

BLACKNESS AS PROPERTY:

Sex, Race, Status, and Wealth¹

by

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Using Critical Race Theory and legal history, this article searches the roots of Justice Sandra Day O'Connor's rationale in Grutter v. Bollinger. It critically views Grutter as an “anti-affirmative” action case, contrary to popular belief. And it uses Professor Derrick Bell's “interest-convergence” principle to explain the law's regulation of miscegenation, interracial love and marriage, and why the law gave black women limited property ownership rights, in the antebellum South.

African Americans have a peculiar relationship with the legal history of America's private property ownership system. Most of them descend from America's enslavement of blacks, in which they were legally classified as “private

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property.” For enslaved blacks, being “property” meant that you were owned by, controlled by, could be abused by, and bought and sold by your owner. (As an enslaved black, you were also generally denied property ownership rights.) Your freedom, your labor, and even your body were attributes that your master legally controlled. For enslaved black women, this meant that white men owned and controlled your sexuality, often using you to bear their children. White masters owned their mixed-race children they fathered with their enslaved black women!

This article analyzes how the American legal system regulated miscegenation, from the perspective of the black woman’s property rights. It describes and analyzes the black woman’s property rights against the white man’s American Dream, the “property-enslavement-sexual” paradigm: cheap land, cheap labor, and cheap sex. It describes and analyzes the law’s regulation of white men who attempted to bestow upon their black women and children inter vivos and causa mortis legacies. How antebellum southern legislatures and courts managed the property rights of black women illustrates the relationship between sex, race, status, and wealth acquisition. This article also analyzes the little known anomaly of the law’s treatment of “free” black women, who successfully negotiated past enslavement, and who themselves owned plantations, large homes,

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and enslaved blacks: the “black mistress.”

This article concludes that the roots of Grutter are in the Nineteenth Century antebellum South’s legal treatment of blacks as white property. And that Justice O’Connor’s rationale in Grutter treats aspiring African-American students (mainly women), applying to America’s elite public universities and professional schools, as intellectually-inferior “diversity commodity”: there merely to serve the white majority’s (mainly men) needs. In summary, both Grutter and its Nineteenth-Century roots, regulate the sexual-racial economies of property, treat blackness as white property, reflect Professor Bell’s “interest-convergence” principle, and serve to reinforce a greater social and economic order: the continued domination, supremacy, and privilege of wealthy white men.

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The life of the law has not been logic: it has been experience.

The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or subconscious, even the prejudices of judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

– Justice Oliver Wendell Holmes³

Translated from judicial activity in racial cases both before and after *Brown*, this principle of ‘interest convergence’ provides:

³OLIVER W. HOLMES, *THE COMMON LAW* 1 (1881). See JOHN W. BLASSINGAME, *THE SLAVE COMMUNITY, PLANTATION LIFE IN THE ANTEBELLUM SOUTH* (1979) [hereinafter *BLASSINGAME*], Preface to the Second Edition, at vii, restating Holmes’ analysis in terms of history of American slavery: “Intriguing, complex, opaque: these are descriptive terms easily applied to American slavery. The more the student of the peculiar institution reads, the more conviction grows that antebellum Southerners persisted in deviating from the beliefs and behavioral patterns historians have ascribed to them.”

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The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.

– Professor Derrick Bell⁴

I. INTRODUCTION

A. *GRUTTER* ON SEX, RACE, STATUS, AND WEALTH

This is an article about sex⁵, race⁶, status⁷, and wealth⁸ in American society.⁹

⁴Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1979-1980) [hereinafter BELL].

⁵“Sex” is defined as “[e]ither of the two divisions of organic beings distinguished as male and female respectively; the males or the females (of a species, etc. of the human race) viewed collectively.” THE OXFORD ENGLISH DICTIONARY, VOL. XV, 107 (2nd ed. 1989) [hereinafter OXFORD DICTIONARY]. This article defines “sex” as the broad division of gender, male and female, as well as the physical and emotional relationship between people, regardless of gender. The author uses sex in the content of the American antebellum South, and does not deny or choose to ignore trans-gender issues.

⁶“Race” is defined as “[o]ne of the great divisions of mankind, having certain physical peculiarities in common. The term is often used imprecisely; even among anthropologists there is no generally accepted classification or terminology.” OXFORD DICTIONARY, VOL. XIII, *supra*

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note 5, at 69. This article defines “race,” following the American antebellum southern tradition, as “black,” generally enslaved people of African descent, and “white,” generally free people of European descent. The author recognizes this use reflects the values of a political economy that has benefitted and continues to benefit from such racial polarization.

⁷“Status” is defined as “*Law*. The legal standing or position of a person as determined by his membership of some class of persons legally enjoying certain rights or subject to certain limitations; condition in respect, e.g. of liberty or servitude, marriage or celibacy, infancy or majority.” OXFORD DICTIONARY, VOL. XVI, *supra* note 5, at 573. This article defines “status,” in the context of the American antebellum South, to emphasize the social value that white society placed on groups, based upon the political economy of sex and race. In particular, how powerful white men perceived another group’s utility to them.

The author believes that status is an important factor when analyzing sex and race. While the African-American community is not economically monolithic, as discussed *infra*, there are many shared “black experiences” that derive from white stereotypes of African Americans. For example, a successful African-American female brain surgeon certainly enjoys greater financial and societal benefits than that of an impoverished, inner-city black welfare mother who is a high school dropout. Yet they both share in the experience of being victims of police “racial profiling,” based upon the police’s perception of them as criminal element. *See generally* Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the ‘War on Drugs’ Was a ‘War on Blacks,’* 6 J. GENDER, RACE & JUST. 381 (2002).

Similarly, in the antebellum South, although all blacks faced racially-based discrimination, their status were not the same. *See generally* BLASSINGAME, *supra* note 3, at 249 (“The behavior of the black slave was intimately bound up with the nature of the antebellum plantation, the behavior of masters, the white man’s perceptions and misperceptions, and a multitude of factors which influenced personal relations.”) For example, the vast majority of blacks were enslaved, yet there were a minority, approximately ten percent, who were legally “free.” *See generally* IRA BERLIN, *SLAVES WITHOUT MASTERS, THE FREE NEGRO IN THE*

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More specifically, it is about how sex, race, and status affect the acquisition, development, and retention of wealth.¹⁰ It exhibits how an analysis of legal

ANTEBELLUM SOUTH (1974) [hereinafter BERLIN].

⁸“Wealth” is defined as “*Economics*. A collective term for those things the abundant possession of which (by a person or a community) constitutes riches, or ‘wealth’ in the popular sense.” OXFORD DICTIONARY, VOL. XX, *supra* note 5, at 42. This article uses “wealth” as synonymous with the full rights of U.S. citizenship and capital accumulation, especially all rights of private property ownership, and wealth creation and transference, including that of intellectual or intangible property and government “entitlements.” The author recognizes that “wealth” is synonymous with “greed,” the root of all evil, including the root of the American enslavement system.

⁹This article adopts Professor Adrienne Davis’s terms “enslavement” and “enslaved,” rather than “slavery” and “slave” to describe the political-economic-sexual economy in which blacks were legally and often physically held in bondage. Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 223 at n. 4 (1999) [hereinafter DAVIS] (“I do so in order to highlight the fact that people are not born into servitude. Others force such conditions onto them, with the assistance of state-sanctioned, and often state-sponsored, violence and coercion. Enslavement is not a one-time determination of status; rather, it must be enforced and maintained on an ongoing basis.”)

¹⁰*See generally* Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 YALE L.J. 1473 (2003) (presenting society’s attempts to divide the world strictly into black and white, and to erase racially-mixed people from legal classification).

