Slavery & Shadow Families: Re-Thinking Miscegenation Regulation Through the Lens of Caste

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In 1826, Elisha Brazealle, a white resident of Jefferson County, Mississippi, took "a negro woman" he enslaved and their son, John Monroe Brazealle, to Ohio to free, or manumit, them. After executing a deed of emancipation, he brought them back to Mississippi. At his death, he left a will devising his entire estate to John Monroe. Brazealle was survived by neither a wife nor other children. Collateral relatives, all white, challenged not only Brazealle's testamentary gift of property to his son, but the emancipation itself, claiming John Monroe as part of the estate to which they were entitled as Brazealle's legal heirs. The chancery court upheld the putative heirs' challenge to the will and the Mississippi Supreme Court affirmed. John Monroe and his mother were re-enslaved and distributed to their white relatives as part of Elisha's estate.[1]

In 1850, James Brown, also a resident of Mississippi, took a "mulatto woman named Harriet" he enslaved and their four children, Francis, Jerome, Teresa, and Louisa, to Ohio to manumit them. After freeing them, he sent them on to Indiana where they lived as free blacks. At his death, he left a will instructing his executors to liquidate his estate (i.e., sell his plantation and remaining slaves), pay his debts, and deposit the surplus in the Bank of Louisiana for the benefit of his sons, who would remain in Indiana. Brown's collateral heirs also challenged the emancipation and the testamentary gift of property to his black family. In this case, the Mississippi Supreme Court overruled the chancery court and ordered the manumission and testamentary gifts to be valid.[2]

Two narratives of interracial intimacy have dominated in U.S. culture. Law plays central roles in both. The first story, and the one probably most familiar to legal scholars, is about the web of rules states erected prohibiting and punishing interracial intimacy. In this understanding of history, criminal and civil bans on miscegenation repressed interracial intimacy much as other Jim Crow statutes repressed other social relations between the races. Miscegenation regulation appears to be the sexual manifestation of social apartheid, implementing in the bedroom what

[1] Hinds v. Brazealle, 3 Miss. 837, 2 How. 837 (Miss. 1838).

[2] Shaw v. Brown, 35 Miss. 246 (1858).

segregation implemented in the streets. In short, law worked to secure sexual racial apartheid.[3] The second narrative of interracial intimacy is about antebellum slavery and its sexual injustices and injuries. Criminal law excluded enslaved black women from protection from rape while the status rule of *partus sequitur ventrem* dictated that a child's status as slave or free was inherited from the mother, without regard to the father. These legal rules allowing sexual and reproductive commodification and coercion secured white male sexual access to black women, the conceptual converse of sexual racial apartheid. In short, slavery comprised a society in which white men could pursue their intimate interests at will, or what I call "sexual libertarianism."

Each of these two narratives represents the injuries of miscegenation regulation in very specific ways. According to the first, racial hierarchies are reinforced by securing sexual segregation–or sexual racial apartheid. In the second, law inflicts racial injury by protecting white men's unfettered sexual access to black women–it secures black women as sexual property. Both accounts, sexual racial apartheid and sexual libertarianism, rest on excellent history done by legal scholars and historians and have generated rich, and growing, literatures. Yet, this Article uses the two Mississippi case studies with which it started to expose the limits of both of these dominant stories about interracial intimacy governance and some of the contemporary claims they have generated. Both conflicts involve challenges to white men's efforts to free and leave property to families they fathered and

[3]Technically, these and other statutes prohibited whites from marrying non-whites, a point emphasized in the Loving v. Virginia opinion which concluded that the statutes were designed to promote racial hierarchy. However, for simplicity's sake, I will use the broader terms "miscegenation" and "interracial intimacy" in referring to these statutes and constitutional rules. *See infra* notes [Virginia statute citations].

enslaved, or what I call their shadow families. By contrasting these two cases–one shadow family wins and one shadow family loses–the Article exposes how a crucial, yet under-attended, task of miscegenation management was to guard against the threats posed by otherwise authorized interracial intimacy and unconstrained white male sexual liberty. Comparing the underlying facts of the cases shows how law defined the limits of miscegenation at the point it threatened the social order: free shadow families owning substantial property in the antebellum South. Neither an understanding of miscegenation rules as keeping blacks and whites apart–sexual racial apartheid–nor as giving white men free sexual rein–sexual libertarianism–predicts or accounts for the law's management of the shadow family threat. Sexual segregation was not the goal or solution and white male privilege didn't always work in the ways we imagined it did.

How then should we understand miscegenation regulation? The Article does not make the standard legal scholarly move to deny the explanatory power of sexual racial apartheid or sexual libertarianism as accounts of law's role in managing interracial intimacy. To the contrary, each yields a central insight about the legal history of miscegenation regulation. Rather, the Article argues that the shadow family cases taken together with insights from the extant dominant narratives suggest the presence of a broader paradigm governing interracial intimacy: caste. The central task of caste regulation is not to keep races apart, but rather to manage the inevitable interaction between them, securing social hierarchies by regulating points of social contact. As the shadow family cases illustrate, sexual and intimate contact are places where property is particularly susceptible to re-distribution. (I'll distinguish between the racial, economic, and sexual property that are at issue.) When not properly managed, interracial sexual

relations may pose threats to social hierarchies that are often missed or glossed over under narratives of intimacy as romance. The Article exposes miscegenation regulation as a crucial tool of caste regulation, a set of laws and doctrines designed to repress intimate relations that might threaten the social order, while expediting those that would reinforce it.

Certainly, I am not the first scholar to conceive of race in America as caste. Most notably, historian Oliver Cox and legal scholars Cass Sunstein, Willie Forbath, and even Richard Epstein have also characterized it in this way.[4] Yet, no one has considered racial caste through this sexual and gender lens, as regulating the threat posed by outlier intimacy to closely held property.

What are the larger stakes here? Neither of these narratives are of purely historical interest. Both have shaped how we think about the politics and meaning of interracial intimacy today. For instance, contemporary commentators, including many legal scholars, have gained much traction from the notion of miscegenation regulation as sexual racial apartheid. The story goes like this: the injury of bans on interracial intimacy was in their repressive effect–prohibiting and punishing interracial sex–and hence rising rates of interracial intimacy, enabled by the repeal of laws banning such intimacy, are a bellwether of racial progress. In this version of what I call the "bellwether hypothesis," interracial intimacy family formation heralds true racial equality, or in a more extreme form, predicts and argues for the demise of the racially conscious state. Remove the law and let them love.

On the other hand, the ugly and brutal history of the law's refusal to intervene in white male sexual violence against enslaved black women has generated a far more pessimistic vision

[4] *See infra* notes []and accompanying text.

about the subversive potential of interracial intimacy. Historians have long argued that slavery required whites to make substantial concessions of personal liberty to maintain racial control, most notably freedom of speech and state interference with the slave relationship itself. Yet, in the context of sexual and intimate relations, historians have concluded white men enjoyed unfettered sexual liberty. This story is an extremely juridical one in which law confers on white men close to complete sexual power to be wielded against black women in some part *because*, unlike completely free speech, white men commodifying and coercing black women's intimate lives reinforces the racial and gender orders comprising slavery. Unlike the bellwether hypothesis belief that interracial intimacy heralds true racial equality, according to what I label the juridical imperative, sex between white men and black women remains in the service of structural racial supremacy and the sexual interests of white men were coterminous with those of the slaveholding state.

The Article concludes by showing how conceiving miscegenation regulation as caste regulation challenges and complicates both of these broader normative claims about intimacy, the bellwether hypothesis and the juridical imperative. The caste rubric argues for a different way of thinking about the politics and possibility of interracial intimacy today. In the end, then, this Article uses the shadow family cases to make two sets of claims, one about the legal past and one about the legal present.

This Article proceeds in four parts. Section I explains the two dominant accounts of miscegenation regulation as sexual racial apartheid and sexual libertarianism. It reviews, briefly, the relevant regulatory regimes and the normative claims about interracial intimacy–the bellwether hypothesis and the juridical imperative–each has generated. Section II turns its

attention to cases that the two dominant accounts cannot adequately predict or explain: efforts by slaveholders in Mississippi to manumit and leave property to what I describe as their shadow families. While these two cases yield opposite outcomes, taken together they suggest the descriptive and normative limits of both of the dominant accounts. This Article does not seek to replace either of these accounts; to the contrary, each offers central insights about interracial intimacy regulation in the U.S. Rather, Section III makes the case that the common thread linking *all three accounts* is caste, or efforts to regulate interracial contact to reinforce and maintain racial and gender hierarchies while minimizing and managing the threats that certain forms of intimacy might bring. This Section attempts to offer a so-called "thick" description of what I mean by caste regulation, distinguishing it from others who have used this rubric, most notably Cass Sunstein, William Forbath, and Richard Epstein. It also contrasts the caste account with Andy Koppelman's persuasive argument about analogies between miscegenation and gay marriage regulation. Section IV concludes the Article by revisiting the bellwether hypothesis and the juridical imperative, suggesting some of the implications of the shadow family cases and the caste rubric for our understandings of American law's interplay of sex, race, and power in history and today.

In some ways, this Article continues a story I began several years ago about how southern courts confronted with slaveholder wills manumitting and leaving property to shadow families
could uphold these wills and yet secure racial hierarchies at the same time.[5] I argued that

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[5] Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STANFORD L. REV. 221 (1999) [hereinafter, Davis, *The Private Law of Race and Sex*].

testamentary manumissions allowed slaveholders to maintain power over their shadow families through-out their erotic and affective lives and speculated that inter vivos, or lifetime, manumissions would pose a far greater threat to white male sexual power. This Article takes up where that one left off, investigating such inter vivos manumissions and concluding that the threat they posed was actually to the slaveholding state itself.

A couple of caveats. First, the focus of this Article is on the regulation of interracial intimacy between blacks and whites in the U.S. South. Other legal scholars and historians have done broader studies or have focused on other groups.[6] My argument, though, is not about intimacy itself. Rather, it is about paradigms for understanding its legal management and the normative claims and understandings those paradigms have sponsored. Second, this is a paper about legal ideology. These case studies are fairly anomalous and should not be taken as indicative of broad trends in southern society. Few slaveholders manumitted their shadow families and even fewer transferred property of any note. As in my prior work, this Article's claims are about legal and cultural ideology, not sociology. Finally, the Article does not mean to de-emphasize the horrors of lynching or the regularity and brutality of rape and overt sexual

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[6] *See, e.g.*, ROBERT CHANG, DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION STATE (1999); Leti Volpp, Latcrit IV, *Diversity, Commonality, and Identity: American Mestizo: Filipinos and American Laws in California*, 33 U.C. DAVIS L. REV. 795 (2000) (Filippinos and whites in California) [hereinafter, Volpp, *American Mestizo*]; Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257 (1997) [hereinafter, Kwan, *Cosynthesis of Categories*]; Peter Kwan, *Complicity and Complexity: Cosynthesis and Praxis*, 49 DEPAUL L. REV. 673, 688 (2000) [hereinafter, Kwan, *Cosynthesis and Praxis*]; A READER ON RACE, CIVIL RIGHTS, AND AMERICAN LAW: A MULTIRACIAL APPROACH (Timothy Davis et al eds., 2001); Peggy Pascoe, *Race, Gender, and the Privileges of Property: On the Significance of Miscegenation Law in the U.S. West*, in OVER THE EDGE: REMAPPING THE AMERICAN WEST 215, 215 (Valerie J. Matsumoto & Blake Allmendinger eds., 1999) [hereinafter, Pascoe, *Race, Gender, and the Privileges of Property*]; MIXED RACE AMERICAN AND THE LAW: A READER (Kevin R. Johnson ed., 2003) (anthology of essays on US).

violence in American slavery. (Or to represent enslaved women as complicit succubi in a pornographic sexual schema. There is real risk that what we might lose is an appreciation for the moral repugnance of the system.) In short, the Article does not make the standard challenge to replace either of these standard accounts. To the contrary, I firmly believe that the scholarship on rape and forced reproduction implemented a critical paradigm shift in slavery studies, drawing attention (finally) to how endemic sexual exploitation was to slavery. Similarly, the maintenance of sexual racial apartheid between black men and white women was one of the most brutal manifestations of Jim Crow. Rather, my concern is that, by limiting our understanding to sexual racial apartheid and sexual libertarianism, we miss how other laws too have shaped our sexual racial landscape.

