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## Resuscitating the Black Body: Reproductive Justice as Resistance to the State's Property Interest in Black Women's Reproductive Capacity

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# Resuscitating the Black Body: Reproductive Justice as Resistance to the State’s Property Interest in Black Women’s Reproductive Capacity

Jill C. Morrison<sup>†</sup>

**ABSTRACT:** 2019 marks 400 years since the first Africans were brought to the Virginia colony as captives, and deemed not human beings but rather the property of others. Black women have endured reproductive oppression since our arrival in the United States. This Article argues that current methods of reproductive oppression attempt to restore the State’s property interest in the bodies of Black women—specifically the basic rights of use and exclusion—once secured by enslavement. This Article seeks to identify some of the ways that current restrictions on women’s reproductive liberty mimic systems that once formally commodified Black women’s sexuality and reproductive labor. It concludes, however, that a Reproductive Justice framework can help remove these property interests in Black women’s bodies and return them to their rightful “owners.”

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<sup>†</sup> Visiting Professor of Law and Executive Director, Women’s Law & Public Policy Fellowship Program, Georgetown University Law Center. LL.M., Georgetown University Law Center; J.D., Yale Law School. With credit to Professor Dorothy E. Roberts, who described the range of legally imposed means of oppressing Black women’s reproductive freedom in *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (2017). This paper was written for *Racialization of American Law*, taught by Professor Sherally Munshi, at Georgetown University Law Center, Fall 2017.

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## INTRODUCTION

The Reproductive Justice (RJ) movement arose in recent decades in response to a pro-choice movement concerned primarily with preventing births and terminating unwanted pregnancies.<sup>1</sup> This focus ignored the very real threats to Black<sup>2</sup> women’s reproductive autonomy seen since our arrival on America’s shores. These include barriers to becoming pregnant, having healthy pregnancies and births, and raising children to adulthood in safe environments. Both human rights and social justice frameworks are integral to RJ.<sup>3</sup> RJ adopts the human rights approach of positive rights: affirmative duties imposed upon the State to actualize rights. RJ recognizes that the right to privacy and governmental non-intrusion—at the core of much reproductive rights discourse—is inadequate to address the needs of the most vulnerable and marginalized women.<sup>4</sup>

This Article explores how present-day reproductive oppression reflects an attempt by the State to retain a property interest in Black women’s bodies once held by their owners during the time of enslavement. Rather than endorsing the view that sexuality and reproduction are legitimately conceptualized as property, this Article merely seeks to identify some of the ways that current restrictions on women’s reproductive liberty mimic systems that once formally commodified

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1. LORETTA ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 54-57 (2017).

2. I capitalize Black but use the lowercase when it was used in the original source. For the reasoning behind the capitalization of Black, see Lori L. Tharps, *The Case for Black With a Capital B*, N.Y. TIMES (Nov. 19, 2014), <https://www.nytimes.com/2014/11/19/opinion/the-case-for-black-with-a-capital-b.html> [<https://perma.cc/6GFC-JESZ>].

3. ROSS & SOLINGER, *supra* note 1, at 78-89.

4. Legal scholar Dorothy Roberts observes that the choice framework “aligns with a neoliberal market logic that relies on individuals’ purchase of commodities . . . instead of the state investing in health care and the other social needs of the larger public.” Dorothy Roberts, *Reproductive Justice, Not Just Rights*, DISSENT (2015), <https://www.dissentmagazine.org/article/reproductive-justice-not-just-rights> [<https://perma.cc/TGN5-MJ3U>].

Black women's sexuality and reproductive labor. The Reproductive Justice framework seeks to remove these property interests in Black women's bodies and return them to their rightful "owners."

Part I describes how racialized rhetoric is used to justify reproductive oppression and support the State's property interest in Black women's reproductive capacity and sexuality. Part II analyzes the reproductive and sexual oppression of Black women through a framework of the property rights of use and exclusion.<sup>5</sup> During enslavement, these property rights were exploited by the owner; currently, these property rights are exploited by the State. Part III proposes that the RJ framework serves to emancipate Black women from continued attempts to render their sexuality and reproductive labor the property of the State, attempting to sever this badge of inferiority established during enslavement.

## I. THE RACIALIZATION OF RHETORIC OPPOSING ACCESS TO REPRODUCTIVE HEALTH SERVICES

Despite the consistent demonization of Black women's reproductive decision-making, this issue is all too often sidelined in examinations of the legacy of enslavement and racial oppression.<sup>6</sup> This Section provides a sampling of the ways that race has been inserted into debates about abortion and contraception. Each of these examples illustrates Black women's treatment as passive objects who have no control over their reproductive decisions. These rhetorical tools are an extension of the dehumanizing treatment enslaved women experienced as the reproductive property of others, described in Section II.A. This rhetoric also provides support for the oppressive policies that negate Black women's agency, explored in Section II.B.

### A. *Contraception and Abortion as Tools of a Conspiracy of Genocide*

*The myth of abortion as Black genocide depends on denying Black women their humanity and their agency to make medical decisions regarding their reproduction.*

Shyrisa Dobbins-Harris<sup>7</sup>

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5. The other property rights include those of possession and transfer. JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 86 (3d ed. 1993).

6. Pamela Bridgewater has observed that despite a comprehensive treatment of reparations for the descendants of enslaved Africans, Randall Robinson devotes little attention to the reproductive and sexual exploitation of enslaved women. Pamela D. Bridgewater, *Ain't I a Slave: Slavery, Reproductive Abuse, and Reparations*, 14 *UCLA WOMEN'S L.J.* 89, 113 (2005).

7. Shyrisa Dobbins-Harris, *The Myth Of Abortion As Black Genocide: Reclaiming Our Reproductive Choice*, 26 *NAT. BLACK L.J.* 85, 90 (2017). This article provides a comprehensive critique of the "abortion as Black genocide" rhetoric and also highlights the Reproductive Justice Movement's response.

Abortion rates have declined significantly for all groups since the early 1980s, but the rate for Black women remains at almost three times the rate as for White women.<sup>8</sup> Black women comprise fifteen percent of the U.S. population, but account for almost twenty-eight percent of women having abortions.<sup>9</sup> The abortion rate is higher among Black women because the unintended pregnancy rate is three times higher than that of white women.<sup>10</sup> Despite the well-documented and complex factors causing the high abortion rate among Black women, this fact is often used as “evidence” that abortion is a racist plot to diminish the Black population.<sup>11</sup> In November 2018, Mississippi Governor Phil Bryant defended a lynching joke by Senator Cindy Hyde-Smith, claiming that the Black community should be more concerned with abortion than with racism.<sup>12</sup>

This claim of genocidal conspiracy about both abortion and contraception was made prior to *Roe v. Wade*,<sup>13</sup> the Supreme Court case decriminalizing abortion. Marcus Garvey, the leader of the Back to Africa Movement of the 1930s, decried birth control as “race suicide.”<sup>14</sup> Both the Black Panthers and Nation of Islam opposed birth control and abortion, but the genocide argument was much more common among the Panthers, who viewed Black children as potential soldiers in the fight for Black freedom. The Nation’s opposition was rooted in religious principles and women’s duty to raise children.<sup>15</sup>

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8. Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 107 AM. J. PUB. HEALTH 1904, 1906 tbl.1 (2017) (showing rates of 10 abortions per 1,000 for White women versus 27.1 per 1,000 for Black women according to the most recently available data).

9. *Id.*

10. Causes of unintended pregnancy among Black women include higher poverty rates, lower marriage rates, less access to comprehensive sexuality education, lower health insurance coverage, and less access to the most effective forms of contraception. Susan Cohen, *Abortion and Women of Color: The Bigger Picture*, 11 GUTTMACHER POL’Y REV. 2-4 (2008).

11. Some individuals may indeed have a racist motivation for supporting abortion, and welcome the high abortion rate among Black women. Likewise, conservatives were once strong proponents of contraception, recognizing the potential impact on electoral politics. Loretta Ross, *The Color of Choice: White Supremacy and Reproductive Justice*, RACIAL EQUITY TOOLS 7 (2005), <http://www.racialequitytools.org/resourcefiles/The-Color-of-Choice----Public-Version-with-footnotes-1.pdf> [https://perma.cc/822Q-59QP].

12. Amanda Michelle Gomez, *Mississippi Governor Defended Lynching Joke by Calling Abortion “Black Genocide,”* THINKPROGRESS (Nov. 15, 2018, 10:20 AM), <https://thinkprogress.org/misogynoir-mississippi-governor-phil-bryant-black-genocide-defense-cindy-hyde-smith-453c135339b9/> [https://perma.cc/RZK2-3AP9].