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principles regulating miscegenation, specifically pertaining to sexual relations¹¹

¹¹See PETER KOLCHIN, *AMERICAN SLAVERY, 1619-1877*, 122-24 (1993) [hereinafter KOLCHIN] (“The close contact that existed between masters and slaves worked special hardship on slave women, who were vulnerable to sexual as well as labor exploitation.... South Carolina ideologue William Harper turned it into a virtue, insisting that it helped account for the absence of Southern prostitution and the purity of white women. Patrician diarist Mary Boykins Chesnut, by contrast, countered that in fact ‘we live surrounded by prostitutes.... Like the patriarchs of old our men all live in one house with their wives and concubines, and the mulattoes one sees in every family exactly resemble the white children.’ Chesnut’s resentment was directed at the wrongs she saw committed against *white* (sic) women...but to the equally bitter ex-slave autobiographer Harriet Jacobs, the victims were *black* (sic) women forced to endure the shameful indignities ‘inflicted by fiends who bear the shape of men.’ (sic) As Chesnut and Jacobs recognized, and Harper implicitly conceded, no slave woman was safe from unwanted sexual advances.

Of course, not all advances were entirely unwanted. There were slave women who maintained long-term relationships with white men that came close to common-law marriages. [This author disagrees with this source, that longevity in an abusive relationship equates to consent, especially when the victim is already legal property of the other party in the “relationship.”]....

Far more often, however, slaves who had sex with whites did so against their will, whether the victims of outright rape or of the powerlessness that made resistance to advances futile and the use of force in such advances unnecessary.... Sex between white men and black women was a routine feature of life on many, perhaps most, slaveholdings, as masters, their teenage sons, and on large holdings their overseers took advantage of the situation to engage in the kind of casual, emotionless sex on demand unavailable from white women. What was routine and casual to white men caused anguish to black women, anguish graphically described by Harriet Jacobs in her searing autobiography, *Incidents in the Life of a Slave Girl*, ‘I cannot tell

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between wealthy white men¹² and black¹³ women¹⁴ in the antebellum South,¹⁵

how much I suffered in the presence of these wrongs,' she wrote, 'nor how I am still pained by the retrospect.'" (Footnotes omitted.))

¹²Who were these “wealthy white males” in the antebellum South, and why are they significant to understanding sexual-racial economies? In the antebellum South, “wealth” was viewed by the number of enslaved blacks one owned. See KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 30-1 (1956) [hereinafter STAMPP] (“The planter aristocracy was limited to some ten thousand families who lived off the labor of gangs (sic) of more than fifty slaves. The extreme wealthy families who owned more than a hundred slaves numbered less than three thousand, a tint fraction of the southern population.”). It is generally accepted that owning fifty or more slaves constituted a “large” holding. ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* 200 (1974) [hereinafter FOGEL & ENGERMAN]. See generally WILLIAM KAUFFMAN SCARBOROUGH, *MASTERS OF THE BIG HOUSE: ELITE SLAVEHOLDERS OF THE MID-NINETEENTH-CENTURY SOUTH* (2003) [hereinafter SCARBOROUGH] (presenting a comprehensive analysis of the demographics, backgrounds, and thinking of this elite super-class).

While black enslavement was concentrated on several large plantations, it was, at the same time, widespread and intimate: the majority of the four million enslaved blacks, counted in the 1860 U.S. Federal Census, were owned by “resident” masters, in small holdings. KOLCHIN, *supra* note 11, at 93, 101.

The planter aristocracy added to wealth, with political power. KOLCHIN, *infra*, 183-84 (“More and more, slaveholders—and the defense of slaveholders’ interests—dominated Southern politics.... Reinforcing the hegemonic hold of slaveholding interests over Southern politics was the simple numerical preponderance of slaveholders in Southern government.... A majority of legislators in every slave state except Missouri, Arkansas, and Delaware were slave owners in 1860; typically, about three-quarters of deep-South legislators and two-thirds of upper-South

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legislators owned slaves. At the gubernatorial level, slaveholding was virtually universal.... [t]he slaveholding character of most Southern politicians greatly facilitated the identification of Southern interests with slaveholding interests, both in their own minds and in the minds of others. Southern politics increasingly revolved around the defense of slavery, which was cast as defense of the South itself.”)

One might believe that white men, especially wealthy and powerful white men, rarely chose black women, especially enslaved black women, as their sexual partners. Yet our history is filled with miscegenational relationships, involving rich and powerful white men and black, sometimes enslaved, women. Some noteworthy ones include that of President Thomas Jefferson’s sexual relationship with Sally Hemming (*see* WINTHROP D. JORDAN, *WHITE OVER BLACK* 546 (1968), Chapter 6, detailing Jefferson’s long-term sexual relationship with Sally Hemming, one of his enslaved black women). They also include Vice President Richard M. Johnson (under President Martin Van Buren) who had an open, long-term relationship with a black woman, and provided for their mulatto children. And most recent, it is now known that Senator Strom Thurmond had a sexual encounter with Carrie Butler, that produced their daughter, Essie Mae Washington-Williams (*see* Michael Janofsky, *Thurmond Kin Acknowledge Black Daughter*, N.Y. TIMES, Dec. 16, 2003, at <http://www.nytimes.com> (last visited, Dec. 16, 2003)). *See generally* RANDALL KENNEDY, *INTERRACIAL INTIMACIES, SEX, MARRIAGE, IDENTITY, AND ADOPTION* 41-59 (2003) [hereinafter KENNEDY].

¹³“Black(s)” is defined as “[h]aving an extremely dark skin; strictly applied to negroes and negritos, and other dark-skinned races; often loosely, to non-Europeans races, little darker than many Europeans.... Of or pertaining to the negro race.” OXFORD DICTIONARY, VOL. II, *supra* note 5, at 238. For purposes of this article, the term “black(s)” refers to people of African heritage, who, in the American enslavement system, were generally enslaved. The term “black” is synonymous with the terms “Negro,” “colored,” “black,” and “mulatto,” as those terms were used in the 1830, 1840, 1850, and 1860 United States Census. “Black” is a term unoffensive to most contemporary African Americans, especially compared to terms often used by some whites

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in the antebellum period (and afterwards) including “Negro” and “nigger.” For an intriguing and brilliant analysis of the history and legacy of a racially-charged word, see RANDALL KENNEDY, NIGGER, THE STRANGE CAREER OF A TROUBLESOME WORD (2002).

Unlike Professor Kimberle Crenshaw, this author has chosen not to capitalize the word “black,” seeking to highlight skin color and to contrast “white,” which is generally not capitalized. In doing so, the author does not disagree with Professor Crenshaw’s view that “Blacks, like Asians, Latinos, and other ‘minorities’ constitute a specific cultural group and, as such, require denotation as a proper noun.” See Kimberle W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1987-1988). The term “black(s)” in this article does not refer to skin color, as by operation of law, any “drop of black blood” (any black ancestry) resulted in a person being classified as “black,” or “Negro,” meaning not white. See JOHN HOPE FRANKLIN & ISIDORE STARR, THE NEGRO IN 20TH CENTURY AMERICA 3-13 (1967). The enslavement economy used racial classification to promote enslavement over freedom. See generally COLOR AND RACE (John Hope Franklin ed., 1968); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487 (1999-2000).

In Louisiana, racial classifications were taken to another level. Free blacks were often referred to as “persons of color” or “gens de couleur.” There were also many levels of racially-based classification based on the mixture of black and white “blood” (although we know that blood only has one red color). This article is not concerned with the debate over the effect that skin color or ethnicity may have had on the status or social acceptability by whites of certain free blacks who might have looked and acted “European,” although the author does not deny that skin color may be a “status” issue. A black’s skin color alone did not determine status in the antebellum South, as there were clearly dark-complexioned blacks who were free and owned enslaved blacks. In addition, there were clearly light- or white-complexioned blacks (and even reportedly white people) who were enslaved and treated as such. See VIRGINIA R. DOMINGUEZ, WHITE BY DEFINITION: SOCIAL CLASSIFICATION IN CREOLE LOUISIANA (1986).