I. Narratives of Interracial Intimacy: Sexual Racial Apartheid & Sexual Libertarianism

Legal regulation of sex between blacks and whites erected two distinct regimes on which scholarly and popular understandings of interracial intimacy rest. This Section describes the two sets of laws and their corresponding narratives that, I'll argue, dominate thinking about interracial intimacy and its regulation. It then considers some of the contemporary claims about interracial intimacy they have generated.

A. *Sexual Racial Apartheid*

One narrative, and perhaps the dominant one, of interracial intimacy derives from the web of rules states erected that directly prohibited and punished miscegenation. This understanding of interracial intimacy regulation is dominant in large part, I think, not only

because of formal prohibitions on interracial marriage and sex, but also the supporting cast of uncompromising and brutal laws and practices that accompanied them. Here I explore, briefly, this legal regime, and the ways it sought to prevent and punish interracial sexual contact. What we encounter is the apotheosis of miscegenation regulation as prohibitory, repressive--and even lethal.

1. The Regulation: Sexual Segregation

a. Bans on Interracial Marriage

Forty-one states/colonies prohibited marriages between the races.[7] While some prohibited any interracial marriage, many limited their scope to whites marrying non-whites. Bans could have two components. First, they might criminalize such marriages. Lest we fall into the presentist assumption that these laws were similar to contemporary sexual morality statutes that largely go unenforced (i.e., heterosexual sodomy and adultery), many states mounted active prosecutions against those who did marry members of another race.[8] Some even

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[7] For excellent general histories of these statutes, see for example, DAVID FOWLER, NORTHERN ATTITUDES TOWARD INTERRACIAL MARRIAGE (1963); Byron Curtis Martin, Racism in the US (1979); Kitchen, Interracial Marriage in the US: 1900-1980 (1997). Peggy Pascoe's work also sheds significant insight into miscegenation regulation. *See* Pascoe, *Race, Gender, and the Privileges of Property*, *supra* note []; Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 J. AM. HIST. 44, 61-63 (1996) [hereinafter Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race"*]; Peggy Pascoe, The Production of Privilege from the Perception of Equality: Gender, Law, and "Miscegenation" Regulation in the Reconstruction-Era U.S. South, 1864-1879 (unpublished manuscript on file with author).

[8] Historical data is still very limited, but historians have begun excellent work in this area. *See, e.g.*, Julie Novkov, *Racial Constructions: The Legal Regulation of Miscegenation in Alabama, 1890-1934*, 20 LAW & HIST. REV. 225, 57 n.5, 2 (2002) (study of Alabama between 1883-1938 finding that Alabama attorneys general filed over 300 charges for violations of

prosecuted religious and other officials who performed such marriages.[9] Penalties ranged from fines to imprisonment and hard labor.[10]

Legal nullification of the marital contract had significant civil effects, as well, which have been under-attended in legal scholarship on miscegenation, as well as on marriage.[11] Without the formal, legal recognition of marriage, sexual families do not yield the economic and

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miscegenation laws, resulting in 177 convictions; 38 of these produced appellate court opinions) [hereinafter, Novkov, *Racial Constructions*]; Julie Novkov, The Best Interests of All Our People: Miscegenation and the Socio-legal Construction of Whiteness in Alabama (unpublished manuscript on file with author) [hereinafter, Novkov, Best Interests]. One legal scholar has uncovered a fascinating use of the rule in a California murder trial. A Filippino man was charged with murdering his white wife's lover. He invoked spousal privilege in order to exclude the wife's testimony, but the State had the marriage declared void, thereby defeating his assertion of privilege. Volpp, *American Mestizo*, *supra* note [].

[9] [cite case where minister fined; statutes] *See* Novkov, Racial Construction, *supra* note [], at 5 (characterizing officiating the marriage of parties of different races as strict liability, regardless of knowledge). Interestingly, Novkov found that the only successful appeal to a miscegenation conviction in Alabama between the end of the Civil War and 1889 involved a justice of the peace/minister. Novkov, *Racial Constructions*, *supra* note [], at [] (discussing case cite); Novkov, Best Interests, *supra* note [], at 17. Novkov notes that only the statutes directed at officiates had a truly independent standing from other sexual regulations. Novkov, Best Interests, *supra* note [], at 15.

[10] [fill in cite] Novkov, *Racial Constructions*, *supra* note [], at 34 (black woman sentenced to seven years in penitentiary). Alabama and Georgia sentenced women to seven and ten years in prison, and one religious official to [fill in the sentence].

[11] Historian Peggy Pascoe's work has foregrounded this effect. Pascoe's work is discussed infra, notes [] and accompanying text. *See also*, Berry, *supra* note []; Davis, *Private Law of Race and Sex*, *supra* note [] (describing marriage as racial institution); Mary Lou Fellows, *Wills and Trusts: "The Kingdom of the Fathers*,*"* 10 LAW & INEQ. J. 137 (1991) [hereinafter Fellows, *"Kingdom of Fathers"*]; Saks, *supra* note [].

other legal relationships that can be critical to sustaining a family.[12][13] And, contrary to popular belief, these economic abilities and disabilities of marriage affect much more than just inheritance among the wealthy. For instance, one major benefit to legally recognized families is the homestead exemption, which protects the "family" home against creditors. Hence, miscegenation regulation entailed economic as well as criminal surveillance and punishment.

b. Bans on Interracial Sex

Statutes criminalizing interracial sex worked in tandem with the legal bans on interracial marriage.[14] Anti-fornication laws prescribed heightened penalties for non-marital sex between whites and non-whites.[15] The anti-marriage statutes not only criminalized, but, as just mentioned, nullified the legal effects of these interracial marital contracts. Once a marriage was

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[12] *See generally* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995) (quote defining sexual family).

[13] For further discussion, see Davis, *Private Law of Race and Sex*, *supra* note []. Contemporary advocates of same-sex marriage have identified at least [number] legal rights and abilities that inure to married couples. *See, e.g.*, Ira Ellman, [cite]. *But see* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995) (arguing state should support bonds of dependency, not "horizontal" affective ones).

[14] Julie Novkov offers a helpful description of the interplay of rules prohibiting adultery and fornication with anti-marriage laws. Novkov, Best Interests, *supra* note [], at 14-15. *See also*, Pascoe, *Race, Gender, and the Privileges of Property*, *supra* note [], at n.15 and accompanying text.

0. For instance, in Alabama, adultery and fornication were each misdemeanors, but miscegenation was a felony that could result in imprisonment. Novkov, *Racial Constructions*, *supra* note [], at 6; Novkov, Best Interests, *supra* note [], at 15. These were upheld in 1883. Pace v. Alabama, 106 U.S. 583 (1883) (upholding fornication laws giving heightened penalties for sex between members of different races.) The U.S. Supreme Court declared these laws unconstitutional three years before the *Loving* decision. McLaughlin v. Florida, 379 U.S. 184 (1964).

declared void, the couple could be prosecuted for having unlawful sex outside of marriage, with more severe penalties than if they engaged in sex outside of marriage with someone of the same race.[16] Paradoxically then, marriage across the color line entailed heightened risk of prosecution for fornication (thereby defying the logic of anti-fornication law). The anti-fornication laws also were the basis for wide-spread independent prosecutions. But they operated synthetically with the anti-marriage statutes to produce a unique Catch-22 for those who dared love across the color line.

c. The Southern Rape Complex

Undergirding these direct prohibitions on miscegenation were criminal and vigilante regulatory forces, directed primarily at interracial intimacy between black men and white women. Much has been written about how the South construed black men as sexual predators of white women, commandeering rape law and lynching in the service of protecting white womanhood.[17] Criminal law of rape incorporated massive racial disparities along two axes: prosecution and punishment. Jim Crow southern courts concluded that white women were

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[16] *See* Novkov, *Racial Constructions*, *supra* note [], at 5-6 (Alabama's fornication prosecutions of nullified couples typified this pattern); *see also*, Pascoe, *Race, Gender, and the Privileges of Property*, *supra* note [], at 217 ("criminal courts treated offenders as if they had never been married at all; that is, prosecutors charged interracial couples with the moral offense of fornication or some other illicit sex crime, then denied them the use of marriage as a defense.").

[17] *See, e.g.*, RANDALL KENNEDY, RACE, CRIME, AND THE LAW [pin] (1997). Much has been written about the use of interracial rape to police racial and gender norms. *See, e.g.*, DOWD HALL, *supra* note [] (using biography of anti-lynching reformer to explore racial and sexual politics of both lynching itself and anti-lynching struggles); GILMORE, *supra* note [] (offering rich account of political historical context); *see also*, Holden-Smith, *supra* note [], (1996) (analyzing role of black on white rape in defending lynching); Valerie Smith, *Split Affinities: The Case of Interracial Rape*, *in* CONFLICTS IN FEMINISM 271 (Marianne Hirsch & Evelyn Fox Keller eds., 1990) (considering from literary perspective).

presumed to have withheld consent from sexual relations with black men *as a matter of law*. While typically this sealed a conviction, one black defendant was the beneficiary of this presumption when a judge overturned his conviction, concluding that the exclusion of exonerating evidence was fatal because "without such evidence, the jury could be forgiven for presuming that no white woman would ever consent to crossing the racial boundary, even if she had transgressed sexual boundaries with white men."[18] As the second axis of analysis, punishment, shows, the consequences were serious. Until *Furman v. Georgia* in 1972, rape constituted a capital crime in every southern state.[19] Black men suffered disparate treatment for sexual assault not just in prosecution and conviction, but also in penalty. Rape of a white woman by a black man was perceived as one of the most brutal crimes that could be committed and was punished accordingly.[20] (Its converse was, and remains, the least serious.[21]) Not only executions, but also non-capital sentencing for rape was starkly racially disparate.[22]

Thus rape in the post-Reconstruction South, the reality and the doctrine, evolved into an

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[18] *Story v. State*, 59 So. 480, [pincite] (Ala. 1912).

[19] 408 U.S. 238 (1972) (finding death penalty unconstitutional).

