

Expropriating Reproduction, Generating Property –
Enslaved Childbearing, Property Law & Racial Capitalism in the American South

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Abstract

Connecting critical theoretical literatures on racial capitalism, reproduction and sexuality on the one hand, to scholarship on the history of American capitalism on the other, the paper develops the framework of racial capitalism to highlight the crucial significance of enslaved (sexual) reproduction to slavery's capitalism in the nineteenth-century American South. Focusing on rules of property as an evolving technology of law the paper demonstrates the centrality of Black women's sexual reproduction to the legal constitution of property in enslaved people, also analyzing case law on wills and succession to empirically show how, in the three decades before the Civil War, southern courts carved out enslaved Black reproduction ("increase") as an independent, increasingly valuable, form of property in itself, with a market value that was intertwined with, but distinct from, the property value of the enslaved woman. By so doing, the paper argues that southern courts effectively extended slaveowners' property rights to an enslaved woman to include her reproductivity, simultaneously making race by making property – marking Blackness *through* women's unfree, commodified, reproduction, as singularly market-bound and always non-familial. In this way southern state actors assembled and reinforced intersectional gendering and racializing logics of market, property ownership, and state authority that have been naturalized and accepted much beyond slavery and regional boundaries, and into our current time.

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Starting with W.E.B. Du Bois, a venerable corpus of scholars has situated slave economies in British North America and subsequently in the United States at the heart of the global history of capitalism, colonialism, and empire.¹ In the nineteenth century, upon the closure of the transatlantic slave trade in 1808 and thwarted only by the Civil War, slaveowners within the southern United States, aided by northern interests, expanded the international market for enslaved-produced agricultural products by: consolidating political power over state apparatuses, adopting new technologies such as steam engines, canals, telegraphs, and designing complex practices of accounting, mortgages and financial securities.² Slaveowners also developed violent disciplinary and regulatory technologies to maximize labor productivity of enslaved workers, producing cotton, sugar, and coffee at unprecedented levels and transporting these products to long-distance national and international markets.³ The southern slave plantation thus served as a crucial site of modernity prior to the Civil War, creating and advancing technologies of capitalism and channeling in unique ways key processes of nineteenth-century

¹ W.E.B. Du Bois, *The Suppression of the African Slave-Trade in the United States of America, 1638-1870* (New York: Longmans, Green, and Co. 1896), Stuart Hall, Eric Wolf, Robin Blackburn, *The Making of New World Slavery: From the Baroque to the Modern, 1492-1800* (New York: Verso, 1997), Cedric J. Robinson). Sven Beckert and Seth Rockman, "Introduction" in Sven Beckert and Seth Rockman (eds.) *Slavery's Capitalism: A New History of American Economic Development* (Philadelphia, PA: University of Pennsylvania Press, 2015), 12, 29-104. Dale W. Tomich, *Through the Prism of Slavery: Labor, Capital, and the World Economy* (Lanham, Md: Rowman and Littlefield, 2004);

² Edward E. Baptist *The Half Has Never Been Told: Slavery and the Making of American Capitalism* (New York, NY: Basic Books, 2016); Matthew Karp, *This Vast Southern Empire: Slaveholders at the Helm of American Foreign Policy* (Cambridge, MA: Harvard University Press, 2016); James Oakes, *Slavery and Freedom: An Interpretation of the Old South* (New York: Alfred A. Knopf, 1990); Seth Rockman, *Scraping By: Wage Labor, Slavery, and Survival in Early Baltimore* (Baltimore: The Johns Hopkins University Press, 2009), L. Diane Barnes, Brian Schoen, and Frank Towers, eds., *The Old South's Modern Worlds: Slavery, Region, and Nation in the Age of Progress* (New York: Oxford University Press, 2011).

³ Baptist, *The Half that was Never Told*.

capitalist development, such as industrialization, bureaucratization, nationalism and imperialism.⁴

Whereas the literature on slavery's capitalism emphasizes the emerging technologies that extracted market utility and labor productivity from the enslaved, other seminal works situate the foundational character of slavery's capitalism within its developing, increasingly racist, *social* order. In the words of Ira Berlin, "the social order (of slave societies) conceded nearly everything to the slaveowner and nothing to the slave."⁵

In the antebellum nineteenth century slavery in the South was upheld as a positive good (as opposed to a necessary evil, as before) precisely through an emerging social ideology of domestic paternalism. Whereas southern slaveowners had previously conceived of slavery as an economic institution grounded in material coercion, by the 1830s the defenders of slavery viewed enslaved production as part of the household, a domestic social institution.⁶ Through the

⁴ Beckert and Rockman, *Slavery's Capitalism*, 12; and, Dale Tomich, *Through the Prism of Slavery*.

⁵ Ira Berlin, *Many Thousands Gone: The First Two Centuries of Slavery in North America* (1998). Berlin famously distinguished between "societies with slaves" and "slave societies," following Karl Polanyi's distinction between societies with markets and market societies. He defined slave societies, as those where "slavery stood at the center of all economic production, and the master-slave relationship provided the model for all other social relations." (p.8); See also, Wilma Dunaway, *The African-American Family in Slavery and Emancipation*, 13. Dunaway points out that owners of all slaveholding farms, whether of large, middling, or small size, all shared an accumulated surplus wealth and/or relied on credit systems tied to a matrix of financial markets which allowed them to own enslaved laborers in excess of their household assets. An example of recent work that illustrates how credit was developed as a robust system available to even small farm slaveowners, see: Bonnie Martin, "Neighbor-to-Neighbor Capitalism: Local Credit Networks and the Mortgaging of Slaves" in Sven Beckert and Seth Rockman (eds.) *Slavery's Capitalism*, 107-121. Martin identifies what she terms, 'neighbor-to-neighbor' credit systems, that developed across the South and enabled more and more widespread slave ownership, generating a localized social credit system that was often more resilient than the more formal banking systems of lending, able to withstand even the financial panics of 1819, 1837, and 1855. Also see: John J. Clegg, "Credit Market Discipline and Capitalist Slavery in Antebellum South Carolina," *Social Science History* 42 (Summer 2018), 343-376. In political terms, Wilma Dunaway and others points out that because small slaveowners (indeed even large numbers of non-slaveowners) aspired to be planters, they formed a political cohesive bloc. Wilma Dunaway, *The African-American Family in Slavery and Emancipation* (New York: Cambridge University Press, 2003) 13.

⁶ Lacy Ford, *Deliver Us from Evil*. I have demonstrated elsewhere how antebellum southern courts, when adjudicating property rights to enslaved persons across a range of cases such as those involving gifts, estates, alimony, inheritance, legally cohered 'messy' white kinship relations into clearly 'seeable' and bounded 'familial'

1840s and '50s slaveowner paternalists, says historian Lacy Ford, "sought to render slavery more domestic by giving it a sense of order and discipline as well as a sense of kindness and ...affection."⁷ Across the enslaving South, the law too approached slavery as a social, domestic enterprise, regardless of size or scale of production; and slaveowners, from the largest planters to the smallest farmers, were viewed, first and foremost, as domestic patriarchs, whose legal relationship to enslaved workers (in law, "master-slave relations") was embedded within the legal category of "domestic relations" in southern statute books.⁸

Domesticity in the American South was deeply imbricated in slavery's coercive material capitalism. The foremost dominion of the white master-patriarch over all domestic relations (including that of the enslaved) became the very means by which some of the most brutal, dehumanizing, forms of enslaved coercion and disciplining occurred and were ideologically justified, naturalized and normalized. Alongside the tightening of racial boundaries and the heightened political exclusions of free Blacks nationwide at this time,⁹ the 'natural' authority of the (white) master-patriarch over the southern household (over wives, children, and slaves) and his right to profit from slavery as a (domestic) enterprise, justified widespread sexual abuse and exploitation of enslaved women, systematic threats and extensive practices of enslaved family separations, of enslaved kin-focused punishments, and of commercialization of enslaved

ones. [Gwendoline Alphonso, "Naturalizing Affection, Securing Property: Family, Slavery, and the Courts in Antebellum South Carolina, 1830-1860" *Studies in American Political Development* 35, no. 2 (2021): 194 -213.]

⁷ Ford, *Deliver Us from Evil*, 164, 163, 525.

⁸ Peter W. Bardaglio, *Reconstructing the Household: Families, Sex, and Law in the Nineteenth Century South* (Chapel Hill: University of North Carolina Press, 1995).

⁹ On the tightening of racial boundaries during the antebellum period see, for instance: Ira Berlin, *Slaves without Masters*, Ariela Gross, *What Blood Won't Tell*, Haller, *Outcasts from Evolution: Scientific Attitudes of Racial Inferiority, 1859-1900*. On the heightened exclusions of free Blacks, particularly Black free men, in the expanding ("White Man's") democratic Republic see: David Bateman, *Disenfranchising Democracy: Constructing the Electorate in the United States* (New York, NY: Cambridge University Press, 2019).

reproduction;¹⁰ practices that arguably impacted enslaved people where it mattered the most: in their intimate social and family lives.

By emphasizing enslavement as a coerced labor system and focusing solely on economic structures and material/financial technologies, the literature on American slavery's capitalism has overlooked such critical *social* dynamics, that accompanied and advanced slave economies in the South.¹¹ In so doing this literature maintains a de facto (spurious) line between public and private, separating economic/material institutions from social ones; a distinction that has been roundly deconstructed as empirically and theoretically specious by feminist legal scholars and political scientists.¹² In contrast, a growing body of scholarship situated in the fields of legal and

¹⁰ In earlier key works on enslaved families enslaved families were viewed as forming quasi-independent 'social worlds' where enslaved people had relatively more agency despite the harshness of the system of slavery (seminal, see: Herbert Gutman, *The Black Family in Slavery and Freedom, 1750-1925* (New York, NY: Vintage Books, 1976) and offshoots. Some works also suggested that in some parts of the United States, such as South Carolina Low Country, the material conditions of large plantations afforded enslaved families' greater stability during the antebellum period, many of whom were more able to form and retain nuclear family structures (Ann Patton Malone, *Sweet Chariot: Slave Family and Household Structure in Nineteenth-Century Louisiana* (Chapel Hill: University of North Carolina Press, 1996); for example). Other, newer, historical work has greatly tempered these arguably optimistic historical claims, highlighting the rarity of such conditions for enslaved kin (and their limited geographical scope), the magnitude of enslaved family separations nation-wide, and the vastness (and growing) legal dominion of the enslaver-master during the antebellum period [see, for instance: Wilma Dunaway, *The African-American Family in Slavery and Emancipation*, (Cambridge: Cambridge University Press, 2003); Tera W. Hunter, *Bound in Wedlock: Slave and Free Black Marriage in the Nineteenth Century* (Cambridge, Massachusetts : The Belknap Press of Harvard University Press, 2017), Stephanie Jones-Rogers, *They were Her Property: White Women as Slave Owners in the American South* (New Haven: Yale University Press, 2019) and Emily West, *Family or Freedom: People of Color in the Antebellum South* (Lexington, KY: University of Kentucky Press, 2012). My work follows this second, newer, turn in the historiography of enslaved family relations in the nineteenth century.