Racial classification, that is “black” and “white” (and formerly “colored”), remains a

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closely guarded legal phenomenon in contemporary America. *See* recent debate over California's Proposition 54, a failed and heated attempt to change the California constitution to delete racial classifications from official records. *See generally* Tanya Kateri Hernandez, "Multiracial" Discourse: Racial Classification in an Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97 (1998) (exploring the contemporary legal ramifications of the multiracial category movement, proposed by "monoracial" black and white parents of biracial children). (Racial classification is legally more significant than gender classification, as seen in a Louisiana statute, by which a person, who "changes" his or her sex, can legally have the "sex" designation (e.g., from "male" to "female") changed on his/her birth certificate. *See* 40 La. Rev. Stat. § 62, "Issuance of New Birth Certificate after Anatomical Change of Sex by Surgery." There is no corresponding provision for a person to change their race on their birth certificate.

¹⁴This article will focus primarily on the adult relationships between wealthy white masters and "adult" enslaved or free black women, both of legal age of consent. (There is doubt whether black women ever "consent" to these relationships. First, the law gave such overwhelming power and authority that white masters made their sexual advances difficult to resist. Second, the law provided no remedy for the rape of an enslaved black woman. And, third, the law failed to provide an enslaved black the legal capacity to consent, negating their humanity and will.) Some historians, such as Eugene Genovese, have concluded that these illicit relationships began with rape and may have ended with love. EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 415 (1974) [hereinafter GENOVESE, ROLL]. ("Many white men who began by taking a slave girl in an act of sexual exploitation ended loving her and the children she bore.") Tragically, many of these relationships began with adult white men raping underage enslaved black girls. *See* Lisa Haberman, *The Seduction of Power: An Analogy of Incest and Antebellum Slavery*, 13 HASTINGS WOMEN'S L.J.307, at 313 -19 (2002) (noting the similar relationship in the law's treatment of enslaved blacks and that of wives and children, which in each case, many times led to sexual exploitation).

There is consensus that some enslaved black women were purchased specifically to be

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white men's sex toys, although perhaps not a widespread reason for all purchases of black women. See ULRICH B. PHILLIPS, *AMERICAN NEGRO SLAVERY: A SURVEY OF THE SUPPLY, EMPLOYMENT AND CONTROL OF NEGRO LABOR AS DETERMINED BY THE PLANTATION REGIME 193-4* (2nd ed. 1969) [hereinafter PHILLIPS] ("The slaves whom the dealer preferred to buy for distant sale.... Demonstrable talents in artisanry (sic) would of course enhance a man's value; and unusual good looks on the part of a young woman might stimulate the bidding of men interested in concubinage. Episodes of the latter sort were occasionally reported.... Concubinage itself was fairly frequent, particularly in southern Louisiana; but no frequency of purchases for it as a predominant purpose can be demonstrated from authentic records.")

A romantic view of these miscegenational relationships can be found in the account of a white Tennessee schoolteacher. Showing his deep love for his black wife and their children, in a petition to the American Colonization Society, he asked for permission to migrate to Liberia: "My wife is a Quadroon of New Orleans... we have been married for five years and have two children, who being only 1/8 African, are blue-eyed, and flaxen hair; and nearly as 'pale faced' as myself. Still, they are *coloured* and that is a word of tremendous import in North America!... I will go *anywhere*... to avoid so hateful an alternative." BERLIN, *supra* note 7, at 267.

Other white men-black women relationships existed, some legitimate and some "illegitimate." There was the wealthy white master's relationship with his mulatto daughter, who is herein referred to as the "black princess," the offspring of a white master and a black woman, free or enslaved. By law, the black princess was owned by her white father, as she maintained the legal status of her enslaved mother. For example, the first recorded Virginia "slave code" statute, in 1662, firmly dealt with the legal status of mixed race offspring: "Whereas some doubts have arisen whether children got (sic) by an Englishman upon a negro woman should be slave or free, Be it therefore enacted... that all children borne in this country shall be held bond (sic) or free only according to the condition of the mother." JOHN H. RUSSELL, *THE FREE NEGRO IN VIRGINIA, 1619-1865*, 19 n. 8 (Dover Publications, Inc. 1969) (1913) [hereinafter RUSSELL] (citing Hening, vol. ii, p. 170). See also BLACK'S LAW DICTIONARY 1121 (6th ed. 1990), under the term "partus sequitur ventrem." ("The offspring of a

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provides great insight into the very nature of the regulation of wealth transference and property rights, including a better understanding of contemporary constitutional issues involving race and gender. This article's focus on the relationship between miscegenation and wealth transference represents an unusual and exciting interdisciplinary approach to the contemporary debate on society's obligations to African Americans. Legal scholarship has peeked at how Critical Race Theory can illuminate the truth in the development of the American legal system.¹⁶ This article's approach serves to open the door to an increased use of

slave belongs to the mother, or follows the condition of the mother.”). The white father and master had to both acknowledge and emancipate his black princess to give her “free” status, along with inheritance rights. In addition to relations with the black mistress, wealthy white masters had relationships with older black women, free or enslaved; some of whom reared him and breast fed him, as a surrogate mother.

¹⁵See STAMPP, *supra* note 12, at 28 (referring to the 1830-1860 time period as the “antebellum” enslavement period).

¹⁶See generally DOROTHY A. BROWN, *CRITICAL RACE THEORY: CASES, MATERIAL AND PROBLEMS* (2003) (utilizing Critical Race Theory in developing a black letter law case book). See also DAVIS, *supra* note 9 (analyzing the relationship of race, sex, and inheritance law, and describing the legal obstacles to black devisees in the antebellum South); Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1 (1995) [hereinafter CHASE] (taking a Critical Race Theory approach to analyzing the development of contract law); Mary Frances Berry, *Judging Morality: Sexual Behavior and*

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Critical Race Theory to solve contemporary legal problems.

This article seeks to explain the majority opinion in the recent Supreme Court's "anti-affirmative action"¹⁷ decision in *Grutter v. Bollinger*.¹⁸ It seeks to

Legal Consequences in the Late Nineteenth-Century South, 78 J. AM. HIST. 835 (1991) (analyzing legal attitudes towards concubinage and inheritance); MARK V. TUSHNET, *THE AMERICAN LAW OF SLAVERY 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* 45-50 (1981) [hereinafter TUSHNET] (describing how commercial law was influenced by enslavement, such as the fellow-servant rule); and Frederick Wertheim, *Slavery and the Fellow-Servant Rule: An Antebellum Dilemma*, 61 N.Y.U.L. REV. 1112 (1986) (describing enslavement's effect on the fellow-servant rule). One Critical-Race-Theorist defined it as "the work of progressive legal scholars of color who are attempting to develop a jurisprudence that accounts for the role of racism in American law and that works towards the elimination of racism as part of a larger goal of eliminating all forms of oppression." Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1763 n.3 (1990). See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberle Crenshaw et al., eds., 1995).

This article seeks to marry Critical Race Theory with Feminist sensitivities to promote the observation that anticipated this article's position, made by DOROTHY ROBERTS, *KILLING THE BLACK BODY, RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 23 (1997), wherein she states: "The social order by powerful white men was founded on two inseparable ingredients: the dehumanization of Africans on the basis of race, and the control of women's sexuality and reproduction. The American legal system is rooted in this monstrous combination of racial and gender domination."

¹⁷*Grutter* is an "anti-affirmative action" decision because, even though hailed as a victory for racial and ethnic-based "affirmative action" at state universities and professional schools, the

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do so by analyzing the legal history of miscegenation and of black women's property rights in the antebellum South. It is within that analysis that this article expects to find the roots of the majority's rationale in *Grutter*.

Tying the *Grutter* rationale to laws regulating miscegenation and black women's property rights in the antebellum South, needs some introductory explanation. From a critical perspective, *Grutter* is a case about property, wealth transference, and miscegenation, when seen through the rationale of Justice O'Connor's swing-vote opinion.¹⁹ First, *Grutter* is a case about privilege and

Supreme Court's justification was not to act affirmatively to benefit African-American and other racially and ethnically "disadvantaged" students, but, rather, it was to enhance the educational experience of the affluent majority white student population. *See infra*, note 19. Compare a positive interpretation of *Grutter* P. ATRICIA GURIN, JEFFREY S. LEHMAN, AND EARL LEWIS, DEFENDING DIVERSITY: AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN (2004). The author is particularly grateful to Cornell University President (formerly Dean, University of Michigan Law School) Jeffrey S. Lehman for sending an advance chapter, entitled, "The Evolving Language of Diversity and Integration in Discussions of Affirmative Action from *Bakke* to *Grutter*."