[20] Rape prosecutions took on a gruesomely voyeuristic quality. Black men rapists were big, burly, and brutish; the age of the victim was often reduced; the victim was repeatedly assaulted; the victim was sexually innocent and/or information was withheld. *See, e.g.*, [cites].

[21] According to a 1988 study quoted in Kennedy, the rapes taken most seriously are black men/white women; the least serious: white men/black women. The average prison term for raping black woman is two years; a Hispanic woman five years, and a white woman ten years. KENNEDY, *supra* note [], at 73.

[22] Randall Kennedy's in-depth research demonstrates how this affected punishment. In Virginia between 1908 and 1949, no white men and 45 black men were put to death for rape. During those same years, of those *convicted*, twice as many blacks as whites were sentenced to life. In Florida between 1935 and 1955, 23 blacks were executed for rape and 1 white. KENNEDY, *supra* note [], at 312, 316.

expressly and intensely racialized phenomenon.[23] Rape was construed as an assault on both *white* womanhood (which it was not when white men raped white women[24]) and, most outrageously, on white male authority.[25] Significantly, the racial politics of black on white rape resulted in racial consolidation, eroding class distinctions between white women.[26] For instance, under slavery, prosecutions of (enslaved) black men for alleged rapes of white women did not *uniformly* result in convictions.[27] Failure to conform to class-coded norms of gender and sexuality could severely harm a white woman's ability to be a credible prosecutrix.[28] But as southern white elites regained power following Reconstruction, they developed a monolithic construct of white womanhood, one that took its meaning in no small part from interracial rape.[29] Abandoning previous condemnations of white women who did not conform to elite norms of gender and sexual performance, courts now proclaimed that "though a white woman be a prostitute, the presumption is strong, nearly conclusive, among both the races, that she will not yield--has not yielded--even in her confirmed depravity, to commerce with a Negro charged with

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[23] GILMORE, *supra* note [], at []; *see also*, DOWD HALL, *supra* note [], at [] (insert quote into parenthetical).

[24] Indeed, white male rape of white women was largely understood as an assertion of male authority, an entitlement of marriage or other relationship, or the deserved "due" of women who did not conform to social sexual norms. *See, e.g.*, [cites].

[25] *See, e.g.*, DOWD HALL, *supra* note [], at []; GILMORE, *supra* note [], at []. Under slavery, the combination of these two represented southern sovereignty.

[26] On class divides among southern whites in the nineteenth century, see [cites].

[27] This is discussed infra notes [] & accompanying text.

[28] I certainly don't mean to endorse this; see infra notes [] & accompanying text.

[29] This had not always been the case. For discussion of impact of class and reputation on antebellum rape litigation in the South, see infra notes [] and accompanying text.

an offense against her person."[30] Southern courts sacrificed rape law's function as a tool of gender and class discipline to deploy it as a tool of racial supremacy.

This leads to the most brutal and disturbing manifestation of the southern rape complex, lynching. Expressions by black men of a desire for interracial sexual intimacy were construed as racial rebellion, justifying the most brutal of regulatory practices, lynching. As several scholars have noted, most victims of lynching were not accused of rape.[31] Assertions of economic, political, and social equality were at least as likely to generate these brutal tortures and murders. Yet, southern whites filtered these other apparent racial transgressions through the emotionally charged filter of interracial rape. Despite on-going public outcries against it, black lynching was justified by white southerners as necessary in light of the propensity of black men to rape white women.[32] One man said (presumably to white men in the North): "You have never had to leave your home with a feeling that upon coming back you might find your wife or daughter outraged and probably dead. Well that is the condition that faces the Southern people day-to-day, and there is no law to stop it . . . until the negro comes to realize that it is sure death for him to commit this outrage."[33] Similarly, southerners denounced the federal Dyer bill to prevent

[30][case cite] (), *discussed in*, Novkov, *Racial Constructions*, *supra* note [], at 14.

[31] [add cite]

[32]*See* Holden-Smith, *supra* note [], at [] (in *actual lynchings*, charges of rape accounted for only roughly one third of the murders); DOWD HALL, [pin cites]; HODES, *supra* note [], at 75 (probably expand her citation); KENNEDY, *supra* note [], at 39, 45 (while rape was the most emotional and potent rationale for lynching, murder was the most widely used excuse); Coleman Jordan, *supra* note [], at 562.

[33] [find citation]

lynching as a bill to encourage rape.[34] Lynching was an extreme, but necessary form of regulation because "black men lusted after white women with such powerful longing that ordinary means of control were insufficient."[35]

While it might be tempting to condemn lynching but ultimately dismiss it as the individual deviancies of brutes, it was understood by all involved as a quasi-legal (and highly effective) institution. Lynching functioned as quasi-legal in at least three ways. First, southerners, white and black, understood it to be connected to the prosecution (or abdication) of justice. Hence the celebration/condemnation of "Judge Lynch."[36][37] Second, legal officials at all

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[34] *See* Holden-Smith, *supra* note [], at [] (examining failure of federal policy to enact anti-lynching laws during Progressive era); KENNEDY, *supra* note [], at 49-58 (analysis of federalism in lynching regulation, in part comparing opposition to Dyer anti-lynching bill with passage of the Mann Act).

[35] KENNEDY, *supra* note [], at 45. Kennedy continues: "According to the white supremacist intellectual Philip Alexander Bruce, white women so arouse black men that they are moved 'to gratify their lust at any cost and in spite of every obstacle.'" *Id.* at 45 (footnote omitted).

[36] On the origins of "Judge Lynch," see FRANK SHAY, JUDGE LYNCH: HIS FIRST HUNDRED YEARS (1938); WALTER WHITE, ROPE AND FAGGOT: A BIOGRAPHY OF JUDGE LYNCH (1929) As Angela Harris powerfully put it: "The ironic term "Judge Lynch" captures the sense that lynching was both against the law and constituted the most extreme enforcement of the law." Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 1967 (2000). *See also*, Robert Chang, [cite] (discussing Judge Lynch in context of Asian violence). Similarly, the phrase "lynch law" is telling. The origins of the phrase are unclear. *Compare* Harris, *supra* note [], at 197 n.5 (parenthetical) *with* JAMES E. CUTLER, LYNCH-LAW: AN INVESTIGATION INTO THE HISTORY OF LYNCHING IN THE UNITED STATES (1905) (parenthetical).

[37] In Emma Coleman Jordan's description, "Lynching with ritual mutilation became a dark system of law as firmly enforced as statutes and cases of formal laws. . . . Lynch mobs were formed to displace conventional legal processes. However, at the same time, this pattern of lawlessness redefined the meaning of law itself." Coleman Jordan, *supra* note [], at 565 (footnote omitted).

levels were implicated in lynching, either actively or passively. While the complicity of sheriffs and other local law officials is well-documented, southern leaders in the highest political offices–including the governors of South Carolina and Mississippi (two from the latter) and at least one United States senator–also endorsed lynching and even boasted that they had led mobs.[38] Finally, murders committed in the context of lynchings enjoyed immunity from prosecution.[39] After 1900, fewer than one percent (.8%) of lynchings were followed by convictions.[40] In this sense, they were viewed by the white community as justice proceedings. And by the black community as a complete corruption of justice. By the early twentieth century, lynching atrocities had become one of the most brutal forms of American miscegenation regulation.

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[38] KENNEDY, *supra* note [], at 46-47. "Cole Blease, governor of South Carolina, received the finger of a lynched black in the mail and planted it appreciatively in the gubernatorial garden." *Id.* at 46 (footnote omitted).

[39] "In some of the pictures, some members of the mob posed brazenly, without hiding their faces, or showing any sign that they were engaged in murder. The photographs bore testimony to the undeniable legal immunity conferred by whiteness." Coleman Jordan, *supra* note [], at 549 (reviewing photographs of lynchings from Library of Congress and Tuskegee files); *see also*, KENNEDY, *supra* note [], at 46. And, according to Hodes:

> As black bishop Henry McNeal Turner observed in 1893, the local papers "can advance what they are going to do, how and when it was done, how the rope broke, how many balls entered the Negro's body, how loud he prayed, how piteously he begged, what he said, how long he was left hanging, how many composed the mob, the number that were masked, whether they were prominent citizens or not, how the fire was built that burnt the raper, how the Negro was tied, how he was thrown into the fire, and the whole transaction; but still the fiendish work was done by a set of 'unknown men.'"

HODES, *supra* note [], at 177.

[40] KENNEDY, *supra* note, at 47 (citing Professor James Chadbourn). In addition, the trial in which an all-white jury acquitted Emmett Till's murderers was in 1955. *See supra*, *infra* notes [].

2. The Bellwether Hypothesis

What then do we make of this immense sexual apparatus? And, in particular, what light does this legal history shed on our understanding of interracial intimacy regulation? Several prominent scholars have argued that lynching is this nation's hidden shame, the dark secret that remains hidden.[41] In contrast, I would argue that the relentless and uncompromising measures taken to prevent and punish interracial intimacy dominates the nation's consciousness and comprehension of interracial intimacy.[42]

But the dominance of this story of miscegenation regulation can be attributed to more than its brutality–it also resonates with the nation's history of racial segregation. Following the logic of segregation, miscegenation rules were prohibitory, repressing interracial intimacy much as other Jim Crow statutes repressed other social relations between the races. And efforts to prevent racial sexual transgression reached their peak during formal Jim Crow (1880-1954). Miscegenation regulation appears to be the sexual manifestation of social apartheid, implementing in the bedroom what segregation implemented in the streets. Given its unrelenting brutality and scorched earth tactics, it is no wonder that the image of interracial intimacy emerging from this era would be that of sexual racial apartheid. How could more than a tiny,

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[41] Emma Coleman Jordan, Martha Hodes, and Randall Kennedy offer related, but slightly different accounts of the prevalence of lynching in the American imaginary. HODES, *supra* note [], at [] (parenthetical quote); KENNEDY, *supra* note [], at 48 ("Along with the unpunished raping of black women, lynching stands out in the minds of many black Americans as the most vicious and destructive consequence of racially selective underprotection."); Coleman Jordan, *supra* note [], at 552 ("The hidden legacy of ritual lynching feeds a deep and treacherous undertow of competition between white and black women for economic and cultural power today. This competition is more intense because it takes place with the constricted boundaries of gender defined by white men.").

[42] [add taboo dyad footnote]

foolishly brave minority love across such formidable barriers?

In light of this sexual history understood as apartheid, increasingly, interracial family formation, or families that transcend “difference,” has taken on normative content. They are depicted as “bellwethers” of enlightened politics and racial progress. A diverse array of legal scholars has endorsed this hypothesis. For instance, Professors Randall Kennedy and Jim Chen share relatively few positions with regard to race and the law.[43] Hence, it is intriguing that both ascribe normative content to interracial intimacy.

