American Husbandry: Legal Norms Impacting the Production of (Re)Productivity

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INTRODUCTION.................................................................................................................. 2
I. THE LAW’S NORMATIVE LEGITIMIZATION OF SLAVERY ........................................... 7
II. THE PLIGHT OF BLACK FEMALE SLAVES ................................................................... 13
A. Enhanced Valuation of Slave Women and their Issue ............................................. 14
B. The Doctrine of Partus Sequitur Ventrem ............................................................... 17
C. “Incentives” to Breed ............................................................................................ 20
D. Stereotypes and the Lack of Criminal Protection ..................................................... 22
III. DR. SIMS AND THE BLACK FEMALE BODY AS THE SITE OF MEDICAL EXPERIMENTATION .................................................................................................................. 26
A. Dr. Sims’s Experiments on Slave Women ............................................................... 31
B. Pain and the Absence of Anesthesia ....................................................................... 35
IV. CONTINUING ISSUES IN RACE AND (RE)PRODUCTIVITY .................................. 37
A. Birth Control Pill and Sterilization ........................................................................ 38
B. Norplant .................................................................................................................. 42
CONCLUSION .................................................................................................................... 46

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INTRODUCTION

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 seventeenth 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 justifications.

Systematic colonization used European legal systems, which rationalized the existence of slavery by providing normative legitimacy.³ Throughout the duration of slavery, jurisprudence was a sword employed against enslaved Africans and not a shield, as it is traditionally envisioned.⁴ This contradiction of legal imperatives operated not only along racial lines, but also along sexual and gender lines. Female slaves were impacted differently and disparately. They were exploited not only because of their race; their sex could be used as a means of accumulating both wealth and property, which rendered them particularly vulnerable to the external manipulation and co-opting of their sexual and reproductive agency.⁵ This Article explores how the American legal system's endorsement of racially based proprietary interests in female slaves, as "breeders" of property, created powerful norms of social control over the

². See PHILIP D. CURTIN, THE ATLANTIC SLAVE TRADE: A CENSUS 212 tbl.65 (1969) (showing that over 6,000,000 slaves were sent to Brazil and the French and English Caribbean during this period).
⁴. See TUSHNET, supra note 3 passim.
⁵. MacKinnon explains: 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. Catharine A. MacKinnon, Feminism, Marxism, Method, and the State: An Agenda for Theory, 7 SIGNS 515, 531-33 (1982).
American Husbandry bodies of black women. These norms exacted a premium on enslaved women by facilitating dominion over their agency. If, as MacKinnon suggests, “[g]ender socialization is the process through which women come to identify themselves as sexual beings, as beings that exist for men,” then the exacting of black “female sexual submission” not only reifies patriarchy, but also institutionalizes white supremacy. Therefore, while “sexuality is the linchpin of gender inequality,” it is also the lynch-pin of racial injustice for black women. The systemic imperatives of reproduction reveal the centrality of American husbandry—that “[c]ontrol 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 further slaveholders’ profit maximization and social domination. For example, the criminal law denied the “rapeability” of slave women, while the legal doctrine of partus sequitur ventrem, contrary to the common law, mandated that the legal status of children born of slave women track the mother’s status. As a result, the law denied black 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 in their own offspring. The law maintained an

7. See MacKinnon, supra note 5, at 531-33.
8. Id. at 533.
11. See infra Section II.D.
12. Partus sequitur ventrem was the rule of descent that ensured 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 mothers’ enslaved status. MARVIN HARRIS, PATTERNS OF RACE IN THE AMERICAS 56 (1964); A. LEON HIGGINbotham, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS 43 (1978).

According to Higginbotham and Higginbotham:

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, servant 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.

A. Leon Higginbotham, Jr. & F. Michael Higginbotham, Yearning to Breathe Free: Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia, 68 N.Y.U. L. REV. 1213, 1243 n.164 (1993); see 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 (2004) ("Although the status of the very first mulattoes was uncertain, planter elites quickly settled on the rule that the 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.") (citations omitted).
environment where sexual abuses and reproductive interference with female slaves was both profitable and condoned.  

Such norms created the atmosphere in which people 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 unanesthetized 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 value, rendering them unfit for their reproductive duties and thus vulnerable to such medical experimentation. Slavery provided Dr. Sims with these human subjects/objects for medical and surgical experimentation; moreover, slavery provided Dr. Sims with a legally normalized culture that degraded black humans and subjected black females to the most intrusive forms of interference with their (re)productivity. While slave women were legally dehumanized by their definition as three-fifths human, which vitiated principles of consent and decreased concerns over slave welfare or autonomy, their sex and gender conveniently rendered them sufficiently similar to white women so that medical

13. In the words of Paula Johnson:
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.


15. For an exploration of the available options for anesthesia at the time, see infra note 196. To be sure, Dr. Sims was zealous about finding suitable subjects. This enthusiasm related to the utilitarian ends of his project—the goals were fame, fortune, and technological advancement, not ending the suffering of the lowly female slave. Dr. Sims candidly wrote about finding suitable slave women:
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.

16. See 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); SIMS, supra note 15, at 227 (Sims informs Anarcha’s master that she was unfit for her duties); Valerie J. Riley & John Spurlock, Vesicovaginal Fistula, June 25, 2006, http://www.emedicine.com/med/topic3321.htm (last visited Feb. 6, 2007) (recommending cesarean delivery for subsequent pregnancies).


18. 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 attempt throughout this Article to distinguish between these two related terms.
technologies could be tested upon their bodies. While white women ultimately benefited from the perfecting of these surgical techniques, even their improved situation was likely tangential. Sims’s ultimate goals were scientific advancement, fame, and profit. The law thus set the stage for a lapse in medical, religious, and legal ethics, whereby notions of liberty, agency, and autonomy—and the principle of consent generated therefrom—were disregarded. Nonetheless, Dr. Sims was considered by his peers to be a fine gentleman and professional. Indeed, Dr. Sims’s acclaim would ultimately take him to prestigious heights. He became president of the American Medical Association and has been honored with statues in Alabama’s capitol grounds and New York’s Central Park.

American medicine has yet to acknowledge the effect of the legal norms that enabled sexual and reproductive interference with enslaved women. However, this story forms part of a larger history of sexual and reproductive interference. From Nazi Germany to the Tuskegee syphilis experiments, the powerful have sought to advance science, coercively and without consent, at the expense of the powerless. Given that a “reproductive cure” would have facilitated further sexual and (re)productive interference with slave women, it is important to note that the question of whether these women wanted to be treated for their reproductive ailments was never exclusively for their autonomous determination. While heinous medical experimentation has been condemned since the Nuremberg Trials, the appropriate furor over the Nazi doctors who experimented upon and tortured human subjects for scientific gain has not yet been extended to the analogous medical and surgical experimentation on black women in antebellum America.

19. See Kapsalis, supra note 17, at 47; Judy Oliver, The Second Statue on the Right, Montgomery Living Magazine (2000) (discussing the respect that Sims still commands in the profession).
20. Oliver, supra note 19.
23. See Volker Rohlfs, Nazi Medicine and Research on Human Beings, 364 Lancet 6 (2004) (“If a context of unlimited access to consenting people who were defined as ‘biologically inferior,’ the research programme was accompanied by complete disregard for the victims, and many cruelties ensued.”); see also Robert N. Proctor, Nazi Science and Nazi Medical Ethics: Some Myths and Misconceptions, 43 Persp. Biology & Med. 133 (2000) (criticizing the “myth” that Nazi research was not scientific); William E. Seidelman, Nuremberg Lamentation: For the Forgotten Victims of Medical Science, 313 British Med. J. 1463 (1996) (discussing Nazi doctors’ abuse of their professional power).
24. For example, medical historian John Duffy revealed the nexus of race and gender in antebellum Southern medicine, especially in the use of cesarean sections:
This haunting history should be used to inform our views of contemporary interference in the (re)productivity of marginalized women. While human rights activists tend to focus on reproductive interference in the developing world, where even fewer safeguards against racially-based sexual predation may operate, similar issues often go unnoticed domestically. Given the pace of medical and scientific advancement, which causes incredible innovation, such controversies are seldom or insufficiently explored from a perspective of race and gender intersectionality. Specifically, the tragedy of legalized slavery remains a touchy subject in contemporary America. The combination of race, sex, interracial sex, and slavery makes us extremely reluctant to participate in open and honest discussion. This avoidance is troubling as we have much to learn from our shared history. Contemporary interference with and manipulation of the reproductive capacity of women of color and poor women continues the legacy of America’s longstanding disregard for the (re)productive autonomy of the vulnerable.

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, and where a critical race feminist methodology 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” informed by the socio-legal history of slavery. The “consciousness-raising” potential of feminism is used to “expos[e] dominant realities and shar[ed] subordinated ones” and to advocate for reproductive freedom and equality for women of color.

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. See KAPSALIS, supra note 17, at 42-45; Bernier, supra note 21, at 128-42 (discussing the experimentation and interference endured by enslaved women as part of a legacy of white interference with black reproductivity).
Focusing on black female slaves as racially sexualized property, this Article explores the notion of legal norms as constitutive of, and imbedded within, an environment where slave owners and the larger society could harness and manipulate slave women’s (re)productivity. Part I examines the normative role of the law in legitimizing slavery through legal discourse. It emphasizes 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 breeding techniques were valid options. Slave breeding can thus be conceptualized as a type of animal husbandry wherein the slave owner, like an animal breeder, controls and manages reproduction in order to maximize the profits from his initial investment, through the sale or use of the resulting animals.

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 the 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 a call for increased attention to this history of abuse, because interference in, and manipulation of, the reproductive capacity of women of color and of poor women continues today. 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

The motivating principle of bourgeois law is an undifferentiated individualism. . . . In slave law . . . 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.

30. WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND IN PRACTICE 16 (New York, American and Foreign Anti-Slavery Society 1853) (“In Maryland, the issue (i.e., of female slaves) is considered not an accessory, but as a part of the use like, that of other female animals. Suppose a brood mare be hired for five years, the foals belong to him who has a part of the use of the dam. The slave, in Maryland, in this respect, is placed on no higher or different ground.”) (citations omitted).

31. See WEBSTER’S II NEW COLLEGE DICTIONARY 539 (1999) (defining husbandry as “[t]he cultivation of crops and the breeding and raising of livestock” and “[t]he application of scientific principles, esp. to animal breeding”).

32. TUSHNET, supra note 3, at 157-58.
In the American colonies slaves were usually categorized as chattel property and adjudged to be “chattels personal,” subject “to all intents, constructions, and purposes whatsoever” of their owners, administrators, or assigns. The classification of slaves as property resulted from deliberate legal orchestration. 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. In property law, the owner of an animal owns the offspring. So too, the owner of a female slave owns her offspring. Therefore, the conception of slaves as personal property created a 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. “[A]gency means the capacity to direct one’s own life through individual actions and choice.” In the traditional dichotomy, the antithesis of autonomous action is total victimization. A survey of feminist legal theory, however, indicates a shift in feminist discourse from such polarities to a spectrum; the recognition that many women do exercise agency in their lives and are not entirely “consumed by male domination.” 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 nonexistent. American courts strategically recognized the humanity of slaves—indeed, it was the recognition of the humanity of slaves which rendered strategic appeals to the person, as opposed to the property, of the slave possible. Specifically, recognition of the humanity of slave women allowed for strategic manipulation of slave reproductive autonomy. In this sense, slave women might be said to have faced “constrained choices under oppressive conditions,” or what has

33. Goodell, supra note 30, at 63-76.
34. See id. at 23.
35. Higginbotham, Jr., supra note 11, at 11-12. For examples of litigated cases involving slaves, see generally 1 Judicial Cases Concerning American Slavery and the Negro (Helen Tunnicliff Catterall ed., 1968).
36. Felix Cohen, in his Dialogue on Private Property, explains:
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 . . . by saying that this 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?
38. Id.
39. Id. at 96-97 (recognizing that feminist theorists 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”).
come to be known as "partial agency." However, the plight of slave women was so tenuous, given that the other two-fifths of their existence was categorized as non-human, that their particular victimization resulted in what I will call "captured agency."

Captured agency is agency encumbered by socio-legal norms in order 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. Rather, an analysis that contextualizes the operative forces of coercion and oppression in the lives of slave women reveals that marginalized women cannot be empowered by the piecemeal disruption of negative influences on an individual woman's life. Rather, they must be liberated by reformulating the socio-legal conditions of women's existence on a structural and systemic level.

The case of Erwin v. Henry, 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 status of black slaves. This Missouri decision additionally demonstrates the capture of agency through the legal process. The decision underscores the court's willingness to buttress captured agency both by reference to the legal dehumanization of slaves and through an ironic recognition of slave humanity. The court's opportunistic engagement with these seemingly inconsistent theories of slavery ensured a system where a slave woman's very existence was at the mercy first of her owner, and secondarily of the legal system.

During the four years Cynthia was required to serve the executor before being emancipated, she had a baby girl named Adaline. Eleanor Erwin, as beneficiary entitled to the residue of Henry's estate, claimed Adaline as her...

40. Id. at 98-99.
43. 5 Mo. 469 (1838). Malcolm Henry's will stated:
   It is my will and desire that my boy, Adam, Juno and Cynthia, be released from bondage, on condition that Juno serve my sister Mary one year; Adam and Cynthia to serve the executor of my estate, or serve them to whom he hire them. Adam to serve two years, and Cynthia to serve four years, each then to have their perfect freedom, provided my sister may quit her claim to Juno; otherwise, the property I will to her shall hereafter be equally divided between my brothers and sisters: my desire is to pay sister Mary well for her claim on Juno.
   My crop of grain, farming utensils, household and kitchen furniture, and stock, all of which I want valued and acted on according to law, after my affairs are settled; then, if there is a residue from hire of negroes, crop, &c., I wish it to be given to Eleanor Erwin.
44. Id. at 470.
property. As the other denominated species of property in the will were so dissimilar from slaves, the court denied Eleanor Erwin's request, ruling that the residuum "cannot reach slaves, a species of property as distinctive in its character as real estate." The court continued, "Slaves are by our law personal property, but of a distinctive and peculiar character," thereby constructing slaves not simply as property, but rather as paradoxical confluences of person and property.

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 amounted to a concession that slaves' 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 regularly appealing to the human desires and weaknesses of their slaves in an effort to control their behavior. American husbandry was necessarily both cognizant and dismissive of the human characteristics possessed by those who were subjected to its (re)productive technologies. The irony of the strategic appeal to slave humanity was not lost on the court:

The age, health and disposition of slaves, their aptitude for particular employments, the length of time during which their owners or their owner's ancestors have possessed them, their matrimonial connections and other like circumstances, contribute to fix the degree of estimation in which their proprietors hold them, apart from the amount of money into which they can be converted in [the] market.

Thus, one sees the fleshing out at law of orchestrated agency capture to create doctrinal fixity and manipulate humanity for externally articulated ends. In this context, captured agency creates gender, and its implicit subjugation, by diminishing female autonomy; it also simultaneously creates literal and legal capture of racial autonomy by constructing intersectional submission. Captured agency reveals the degradation visited upon black female slaves who lacked agency over their bodies and produce. The court's observations were, therefore, particularly salient for female slaves because an essential element of their market value was their health, disposition towards (re)production, and their fecundity—the ability to produce future generations of the perpetually...

45. Id.
46. Clark v. Henry's Adm'r, 9 Mo. 336, 346 (1845).
47. Id. at 344-45.
48. See the dictionary definition of "animal husbandry," supra note 31.
49. See Bridgewater, supra note 10, at 16-18 (discussing the correlation between the level of slave reproduction and the level of punishment inflicted, and the use of gifts such as dresses and food as incentives for (re)production).
50. Clark, 9 Mo. at 345.
enslaved. The (re)productivity of female slaves increased their market value, and the benefits of increased market value accrued to their owners. As a result, the slave who was denied an interest in herself and her offspring knew neither reproductive autonomy nor proprietary agency. That a child could even conceivably be declared residuum, capable of separation from her mother, demonstrates the total denial of personhood in the name of legally protected property interests. That another woman, Eleanor Erwin, would litigate to acquire such property as a child bespeaks the viciousness of this peculiar institution. Solidarity along the lines of gender or sexuality was precluded 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. 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 status as property. 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. Reflection upon these concepts reveals the fundamental problem posed by slavery—the inherent contradiction between the legal classification of slaves as property and their undeniable humanity.


52. See Bridgewater, supra note 10, at 17-18. Cohen's dialogue further explains:
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.
Cohen, supra note 36, at 368.

53. For a discussion of 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).

54. Indeed, in Erwin v. Henry, 5 Mo. 469 (1838), 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, Eleanor Erwin would have received the "value" of Adaline, Cynthia's child. 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.

55. The Federalist No. 54, at 367-68 (James Madison) (Jacob E. Cooke ed., 1961) ("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.").

56. See Goodell, supra note 30, at 62 ("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.'"); Tushnet, supra note 3, at 158-69.
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, which would have helped protect their families and children.\textsuperscript{57} Despite its occasional recognition of slaves' humanity,\textsuperscript{58} the law refused to honor and dignify that humanity—to do so would have created a precedent of enforceable agency interests which would have undermined the 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 the annihilation of slave family structures.\textsuperscript{59} For instance, by holding that slave marriages had no legal validity, 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.\textsuperscript{60} As with other notions of relational autonomy, the notion of captured agency reveals the complicity of the legal regime and makes “visible the ways in which autonomy is affected by social forces, especially oppression.”\textsuperscript{61}

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

\textsuperscript{57} For discussions regarding the legality of slave marriages, see Laura F. Edwards, "The Marriage Covenant Is at the Foundation of All Our Rights": The Politics of Slave Marriages in North Carolina After Emancipation, 14 LAW & HIST. REV. 81 (1996); Glory McLaughlin, A "Mixture of Race and Reform": The Memory of the Civil War in the Alabama Legal Mind, 56 ALA. L. REV. 285, 302-04 (2004).

\textsuperscript{58} See THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW 1619-1860 passim (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).

\textsuperscript{59} For examples discussing the extent to which slaveholders had control over their property, see GOODELL, supra note 30, at 67 (“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?’”); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 129 (1985) (explaining that slave nuptial rights suffered because antebellum slave codes prohibited marriage).

\textsuperscript{60} REMEMBERING SLAVERY: AFRICAN AMERICANS TALK ABOUT THEIR PERSONAL EXPERIENCE OF SLAVERY AND FREEDOM 122 (Ira Berlin et al. eds., 1998) (“In law, the masters' power to transgress the boundaries of the slave family was nearly limitless. Slave marriages had no legal standing... 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.”).

\textsuperscript{61} See McLeod & Sherwin, supra note 42, at 260.
class to appropriate the most intimate features of their persons for profit and pleasure.62

Defined as beyond “other,” 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 them. But this 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? The fact of such intercourse highlights the socio-legal hypocrisy of the day. 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,63 it also reinforced the race-based system of American slavery and white supremacy.