13. 410 U.S. 113 (1973).

14. DOROTHY E. ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 84 (2017). See also Miriam Zoila Perez, *Past and Present Collide as the Black Anti-Abortion Movement Grows*, COLORLINES (Mar. 3, 2011, 9:35 AM), <https://www.colorlines.com/articles/past-and-present-collide-black-anti-abortion-movement-grows> [https://perma.cc/F2TE-6SDH].

15. JENNIFER NELSON, *WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT* 96-97 (2003).

These organizations were justified in their suspicion of State-supported family planning.<sup>16</sup> Birth control was the government's preferred panacea to poverty, promoting contraception, abortion, and sterilization rather than actually responding to poverty's root causes and providing meaningful social and economic support to struggling families.<sup>17</sup> While the Nation of Islam has maintained its stance,<sup>18</sup> eventually, the Black Panthers adopted a position in support of abortion and contraception when freely chosen by the individual.<sup>19</sup> This came at the urging of Black feminists who recognized reproductive freedom as a critical part of community empowerment.<sup>20</sup>

The issue was unsurprisingly a contentious one within mainstream civil rights organizations, which were heavily grounded in the church. Despite the controversy over the use of abortion and contraception by Black women, prominent individuals and organizations supported both measures as a tool for women's empowerment. The National Council of Negro Women supported family planning in 1941.<sup>21</sup> Speaking on behalf of the Student Nonviolent Coordinating Committee's Black Women's Liberation Committee, Frances Beal stated that Black women must determine "when it is in the interest of the struggle to have children or not have them."<sup>22</sup> Shirley Chisholm, the first Black woman in the House of Representatives, was a strong supporter of access to safe, legal abortion, recognizing that most women dying from illegal abortions were Black and Brown.<sup>23</sup>

It was as easy then as it is now to distinguish government-imposed population control from individually chosen family planning, yet this rhetoric was reinvigorated in 2009 by the documentary *Maafa 21: Black Genocide in 21st Century America*, made by a white antiabortion activist.<sup>24</sup> The two-hour film charts the alleged plan to eliminate the "surplus" Black population, those who were rendered superfluous after emancipation when they could not be used for free labor.<sup>25</sup> Investigative reporter Akiba Solomon describes the film as "the

16. *Id.* at 85-87.

17. *See id.* at 87-88. *See also* JOHANNA SCHOEN, CHOICE & COERCION: BIRTH CONTROL, STERILIZATION AND ABORTION IN PUBLIC HEALTH AND WELFARE (2005) (describing governmental efforts to reduce childbearing among low-income women and women of color).

18. *See Nation of Islam leader warns against abortion*, DOMINICA NEWS ONLINE (Dec. 5, 2012, 7:39 AM), <http://dominicanewsonline.com/news/homepage/news/muslim-leader-warns-students-against-abortion/> [<https://perma.cc/7BWE-AUS5>] (recounting Minister Louis Farrakhan telling students at Dominica State College that "abortion should never be an option"); *see also* ELIJAH MUHAMMAD, HOW TO EAT TO LIVE: BOOK 1 83 (2018) (in which the former Nation of Islam leader likens birth control to suicide).

19. NELSON, *supra* note 15, at 89. The leadership of Elaine Brown also played a role in the Party Platform's inclusion of women's liberation. *Id.* at 109.

20. *Id.* at 109.

21. Perez, *supra* note 14. *See also* Ross, *supra* note 11, at 9.

22. Perez, *supra* note 14.

23. NELSON, *supra* note 15, at 77-79 (2003).

24. Mark Crutcher, *Maafa 21: Black Genocide in 21st Century America*, YOUTUBE (Oct. 27, 2012), <https://www.youtube.com/watch?v=HshhtiNm2Kc> [<https://perma.cc/9H5V-QHFP>].

25. With far more evidentiary support, Michelle Alexander has argued that the Prison-Industrial Complex has developed as a "remedy" to underemployment and poverty in communities of color. *See*

closest the predominately white, Christian right has come to successfully exploiting Black Nationalist themes and aesthetics.”<sup>26</sup>

Planned Parenthood is the primary focus of those claiming that abortion constitutes Black genocide, with its founder Margaret Sanger receiving much of the criticism. It is well-documented that Margaret Sanger believed in eugenics—limiting reproduction to the mentally and physically fit.<sup>27</sup> Yet Sanger still rejected the idea of State control of women’s reproductive choices that was at the heart of eugenic ideology.<sup>28</sup> Planned Parenthood has addressed and denounced this and other troubling actions and beliefs held by Sanger.<sup>29</sup> Furthermore, there is no evidence that Sanger coerced women of color into using family planning.<sup>30</sup> It is also well-documented that Sanger was invited to work in partnership with Black leaders, organizations, and healthcare providers to increase access to contraception in Black communities.<sup>31</sup> Scholars have documented the questionable motives for including Black healthcare workers and maintaining Black leadership in the project, yet this reality coexisted with Black women’s desire to control the timing and spacing of their pregnancies.<sup>32</sup>

There is also a claim that Planned Parenthood situates its facilities in predominately Black areas, with the implication being that Black women terminate their pregnancies at higher rates simply because abortion services are conveniently available. Aside from this argument being incredibly simplistic and insulting, it is also false. Less than ten percent of abortion facilities are located in neighborhoods with a majority Black population.<sup>33</sup> Both today and in Sanger’s

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generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

26. Akiba Solomon, *The Missionary Movement to Save Black Babies*, COLORLINES (May 2, 2013, 7:40 AM), <https://www.colorlines.com/articles/missionary-movement-save-black-babies> [<https://perma.cc/933C-7NXF>].

27. ROBERTS, *supra* note 14, at 57-59.

28. PLANNED PARENTHOOD, *OPPOSITION CLAIMS ABOUT MARGARET SANGER* 4 (2016), [https://www.plannedparenthood.org/uploads/filer\\_public/37/fd/37fd7b6-de5f-4d22-8c05-9568268e92d8/sanger\\_opposition\\_claims\\_fact\\_sheet\\_2016.pdf](https://www.plannedparenthood.org/uploads/filer_public/37/fd/37fd7b6-de5f-4d22-8c05-9568268e92d8/sanger_opposition_claims_fact_sheet_2016.pdf) [<https://perma.cc/FYC5-24WT>].

29. *Id.* In addition to evidence of her belief in eugenics, it has been documented that Sanger spoke to a meeting of the women’s auxiliary of the Ku Klux Klan. *Id.* at 3.

30. Margaret Sanger did not support abortion. The procedure was not just illegal, but quite dangerous in Sanger’s day. Imani Gandy, *How False Narratives of Margaret Sanger Are Being Used to Shame Black Women*, REWIRE (Aug. 20, 2015), <https://rewire.news/article/2015/08/20/false-narratives-margaret-sanger-used-shame-black-women/> [<https://perma.cc/3R6Q-2N5C>].

31. PLANNED PARENTHOOD, *supra* note 28, at 1. The Harlem Project was supported by The Urban League, W.E.B. Du Bois, and Abyssinian Baptist Church. It was in fact Du Bois who paternalistically accused impoverished Black people of “breeding carelessly,” a quote that is often misattributed to Sanger. *Id.* at 5.

32. ROBERTS, *supra* note 14, at 77-78.

33. Using data from its survey of abortion providers, the Alan Guttmacher Institute found that 60 percent of abortion facilities are in predominately white areas. ALAN GUTTMACHER INSTITUTE, *News in Context, Claim that Most Abortion Clinics Are Located in Black or Hispanic Neighborhoods Is False* (June 1, 2014), <https://www.guttmacher.org/article/2014/06/claim-most-abortion-clinics-are-located-black-or-hispanic-neighborhoods-false> [<https://perma.cc/7Y9R-HSQU>] (relying on data from Rachel K. Jones & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2011*, 46 FAMILY PLANNING PERSPECTIVES 3 (2014)).

day, Black women make their reproductive decisions as other women do: in the context of their current lives, families, plans for the future, finances, education and employment goals.