¹⁸123 S. Ct. 2325 (2003).

¹⁹Justice O'Connor's fifth vote is generally regarded as the decisive tiebreaker in that case. *See* Evan Thomas, Stuart Taylor Jr., Debra Rosenberg & Eleanor Clift, *Center Court: She helped America seek a middle ground on the thorny subject of race. Sandra Day O'Connor's brand of justice*, NEWSWEEK, July 7, 2003, available at 2003 WL 8639381. First, Justice

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wealth transference. Wealth is the capital accumulation of “privilege” and “property”²⁰ interests. It has been widely recognized that access to prestigious

O’Connor reiterates Justice Powell’s view in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), establishing “strict scrutiny” of racial or ethnic-based state actions: “In Justice Powell’s view, when governmental decisions ‘touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.’ *Id.* at 299, 98 S. Ct. 2733. Under this existing standard, only one of the interests asserted by the university survived Justice Powell’s scrutiny.” Second, Justice O’Connor agrees with Justice Powell’s rejection as a compelling argument that African-Americans deserved to have an equal opportunity to attend professional (medical) degree granting schools. She states that Justice Powell first rejected an interest in “reducing the historic deficit of traditionally disfavored minorities in medicine and in the medical profession” as an unlawful interest in racial balancing. *Id.* at 306-07, 98 S. Ct. 2733. Second, Justice Powell rejected an interest in remedying societal discrimination because such measures would risk placing unnecessary burdens on innocent third parties “who bear no responsibility for whatever harm the beneficiaries of the special admissions programs are thought to have suffered.” *Id.* at 310, 98 S. Ct. 2733. And third, Justice Powell rejected an interest in “increasing the number of physicians who will practice in communities currently underserved,” concluding that even if such an interest could be compelling in some circumstances, the program under review was not “geared to promote that goal.” *Id.* at 306, 310, 98 S. Ct. 2733. Justice Powell approved the university’s use of race to further only one interest: “the attainment of a diverse student body.” *Id.* at 311, 98 S. Ct. 2733.

²⁰“Property” has historically been seen as a legal interest in a thing, and almost synonymous with the thing, such as land. That legal interest became “reified” or abstracted, as to be no longer reflective of a tangible object. See Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV.

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universities, like Yale, Stanford, and the University of Michigan, is one of the greatest sources of wealth creation in contemporary society, especially their professional school programs.²¹

Second, *Grutter* is about “property,” in that African Americans who apply to elite predominately white universities and professional schools are judicially

325 (1980) (analyzing the “dephysicalization” of property and the resultant broadening of property law to include valuable interests not traditionally treated or considered as property.) Compare William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974) (showing how the racial sexual economy impacts legal development). Query: Did this “dephysicalization” or “reification” occur in response to the classification of enslaved blacks as “property?” One answer can be found in the view of JUDGE A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 15 (1978) [hereinafter HIGGINBOTHAM] (explaining “how the American legal process was able to set its conscience aside and, by pragmatic toadying (sic) to economic ‘needs,’ rationalize a regression of human rights for blacks.”)

Today, “property” is legally enforceable interests over wealth including intangibles such as intellectual property (copyrights and patents), investment vehicles (stocks and bonds), education (law and medical degrees and licenses), and arguably governmental benefits (social security and welfare). See Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). Hence, the contemporary issue of African-American access to quality higher education, “affirmative action” is a property law issue.

²¹See Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383 (1993).

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reduced to “white property,” or “diversity commodity.”²² In Justice O’Connor’s opinion, the only legal justification for African Americans attending America’s elite public (and arguably) private universities and professional schools, is to provide “a diverse student body” to enhance the learning environment of the affluent white majority.²³ This view reduces African Americans to white property

²²The author coins this phrase to refer to African-American students on white college campuses, who, in the eyes of the majority of the Supreme Court in *Grutter* are not entitled as tax-paying citizens to seek a quality education at their state’s “flagship” universities and professional schools. The *Grutter* Court’s only legal justification for minority students’ presence on white campuses is that they merely enhance the experience of the white student majority. (Query: Should the white student majority pay the African-American students’ tuition, as the white students are the prime beneficiaries of the experience?)

²³123 S.Ct. at 2340 (Justice O’Connor):

These benefits (of diversity; author’s words of explanation, not Justice O’Connor’s direct words) are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.... What is more, high-ranking retired officers and civilian leaders of the United States military assert that, ‘a highly qualified, racially diverse officer corps... is essential to the military’s ability to fulfill its principle mission to provide national security.’... The primary sources for the Nation’s officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to

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in three ways: The *Gruttem* majority fails to recognize African -American self-determination as a consideration, negating their free will. The *Grutter* majority appears to accept as its premise the “African-American inferiority stereotype.”²⁴

participating colleges and universities.... At present, ‘the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies.’... To fulfill its mission, the military ‘must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting.’... We agree that ‘it requires only a small step from this analysis to conclude that our country’s other most selective institutions must remain both diverse and selective.’ (References omitted.)

²⁴That stereotype of “inferiority” is based mainly upon performance on “standardized” examinations, such as the LSAT test for law school applicants. It is irrefutable that Justice O’Connor’s *Grutter* opinion stigmatizes *all* racial minorities who apply to, and attend, predominately white, elite public (and arguably private) institutions as less qualified than many, if not most, of their white counterparts. *Grutter*, 123 S. Ct. at 2344 (O’Connor, as part of her discussion of the “termination” point of affirmative action): “What is more, the Law School actually gives substantial weight to diversity factors besides race. The Law School frequently accepts nonminority (sic) applicants with grades and test scores lower than underrepresented (sic) minority applicants (and other nonminority (sic) applicants who were rejected.” And again, at 2346-7, Justice O’Connor refers to the lower scores of minority students: “It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of higher education. Since that time, the number of minority applicants with high grades and test scores have indeed increased.” (She also referenced lower minority grades at

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That is, that African-American applicants need “affirmative action,” because they are inherently unqualified to compete with white students at elite state universities and professional schools. And the *Grutter* majority empowers white America to judge whether African-American applicants are worthy recipients of white generosity.

And, third, the *Grutter* case is about miscegenation. It is specifically concerned with a limited number of African-Americans, primarily women, seeking access into predominantly white, elite public universities and professional schools.²⁵ As white men make up the largest single gender group on elite public

2344, “Justice Kennedy speculates that ‘race is likely outcome determinative for many members of minority groups’ who do not fall within the upper range of LSAT scores and grades.”)

At the same time, Justice O’Connor was aware that there were less stigmatizing alternatives to increase the number of minority at the University of Michigan Law School, but chose to ignore them: “The District Court took the Law School to task for failing to consider race-neutral alternatives such as ‘using a lottery system’ or ‘decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores’.... So too with the suggestion that the Law School imply lower admissions standards for all students, a drastic remedy that would require the Law School to become a much different institution and sacrifice a vital component of its educational mission.” *Grutter*, 123 S. Ct. at 2345 (O’Connor).

²⁵See *The Journal of Blacks in Higher Education*, at www.jbhe.com/latest/112703_blacks_law_schools.html (last visited December 16, 2003) [hereinafter JOURNAL] (reporting that “black women are now 60 percent of all African-

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university campuses, when we discuss integrating those campuses with primarily black women, we must consider the issue of miscegenation. (Of course, there are other racial-gender relationships, including white men and black men, white women and black men, and white women and black women, that exist on elite university campuses.)