Randall Kennedy has argued that rising rates of interracial intimacy herald true racial equality:

> In my view, black-white intermarriage is not simply something that should be tolerated--it is a mode of partnership that should be applauded and encouraged. Intermarriage is good because it signals that newcomers or outsiders are gaining acceptance in the eyes of those in the dominant population and are perceived by them as persons of value on whom it is worth risking one’s future. Intermarriage is also good because it breaks down the psychological boundaries that separate and distance people on racial grounds, opening up new expectations and experiences that would otherwise remain hidden.[44]

For Kennedy, interracial families are what might be thought of as a miner’s canary. To him, the far lower numbers of black/white marriage compared to other racially exogamous marriages is a primary and overlooked indicator of continuing racial inequality:

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[43] Randall Kennedy’s aspirational vision of racial harmony is complete color blindness, but his views on race consciousness as an interim strategy are complex. He believes there is a real and material role for race to play in American law and life, but also argues that there are some areas in which racial recognition is spurious and unconstitutional. The body of his work, encompassing criminal law, speech, legal scholarship and pedagogy, and even judging racial passing, comprises an effort to discern and distinguish those instances that warrant race consciousness (including attention to disparate impacts) from those in which it is permissible from those that mandate its strict exclusion. Jim Chen on the other hand believes in color blindness *über alles* and views all race consciousness as both legally and morally repugnant.

[44] Kennedy, *Race, Law, and Intermarriage*, *supra* note [], at 819 (footnote omitted?).

> That blacks intermarry with whites at strikingly lower rates than others is yet another sign of the uniquely encumbered and peculiarly isolated status of African Americans. It is also an impediment to the development of attitudes and connections that will be necessary to improve the position of black Americans and, beyond that, to address the racial divisions that continue to hobble our nation. Marriage matters.[45]

In short, for Kennedy, interracial intimacy is a bellwether of black racial progress.

In the most extreme characterizations, interracial sex is construed as the best antidote to racism. For instance, Jim Chen defends interracial family formation as the ideal mode of racial equality, preferable to public sphere civil rights.

> Nearly four centuries of positive lawmaking by the United States and its predecessor sovereigns have contributed less toward overcoming racial tensions at the person-to-person level, *at the level that counts*, than discrete acts of family-building across racial lines. All the law and legalism that the positive state can spew can scarcely match the power of "an explosion of joy or a miracle like love, . . . [t]he deep commitment of a loving couple, [or] the birth of a baby" to spark "the building of communities not based on color but based on conscience."[46]

Elsewhere, Chen describes interracial family formation as an optimal strategy for achieving racial harmony, describing "miscegenation as an engine of racial healing"[47] and contending that "[t]hrough the intensity and virtual voluntariness of the bonds created by marriage or parenthood, family relationships hold the key to the resolution of racial conflicts."[48] Likewise, in arguing for the abolition of race on the federal and state censuses he predicts that the rise of

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[45] Kennedy, *Race, Law, and Intermarriage*, *supra* note [], at 819. [include different numbers for groups]. Kennedy, *Race, Law, and Intermarriage*, *supra* note [], at 817-21; *see also*, *id.* at 821 ("[a]s long as black people are kept in a state of relative social, political, and economic deprivation, others will be less inclined to want to marry them.").

[46] Chen, *Un*loving, *supra* note [], at 167 (quoting []).

[47] Chen, *Un*loving, *supra* note [], at 165.

[48] Chen, *Un*loving, *supra* note [], at [pin cite].

interracial families will "smash strict racial categorization."[49] In the end, for Chen, rising numbers of interracial families are more than the logical result of desegregation. They also signal the inexorable power of personal relationships to shatter racial hierarchies.

This contemporary vision of interracial intimacy, what we might call the bellwether hypothesis, is a seductive one. It gains its analytic traction from the sexual racial apartheid narrative. When the goal and effect of miscegenation regulation is understood as sexual segregation, the remedy appears not unlike the one courts applied to water fountains and buses: to strike de jure rules and allow the contact that state prohibitions previously repressed.[50] This follows closely the logic of the Warren Court's assault on Jim Crow and its integrationist impulses in that the measure of success and equality becomes the extent of integration. Remove the law and let them love.

B. *Sexual Libertarianism*

The second narrative of interracial intimacy regulation is about antebellum slavery and its sexual injustices and injuries. Always understood in the black community, this narrative has achieved more widespread circulation in light of several popular movies and, I think, innovations

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[49] Chen, *Un*loving, *supra* note [], at 170 (footnote omitted); *see also*, [add other census quotes].

[50] In a previous article I noted:
The logic follows Foucault's repression hypothesis closely: the historical injury of legal regulation of interracial sex resulted from the prohibition and repression of interracial relationships. Hence, the occurrence of these relations is interpreted as subversive of the historic racial order. Following the repression hypothesis, such relationships are subversive.
This term derives from Michel Foucault's later work on sexuality and is developed in Section I. *See infra* [add].

in college curricula.[51] This Section considers the relatively smaller set of laws that underpin the narrative of miscegenation regulation as commodification and coercion, or, as securing black women as the sexual property of white men.

[Readers: this section is undergoing a vast edit. It details laws of rape, reproduction, inheritance, and fornication that enabled white male sexual access to enslaved black women]

2. The Juridical Imperative

The very idea of slavery and law is counter-intuitive to many. Many imagine southern slavery to have been a lawless state in which only the law and logic of property intervened to confer complete autonomy on whites, particularly on slaveholding whites. (I call this the "pure property paradigm."[52]) Scholars of slavery have demonstrated the limits of this understanding. As an initial matter, like other totalitarian societies, the slaveholding South could not tolerate the free circulation of ideas and thought. [Drew Faust quote re closed nature of antebellum south and threat posed by open ideas[53]] Managing this threat required that whites concede significant civil liberties. As the antebellum period progressed, Southern states rabidly repressed anti-slavery speech, censoring mail and prosecuting opponents for treason, even seeking extradition

[51] Jefferson in Paris; Beloved, which fictionalized Margaret Garner's story. Now, Margaret Garner opera. Two: more white students taking af-am classes; also, more attention to race and slavery in women's studies and other humanities, including women's studies, english, history

[52] [attribute to common law analogies; mis-attributed to Ruffin]

[53] Drew Faust, The Sacred Circle.

of abolitionists from free states.[54] Nor did southern states capitulate to slaveholders' demands for complete deference to their "property" rights, meaning complete control over their slaves. Laws restricted masters in hiring out enslaved workers;[55] prohibited whites from trading with enslaved people;[56] restricted manumissions;[57] and mandated that slaveholders permit state agents to search their property for slave-related "contraband."[58] Leading up to secession, slave states increasingly identified ways that slaveholders pursuits of their own economic and privacy interests–combining slave and wage labor, at-will manumissions leading to increases in the free black population, the growth of an underground economy of trading with slaves–could threaten the stability of slavery itself.[59]

This insight–that slavery imposed significant restrictions on white civil liberties and property rights–comprises a crucial insight into how whites did not enjoy unfettered liberty under slavery, but, rather, that certain market relations or ideological positions posed a

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[54] *See, e.g.*, [add cites]; *see also*, Garrett Epps, *The Slave Power*, DUKE LAW & CONTEMP. PROBS. (2004); A. Leon Higginbotham, Jr., *"The Law Only as Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C.L. REV. 969, 1016-1019 (1992) [hereinafter Higginbotham, *"The Law Only as Enemy"*] (discussing criminal restrictions on freedom of speech in Virginia).

[55] Many states determined that slaves hiring themselves out on their "own accounts" posed several public policy threats and banned this altogether. On the other hand, slaveholders might seek to make such contracts themselves in order to manage periodic surplus labor or to profit from skilled enslaved artisans. [find the urban slavery cite; look at James Sidbury's work; see also, Ira Berlin, Slaves Without Masters, supra note [], at []; Ira Berlin, Many Thousands Gone, supra note [], at []].

[56] [Add cites]

[57] *See infra* notes [] and accompanying text.

[58] [Add case cites] See generally Sally Hadden, Slave Patrols; [add other cites].

[59] [Add explanatory footnote on why]. See, e.g., William Freehling [add cite].

substantial threat to the slaveholding order itself. Yet the same analysis has not been extended to sexual relations. In the context of intimate or domestic relations, the assumption of the libertarian slave state remains unchallenged./Yet, in the context of sexual and intimate relations, historians have concluded these same men exercised free rein–what we might call sexual libertarianism.[60] The narrative of the sexually libertarian slave state rests on two related ideas. First, that law conferred on white men close to complete sexual autonomy vis-à-vis women in the enslaved workforce. These arguments first appeared in the late 1970s in path-breaking scholarship on slavery and gender, reaching its apotheosis in the work of legal historians who set forth the first comprehensive accounts of laws of rape and forced reproduction.[61] In A. Leon Higginbotham, Jr.'s detailed documentation of the emergence of colonial slave law, *partus sequitur ventrem* plays a key role in regulating sex between white men and black women. "[C]ontrary to English precedent, the legislators adopted the doctrine which would maximize their privileges; thus, even the children whose fathers were their mother's white masters were not only bastards, but slaves. By his illicit relations, a white male could eliminate the cost of purchasing an infant slave; by agreeing to enslave his progeny he became a breeder of

[60] To the contrary, historians identified how apologists deployed interracial intimacy to defend slavery. [quotes re ideology & defense against white prostitutes] According to this logic, unfettered sexual access could actually be rhetorically deployed to reinforce slavery's hierarchies and defend its sexual economy against northern sexual norms.

[61] See, e.g., Catherine Clinton's early work on plantation mistresses stressed white male control over women's sexuality, white and black; Catherine Clinton, The Plantation Mistress: Woman's World in the Old South (1982); Darlene Clark Hine, [add 2 titles]; Deborah Gray White, Ar'n't I a Woman?: Female Slaves in the Plantation South (1985); Angela Davis; See also, [Anne Firor Scott?; Elizabeth Fox-Genovese?; Jacqueline Jones? Nell Painter?].

slaves."[62] In subsequent articles, Higginbotham elaborates how colonial and antebellum slavery made dyadic distinctions about interracial sexuality, adopting various rules that gave white men substantial sexual and reproductive control over black women.[63] Karen Getman's more narrow, but highly influential, analysis of antebellum slavery also stressed the interplay of rape and reproduction doctrine, showing how "plantation owners benefitted economically from their illicit sexual relationships with Black women; their children would be additional slaves for the plantation. The failure to punish white men for these relationships interacted with this economic benefit, and with the plantation owner's absolute power over his slaves, to condone and even encourage the sexually abusive form these relationships often assumed."[64] Getman's

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[62] A. Leon Higginbotham, Jr., In the Matter of Color: Race and the American Legal Process 44 (1978).