II. THE PLEIT 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.64

The classification of slaves as property enabled white slave owners to advocate and promote the acquisition and (re)production of slaves. Defining slaves as property encouraged the notion that husbandry was suitable for slaves as a means of property accumulation and wealth generation.65 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.66 The contortion of religious teaching was a convenient legal leap which ensured that the slavocracy67

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62. See WHITE, supra note 53, at 31 (“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.”); Bridgewater, supra note 10, at 15 (describing 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”).
63. See MacKinnon, supra note 5.
64. DUBOIS, supra note 1, at 169.
65. See GOODELL, supra note 30, at 82-83 (discussing the use of female slaves for breeding).
66. 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.”).
67. Slavocracy refers to the “ruling group of slaveholders or advocates of slavery, as in the southern United States before 1865.” THE AMERICAN HERITAGE COLLEGE DICTIONARY 1280 (3d ed. 1993).
maintained its gender and race privileges. In this way, as racialized and 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

During the period of slavery, most whites expected that blacks would be held as slaves in perpetuity. 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 would be so classified for eternity. It was therefore common to find clauses and provisions in wills like the following: “William Whittington sold a ten-year-old black girl named ‘Jowan’ to John Pitt and his ‘heyers, Exors. Adms. or Assigns’ . . . , [together with] her Issue and Produce . . . and their services forever.”

As the (re)producers of the labor force, enslaved women were valued like animals that were capable of generating further valuable units of production. The economic impetus behind such control over women’s reproductive capacities has a long and infamous history. The “breeding” of slave women was made economically viable by the American legal system’s recognition of slaves as property. Traditionally, husbandry techniques, as practiced on animals, were made possible by Western legal conceptions of property, and the legal status of slaves made them equivalent to livestock. As with the reproduction of animals, slaves were subject to manipulation for capital maintenance and profit maximization. Property law built incentives to breed into the legal system, since “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.” Property law provided the conduit through which the slave could be legally substituted for the mare, the child for the foal. Accordingly, the

68. See McCoin, supra note 6, at 237.
69. 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 because slavery was conceived of as a life long condition, and second because slavery was thought of as hereditary).
72. See GOODELL, supra note 30, at 51; Bridgewater, supra note 10, at 18.
73. See generally Tessie Liu, Teaching the Differences Among Women from a Historical Perspective: Rethinking Race and Gender as Social Categories, 14 WOMEN’S STUD. INT’L F. 265 (1991).
74. See GOODELL, supra note 30, at 82-83.
75. See Cohen, supra note 36, at 363-68 (discussing the underpinnings of property law as it impacts the ownership of chattel property, including animals).
76. Id. at 368.
“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 also ensured the capture of their agency as well.\textsuperscript{77} 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.\textsuperscript{78}

Perhaps this legal support stemmed from the fact that many members of the judiciary and the legislature were also slaveholders.\textsuperscript{79} Even revered American President Thomas Jefferson owned slaves—this was the order of the day.\textsuperscript{80} 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 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:

\textit{[A] just and reasonable allowance ought to be made here, 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 . . . .}\textsuperscript{81}

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.\textsuperscript{82} Since the slave was the property of the master—much like a work animal—the same husbandry techniques were available to a master in order to increase his investment portfolio.\textsuperscript{83} Husbandry techniques included, as

\textsuperscript{77} See Goodell, supra note 30, at 82-83; Gross, supra note 51, at 129.
\textsuperscript{78} See Goodell, supra note 30, at 51, 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’. . . . [T]he express language of the judges . . . [placed] 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.’”).
\textsuperscript{79} See Upshaw v. Upshaw, 12 Va. 381, 393-394 (1808) (comments of Judge Fleming); see also James Oakes, The Ruling Race: A History of American Slaveholders 144 (1982) (noting that nearly three-quarters of magistrate-level judges in Kentucky were slaveholders, compared to only one-third of heads of households in the general population); Ralph A. Wooster, Politicians, Planters, and Plain Folk: Courthouse and Statehouse in the Upper South, 1850-1860 passim (1975) (listing numerous influential judges and legislators as slaveholders).
\textsuperscript{81} Upshaw, 12 Va. at 393-394 (emphasis added).
\textsuperscript{82} See Augustin Cochin, The Results of Slavery 13 (1863) (“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.”).
\textsuperscript{83} See Cohen, supra note 36, at 365-68 (detailing the manner in which property law encourages the (re)productivity of livestock); Richard Sutch, The Breeding of Slaves for Sale and the Westward
an example, 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 former slaves provide ample evidence of breeding. Often, a master would put one female and one male slave together as though they were cattle. Some masters had breeding farms and "raised slaves," as breeding was most generously called, to sell on an order basis. For instance, one slave owner reported that he kept fifty to sixty females solely for breeding purposes. Twenty to seventy-five children, who were sold as soon as they were ready for the market, were bred annually on this plantation. Indeed, DuBois 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 elevated market price for young pregnant women provides corroborative evidence of slave breeding. Commentators have remarked that the value of a "prime field wench," meaning a woman capable of bearing between five and ten "marketable" children, was one-sixth to one-fourth greater than that of an infertile slave. In accordance with the premium placed on female "breeders," advertisements in the South for "Negro wenches" prominently featured the fecundity and child-rearing qualities of young female slaves. 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. 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. 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.95

Conversely, the inability to reproduce reduced the market value of, and hence demand for, female slaves.96 In addition, the type, severity, and frequency of punishments received by female slaves were related to the economic interest in slave (re)productivity.97 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.98

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

B. The Doctrine of Partus Sequitur Ventrem

Slave women were especially prized because their offspring could be held perpetually.99 Black 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 their mother’s 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

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95. GOODELL, supra note 30, at 84 (emphasis added).
96. See GROSS, supra note 51, at 129; Bridgewater, supra note 10, at 23 (“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.”); see also Neal Kumar Katyal, Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution, 103 YALE L.J. 791, 794 (1993).
98. Id. at 16-17 (discussing the techniques used by slave owners including gifts and threats to encourage their slaves to breed); BELL HOOKS, AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM 33-45 (1981) (discussing the separation and sale of barren women from their husbands); WHITE, supra note 53, at 99-101 (same).
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 ventrem*, 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 then-established common law rule that the child inherits the status of the father. One such act read:

WHEREAS some doubts have arisen whether children got by any 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 country shall be held bond or free only according to the condition of the mother . . . .

By reversing the traditional common law rule, the doctrine of *partus sequitur ventrem* provided for increased enslavement through the 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 ventrem* was fueled not only by white conceptions of slavery and blacks, but also by the end of the international slave trade. With the abolition of the international slave trade, maintenance of slavery required that the existing domestic slave labor force reproduce itself. Shrewd slave owners quickly realized they could breed and raise slaves faster than they would need them for themselves. Maryland, Virginia, South Carolina, and North Carolina became the main exporting states—together these

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100. *See Shaw*, supra note 99, at 45 n.10; *Cohen*, supra note 36, at 363-68.
103. *Id.*
105. *Id.*
106. *See id.* at 42-43 (discussing numerous federal legislative 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 211-12 (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).
108. *Byrd & Clayton*, supra note 107, at 289; *see GoodeLL*, supra note 30, at 56 (noting that the editor of the *Virginia Times* in 1836 calculated that 40,000 slaves were independently sold out of the state representing millions of dollars in income).
states supplied over 85 percent of migrant slaves.\textsuperscript{109} In fact, during the tumultuous last decade of slavery, the domestic slave trade reached its height.\textsuperscript{110} Again, the convenient doctrine of \textit{partus sequitur ventrem} focused the attention of those desiring a domestic slave trade upon female slaves. As one slave-owner explained,

The legal maxim \textit{`Partus sequitur ventrem'} 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 the 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.\textsuperscript{111}

In addition to the end of the Atlantic slave trade, American expansionism fueled the increased emphasis on slave-raising and black women’s (re)productivity.\textsuperscript{112} For instance, in 1832, Thomas R. Dew, a prominent slave-owner who would later become President of William and Mary University in Virginia, 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.”\textsuperscript{113} Because of this emphasis on (re)productivity, Dew stated bluntly, “Virginia is, in fact, a negro raising State.”\textsuperscript{114} Dew’s 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.”\textsuperscript{115} Of course, such language had distinct and overwhelming implications for slave women, who were considered “brood mares,” capable of generating issue for the domestic slave market.\textsuperscript{116} For instance, as a politician 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.”\textsuperscript{117} 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 the force of law.

\begin{enumerate}
\item[110] See DUBOIS, supra note 90, at 43.
\item[111] GOODELL, supra note 30, at 83 (reproducing a speech in the Virginia legislature by a prominent politician and judge).
\item[112] FONER, supra note 86, at 51; GOODELL, supra note 30, at 78-88.
\item[113] FONER, supra note 86, at 51; see HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 31 (Nellie Y. McKay \& Frances Smith Foster eds., W.W. Norton \& Co. 2001) (1861).
\item[115] FONER, supra note 86, at 51.
\item[116] GOODELL, supra note 30, at 85.
\item[117] Id. at 55-56.
\end{enumerate}
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 offspring from livestock, were the property of the owner. Thus, in holding that "[r]ape 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 slaves to the sanctity of their personal, sexual, and reproductive autonomy. Female slaves' 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 legitimized 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 sequitur ventrem* aided the imposition of human husbandry—American husbandry—on slaves by rendering those techniques economically viable and highly lucrative. While some have challenged exactly how widespread the practice of breeding actually was, 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 and wealth acquisition.

C. "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. Accordingly, the most common method of American husbandry appealed to

118. *Id.* at 86 (citations omitted).
120. Edmund Ruffin, a Virginia agricultural reformer, insisted that "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 86, at 51.
human desires and weaknesses. 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. Moreover, slave women understood 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. 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.