¹¹ Dunaway, *The African-American Family in Slavery and Emancipation*, as exception.

¹² Martha Fineman, *The Autonomy Myth: A Theory of Dependency* (New York, NY: New Press, 2004), and *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (New York, NY: Routledge, 1995).. For theoretical approaches to family and state/public and private, as imbricated, from a political development perspective, see Julie Novkov and Carol Nackenoff, "Introduction," in *Stating the Family: New Directions in the Study of American Politics*, ed. Julie Novkov and Carola Nackenoff (Lawrence: University Press of Kansas, 2020); Susan Burgess, "Introduction: Family, State, and Difference in Political Time," *Polity* 48 (2016): 140–45; Linda C. McClain, "The Family, the State, and American Political Development as a Big Tent: Asking Basic Questions about Basic Institutions," *Polity* 48 (2016): 224–42; Gwendoline Alphonso, *Polarized Families, Polarized Parties: Contesting Values and Economics in American Politics* (Philadelphia: University of Pennsylvania Press, 2018), 1–20; Priscilla Yamin, *American Marriage: A Political Institution* (Philadelphia: University of Pennsylvania Press,

cultural studies highlights the vital significance of family, sexuality, and gendered racialist structures to capitalism, including to nineteenth-century slavery in the United States.¹³ This body of work utilizes the overarching framework of *racial capitalism*, a historical and analytical construct that emphasizes the embedment of capitalism and racialism as imbricated, mutually constitutive, twin structural forces.¹⁴ Scholarship on slavery's capitalism rarely incorporates theoretical work on racial capitalism¹⁵ and has almost entirely overlooked the centrality of family and sexuality to slavery as a capitalist system.¹⁶

This paper aims to fill this gap. Connecting critical theoretical literatures on racial capitalism, reproduction, and sexuality on the one hand, to the scholarship on the history of American capitalism on the other, the article develops the framework of racial capitalism to

2012), 7–13; Patricia Strach, *All in the Family: The Private Roots of American Public Policy* (Stanford, CA: Stanford University Press, 2007), 40, 21–35..

¹³ Jennifer Morgan, *Laboring and Women: Reproduction and Gender in New World Slavery* (2011); Daina Ramey Berry, *The Price of Their Pound of Flesh* (2017), Daina R. Berry and Leslie M. Harris (eds.), *Sexuality and Slavery: Reclaiming Intimate Histories in the Americas* (2018); Jones-Rogers, *They Were Her Property*; Thavolia Glymph, *Out of the House of Bondage: The Transformation of the Plantation Household* (2008). Also, literature in Cultural Theory on capitalism "as a form of life" - Alyson Cole & Estelle Ferrarese (2018) "How Capitalism Forms our Lives," *Journal for Cultural Research*, 22:2, 105-112.

¹⁴ As a foundational text outlining 'racial capitalism' as a concept and historical force, see Cedric J. Robinson, *Black Marxism: The Making of the Black Radical Tradition*, 3rd Ed (Chapel Hill: University of North Carolina Press, 2021).

¹⁵ As an exception see: Kris Manjappa, "Plantation Disposessions: The Global Travel of Agricultural Racial Capitalism" in *American Capitalism: New Histories*, Sven Beckert and Christine Desan (eds.) (New York, NY: Columbia University Press, 2018); yet, this chapter, as well as all others in the edited volume do not consider family or sexuality as founts/sites of capitalism's development, whether in a slavery or non-enslaved context.

¹⁶ For an older, established corpus of work in the fields of legal and social history, excavating family relations in southern (white, Black, and enslaved) households and demonstrating the 'domestic' framing of laws that structured the economic system of slavery in the United States albeit unconnected to the history of capitalism, see, for example: Bardaglio, *Reconstructing the Household*; Stephanie McCurry, *Masters of Small Worlds: Masters of Small Worlds: Yeoman Households, Gender Relations, and the Political Culture of the Antebellum South Carolina Low Country* (New York: Oxford University Press, 1995); Victoria Bynum, *Unruly Women: The Politics of Social and Sexual Control in the Old South* (Chapel Hill: University of North Carolina Press, 1992); Elizabeth Fox-Genovese, *Within the Plantation Household: Black and White Women of the Old South* (Chapel Hill: University of North Carolina Press, 1988), Patton Malone, *Sweet Chariot*; Orville Vernon Burton, *In My Father's House Are Many Mansions: Family and Community in Edgefield, South Carolina* (Chapel Hill: University of North Carolina Press, 1987)

highlight the crucial significance of enslaved (sexual) reproduction to slavery's capitalism in the nineteenth-century American South. Focusing on common law rules of property, as a critical part of the evolving technology of law,¹⁷ the paper demonstrates the centrality of Black women's sexual reproduction to the southern legal constitution of property rights to enslaved people, also empirically analyzing case law to show how, in the three decades before the Civil War, southern courts carved out enslaved Black reproduction ("increase"), including reproductive futurity ("future increase"), as an independent, increasingly valuable, form of property in itself, with a market value that was intertwined with, but distinct from, the property value of the enslaved woman. By so doing the courts effectively extended slaveowners' property rights to enslaved women to include not only their children but their very reproductivity, making race by making property – marking Blackness *through* women's unfree, commodified, reproduction, as singularly market-bound and always non-familial.

The lens of property rights as an evolving technology of slavery's capitalism spotlights the formative and critical role of property law in the history of American capitalism. Through the institution of property, the state continually works out what it means to have 'the right *to*' as distinct from merely 'having,' and, in so doing plays both a constitutive and dispossessive role – constituting an individual owner's possession into property while also dispossessing others from

¹⁷ For a recent turn in the literature on slavery, viewing racial slavery as a property regime (and not merely a labor regime, as is more typical) with unifying themes across the capitalizing South and the North in the nineteenth century, see Gavin Wright, Robin Einhorn, *American Taxation, American Slavery* (Chicago, IL: University of Chicago Press, 2006). Sven Beckert and Seth Rockman (*Slavery's Capitalism*) urge consideration of law as a technology of capitalism, arguing, "The consideration of law as a technology—as a vehicle for achieving mastery over nature and other human beings— reinforces the themes of ... (emerging) accounting practices, plantation management, and agricultural machinery." *Slavery's Capitalism*, 25.

that property, constructing an enforceable hierarchy of social relations between individuals, groups, and between individuals/groups and the state.¹⁸

Feminist theorists such as Dorothy Roberts, Hortense Spillers, Saidiya Hartman and reproductive justice scholars, such as Loretta Ross, have pointed to various forms of state action that have singularly commodified and utilized Black and brown women's bodies and dispossessed them of their children/kin, such as child removals through child welfare policy, family separations in immigration and incarceration policies, labor coercions of poor mothers and fathers through workfare policies and welfare rights retrenchment, inequitable access to contraception and maternal care in healthcare policies etc., all of which have the effect of dispossessing Black and brown women of their kinship rights to have children and to parent with dignity.¹⁹ This scholarship, however, has not connected racialized and dispossessive reproductive and family policies to the evolving legal regime of property within the history of American capitalism, as I do here.

The narrative that follows is divided into four sections. The first section is theoretical: it identifies and situates expropriation as a mode of racial capitalism, demonstrating the centrality of Black expropriated reproduction to capitalist development: first as part and parcel of

¹⁸ Deakin, p. 192. In contrast to Marxist, libertarian, and economists approaches to property which conflate property with possession and focus on physical relations between people and legal commodities, legal institutionalists focus on property as a coherent system of rules, norms, and customs and focus attention on the role of the state in creating and sustaining property as a legal institution. Cheryl Harris, on Charles Reich and offshoots – *Whiteness as Property* – 1728-1729.

¹⁹ Dorothy Roberts, *Killing the Black Body: Race, Reproduction and the Meaning of Liberty* (1997), Loretta Ross and Rickie Price, *Reproductive Justice: An Introduction* (2017); Kimala Price, *Reproductive Politics in the United States* (2022), Rachel Johnson-Farias, "Separating Families of Color in the United States," *Harv. Law and Policy Review* (2020), Margaret A. Burnham, "An Impossible Marriage: Slave Law and Family Law," *5 Law and Inequality* 187 (1987), Premilla Nadasen, *Rethinking the Welfare Rights Movement* (2012), *Household Workers Unite: The Untold Story of African American Women who Built a Movement* (2015). For an excellent historiography of reproductive justice scholarship see: Zakiya Luna and Kristin Luker, "Reproductive Justice," *Annual Review of Law and Social Science*, 2013. 9:327–52

European/English imperialism and transatlantic trade and, subsequently, at the core of slavery as a domestic enterprise in the nineteenth century American South. The lens of expropriation allows us to pay clearer attention to the simultaneity of two mutually constitutive, racializing, aspects of state action in the creation of property out of human reproduction: constituting *and* dispossessing – that is the state's constitution of slaveowners' property rights to possess, own, and profit from enslaved "increase" and childbearing futures imbricated with the dispossession of African women of their children and childbearing and their racialization *through* reproductive dispossession. The second section is historical. It discusses the evolving scope of slaveowners' property rights to aspects of enslaved personhood within antebellum southern proslavery thought and highlights southern political economists and jurists' increasing focus on slaveowner's property right to profit when defending slavery as a capitalist system, naturalizing profit-making and wealth accumulation as neutral rationales for the increased commodification and extraction of enslaved 'breeding' that was practiced in the antebellum era.

The third and fourth sections are empirical and focus on legal practice. The third section discusses the *partus sequitur ventrem* rule of maternal descent of racial slavery, as a legal innovation that transformed Black women's fertility into ownable property. The section also discusses how the courts intensified and expanded such 'property-making' in the nineteenth century: tying the rule more closely to a mother's "Black" color and physical appearance, underscoring the singularity of "Black" reproductivity as commodifiable property, even if "most unnatural." The final section works through the courts' tortured attempts in the midst of the era's liberalization of property law to construct common law rules of inheritance to Black enslaved women's 'increase' and 'future increase' as property. In so doing, we see how the courts facilitated and extended slaveowners' individual rights, as property holders, to enslaved women's

reproductivity, while simultaneously replicating the social order of white planter patriarchy and the capitalist market demand for enslaved labor and bodies. The conclusion summarizes findings and suggests implications for adopting a reproduction-centered property law approach to the study of slavery's capitalism.