[63] A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 2020 (1989) [hereinafter, Higginbotham & Kopytoff, *Racial Purity and Interracial Sex*] ("Those black and mulatto women who were slaves were valued, by the law, in the same ways property in general was valued, as something in which the owner's rights were to be protected."); *see also*, A. Leon Higginbotham, Jr., *Race, Sex, and Missouri Jurisprudence:* Shelley v. Kraemer *in a Historical Perspective*, 67 WASH. U. L.Q. 673, 694 (1989) [hereinafter, Higginbotham, *Race, Sex, and Missouri Jurisprudence*] ("a slave woman had no virtue that the law would protect against a slave master's lust."); Higginbotham, *"The Law Only as Enemy,"* supra note [], at 1055-56 (finding no reported prosecutions of white men for rape or attempted rape of a black woman, free or enslaved); A. Leon Higginbotham, Jr., *The Ten Precepts of American Slavery Jurisprudence: Chief Justice Roger Taney's Defense and Justice Thurgood Marshall's Condemnation of the Precept of Black Inferiority*, 17 Cardozo L. Rev. 1695 (1996) (x precepts involve white men's sexual access to black women). criminal law to intervene on her behalf plus economic intrest in estate, 684; Shortly thereafter, in one of the first accounts of the tragic case of *State v. Celia*,

[64] Karen A. Getman, *Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System*, 7 HARV. WOMEN'S L.J. 115, 126 (1984). Elsewhere, Getman notes that the partus sequitur ventrem rule "maximized the economic benefits to white men of sexual exploitation of women" and that through heightened penalties for interracial sex "the [Virginia] colony proclaimed its disapproval of interracial relationships while simultaneously ensuring that white men's transgressions would further the self-reproduction of the slave labor force." Id. at 125 n.50, 130; *see also*, Jennifer Wriggins, *Rape, Racism, and the*

formulation reiterates how slavery's regulation allowed white men to sexually exploit black women and then reap the economic benefits of enslaving their own children, or "rape-for-profit." Both of these now-classic accounts view rape and reproduction doctrine as operating in tandem to give white men free rein, in effect, securing black women as their sexual property.[65]

The second, related, assumption flows from the first: that the state declined to intervene in these relations, indeed expedited them, because commodification and coercion of black women's intimate relations served slavery's own interests. Unlike free speech and unfettered property rights, conferring sexual liberty on white men reinforced the racial and gender order. Articulated perhaps most powerfully by Angela Davis, [add sexual terrorism quote].[66] Both Higginbotham and Getman make similar points.[67] In all of these accounts, these legal rules of

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Law, 6 HARVARD WOMEN'S L.J. 103 [pin] (1983) (**parenthetical).

[65] A decade later, Higginbotham published a series of essays identifying "ten precepts of American slavery jurisprudence," which documented under which circumstances slaves were construed as property versus as humans. Distinguishing other instances when law treated slaves as property versus as humans, he shows how rape and reproduction laws treated black women as property.

[66] ANGELA Y. DAVIS, WOMEN, RACE & CLASS; Angela Y. Davis, "Reflections on the Black Woman's Role in the Community of Slaves," in THE ANGELA Y. DAVIS READER 111, 124 (Joy James ed., 1998) (originally published in 3/4 THE BLACK SCHOLAR 3, 13 (1971)). Around the same time, Susan Brownmiller's germinal text on rape characterized white male rape of enslaved women as an "institutional crime, part and parcel of the white man's subjugation of a people for economic and psychological gain." SUSAN BROWNMILLER, AGAINST OUR WILL 165 (1975); *see also*, Dorothy Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty 29 ("The rape of slave women by their masters was primarily a weapon of terror that reinforced whites' domination over their human property.") (1997).

[67]Slavery's rape and reproduction rules figure heavily in one of Higginbotham's ten precepts of American slavery: "always preserve white male sexual dominance."/Black women's sexual vulnerability under colonial and antebellum law figures heavily in Higginbotham's characterization of slavery as white male dominance. "end of slavery joy in sexual conquest" 694; In discussing colonial era, H characterizes mr as white men "maximized their options" imc 47. Finally, Getman explicitly characterized slavery as gender supremacy and sexual control by

commodified and coerced sex and reproduction, of rape-for-profit, yield a narrative of slavery as a sexually libertarian regime in which the erotic and economic interests of white men were coterminous with the slaveholding state.

This characterization, a crucial doctrinal and conceptual intervention in understanding southern racial slavery, has largely dominated the legal history since.[68] It appears as a central argument or assumption in the work of feminist legal scholars on contemporary issues of race and sex. For instance, in their work on race and reproductive liberty, Dorothy Roberts and Pamela Bridgewater each emphasizes rape and forced reproduction as the sine qua non of slavery's sexual regulation and exploitation of black women.[69] Meanwhile, historians who have

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white men, concluding "Sexual abuse of Black women was pervasive in the South. The legal system's silence toward this abuse and its subjugation of the resultant mulatto population strengthened white men's power over the Black community and accentuated their dominant position over white women." Getman, supra note [], at 142; see also, id at 126 ("Abuse had only positive economic and social ramifications for the slave owners–an increase in the slave population and the further subjugation of the Black community through the sexual tyranny of white men over slaves."); supra note [x].

[68] Scholars have literature have long asked different questions about slavery's sexual economy. Compare Saidiya Hartman, Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America (1997) ([add parenthetical]); Hortense Spillers, Mama's Baby, Papa's Maybe: An American Grammar Book 17 Diacritics 65, [add pin] (1987) ([add parenthetical]); [check Jennifer Brody].

[69] Dorothy Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty 22-55 (1997). In particular, both articulate the rape-for-profit understanding. *See, e.g.*, Pamela D. Bridgewater, Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence, 7 Wash. & Lee Race & Ethnic Anc. L.J. 11, 11-26 (2001) (arguing that Thirteenth Amendment should encompass reproductive liberty); Pamela D. Bridgewater, Ain't I a Slave: Slavery, Reproductive Abuse, and Reparations 14 U.C.L.A. Women's L.J. 89, 115-25 (2005) (incorporating slavery's sexual and reproductive injuries as part of racial reparations); [add Roberts]. Both endorse the juridical model of law in the service of reproductive and sexual exploitation and the erotic/economic convergence. "This state of the law made sexual assault a wise investment strategy for a cash-strapped slave owner who was interested in increasing the number of his slaves." Bridgewater, Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence, supra, at 26 (footnote omitted).

broken new ground in southern legal history by arguing that restrictions on white male sexual and domestic freedom defined Reconstruction and post-Reconstruction households do so against the vision of unfettered sexual liberty under slavery.[70]

Like sexual racial apartheid, this narrative of slavery as comprising a sexually libertarian state has also shaped current understandings of interracial intimacy. The sexual libertarian narrative follows what Michel Foucault classically termed a juridical account of sexual regulation, one which conceives power as held by one body who exercises it against another.[71] [add quote] Sexual libertarianism follows this top-down account: power is held by white men and wielded against black women who may only futilely resist victimization. One group has power and one group doesn't, and within this structure sex between them only reinforces power dynamics; it does not, and cannot, subvert them. According to what I call the "juridical imperative," interracial intimacy between black women and white men has followed, and must always follow, this logic of unfettered access and predation. And, significantly, because sexual terrorism against black women was a hallmark of the powerlessness and subordination of the entire black community, sex between this dyad continues to be viewed as in the service of the

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Bridgewater also notes that charges of rape and reproduction also made contemporaneously. She quotes Harriet Martineau, "Yet, these planters who sell their own offspring to fill their purses, who have such offspring for the sake of filling their purses, care to raise the cry of amalgamation against the abolitionists of the north."

[70] See generally LAURA F. EDWARDS, GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION (1997); [check her law review article]; Peter Bardaglio, Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South (1995); [check Bardaglio's first book]; [Michael Grossberg?]; *see also*, Emily Field Van Tassel, *"Only the Law Would Rule Between Us": Antimiscegenation, the Moral Economy of Dependency, and the Debate over Rights After the Civil War*, 70 CHI.-KEN L. REV. 873 (1995).

[71] Or, black workforce in Davis's excellent articulation.

state's own interests in racial and gender subordination. [couple of quotes] In short, when it comes to sex between white men and black women, many blacks today reject the bellwether hypothesis of interracial intimacy as heralding true racial equality and continue to adhere to the juridical imperative.

In sum, it is now intuitive to slavery scholars how the institution required the sacrifice of significant white civil liberties, most notably, free speech and property rights. Yet, in the legal imaginary, the South was the consummate *sexually* libertarian state, imposing no constraints on the sexual autonomy of slaveholders.[72] Higginbotham offers a classic statement of this vision of slavery when he notes that, under the law, a master "could sexually exploit a slave's body but could not provide an education for the slave's mind."[73] As noted above, even scholars who have devoted substantial attention to the slaveholding household and sexual regulation have largely adhered to this narrative. Unsurprisingly, then, sexual relations between this dyad are viewed as inherently subordinating, as perpetuating the racial and gender orders of slavery in which white men enjoyed unfettered access. Far from subversive, such relations adhere to the juridical imperative. [They are perpetually and solely proprietary, illicit, and exploitative.]

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[72] [We might characterize slavery as sexually libertarian regime in two ways. First, with regard to sex, it was classically loibertarian –an abdication of law–. Second, it wasone in which law gave strong protection to white men's erotic and economic interests in their "sexual property".] by libertarianims I mean to invoke both dominant meanings: absence of law and minimal regulatory state; strong protection of white men's erotic and economic property rights (but not strong protections for contract or alienability rights)
On silence or abdication point, of law: See, e.g., Getman, 142-144 ("although the legal system of the slaveholding South was obsessed with regulation the intraracial and interracial sexual activities of white women it was noticeably silent on the intraracial sexual activities of Black women.").

[73] Higginbotham, Race, Sex, Education and Missouri Jurisprudence, supra note [], at 694.

C. *Summary*

For much of its history, our nation has been arguably obsessed with regulating intimacy between blacks and whites. Attention to different sets of laws has generated distinct narratives of miscegenation regulation, each of which represents its injuries in very specific ways. A focus on the brutal cast of laws and practices that sought to prohibit and punish interracial intimacy resonates with the logic of Jim Crow. Law sought to enforce sexual segregation, with a particularly rabid focus on the black man and white woman dyad. On the other hand, attention to slavery's equally ugly rules reveals a very different regulatory structure, one that deferred to white male sexual liberty, declining to intervene in white men's efforts to secure black women as their sexual property.

Nor are these narratives of purely historical or theoretical interest. Each has sponsored a broader set of normative claims about interracial intimacy today. Conceiving miscegenation governance as sexual racial apartheid yields an integration solution, one that follows the Warren Court's much-applauded approach to water fountains and other public accommodations. The bellwether hypothesis tracks the liberal logic of integration, concluding that rising rates of interracial family formation heralds racial equality, more so, in fact, than school or workplace integration. The mandate of the juridical imperative, on the other hand, is a more narrow one. [It concludes that sex between white men and black women continues to manifest exploitative impulses and defer to white patriarchal impulses.]

As I've said, both of these narratives rest on outstanding research that transcends the confines of any given discipline. Historians, psychologists, anthropologists, sociologists, and literary academics, in addition to legal scholars, all have shown how these two narratives reveal

fundamental insights and truths about our nation. Indeed, attention to the interracial intimacy governance as a crucial part of our national history itself intervenes in color-blind and self-congratulatory narratives about our culture. Yet, the next section suggests the limits of both of these dominant stories of the nation's history of miscegenation regulation. It shows how neither is complete, and both miss a significant aspect of this legal history.

In addition, on their face, these might seem to be contradictory narratives of sexual regulation, one of prohibited apartheid and one of forced access. Two standard ways of reconciling them are to posit them as dyadic specific regulation and/or chronological, i.e., the emphasis of slavery's sexual regulation was on securing black women as sexual property and post-Emancipation the regulatory engine shifted to the Jim Crow logic of securing sexual racial apartheid between black men and white women. This Article goes on to reject both of these reconciliations, using the case studies in the next Section to do so.[74] Section III posits a third way of reconciling them, which is that both exist as strategies of achieving caste.