Female slaves were often conscripted to sacrifice their sexual autonomy through a system of exchange. For example, maternity prizes were used as incentives for female slaves to breed. Rather than exclusively using systems of punishment to coerce (re)productivity, slave-owners instituted maternity rewards systems, offering dresses, food, or reprieves from work. 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 “Jeany brings ten live children that she shall be at her... liberty...” Similarly, Mr. 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.” 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 those of their families by whatever means possible, including the strategic utilization of sexuality and reproductivity. However, slave women could only achieve these ends by surrendering their (re)productivity.

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. Moreover, given the notorious sexual excesses for which many

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123. Id.
124. Id. at 16-17.
125. Id.
126. See HOOKS, supra note 98, at 24-26.
127. See Bridgewater, supra note 10, at 16-17.
128. HOOKS, supra note 98, at 26 (noting that maternity prizes might include the promise of additional food or clothing); KAPSALIS, supra note 17, at 35 (reporting that breeding women yielded higher market prices and were often entitled to “special privileges” such as a preferred job in the master’s house); WHITE, supra note 53, at 99-101 (discussing inducements and incentives to reproduce including lightened labor, greater attention, days off, more food rations, new clothing, or money).
129. Bridgewater, supra note 10, at 17.
130. Fairclaim v. Guthrie, 5 Va. 7, 8 (1797).
133. Id. at 17.
D. Stereotypes and the Lack of Criminal Protection

In the white public imagination, female slaves were without decency and 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 (re)productivity. As Bridgewater has stated, "With 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, which 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

135. See WHITE, supra note 53, at 152-53, 164-65 (discussing the sexual abuse of slave women); JACOBS, supra note 113, at 26.
136. Harriet Jacobs describes the effect of such jealousy:
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 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 footfall. 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.

138. See WHITE, supra note 53, at 32.
139. Bridgewater, supra note 10, at 18.
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 as 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.\(^{141}\)

Neither the terminology of child molestation nor that of statutory rape would come to the aid of a slave girl confronting such sexually abusive situations, unless her master chose to pursue legal recourse for damage to his property.\(^{142}\) 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.\(^{143}\) Some slave girls had children at the age of twelve or thirteen.\(^{144}\) As one former slave observed, “Negro men six feet tall went to some of these children.”\(^{145}\) The issue of child molestation was framed by the court in *George v. State*\(^{146}\) 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.”\(^{147}\) In holding that such a violation would not be deemed rape,\(^{148}\) the Mississippi court emphasized the unassailable dominion of the master:

> [T]he 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.\(^{149}\)

The motivations for denying such criminality were economic.\(^{150}\) Provided that the slave, the slave owner’s physical property, was not injured by such sexual abuse, the owner could reap profits from sexual interference with his slaves.\(^{151}\) If slave women and girls could be legally protected from sexual interference from other slaves, an argument could be made which would have been disastrous to the slavocracy—that is, would not the slave woman and

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\(^{141}\) Id. (emphasis added).


\(^{143}\) See Jacobs, supra note 113, at 25-44; White, supra note 53, at 152-53, 164-65.

\(^{144}\) Bullwhip Days—The Slaves Remember 147 (James Mellon ed., 1988).

\(^{145}\) Id.

\(^{146}\) 37 Miss. 316 (1859).

\(^{147}\) Id. at 318.

\(^{148}\) Id. at 320 (“There is no act which embraces either the attempted or acted commission of rape by a slave on a female slave.”).

\(^{149}\) Id. at 318.

\(^{150}\) See State v. Mann, 13 N.C. 263 (1829); Goodell, supra note 30, at 82-83; Bridgewater, supra note 10, at 25 (“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.”); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 Colum. L. Rev. 1193, 1198-99 (1985).

\(^{151}\) See Goodell, supra note 30, at 78-82; Cohen, supra note 36, 360-69.
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 allowing the rape of a ten-year-old girl would preserve
such bottom-line concerns, then so be it. Additionally, 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.152

Criminal law theories of punishment, specifically deterrence, retribution,
and incapacitation, were of no force when considering possible criminalization
of sexual interference with female slaves.153 In 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.154 Such a
prosecution would have been unheard of—female slave autonomy did not
engage criminal sanctions.155 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.156

Describing the complete agency of the master, Judge Ruffin in State v.
Mann stated that “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 in fine, as most effectually securing the general
protection and comfort of the slaves themselves.”157 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. While haunting, the words of
Judge Ruffin are as candid a description of the institution of slavery as can be
found: “The 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

152. Bridgewater, supra note 10, at 19.
153. MORRIS, supra note 58, at 305 (noting that every state 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).
154. 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 State v. Charles (a slave), 1 Fla. 298 (1847); George v. State,
37 Miss. 316 (1859); Commonwealth v. Jerry Mann, 4 Va. 210 (1820); Jennifer Wriggins, 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 and that indictments were sometimes dismissed for failure to allege that
the victim was white).
155. Finkelman, supra note 142, at 104.
156. See State v. Mann, 13 N.C. 263, 267-68 (1829) (“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 no appeal from his master . . . .”).
157. Id. at 268.
of the slave perfect.” Such absolute agency included absolute sexual power over female slaves and their bodies.

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. So valuable was this market that prominent businessmen proudly proclaimed their personal “attention” to their female slaves. Such “attention,” however, was a most generous reference to sexual molestation and rape, no matter the “nobility” of the abusers. The articulations of Dew attest to the emphasis that slave owners placed on—if not the pride they felt 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.”

The absence of criminal law protection for slave women should be analyzed from two vantage points. First, doctrinally, the person of a female slave could suffer no cognizable harm from sexual abuse because she was not a legally recognized human being. Moreover, while a slave-owner could agitate for criminal prosecution of a third party for raping his slave, 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. In accordance with this vision of black women as (re)productive property unworthy of the protection accorded to white women, the physical injury to the slave woman was handled by civil law as trespass or as damage to property. Second, because it behooved a master to “attend” to his slave women, he could exercise complete control and authority over that which was his own. As a

158. Id. at 266.
159. GOODELL, supra note 30, at 55; Sutch, supra note 83, at 178-90.
160. Recall the words of prominent slave-owner Thomas Dew, stating that the imperative 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 86, at 51 (citations omitted).
161. 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.”).
162. GOODELL, supra note 30, at 84 (quoting Dew).
163. Id. at 83 (discussing the nature of “chattels personal,” which allows the master to manifest his full intentions, “constructions and purposes whatsoever” regarding his slaves without limitation).
164. See Bridgewater, supra note 10, at 19.
165. SHAW, supra note 99, at 158.
166. 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, reminding 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.
result, rape of a female slave by her owner would have been considered a legal impossibility. Clearly, the racially sexualized property interest in female slaves made sexual assault a financially lucrative practice for slave owners, who were 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.167

Medical historians have posited 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.168 According to this cold logic, “The 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.”169 Be that as it may, the slave woman’s body and agency remained captured for ends determined without her well-being in mind—she was but the site at which scientific advancement took place.

Any benefits for slaves in this process were offset by the dehumanization they suffered as objects lacking autonomy over their own bodies.170 Legally designated as their masters’ property, slaves were completely vulnerable to their masters’ decisions about the use of their bodies.171 According to this legal determination, Dr. Sims either owned his patients or was given complete authority over them by their owners, and thus he had carte blanche to do as he pleased with them to further medical science and his own career.172 Thus the slave women “treated” by Dr. Sims were not really patients at all. Rather, they were dehumanized subjects/objects lacking agency, both in Dr. Sims’s eyes and at law. Patients generally have the legal ability, which is medically respected,

JACOBS, supra note 113, at 27.
168. See BYRD & CLAYTON, supra note 107, 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.”); RICHARD HARRISON SHRYOCK, MEDICINE IN AMERICA: HISTORICAL ESSAYS 64 (1966).
169. SHRYOCK, supra note 168, at 64.
170. See Roberts, supra note 9, at 1969. In reviewing the criminalization of reproductivity, Roberts states that such criminalization is made possible by degrading humans into “objects which can be manipulated for the dominant society’s good.” Id.
171. See SHRYOCK, supra note 168, at 166-67.
172. MCGREGOR, supra note 16, at 61.
to control and participate in the terms of their medical care, and as such may forgo experimental procedures at their discretion.\textsuperscript{173} 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 who would have been patients in the true sense—persons who could assert their autonomy and agency by virtue of their “ownership” of their own bodies.\textsuperscript{174} 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, the Hospital being the legitimate field for experimental observation.”\textsuperscript{175} Accordingly, gynecological experimentation outside of the racialized space would have been outrageous and undoubtedly would have been met with criticism.\textsuperscript{176}

Because slave owners derived economic benefits from slave women’s status as sui generis property, the value of slave women was often contingent upon their (re)productivity and sexualization.\textsuperscript{177} Indeed, when we (re)view Dr. Sims’s reproductive experiments in this light, we find that slave owners were unyielding in their economic interest in female slave (re)productivity.\textsuperscript{178} As such, reproductively-challenged female slaves were subjected to medical techniques as a last ditch effort to recoup their master’s investment.\textsuperscript{179} Accordingly, the gynecological experimentation of Dr. Sims becomes particularly salient when viewed in light of the legal and economic norms underpinning slavery.