The thesis of this article, then, is that Justice O'Connor's rationale in *Grutter* has its roots in southern antebellum laws regulating and negotiating the sexual-racial economies of property acquisition and transfers from white men to black women, including testamentary transfers and intestate succession, and, consistent with Professor Derrick Bell's "interest-convergence" principle, serves to reinforce a greater social and economic order (as the law did in the antebellum South): the domination, supremacy, and privilege of wealthy white men.

An overview of the article's layout is appropriate here. Part I establishes the

Americans law school enrollments.... At both the University of California at Berkeley and the University of Virginia, black women are more than 70 percent of all black students." *See also* The Journal of Blacks in Higher Education, at www.jbhe.com/latest/120403_grads_MedicalSchool.html (last visited December 16, 2003) (reporting that "Beginning in 1989, and for every year since then, black women have been the majority of all blacks completing medical school. In 2001 they made up 60.5 percent of all blacks who graduated from medical school.... Black women are 61 percent of all black students at Johns Hopkins University, believed to be the best medical school in the nation.")

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critical value of a case study of the law of miscegenation and black women's property rights, relative to contemporary constitutional law race and gender issues and its validity in evaluating Professor Derrick Bell's "interest-convergence" principle. Part II presents and analyzes the legal principles that the white masters developed to control the world they made, one that effectively married America's antebellum private property ownership, enslavement, and sexual paradigms; their "American Dream." Part III describes and analyzes how, in the antebellum American South, legislatures regulated miscegenation, and how sex, race, and status affect the doctrinal mechanisms that governed private property transactions including the acquisition, control, and transfer of property. Part IV describes and analyzes how and why antebellum Southern courts, particularly in the more permissive legislative regime of Louisiana, restricted white men's ability to transfer, by will, wealth to their enslaved black female sexual partners. Part V describes and analyzes the paradox in the existence and success of the "black mistress," black women who the law allowed certain property law privileges, including the right to own land and enslaved blacks in the antebellum South, and how their legal experience challenges Professor Bell's "interest-convergence" principle. Part VI provides a postscript to the black mistress, describing her role in

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the post-bellum civil rights movement. And Part VII describes and evaluates the concept of “blackness as white property” in contemporary society.

This article concludes that the legal treatments of miscegenation and of black women’s property rights, in the antebellum South, are the roots to Justice O’Connor’s rationale in *Grutter*, and that both reflect and support Professor Bell’s “interest-convergence” principle. That is, that the law regulating and negotiating the sexual-racial economies of property acquisition and transfers, including testamentary transfers and intestate succession between white men and black women, served to reinforce a greater social and economic order in the antebellum South: the domination, supremacy, and privilege of wealthy white men.

B. BELL’S “INTEREST-CONVERGENCE” PRINCIPLE TESTED BY THE LEGAL HISTORY OF MISCEGENATION

This article utilizes Professor Derrick Bell’s “interest-convergence” principle as a vital tool. Relative to Critical Race Theory, Professor Bell has observed: “Translated from judicial activity in racial cases both before and after *Brown*, this principle of ‘interest convergence’ provides: The interest of blacks in

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achieving racial equality will be accommodated only when it converges with the interests of whites.”²⁶ This article tests the application of Bell’s “interest convergence” principle to the development of the antebellum South’s law of miscegenation and the black women’s property rights, or simply white to black wealth transference.

This article conducts an interdisciplinary analysis of sex, race, status, and private property by examining the law’s role in black women’s property ownership in the antebellum South. (It also exposes and explodes certain myths and stereotypes about enslavement and the status of black women within the enslavement.) This article examines nineteenth-century statutes and cases involving black women’s²⁷ property and inheritance rights, including those of

²⁶BELL, *supra* note 4.

²⁷This article expressly singles out African-American women in its treatment of the subject for various reasons. First, as discussed later, black women made up a significant percentage of the free population. BERLIN, *supra* note 7, at 151 (“Of all slaves, the black concubines and children of slaveholders were most assured of emancipation.”) *Id.* at 177 (“In contrast to the white and slave populations, there were many more Negro women than men in the South. The great preponderance of free Negro women was confined almost entirely to the cities. There the combined effects of manumission and migratory patterns played havoc with the sexual balance. Urban emancipators tended to bestow favors on women, partly because slave women

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free²⁸ black women who owned property, including land and their ownership of enslaved blacks.²⁹ In this article, these rare, privileged, and affluent class of free

outnumbered slave men in the cities and partly because close intermingling encouraged sexual liaisons which sometimes led to manumission.... [T]he greater mobility of free Negro men allowed a disproportionate number of them to leave the South.”) Second, some black women held significant tracts of land and large numbers of slaves. Third, miscegenation, particularly black women’s relationships with white men, is an essential element for understanding this piece of legal history.

The author’s focus on the relationship between white men and black women is not meant to lessen the importance of other miscegenational relationships in the antebellum South, or to be blind to their existence. For example, there were also free black men who played a significant role in American history. Consistent with Professor Bell’s “interest-convergence” principle, black men were manumitted mainly due to military service and other heroic deeds that served the interests of wealthy white males. *See, e.g.*, PHILLIPS, *supra* note 14, at 428 (“Among the more romantic liberations was that of Pierre Chastang of Mobile who, in recognition of public service in the war of 1812 and the yellow fever epidemic of 1819 was bought and freed by popular subscription....” (Footnote omitted.)) Needless to say, there were sexual relationships between free black men and white women, particularly in the urban areas. *See, e.g.*, JOHN W. BLASSINGAME, *BLACK NEW ORLEANS 1860-1880* (1973) [hereinafter *BLASSINGAME, BLACK*] (especially Chapter 7 on sexual relations between blacks and whites).

²⁸These blacks, living in the southern enslavement states, were legally “free,” not legally enslaved and were not someone’s property. *See generally* BERLIN, *supra* note 7.

²⁹*See* LOREN SCHWENINGER, *BLACK PROPERTY OWNERSHIP IN THE SOUTH, 1790-1915*, 86-87 (1990) [hereinafter *SCHWENINGER*]:

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[F]ree women of color... as a group... controlled a substantial proportion of the total black wealth. In 1850, they owned \$2,033,500 worth of real estate or 27 percent of the total \$7,668,100; in 1860, they owned \$2,782,700 of the \$12,841,600 in real property, or 22 percent. As with men there was a sharp contrast between the Lower South, where, according to the census, 561 free women of color owned a total of \$1,671,400 in 1850, or \$2,979 per realty holder, and the Upper South, where 695 black women controlled only \$362,100, or an average of only \$521 each. In 1860, 694 women in the Lower South owned \$1,870,200, or \$2,695 per owner, while in the Upper South 1,223 owned \$912,500, or \$746 apiece. Some of these women—especially in Louisiana and Virginia where half of them lived—were widows of prosperous free men of color or former mistresses of wealthy whites, but in the Upper South most were simply industrious women who had spent many years accumulating small amounts of property. On both sections a few Negro women had made the journey from slavery to freedom to landownership in a single lifetime.... Yet, despite these difficulties, free black women accumulated significant amounts of property. In addition, they owned more real estate, on average, than Negro men: in 1850, their average realty holding stood at \$1,619 compared with \$1,144 for men; a decade later the gap had narrowed but women still possessed larger average (sic) estates than their male counterparts. By then, one out of five Negro real estate owners in the South was female.

For empirical evidence that southern blacks did, in fact, own enslaved blacks, see FREE NEGRO OWNERS OF SLAVES IN THE UNITED STATES IN 1830 TOGETHER WITH ABSENTEE OWNERSHIP OF SLAVES IN THE UNITED STATES IN 1830 (Carter G. Woodson, compiler and editor, 1924) [hereinafter WOODSON], and Carter G. Woodson, *Free Negro Owners of Slaves in the United States in 1830*, 9 J. NEGRO HIST. 41-85 (1924) (both compiling and analyzing the United States 1830 Population Census to list by states the names of free black heads of families and the

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black women is referred to as the “black mistress.”³⁰ This article seeks to explain

number of slaves they owned). *Compare* LUTHER PORTER JACKSON, *FREE NEGRO LABOR AND PROPERTY HOLDING IN VIRGINIA, 1830-1860*, 201, 202 n.5 (Atheneum 1968) (1942) [hereinafter JACKSON] (noting “a few serious errors” in Woodson’s work, such as “Many of the largest slaveholders listed in the Virginia section... were not Negroes but white persons.... The number of slaves credited to each individual in this compilation varies from 18 to 71. Free Negroes in Virginia never owned slaves on so large a scale.”) *See also* PHILLIPS, *supra* note 14, at 433-36 (“...a negro planter in St. Paul’s Parish, South Carolina, was reported before the close of the eighteenth century to have two hundred slaves as well as a white wife and son-in-law, and the returns of the first federal census appear to corroborate it.... In Louisiana colored planters on a considerable scale became fairly common.... In rural Virginia and Maryland also there were free colored slaveholders in considerable numbers.”)