The most prominent campaign in recent memory arose from the Radiance Foundation, with billboards placed in predominately Black areas declaring, “Black children are an endangered species.”<sup>34</sup> Another campaign from Life Always proclaims, “The Most Dangerous Place for an African American is in the Womb.”<sup>35</sup> The founder and spokesperson for the organization is a biracial adoptee, but the campaign is funded by white-led and Republican-supporting organizations like Georgia Right to Life.<sup>36</sup> These and other “pro-life” supporters asserting an interest in the disproportionate rate of abortions among Black women have otherwise shown no commitment to the well-being of mothers, infants, or children of any race.<sup>37</sup> Campaigns by Black women’s organizations have responded to these claims, including Trust Black Women, a project of SisterSong: Women of Color Reproductive Justice Collective.<sup>38</sup>

### *B. The Co-opting of Black Lives Matter*

The most recent racialized anti-abortion rhetoric grows out of the Black Lives Matter (BLM) movement. BLM, started by Black women in 2013, has an explicitly anti-patriarchal frame.<sup>39</sup> BLM has also partnered with RJ organizations, including Trust Black Women.<sup>40</sup> The two organizations issued a solidarity statement affirming their common goals. In a joint interview, they described the intersection of the movements, and how RJ demands that parents be able to raise their children to adulthood free of State violence and poverty, with quality education and in healthy environments.<sup>41</sup>

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34. RADIANCE FOUNDATION, *Black Children Are An Endangered Species* (Feb. 4, 2010), <http://www.toomanyaborted.com/black-children-are-an-endangered-species/> [<https://perma.cc/ZE2V-JEZ5>].

35. “*The Most Dangerous Place for an African-American is in the Womb*”: *Black Politician Criticises Anti-Abortion Billboard*, DAILY MAIL (Feb. 24, 2011), <https://www.dailymail.co.uk/news/article-1360125/The-dangerous-place-African-American-womb-Black-politician-criticises-anti-abortion-billboard.html> [<https://perma.cc/2XNH-LVR3>].

36. Solomon, *supra* note 26.

37. *See, e.g.*, NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, A DOUBLE BIND: WHEN STATES DENY ABORTION COVERAGE AND FAIL TO SUPPORT EXPECTING AND NEW PARENTS (Sept. 2016), <http://www.nationalpartnership.org/research-library/repro/abortion/a-double-bind.pdf> [<https://perma.cc/8DW3-MCT5>] (reporting lack of workplace supports for parents in states with the most abortion restrictions, largely tracking Republican-dominated state legislatures).

38. *See* TRUST BLACK WOMEN, [www.trustblackwomen.org](http://www.trustblackwomen.org) [<https://perma.cc/BV42-SPU8>].

39. *See Platform*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/platform/> [<https://perma.cc/52WC-YFW5>]; *see also What We Believe*, MOVEMENT FOR BLACK LIVES, <https://blacklivesmatter.com/about/what-we-believe/> [<https://perma.cc/QE9Z-5ZR7>].

40. Kenrya Rankin, *Black Lives Matter Partners with Reproductive Justice Groups to Fight for Black Women*, COLORLINES (Feb. 9, 2016), <https://www.colorlines.com/articles/black-lives-matter-partners-reproductive-justice-groups-fight-black-women> [<https://perma.cc/XUH2-R2QT>].

41. *Id.*

Attempting to draw attention away from BLM and redirect to their anti-abortion campaign, the Radiance Foundation's most recent poster reads: *Black Lives Matter In and Out of the Womb*.<sup>42</sup> The founder of the Radiance Foundation has also decried the "hypocrisy" of the aforementioned partnership, noting that Planned Parenthood "kills more unarmed black lives in one day than police are accused of killing in one entire year."<sup>43</sup> Again, this statement presumes that Black women have no agency in determining whether or not to continue a pregnancy.

Yet others have identified those opposing abortion in the name of "Black Lives" as the actual hypocrites. One columnist describes his exchange with a self-proclaimed pro-lifer, challenging him on commitment to Black lives with regard to housing, education, and police brutality. He describes abortion opponents' purported interest in the lives of Black children as "cynical and offensive" when the same individuals do nothing to improve the lives of Black people.<sup>44</sup>

Even Black clergy who are opposed to abortion have rejected the use of Black Lives Matter by those who have shown no concern for the Black community. Recognizing that Black women are acting in consideration of the totality of their lives, they have opposed recent attempts to ban abortion, and spoken out about addressing the social conditions faced by Black families. "Those who are most vocal about abortion and abortion laws are my white brothers and sisters, and yet many of them don't care about the plight of the poor, the plight of the immigrant, the plight of African-Americans."<sup>45</sup>

### C. *Slavery Rhetoric*<sup>46</sup>

Another common tool among those opposing abortion is to compare it to slavery. They assert that one day, the fact that abortion was deemed acceptable

42. See Feminista Jones, *How Anti-Abortion Extremists are Exploiting #BlackLivesMatter to Vilify African-American Women*, OPEN DEMOCRACY (Oct. 16, 2017), <https://www.opendemocracy.net/5050/feminista-jones/anti-abortion-extremists-exploiting-black-lives-matter> [<https://perma.cc/4UMR-5NWU>]. The "in and out of the womb" part of the poster, superimposed over a Black infant, is faded out.

43. Ryan Scott Bomberger, *#Blacklivesmatter, White Guilt and the Marketing of Racism*, RADIANCE FOUND., (July 8, 2016), <https://www.theradiancefoundation.org/blacklivesmatter/> [<https://perma.cc/XRD5-FKAA>]. The article goes on to state that "those with Black skin" present the biggest threat to other Black people. *Id.*

44. Leonard Pitts Jr., *The hypocrisy of anti-abortion activists*, BALT. SUN (May 26, 2019), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-op-0526-pitts-abortion-20190522-story.html> [<https://perma.cc/SSU7-EKGY?type=image>].

45. John Eligon, *When "Black Lives Matter" Is Invoked in the Abortion Debate*, N.Y. TIMES (July 6, 2019), <https://www.nytimes.com/2019/07/06/us/black-abortion-missouri.html> [<https://perma.cc/KX4E-96BE>].

46. Arguments have also been made by abortion rights supporters comparing the forced continuation of pregnancy to slavery. See, e.g., Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990). Debora Threedy argues that such appropriation by either side

to Americans will seem as unthinkable as (white) Americans' acceptance of slavery 200 years ago. The tactic serves two purposes: to link abortion to something that people—especially those who consider themselves progressive—would consider morally reprehensible today, and to further draw upon the “abortion as a plot to destroy the Black race” narrative.<sup>47</sup>

Although the comparison has been made since *Roe*,<sup>48</sup> it was most recently re-popularized by Black Republican presidential candidate (and current Secretary of the Department of Housing and Urban Development) Ben Carson.<sup>49</sup> Carson explicitly compared women who have abortions to slave owners, stating,

During slavery, a lot of the slave owners thought that they had the right to do whatever they wanted to that slave . . . . And, you know, what if the abolitionists had said, you know, “I don’t believe in slavery. I think it’s wrong. But you guys do whatever you want to do”? Where would we be?<sup>50</sup>

Putting aside the obvious logical and factual weakness of the analogy, it completely erases the reproductive experiences of enslaved women. As RJ activist Imani Gandy observes, “if abortion is like slavery . . . then what of the women who suffered under slavery? What of the women who performed self-abortions in order to resist slavery? They cease to exist.”<sup>51</sup>

Carson’s analogy results in the complete erasure of women who were experiencing both enslavement and pregnancy. In thinking of the things that slave owners “thought that they had the right to do,” Carson does not consider that among those “rights” were forced breeding, rape, and removal of children from their mothers. If the enslaved woman is centered in his analysis, not only does the “slavery equals abortion” analysis fail, but reproductive oppression begins to look far more like slavery than does abortion. Given that reproductive oppression was essential to maintaining the system of slavery, this analogy is a far easier one to draw, but only if Black women are considered.

indicates a failure to adequately appreciate the racial implications of such an analogy. Debora Threedy, *Slavery Rhetoric and the Abortion Debate*, 1 MICH. J. GENDER & L. 3, 15 (1994).

47. Chloe Angyal, *A New Federal Court Judge Compared Abortion to Slavery. He’s not Alone*, HUFFINGTON POST (July 26, 2017, 3:47 PM), [https://www.huffpost.com/entry/judge-abortion-slavery\\_n\\_5978ce3fe4b0c95f3760fc00](https://www.huffpost.com/entry/judge-abortion-slavery_n_5978ce3fe4b0c95f3760fc00) [<https://perma.cc/9CYN-W7K9>].

48. The most comprehensive academic treatment of this analogy is JUSTIN BUCKLEY DYER, *SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING* (2013).

49. Emily Crockett, *Why Republicans like Ben Carson Love Comparing Abortion to Slavery*, VOX (Nov. 1, 2015), <https://www.vox.com/identities/2015/11/1/9654462/ben-carson-abortion-slavery> [<https://perma.cc/8LLT-2EGW>].

50. *Id.*

51. Imani Gandy, *Abortion Is not like Slavery, So Stop Comparing the Two*, REWIRE (Nov. 12, 2013), <https://rewire.news/article/2013/11/12/abortion-is-not-like-slavery-so-stop-comparing-the-two/> [<https://perma.cc/2FKZ-F96A>].