III.THE SHADOW FAMILY THREAT

In 1826, Elisha Brazealle, a white resident of Jefferson county, Mississippi, took "a negro woman" he enslaved and their son, John Monroe Brazealle, to Ohio to manumit them.[75] After executing a deed of emancipation, he brought them back to Mississippi. At his death, he left a will reciting and ratifying the earlier Ohio emancipation; acknowledging John Monroe as his son; and leaving his entire estate to John Monroe. Apart from this shadow family, Brazealle's

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[74] Compare Pascoe and Novkov.

[75]Hinds v. Brazealle, 3 Miss. 837, 2 How. 837 (Miss. 1838). The "negro woman" remains unnamed in the case.

closest relatives were what inheritance law calls collateral ones, siblings, nieces and nephews, aunts and uncles, relatives legally conceived as more remote than a son, yet, who could claim to be the legitimate heirs at law because their relations were sanctioned by marriage.[76] These (white) putative heirs challenged not only the testamentary gift of property to John Monroe, but the manumission itself, claiming Brazealle's son as part of the estate to which they were entitled.

On appeal from chancery, the court invalidated Brazealle's efforts to manumit his shadow family by deed in Ohio and by will at death.[77] The deed of emancipation executed in Ohio was void for two reasons. First, the court found that it was made in fraud of the laws and policy of Mississippi.[78] "No state is bound to recognise [sic] or enforce a contract made elsewhere, which would injure the state or its citizens; or which would exhibit to the citizens an example pernicious and detestable."[79] The court then explained that, in Mississippi, as a matter of policy, "free negroes are deemed offensive," reciting removal statutes requiring free blacks to leave the state with thirty days notice and post bonds in the interim; prohibitions on free blacks emigrating to the state; the requirement that those blacks permitted to stay to register and carry certificates of their status or risk jail; and the concession of very few privileges accorded to free

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[76]*See infra* note []. Collateral heirs are those related by blood to the decedent who are not descendants or ancestors. [add treatise definition]

[77]The chancery court overruled the shadow family's demurrer to the white heirs' bill challenging the will.

[78]"As we think the validity of the deed must depend upon the laws of this state, it becomes unnecessary to inquire whether it could have any force by the laws of Ohio. If it were even valid there, it can have no force here." 3 Miss. 843.

[79] "It is a settled and sound principle that no state will enforce a contract made by its citizens elsewhere in violation and fraud of its laws." 3 Miss. 842 (quoting Joseph Story, Commentaries on the Conflict of Laws (1834)).

whites and the imposition of heavy penalties for violations.[80] In emancipating his shadow family in Ohio, Brazealle had tried to circumvent these policies:

> The state of the case shows conclusively, that the contract had its origin in an offence against morality, pernicious and detestable as an example. But above all, it seems to have been planned and executed with a fixed design to evade the rigor of the laws of this state. The acts of the party in going to Ohio with the slaves, and there executing the deed, and his immediate return with them to this state, point with unerring certainty to his purpose and object. The laws of this state cannot be thus defrauded of their operation by one of our own citizens.[81]

The act of emancipation, then, violated the state's strong policy against black Mississippians who were not enslaved.

The court also found the deed of emancipation void because of several technical defects, including failure to provide proof of meritorious service to either the master or the state and to secure legislative ratification of such.[82] These were the only conditions under which a slaveholder could manumit a slave in Mississippi. Finally, the court addressed Brazealle's testamentary language regarding the manumission. It concluded that he could not ratify a failed deed. Nor was the language valid as a testamentary manumission because it suffered from the same formal defects as the deed. In the end, neither the lifetime nor the testamentary efforts at manumissions were valid.

This initial conclusion, that a slaveholder could not free his family for purely affective reasons, or reasons of conscience, but only for "meritorious service"proved to the satisfaction of

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[80]3 Miss. 842. Mississippi had some of the strongest anti-manumission regulations. Morris, supra note [], at [pin cite] ([add parenthetical]).

[81]3 Miss. 843.

[82][replace with statutory language: "No owner can emancipate his slave, but by a deed or will properly attested, or acknowledged in court, and proof to the legislature, that such slave has performed some meritorious act for the benefit of the master, or some distinguished service for the state; and the deed or will can have no validity until ratified by special act of the legislature."

the legislature, dictated the rest of the outcome. The court voided Brazealle's devise of his estate to his son because, according to both the common law and statutory laws of Mississippi, enslaved persons could own no property of any kind, including as legatees of a will.[83] Citing statutory prohibitions against slaves holding what the court took to be relatively innocuous economic assets such as cattle, hogs, and horses, the court concluded that, "They cannot be prohibited from holding such property in consequence of its being of a dangerous or offensive character, but because it was deemed impolitic for them to hold property of any description."[84] Nor, crucially, could Brazealle establish a trust on behalf of his shadow son as long as he was enslaved. The trust's conceptual division of legal and equitable title requires beneficiaries who can enforce the equitable obligations of the trustee, and, without civil legal capacity, enslaved persons could not do so.[85]

Invalidating both the manumission and the legacy, as an outright gift and under the trust rubric, the court ordered distribution of Brazealle's estate by operation of law to his legitimate heirs. Accordingly, Brazealle's shadow family, mother and son, were re-enslaved and distributed as part of his estate to their white relatives.

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[83]As the lawyer for Brazealle's white heirs' argued: "He has no more political capacity, no more right to purchase, hold, or transfer property, than the mule in his plough." Hinds, 3 Miss. 837.

[84]3 Miss. 843-44.

[85]As the putative heirs put it, a trust in favor of a slave "imposes no obligation upon the trustee; it cannot be enforced in favor of the cestui que trust, who, being a slave, can maintain no action to have the trust executed." 3 Miss. 837; *see also*, Thomas R. R. Cobb, An Inquiry into the Law of Negro Slavery in the United States of America sects. 258, 265, 277 (1999) (slaves cannot hold property or make and enforce contracs); [Bynum v. Bostick] 4 Des. [S.C.] 266 Even, they argued, if John Monroe left Mississippi "The policy of the state would forbid that any portion of its wealth should be prostituted to serve a purpose, or that its own free citizens should become the stewards or overseers of a foreign slave." 3 Miss. 840 [check this pin cite].

Twenty years later, James Brown took his enslaved shadow family, a "mulatto woman named Harriet" and their four children, Francis, Jerome, Teresa, and Louisa to Ohio to manumit them.[86] Like, Elisha Brazealle, James Brown acknowledged the children as his own. Unlike Brazealle, following the Ohio manumission, Shaw sent his shadow family to Indiana, where they lived, and, as multiple witnesses agreed, were treated, as free blacks. In 1855 Brown went to Indiana and stayed with his shadow family until 1856 when he died. His will, executed in 1853, instructed his executors to liquidate his estate (i.e., sell his plantation and remaining slaves), pay his debts, and deposit the surplus in the Bank of Louisiana for the benefit of his sons, who would remain in Indiana, and, crucially to the court, out of Mississippi.[87]

As in *Brazealle*, it was a collateral relative who challenged the will, here, James Brown's brother, John, who brought suit on behalf of their other siblings, as well. Again, the putative heirs at law challenged the manumissions and the legacies, arguing they were void, against policy, and in fraud of laws of state. First, like Brazealle's collateral relatives, they claimed that Brown had taken his shadow family to Ohio to free them and *bring them back to Mississippi*, in violation of the clear law and policy of the state. Second, even if the manumissions were valid, free blacks, the object of so much state animus, should be construed as having the status of alien

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[86]Shaw v. Brown, 35 Miss. 246 (1858). Apparently, Brown put significant thought into the emancipation, a point noted by the court. Initially he planned to manumit them in Louisiana, but then learned that state's rules had changed. In 1849 he attempted to take his family to Ohio to emancipate them; however the river was too low for them to cross. He successfully completed the manumission the following year.

[87]More specifically, Shaw instructed that the fund should be subject to draft by Francis, his elder son, or, at his death, by Jerome. While several witnesses referred to other legacies to the rest of his family, Harriet and his two daughters, the court never addresses this and refers to the disposition solely as to Francis and Jerome. Interesting work on shadow sons in Louisiana indicates that this sexual economy differed in material respects from the common law slaves states. [find citation to dissertation on barbers]

enemies, banished persons, or outlaws, none of whom could not hold property in the state or sue in its courts.[88] The chancery court awarded the heirs an injunction against the execution of the trusts Brown bequeathed to his sons.

Perhaps surprisingly to many contemporary readers, particularly in light of *Hinds v. Brazealle*, the Mississippi Supreme Court overturned the chancellor's decree and determined that the emancipations and the legacies were both valid. As it did twenty years earlier, the Court noted that the validity of the testamentary legacies depends on the validity of the emancipations. Intriguingly, the court did not frame the legal question as whether Brown had *intended* to defraud the state, but, rather, whether he *had* in fact done so by bringing his shadow family back to the state. Mere intent, without acting on it by bringing them back, would not be sufficient to invalidate the manumission.[89] The court heard voluminous, detailed, and contradictory testimony about when and how many times Brown's sons had returned to Mississippi; how long they had stayed and how they had behaved while in Mississippi; Brown's proclamations about their legal status; and how Brown had behaved towards them.[90] All of the witnesses agreed that the shadow family spent time in both Indiana and Mississippi, yet there was no agreement on the crucial question as to which state was considered their permanent residence.

In a classic bit of circular reasoning, the court concluded that, because Brown's

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[88][quote from heirs]

[89]Echoing the language in *Brazealle*, "This illegal intent only becomes material to vitiate the emancipation, and can only render it void, when it is carried into action by bringing the slaves back to this State, in pursuance of the original design to evade our laws." The court cited a statute passed four years after Brazealle. [get cite to 1842 Miss statute allowing for manumissions outside of the state]

[90]*See infra* note [159] and accompanying text.

overriding intent was manumission, he must not have intended any actions that would have defeated that ultimate goal.[91] Analyzing the evidence in accord with this conclusion, the court characterized the shadow sons as having only limited visits to Mississippi and residing on land Brown had purchased for them in Indiana; accepted the testimony that Brown had declared to others the children to be free and had not treated them as slaves during their visits "home"; noted that the sons' mother resided in Indiana; Brown visited them there; and he died there.[92] Having determined that the outcome did not rest on Brown's intent, the court proceeded to focus on his clear desire to manumit his shadow family, which required resolving all of the disparate and contradictory evidence in favor of their residence being elsewhere.[93]

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[91]The court noted that he consulted with two lawyers, who advised him that he could not successfully manumit slaves either within the state to live free in Mississippi or elsewhere, or, manumit them outside of the state and then bring them back to Mississippi to live. "It must be presumed that he acted with reference to this knowledge, in executing the deeds; and accordingly it appears that, at that time, he declared to the notary, that his object was to settle them either in Ohio, or Indiana, for education and residence, and that he would himself return to this State." 35 Miss. 306. Additionally, apparently Brown had considered purchasing land for his family in Louisiana or Texas, but one witness testified that he advised Brown to purchase property and settle them in a free state.