§1 – Racial-Capitalist Expropriation and Enslaved Black Reproduction

Legal theorists, Carmen Gonzalez and Athena Mutua, in their article, *Mapping Racial Capitalism*, survey the literature and identify three, overlapping but distinct, modes of racial capitalism: exploitation, expropriation and expulsion.²⁰ Of the three, expropriation is the most significant when analyzing the history and legal significance of enslaved reproduction in the American South. In Gonzalez and Mutua's words, expropriation involves "dispossessing and/or commandeering (often brutally) human, non-human, material, and natural resources for the purpose of creating and expanding economic profits – but doing so without paying for them, without paying enough to cover the cost of their replenishment and reproduction, or without ensuring their regeneration (for example logging leading to deforestation)."²¹ Exploitation, on the other hand, is a less intense mode than expropriation and involves "the commodification of labor and its "free" exchange on markets for incomes that are less than the value produced, but nonetheless sufficient to meet life's basic needs (such as, "a living wage")."²² Whereas both exploitation and expropriation are unjust, insofar as they involve commodification of a human, material, or natural resource for purposes of creating and maximizing individual profits with no or insufficient recompense for value produced, only expropriation encompasses the violent

²⁰ Gonzalez and Mutua, *Mapping Racial Capitalism*, *Jour. Of Law and Political Economy*

²¹ Fraser and Jaeggi 2018, Moore 2016b cited in Gonzalez and Mutua, "Mapping Racial Capitalism," 144.

²² Ibid, 130.

process of *dis*-possession, or *taking* (not just utilizing) a resource, from its prior state and/or possessor.²³

Expropriation is also critical to understanding the role of race-making within the system of capitalism. As Gonzalez and Mutua explain, race-making is a process integral to capitalism, that structures, facilitates and naturalizes expropriation, and distinguishes it from exploitation. Dividing humanity into a social hierarchy of superior and inferior groups based on perceived differences in human appearance, race operates, historically and currently, as both an outcome and primary tool for disproportionately subjecting some groups (and not others) to expropriation; such that expropriation serves "as the fount for nonwhite racialization."²⁴ The exploitation of wage labor for profit, for instance, depended/depends on the expropriation of nature, land, and labor from racialized and other subordinated groups:

"The emergence of free wage labor (a form of exploitation),²⁵ in the first instance, was made possible by the expropriation of peasant and Indigenous land and resources and the enslavement of Africans. The continued reproduction of wage workers is subsidized by the energy, food, and raw materials extracted from nature and other expropriated workers."²⁶

Expropriation as a site of racial capitalism thus challenges any view of "free" wage labor as a neutral, *sine qua non* feature of capitalism or, alternatively, as the singular site of critical inquiry into capitalism as a force of exploitation; instead, we are reminded that capitalism's exploitation of wage labor is deeply dependent on, but also distinct from, its more intense mode of racialized

²³ The fundamental essence of *dispossession* in expropriation can also be gleaned from the etymology of the word, described by the OED as deriving from *ex* "away from" and *propriare* viz. to "take as one's own," thus conveying the clear sense of '*taking* away a resource as one's own.' By dispossessing, the act of expropriation is dissimilar from related acts, such as those of '*appropriation*,' or "a *making* [of] one's own" (as in '*cultural appropriation*') where the original possessor is not dispossessed; instead, expropriation is "*taking*" or "*appropriation without exchange*." (Fraser and Jaeggi, 2018.)

²⁴ Ibid, 128

²⁵ Added parenthetical information. Free wage labor is presented as a form of 'exploitation' insofar as it is not compensated at the level of value added

²⁶ Gonzalez and Mutua, "Mapping Racial Capitalism," 145.

expropriation. As Gonzalez and Mutua write, "capitalism has always depended on commandeering of "free nature" on the one hand, and the extraction of unfree, unpaid, or grossly underpaid labor of women and those racialized as inferior, on the other" and that "these resources become inputs of capitalist production through expropriation."²⁷

The state plays a critical role in facilitating the racializing process of capitalism's expropriation, seen most clearly in the state's formulation and enforcement of laws. Through law, the state creates rules that form and structure "markets, govern market transactions, and determine which interests enjoy special protection" and "which interests are rendered vulnerable and left unprotected."²⁸ In constituting property rights, in particular, the state historically enforces the dispossession of non-Europeans of their shared, and interdependent, human, material, and natural resources, most often by ascribing racist characteristics, cultural norms and deviant behaviors to them, naturalizing their dispossession and legitimizing the possession of resources by (historically European/white) individual property owners.²⁹ Property making and race making are thus, in fact, imbricated forms of state action; both turning on state creation of property rights out of resources extracted from others.

²⁷ Gonzalez and Mutua, "Mapping Racial Capitalism," 144. Cite also Feminist Theorists of Care, social feminists such as Nancy Fraser, for how unpaid gendered family work subsidizes public masculinity wage work. And Dorothy Roberts (cited in my *Placing Parties* article) for menial, underpaid, work of black women as domestic help further subsidizing even white women's domestic work.

²⁸ Gonzalez and Mutua, 139-140 (citing Grewal and Purdy, 2015). The constitutive role of law is a central theme also in legal institutionalist scholarship on property that emphasizes law's constitution of social relations between owners and non-owners. For instance, Richard Pipes and others note that through political authority and monopoly over the use of force, the state constitutes property, namely as, "the right of the owner or owners...both to exploit assets to the exclusion of everyone else and to dispose of them by sale or otherwise." (Richard Pipes, *Property and Freedom*, p. 117. (in Deakin); Piper, p. 15.) Legal institutionalists however are less attuned to the state's historical *dispossessive* role in its constitution of property rights and the ways in which the state's constitution of property engenders social relations that are distinctly racial in nature.

²⁹ See: Eric Williams, *Capitalism and Slavery*, on the state's role in racial classification as a constructive, racializing, force, see: Iain Hacking, *Essays on "Making up People"* (1986, 2006)

Applying the framework of racial capitalism to slavery as a property regime, we see that southern states fashioned racialism, white superiority and Black inferiority, through property adjudication in at least two imbricated ways, actively 'making' race through property claims in an everyday way. First, like in other forms of property, southern states assembled racial relations by creating, adjudicating, and enforcing rights and duties between transaction parties who were almost always white, such as between buyer-seller, creditor-debtor, testator-heir, all of which involved implicit recognition of the ownability of enslaved labor as property and the enslavability of Blacks.³⁰ By setting property rules regarding the use, alienability, and sale of Black enslaved property, the southern slave state played a vital role in structuring expectations and social relations between white southerners, for instance, assembling traits of idealized mastery and dominion over enslaved Blacks and tying these traits to ideals of civic white manhood,³¹ reinforcing the centrality of whiteness, masculinity, and slave-property ownership to the slaveholding republic.³²

Second, as part of judicial adjudication of property claims to enslaved persons, southern states continually engaged in the expropriative process of *commodifying* people racialized as

³⁰ Given the centrality of planters (owners of farms deploying more than fifty enslaved workers) within the southern economy, the social significance of 'human property ownership' was especially heightened and unique, resulting in reputational and other benefits, similar to, but also distinct from, emerging industrial magnates in the North. - Thorstein Veblen, Bertram Wyatt-Brown etc.

³¹ For an insightful discussion of the (slave) 'state' as a compendium of social relations and practices occurring within a bounded territory, and the centrality of the enslaved to its governing praxis see: Ryan A. Quintana, "Slavery and the Conceptual History of the Early U.S. State," *Journal of the Early Republic*, 38 (Spring 2018), 77-86; More generally, for the theoretical approach to 'finding' the state (as distinct from society), as an outcome of internal dynamics reflecting complex power relations, an approach to state that is followed in this article, see Timothy Mitchell, "The Limits of the State: Beyond Statist Approaches and Their Critics." *American Political Science Review* 85 (March 1991): 77-96. On the construction of 'good master' as the most cherished social and political role and form of personhood, see Ariela Gross, *Double Character*; and McCurry, *Masters of Small Worlds*.

³² On the centrality of white, slave-owning, men to the southern social-political system of slavery, see – cite All the literature from social history of (white) women/men in the plantation south – Genovese, Fox-Genovese, Cashin, McCurry, etc.

Black, constructing legal justifications and rules to allocate monetary *value* to various conditions and relations of their humanity (such as reproduction and childbearing, as examined here), transforming aspects of their personality into extractable property, viz. within the purview of the property rights of the slaveowner, and his right to use, alienate, and profit from them.³³ As historian Walter Johnson notes, "everyday all over the antebellum South, slaveowners relations to one another – their promises, obligations, sentiments – were backed by the idea of market in slaves, the idea that people had a value that could be abstracted from their bodies and cashed in when the occasion arose."³⁴ Southern states' race-making through property law, constituting whiteness and blackness as integral to the constitution and adjudication of property rights to enslaved people, are summarized in the below Table and Figure (Table 1 and Fig. 1).

Table 1 –Southern Slave States' Fashioning of Whiteness & Blackness through Enslaved Property Statutes and Adjudication of Claims.

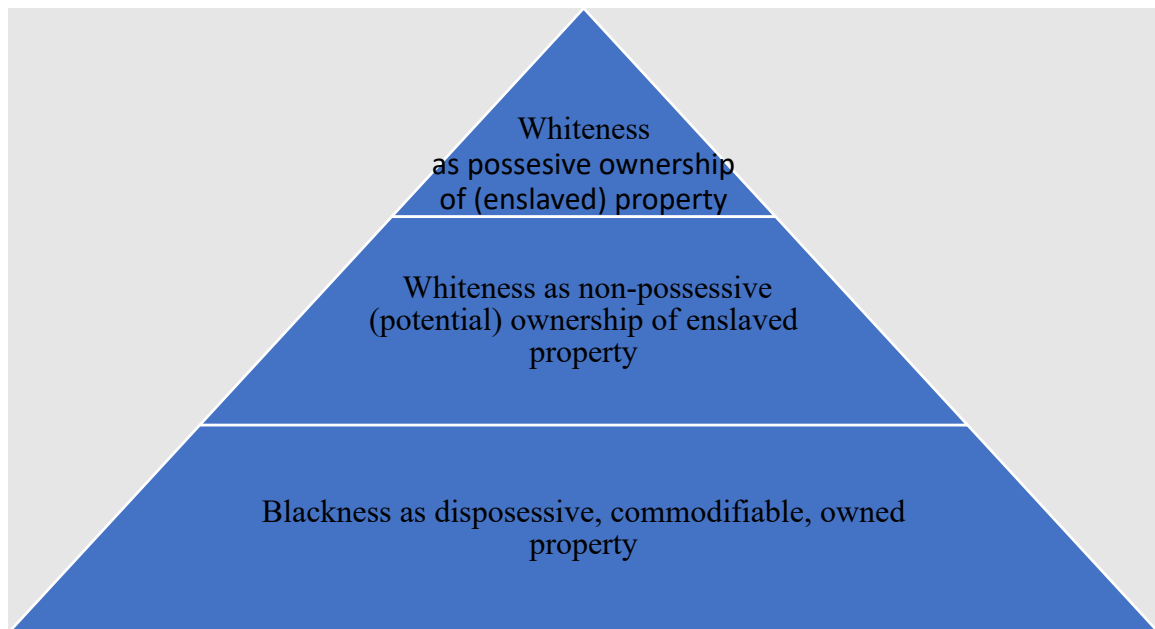
<p><u>Mechanism A – between whites:</u></p> <p>State creation/enforcement of property ownership of slaveowner vis-à-vis non-owners, such as between buyer-seller, creditor-debtor, testator-heir; almost all of whom were white.</p>	<p><u>Constituting whiteness as possessive property ownership:</u></p> <ul style="list-style-type: none"> - creating social hierarchies among whites viz. between owners and non-owners of enslaved property. - Instating norms of White mastery and slave-property ownership as the highest form of whiteness.³⁵
<p><u>Mechanism B – whites over Blacks:</u></p> <p>Adjudicating disputes over the value of enslaved people as property.</p>	<p><u>Constituting Blackness as commodifiable and dispossessive:</u></p> <ul style="list-style-type: none"> - Commodifying aspects of enslaved personality into market value - Enforcing (white) ownership over "Black" bodies and personality