Not all free blacks, of course, owned enslaved blacks. Most of them, like the majority of antebellum southern whites, were poor and owned no property of any kind. The majority of free blacks who did own enslaved blacks owned only a few, leading to the observation “that by far the larger portion of free Negro owners of slaves were the possessors of this human chattel for benevolent reasons. There are numerous examples of free Negroes having purchased relatives or friends to ease their lot.” JOHN HOPE FRANKLIN, *THE FREE NEGRO IN NORTH CAROLINA, 1790-1860*, 160 (W. W. Norton & Co., Inc. 1971) (1943) [hereinafter FRANKLIN].

³⁰The author expressly uses the term “black mistress” to describe black women who owned land and enslaved blacks, even though in antebellum society, the term “mistress” denoted white women who ran plantation households. *See* DAVIS, *supra* note 9, 220 n.17 (describing her views on various words labeling black women). As will be discussed later, this article takes issue with Professor Davis’s observation that the role of running a plantation was “specifically denied to black women.” *Id.* at n.17. Within the term “black mistress,” the author intends to include the “black princess,” the female offspring of white slaveholding masters and black women, free or enslaved. *See* FREDERICK LAW OLMSTED, *THE COTTON KINGDOM: A*

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TRAVELLER'S OBSERVATIONS ON COTTON AND SLAVERY IN THE AMERICAN SLAVE STATES 235-36 (Arthur M. Schlesinger ed., 1953) ("There is one, among the multitudinous classifications of society in New Orleans, which is a very peculiar... result.... I refer to a class composed of illegitimate offsprings of white men and coloured women (mulattoes or quadroons), who, from habits of early life, the advantages of education and the use of wealth, are too much superior to the negroes, in general to associate with them, and are not allowed by law, or popular prejudice, to marry white people. The girls are frequently sent to Paris to be educated, and are very accomplished. They are generally pretty, often handsome. I have rarely, if ever, met more beautiful women than one or two whom I saw by chance, in the streets.")

This author is greatly in debt to Professor Davis for setting the bar of legal scholarship on the subject of sex, race, and testamentary transfer at such a high level so as to challenge to greatness anyone with the fortitude to enter into the arena. Professor Davis "chose to focus on (black) women who suffered under the disabilities of slavery to reveal the contradictions and evolution of private law doctrine as it struggled to manage the racial economics of sex." DAVIS, *supra* note 9, at 228. (Emphasis added.) Professor Davis's work focused on relationships between white men and enslaved black women, admittedly leaving out white men's relationships with free black women (*id.* at 228). This article covers white men's relationships with enslaved and with free black women. The author is especially interested in focusing on the relationships between free women of color and wealthy white men is that those relationships support the author's sub-thesis that some black women were not helpless or defenseless, and were, in fact, mistresses of their own faith and drivers of their own destiny.

The term "black mistress" plays on our historically flawed, fictionalized picture of the drama of the master-enslaved relationship. As this study will show, there were a few free blacks, who like their white "aristocratic," wealthy counterparts, were in the "planter" class. For these "black mistresses," there was the greatest status difference with the enslaved population. Black mistresses were also the greatest challenge to enslavement's white supremacy premise. Black mistresses, then, were free black women who owned land and twenty or more enslaved blacks. See ELIZABETH FOX-GENOVESE, *WITHIN THE PLANTATION HOUSEHOLD: BLACK AND WHITE*

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the legal paradox of the black mistress's property rights.

In the antebellum American South, legislatures and courts had to decide how sex, race, and status affected the doctrinal mechanisms that governed interracial private property transactions, including the acquisition, control, and transfer of property. How these legislatures and courts handled black women's property rights illuminates principles of sex, race, status, and property (wealth inheritance) law that may help us understand contemporary gender and race issues relative to wealth transference. In addition to key cases, this article effectively utilizes primary legal research sources, including the United States Census schedules, the private property transactions recorded in courthouses such as conveyances, mortgages, donation records, and probate records to provide a rich, yet little known, glimpse into this peculiar anomaly of American society.

This article serves to answer three probing questions about the relationship between sex, race, status, and private property law: First, why did the law allow some blacks to be freed and to remain free, despite the general legal proposition of enslavement law that all blacks be enslaved? Second, why did the law allow free

WOMEN IN THE OLD SOUTH 86 (1988) [hereinafter FOX-GENOVESE] (defining "planters" as a person owning more than twenty); *compare* KOLCHIN, *supra* note 11, at xiii (1993) (defining "planters," as a person owning twelve or more enslaved blacks).

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blacks to own private property, despite the general legal proposition that enslaved blacks were not allowed to own property? And third, why have American-African women been stereotyped as un-industrious, helpless victims of white domination, despite a history of self-determination and achievement? These questions and their answers will be approached from a study of the legal history of the antebellum, southern, black woman's private property ownership and the law of miscegenation.

How, then, does Professor Bell's "interest-convergence" principle facilitate our understanding of how and why the law generally failed to provide white men the right to marry black women, and to alienate, *inter vivos* and *causa mortis*, their private property, to their black women and their children? It would appear, according to Professor Bell's principle, that whoever provided the greatest "service" to wealthy white men received the greatest legal benefits, including property rights. An analysis of this question requires us to evaluate both the law of miscegenation, particularly as it relates to white men's ability to dispose of legacies to black women, and the legal history of free black women, who owned property in the antebellum South.

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C. WEALTH AND RACIAL/SEXUAL STEREOTYPES

Private property ownership is perhaps the hallmark of American society.³¹ Its relationship to sex and race provides a compelling opportunity to evaluate private property ownership's role in the development of our legal system. The first American revolution was arguably tied to the struggle for control of property, particularly land.³² The second American struggle for freedom that culminated with the Civil War, was tied to another form of private property ownership, that of enslaved black human beings.³³ In the enslavement political economy,³⁴ private

³¹See Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1937-1938) (documenting primary of property law in the legal order, and concluding that the doctrinal concern for vested property rights was “the basic doctrine of American constitutional law.”)

³²See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973) [hereinafter FRIEDMAN], especially Chapter IV, “The Law of Person Status: Wives, Paupers, and the Slaves” and Chapter V, “The American Law of Property.”

³³See generally DAVID M. POTTER, *LINCOLN AND HIS PARTY IN THE SECESSION CRISIS* (Yale Univ. Press, 6th ed 1971) (1942) (analyzing and documenting the attitudes of the Republicans to the threat of secession and the actions of President Lincoln between his election as President and the fall of Fort Sumter).

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ownership of enslaved blacks represented a very substantial investment in capital.³⁵

³⁴The term “enslavement political economy” or “enslavement economy” reflects the plantation society of EUGENE D. GENOVESE, *THE POLITICAL ECONOMY OF SLAVERY: STUDIES IN THE ECONOMY AND SOCIETY OF THE SLAVE SOUTH* 15-16 (1965) (“The essential element in this distinct civilization was the slaveholders’ domination, made possible by their command of labor. Slavery provided the basis for a special Southern economy and social life, special problems and tensions, and special laws of development.”)

