivity is continually subjected to external pressures for rationale disconnected from women’s agency over, and interest in, sexual and reproductive autonomy. The concern for the reproductive health of poor women is not (purely) benevolent. As was the case with reproductive initiatives undertaken during slavery, contemporary reproductive interferences with poor women are similarly motivated by fiscal concerns. 303 While the logic has been inverted, the interference is the same. Historically the (re)productivity of Black women was valuable as ownership resided outside the body of the subject slave woman.

Today, the (re)productivity of Black and poor women has been devalued as it, generally, no longer accrues to the benefit of the ruling class and it is further based upon “the same premise underlying the eugenic sterilization laws – that certain groups in our society do not deserve to procreate.” 304 Having more children no longer benefits the powerful as they no long control black women and their offspring.

298 *Id* at 611.

299 *Id*. at 613.

300 *Id*.

301 KAPSALIS, *supra* note 27, at 50.

302 KAPSALIS, *supra* note 27, at 50. See Nikourkari, *supra* note 260, at 27-32 (for a discussion in support of the assertion that Norplant was developed in response to the need to control poor women’s (re)productivity)


through legal ownership. Specifically, it can be ascertained that since women of color are now able to exercise greater, albeit at times limited, agency over their own (re)productivity, it is devalued on a utilitarian basis. Yet attempts continue to re-capture that same agency which was lost to the ruling class with emancipation and the women’s movement. Norplant bonuses have been offered by which the State pays for the implantation of the Norplant capsules and also provides a cash bonus. As it is now more difficult, at least in the absence of payment as consideration, to appropriate the (re)productivity of marginalized women, the devaluation of Black offspring has led to the corollary devaluation of such reproduction. Terri Kapsalis has insightfully summarized this as having contemporary resonance of the precedent legally set by Dr. Sims:

While arising out of very different historical conditions, Norplant and Sims’s crude reproductive technologies are cousins. Both in Sims’s time and today, certain women’s reproductivity is valued over other’s, and new technologies are demanded in order to foster and prevent reproduction.

As during the days of slavery, the volition of poor women offered Norplant, or other reproductive technologies to control their (re)productivity, is questionable – the key determination is whether personal monetary concerns are motivating their agreement to limit their (re)productivity. Indeed, “Almost immediately after Norplant became available in the United States in December of 1990, some state and federal policymakers suggested that the device could be used to limit childbearing among disadvantaged women, variously identified as women on welfare, or low-income teenagers, or drug abusers.” The agency of these women is compromised by external forces seeking to either enhance or diminish sexuality and (re)productivity – in either case their personal autonomy is compromised. Preying upon the economic vulnerability of poor women greatly diminishes the likelihood of informed consent as other reproductive options are likely not explored, offered, or available and consent is manipulated through fiscal enticements or coercion.

305 Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 Harv. J. L. & Gender 151, 169 (2006) (stating that bonuses up to $500 have been paid for going through with the implantation of the Norplant capsules and stating that several states provide Norplant bonuses to women on welfare, while Mississippi and South Carolina have considered mandatory Norplant implants for women on welfare) (referencing Melynda G. Broomfield, *Note, Controlling the Reproductive Rights of Impoverished Women: Is this the Way to “Reform” Welfare?* 16 B.C. Third World L. J. 217, 228 (1996).

306 See, e.g., the recent comments of Bill Bennet, which indicate the contemporary devaluation of black children, even black fetuses: “if you wanted to reduce crime, you could — if that were your sole purpose — you could abort every black baby in this country, and your crime rate would go down.”. Brian Faler, *Bennet Under Fire for Remark on Crime and Black Abortions*, Wash. Post, Sept. 30, 2005, at A05.

307 KAPSALIS, supra note 27, at 50.

308 See id. at 52-53.


310 Id.
While slave women received incentives for increased (re)productivity, women on welfare receive incentives for temporary or permanent sterilization. There are, of course, many who object to such contemporary interference with the (re)productivity of marginalized women. Indeed, many women, physicians, and women’s healthcare activists have voiced concerns over the safety and impact of Norplant on particular segments of women. Despite this, welfare reform advocates and legislators have argued that connecting birth control to public assistance programs would overcome the “cycle of poverty,” reduce overpopulation, lighten the tax burden on their constituents, and lessen the welfare dependency arguably found in certain subcultures, meaning the racialized poor.