*D. Racial Targeting at Crisis Pregnancy Centers (CPCs) and Abortion Facilities*

The first Crisis Pregnancy Center (CPC) was established in 1967 in Hawaii, with the express purpose of dissuading women from having abortions through false information.<sup>52</sup> Founder Robert Pearson said that a woman who wanted to terminate her pregnancy “has no right to information that will help her kill her baby.”<sup>53</sup> CPCs are organizations that advertise pregnancy testing and options, leading women to think that they provide abortion services.<sup>54</sup> Once in the door, staff use a variety of methods to convince women to continue their pregnancies. Methods include generous offers of financial support to help raise the child (which never materialize); convincing women that abortion causes breast cancer and infertility (which is untrue); exaggerating the likelihood of complications, including death; and using ultrasound pictures to evoke emotional responses.<sup>55</sup>

Most insidiously, some CPCs tell women that they can get an abortion at any time during their pregnancies, leading them to believe that there is no urgency in their decision.<sup>56</sup> Other CPCs tell women that they are earlier in their pregnancy so that women believe they have more time to decide to have an abortion than they actually do, or that they are likely to miscarry so that there is no need for an

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52. *Crisis Pregnancy Centers: An Affront to Choice*, NAT'L ABORTION FED'N (2006), [http://prochoice.org/wp-content/uploads/cpc\\_report.pdf](http://prochoice.org/wp-content/uploads/cpc_report.pdf) [<https://perma.cc/GYX3-29F7>].

53. *Id.*

54. Several states and local jurisdictions have attempted to require CPCs to make clear that they do not provide abortion services, or else to direct women to resources for comprehensive care. Most of these efforts have been significantly scaled back, with the Supreme Court recently finding that such a requirement violates the right to free speech. *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018). In New York, CPCs are now only being required to disclose: “This facility does not have a licensed medical provider on site to provide or supervise all services.” Lauren Evans, *New Law Hasn't Stopped Anti-Abortion “Pregnancy Centers” From Misleading Women*, VILLAGE VOICE (Sept. 13, 2017), <https://www.villagevoice.com/2017/09/13/562988/> [<https://perma.cc/7WJE-VKNF>]; see also David G. Savage, *Supreme Court Agrees to Hear Antiabortion Challenge to California Disclosure Law for Pregnancy Centers*, L.A. TIMES (Nov. 13, 2017), <http://www.latimes.com/politics/la-na-pol-abortion-court-california-20171113-story.html> [<https://perma.cc/YV9L-LWHB>]; Pam Belluck, *Pregnancy Centers Gain Influence in Anti-Abortion Arena*, N.Y. TIMES (Jan. 4, 2013), <https://www.nytimes.com/2013/01/05/health/pregnancy-centers-gain-influence-in-anti-abortion-fight.html> [<https://perma.cc/8XJM-PAHH>].

55. See, e.g., NARAL PRO-CHOICE AMERICA, *CRISIS PREGNANCY CENTERS LIE: THE INSIDIOUS THREAT TO REPRODUCTIVE FREEDOM* 8, 10 (2015), <https://www.prochoiceamerica.org/wp-content/uploads/2017/04/cpc-report-2015.pdf> (breast cancer and death risks); *id.* at 9 (mental health risks); MELISSA KLEDER & S. MALIA RICHMOND-CRUM, NARAL PRO-CHOICE MD. FUND, *THE TRUTH REVEALED: MARYLAND CRISIS PREGNANCY CENTER INVESTIGATION 3* (Jan. 14, 2008) [hereinafter *TRUTH REVEALED*], <http://www.prochoicemd.org/assets/bin/pdfs/cpreportfinal.pdf> [<https://perma.cc/YW9Q-4KGE>] (breast cancer, infertility and mental health risks). CPC workers have also been filmed using these tactics. See *12<sup>TH</sup> & DELAWARE* (Loki Films 2010) (showing a CPC claiming that abortion causes breast cancer and infertility); *JACKSON* (Girl Friday Films 2016) (documenting a CPC client being told that she could “die from it [abortion],” that a CPC’s provision of clothes and diapers for the pregnant client’s one-year-old were contingent upon her attendance of abstinence classes, and a CPC worker performing an ultrasound offering to write “hi mommy” on the picture for a woman who was considering terminating her pregnancy).

56. NARAL PRO-CHOICE AMERICA, *supra* note 55, at 1255.

abortion.<sup>57</sup> These tactics may result in a woman having a later, more expensive and more dangerous procedure, or carrying an unwanted pregnancy to term.<sup>58</sup>

While Planned Parenthood facilities are not primarily found in Black neighborhoods, the same cannot be said for CPCs. Citing the high rates of abortion in communities of color, CPCs have explicitly targeted what they call “underserved” communities.<sup>59</sup> Tactics include buying airtime in media outlets serving the Black community and advertising on public transportation routes in Black neighborhoods.<sup>60</sup>

While data on the race of staff members of CPCs is not available, CPCs are largely funded by conservative, evangelical Christian organizations, and most have white, male leadership.<sup>61</sup> Another significant portion of their funding comes from governments: the federal government, which contracts with CPCs to provide “abstinence only” education; and states, which support CPCs with tax breaks, direct financial support, and fees collected from “Choose Life” license plates.<sup>62</sup>

CPCs view women of color as passive victims of abortion, rather than individuals exercising their own volition, justifying the need for these “urban initiatives.”<sup>63</sup> This reproductive paternalism, and presumption that Black women are not competent decisionmakers regarding their own reproduction, reflects the most abhorrent and stereotyped notions about Black women’s humanity and competency. This harks back to enslavement, which “marked Black women . . . as objects whose decisions about reproduction should be subject to social regulation rather than to their own will.”<sup>64</sup>

This racial targeting also occurs at facilities providing abortion care. A Black obstetrician/gynecologist regularly receives racial taunts from protesters as he enters a facility where he practices, being called “a filthy negro abortionist” by a white man.<sup>65</sup> Another Black provider hears, “You’re killing the black race!”

57. 12<sup>TH</sup> AND DELAWARE, *supra* note 55 (a woman at a CPC was told she was seven weeks pregnant instead of ten). NARAL PRO-CHOICE AMERICA, *supra* note 55, at 12 (miscarriage claim); TRUTH REVEALED, *supra* note 54, at 4 (telling a woman she could get an abortion at any point in her pregnancy). See also Jenny Kutner, “I Feel Like I Was Tricked”: *New Documentary Uncovers How Crisis Pregnancy Centers Lie to Women*, SALON (Sept. 18, 2014), [https://www.salon.com/2014/09/18/i\\_feel\\_like\\_i\\_was\\_tricked\\_new\\_documentary\\_uncovers\\_how\\_crisis\\_pregnancy\\_centers\\_lie\\_to\\_women/](https://www.salon.com/2014/09/18/i_feel_like_i_was_tricked_new_documentary_uncovers_how_crisis_pregnancy_centers_lie_to_women/) [<https://perma.cc/34KP-9U72>] (last visited Apr. 4, 2019) (purposely misdating gestation).

58. NARAL PRO-CHOICE AMERICA, *supra* note 55, at 7.

59. FAMILY RESEARCH COUNCIL, *A PASSION TO SERVE: HOW PREGNANCY RESOURCE CENTERS EMPOWER WOMEN, HELP FAMILIES, AND STRENGTHEN COMMUNITIES* 26 (2011).

60. NARAL PRO-CHOICE AMERICA, *supra* note 55, at 16.

61. National Abortion Federation, *supra* note 52, at 14. These include the Pearson Foundation and Liberty Foundation. The Christian Action Council’s Care Net is headed by a Black man.

62. *Id.* at 11-14.

63. The Family Research Council’s report also claims (incorrectly) that abortion facilities are concentrated in minority areas. See *supra* note 59, at 26.