³⁵See FOGEL & ENGERMAN, *supra* note 14, at 4 (“Slavery was not a system irrationally kept in existence by plantation owners who failed to perceive or were indifferent to their best economic interests. The purchase of a slave was generally a highly profitable investment which yielded rates of return that compared favorably with the most outstanding investment opportunities in manufacturing.”) See also ULRICH B. PHILLIPS, *LIFE AND LABOR IN THE OLD SOUTH* 185, 185 n. 4 (Little, Brown and Company 1963) (1929) [hereinafter PHILLIPS, LIFE] (“The universal disposition is to purchase. It is the first use for savings, and the negro purchased is the last possession to be parted with,” quoting a writer of a well-read southern agricultural journal, James B. D. DeBow, on the primacy of investing in slave property. *DeBow’s Review*, XXX, 74 (January, 1861)). “An expert accountant has well defined the property of a master in his slave as an annuity extending throughout the slave’s working life and amounting to the annual surplus which the labor of the slave produced over and above the cost of his maintenance.” PHILLIPS, *supra* note 14, at 359, 359 n.1, citing Arthur H. Gibson, *Human Economics* (1909), at 202 (sic).

Enslaved black labor was often viewed as a commodity, like chattel. See, e.g., PHILLIPS, LIFE, *infra* at 176-177 (presenting a price-curve chart for prime field hands, plotted from four nineteenth-century enslavement markets, including New Orleans, Charleston, Virginia, and Georgia, showing the average price being \$1,300 over a thirty-year time-span, with a high of \$1,800 in 1860).

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Therefore, one peculiar aspect of the development of American property law is its relationship to the institution of enslavement.³⁶ The third and current American revolution will arguably focus on economic disparities and wealth redistribution.³⁷

“Whiteness” has come to represent a positive property right in America’s political and economic wealth.³⁸ The opposite could be said about “blackness:” a negative property right in America’s legacy, starting with a history of blacks as

³⁶See generally DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* (2000) [hereinafter “BELL, RACE”].

³⁷See Kevin Hopkins, *Forgive U.S. Our Debts: Righting the Wrongs of Slavery* 89 GEO. L. J. 2531 (2001); Charles J. Ogletree, *Edward L. Barrett, Jr., Lecture of Constitutional Law: The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051 (2003). (The National Coalition of Blacks for Reparations in America (“N’COBRA”) is an umbrella organization of more than a dozen groups seeking to advance the campaign for reparations.) See generally SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS (Raymond A. Winbush, ed.) (2003).

³⁸See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1716 (1993) (examining how whiteness, initially constructed as a form of racial identity, evolved into a form of property, historically and presently acknowledged and protected in American law, noting that race or racism alone did not operate to oppress blacks; instead “the interaction between concepts of race and property, played a critical role in establishing and maintaining racial and economic subordination.”) It is, as a result of her inspiring work and thought-provoking analysis, that this article adds “sexual oppression” to the analytical picture and parodies the title of her note-worthy thesis. (Imitation is the highest form of compliment!)

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whites' enslaved property, to second-class citizenship status following the Civil War, and still facing a wealth and education gap compared to white Americans.³⁹

African Americans today are still seeking full legal equality under property law,⁴⁰ following a recent history that includes racially-restrictive covenants.⁴¹ It

³⁹African-American legal history is one of a continuing struggle for full and equal rights as U.S. citizens, without the shackles of racial and gender discrimination. *See generally* BELL, RACE, *supra* note 36. The Reconstruction Congress recognized the need to bestow full U.S. citizenship benefits on African Americans, including the right to property, the right to contract, the right to the benefits of one's labor, and attempted to do so through the 13th, 14th, and 15th Amendment to the U.S. Constitution and the Civil Rights Act of 1866. U.S. CONST. amend. XIII, XIV, and XV.

⁴⁰*See generally* BELL, RACE, *supra* note 36, especially Chapter 8, "Property Barriers and Fair Housing Laws" (outlining and analyzing the legal history of housing discrimination).

⁴¹*See Shelley v. Kraemer*, 334 U.S. 1 (1948), as cited in BELL, RACE, *supra* note 36, at 372 (wherein the Supreme Court struck down as unconstitutional a restrictive covenant in a deed stating, "it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.") *See also*, the Federal Fair Housing Act, enacted as Title VIII of the Civil Rights Act of 1968, 42 U.S.C.A. §§ 3601-31, as cited in BELL, RACE, *supra* note 36, at 398 (1994) (making it unlawful to refuse to sell or rent or otherwise make unavailable a dwelling to any person because of race, color, religion, sex, national origin, familial status, or handicap).

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has been shown that the basis for today's racial wealth gap⁴² is rooted in America's enslavement of African Americans, followed by continuing racial discrimination and victimization.⁴³ It appears that we are still living the legacy of our racially-oppressive past.

To better understand the law's relationship to wealth creation and the

⁴²See Edward N. Wolff, *Recent Trends in Wealth Ownership, 1983-1998*, Apr. 2000, at <http://www.levy.org/docs/wrkpap/papers/300.html> (last visited Mar. 8, 2004) (showing that in 1998, the median net worth of African Americans was \$10,000, compared to \$81,700 of white Americans, and, when housing is excluded, \$1,200 for African Americans, compared to \$37,600 for white Americans.) See generally THOMAS M. SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN, HOW WEALTH PERPETUATES INEQUALITY* (2004).

⁴³See A. Leon Higginbotham Jr. & Anne F. Jacobs, *The 'Law Only as an Enemy': The Legitimatization of Racial Powerlessness through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C.L. Rev. 975 (1992) [hereinafter HIGGINBOTHAM & JACOBS] (recognizing "a nexus between the brutal centuries of colonial slavery and racial polarization and anxieties today. The poisonous legacy of legalized oppression based upon the matter of color can never be adequately purged from our society if we act as if slave laws never existed.") See also CLAUD ANDERSON, *BLACK LABOR, WHITE WEALTH: THE SEARCH FOR POWER AND ECONOMIC JUSTICE* (1994); Joint Center for Political and Economic Studies, Joint Center Data Bank, available at <http://www.jointcenter.org/DB> (for statistical data showing the nature of the racial wealth gap). See generally RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000); GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* (2002); Charles J. Ogletree, Jr., *Essay: Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.- C.L.L. REV. 279 (2003).

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challenges to full wealth equity that African Americans face, it is appropriate to introduce the “racial ladder” analogy.⁴⁴ At the bottom level of the ladder was enslavement, where enslaved black women, as will be later described, had no property rights and, indeed, were themselves property, subject to many types of personal abuse, including sexual. At the top rung of the ladder was freedom, where wealthy white men or “masters” enjoyed all legal private property law benefits. Freedom’s legal citizenship benefits included the right to purchase, sell, own, alienate, abandon, manumit (in the case of enslaved property), lease (as lessor or lessee), gift (both inter vivos and causa mortis), contract (sale and concurrent ownership including marriage), inherit (both by will and through the intestate laws), create non-possessory interests (e.g., easements), collateralize (to secure financing), and the like. A legal history of enslaved blacks’ struggles to obtain the full civil benefits of freedom is an important lesson in America’s history and valuable in understanding contemporary constitutional rights issues. It also helps legal scholars better understand the development and the nature of property rights.

Relative to property rights, there is a ten step or “rung” process from

⁴⁴The author refers to the various levels of American citizenship as the “racial ladder,” because it helps the reader visualize the different levels or “rungs” of citizenship, from “alien”

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enslavement to freedom that enslaved black women had to negotiate. Step One was manumission. This was the legal process through which an enslaved black obtained “free” legal status.⁴⁵ Step Two was the right to contract, especially for one’s labor.⁴⁶ Step Three was the right to receive gifts, inter vivos, and by inheritance. Step Four was the right of succession, to inherit through operation of intestate succession law, as well as the right to be recognized as a legitimate heir. Step Five was the right to acquire land as property in one’s own name.⁴⁷ Step Six

(or enslaved) status to full citizenship status (or free).