By conditioning receipt or maintenance of public assistance upon the implantation of Norplant, contemporary legislators continue the historical interference with the (re)productivity of marginalized women. “Like female slaves forced to breed, women faced with Norplant incentives and conditions are asked to exchange their reproductive capacities for financial gain or decreased jail time.” Indeed, using language reminiscent of the earlier eugenics movement, West Virginia Supreme Court Justice Richard Andrews, supra note 29, at 909; see KAPSALIS, supra note 27, at 50.

See Nikourikari, supra note 260, at 29 (discussing the National Black Women’s Health Project’s concerns over the safety of Norplant, particularly since black women may be at a greater risk of experiencing complications since several of the illnesses resulting from the drug occur in greater numbers in black populations). See also KAPSALIS, supra note 27, at 54 (“Norplant does not serve as a simple on-and-off switch for fertility: there are a host of side effects that may accompany its use. The most common is a change in menstrual bleeding patterns. Other side effects include dizziness, headaches, nervousness, weight gain weight loss, ovarian cysts, acne, infections at the implant site, nipple discharge, inflammation of the cervix, mood changes, depression, general malaise, itching, and hypertension....Changes in menstrual bleeding patterns. are not considered by the medical establishment to be a reason to discontinue its use. And yet this single side effect may deeply affect the cultural performance of some women, particularly Native American and Muslim women. A report on Norplant issued by the Native American Women’s Health Education Resource Center reads: ‘for Native American women, the bleeding restricts their daily activity and prohibits them from participation in many traditional practices and religious ceremonies...They do not attend sun dances, sweats, or other spiritual ceremonies or go to any place where the pipe is used or to meetings of the Native American church.’”)

See KAPSALIS, supra note 27, at 49-50; Rutherford, supra note 269, at 262. (these (re)productive strategies are connected to the strategies of the past in that one sees either external dictation of the imperatives to reproduce or restraint of same).

See John Robertson, Norplant and Irresponsible Reproduction, in COERCED CONTRACEPTION MORAL AND POLICY CHALLENGES OF LONG-ACTING BIRTH CONTROL 81 (Ellen H. Moskowitz & Bruce Jennings, eds., 1996). See also Nikouikari, supra note 276, at 30-33; Rutherford, supra note 269, at 261-262. (these (re)productive strategies are connected to the strategies of the past in that one sees either external dictation of the imperatives to reproduce or restraint of same).


See Roberts, supra note 9, at 1961(stating that “[d]uring the first half of the twentieth century, the eugenics movement embraced the theory that intelligence and other personality traits were genetically determined and therefore inherited.” As such, “[e]ugenicists advocated compulsory sterilization to prevent reproduction by people likely to produce allegedly defective offspring”). For further support of compulsory sterilization see Justice Holmes’ opinion in Buck v. Bell, 274 U.S. 200, 207-208 (1927)

We have seen more than once that the public welfare may call upon the best citizens for their lives call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their
Neely advocated for an incentivized Norplant regime directed at the “underclass,” stating, “I am speaking for the Heartland of America, where the underclass is growing by leaps and bounds.”\textsuperscript{317} Given the history of racially sexualized interferences with the (re)productivity of slave women, Justice Neely’s language of an uncontrollable underclass should give us pause. The subtext is clear – there is a class of people beneath us, subjects, likely by virtue of race and socio-economic status, in need of governance.\textsuperscript{318} For the sake of the greater good, even the greater fiscal good, Justice Neely, and his supporters, would advocate that sexual and reproductive interference is in order to prevent this “underclass” from siphoning off the resources of the upper classes. Echoing Justice Neely’s view, the Philadelphia Inquirer published an editorial entitled, \textit{Poverty and Norplant: Can Contraception Reduce the Underclass?}\textsuperscript{319} This editorial rendered the racialized motivations visible by stating that welfare recipients should be incentivized to use Norplant because, “the main reason black children are living in poverty is that people having the most children are the ones least capable of supporting them.”\textsuperscript{320} This “underclass,” in the opinion of those who would interfere with their (re)productivity, is undeserving of sexual and reproductive agency as their exercise of such autonomy negatively impacts the financial wellbeing of others. While the numerous legislative Norplant proposals ultimately failed under heavy scrutiny and significant opposition, the imperatives of heteronomous (re)productive interference with racialized women remains. Consider Project Prevention in which the identical concept of incentivizing women to diminish their (re)productivity is utilized, but in the private sector.