³³ In the British slave-holding colonies and subsequently in the United States, the state, notably through the judiciary, had to fashion a whole new set of laws related to enslaved human property for which there was no direct precedent in Anglo-American common law. Legal historians of Anglo/U.S. slavery have traditionally distinguished between laws that dealt with slaves as 'property' and those that were about regulations over slave as people, see, seminally: Mark Tushnet, *The American Law of Slavery, 1810-1860: Considerations of Humanity and Interest* (Princeton, N.J.: Princeton University Press, 1981).

³⁴ Walter Johnson, *Soul by Soul*, 16. Also see: "Making a World out of Slaves" Chapter Three, *Soul by Soul*, 78-116.

³⁵ On the slaveholding household as the assumed highest form of whiteness, see Walter Johnson, *Soul by Soul: Life Inside the Antebellum Slave Market* (2001).

Figure 1 - Stratification of Race via Adjudication of Property Rights to Enslaved People



The framework of racial capitalism also helps us see the centrality of (sexual) *reproduction* to the historical development of capitalism in the United States, wherein capitalism is more clearly understood as an expropriative system of evolving property rights. Seminally the work of Jennifer Morgan demonstrates how nation-state preoccupation with sexual reproduction emerged in the seventeenth century with the establishment of colonial settlements in the Americas and was shaped by the rise of demography or population science, a tool used to aid the European/English nation-state acquire wealth and expand its boundaries.³⁶

Right from the start, states concern with sexual reproduction was gendered and racial, with reproduction playing both a constitutive and extractive role in state-building. On the one hand, state concern with reproduction as a constitutive force (constituting and expanding nation

³⁶ Jennifer Morgan, *Reckoning with Slavery, and Laboring Women: Reproduction and Gender in New World Slavery*, (Duke University Press, 2021)

and sovereignty) pivoted on white male reproduction. Englishmen's reproduction served as the site to create and regenerate the success of empire, an important means to measure and project the profitability of colonies. As Morgan writes:

"...for theorists of policy and the acquisition of wealth from the settlements, no matter how degraded the English settler was, his reproductive capacity signaled the health of the colonial settlement (and thus of the nation) ...as they pondered the relationship between population counts and national interests, they were also producing populations - "making up people" – to whom characteristics and uses could then be attached. These populations included English settlers in the Americas and the children they fathered with indigenous (and English) women. They did not include enslaved Africans or the children Englishmen fathered with African women."³⁷

By the nineteenth century *all* men racialized as white across social class gained access to the franchise and to political rights in the United States and so did their male offspring (both legitimate and illegitimate).³⁸ In most southern states, white men alone (as opposed to white women, or non-white men and women), had the legal right to choose to formally acknowledge, legitimize, and bequeath "public paternity" to mixed race children begotten outside of marriage.³⁹ Thus from early on and into the nineteenth century, white men's sexual reproduction had elevated importance to states above all and ascribed with important *constitutive* cultural meanings, namely: (a) as an indicator of the health of the republic, and (b) as the primary conveyor of civic personhood, citizenship, social and political rights; and whiteness itself, as a possessive form of property,⁴⁰ flowed through the loins of the racialized white male subject.

At the other end of the spectrum, the nation-state's preoccupation with reproduction as a means of dispossession and extract-able property centered on African – and "Black" – reproduction that was first and foremost channeled through the figure of the mother. Racialist

³⁷ Morgan, *Reckoning with Slavery*, 95-96.

³⁸ David Bateman, *Disenfranchising Democracy* (2018)

³⁹ Alphonso and Bensel, "Legal Construction of Motherhood and Paternity."

⁴⁰ Cheryl Harris, "Whiteness as Property" (1993) – for ongoing entrenchment of whiteness as property interest in public policy; also see: George Lipsitz, "The Possessive Investment in Whiteness: How White People Profit" (2018), Ian F. Haney-Lopez (2010) "Post-Racial Racism" *California Law Review* article

understandings of African *women's* sexuality and reproductivity as a 'freely available' natural resource that could be utilized, commodified, owned, and commandeered for profit were embedded within sixteenth century ideas of trade, value, and currency. European travel and trade writers in the sixteenth and seventeenth centuries described a multitude of African women's reproductive and sexual practices and gendered customs through which they presented all Africans - women, men, and children - "as strangers who lived in nature without culture,"⁴¹ these included: apparent ease with which African women gave birth, African women's strength and endurance during the birthing process and their rapid recovery,⁴² African women's alleged unregulated coupling beyond marriage,⁴³ alleged sexual perversions, aberrant gender norms such as African women who engaged in trade while men stayed home spinning fibers,⁴⁴ indifferent mothers who would readily sell their virgin children to European traders; all of which accounts were deeply embedded within early discussions of trade.⁴⁵

Early European depictions of African women's sexual, reproductive, and family practices, as aberrant and abhorrent racialized Africans as a culturally uncivilized and racially inferior people, and also rendered them unfit trade partners, fit only for commercial enslavement,⁴⁶ marking the continent and its people as legitimate resources for European extractive economies. In other words, African women's sexuality and reproduction served as an important ideational means to dehumanize Africans and to naturalize European expropriation of Africans' labor and sexuality as ownable property, such that African children, as Morgan says, were "cast from the

⁴¹ Morgan, *Reckoning with Slavery*, 119 citing Van den Brooke, *Journal of Voyages*, 97-98.

⁴² Morgan, *Reckoning with Slavery*, 120.

⁴³ Morgan, *Reckoning with Slavery*, 119, citing Boemus, *Fardle of Facions*, 60.

⁴⁴ Ibid, citing Boemus, *Fardle*, 45.

⁴⁵ Morgan, *Reckoning with Slavery*, 129

⁴⁶ Cite Morgan and others here.

conceptual (and empirical) landscape of families and onto the balance sheets of slave traders."⁴⁷

In so doing, African women's bodies and wombs were discursively dispossessed of their human capacity to transmit kinship, affection and belonging to their kin, a trope that endured and underpinned the intensification of slavery's capitalism in the nineteenth century American South.⁴⁸ Table 2 (below) summarizes the constitutive and extractive properties of sexual reproduction in terms of its significance to the emerging British North American state and its gendered and racialist focus and application.

Table 2: Gendered-Racial Reproduction & the State/Nation-Building

Reproduction as Constitutive of Nation	Reproduction as Extractive Property
<u>State Focus:</u> White male sexual reproduction	<u>State Focus:</u> Black female sexual reproduction
<u>State Interest:</u> Nation-building, empire expansion/extension of European sovereignty to New Worlds; re/production of tax base, population and democratic civic membership	<u>State Interest:</u> Legitimize African slave trade, naturalize enslavement as a system of capitalist expropriation, reproduce African labor as an extractable 'natural' resource, create property, capital and wealth
<u>Ascribed Cultural Value:</u> signifier of health of Republic; conveyor of civic personhood, citizenship, social and political rights; marker of Whiteness as superior and integral to the Republic	<u>Ascribed Cultural Value:</u> marker of Blackness as 'naturally' market-bound, non-familial/kin-less; marker of Black inferiority as distinct from white social norms and gendered relations.
<u>State Orientation:</u> Possessive, protectionist	<u>State Orientation:</u> Dispossession, expropriative

As we see in the next sections, African women's sexual reproduction as an expropriative property resource became even more significant to southern states with the end of the transatlantic slave trade and the expansion of slavery as a domestic system of modern capitalist production in the nineteenth century American south.

⁴⁷ Morgan, *Reckoning with Slavery*, 134, 135.

⁴⁸ Footnote 72.

§ 2 – *Scope of Slaveowners' Property Rights & Antebellum Enslaved "Breeding"*

Writing in 1827 in his well-known *Sketch of Slave Laws*, George Stroud pointed out, "[The] cardinal principle of slavery – [is] that the slave is to be regarded as a thing – is an article of property – a chattel personal."⁴⁹ Arguably, it is a truism to point to slavery as a system of property rights to human beings. What is less evident, however, is *what* about the slave, as a human being, was seen as legitimately within the purview of a slaveowner's property right; and that this "property making" exercise, viz. including or excluding certain aspects of a slave's humanity and not others within the bounds of property ownership, was developing in southern jurisprudence and philosophy, contingent on the prevailing political and economic demands on the southern slave state.