64. ROBERTS, *supra* note 14, at 23.

65. DAVID S. COHEN & KRISTEN CONNOR, *LIVING IN THE CROSSHAIRS: THE UNTOLD STORIES OF ANTI-ABORTION TERRORISM* 96 (2015).

yelled by the same woman every Friday.<sup>66</sup> A white protestor outside of an Alabama clinic says to a reporter, “The KKK would be happy with what’s happening here today . . . [a]ll these black babies being murdered. Black babies’ lives matter.”<sup>67</sup>

I was working with the Center for Reproductive Law & Policy in the Summer of 1993, challenging Mississippi’s parental consent law. As I walked into the clinic to take depositions, a white protester holding a Black infant in the 90-degree August heat yelled out to me, “Malcolm X wouldn’t want you to kill your baby.” My white female supervisor was also of childbearing age, but I was the sole target of the protestors’ attention. Under the guise of “saving Black babies,” the protestors saw nothing wrong with making assumptions based on my status as a Black woman. Protestors have continued to use the tactic of racial shaming at this particular clinic. In the opening scene of the documentary *Jackson*, a protestor makes reference to Martin Luther King’s most famous speech, calling out to a woman walking into the clinic, “Mommy, please don’t kill me. I have a dream, Mommy.”<sup>68</sup>

### E. So-called “Race Bans”

Building on the argument that the higher abortion rate among Black women is some sort of evidence of a genocidal conspiracy, legislation has been proposed to ban abortion based on race.<sup>69</sup> In order to directly target Black women’s reproductive decision-making, proponents claim that the disproportionate rate of abortions among Black women is driven by some animus that these women have against their fetuses based on its race.

Ironically, the only reported cases of abortion motivated by the race of the fetus involve white women. Typically, these women are pressured by parents to terminate the pregnancy because the man who impregnated their daughter was

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66. *Id.* at 97.

67. Angyal, *supra* note 47.

68. JACKSON, *supra* note 55.

69. Prenatal Nondiscrimination Act (PRENDA) of 2016, H.R. 4924, 114th Cong. (2016). Arizona is the only state with a law banning race- and sex-selective abortions. See Ariz. Rev. Stat. Ann. § 13-3603.02. Rep. Trent Franks (R. Az.), who recently resigned from the House amid allegations that he offered staffers money to conceive a child with him, was the champion of these bans. Ben Johnson, *Banning Abortion Based on Sex and Race is “The Civil-Rights Struggle That Will Define Our Generation”*: Congressman, LIFESITE NEWS (Apr. 14, 2016), <https://www.lifesitenews.com/news/banning-race-and-sex-selective-abortion-is-the-civil-rights-struggle-that-wil> [<https://perma.cc/8HRJ-3HS8>]; Katie Rogers, *Trent Franks, Accused of Offering \$5 Million to Aide for Surrogacy, Resigns*, N.Y. TIMES (Dec. 8, 2017), <https://www.nytimes.com/2017/12/08/us/politics/trent-franks-sexual-surrogacy-harassment.html> [<https://perma.cc/A6AY-2ZK7>]. PRENDA and the Arizona law are the only efforts to directly restrict abortion based on race, but every abortion restriction has a disproportionate impact on women of color. Common restrictions include waiting periods, bans on Medicaid funding, and parental involvement requirements. This is not only because of their higher abortion rates, but also due to their lower incomes, lower rates of insurance, reduced access to transportation, and employment that typically does not allow time off. ROBERTS, *supra* note 14, at xiv.

Black.<sup>70</sup> These abortions procured by white women obviously were not included in the statistics about abortion among Black women cited in the findings of legislation to prevent “race-based” abortions.

This legislation is often coupled with efforts to ban sex-selective abortion.<sup>71</sup> The “Prenatal Non-Discrimination Act” cites extensive evidence suggesting that some individuals choose to terminate their pregnancy based on the sex of the fetus, but it can only cite the racial disparity in abortion rates as “evidence” of individuals choosing to abort based on the fetus’s race.<sup>72</sup> This is because there is no evidence of Black women basing their abortion decision on the race of the fetus they are carrying. Fortunately, courts see these laws for what they are: attempts to prevent women from terminating their pregnancies. Most recently, Indiana’s race- and sex-selection ban has been enjoined by the Seventh Circuit Court of Appeals.<sup>73</sup>

The Supreme Court recently denied Indiana’s request for review of the provisions related to race and sex-selective abortions on the ground that the issue had not been presented in any other Court of Appeals.<sup>74</sup> Justice Clarence Thomas wrote a dissent that attempted to draw a connection between the disproportionate abortion rate among Black women and eugenic motives, while devoting nary a word to Black women’s capacity for decision-making.<sup>75</sup> Adam Cohen, the author cited liberally by Justice Thomas in making his arguments about the eugenic consequences of abortion and contraception explicitly rejected Thomas’ mischaracterization of his work:

Between eugenic sterilization and abortion lie two crucial differences: who is making the decision, and why they are making it. In eugenic sterilization, the state decides who may not reproduce, and acts with the

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70. See, e.g., Ernie Suggs, *Senate Abortion Bill Continues to Stir Emotions*, ATLANTA JOURNAL-CONSTITUTION (Apr. 6, 2010), <http://www.ajc.com/news/local-govt--politics/senate-abortion-bill-continues-stir-emotions/miKKzUrS4Z3UvnFm8pSDtM/> [<https://perma.cc/S3WC-Q6RQ>]; Associated Press, *Police: Parents Kidnap Plot Motivated by Race*, NBC NEWS, (Sept. 19, 2006), [http://www.nbcnews.com/id/14893787/ns/us\\_news-crime\\_and\\_courts/t/police-parents-kidnap-plot-motivated-race/#.WjLlFwNgPo](http://www.nbcnews.com/id/14893787/ns/us_news-crime_and_courts/t/police-parents-kidnap-plot-motivated-race/#.WjLlFwNgPo) [<https://perma.cc/UK7M-AVNX>].

71. Skewed sex ratios indicating son preference are documented among some sub-populations in the United States. Bans on sex-selective abortion, however, do not address the underlying causes of son preference and subject certain women to racial profiling when they are seeking abortion care. NAT’L WOMEN’S L. CTR., RACE AND SEX SELECTION ABORTION BANS ARE HARMFUL TO WOMEN 11 n.6 (Aug. 2015), <https://www.nwlc.org/wp-content/uploads/2015/08/prendafactsheet.pdf> [<https://perma.cc/2JCM-7FGW>] (noting that the ratio could be the result of assisted reproductive technology and not abortion).

72. Compare H.R. 4924, § 2(a)(1) with H.R. 4924, § 2(a)(2).

73. Planned Parenthood of Indiana and Kentucky, Inc. v. Indiana State Dept. of Health, 888 F.3d 300 (7th Cir. 2018).

74. *Box v. Planned Parenthood of Indiana and Kentucky*, No. 18-483, slip op. at 3 (May 28, 2019).

75. *Id.* slip op. at 17. Thomas also perpetuates the myth that Sanger targeted the Black community, despite evidence that she rejected race-based eugenics. See Gandy, *supra* note 30.

goal of “improving” the population. In abortion, a woman decides not to reproduce, for personal reasons related to a specific pregnancy.<sup>76</sup>

This legislation is based on the unproven hypothesis that Black women are terminating their pregnancies because they do not want to have Black children. Based on this rationale, proponents argue that race bans are consistent with U.S. law that prohibits race discrimination.<sup>77</sup> Yet in practice this would require doctors to give special scrutiny to Black women presenting for abortion care, which would further entrench race discrimination rather than prevent it.

Finally, the fact that this theory is completely fabricated by those pushing an anti-abortion agenda does not mean that such a reason to terminate a pregnancy would be invalid. RJ principles assert that women’s decisions regarding pregnancy termination should be left to them alone. It is plausible that a Black woman, seeing the degree of State and private violence inflicted upon Black children and adults, would determine that she would rather not carry a pregnancy to term and raise a child in such a climate.<sup>78</sup>

## II. CLAIMING A PROPERTY INTEREST IN BLACK WOMEN’S BODIES: PAST AND PRESENT

The racialized rhetoric described in Part I contributes to a particular narrative about Black women’s autonomy, agency, and value. It characterizes Black women as objects, and not actors. This particular form of objectifying Black women was also an integral part of how they were controlled during enslavement. As property, they were merely to be acted upon, with their owners holding all rights over them.

Property theory posits that there are two primary property rights: use and exclusion. For the purposes of this analysis, the right of use of one’s reproductive capacity and sexuality includes all of the benefits that one could draw from her own sexual decision-making and reproductive labors. With regard to the right of exclusion, this means one’s right to determine who has sexual access to her body, whether that body will be used for reproduction, and whether that body will be subjected to restrictions based on one’s reproductive status (for example, the state of being pregnant). The RJ framework considers these rights as encompassing the right to decide whether or not to have children, the right to

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76. Adam Cohen, *Clarence Thomas Knows Nothing of my Work*, THE ATLANTIC (May 29, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/clarence-thomas-used-my-book-argue-against-abortion/590455/> [<https://perma.cc/3HW7-WEW3>].