Originally denominated as C.R. A. C. C. (Children Requiring a Caring Community), Project Prevention pays drug and alcohol abusers $300 if they agree to sterilization or to adopt long-term reproduction diminishing techniques such as Norplant or Depo-Provera.\textsuperscript{321} The group, funded by private donors and philanthropists, has chapters in 27 states but has paid “rewards” in 39 states and the District of

\begin{quote}
\textit{Id.}
\end{quote}

\textsuperscript{317} Andrews, supra note 29, at 909.

\textsuperscript{318} William E. Seidelman writes:

\begin{quote}
The operant paradigm of medical practice during the Hitler period was that of the physician as “selector” acting on behalf of the state in order to improve the health of the nation (Volksgesundheit). Having defined people as an underclass or a risk to the genetic or racial health of the population, medical science deemed the so called “inferiors” to be appropriate “subjects” who could be selected for enforced sterilization, incarceration, and eventual extermination.
\end{quote}

\textsuperscript{Supra} note 22.


\textsuperscript{320} Id.

Columbia to over 800 women and roughly 20 men. Of these rewardees, 43% selected sterilization, 41% decided to use Depo-Provera, 12% selected Norplant and 4% preferred the insertion of an IUD. Replicating the racial and economic asymmetry demonstrated throughout this article, while the program purports to focus on drug and alcohol addicts, the clientele is heavily weighted towards those racialized as substance abusers. Specifically, while African Americans are approximately 13% of the population, they represent 35% of those participating in Project Prevention, with 48% of rewardees being white, 10% Latino/a and 8% classified as other. This program reveals that captured agency continues to surface in new and innovative ways, now largely through economically coercive means which prey upon the financially needy, the drug addicted and the vulnerable.

Like the female slave, women faced with procreative conditions and incentives, whether through contraception or sterilization, are forced into an economic marketplace where their (re)productivity is the currency. The techniques are the same. The government and the privileged identify mechanisms for the preservation or enhancement of their own wealth – the reproductive agenda is set outside the marginalized women, without her consent or involvement, yet she is its focus. At the same time, they exploit the vulnerabilities of the oppressed, and condition the satisfaction of their needs upon a willingness of the “other” to relinquish reproductive agency. As such, marginalized women are at the mercy of the ruling class in much the same way that slaves were at the mercy of masters who exercised agency over their bodies. Therefore, the lessons of history reveal added reason for caution where (re)productive interference is concerned.

V. CONCLUSION

The commonality among these reproductive inequities is that they are contingent upon the female subject’s social construction. As Susan Sherwin has stated:

The tendency of illness to undermine patients’ autonomy is especially threatening when the patients in question face other powerful barriers to the exercise of their autonomy, as do members of groups subject to systemic discrimination on the basis of gender, race, class, disability, age, sexual preference, or any other such feature. A principle insisting on patient autonomy can be an important corrective to such overwhelming power imbalances.

322 See Mauldon, supra note 309, at 354, and Shultz, supra note 321.

323 Mauldon, supra note 309, at 352.


325 Mauldon, supra note 309, at 354.

326 Reproductive Freedom, supra note 315, at 423.

327 Id.

328 Susan Sherwin, A Relational Approach to Autonomy in Health Care, in Sherwin et al., The Politics of Women’s Health:
In all the cases explored above, health care providers or others capable of impacting the health care system, such as policy-makers and judges, considered the reproductive capacities of disadvantaged women, decided to forgo informed consent and discussions concerning the best interest of these patients, and instead fashioned extreme utilitarian “treatments” to further their sense of societal objectives. Provocatively, in writing about the Nazi experiments and the complicity of the legal regime, Volker Roelcke states, “the urge to establish new knowledge superseded any respect for the people who suffered in these experiments.” So too, Dr. Sims’s surgical experiments are paradigmatic of this power imbalance and extreme utilitarianism or heteronomy; in serving the greater good of medical progress slave women were (re)productively expendable and infinitely accessible as the prototype upon whom experimentation could be performed for external societal benefit.