Slave owners ensured frequent childbirth through encouragement, coercion, and rape.\textsuperscript{180} As a result of the premium placed on reproduction, gynecological disorders were common among slave women.\textsuperscript{181} For example, the smell of urine and feces, common indicia of vaginal tears, also known as vesico-vaginal fistulas, undermined the value of slave women whose (re)productivity was greatly compromised by this condition.\textsuperscript{182} In order to

\begin{itemize}
  \item \textsuperscript{173} See id. at 60-61.
  \item \textsuperscript{174} Id. at 61. Indeed, at this time many doctors dared not visually examine a white female patient internally—such crude observation was shunned and palpation, or touch, was the preferred method of internal examination. A Dr. J. Marion Sims Dossier, http://www.english.uiuc.edu/maps/poets/m_r/moss/sims.htm (last visited Feb. 6, 2007).
  \item \textsuperscript{175} MCGREGOR, supra note 16, at 2 (quoting J. Marion Sims, On Vaginismus, BULL. N.Y. ACAD. MED., April 1862, at 429).
  \item \textsuperscript{176} Id. at 61.
  \item \textsuperscript{177} For a discussion on the relationship between a slave woman’s ability to have children and her value, see GOODELL, supra note 30, at 84-88; Katyal, supra note 96, at 794.
  \item \textsuperscript{178} BYRD & CLAYTON, supra note 107, at 289 (discussing how commercial matters sealed the importance of slave women as breeders, thus impacting antebellum slavery’s health agenda).
  \item \textsuperscript{179} See KAPSALIS, supra note 17, at 39-40.
  \item \textsuperscript{180} See BYRD & CLAYTON, supra note 107, at 282.
  \item \textsuperscript{181} Id. at 228-29 (describing 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 live, work, and reproduce).
  \item \textsuperscript{182} KAPSALIS, supra note 17, at 35-36; see BYRD & CLAYTON, supra note 107, at 273 (describing vesico-vaginal fistulas as “an abnormal opening between the urinary bladder and the vagina, then most
yet, in an ironic twist, 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. And rather than ceasing their sexual interference with female slaves, masters continued their sexual violations by using medical techniques meant to increase slave (re)productivity.

Dr. Sims capitalized on slave-owners' willingness to interfere with their female slaves' (re)productivity and, through his experiments on these women, is credited with having accomplished the first successful repair of a vesico-vaginal fistula in 1849. In addition, Dr. Sims is remembered for developing his double-ended speculum in 1866, and for introducing the Sims's position for gynecological examination. Dr. Sims has since been embraced as the "father of American gynecology," the "father of modern gynecology," and the "architect of the vagina"—and is remembered as the savior of these slave women. However, Dr. Sims viewed slave women as a means to an end. He perfected his techniques on enslaved subjects in order to treat fully human, upper-class white women who were capable of paying for his services. Dr. Sims's account of his effort is revealing in this regard:

"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 only of relieving the loveliest of all God's creatures of one of the most loathsome maladies that can possibly befall poor human nature; and in this, I honestly confess that I was stimulated by feelings of national pride, as well as by a desire to advance our glorious profession. 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.  

This passage elucidates 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 creatures,” it is doubtful that Dr. Sims was referring to the slave women upon whom he experimented—he most certainly had tried to avoid this class of sufferers for his professional career until he found them useful as medical subjects/objects that would advance his career and enhance his professional stature. Curiously, Dr. Sims indicated that by ransacking the country he was able to have at his disposal seven or eight additional cases of women with vesico-vaginal fistulas, “all of them healthy young negro women.” Even as he experimented upon his female slaves, Dr. Sims, in all likelihood, was not thinking of their ultimate well-being. 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. Indeed, Dr. Sims seems a shrewd medical pioneer who knew the
ultimate value of his treatments for white patients. By his own account he became “the second wealthiest of all American physicians.”

Affluent white women represented the class of sufferers on whom Dr. Sims had avoided developing his experimental techniques. Nonetheless, Dr. Sims was a man of his time whose medical exploits in his makeshift hospital were supported by the normative force of the law. Dr. Irwin H. Kaiser remarked that Sims charged “stupendous fees” in private practice for the application of the techniques developed through his medical experiments.

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. It is questionable, however, whether the cure provided by Dr. Sims—repeated unanesthetized vaginal surgeries—was worse than living with the ailment, the consequences of which were the leaking of urine and feces and the accompanying unappealing odor.

"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, ranging from bleeding to deliquium animi (bleeding to the point of fainting), intoxicating the patient, choking off blood-flow to the area, icing, hypnosis, herbal remedies, and opium. Id. at 23-26. Not only did Dr. Sims have access to opium, for he administered it to his patients post-operatively to keep them still, but he was also aware by the early 1840s of the anesthetic properties of ether, supporting another Southern doctor, Dr. Long, in his claim that he had been the first to administer “sulfuric ether during minor operations as early as 1842.” Id. at 192-95. Interestingly, from the perspective of “slave medicine,” in July 1842, Dr. Long is said to have administered ether to a black boy in order to amputate a toe. Id. at 193. Ether was not unknown to Southern doctors in their “treatment” of slaves. For a general history of anesthesia, see Robert Hirst, From Out of the Primordial Soup: A Brief History of Anesthesia, 10 INTERNET J. ANESTHESIOLOGY (2005), http://www.ispub.com/ostia/index.php?xmlFilePath=journals/ija/vol10n1/history.xml (last visited Feb. 6, 2007).

198. See KAPSALIS, supra note 17, at 49.
199. Dr. Sims and his family were slave owners. Indeed, he is known to have purchased at least one slave "expressly for the purpose of medical experimentation when her master resisted Sims’s solicitations." KAPSALIS, supra note 17, at 35; see RICHARD HARRISON SHRYOCK, THE DEVELOPMENT OF MODERN MEDICINE: AN INTERPRETATION OF THE SOCIAL AND SCIENTIFIC FACTORS INVOLVED 177 (1974) (“[I]t is interesting to find [Dr. Sims] remarking that in one case he had purchased his patient in order to operate upon her.”).

200. KAPSALIS, supra note 17, at 187.
201. See DAVID H. NICHOLS & CLYDE L. RANDALL, VAGINAL SURGERY 433 (4th ed. 1996) (discussing the side effects of vesico-vaginal fistulas including uncontrollable urine leakage and continuous odor); Valerie J. Riley & John Spurlock, Vesicovaginal Fistula, EMEDICINE, June 25, 2006, http://www.emedicine.com/med/topic3321.htm (“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.”).
First, there is some controversy surrounding whether the condition of his slaves was as grave as Dr. Sims reported. Second, if these slave women were actually cured, they were presumably placed back into the sexually and (re)productively vulnerable positions they inhabited as racially sexualized property. Thus, for female slaves, having a gynecological impairment might have been an ironically liberating and, therefore, welcome development. While fistulas were undoubtedly embarrassing, distressing, and uncomfortable, when balanced against the realities of sexual violations and (re)productive subjugation, the alternatives presented by this reproductive ailment are obvious—to be sexually and reproductively autonomous but ill, or to be healthy and subject to sexual and (re)productive violation. It is worth contemplating whether damage to female slave reproductivity might have alleviated some of the conditions of sexual terrorism under which female slaves existed, thereby allowing for the recapture of some limited agency.

A. Dr. Sims’s Experiments on Slave Women

In 1845, Dr. Sims began gynecological experiments on Anarcha, Betsey, and Lucy, who suffered from vesico-vaginal fistulas. Until 1849, Dr. Sims performed countless gynecological operations on these enslaved women in his makeshift backyard hospital, which he even enlarged for the tasks at hand. According to his autobiography, Sims performed thirty 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 he encountered resistance to his solicitations, Dr. Sims purchased slaves for his experimental pursuits. For Dr. Sims and for the masters whom he convinced

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203. See KAPSALIS, supra note 17, at 43 (noting that while Dr. Sims referred to this condition as grave, others have stated that the predominant side effect was discomfort and irritation resulting from incontinence); NICHOLS & RANDALL, supra note 201, at 46.
204. See KAPSALIS, supra note 17, at 39-40, 50.
205. Id. at 43.
206. According to Kapsalis:

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.”

Ibid. at 35-36 (citations omitted).
207. TIZZANO & PARAISO, supra note 186.
208. BYRD & CLAYTON, supra note 107, at 271-74; KAPSALIS, supra note 17, at 40.
209. SIMS, supra note 15, at 244-45.
210. McGREGOR, supra note 16, at 50; BYRD & CLAYTON, supra note 107, at 273.
211. SIMS, supra note 15, at 236 (“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.”).
212. KAPSALIS, supra note 17, at 35.
to turn over their slaves, these women could not properly perform their slave duties due to their gynecological condition.\textsuperscript{213} Thus, 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.\textsuperscript{214} It is noteworthy that the slaves’ consent, or lack thereof, was irrelevant—consent to such reproductive experimentation was purely for the master, usually a male owner, to give. Such was the case with Anarcha.

Anarcha was one of seventy-five slaves on the Westcott plantation outside of Montgomery, Alabama.\textsuperscript{215} She had been in labor for three days without delivering when Dr. Sims was summoned.\textsuperscript{216} Despite having minimal experience using forceps, and in an effort to expedite delivery, Dr. Sims applied forceps to the impacted head of the baby.\textsuperscript{217} Although the baby was delivered, its condition, or even whether it survived, is unknown. Anarcha sustained vesico-vaginal fistulas resulting in incontinence.\textsuperscript{218} Anarcha’s value and ability to work were diminished, and Dr. Sims took possession of her.\textsuperscript{219} Dr. Sims told Anarcha’s master, “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{220}

Dr. Sims’s main concern appears to have been Anarcha’s ability to perform the work expected of slave women.\textsuperscript{221} However, it has been noted that while vesico-vaginal fistulas made women smell from the leakage of feces and urine, fistulas did not diminish their strength or capacity for physical labor.\textsuperscript{222} Thus, one must query exactly what type of work Anarcha was incapable of performing. Dr. Sims’s comments can be interpreted as referencing the fact that slave women were sexually exploitable property.\textsuperscript{223} The bodies of slave women were, thus, available for purchase and sale, inspection and experimentation, no matter if the experimentation was sexual or reproductive.\textsuperscript{224}

\textsuperscript{213} SIMS, supra note 15, at 226-30 (describing vesico-vaginal fistulas as “absolutely incurable,” “hopelessly incurable,” and “an affliction that unfits [the slave woman] for the duties required of a servant”).