[92]The testimony differed, intriguingly, over whether to characterize Brown's control as "quote re father" or "quote re master." According to one witness for the will challengers, while claiming he still considered them as slaves, the witness testified his shadow sons lived in same house, ate at table with him and white guests; employed a man, presumably white, who lived on plantation, traveled with sons to Indiana; instructed to take family to Indiana if Brown died while they were there. According to another, "Francis went when and where he pleased, hunted, fished, exercised authority on the place, as any young man would do on his father's plantation, ordered the negroes to do what he considered necessary." [add pin cite]; see also, supra note [157] and accompanying text. The voluminous and intricate testimony raises highlights the fascinating issue of how slavery and freedom are "performed." *See* ARIELA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM (2000); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determinations in the Nineteenth Century South*, 108 YALE L.J. 109 (1998).

[93]

Upon consideration, therefore, of his purposes intended to be accomplished by him in

Because the *Brazealle* court concluded that Elisha had not enacted a valid manumission, they could determine that, as a slave, his shadow son could not hold any property, including the legacy bequeathed in his will. In contrast, in *Shaw v. Brown*, having determined that James Brown had legally freed his family, the court next had to address the opponents' argument that state policy prohibited them as free blacks from taking the legacies. According to counsel for the opponents, [add quote]. The court rejected the will opponents' argument that free negroes, sharing the status of alien enemies, banished persons, or outlaws had no rights the state was bound to support.[94] The court conceded though that "to allow [free blacks] to become the owners of a plantation and slaves, would be dangerous to the slave population here, and in contravention of the spirit of our laws and public policy with regard to slaves."[95] But, that particular question was not before the court.[96] Brown's (presumably careful) structuring of his will did not require his sons' presence in Mississippi. In this instance, "The enjoyment of their

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> relation to the children, his acts with regard to their condition and residence, and the general scope of his declarations upon the subject, it appears to be clear, that it was his intention to give immediate freedom to the children, and to locate them permanently in some State where they could be free, and that that intention was carried out by emancipating them and settling them in Indiana.

35 Miss. 311.

[94]

> [N]egroes born in the United States, and free by the laws of the State in which they reside, are in a different condition from aliens. They are natives, and not aliens. Though not citizens of the State in which they reside, within the meaning of the Constitution of the United States, they are inhabitants and subjects of the State, owing allegiance to it, and entitled to protection by its laws and those of the United States.

35 Miss. 315.

[95]35 Miss. 314.

[96]"If the question of the right of a free negro residing in another State to hold specific property in this State, not forbidden by the spirit of our laws, or dangerous to our institutions, is an open one. it is not now presented for determination by the case before us." 35 Miss. 314.

rights did not require their presence in Mississippi because the executor was required by the will to sell the testator's property and to deposit the money in a bank for the testator's sons' use and enjoyment."[97] Drawing an odd but telling analogy to banks, which, like free blacks, were strongly disfavored in Mississippi, the court concluded that the legislature could prohibit the circulation of both free blacks and bank notes in the state, yet that would not disable legal rights of free blacks or banks resident elsewhere to sue or take a legacy in Mississippi.[98] The Supreme Court overturned the chancery court's injunction against the distribution of the legacies. Brown's shadow family won–their freedom and their property.

In both *Brazealle* and *Brown*, white collateral heirs charged that bequests in favor of testators' shadow families were illegal and void and sought to enjoin the executor from executing the will. In upholding the validity of the emancipations and the bequests *Brown* had a different outcome from *Brazealle*. Yet, the courts followed the same logic in both: rendering judgment in light of the threats posed by the presence of free blacks.[99] Recall that they

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[97] 35 Miss. [add pin cite]

[98] The court elaborated, while the bank could not circulate its notes within the state (presumably the notes are the analogical equivalent of free blacks) the court notes that a foreign bank could sue to enforce a legacy or other right within the state. 35 Miss. 319-320. Much has been written about state hostility to banks during the Jacksonian era. Yet, the court's analogy is telling of the southern slave economy's particular hostile to banks. Banks, credit, wage labor, and free blacks all seen as part of market- and wage-based economy that would threaten the status regulations of slavery. [cite Genovese, Our Family Black and White; post-slavery Bardaglio, Edwards, and Van Tassel].

[99] As numerous historians have noted, free blacks posed an increasing threat to the southern way of life. IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH (1974); JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 157-79 (**1980 5th edition**); EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 398-413 (1972); LEON LITWACK, [FILL IN]; SLAVERY AND FREEDOM IN THE AGE OF THE AMERICAN REVOLUTION (Ira Berlin & Ronald Hoffman eds., 1983); *see also*, BARBARA JEANNE FIELDS, SLAVERY AND FREEDOM ON THE MIDDLE GROUND:

comprised the "example pernicious and detestable" condemned by the judge in *Brazealle*. They were "offensive" and so "injured" the state that Brazealle's efforts to increase their class was tantamount to a fraud on Mississippi. While endorsing a different outcome, the judge in *Brown* too condemned the idea of black Mississippians who were not enslaved:

> It is true, they are prohibited from coming into this State. But the reason of that policy has reference solely to their presence. Hence they are not allowed to be manumitted here, to take effect here or elsewhere, though they are permitted to be taken out of the State and there manumitted. *The mischief intended to be prevented, was their improper interference with our slaves, or the force of their example, in producing discontent and insubordination among them; and that could only arise from their presence here and intimate personal intercourse with the slaves.* It could not possibly come within that mischief, that they should take pecuniary legacies here or should acquire a right of property here which did not require their presence and could not bring them in connection with the slaves of the State; for their presence is by no means necessary to the enjoyment of such rights.[100]

The two crucial points for the *Brown* court were that the shadow family would never permanently reside in Mississippi and that the estate was to be liquidated and the assets deposited elsewhere.[101] (Recall the court's pronouncement that "to allow [free blacks] to become

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MARYLAND DURING THE NINETEENTH CENTURY (offering in-depth regional analysis); A LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIOONS OF THE AMERICAN LEGAL PROCESS 195, 201 (1996) (discouraging and limiting manumission is Higginbotham's fifth precept of "American slavery jurisprudence."); JAMES OLIVER HORTON & LOIS E. HORTON, IN HOPE OF LIBERTY: CULTURE, COMMUNITY AND PROTEST AMONG NORTHERN FREE BLACKS 1700-1860 (1997) (free blacks in the North).

[100]35 Miss. 318-19 (emphasis added). The court's language, surprisingly, appears largely indifferent to the status of slavery elsewhere. *Compare* Hooper v. Hooper, 669 (Al. Sup. Ct. 1858) (where white testator directs his executor brother to remove his shadow family (his lover and their six children) to Ohio, establish them in the country, put $10,000 in bank to be used for their support, and then divide the estate, held, his family was free, not by virtue of the will, but because of the agreement of the white legatees to the estate, and testamentary distribution of property to shadow family invalid); Epps, *supra* note [] (arguing contests over scope of "slave power" characterized many disputes in slave states).

[101]Randall Kennedy uncovered a more recent example that is eerily reminiscent. In Louisiana in the 1950s', state agencies and courts refused to allow a black couple to adopt a child who appeared to some to be scopically black but was legally classified. Instead she was

the owners of a plantation and slaves, would be dangerous to the slave population here, and in contravention of the spirit of our laws and public policy with regard to slaves.") This latter point is crucial in that it avoided even the specter of an empty plantation haunted by a shadow family who owned it. Instead, the Brown plantation was liquidated and presumably sold back into the hands of a proper, racially conscious, white slaveholder. In short, Brown avoided Brazealle's fate for his shadow family by severing any human or economic links between them and Mississippi.

The different outcomes in *Hinds* and *Brown* are susceptible to a few explanations, most obviously the twenty-year lag between the decisions during a time of heightening sectional conflict.[102] Alternatively, one might read the *Brown* court's judicial deference to states' rights as sincere, a (rare) example of southern federalism. Following this logic, as southern states sought respect for slave law, they became more willing to concede other states' own legal sovereignty.[103] Finally, one might explain the cases as produced by differences in judicial ideology. Any and all of these could explain the differences between *Brazealle* and *Brown*. While chronology, federalism, and ideology might have been at work, I find these cases instructive for another set of reasons. The next section describes how one shadow family wins and one family loses for reasons that go the very heart of the sexual logic of racial slavery in the

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placed in an orphanage for black children and sent to black schools. However, subsequently, a black couple from Illinois was permitted to adopt her and take her out of the state. *See* Kennedy, *Interracial Intimacies*, *supra* note [] (discussing Green v. City of New Orleans, 88 So. 2d 76 (La. Ct. App. 1956)).

[102][add discussion of rise of slavery reform impulses contemporaneous with proto-secessionist]

[103]*See, e.g.*, [add cites].

antebellum South.

III.Caste

[Readers: This section will do three things. First, it will show how these case studies demonstrate the incompleteness of both of the dominant narratives of interracial intimacy, sexual racial apartheid and sexual libertarianism. Neither captures these shadow family conflicts or their resolution. Next, this section will incorporate these two case studies together with the two narratives to derive a broader governing paradigm, caste. The typical use of caste is to describe the rigid implementation of hierarchies along lines of race (or ethnicity). I mean to capture this meaning and an additional one. By caste I mean the vulnerability of hierarchies at points of contact. Hence, caste requires management of outlier intimacy through sexual and gender regulation, in addition to the more commonly thought of racial or ethnic restrictions.]

IV.

What then do we make of the caste rubric? What difference might it make for how we understand the past, the present, and the operation of law in each? This Section considers, briefly, some of the implications of displacing the dominant narratives by understanding miscegenation regulation as caste regulation. In the process it shows the limits of the claims sexual racial apartheid and sexual libertarianism have sponsored about the meaning of interracial intimacy today.

A. *Beyond the Sexually Libertarian Slave State*

Incorporating the sexual black sheep from Mississippi and the caste rubric of miscegenation regulation suggests the limits of the sexually libertarian understanding of southern slavery. In the process, it also challenges the juridical imperative's assumption that law can blindly leave power in the hands of white men, assuming that their interests are co-terminous with those of the racially and gender supremacist state.

As was the case with social and economic relations, in most instances the sexual and intimate interests of individual white slaveholders do appear to have coincided with those of the slave order. White men's sexual and reproductive commodificaton and coercion of black women functioned as an effective tool of labor and racial discipline of a captive workforce, as well as ensuring its reproduction. Yet, like other so-called "market" or "political" relations, sexual relations too could threaten the interests of the slaveholding state.[104] As this Article showed, attempts to create autonomous, propertied, perhaps even slaveholding shadow families demonstrate that unfettered sexual liberty, like completely free speech, also threatened the distribution of closely held economic, racial, and sexual power and property under slavery. Like the line between contraband and licit with regard to more conventional economic transactions with or involving enslaved people, the threatened shift from sexual property to emancipated African-American plantation mistress challenged slavery's fundamental ideology. The conceptual converse of libertarian economies, caste societies can tolerate the free circulation of neither ideas and speech, nor of desire.

As the caste rubric foregrounds, southern miscegenation regulation answered these

[104] An earlier Essay debunked the intuitive line between "public" and "private" in slavery. [Add Rutgers cite; see also Angela Y. Davis; Jacqueline Jones]

threats, installing limiting state power at crucial points of interracial contact. Manumission restrictions managed the interracial sexual relations otherwise authorized by the political economy. The conceptual analog to censorship and patrol provisions, manumission and miscegenation rules operated in tandem to establish and define the limits of white male autonomy in the sexual arena. Drew Faust noted that restraining the relatively few outliers consumed a disproportionate amount of slavery's regulatory energies.[105] Contra the juridical imperative, the caste narrative demonstrates that the law's disciplinary function must extend to white men, too. While sex itself could not disrupt the caste structure, when combined with property redistribution these relations threatened to go rogue. My argument here is not that these restrictions on white male autonomy should be understood as the primary, or even as terribly significant, injuries of miscegenation regulation. Relative to the brutal regulation inflicted on other groups there is no comparison. Rather, my point is that attention to how caste rules targeted dominant group outliers, constraining their sexual autonomy and power, offers a more subtle and nuanced understanding of how interracial intimacy reinforced racial supremacy under slavery.