“Dr. Sims’s surgical experiments can be viewed as early reproductive technologies aimed at optimizing the reproductive capacity of slave capital.” Only a female slave could be laborer and also a potential unit of production – produced, product, and producer. As basic economic units, female slaves stood entirely apart. An examination of even a sampling of the relevant jurisprudence reveals the complicity of the legal system in furthering racialized sexual property interests in female slaves.

Thus, both in the time of Dr. Sims and today, women’s social construction dictates the valuation of her (re)productivity. Accordingly, new technologies, or experiments, are created in order to foster or prevent reproduction. Not surprisingly, racially sexualized property interests drive the contemporary demand for the limited (re)productivity of poor racialized women, just as these interests drove the application of husbandry techniques to increase the (re)productivity of female slaves. But while property interests in Black slave women pertained to the value of their offspring, the contemporary property interests in poor women of color pertain to the cost of the welfare benefits arguably expended upon them.

The analyses found in this article seek to reveal historical connections. It is evident that reproductive rights discourse protects the interests of the privileged and the powerful. Dr. Sims’s surgical experimentation set an early precedent for medical involvement in racist and sexist practices. In retrospect, the success of Dr. J. Marion Sims, as the father of gynecology, depended upon the slave class of Black women who were his subjects, women whose agency was captured and owned by their masters. So too contemporary (re)productive initiatives are aimed at “the underclass,” who are essentially denied full agency and sexual or reproductive autonomy. However, it remains to be determined who is the contemporary master. It seems much more diffuse an interest in capturing agency and perhaps there is no longer only one class of people with a sense of entitlement and “ownership” over the marginalized woman’s (re)productivity. Essentially there now seem to be multiple Dr. Sims. What is clear, however, is

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329 Roelcke, supra note 22, at 7.

330 Kapsalis, supra note 27, at 6.

331 Id. at 32.

332 Id. at 50.

333 See generally Nikoukari, supra note 276.
that “Without a strong principle of respect for patient autonomy, patients are vulnerable to abuse or exploitation, when their weak or dependent position makes them easy targets to serve the interests (e.g. financial, academic, or social influence) of others.”334

Commentators have speculated that, “Dr. Sims’s fame and wealth are as indebted to slavery, sexism, and racism as they are to innovation, insight, and persistence.”335 His four years of surgical experimentation on captive slave women represent the foundation of gynecology as a distinct medical specialty.336 Given the history of America, it is significant that the father of modern gynecology, the architect of the vagina, hailed from South Carolina and honed his skills in Alabama, both notorious slave states. Indeed, it has been asserted that “[t]he perpetuation of the institution of slavery, as nineteenth-century Southerners knew it, rested on the slave woman’s reproductive capacity.”337 Dr. Sims’s experiments on Betsey, Anarcha, Lucy and other slave women, set the unfortunate precedent that (re)productive interference with marginalized women – whether to increase or decrease reproduction – was acceptable and appropriate.338 Further, his medical experimentation upon the vulnerable or oppressed was both predatory and exploitative. Long before the horrors of the Tuskegee syphilis experiments and Nazi eugenics and medical abuses, Dr. J. Marion Sims exploited and held captive young Black slave women. For his own fame and the glory of medical science, he experimented upon those already victimized by perpetual bondage, racism and sexism. Sadly, it appears that we have not yet learned our lessons from this most unfortunate history.

334 Sherwin et al., supra note 328 at 20.

335 KAPSALIS, supra note 27, at 31.

336 Id. at 31-32.

337 WHITE, supra note 57, at 79-80.

338 See KAPSALIS, supra note 27, at 49.