\textsuperscript{214} Id. at 236 (“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.”).

\textsuperscript{215} MCGREGOR, supra note 16, at 45.

\textsuperscript{216} Id.

\textsuperscript{217} Id.

\textsuperscript{218} Id.

\textsuperscript{219} SIMS, supra note 15, at 236.

\textsuperscript{220} Id. at 227.

\textsuperscript{221} KAPSALIS, supra note 17, at 35.

\textsuperscript{222} See AGNEW, supra note 202, at 57; KAPSALIS, supra note 17, at 35.

\textsuperscript{223} KAPSALIS, supra note 17, at 35.

\textsuperscript{224} SHRYOCK, supra note 199, at 177. Sexual or reproductive access to white women was certainly off limits for black men at the time, and any overtures to use the bodies of white women for medical experimentation further highlight the way in which the constructions of race and class granted intimate access to slave women. See BYRD & CLAYTON, supra note 107, at 274 (discussing
In conceptualizing the “duties” of slave women, Dr. Sims’s reference reveals the expectation that they would labor not only physically—whether in the field or plantation house—but also sexually, by fulfilling their reproductive duties to their masters and others, for the benefit of the slavocracy. As infertility was thought to result from all manner of “female diseases” and “gynecological disorders,” it behooved the master to be invested in its cure and Dr. Sims to attempt repair of the fistulas. By limiting sexual accessibility and diminishing the reproductive capacity of slave women, “loathsome” and “disgusting” vesico-vaginal fistulas negatively impacted their ability to “breed” future generations of slaves.

Clearly, “[i]llness affecting slave women’s reproductive [and sexual] labor was not taken lightly because it seriously threatened a master’s earnings.” Slave women “purchased for breeding” who could not reproduce had significantly diminished value. As a result, it benefited a shrewd master to maintain their (re)productivity. Dr. Sims requested such subjects/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 surgically experimented on as many as eleven slave patients at one time. His makeshift hospital contained approximately sixteen beds, and he created over seventy-one surgical implements for use in his experiments. Together with other patients, these slave women came to be known as “inmates” in the Sims hospital, until he closed it in 1849.

To the shrewd slave master, Dr. Sims’s offers of free medical treatment must have appeared to be sound business deals, offers to be accepted in light of the fact that their slave capital would be maintained and possibly returned to its experimentation on poor and Irish women as well as black women. But see generally RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA, supra note 119, at 445-550 (analyzing the manner in which the Irish, Italians, and Jews went from being racialized as non-white to being considered white).

225. KAPSAHIS, supra note 17, at 35.

226. BYRD & CLAYTON, supra note 107, at 229 (noting that gynecological conditions may have been a reason for the high rates of miscarriages and stillbirths amongst slaves and that infertility was often the reason why slave women were sold or punished).

227. KAPSAHIS, supra note 17, at 36.

228. Id.; see GROSS, supra note 51, at 129; Bridgewater, supra note 10, at 23 (“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.”). Katyal, supra note 96, at 794.


230. Betsey and Lucy were also young slave women who contracted fistulas while giving birth.

231. Id. at 48.

232. Id.

233. Id. at 3.
full (re)productive value by his experiments.\textsuperscript{234} The institution of slavery thus afforded Dr. Sims an ideal scenario in which to experiment and make a name for himself.\textsuperscript{235} By contrast, Dr. Sims’s European contemporaries did not have a population of dehumanized patients on which to practice their surgical techniques and, instead, practiced on animals or cadavers.\textsuperscript{236} For instance, Dr. J.Y. Simpson, a renowned obstetrician from Edinburgh, relied on the vivisection of animals to improve his surgical gynecological techniques.\textsuperscript{237} Dr. Simpson criticized Dr. Sims for his use of slaves as subjects of medical experimentation, and for his failure to provide them with anesthesia.\textsuperscript{238}

In America, unlike in Europe, the race, gender, and property status of female slaves ensured their status as medical subjects and experimental objects. Because American slave women lacked agency, Dr. Sims could intrude upon their most intimate areas—areas which would be controversial and inaccessible if the patient had dominion over her own body. Dr. Sims had the authority to explore these intimate areas not at the behest of his subjects/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 independent of their owners’ desires for their bodies.\textsuperscript{239}

Such sexual and (re)productive exploitation had ramifications for the health of slave women.\textsuperscript{240} The effects of frequent and arduous repeat pregnancies inevitably took their toll on the physical and mental health of slave women.\textsuperscript{241} For them, pregnancy was not a time for bed-rest—generally, there were no work or dietary accommodations for pregnant slave women, and any benefits came only in the last trimester.\textsuperscript{242} Under these conditions it should not come as a surprise that Dr. Sims had ample slave women upon whom to hone his medical and surgical techniques.

Significant developments in gynecology, such as the speculum and the use of silver sutures, were thus not only the product of nineteenth century medical advancements; they were also the product of captured agency, which was defined by the exploitative intersecting constructions of race and gender. These developments, which allowed America to surpass the rest of the world in reproductive technology, were “discovered” through the exploration of and

\textsuperscript{234} KAPSALIS, supra note 17, at 40.
\textsuperscript{235} Id. at 42.
\textsuperscript{236} See McGREGOR, supra note 16, at 67.
\textsuperscript{237} Id.
\textsuperscript{238} Id. at 68.
\textsuperscript{239} Id. at 54.
\textsuperscript{240} For a discussion regarding the risks associated with frequent pregnancies, see BYRD & CLAYTON, supra note 107, at 229, 283.
\textsuperscript{241} McGREGOR, supra note 16, at 40; see BYRD & CLAYTON, supra note 107, at 229, 283 (discussing the threats to slave women’s reproductive health, including strenuous work, poor diet, little medical attention, and inadequate rest).
\textsuperscript{242} BYRD & CLAYTON, supra note 107, at 229 (“[F]emale diseases and gynecological disorders worked special hardships on slave populations.”); McGREGOR, supra note 16, at 40.
experimentation upon slave women like Anarcha, Betsey, and Lucy. It is
doubtful that modern gynecological expertise would be what it is today without
slavery. The site of these unprecedented medical discoveries was the physical
embodiment of racially sexualized property interests—the place where race,
property, class, gender, and sex were embodied in the female slave.

B. Pain and the Absence of Anesthesia

Other than physicians’ own decisions about their practice, no legal norms
existed to prevent research trials from 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 them. The
complicity of the law is revealed by the words of Judge Ruffin in State v. Mann:
"[W]hile 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 . . . ." By strictly
construing slaves as property, the law negated the 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. It is hard
to imagine the pain Sims’s inmates must have endured during these
unanesthetized vaginal surgeries over the course of many years. To make
matters worse, after operating on Lucy for the first time, Dr. Sims failed to
remove a sponge used during the procedure, and she nearly died from the
resulting infection. Not to be accused of cruelty, Dr. Sims recognized the
pain inflicted upon his slave subjects, and administered opium post-
operatively. While Dr. Sims never administered anesthesia to his female

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243. KAPSALIS, supra note 17, at 38.
244. Id.
245. See GOODELL, supra note 30, at 63-76; KAPSALIS, supra note 17, 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’s (re)productivity).
246. 13 N.C. 263 (1829).
247. Id. at 268.
248. See BYRD & CLAYTON, supra note 107, at 273.
249. KAPSALIS, supra note 17, at 40; MCGREGOR, supra note 16, at 3.
250. KAPSALIS, supra note 17, at 40.
251. See BYRD & CLAYTON, supra note 107, at 273-74; MCGREGOR, supra note 16, at 51.

Examining Sims’s use of opium on slave women, McGregor argues:
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
slave subjects before his experiments, he provided opium after the fact to keep them still, thereby aiding in the post-operative healing process. However, habitual opium use results in constipation. To alleviate the constipation, Dr. Sims ordered that the female slaves be provided minimal food and water for two weeks after their surgeries. Therefore, not only were these slave women held captive, denied anesthesia, and experimented upon, but they were also drugged, minimally fed, and inevitably became addicted to opium. 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 believed to have delicate constitutions. Further, reproductive and sexual interference with slaves was consistent with the notion that slaves "copulated freely" and were overly sexual, even bestial, having intercourse with chimpanzees and orangutans. Dr. Sims questionably claimed that his subjects "begged him to proceed with surgery after a lapse of six weeks occurred between surgeries."

By allowing his patients to suffer extreme pain and endure drug addiction, as he could not have done 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. This premium, which superseded any concern for the well-being of black women, 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.

Id. Similarly, Byrd and Clayton emphasize the beneficial effects resulting from Sims's administration of opium, which raised a host of race and gender implications:

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.

BYRD & CLAYTON, supra note 107, at 273-74.

252. See id.


255. See BYRD & CLAYTON, supra note 107, at 273-74.

256. MCGREGOR, supra note 16, at 50-51; see WHITE, supra note 53, at 30.

257. SIMS, supra note 192, at 52; see 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."); (citations omitted).

258. See KAPSALIS, supra note 17, at 34-45; BYRD & CLAYTON, supra note 107.
ensured that female slaves continued to (re)produce slave capital.\textsuperscript{259} The benefits that flowed from this disregard of black women’s well-being and humanity were reserved for white women.\textsuperscript{260} Although Sims portrayed his slave subjects as animalistic and hyper-sexual, their anatomical “sameness” to white women allowed for ready transfer of his medical and surgical techniques for the benefit of white patients.\textsuperscript{261}

In light of these particulars and the fact that everything Dr. Sims did to the slave women in his care was legal, his meteoric rise from plantation doctor in Alabama to president of the American Medical Association and physician to European royalty was made possible only by the legal entrenchment of slavery.\textsuperscript{262} In this way, slavery helped define the proper object of medical experimentation as the “other”—whether such an outsider is marginalized based upon race, gender, and/or class marginalization.\textsuperscript{263} Disparate strategies for birth control, sterilization, welfare reform, and ongoing reproductive experimentation flow from this legacy to situate black womanhood as a site of sexual and (re)productive interference in American society.