Finally, adding manumission and other rules, such as marriage, does more than "add more law." The caste rubric redefines our vision of what comprises "sexual" regulation, directing attention to apparently sexually neutral rules that establish the background conditions against which intimate relations unfold. As this Article emphasized, miscegenation regulation entailed property management as well as sexual management. Manumission laws mandated that black women in intimate relations with white men could only *be* and *reproduce* property, not

[105] [add quote]

claim it as rights-bearing equals. Attributing enslaved women's sexual exploitation solely to two doctrine, rape and reproduction, obscures the insidious range of coercive sexual techniques slavery brought to the table. It misses the extent to which sexual relations between this dyad were emblematic of structural subordination not because they were intrinsically so, but rather because law repressed efforts at making them otherwise.

If the caste rubric suggests the limits of the juridical imperative, it does not mean to then devolve into the standard liberal response, either. Advocates of the bellwether hypothesis might be chomping at the bit to conclude that today's fears of white male sexual exploitation of black women have been answered by the lifting of the old restrictions and the availability of marriage. In other words, black women are no longer sexual property and interracial intimacy between this dyad is presumptively now equal and heralds progress. Yet, the next section suggests the limits of this interpretation.

B. *Beyond the Romance of Racial Apartheid*

As noted earlier, the bellwether hypothesis is a seductive one. When miscegenation regulation is construed as sexual racial apartheid, the remedy appears not unlike the one courts applied to water fountains and buses: remove the law and let them love. Yet, despite the romance of interracial intimacy as an antidote to racial apartheid, the caste rubric yields a different understanding.

First, it forecasts the injuries of intimacy. As this Article showed, interracial intimacy can reinforce, as much as challenge, racial and gender hierarchies. These injuries of intimacy are evident in subordinated shadow families, as well as in the structure of domestic service and

putatively “segregated” transportation like street cars. In addition, intimacy does not always triumph over evil. As the shadow family threat showed, intimacy can threaten the state, sponsoring more repressive rules, i.e., manumission and other restrictions.

In fact, what the caste rubric reminds us is that the mere fact of interracial intimacy and contact does not tell us very much at all. Rather, what appears subversive to racial hierarchies is interracial intimacy *under conditions of legal and social equality*. Intimate relations do not occur in a legal vacuum. Rather, individuals approach each other with an already defined set of legal and political abilities and disabilities. Or, as Section I.B demonstrated, can be commandeered into them because of the social allocation of sexual capabilities and autonomy.

We understand, most of us, why President Jefferson’s relationship with Sally Hemings and, not much more than a century later, Senator Thurmond’s with his family’s fifteen-year-old housekeeper, Carrie Mae Butler, should give us pause–at a minimum. They occurred in legal regimes that vastly skewed legal, social, and economic power between this dyad. Many intuitively would distinguish those relationships from contemporary interracial intimacy. But why? *Because the background legal regimes have changed.* No act or practice (or change) in a sexual regime is inherently liberatory (or subordinating). Rather, such judgments must attend to the background rules against which intimacy unfolds, or what we might characterize as the sexual political economy. Despite efforts to romanticize sex and intimacy by segregating it from questions of political, legal, and economic distributions of power, as many feminists have noted, it remains embedded in market and political relations.

What then does that mean for interracial intimacy today? On the one hand, economic disparities and unequal legal access continue to generate too many scenarios in which black

women and girls can be sexually on preyed on by white men. In particular, domestic workers continue to report their vulnerability to employers and their sons. And prosecutors, judges, and juries continue to exercise informal discretion resulting in white-on-black rape remaining the least "serious" form of sexual assault.

On the other hand, "subversive" intimacy between this dyad is far more plausible than it was. Today, when black women and white men meet in the sexual arena it is on terms of at least formal equality.[106] While there remain immense disparities between this dyad, law no longer secures black women as the explicit sexual property as white men. Hence, what is arguably laudatory about interracial intimacy is that it is being conducted under conditions of (or vastly closer to) equality. In particular, notable numbers of professional black women now view the white men they meet in school, the workplace, or in restaurants or bars as potential mates.[107] Importantly, this is largely a product of the very civil rights and anti-discrimination laws that bellwether fan Jim Chen has declared superfluous. They meet and fall in love in *precisely* the places that the formal civil rights movement emphasized as critical to racial equality. And while Randall Kennedy may be correct, that whites falling in love with blacks is a sign of racial progress, it is not because intimacy itself heralds equality. To the contrary, it is the conditions of equality that herald a salutary intimacy.

One potential response to this argument is that, while it glorifies interracial intimacy broadly, the bellwether hypothesis is particularly focused on rising rates of interracial intimacy as a proxy for interracial *marriage and family formation*. Unlike President Jefferson or Senator

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[106] [Discuss still troubling discrepancies in rape prosecution, sentencing, etc; income disparities, etc.]

[107] [cites]

Thurmond, in the post-*Loving* environment, whites can and are marrying non-whites, marking the end of the "shadow" family. This distinction is not without its attractions. While discussing interracial intimacy broadly, Kennedy emphasizes what he calls "intermarriage," and this distinction is arguably latent in Chen's rather vague calls for interracial family formation. But, a quick [set of] example will, I hope, indicate the limits of the distinction.

In the last [few] decades the importation of women into this country to marry men who are U.S. citizens has increased at a rate of 100% [check this statistic].[108] In many cases, third-party agencies mediate these matches, making a significant profit.[109] Known in popular culture as "mail order brides," and inevitably from lesser developed nations or countries in crisis, these women are frequently depicted as lucky to have fallen in love with American largesse.[110] By the same token, many celebrate these unions, many of them interracial or inter-ethnic, as examples of loving across barriers of difference. [quotes] Following the logic of the bellwether hypothesis, it is not uncommon to find the matches lauded as a sign of America's increasing diversity.

The caste rubric cautions against such an interpretation, warning us to be attentive to how citizenship, domestic violence, and language barriers affect the "romantic" trajectory of such

[108] In 1990 2,000 to 3,500 marriages between men in U.S. and foreign brides from mail order or facilitated email correspondence. In 1998 it was 4,000 to 6,000. http://www.uscis.gov/graphics/aboutus/repsstudies/Mobappa.htm

[109] 200 international matchmaking organizations or IMO's. One of the largest agencies serves 1,000 U.S. men a month. Charge $200 per person. http://www.uscis.gov/graphics/aboutus/repsstudies/Mobappa.htm

[110] 94% of U.S. men are white. Southeast Asia and Russia, former Soviet Union

relationships.[111] Feminists and human rights activists have shown how the denial of legal rights to immigrant women has left them susceptible to domestic violence, even homicide. Concerns over immigration fraud led to regulations granting spouses of U.S. citizens only conditional resident status for two years, at which point the couple could file a joint petition seeking conventional permanent resident status. Subsequent studies and hearings found that the fragility of their political and economic rights in the citizenship process left many women at risk for domestic abuse. And although there have been subsequent rounds of regulatory intervention and reform, legal access remains a significant problem. Language barriers, cultural isolation, and the active misrepresentation of both husbands and the profit-making agencies prevent many women from learning of regulatory reforms designed to help them. [And, "difference" may be part of the problem. Some have found that U.S. men seek Asian women in particular precisely because they myth of submissive, loyal, and feminine.] Rather than embodying global rainbow families transcending the bounds of not only race but culture and nation, these marriages fall prey to disturbing dynamics precisely because of the disparate backgrounds.

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[111] Mail order brides are only one among many examples. While the explicit slavery paradigm no longer governs racial interactions, there remain many instances of racial and colonial exploitation performed through interracial relations between white men and women of color. In Mexico, a noted author recently published a book describing how his white father sold him into slavery to his father's mistress, after his former mistress, the child's mother, his black maid, died. Such a situation, just over our border, reflects slavery norms and practices with disgusting accuracy. Finally, the world over, brown and yellow women are the much sought after subjects of the sex trade. Ranging from kidnapping to "consensual" sex markets, most would not denominate these intensely racially sexualized encounters as progressing toward racial harmony. To the contrary, as in the slavery paradigm, such sexual relations reflect and entrench racial (and now colonial) power dynamics. And marriage cannot be employed as the dividing line between the exploitative and the celebratory, as mail-order brides enter the country to marry, and some of the sex markets run through or result in marriages. Such awful instances of course do not reflect the norm in U.S. practices; yet such international practices inevitably shape eroticism and desire domestically, manifest most vividly in the "mail order brides" case study.

As feminists have long noted, marriage in and of itself does not have to entail recognition of the worth and humanity of another group. The caste rubric supports this view. It reminds us of the need to remain attentive to the allocation of power within sexual dyads. State-imposed statuses can distribute power in intimate relationships through mechanisms not directly or obviously related to sexuality or intimacy. In this instance, it is citizenship rather than slavery that triggers a whole series of political and economic disabilities that reinforce rather than challenge racial/ethnic and gender hierarchies./Although we are no longer an enslaving economy, other state-imposed status relations, here citizenship, still can trigger a whole series of political and economic disabilities that also reinforce rather than combat the injuries of intimacy. Again, we must remain attentive to the background conditions and rules, including apparently sexually neutral rules, are at work. Marriage in and of itself cannot salvage the bellwether claims and allay caste concerns about the injuries of intimacy.

C. *Summary*

Let me clear here. Slavery sponsored many acts of sexual brutality against black women by white men. Arguing that law had to constrain outliers' disruption of property is not tantamount to ignoring the reprehensible numbers of white men who subordinated their shadow families with apparently little guilt or thought. Similarly, suggesting the logical limits of the bellwether hypothesis should not be read as an indictment of interracial intimacy more broadly, but, rather, of the social meanings attributed to it. Nor is my point that intimacy has no broader political effects. Clearly, it does. The caste rubric defeats universal accounts of any intrinsic politics–positive or negative–of interracial intimacy. It limits judgment of intimacy as

subversive or salutary intimacy to assessment of the political economy in which the intimacy occurs. This is certainly a more accurate account, if a less romantic one.

CONCLUSION

As this Article has shown, the caste rubric casts doubt on several deeply held truths about the interplay of sex, race, and law in the United States. The bellwether hypothesis rests on the assumed repression of interracial sex, hence deducing that its proliferation is intrinsically subversive. The juridical imperative has assumed a more limited jurisdiction over white men and black women, concluding that the hydraulic force of law between this dyad conferred sexual autonomy on white men, thereby reinforcing the interests of the slaveholding state, as well as its equally racially and gender supremacist successors. In contrast, caste directs attention to how maintaining a rigidly social structure paradoxically accommodated shifting and fluid meanings of interracial intimacy. Intimacy did not have an intrinsic meaning,

[complete conclusion]