In the antebellum period, abolitionists asserted that every abomination of slavery lay in the expansive scope of the slaveowner's property right to a slave's personhood. William Goodell wrote, "the claim to property in slaves in theory and practice...is manifestly and notoriously a claim, not only to the bodies and physical energies of the slave, but also to his immortal soul, his human intelligence, his moral powers." Proslavery advocates, in response, increasingly described their property claim in narrower terms, claiming that slavery constituted property rights to slaves' labor alone, leaving intact a slave's personhood. For instance, E.N. Elliott, when introducing a volume of leading proslavery writings in 1860, wrote, "The person of the slave is not property, no matter what the fictions of the law may say; but the right to his labor is property."⁵⁰

⁴⁹ Thomas Morris, *Southern Slavery and the Law, 1619-1860* (Chapel Hill, NC: University of North Carolina Press, 1997) 61

⁵⁰ E.N. Elliott (Complete), *An Introduction to Cotton is King and Pro-Slavery Arguments*. Unlike southerners, enslaved labor itself had been long considered immoral, degraded, and inefficient. Adam Smith, the progenitor of classical economics, writing in the eighteenth century had pointed to the denial of enslaved workers of the ability to accumulate property as removing all incentives to work efficiently and/or restrain consumption: See Adam Smith, *An Inquiry into the Nature and Causes of The Wealth of Nations*, 156-7, and 365-6. On southern political economists

Southern political economists were less demure. Beginning in the 1830s, they developed an intellectual framework that defended slavery, wholly as a form of profit-seeking capitalism. "Naked or mere labor," wrote one southern planter-political economist in 1844, "pledged under circumstances where almost certain profits await it, becomes capital, and serves until the profits return upon it in the shape of a realization."⁵¹ Like all other capitalists, southern slave-owners, they said, strove to "receive a fair remuneration of living profit on our capital, resulting in the specialization of much of the South in cotton plantation and an increase in the region's wealth."⁵² Justice Thomas Ruffin in his much-cited opinion in *State v. Mann*, also noted, "The end (of slavery) is the profit of the master, his security, and the public safety."⁵³

A slaveowner's property right to profit from his property was seen as a positive social good across the antebellum slave South, and slaveowners' market interests ('fair remuneration') were commonly touted by the 1830s as essential to overall social well-being, including that of the enslaved.⁵⁴ The South Carolina Committee on the Judiciary in their commentary on a particular *Digest on Negro Law* in 1848, for example, roundly refuted the claim that "the negroes in South Carolina are so badly provided with clothing, food, &c. as to need the enforcement of

claim that enslaved labor was no more deficient or immoral than wage labor, and that slaveowners were efficient capitalists, investing resources, including capital, across multiple activities and methods of production based on calculations to maximize returns on their investments, skillfully converting raw slave labor into a capital good, see: Carlander and Brownlee, "Antebellum Southern Political Economists," 395.

⁵¹ Nathaniel A. Ware, *Notes on Political Economy as Applicable to the United States by a Southern Planter*, New York: Leavitt, Trow and Co., 1844, 37-8.

⁵² Carlander and Brownlee, "Antebellum Southern Political Economists," 395. The emerging consensus view among historians today supports these claims, documenting widespread aggregate empirical patterns of capitalist development as well as individual capitalist behavior among slave owners in the nineteenth-century slave South, with cold, and often brutal, regard for the fate of the enslaved.

⁵³ *The State v. Mann*, 2 Devereux Rep. 263, 266. For Thomas Ruffin's influence on southern jurisprudence as representative of pro-slavery instrumentalism across institutions that promoted a world of property, slavery, and economic efficiency, see: Alfred L. Brophy, "Beyond *State v. Mann*, Thomas Ruffin's Jurisprudence," in *University, Court, and Slave: Proslavery Academic Thought and Southern Jurisprudence, 1831–1861* (New York, Oxford, 2016), 197-211.

⁵⁴ Genoveses, Ford etc.

the existing statutory enactments with severe penalties." Instead, they presented the view widespread across the South, that, "independent... of the feeling of humanity, it is in the interest of all who hold this property to make such arrangements for comfort, as will both preserve health, strength and life, and contribute to their increase."⁵⁵ In this framework, the well-being of enslaved people, including their health, 'increase,' and reproduction, were 'spontaneously' protected by the slaveowners' property interest in market profits and that the slaveowner's property right to profit from his enslaved property in all ways possible, underpinned the expansive scope of his authority over all aspects of an enslaved person's vitality, such as her 'health, strength and life," and "increase."⁵⁶

With the spread of market capitalism and the capitalization of slavery, enslaved women's bodies, in particular their fertility and childbearing futures, emerged as a separate source for extracting profits.⁵⁷ The discursive process constituting expropriation of enslaved women's reproduction into property, for slaveowners' use and profit, greatly intensified in the antebellum

⁵⁵ The Committee on the Judiciary, *Report on the Negro Law of South Carolina*. The widespread southern political framing of slavery as domestic paternalism where slavery was no more than an ordinary patriarchal labor system, could not have been further from law or social practice (See Fogel and Engerman, for instance). On the ideology of 'domestic paternalism' as framing antebellum pro-slavery thought see: Lacy K. Ford, *Deliver Us from Evil: The Slavery Question in the Old South*, (Oxford, UK: Oxford University Press, 2009), 151-152. ⁵⁵

⁵⁶ A dominant earlier interpretation among historians, starting in the 1960s/70s, with Herbert Gutman's *The Black Family* – supported by cliometricians, economic historians and social historians - unwittingly provided support to these claims by highlighting the empirical stability and longevity of enslaved families, particularly on cotton plantations. However, as Wilma Dunaway points out, this view was limited in that it relied on evidence solely on cotton plantations in the Lower South and not small slaveholding farms which were where almost 80% of enslaved people lived and worked in 1860, also conceptualizing 'family disruptions' very narrowly to mean separations of infants and mothers, and not husbands and wives, or older children from parents. Dunaway, rightly draws attention to the unwitting effect of the scholarship (following Gutman) that overly emphasized enslaved Black agency to the extent of almost 'writing the slaveowner out' of the story. As Dunaway, and several other works since (Tera Hunter for eg.) highlight, the overarching power of the slaveowner to control every and all enslaved family practices, including nuptiality, ceremony, process, and age of marriage, nursing, pregnancy etc. was unparalleled. Indeed, it was through the evolving institution of property rights that slaveowners gained such authority to direct and coerce enslaved family and intimate behavior.

⁵⁷ Daina Ramey Berry, *The Price of Their Pound of Flesh*, Chapter 1.

period and occurred across multiple venues and social practices: first, in the course of *everyday slave management* and agricultural practices on the plantation; second, during *times of sale* in advertisements and in sellers' depictions and buyers' calculations of enslaved women, and, third, *in courtrooms* and legal offices, as judges and legal practitioners conceptualized, priced, and valued enslaved women as property.

First, with the close of the transatlantic slave trade in 1808, slaveowners in their record-keeping practices on plantations in both the slave-selling Upper South as well as in the slave-buying Lower South paid much attention to and calculated the monetary value of 'breeding' of enslaved women of childbearing age, as long-term investments balanced against short term costs.⁵⁸ Thomas Jefferson, for example, insisted that while the annual crop production of male laborers may be consumed for the maintenance of the farm, he said the children of slave women were "an addition to the capital." Admonishing his estate manager for "the loss of 5 little ones in 4 years," Jefferson instructed him "to inculcate upon the overseers that it is not (women's) labor, but their increase which is the first consideration with us."⁵⁹ Some slaveowners in earlier periods had eschewed ownership of enslaved women on grounds of additional costs and considerations attending their pregnancies and care for infant children.⁶⁰ In contrast, as early as by the late eighteenth century, there was a marked change in social practice, as noted by the North Carolina Court of Appeals that observed, "...people are (now) generally of a different opinion, as to thinking a breeding wench a loss."⁶¹ By the 1830s enslaved 'breeding' was accepted as normal, profitable agricultural practice, more systematized and widely encouraged on plantations through

⁵⁸ Dunaway, 128.

⁵⁹ Dunaway, 128. Cite the rates of enslaved maternal and infant mortality. Overseers incentive structure caused them to view pregnant and nursing women as impediments – Schwartz, *Born in Bondage*, 21?

⁶⁰ Daina Ramey Berry, *The Price of their Pound of Flesh*.

⁶¹ *Timms v. Potter* (North Carolina), Morris, *Sout*92.

deliberate actions of enslavers to pressure and even coerce enslaved women to procreate and nurse infant offspring.⁶² Professor Thomas Roderick Dew, who served as President of William and Mary College, speaking of the domestic slave-trade from Virginia, proclaimed in (YEAR), "It furnishes every inducement to the master to...encourage breeding, and to cause the greatest number of slaves to be raised."⁶³

Second, enslaved women's fertility and reproductive capabilities were prominently highlighted in *sales* and pricing practices during the decades from 1830 to the Civil War.⁶⁴ In the early national period, for instance, enslaved women of childbearing age, between fifteen to thirty-five, had commanded higher prices across the South than those older or younger, suggesting that an enslaved woman's fertility had been a part of her value as property.⁶⁵ However, by the mid nineteenth century, as Daina Ramey Berry demonstrates, an enslaved women's "increase" became a central focus of seller's descriptions and buyer's calculations. Berry examines slave advertisements and sale records from the earlier period and finds that the early use of the term "breeding" was less frequent, and narrower in scope, used to describe the

⁶² Berry, 20 fn 35 – Berry, *Swing the Sickle*. Berry, *The Price of their Pound of Flesh*, 78-83. For wide-ranging scholarly debate on the rhetoric, experiences, memories, and historiography on the topic of coerced breeding, see Gregory D. Smithers, *Slave Breeding: Sex, Violence, and Memory in African American History* (Gainesville: University Press of Florida, 2012), Bridgewater, *Breeding a Nation* (2006); Ned Sublette and Constance Sublette, *The American Slave Coast – A History of the Slave-Breeding Industry* (Chicago: Lawrence Hill Books, 2016). On coerced wet-nursing see, Emily West and R.J. Knight, "Mothers' Milk: Slavery, Wet-Nursing, and Black and White Women in the Antebellum South," *Journal of Southern History* 83(2017): 37-68

⁶³ Goodell, 84

⁶⁴ In the nineteenth century increase (natural or forced) became the focus in potential buyer's calculations, see Berry, *The Price of their Pound of Flesh*, 19. On enslaved women's reproductive labor and its centrality within Atlantic Slavery see Jennifer L. Morgan, *Laboring Women: Reproduction and Gender in New World Slavery*, (Philadelphia, PA: University of Pennsylvania Press, 2004); and "Partus Sequitur Ventrem: Law, Race, and Reproduction in Colonial Slavery," *Small Axe*, (2018) 22(1 (55)): 1-17. in the late eighteenth and early nineteenth centuries the terms 'breeding' and 'breeding wench' were used more 'benignly' in advertisements and bills of sale, as reference to an enslaved woman's immediate condition of being pregnant or nursing, unlike the mid to late nineteenth century references to breeding as regards reproduction for profit. Berry, p. 21.

⁶⁵ Daina Ramey Berry, *The Price of their Pound of Flesh*, 17

immediate condition of a pregnant or nursing enslaved women. In contrast, in the antebellum period 'breeder' became a *standard* classification/valued trait of enslaved women of childbearing age in slave sales,⁶⁶ a distinct marker of prolific reproductive capabilities that could command significantly higher prices than other enslaved women not so identified, sometimes even more than prime enslaved males.⁶⁷ One such advertisement in the *Charleston Mercury*, advertised a 20-year-old enslaved woman from Virginia for sale, explicitly casting her 'prolific' childbearing capacity in the language of economic opportunity for a potential buyer: "She is very prolific in her generating qualities, and affords a rare opportunity for any person who wishes to raise a family of healthy servants."⁶⁸

The slave market's focus on enslaved women's reproductivity and anticipated 'increase' or childbearing *futures*, aligned well with the speculative antebellum world of slavery's capitalism, where buying and selling of enslaved property was often a promise of a bourgeoisie financial future by white men seeking independence and prosperity. As one man wrote in a letter to his uncle, "For a young man just commencing in life the best stock in which he can invest capital is, I think, Negro stock."⁶⁹

Third, as we see in detail in the following two sections, law and southern courts played a critical role in upholding and expanding slaveowners' property rights to an enslaved woman's fertility and 'increase,' articulating a market logic⁷⁰ of property rights and profits to naturalize the

⁶⁶ The other two kinds of classifications that were also used in slave sales were "fancies," and "skilled laborers," the latter encompassing: house workers, field hands, cooks, launderesses, and seamstresses. Berry, 18.