IV. CONTINUING ISSUES IN RACE AND (RE)PRODUCTIVITY

Still, the 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.\textsuperscript{264}

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. Roberts’s assertion that “[t]he essence of black women’s experience during slavery was the brutal denial of autonomy over reproduction” is probably quite accurate.\textsuperscript{265} In an ironic historical twist,

\textsuperscript{259} See WHITE, supra note 53, at 31-35.
\textsuperscript{260} KAPSALIS, supra note 17, at 42-45 (“The slave’s 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.”).
\textsuperscript{261} Id.
\textsuperscript{262} KAPSALIS, supra note 17, at 31, 46 (“Sims’s fame and wealth are as indebted to slavery and racism as they are to innovation, insight, and persistence . . . .”).
\textsuperscript{264} Davis, supra note 119, at 886.
\textsuperscript{265} Roberts, supra note 9, at 1970.
contemporary medical technologies that limit (re)productivity are now targeted at poor women of color, while "reproductive technologies that extend or promote fertility (e.g., in vitro fertilization) are largely aimed at wealthy, white women."\(^{266}\) While historical legal norms legitimated Dr. Sims's medical experimentation on slave women, the force of these precedents—to control and exploit the (re)productivity of the "other"—has modern resonance.\(^{267}\) For marginalized women, their social construction continues to dictate the level and type of reproductive interference they encounter.

A. Birth Control Pill and Sterilization

Long before the invention of Norplant,\(^{268}\) questionable techniques for the reduction of (re)productivity were directed at women of color due to their socially constructed inability to fight 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.\(^{270}\) Indeed, 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 to decrease welfare costs.\(^{272}\) In 1939, the Birth Control Federation of America orchestrated a "Negro Project" 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.

\(^{266}\) See KAPSALIS, supra note 17, at 49.
\(^{267}\) Id. at 32, 49.
\(^{268}\) See Darci Elaine Burrell, The Norplant Solution: Norplant and the Control of African-American Motherhood, 5 UCLA WOMEN'S L.J. 401, 402 (1995) ("Norplant consists of several match-sized silicon tubes which release a steady stream of the synthetic hormone levonorgestrel [sic] [and]... are surgically inserted under the skin of a woman's arm and prevent conception for up to five years.").
\(^{269}\) According to Ehrenreich:

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.


\(^{270}\) Randall, supra note 21, 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.
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 of blacks 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 argued that the birth control pill should be strategically directed towards those societal members whose reproduction was problematic. She stated, "More children from the fit, less from the unfit—that is the chief issue of birth control."275 Sanger's conception of birth control as an 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 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 subsidized clinics in a given area was proportional to the number of blacks and Latina/os 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 fortified by those doctors who refused to deliver babies for, or refused to perform abortions on, pregnant black women, unless they agreed to sterilization.279

Considering the recent history of interference with black and Latina women's (re)productivity, it should not be surprising that approximately 97% of obstetricians favor the sterilizing of unmarried welfare mothers.280 Of course, women of color in America were historically subjected to forced sterilization in significant numbers; with black, Latina, and Native American women, physicians even justified removing their reproductive organs without consent.281 The rationale for the overuse of hysterectomies on women of color

273. GORDON, supra note 271, at 332 (citations omitted); see Roberts, supra note 9, at 1970-71.
274. GORDON, supra note 271, at 281-83, 332-33.
275. Id. at 281.
277. Id.
278. Id. at 10-14.
279. Randall, supra note 21, 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).
281. Ehrenreich, supra note 27, at 515; see THE BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, OUR BODIES, OURSELVES FOR THE NEW CENTURY 331 (1998) (noting that women living in poverty; who are black, Latina, 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); Nikoukari, supra note 276, at 13-15 ("Some of the most grizzly [sic] 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
was that these women were too promiscuous, too poor, or too ignorant to use birth control and that their (re)productivity would threaten the public purse.282 The longevity of strategic, yet stereotypical, depictions of black womanhood is disconcerting. During slavery, such stereotypes facilitated sexual and (re)productive abuse.283 We have learned little from our past, as contemporary American society continues to use these same stereotypes, now with the goal of controlling what is deemed rampant out-of-control reproduction. The black reproductivity, which was valued and commodified in antebellum America, is now loathed and repressed, but attempts to capture agency remain.

The 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 an “insured, white, educated, mentally and physically able, thin . . . heterosexual.”284 However, when seeking a research subject/object for reproduction-diminishing technologies, the converse appears to be the case.285 Specifically, when legal and medical establishments push the limits of contemporary reproductive autonomy, they use those who are marginalized.286 The ideal “patients” overwhelmingly become poor women and women of color.287 Doctors condition delivering babies and performing abortions on black women on consent to sterilization;288 welfare payments are threatened unless poor women submit to sterilization;289 cesarian sections are disparately ordered on black women;290 and limitations on (re)productivity are required as a condition of probation.291 Indeed, judges are more likely to criminalize reproduction when the accused women have the intersecting regulations. Thus, it’s not surprising that in such medically destitute areas as the Navajo Reservation there were even less safeguards against coerced sterilization.”); Rutherford, supra note 269, at 273-76.

282. Ehrenreich, supra note 27, at 492, 515-16; 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 sterilized under federally-funded programs where receipt of benefits was conditioned upon “agreeing” to the procedure).

283. WHITE, supra note 53, at 28-29.
284. KAPSA LIS, supra note 17, at 6.
285. Id.
286. Id. Bernier cites Howard University research documenting the experimental use of a procedure in 1972 to induce abortions in poor black women, even though there was a general medical consensus that it should not be used due to the uncontrollable bleeding and eventual shock it often induced. Bernier, supra note 21, at 122.
287. KAPSA LIS, supra note 17, at 6.
288. Roberts, supra note 9, at 1971; see Ehrenreich, supra note 27, at 516 (“In 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.”).
289. Roberts, supra note 9, at 1971.
290. See Ehrenreich, supra note 27, at 501 (“[T]he vast majority of court-ordered C-sections have involved poor women of color.”).
291. Roberts, supra note 9, at 1967 (discussing 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 agree to Norplant treatment for three years); see Ideas and Trends: Punishing Pregnant Addicts: Debate, Dismay, No Solution, N.Y. TIMES, Sept. 10, 1989, at E5.
identities of low socio-economic status and minority race. Today, reproductive abuse continues by individual physicians who indulge 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, by coercively forcing sterilization or the use of long-term birth control. Not only are private physicians interfering with the (re)productivity of marginalized women, but in the public sphere the government captures 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. These reproductive punishments are part of the history of 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. The Hillsborough County Hospital denied these women not only the opportunity to acquiesce to medical testing, but also the option to consent based upon the provision of complete information. Their right to make autonomous decisions was ignored and their agency captured. Unfortunately, this non-consensual intrusion into the intimate sphere is consistent with the history of (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:

My policy was with people who were unable to financially support themselves, whether they be on Medicaid or just unable to pay their

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292. See Michelle Oberman, *The Control of Pregnancy and the Criminalization of Femaleness*, 7 BERKELEY WOMEN'S L.J. 1, 1-6 & n.23 (1992); Roberts, supra note 9, at 1968 & nn.111-12 (1993) (citing STEPHEN TROMBLEY, THE RIGHT TO REPRODUCE (1988) (documenting that in every case in the 1960s where probation was conditioned on diminishing reproductivity, the defendants were black or Latina).

293. Roberts, supra note 9, at 1971; see Ehrenreich, supra note 27, at 500.

294. Ehrenreich, supra note 27, at 492; Roberts, supra note 9, at 1971 & n.128 (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, 361-63 & n.46 (1990) (describing the intersection of race and class in the disparate rates of tubal ligation performed on black women at a Boston clinic where, following the birth of their first child, 45% of the patients apparently “agreed” to be sterilized).


own bills, if they were having a third child, to request they voluntarily submit to sterilization following the delivery of the third child. If they did not wish this as a condition of my care, then I requested that they seek another physician other than myself.299

In reversing a jury verdict against Dr. Pierce and the five dollar judgment entered against him, the Fourth Circuit upheld his right to practice medicine in accordance with his personal economic philosophy.300 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 classist economic philosophy was ultimately held to be legal,301 the decision is entirely consistent with the legal system’s historical interference with the (re)productivity of marginalized women. As this Article has demonstrated, such a legal perspective is coherent when interpreted in the context of the legacy of (re)productive abuses confronting women of color, which has been at best legally condoned and at worst legally normalized through explicit doctrinal support. It is but another example of the manner in which disadvantaged women’s reproductive agency is manipulated based upon externally established priorities.