77. H.R. 4924, § 2(a)(2)(B).

78. This echoes the decisions of enslaved Black women to resist the institution of slavery by terminating their pregnancies or even killing their children. See ROBERTS, *supra* note 14, at 49; see also NIKKI M. TAYLOR, *DRIVEN TOWARD MADNESS: THE FUGITIVE SLAVE MARGARET GARNER AND TRAGEDY ON THE OHIO* (2016).

raise children with adequate supports, and the right to express one's sexuality free from violence or coercion.<sup>79</sup>

### A. Enslaved Women as Reproductive Property<sup>80</sup>

Inasmuch as enslaved Africans were the property of their owners, the sexual and reproductive capacities of women were also owned. Women's sexuality and reproduction merely reinforced their status as property. Saidiya Hartman notes that Black women's sexuality and reproduction were an integral part of their value as labor.<sup>81</sup> This Section identifies but a few of the ways that owners possessed the property rights of use and exclusion in Black women's sexuality and reproduction.

#### 1. *The Right to Use: Being Denied the Benefit of One's Reproductive Labor*<sup>82</sup>

Enslaved parents lived with the reality that their children might be taken from them at any time, with the threat of family separation often used as the ultimate punishment.<sup>83</sup> The joy that parents receive in seeing their children grow and thrive was often denied to enslaved women. The realities of raising children while in bondage cannot be romanticized,<sup>84</sup> yet it is well-documented that strong family ties grew despite the precariousness and instability posed by enslavement.<sup>85</sup>

Once sold to another owner, many parents lacked even the most basic knowledge regarding their children's whereabouts, condition, or even of whether they were dead or alive.<sup>86</sup> The harm done by separating mothers and children was lifelong. As women grew to old age, they were denied the comfort and care

79. ROSS & SOLINGER, *supra* note 1, at 9.

80. A comprehensive review of all the ways Black women's reproductive capacities were rendered property in enslavement is beyond the scope of this piece.

81. Saidiya Hartman, *The Belly of the World: A Note on Black Women's Labors*, 18 SOULS 166, 166 (2016).

82. The right to use was also often denied in the selection of partners, the right to marry (or to receive permission from the owner), and the right to cohabit with a partner of one's choosing. See Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. 187, 195 (1987); see generally Dacia Green, *Ain't I...?: The Dehumanizing Effect of the Regulation of Slave Womanhood and Family Life*, 25 DUKE J. GENDER L. & POL'Y 191 (2018).

83. Burnham, *supra* note 82, at 201-02. See also Green, *supra* note 82, at 211-12.

84. Given this reality, enslaved women practiced contraception, abortion, and infanticide to spare their children the perils of slavery. See Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 11, 27-28 (2001).

85. Burnham, *supra* note 82, at 190.

86. DeNeen L. Brown, "My Mother was Sold From Me": After Slavery, the Desperate Search for Loved Ones in "Last Seen Ads," WASH. POST (Sept. 7, 2017), [https://www.washingtonpost.com/news/retropolis/wp/2017/09/07/my-mother-was-sold-from-me-after-slavery-the-desperate-search-for-loved-ones-in-last-seen-ads/?utm\\_term=.2d425e24826e](https://www.washingtonpost.com/news/retropolis/wp/2017/09/07/my-mother-was-sold-from-me-after-slavery-the-desperate-search-for-loved-ones-in-last-seen-ads/?utm_term=.2d425e24826e) [<https://perma.cc/HR7K-7Z5H?type=image>] (describing archive of ads placed after the Civil War by both mothers and children).

of their own children, but broader notions of family and fictive kin ensured that the elderly received family-like care and attention.<sup>87</sup> Even those with the good fortune to live in close proximity to their children still had no control over their upbringing.<sup>88</sup> For children who were not sold, owners determined what work the children would do, their food rations, and their discipline for any perceived infraction.<sup>89</sup>

Andrea Freeman identifies breastfeeding as another benefit of reproduction denied to enslaved Black women.<sup>90</sup> Sometimes masters forced enslaved women to stop breastfeeding their own children because of nursing's contraceptive properties, or because it disrupted their ability to work.<sup>91</sup> The practice of using an enslaved woman as a wet nurse for white children on some plantations meant that both mothers and their children were denied the benefits of breastfeeding.<sup>92</sup>

In being deprived of an ongoing relationship with the children they bore, the ability to nurture their own children, and the right to direct and influence the upbringing of the children even when nearby, Black women were denied the benefits of their own reproductive labor.

## 2. *The Right to Exclude: Rape and Forced Breeding*<sup>93</sup>

Rape was a common feature of enslavement, and enslaved women had no right to exclude others from access to their bodies. The crime of rape was not recognized between an owner and an enslaved woman.<sup>94</sup> In *State of Missouri v. Celia*, a case in which an enslaved woman killed her owner for raping her, the court found that the rape statute did not apply because the definition of woman

87. DEBORAH GRAY WHITE, *AR'N'T I A WOMAN?: FEMALE SLAVES IN THE PLANTATION SOUTH* 117 (1999).

88. Burnham, *supra* note 82, at 204.

89. *Id.*

90. See generally Andrea Freeman, *Unmothering Black Women: Formula Feeding as an Incident of Slavery*, 69 *HASTINGS L.J.* 1545 (Aug. 2018).

91. *Id.* at 1556-57.

92. *Id.* at 1558.

93. There are many other examples of practices that limited enslaved women's right to exclude others from their bodies. New Orleans and several other cities had a thriving market for "fancy girls," enslaved women of mixed race sold solely for the purpose of being held in sexual bondage as the concubine of one man or to be prostituted to many. WHITE, *supra* note 87, at 37. The "father of American gynecology," J. Marion Sims, subjected enslaved women to medical experiments without the benefit of anesthesia. HARRIET WASHINGTON, *MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT* 65-66 (2008). A statue of Sims, like the statues of others who have committed atrocities concurrently with their good works, has been the subject of recent controversy. DeNeeen L. Brown, *A Surgeon Experimented on Slave Women Without Anesthesia: Now his Statues are Under Attack*, *WASH. POST* (Aug. 29, 2017), [https://www.washingtonpost.com/news/retropolis/wp/2017/08/29/a-surgeon-experimented-on-slave-women-without-anesthesia-now-his-statues-are-under-attack/?utm\\_term=.6593c3db06d8](https://www.washingtonpost.com/news/retropolis/wp/2017/08/29/a-surgeon-experimented-on-slave-women-without-anesthesia-now-his-statues-are-under-attack/?utm_term=.6593c3db06d8) [<https://perma.cc/MB5T-MMLZ>]. These women had no right to refuse to be experimented on, and were thus denied the right to exclude others from the use of their bodies. *Id.*

94. Burnham, *supra* note 82, at 199.

did not include enslaved women.<sup>95</sup> As property, an owner had the right to use a woman in any way he pleased. This impunity also extended to the owner's family members, overseers and even visitors to the household.<sup>96</sup>

One particularly dehumanizing practice, compared to animal husbandry, was "breeding"—the intentional pairing of female and male slaves for qualities that would benefit the owner.<sup>97</sup> Certain enslaved women were forced to mate with certain enslaved men, even if they were committed or married to someone else.<sup>98</sup> These practices can also be viewed as a violation of the right to use, as enslaved women were denied the right to procreate with the man of their choice.

Related to both rape and breeding practices, enslaved women were required to prove their worth by bearing as many children as possible.<sup>99</sup> Bearing children brought rewards in the form of better food, clothing, and a lighter workload.<sup>100</sup> Some owners even promised freedom to women upon birthing a particular number of children.<sup>101</sup> In consideration of the brutality of enslavement, a woman who attempted to meet such goals to improve her conditions can hardly be said to have been acting of her own volition.

## *B. Regulating Black Women as Property of the State*

Current attempts at reproductive oppression reflect the State's property interest in Black women's sexuality and reproduction. Rather than an owner determining the rights of use and exclusion, legislation now accomplishes the same end by either targeting or disproportionately affecting Black women.

### *1. The Right to Use: Family Caps<sup>102</sup>*

The "Family Cap" is shorthand for State policies that deny an increase in cash benefit assistance to families who have an additional child while receiving

95. Evelyn Brooks Higginbotham, *African American Women's History and the Metalanguage of Race*, 17 J. WOMEN SOC'Y 251, 257-58 (1992); see also DeNeen L. Brown, *Missouri v. Celia, a Slave: She Killed the White Master Raping Her, Then Claimed Self-Defense*, WASH. POST (Oct. 19, 2017), [https://www.washingtonpost.com/news/retropolis/wp/2017/10/19/missouri-v-celia-a-slave-she-killed-the-white-master-raping-her-then-claimed-self-defense/?utm\\_term=.5aacd076401e](https://www.washingtonpost.com/news/retropolis/wp/2017/10/19/missouri-v-celia-a-slave-she-killed-the-white-master-raping-her-then-claimed-self-defense/?utm_term=.5aacd076401e) [https://perma.cc/2RHT-FGR9].