⁶⁷ Berry, *The Price of their Pound of Flesh*, 18 fn 28.

⁶⁸ Goodell, p. 84

⁶⁹ Walter Johnson, *Soul by Soul*, 83.

⁷⁰ For scholarship that documents the turn of southern courts in the antebellum period towards an all-pervasive 'market utility' logic (albeit generally so, and not focused on enslaved reproduction) see: Alfred L. Brophy, "The Market, Utility, and Slavery in Southern Legal Thought," in *Slavery's Capitalism*, 262-276; and Alfred L Brophy, *University, Court, and Slave: Proslavery Academic Thought and Southern Jurisprudence, 1831–1861* (New York, 2016; Oxford) James Parisot

transformation of enslaved "breeding" and reproductivity into property. By so doing, the courts played a critical role in the expropriation of enslaved childbearing, fueling the engine of slavery's capitalism all while marking "Blackness" through Black women's dispossessed reproductivity.

§3- "*Partus Sequitur Ventrem*"

The rule of *partus sequitur ventrem* ("follow the belly") was first enshrined into legislation by the Virginia House of Burgesses in 1662. It predicated a person's enslavement on the condition of their mother. The law is acknowledged as establishing the system of hereditary racial slavery in the United States, constructing Blackness as a badge of inherited and heritable unfreedom.⁷¹ On its surface the law appears to have a circumscribed rationale, solely to clarify the status of the offspring of interracial sex between white men and African women, as noted in its preamble:

"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...that all children borne in this country shall be held bond or free only according to the condition of the mother."⁷²

Legal historian, Thomas Morris characterizes the legislation as "the first statute on interracial sexual relations," one that deployed maternal race to establish US slavery as a 'closed' racial system of property rights (African women and their offspring as 'forever' enslaved) that foreclosed "the possibility of (an) innovated racial solution."⁷³

⁷¹ It should be noted that in US hereditary racial slavery was preceded by an early period in the seventeenth (and in some cases early eighteenth century) when enslavement was not confined to "Blacks" or African-descendants, also extending to indigenous groups, but never to white indentured labor as a permanent/life-long state. Cite all sources here.

⁷² Cited in Jennifer Morgan, *Reckoning with Slavery: Gender, Kinship, and Capitalism in the Early Black Atlantic* (Duke University Press: Durham, NC, 2021) 178.

⁷³ Morris, 23. Stroud (emphasis in original).

More implicitly, however, the rule was the first to expropriate Black women's reproductivity ('natural increase') as part of a slaveowner's property right to the mother herself, constituting property not only out of her children but also from the very *probability* of childbearing, her childbearing *future* or her reproductivity as at it were. The rule thus highlighted (for the first time) the singularity of Black women's sexuality *to* generate property, by divesting even white male (Englishmen's) sexuality of its usual primacy in conveying civic personhood. Reversing the general principle of father-based descent in English common law, the rule extended a civil law maxim developed for domestic animals to focus the status of the child on maternal descent instead.⁷⁴ As noted by George Stroud, *partus sequitur ventrem* was the essence of the "*degrading* principle of slavery, inasmuch as it places the slave (woman) upon a level with *brute* animals."⁷⁵ Others have pointed out that the rule was less about the status of the enslaved Black woman or her interracial child but more about the owner's property right *to* the child.⁷⁶ Both interpretations, by projecting a distinction between status and property, of woman/child and of owner, miss the deep co-occurring discursive interconnections between Black women's sexual reproduction, on the one hand, and extractive property rights on the other.

William Blackstone, the preeminent English jurist, likened the *partus* civil law rule to the English law of livestock and highlighted its distinction from the more common rule of paternal descent in the English law of villeinage: "Of all the tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, that '*partus sequitur ventrem*' is the brute creation, *though for the most part in the human species it disallows the maxim*."⁷⁷ The rule codified centuries-long English gendered racialism which had steadily

⁷⁴ Jennifer Morgan, *Partus Sequitur Ventrem*; Also, Morgan, *Reckoning with Slavery*

⁷⁵ Stroud, p. 16

⁷⁶ Morris, *Southern Slavery and the Law*

⁷⁷ *Ibid*, Morris, 16 (Emphasis added).

constructed African women as kinless, unassimilable, and non-maternal viz. wholly unlike English (and other non-African) women;⁷⁸ and *extended* Black women's commodification by dispossessing them of their reproductivity and childbearing future, foreclosing the possibility that they could ever have children that 'belonged' to them.

In contrast, even from the earliest times European/white indentured female laborers in the colonies and new territories had always retained their reproductive ability to serve as conduits to white men's sexual and civic reproduction, conveying kinship, citizenry, and state sovereignty to their offspring despite any temporary condition of their indentured servitude. Even interracial children of English/European women (with 'negro' men) although socially reviled as mulattoes, regarded as "abominable and spurious issue" and subjected to stringent periods (thirty-one years plus) of enforced servitude and legal limitations,⁷⁹ were nevertheless considered bastards (i.e. people) in law, not property. In so doing interracial children of white women retained their freedom and legal personhood, and were eligible to hold rights and civic membership, albeit to a lesser extent. George Stroud notes that by 1796, 'the progressive light of nearly a century and a half' enabled states like Maryland to 'discover' that it is "contrary to the dictates of humanity and the principles of the Christian religion, to inflict personal penalties on children for the offence of their parents," and so abolished compulsory servitude of interracial children from white mothers.⁸⁰ And, by the nineteenth century, there is no recorded instance of enforced servitude of

⁷⁸ See pp. 16-18 of this paper; also, generally, see: Morgan, *Reckoning with Slavery* (2021) and *Laboring Women* (2004)

⁷⁹ The 'offending' Black man was put to death. Cite statutes from South Carolina, Alabama, Georgia etc. ("Offenses against Whites")

⁸⁰ Stroud, "Thirty One Years Slavery", 29

the interracial children of white women,⁸¹ even though 'mulattoes' and all other free Blacks, were progressively subjected to newer, draconian exclusions, coercive regulations and limitations.⁸²

In other words, European and other women racialized as white (including indentured servants), even those considered 'degraded' by sexual liaisons with Black men, could never be nor could they generate/reproduce property i.e. convey commodity/chattel status to their children. White women's reproductivity or childbearing futures and children remained 'theirs' albeit within the existing patriarchal family order. Black men who transgressed the sexual color line were penalized by death as the ultimate punishment, but were also foreclosed from producing property independently from Black women. *Partus sequitur ventrem* affixed racial property status to Black maternal descent alone, branding Black women's reproductivity singularly as an economic resource, as property itself and as property-producing, available for expropriation even while Black women's sexuality itself was 'freely available' as a sexual outlet for white men.

Furthermore, in the nineteenth century in an increasing number of race determination cases in which light-colored, enslaved, women claimed that they were 'white' and therefore free (whites could not be legally enslaved), southern courts considered and *expanded* the property reach of the *partus* rule to even non-enslaved women via her "black" color and racial appearance. The courts clarified that a mother's "black" color (even absent proof of her enslaved status) was a strong presumption in favor of her and her child's enslaved status, regardless of the child's own light color.⁸³ By the antebellum period it was 'uniformly held,' as noted by Judge O'Neill, that the

⁸¹ Morris, *Southern Slavery and the Law*, 23

⁸² See as the seminal works on Free Blacks, Ira Berlin, *Slaves without Masters: The Free Negro in the Antebellum South* (New York: Oxford University Press, 1984) and Joel Williamson, *New People: Miscegenation and Mulattoes in the United States* (Baton Rouge: Louisiana State University Press, 1995),

⁸³ On maternity and the legal construction of racial identity, including the presumption of 'blackness' and enslaved status see, Gwendoline Alphonso and Richard Bense, "Legal Construction of Motherhood and Paternity: Interracial

rule required 'the offspring to follow the condition of the mother: ...such slaves are chattels personal' and that 'color is prima facie evidence, that the party bearing the color of a negro, mulatto or mestizo, is a slave.'⁸⁴

Compared to similar cases of race-determination in previous eras, in antebellum judicial decisions the color and physical properties of the mother assumed the highest evidentiary value as demonstrating her Blackness (or not) and thus her conveyance of enslavement (or not) to the plaintiff.⁸⁵ Thus by the mid-nineteenth century, by legal fact and/or presumption, *partus sequitur ventrem* arguably transformed *all* children of *all* ostensibly 'Black' women into property, enslaved and also free.⁸⁶ Even a free woman, living in freedom for all her life but physically racializable as 'Black' could raise the legal presumption that she was not only enslaved/enslaveable property but also that her child, even if the 'brightest' of colors, was also enslaved and so (de facto) Black.⁸⁷ The singularity of Black women's reproductivity as tied to slaveowner's property rights, via the *partus sequitur ventrem* rule, was thus reiterated and

Unions and the Construction of the Color Line in Antebellum Louisiana," in Julie Novkov and Carol Nackenoff (eds.), *Stating the Family: New Directions in the Study of American Politics* (Lawrence, KS: University Press of Kansas, 2020), 97-126, 106-111; Also, on race-making through judicial adjudication of race-determination ("passing") cases and evidentiary practices, see: Ariela J. Gross, *What Blood Won't Tell: A History of Race on Trial in America* (Cambridge, MA: Harvard University Press, 2008).

⁸⁴ O'Neill, *Digest of Negro Law*, 1. On the centrality of a 'negro' racial identity to slave status, see Thomas Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America* (Philadelphia: T. and J.W. Johnson and Company, 1858) chapter 1.

⁸⁵ Alphonso and Bensel, "Legal Construction of Motherhood and Paternity."

⁸⁶ Ibid.

⁸⁷ It should also be noted that the presumption of maternal color/physical race as stamping the lightest skinned offspring with enslavement while *predominant* across all southern slave states was not *uniformly* applied even in the antebellum nineteenth century. See Gross (2010). (Also Cite cases from Alphonso/Bensel where courts agree there could therefore be ostensible 'white' slaves, even those having lived free for a long time, and contrast with opposing opinions which claimed that once the Black color was not evident in an offspring there was no such presumption, per maternal evidence alone, of her enslavement. Both positions nevertheless evidence the increasing hardening of Blackness, as a color/race category, and the coincident hardening of the racialized singularity of Black women's reproductivity - Black women's reproduction versus non-Black.

expanded during this period of slavery's capitalization to even free women who could be racialized as "black."