B. Norplant

Dr. Sims conducted his experiments in furtherance of the slavocracy’s interests in maximizing the (re)productivity of slave women.302 Conversely, the development of Norplant coincides with initiatives geared toward minimizing the (re)productivity of marginalized women.303 Women’s reproductivity is continually subjected to external pressures for reasons unconnected to women’s agency over, and interest in, their own 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 motivated by economic concerns.304 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 benefits the ruling class. It is furthermore based upon “the same premise underlying the eugenic sterilization laws—that certain groups in our society do

299. Id. at 611.
300. Id. at 613.
301. Id.
302. KAPSALIS, supra note 17, at 50.
303. Id.; see Nikoukari, supra note 276, 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.
304. Rutherford, supra note 269, at 262; see Nikoukari, supra note 276, at 19-20.
It no longer benefits the powerful that more blacks be born, as blacks are no longer valued as property. Now that women of color are able to exercise greater, albeit at times limited, agency over their own (re)productivity, their (re)productivity is consequently devalued. Yet attempts continue to recapture the agency of women of color that was lost by the ruling class at Emancipation and during the women's rights movement. States have offered Norplant bonuses, whereby the state government pays for the implantation of the Norplant capsules and also provides a cash bonus. As it is now more difficult, at least without payment as consideration, to appropriate the (re)productivity of marginalized women, the devaluation of black offspring has led to the corollary devaluation of black reproduction. Kapsalis has insightfully summarized this contemporary echo of the precedent 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 others', 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 motivate their agreement to limit their (re)productivity. Indeed, "[a]lmost immediately after Norplant became available in the United States in December 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, low-income teenagers, or drug abusers." These women's agency is compromised by external forces seeking to diminish their sexuality and (re)productivity. Preying upon the economic vulnerability of poor women greatly diminishes the likelihood of informed consent, as other reproductive

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305. Roberts, supra note 9, at 1969.

306. Rebekah J. Smith, Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences, 29 HARV. J.L. & GENDER 151, 169 (2006) (citing Melynda G. Broomfield, Controlling the Reproductive Rights of Impoverished Women: Is This the Way to "Reform" Welfare?, 16 B.C. THIRD WORLD L.J. 217, 234 (1996)) (noting that bonuses up to $500 have been paid for implantation of Norplant capsules and that several states provide Norplant bonuses to women on welfare, while Mississippi and South Carolina have considered mandatory Norplant implants for women on welfare).

307. The recent comments of conservative radio talk show host Bill Bennett indicate the contemporary devaluation of blacks: "[I]f you wanted to reduce crime, you could... abort every black baby in this country, and your crime rate would go down." Brian Faler, Bennett Under Fire for Remark on Crime and Black Abortions, WASH. POST, Sept. 30, 2005, at A5.

308. KAPSALIS, supra note 17, at 50.

309. See id. at 52-53.

options are likely not explored, offered, or available, and consent is manipulated through fiscal enticements or coercion.\textsuperscript{311}

While slave women received incentives for increased (re)productivity, women on welfare receive incentives for temporary or permanent sterilization.\textsuperscript{312} There are, of course, many who object to such contemporary interference with the (re)productivity of marginalized women. Indeed, women, physicians, and women's healthcare activists have voiced concerns over the safety and impact of Norplant on particular segments of women.\textsuperscript{313} Nevertheless, 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 of their constituents, and alleviate the dependency on welfare arguably found among the racialized poor.\textsuperscript{314}

By conditioning receipt or maintenance of public assistance upon the implantation of Norplant,\textsuperscript{315} 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."\textsuperscript{316} Indeed, using language reminiscent of the earlier eugenics movement,\textsuperscript{317} West Virginia Supreme Court Justice Richard Neely

\textsuperscript{311} Id. at 354-55
\textsuperscript{312} Andrews, supra note 27, at 909; see KAPSALIS, supra note 17, at 50.
\textsuperscript{313} According to Kapsalis:
The most common [side effect] 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, the most common Norplant side effect, 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.

KAPSALIS, supra note 17, at 54-55 (citations omitted); see Nikoukari, supra note 276, at 29 (discussing concerns over the safety of Norplant because black women are at greater risk of experiencing complications).

\textsuperscript{314} See Ehrenreich, supra note 27, at 515; KAPSALIS, supra note 17, at 49-50; Rutherford, supra note 269, at 262.
\textsuperscript{315} See Nikoukari, supra note 276, at 30-33; John A. 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); Rutherford, supra note 269, at 261-62.

\textsuperscript{316} Pamela D. Bridgewater, Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights, 3 J. GENDER RACE & JUST. 401, 416 (2000).
\textsuperscript{317} See Roberts, supra note 9, at 1961 ("During 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. . . . Eugenicists advocated compulsory sterilization to prevent reproduction by people likely to produce allegedly defective offspring."). For further support of compulsory sterilization, see Justice Holmes’s opinion in Buck v. Bell, 274 U.S. 200, 207-08 (1927) ("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 kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.").
advocated an incentivized Norplant regime directed at the “underclass.”

Given the history of racially sexualized interferences with the (re)productivity of slave women, Justice Neely’s vision should give us pause. The subtext is clear—there is a class of people beneath us who are to be treated as subjects/objects by virtue of race and socio-economic status. Echoing Justice Neely’s view, the Philadelphia Inquirer published an editorial entitled Poverty and Norplant: Can Contraception Reduce the Underclass? This editorial rendered the racialized motivations visible by stating that welfare recipients should be encouraged to use Norplant because, “[t]he main reason black children are living in poverty is that the people having the most children are the ones least capable of supporting them.”

This “underclass,” in the opinion of those who would interfere with its (re)productivity, is undeserving of sexual and reproductive agency, because its exercise of such autonomy negatively impacts the financial well-being 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 remain.

Consider Project Prevention, in which the identical concept of incentivizing women to diminish their (re)productivity is utilized, but in the private sector. Originally called CRACC (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. The group, funded by private donors and philanthropists, has chapters in 27 states and has paid “rewards” across the nation to over 800 women and roughly 20 men. Of the 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 blacks comprise approximately 13% of the total population, they represent

318. Andrews, supra note 27, at 909 (“I am speaking for the Heartland of America, where the underclass is growing by leaps and bounds.”) (quoting Justice Neely).

319. Seidelman writes: “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 sterilisation, incarceration, and eventual extermination.” Seidelman, supra note 23, at 1463.


321. Id.


323. See Mauldon, supra note 310, at 355.

324. Id.

35% of participants in Project Prevention.\(^3\) This program reveals that captured agency continues to surface in new and innovative ways, now largely through economically coercive means that prey upon the financially needy, the drug addicted, and the otherwise vulnerable.

Like female slaves, women confronted with procreative conditioning and incentives are forced into an economic exchange based on their (re)productivity.\(^2\) The techniques are the same. The reproductive agenda is set by forces outside marginalized women, without their consent or involvement, yet they are its focus. The government and the privileged identify mechanisms for the preservation or enhancement of their own wealth; at the same time, they exploit the vulnerabilities of the oppressed, and condition the satisfaction of their needs upon the 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.\(^3\) Thus, the lessons of history reveal an added reason for caution toward (re)productive interference.

**CONCLUSION**

The common thread among these reproductive inequities is that they all build upon the female subject’s social construction. In the words of Susan Sherwin:

> 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.\(^3\)

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 the consideration of the best interests of these patients, and instead fashioned extreme utilitarian “treatments” in order to further their societal objectives. 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.”\(^3\)

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326. Mauldon, *supra* note 310, at 355. Forty-eight percent of rewardees are white, ten percent Latino, and eight percent classified as other. *Id.*
328. *Id.*
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.331

Dr. Sims's surgical experiments "can be viewed as . . . early reproductive technologies aimed at helping to optimize the reproductive capacity of slave capital."332 Only a female slave could be a laborer and also a potential unit of production—produce, product, and producer. As basic economic units, female slaves stood entirely apart. An examination of the relevant jurisprudence reveals the complicity of the legal system in furthering racialized sexual property interests in female slaves.

Both in Dr. Sims's time and today, women's social construction dictates the valuation of their (re)productivity. New technologies are devised in order to foster or prevent reproduction.333 Racially sexualized property interests drive the contemporary demand for limiting the (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, contemporary property interests relating to poor women of color look to the cost of the welfare benefits ostensibly expended upon them.

This Article has sought to reveal historical connections. It is evident that the discourse of reproductive rights can protect 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, Dr. Sims’s success as the “father of gynecology” depended upon the underclass of slave women who were his subjects, women whose agency was captured and owned by their masters. So too contemporary (re)productive initiatives are aimed at “underclasses” who are essentially denied full agency and sexual or reproductive autonomy. However, today’s interest in capturing agency seems much more diffuse, and perhaps there is no longer only one class of people with a sense of entitlement and “ownership” over marginalized women’s (re)productivity. There now seem to be multiple stakeholders interfering with women’s reproductive agency. What is clear, however, is that “[w]ithout 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

331. KAPSALIS, supra note 17, at 6.
332. Id. at 32.
333. Id. at 50.
Commentators have argued that Dr. Sims's "fame and wealth are as indebted to slavery, [sexism,] and racism as they are to innovation, insight, and persistence." Attesting to the selectivity of our history, however, in eulogizing Dr. Sims, Dr. Baldwin remarked that "Gynaecology today would not deserve the name of a separate and cultivated science, but for the light which Sims's speculum and the principles involved in it have thrown upon it." What we must not forget is that it was Dr. Sims's four years of unanesthetized surgical experimentation on the reproductive organs of captive slave women, many unnamed and forgotten, that is the foundation of American gynecology.

The "father of modern gynecology," the "architect of the vagina," hailed from South Carolina and honed his skills in Alabama, both notorious slave states. Upon examining the intersection of race, gender, sex and slavery, it becomes apparent that to a large extent "[t]he perpetuation of the institution of slavery, as nineteenth-century Southerners knew it, rested on the slave woman's reproductive capacity." 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. 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.

335. KAPSA LIS, supra note 17, at 31.
336. Id. at 38 (citations omitted).
337. Id. at 31-32.
338. WHITE, supra note 53, at 79-80.
339. See KAPSA LIS, supra note 17, at 32, 49.