96. Burnham, *supra* note 82, at 200.

97. *Id.*; Green, *supra* note 82, at 202.

98. Burnham, *supra* note 82, at 200 n.55. Burnham also documents the limitations imposed on marriage for enslaved persons, including the requirement to first receive permission from the master. *Id.* at 195-97.

99. This was especially important after the ban on further importation of enslaved Africans in the mid-1800s. Bridgewater, *supra* note 84, at 14.

100. *Id.* at 17.

101. Burnham, *supra* note 82, at 198.

102. For an overview of coercive practices in health and public welfare systems, see SCHOEN, *supra* note 17. State attempts to limit or discourage Black women's use of their bodies for childbearing have been extensively documented: for sterilization abuse, see NELSON, *supra* note 15, at 65-67; for coercion in the use of long-acting reversible contraceptives, see Rachel Benson Gold, *Guarding Against Coercion*

Temporary Aid for Needy Families (TANF).<sup>103</sup> Through financial coercion, the State attempts to limit reproduction among low-income women, who are disproportionately Black. Not only are wealthier women not subjected to this attempt to restrict their childbearing, but those with greater means are given tax credits for each additional child.

Family Caps emerged from the “welfare queen” myth widely popularized in the 1970s by then-presidential candidate Ronald Reagan.<sup>104</sup> This backlash and narrative about race and poverty began shortly after the civil rights movement successfully gained equal access to public benefits programs for those Black people who had migrated to the North.<sup>105</sup> When benefits were primarily being accessed by white families in need, there was little public outcry from taxpayers or discussion of the worthiness of the beneficiaries.<sup>106</sup> This narrative reflects beliefs about who deserves to be a mother. Roberts notes that images of motherhood as worthy and honorable do not include Black mothers. “The image of the welfare mother quickly changed from the worthy white widow to the immoral Black welfare queen.”<sup>107</sup>

The logic animating Family Caps is that women have children in order to receive more benefits, so denying them additional funds will cause them to refrain from childbearing.<sup>108</sup> This presumes that women receiving benefits, disproportionately women of color,<sup>109</sup> are motivated by something different than other women in their childbearing decisions. Contrary to the myth underlying the policy, women receiving cash assistance benefits have the same average number of children as all women: two.<sup>110</sup>

*While Ensuring Access: A Delicate Balance*, 17 GUTTMACHER POL’Y REV. 8, at 10-12 (2014). See also Elizabeth A. Stewart et al., *The Burden of Uterine Fibroids for African-American Women: Results of a National Survey*, 22 J. WOMEN’S HEALTH 807 (Oct. 2013) (discussing the overuse of hysterectomies as treatment for fibroids).

103. CTR. ON REPRODUCTIVE RTS. & JUST., BRINGING FAMILIES OUT OF ‘CAP’TIVITY: THE PATH TOWARD ABOLISHING WELFARE FAMILY CAPS 2 (Aug. 2016), [https://www.law.berkeley.edu/wp-content/uploads/2015/04/2016-Caps\\_FA2.pdf](https://www.law.berkeley.edu/wp-content/uploads/2015/04/2016-Caps_FA2.pdf) [<https://perma.cc/RE8Z-WB36>]. Family Caps were an option made available to the states in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, President Bill Clinton’s plan to reform welfare. Since 1995, seven states have repealed their Family Caps, and seventeen still impose a family cap. *Id.*

104. Rachel Black & Aleta Sprague, *The “Welfare Queen” Is a Lie*, THE ATLANTIC (Sept. 28, 2016), <https://www.theatlantic.com/business/archive/2016/09/welfare-queen-myth/501470/> [<https://perma.cc/JAZ5-ZNHC>].

105. *Id.*

106. *Id.*

107. ROBERTS, *supra* note 14, at 207.

108. One researcher observed, “It would be a quantum leap in faith to believe that \$42 influences an act that is usually spontaneous and occurs nine months before birth.” Patricia Donovan, *Does the Family Cap Influence Birthrates? Two New Studies Say “No,”* GUTTMACHER REPORT (Feb. 1, 1998), <https://www.guttmacher.org/gpr/1998/02/does-family-cap-influence-birthrates-two-new-studies-say-no> [<https://perma.cc/NFM4-WGES>].

109. Blacks and Hispanics receive TANF benefits at disproportionately higher rates than whites. A third of TANF recipients are non-Hispanic whites. GENE FALK, CONG. RESEARCH SERV., R43187, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF): SIZE AND CHARACTERISTICS OF THE CASH ASSISTANCE CASELOAD (2016).

110. CTR. ON REPRODUCTIVE RTS. & JUST., *supra* note 103, at 5.

Studies have largely shown that the only effect of the Family Cap is to drive families further into poverty.<sup>111</sup> Other studies have shown that in states that had both Family Caps and Medicaid coverage for abortion, the abortion rate increased.<sup>112</sup> This is obviously not an outcome that self-identified social conservatives would publicly claim as a victory, especially if their goal was to “protect” children.

Khiara Bridges notes that that federal government continues to be the primary propagator of the idea that all social ills are caused by childbearing among poor—often falsely equated with Black—women.<sup>113</sup> Bridges notes that by excluding the work of mothering for a group of women who are disproportionately Black, welfare policy reinforces the historic belief that “mother” is not a legitimate identity for Black women the way it is for white women.<sup>114</sup> This is another way in which the State attempts to limit Black women’s ability to use their bodies for reproduction and benefit from their reproductive labor.

## 2. *The Right to Exclude: The Detainment and Prosecution of Addicted Women*<sup>115</sup>

Beginning with the rise of the crack epidemic in the 1980s, prosecutors targeted addicted pregnant women for criminal punishment.<sup>116</sup> Charges typically included child endangerment, drug delivery and homicide, even though the text

111. *Id.* at 6-7.

112. MICHAEL CAMASSO, FAMILY CAPS, ABORTION AND WOMEN OF COLOR 27 (2007); *See also* Jennifer Preston, *Births Fall and Abortions Rise Under New Jersey Family Cap*, N.Y. TIMES (Nov. 3, 1998), <https://www.nytimes.com/1998/11/03/nyregion/births-fall-and-abortions-rise-under-new-jersey-family-cap.html> [<https://perma.cc/5XCA-Z8Q3>].

113. Khiara M. Bridges, *Quasi-Colonial Bodies: An Analysis of the Reproductive Lives of Poor Black and Racially Subjugated Women*, 18 COLUM. J. GENDER & L. 609, 610 (2009).

114. *Id.* at 642-43.

115. Barriers to abortion and contraceptive access, such as restrictions on insurance coverage, also violate the right to exclude because women are compelled to become pregnant and possibly carry pregnancies to term against their wishes. Additionally, as during enslavement, Black women still suffer disproportionate rates of sexual assault. Black women have the second-highest probability of surviving rape in their lifetimes (21.2 percent). Native Americans have the highest at 27.5 percent. Matthew J. Breiding et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization – National Intimate Partner and Sexual Violence Survey, United States, 2011*, 63 MORBIDITY & MORALITY WEEKLY REP. 1, 6 tbl. 2 (Sept. 5, 2014). Because of the distrust of police, Black women are less likely to report rape and have experienced re-victimization when they attempt to seek justice against their attackers. *See, e.g.*, Lauren Rosenblatt, *Why It’s Harder for African American Women to Report Campus Sexual Assaults, Even at Mostly Black Schools*, L.A. TIMES (Aug. 28, 2017), <http://www.latimes.com/politics/la-na-pol-black-women-sexual-assault-20170828-story.html> [<https://perma.cc/C5FX-4HC5>].

116. Such interventions are not limited to addicts. Women have been subjected to State intervention for failure to follow doctors’ orders, for suspicion of causing fetal harm, for suicide attempts, and for failure to submit to a cesarean section. *See generally* April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM. J. GENDER & L. 147 (2007).

of these laws gave no indication that they were intended to be enforced against a pregnant woman for her actions during pregnancy.<sup>117</sup>

These laws were justified as efforts needed to “protect” fetuses from their “bad mothers.” Both the punitive nature of these laws, and the lack of other efforts by states to actually advance maternal, fetal, and newborn health greatly undermined states’ purported justifications. Furthermore, these laws operated under several false assumptions: that women did drugs in order to harm their fetuses; that women did drugs without regard to harm to their fetuses; that the threat of punishment would prevent them from becoming addicted; that the threat of punishment would inspire them to stop immediately; and there was treatment available for those who wanted to stop using drugs.