In 1831, state legislator James Gholson, speaking in front of the Virginia legislature voiced the view that was by then widespread among southerners, namely that "*Partus sequitur ventrem* is coeval with the existence of the rights of property itself...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." Added Gholson, the "value of the property (i.e., the pregnant woman) justifies the expense," observing, "I do not hesitate to say that in *its increase consists much of our wealth*."⁸⁸ From 1830 to 1860, *partus sequitur ventrem* came to be almost universally invoked (and applied) as a property rule, central to slaveowner's property rights to mixed-race children. This shift in the legal emphasis of the rule again evidences the heightened state concern with upholding slaveowners' property rights, including to Black women's reproduction in this period, as an independent source of property and wealth.

§4- Adjudicating "Future Increase"

Since colonial times slaveowners had bequeathed pre-conceived children of enslaved women (termed "future increase") in their wills despite the fact that the practice was not expressly affirmed in statutes or in judicial decisions. Claims to "future increase" were significantly increased in the nineteenth century.⁸⁹ In the three decades prior to Civil War, the number of cases reaching southern appellate courts that involved disputes over the 'future

⁸⁸ Cited in Daina Ramey Berry, *The Price of their Pound of Flesh*, 11.

⁸⁹ Morris, *Southern Slavery and the Law*, 89.

increase' of enslaved women increased exponentially: almost 80% of all reported cases from 1700 to 1860 (N= 212) in which southern courts were called upon to adjudicate issues of 'future increase' were decided in the thirty-year period between 1830 to 1860.⁹⁰ The explosion in 'future increase' cases and their timing in the antebellum period evidences that enslaved Black women's reproduction served as an important legal site of high material stakes, during the period of slavery's capitalism.

With the spread of market capitalism rules of succession and wills that favored fixed lines of inheritance and collective notions of property through devices such as entail gave way to more individual-centered, liberal, principles of property which favored (i) easy alienability through "individual freedom of disposition," and (ii) consolidation of property interests in the 'single legal entity' of the property holder.⁹¹ However, through provisions in wills and specific bequests, some slaveowners still attempted to tie up enslaved property according to their wishes, seeking to exert their property rights post-mortem, over many successive generations of enslaved property from well beyond the grave. Slaveowner's bequests of enslaved women's reproductivity and future children were uniquely significant in this regard, raising complex questions regarding the scope and extent of a slaveowner's property right to an enslaved woman vis-à-vis the rights of legatees and other claimants.

In most jurisdictions, the courts adapted common law principles of real estate to elevate enslaved property, now including enslaved women's reproductivity, as supremely valued property on par with real estate, also affording greater protections to slaveowners to decide the ownership of enslaved property. In so doing, the courts developed a unique legal grammar to

⁹⁰ Computed by author, from "NexisUNI" database using keyword search "future increase" for all "state cases" from earliest date of records (starting from the year 1700) to 1860.

⁹¹ Gregory S. Alexander, *Liberal Property Law*; Morris, *Southern Slavery and the Law*, 81-82.

transform enslaved reproductivity into a form of property and to rationalize detailed calculations of its market worth, commodifying and expropriating Black women's reproduction as ownable property in an everyday way.

In all English common-law jurisdictions, slaves were considered personal, not real, property.⁹² However, in the age of slavery's capitalization the rules of real estate and personal property increasingly overlapped, producing new legal quandaries, as noted by the Kentucky Court of Appeals in *Banks's Adm'r v. Marksberry* (1823), when deciding between competing claims to the 'increase' of Pen, an enslaved woman,

"...undoubtedly, there should be a period beyond which no man should be allowed to direct how his estate, whether real or personal, should devolve. Perpetuities are not, and ought not to be tolerated; but at the same time, the power of the owner, to direct the course of the devolutions of his estate, ought not to be restrained to such narrow limits, as to prevent the reasonable arrangements of individuals."

The court contrasted the "early ages of the common law, [when] personal estate was but little regarded," and "a gift or grant of a personal thing, for a day or even an hour, was supposed to be equivalent to a gift or grant of it forever," to "succeeding ages, when commerce and civilization had given additional importance to personal estate, [and] new rules were invented, to make it answer better to the exigencies of society...more upon an equality with real estate."⁹³

Utilizing analogies from both real estate and personal property, the court upheld the primacy of slaveowner's wishes in determining inheritances to enslaved women and their increase, ruling that, "he who is the absolute owner of a thing, owns all its faculties for profits or increase as well as the thing itself...it is every day's practice to grant the future rents or profits of real estate; and it is held, that many may grant the wool of a flock of sheep for years."⁹⁴ "Future

⁹² Louisiana as distinction, see for example: Judith Shaeffer.

⁹³ 13 Ky. 275, 279

⁹⁴ Jacob D. Wheeler, *A Practical Treatise on the Law of Slavery* (New York: Allan Pollock, Jr.; New Orleans: Benjamin Levy, 1837) 28; Also, *Banks's Adm'r v. Marksberry*, 13 Ky. 275, 280.

increase" of enslaved women was likened to either profits from real estate on the one hand, or wool from a flock of sheep, as personal property on the other, and decided as having independent, separate value from the mother herself, also within the 'absolute' dominion of the single property holder.

In another case, *Nelson v. Nelson* (North Carolina, 1849) the testator bequeathed Leah, an enslaved woman, to his daughter, Elizabeth, also stipulating, "if there should be any increase" from Leah, "that" was to be "equally divided between Elizabeth and his two other daughters."⁹⁵ Judge Ruffin in writing the court's opinion concluded that the testator must have meant the term 'increase' to include only such "issue that the woman bore in his lifetime" (as opposed to after his death) and that *all* children born to Leah *after* his death belonged to Elizabeth along with Leah herself. In reaching this conclusion Ruffin ascribed ideas of domestic paternal affection to the testator-patriarch and calculated the value of Leah's future reproductivity as an essential, and distinct, part of her property value as a whole gift, subtracting the anticipated monetary cost of her future pregnancies and 'confinements' against her market value:

"It would be difficult to suppose that a testator, and especially a father, in providing for a daughter by the absolute and immediate gift of a negro woman, could mean, that she should be at all the expense of providing for the mother during her pregnancies and confinements after child-birth, and yet give away two thirds of the offspring--almost the only profit of such slaves--which she may have in the course of her whole life. It would destroy the value of the gift, and, in effect, render the negro inalienable... The issue is to vest in three daughters, if at all, when and as it comes into existence; it is most unnatural, that the testator should have intended, on the one hand, that the infants should be immediately taken from the mother, and not reasonable, on the other hand, that the owner of the mother should be obliged to keep the children for the other owners, until it should be fit to separate them from the mother."⁹⁶

Upon the detailed ledger of cost and expense, as we see here, Ruffin quantified Leah's reproductivity numerically as the anticipated net profit resulting from the market price value of

⁹⁵ *Samuel Nelson & Al. v. Elizabeth Nelson & Al.* 41 N.C. 409 *

⁹⁶ *Nelson v. Nelson*, 41 N.C. 409, 417, 418, 1849 N.C. LEXIS 243, *13-14, 6 Ired. Eq. 409 (N.C. December 1, 1849)

her possible children (assumed as at most three) minus the costs of each of her confinements and pregnancies. It is also clear that Ruffin assumed a threshold at which the expenses of childbearing (and the attendant tolls on the body of the enslaved woman) would 'depreciate' her value beyond her market price, "in effect" to "render the negro inalienable." Leah's fertility, not labor, was deemed to be "almost the only profit" extractable from "such slaves." By ensuring that Leah and all her future children born after the death of the testator would not be separated but would jointly pass, as absolute property, to Elizabeth (Leah's designated owner), the ruling upheld Elizabeth's property right to profit from Leah and to alienate (sell) Leah and her children in any way she saw fit, together or separately. Moreover, Ruffin made clear that it was wholly within the ownership right of the testator (the decedent father), to gift an enslaved woman separate from any of her future children, "to give the mother to one and her first or second child or, even all her children, as they may be born during her life, to someone else," even if 'it is most unnatural.'⁹⁷

Bequests of 'future increase' of enslaved women by deceased slaveowners were racially gendered in both practice and effect. Monetary calculations of costs and profits pertaining to enslaved women's pregnancies, childbirth, and post-natal confinement were always ascribed lower value than white women's maternal care;⁹⁸ and the intended donees with life interest (as opposed to absolute interest), were most often (white) female family members.⁹⁹ In most cases

⁹⁷ Ruffin's position on 'slave gifting' to a daughter as a particular form/exercise of paternal affection was echoed by courts across the South, see note 61.

⁹⁸ See: Camille A. Nelson, "American Husbandry: Legal Norms Impacting the Production of (Re)Productivity," 19. *Yale Journal of Law and Feminism* (2007), 1, 3-5; Also cite evidence from the South Carolina case [Check Name, Cite] adjudicating owner's responsibility of medical treatment provided to enslaved pregnant woman, wherein the cost of treatment, by a Black midwife as was practice, and rationalized as necessarily less than the cost of treatment by a white midwife provided to a white woman.

⁹⁹ On the practice of 'gifting' enslaved children, born and projected, see Sarah Winter, "The Slave Child as "Gift": Involutions of Proprietary and Familial Relations in the Slaveholding Household before Emancipation," in Anna

testators, always white men in the cases before the courts, would bequeath the enslaved woman and her 'increase' to a female family member, such as wife or daughter, for temporary use as a 'life tenant' or for another stipulated life stage term (widowhood, pre-marriage, childhood), and provide the remainder to another legatee, often, even if not always, a male heir.

Beginning with North Carolina in *Timms v. Potter* almost all southern states adopted the common law real estate rule of 'remainder-man,' a "fixed rule of property," that held that "the increase of (female) slaves belongs to the remainder-man, and not to the tenant for life."¹⁰⁰ Since in practice the 'remainder-man' was most often a man,¹⁰¹ while the life tenant was almost always a female family member, the remainder-man rule in effect replicated the white patriarchy of plantation slavery's social order,¹⁰² ensuring that enslaved property remained, for the most part, within the absolute dominion of white male patriarchs, with women receiving mainly lifetime interests. As Senator John C. Calhoun famously told the U.S. Senate in 1838, "Every plantation is a little community with the master at its head, who concentrates in himself the united interests of capital and labor, of which he is the common representative." The planter was at once the master of wives and children, governor of slaves and "common representative" of all household dependents, providing the economic, moral, and familial organization that held the little community together.¹⁰³ All slave states, except the two Upper South states of Maryland and Delaware adopted the 'remainder-man' real estate rule, extending the dominion of planters over

Mae Duane (ed), *Child Slavery Before and After Emancipation* (New York: Cambridge University Press, 2017), 50-74. On gifting as a form of patriarchal dominion, see: Alphonso, "Naturalizing Affection," 194–213

¹⁰⁰ *Timm's v. Potter*, (North Carolina) 1 Haywood's Rep. 234. Also see: *Erwin v. Kilpatrick*, (North Carolina, 1825) 10 N.C. 456, 458, 1825.

¹⁰¹ See: for example, *Banks v. Marksberry*, *Erwin v. Kilpatrick*, *Timms v. Potter*, *Preston v. M'Gauhney*

¹⁰² The claim of 'whiteness' of such a patriarchal planter order follows from Walter Johnson's argument that non-slaveholding white households were "only temporary steps in the natural commercial evolution toward slaveholding," and that slaveholding was the foremost coveted status that made a household truly white, Johnson *Soul by Soul*, 90-91.

¹⁰³ Ford, *Deliver Us from Evil*, 525-526; Also Stephanie McCurry and Stephanie Smallwood.

'future increases' of enslaved women and likening enslaved women and their reproductivity to real estate. Warned Justice John Louis Taylor, Chief Justice of the North Carolina Supreme Court, in *Erwin v. Kilpatrick*, to 'draw [the rule] into controversy...would be attended with the most mischievous consequences.'¹⁰⁴

Occasionally courts, such as the Kentucky Court of Appeals in *Murphy v. Riggs*, defended the remainder-man rule also on grounds of humanity, "the rule has also its sanction in some of the strongest and tenderest feelings of our nature. The mother is not, by its operation, torn from her infant child, nor is the sucking child torn from the breast of its mother. The mother and her children pass together, from the tenant for life to him in remainder."¹⁰⁵ Any concern for keeping mothers together with their children invariably did little to sway the rulings of courts. In *Murphy*, for example, despite the acknowledgement of the humaneness of remainder-man rule, the court nevertheless determined it did not apply to the case at hand and separated the enslaved woman from her child on other grounds. Much like southern jurisprudence at large that favored the protection of the market over the fate of enslaved people,¹⁰⁶ the courts developed the remainder-man rule to order market expectations around liberal property principles, consolidating all property interests to the possible children borne by enslaved women in the person of the individual master or property holder, supporting in almost all cases his right to profit from, use, and dispose of his enslaved human property, even those as yet unconceived.

¹⁰⁴ *Erwin v. Kilpatrick*,

¹⁰⁵ *Murphy v. Riggs*, 8 Ky. 532, 533-534, 1819 Ky. LEXIS 65, *2-4, 1 A.K. Marsh. 532 (Ky. May 29, 1819)

¹⁰⁶ Alfred L. Brophy, "The Market, Utility, and Slavery in Southern Legal Thought," in *Slavery's Capitalism: A New History of American Economic Development*, ed. Sven Beckert and Seth Rockman (Philadelphia: University of Pennsylvania Press, 2016), 262–76. Brophy makes the argument that southern courts in the antebellum period, in particular, adopted a "proslavery instrumentalism" that effectively protected the market and principles of utility over concerns of humanity and sentiment.

Questions of separate ownership of enslaved mothers and their children by lifetime tenants or by the remainder-man, also necessitated judicial consideration of whether an enslaved mother's 'increase' was an integral part of her 'stock' or whether her children were additional, separate, "profits" or "income." The majority of states by adopting the remainder-man rule, considered enslaved women and their projected increase as de facto one consolidated property that passed first to the life-time tenant and then, absolutely, to the legatee/remainder-man. The North Carolina Supreme Court in *Covington v. McEntire* observed, "...that the law held that the increase were appurtenant to and formed a part of the parent stock and thus became the property of the ulterior legatee unless it could be clearly collected from the will that the testator excluded the increase from the gift."¹⁰⁷ The assumed property consolidation (of mother and future children) did not diminish the nascent separable quality of them as forms of property, insofar as the courts repeatedly upheld the absolute right of the individual slaveowner to separately dispose of the mother, as existing property, from her projected children, who were "contingent property."¹⁰⁸

However, the border states of Maryland and Delaware, adopted a contrary rule: that the child born to an enslaved woman when possessed by a life tenant was the property of the life tenant and not the remainder-man. This contrary rule was sometimes also argued on the basis of "justice and humanity," as Delaware's Chief Justice, John M. Clayton claimed in *Smith v. Milman* (1839), who summarized the life-tenant rule thus: "He who supports the child of the slave in infancy...ought to be justly remunerated for his expense and trouble by its services and the expectation that he will be so remunerated, will insure greater care and attention to the wants

¹⁰⁷ *Covington v. McEntire*, 37 N.C. 316, 316, 1842 N.C. LEXIS 155, *1, 2 Ired. Eq. 316 (N.C. December 1, 1842)

¹⁰⁸ *Banks's Adm'r v. Marksberry*, 3 Little's Rep, 275; *Nelson v. Nelson*, *Fulton v. Shaw*, 25 Va. 597, 599, 1827 Va. LEXIS 1, *4-5, 4 Rand. 597 (Va. January 23, 1827)

of the child."¹⁰⁹ The courts in this case viewed the enslaved women's future childbearing as personal property, not real estate, adopting a livestock analogy to analogize all future children to the "increase of livestock,"¹¹⁰ who similarly "belongs to the owner or person entitled to the usufruct at the time of the increase."¹¹¹ In either case, whether through the real estate remainder-man rule or the personal property-based life-tenant rule, the question was not whether the principle of humanity should prevail over market profit (and enslaved children should be kept with their mothers), but *whose* property right (lifetime tenant or remainder man) included the right to expropriate and profit from future children, separably and independently from their mother.

Across all courts however the slaveowner's property right to profit from the enslaved mother entailed detailed calculations of net monetary gain offset against cost/expenses of her reproductivity (loss of her labor during pregnancy, medical costs of confinement and delivery, maintenance of young children before they were economically viable).¹¹² By engaging in such valuations of 'future increase' and their property value to legatees, the courts commodified and transformed the kinship bonds between the mother and child into extractable, alienable, property. As Judge Tuck suggested, "we see that the idea of property in the mother, has much to do in determining who is entitled to the increase."

Conclusion

¹⁰⁹ *Smith v. Milman* 2 Del. 497, 498 (1839); Also see: *Scott v. Dobson*, 1 H. & McH. 160; *Somerville v. Johnson*, 1 H. & McH. 348; *Standiford v. Amoss*, 1 H. & J. 526; *Hamilton v. Cragg*, 6 H. & J. 16; *Bohn v. Headley*, 7 H. & J. 257.

¹¹⁰ *Smith v. Milman*, 2 Del. 497, 498 (1839)

¹¹¹ *Id.*

¹¹² See Schwartz, *Born in Bondage*, which also cites profit/economic calculation of women's offspring offset against loss of her services during confinement as a primary, widespread, practice among antebellum slaveowners.

The paper has developed and applied the critical framework of racial capitalism to slavery as a system of property, highlighting the overlooked, racializing, feature of *dispossession* in the composition of property-based social relations. In assembling the central argument that southern states' expropriated Black female reproduction through property law development, the paper developed the broader theoretical proposition that sexual reproduction plays both a constitutive and extractive role in state-building, delineating separate sets of state interests and actions that have foundationally been racial and gendered in focus and application. Whereas much has been written and theorized about white female reproduction as central to the nineteenth century American state and to state politics, exploring the reasons and conditions under which (white) women's autonomy over their sexuality was constrained and delegitimized (Novkov, Pascoe, Lovett), there has been far less scholarly attention to states' interest in Black women's reproduction or to its uniqueness to the history of American capitalism.

By focusing more squarely on the material and *economic* significance of reproduction to states, reproduction itself as an ownable property interest and not solely as a 'cultural' concern, the paper spotlights the centrality of Black women's reproduction to southern states' interest in developing capitalism. In so doing, the paper hopes to make clear states prevailing interest in Black female reproduction as a dispossessive, expropriate-able resource in contrast to its concern with white men's reproduction as possessive property, whereby states through property rules naturalize whiteness as white masculinist property possession and Blackness as Black female reproductive dispossession.

The paper also tells the empirical story of how after the end of the transatlantic slave trade, in the midst of several convergent factors: slavery's capitalization, the rise of abolitionism as a political force, and the concomitant reframing of slavery's defense as a domestic paternalist

enterprise, southern state and social practices worked in tandem to naturalize the increasing incidence of expropriation of Black women's reproductivity as a distinct property resource, for the use and benefit of the slaveowner. This is as much a story of race making as it is a legal historical story of property making and doctrinal development. In so doing, the paper has sought to contribute to three sets of literatures. First, the paper contributes to historical and political development scholarship that has shown southern states' heightened practice in the postbellum period of policing interracial sex between white women and Black men, as a means to reconstruct white superiority after slavery's demise through regulation of white female reproductivity (Novkov, *seminally*). In its focus on the preceding era of slavery in the American south, the paper suggests that Black female reproductivity also had foundational, but much more economic, significance to southern states, serving as the very legal site to construct and mark Blackness as property itself (and elevating the reach of white male property holding) producing unique logics of Black inferiority as non-familial and perpetually market-bound.

Second, the paper contributes to the work of reproductive justice scholars, who have highlighted the racist double standard used in contemporary neoliberal state policies, dispossessing Black and brown poor women of reproductive choice *to* have and to nurture their own children as opposed to state's pro-natalist interest in limiting white women's reproductive choice *not* to have children. The paper suggests that this racist (and gendered) standard reflects longstanding differences in states' interest in white and Black women's reproductivity and fertility; and in particular underscores the singularity of Black women's reproduction seen by the state wholly in market terms, as non-familial and economic, to be considered on the ledger of market costs and benefits as opposed to the cultural and affective value attributed to white reproduction and childbearing.

Finally, the paper contributes to the new histories of slavery as a distinct form of American capitalism by (a) developing a new critical theoretical approach centered on property law as an emerging technology of the state, and (b) demonstrating Black sexual reproduction as an overlooked site of legal innovation in the antebellum nineteenth century. Heeding the call, to examine "law...as a vehicle for achieving mastery over nature and other beings,"¹¹³ the paper emphasizes property law's significance as both a social and structural mechanism but also as a discursive and ideological force, normalizing the otherwise 'unnatural' transformation of human kinship and reproduction into market property and ownership rights. By adjudicating property claims and devising property rules such as *partus sequitur ventrem* and the remainder-man rule, southern courts structured social expectations around the idea of dispossessing Black women of their most intimate personality for market profit and use. Future work would do well to explore the reproduction-as-property approach developed here, analyzing the development of specific property law doctrine, taxation, and/or monetary policies as part of the legal technology of racial capitalism that potentially dispossesses Black and brown women of their kinship, children, and families, in the name of property rights, markets, and profit.

¹¹³ Beckert and Rockman, "Introduction" in *Slavery's Capitalism*, 25.