Despite evidence that women of all races use illicit substances at equal rates, Black women are more than half of those prosecuted for alleged fetal harm.<sup>118</sup> This is largely attributed to selective prosecution, as well as close scrutiny of women using public facilities, who are disproportionately Black.<sup>119</sup> Healthcare providers also limit their testing to drugs disproportionately used by Black women, which are not actually those most dangerous to fetal development.<sup>120</sup>

Studies have shown that poverty and inadequate nutrition were the predominant factors in poor outcomes among women using crack cocaine during pregnancy. Alcohol is actually more harmful to fetal development than cocaine. With the rise of opioid use among white people, commentators have observed a marked shift in the discourse of addiction; from one of individual moral failure to a national public health crisis.<sup>121</sup> This again illustrates how Black women are pathologized.

These forced interventions constitute the most drastic type of State intrusion into women’s lives.<sup>122</sup> By virtue of their pregnant status, women are denied the right of privacy, and the right not to give evidence against themselves as

117. Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women’s Legal Status and Public Health*, 38 HEALTH POL., POL’Y & L. 299, 323 (2013).

118. *Id.* at 310 tbl.1.

119. Julie B. Ehrlich, *Breaking the Law by Giving Birth: The War on Drugs, the War on Reproductive Rights, and the War on Women*, 32 N.Y.U. REV. L. SOC. CHANGE 381, 387-88 (2008).

120. The “crack baby” myth has been largely disproven. Laura M Betancourt et al., *Adolescents With and Without Gestational Cocaine Exposure: Longitudinal Analysis of Inhibitory Control, Memory and Receptive Language*, 33 NEUROTOXICOLY TERATOLOGY 36 (2011).

121. Jesse Mechanic, *When a Drug Epidemic Hit White America, Addiction Became a Disease*, HUFFINGTON POST (July 10, 2017), [https://www.huffingtonpost.com/entry/when-a-drug-epidemic-hit-white-america-addiction-became\\_us\\_5963a588e4b08f5c97d06b9a](https://www.huffingtonpost.com/entry/when-a-drug-epidemic-hit-white-america-addiction-became_us_5963a588e4b08f5c97d06b9a) [<https://perma.cc/N3D5-MA7H>]; Vann R. Newkirk II, *What the ‘Crack Baby’ Panic Reveals About The Opioid Epidemic*, THE ATLANTIC (July 16, 2017), <https://www.theatlantic.com/politics/archive/2017/07/what-the-crack-baby-panic-reveals-about-the-opioid-epidemic/533763/> [<https://perma.cc/PP59-9KLA>].

122. One private intervention started by a white woman pays substance addicted women \$200 to get sterilized or use LARCs, contraception over which they have no control. Erika Derkas, *The Organization Formerly Known as Crack: Project Prevention and the Privatized Assault on Reproductive Wellbeing*, 19 RACE, GENDER & CLASS 179, 180 (2012). *See also* PROJECT PREVENTION, <http://www.projectprevention.org/> [<https://perma.cc/ZB2J-N464>].

protected by the U.S. Constitution.<sup>123</sup> Under the guise of fetal protection, states have arrested and detained women, wholly depriving them of their liberty. Some judges have offered reduced sentences to addicts for using invasive, long-acting forms of contraception.<sup>124</sup> State legislatures have also proposed that addicted women be required to use invasive, long-acting forms of contraception, or be sterilized.<sup>125</sup> Other women have been subjected to parole only on the condition of submitting to treatment, which, like other punitive interventions, is ineffective according to addiction experts.<sup>126</sup> If the only way addicted pregnant women can avoid prosecution is to terminate their pregnancy, this is also a violation of their fundamental rights, and could be deemed a violation of their right to use as well.<sup>127</sup>

### III. REPRODUCTIVE JUSTICE: REJECTING THE STATE'S ATTEMPT TO SECURE A PROPERTY INTEREST IN BLACK WOMEN'S BODIES

As the property of their owners, enslaved Black women could neither use their own bodies for their own benefit, nor exclude others from having access to their bodies. In the 150 years since emancipation, Black women have continued to be oppressed by governmental control of their reproduction, frustrating their own desires to procreate, parent, or abstain from pregnancy and childbearing. Current methods of reproductive oppression, in which the State holds property rights over Black women's bodies through restrictive laws and policies, replicate what was once owners' private property interest in their female slaves.

Black women in the United States have always been burdened with advancing others' priorities with regard to their reproductive decision-making. From arriving on the shores of Virginia in 1619<sup>128</sup> to emancipation, their duty was to increase the wealth of their masters, while at the same time being denied the entitlements and pleasures of motherhood. In the twentieth century, the duty imposed by their own community was to build Black warriors and voters, with

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123. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1425 (1991).

124. Despite some improvement in the narrative around addiction stemming from the opioid crisis, judges are still coercing pregnant addicts to use contraception. See *Rise in Drug-Addicted Babies Prompts Judge's Controversial Solution*, CBS NEWS (July 21, 2017), <https://www.cbsnews.com/news/opioid-crisis-tennessee-judge-neonatal-abstinence-syndrome-birth-control-inmate/> (Tennessee judge offering reduced sentence to both male and female inmates suffering addiction).

125. Roberts, *supra* note 123, at n.217 (describing Ohio bill).

126. Ehrlich, *supra* note 119, at 392.

127. Paltrow & Flavin, *supra* note 117, at 308.

128. Although this date is widely acknowledged as the arrival of African peoples in the American colonies, one scholar cautions that Africans had a history in the Americas predating 1619, and that the sole focus on 1619 renders Africans mere subjects in America's history when they were much more. See Michael Guasco, *The Misguided Focus on 1619 as the Beginning of Slavery in the U.S. Damages Our Understanding of American History*, SMITHSONIAN MAG. (Sept. 13, 2017), <https://www.smithsonianmag.com/history/misguided-focus-1619-beginning-slavery-us-damages-our-understanding-american-history-180964873/> [<https://perma.cc/8EPV-M6KC>].

little consideration given to the mental and physical strains that motherhood imposed on women living with racism, sexism, and poverty. In the twenty-first century, Black women are at the center of the culture wars. Their childbearing is perceived as the root of all social ills, yet they are the subject of “rescues” by those who claim to be pro-life. At the same time, they are denied any meaningful social support for healthy parenting and are criminalized for their reproductive decisions. They are demonized as threats to the Black community for deciding to terminate pregnancies—often in consideration of what is best for the children they are already raising. And police or private vigilantes can kill Black male children who are deemed threats to the white community and suffer no consequences.<sup>129</sup>

RJ seeks to move Black women from the position of object to the position of subject, from acted upon to actor. Reproductive Justice organizations led by Black women and based in the communities they serve have been responding to these current attempts to render Black women objects without agency, and centered the time- and place-specific needs of Black women. In addition to SisterSong’s Trust Black Women, In Our Own Voice: National Black Women’s Reproductive Justice Agenda works with eight local partner organizations to advance policies in Washington, D.C. and around the nation that take into consideration the historical mistreatment of Black women and exploitation of our reproductive capacities. These organizations have led local and national fights to decriminalize sex work, expand birthing options for women on Medicaid, and destigmatize abortion.

Reproductive oppression has always been and continues to be heavily racialized. Therefore, as Bridges argues, the regulation of Black women’s sexuality and reproduction must be treated as a matter of racial justice.<sup>130</sup> The discourse about Black women’s reproductive and sexual capacities is still influenced by the notion developed during enslavement that Black women’s reproductive labors are for the benefit of others; that they are the property of others, be it individual masters or the State acting as master. The Reproductive Justice movement serves to resuscitate the Black body that has been killed by the reproductive oppression so eloquently described by Professor Dorothy Roberts over twenty years ago. Current attempts to marginalize and objectify Black women vis-à-vis their reproductive capacities reflect this centuries-long history of oppression, and must be explicitly rejected on this basis.

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129. Alana Horowitz Satlin, *Hillary Clinton Meets With Mothers of Trayvon Martin*, Jordan Davis, Michael Brown and Tamir Rice, HUFFINGTON POST (Nov. 3, 2015), [https://www.huffpost.com/entry/hillary-clinton-gun-violence-black-lives-matter\\_n\\_563881d3e4b00a4d2e0bb83f](https://www.huffpost.com/entry/hillary-clinton-gun-violence-black-lives-matter_n_563881d3e4b00a4d2e0bb83f) [<https://perma.cc/2HK3-9JVS>]. Their children’s respective ages were 17, 17, 18 and 12. Only Jordan Davis’s killer was convicted. *Id.*

130. Bridges, *supra* note 113, at 611.