⁴⁵*See generally* JUDITH KELLEHER SCHAFER, *BECOMING FREE, REMAINING FREE, MANUMISSION AND ENSLAVEMENT IN NEW ORLEANS, 1846-1862* (2003) [hereinafter SCHAFER, *FREE*]. Manumission often resulted from the magnanimous (although usually self-serving) act of a white master. But it also resulted from the hard-fought efforts of enslaved blacks through the use of “freedom suits.” *See* A. Leon Higginbotham, Jr. and F. Michael Higginbotham, “*Yearning to Breathe Free*”: *Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. Rev. 1213 (1993).

⁴⁶*See generally* CHASE, *supra* note 16 (taking a Critical Race Theory approach to analyzing the development of contract law).

⁴⁷Recognizing that enslavement had deprived enslaved blacks and sometimes free blacks of property rights enjoyed by U.S. citizens, the Civil Rights Act of 1866, Section One, expressly provided for the right to contract for property and other property rights:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of

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was the right to acquire other types of property, including enslaved blacks. Step Seven was the right to mortgage property and borrow money. Step Eight was the right to gift property, inter vivos and causa mortis. Step Nine was the right to participate in open commerce. And Step Ten was the right to marry, especially across racial lines.⁴⁸ An analysis of these ten steps will provide a greater appreciation of the forthcoming study of the regulation of miscegenation and of

the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property as enjoyed by white citizens, and shall be subject to like punishment, pains and penalties and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding.”

Civil Rights Act of 1866, ch. 31, 1, 14 Stat. 27, 27 (1866).

⁴⁸There are many legal benefits that derive from a legally-recognized marriage that were denied black women who had relationships with white men. See William Reppy, *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677, 1678 (1984) [hereinafter REPPY] (analyzing some benefits of marriage, including enforcement of property rights contracts, that achieve income tax, gift tax, or estate tax benefits).

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black women's property rights.

African Americans share a history that is intrinsically tied to the development of American property law.⁴⁹ In the early colonial days, blacks were often treated as indentured servants, who had some property rights and, most importantly, ended their indenture with the completion of a term of years of service.⁵⁰ Yet there is evidence that early in our nation's history, blacks were

⁴⁹*See generally* WINTHROP D. JORDAN, *THE WHITE MAN'S BURDEN, HISTORICAL ORIGINS OF RACISM IN THE UNITED STATES* (1974) [hereinafter JORDAN]; Donald Aquinas Lancaster, Jr., *The Alchemy and Legacy of the United States of America's Sanction of Slavery and Segregation: A Property Law and Equitable Remedy Analysis of African American Reparations*, 43 *HOW. L.J.* 171 (2000).

⁵⁰There is evidence that blacks were not legally "slaves" in colonial America, as they had the same status as white indentured servants. "In the records of the county courts (of Virginia) for 1632 to 1661 negroes were designated as "servants," "negro servants," or simply as "negroes," but never in the records which we examined were they termed "slaves." RUSSELL, *supra* note 14, at 24 (citing for examples or illustrations M.S. Court Records of Accomac County, 1632-1640, pp. 55, 152 et seq.; Lower Norfolk County, 1637-1646, 1646-1651; also citing the opinion of Thomas Jefferson, "...they lived on a footing with the whites, who, as well as themselves, were under the absolute direction of the president." Jefferson Report, 119n.) RUSSELL, *supra* note 14, at 23-24.

Thus for the first two generations the negroes were few, they were employed alongside the white servants, and in many cases were members

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legally classified and treated as “property,” under their master’s control.⁵¹

of their masters’ households... and even their legal status was during the early decades indefinite.... The first comers were slaves in the hands of their maritime sellers; but they were not fully slaves in the hands of their Virginia buyers, for they were neither law nor custom then establishing the institution of slavery in the colony.... In the country court records prior to 1661 the negroes are called negro servants or merely negroes—never, it appears, definitely slaves.... Some of the blacks were in fact liberated by the courts as having served out the terms fixed by their indentures or by the custom of the country.

PHILLIPS, *supra* note 14, at 75.

⁵¹*See generally* THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860*, 62 (1996) [hereinafter MORRIS], especially Part II, “Slaves as Property,” (pointing out that, despite moral objections, enslaved blacks themselves were held as “property,” not just their labor). *See also* STAMPP, *supra* note 15, at 201 (“(Regarding the dehumanizing effects of reducing people to property) The laws, after all, were not abstractions; they were written by practical men who expected them to be applied to real situations. Accordingly, slaves *were* (sic) bartered, deeded, devised, pledged, seized, and auctioned. They were awarded as prizes in lotteries and raffles; they were wagered at gaming tables and horse races. They were, in short, property in fact as well as in law.” (Emphasis added.))

Unfortunately, American enslavement predates the American Revolution and the Constitutional Conventions. *See generally* HIGGINBOTHAM, *supra* note 20, and EDMUND S. MORGAN, *AMERICAN SLAVERY AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* (1975) (describing often-heated debates over the role of enslavement in a free United States society). *See also* WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW, 1760-1830*, 50-51 (1975) [hereinafter NELSON] ([Even in the Prerevolutionary (1760-1775), “Northern free

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For the enslaved, it must have been devastating to be someone's private property.⁵² It meant that you were owned by, controlled by, could be abused by,

state" of Massachusetts] "The law also regarded many laborers as a form of property. Many cases confirm the widely known fact that slaves were regarded as "Property."... What is less known is that indentured servants, apprentices, and even children were similarly regarded....")

In addition, once established, special effort was made to maintain the enslavement economy. For example, a Louisiana statute provided for a master's absolute control over his or her enslaved blacks: "The condition of a slave being merely a passive one, his subordination to his master and to all who represent him, is not susceptible of any modification or restriction.... [H]e owes to his master, and to all his family, a respect without bounds, and an absolute obedience, and he is consequently to execute all the orders which he receives from him, his said master, or from them." *CODE NOIR* or BLACK CODE of Louisiana, Acts Passed at the First Session of the First Legislature of the Territory of New Orleans, § 18 (1806) (repealed 1868) [hereinafter BLACK CODE]. See generally Bill Quigley & Maha Zaki, *The Significance of Race: Legislative Racial Discrimination in Louisiana*, 24 S.U. L. REV. 145 (1997) [hereinafter QUIGLEY].

⁵²See BLASSINGAME, *supra* note 3, at 297 (describing the psychological effect on black families separated by sale):

Added to the slave's fear of the lash was the dread of being separated from loved ones. To be sold away from his relatives or stand by and see a mother, a sister, a brother, a wife, or a child torn away from him was easily the most traumatic event of his life. Strong men pleaded, with tears in their eyes, for their master to spare their loved ones. Mothers screamed and clung grimly to their children only to be kicked away by the slave trader.... Angry, despondent, and overcome by grief, the slaves frequently never recovered from the shock of separation. Many became remorse and indifferent to their

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and be bought, sold⁵³ and devised by your owner.⁵⁴ As private property, being an enslaved black, meant absolute loyalty to your master; your enslaved family came

work. Others went insane, talked to themselves, and had hallucinations about their loved ones.... William Wells Brown described one slave woman who was so despondent over being forced to leave her husband that she drowned herself.

⁵³PHILLIPS, *supra* note 14, at 373 (describing the market for enslaved blacks and showing the incredible prices paid for them):

At the middle of the (eighteen) forties, with a rising cotton market, there began a strong and sustained advance, persistent throughout the fifties and carrying slave prices to unexampled heights. By 1856, the phenomenon was receiving comment in the newspapers far and wide. In the early months of that year the Republican of St. Louis reported field hand sales in Pike County, Missouri, at \$1,250 to \$1,550; the Herald of Lake Providence, Louisiana, recorded the auction of General L.C. Polk's slaves at which 'negro men ranged from \$1,500 to \$1,635, women and girls from \$1,250 to \$1,550, children in proportion—all cash' (sic).... (Emphasis added.)

⁵⁴*See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 449-52 (1857) (wherein the United States Supreme Court held, *inter alia*, that the enslaved Dred Scott's long residence with his owner in a "free" territory did not automatically emancipate him. Chief Justice Taney's opinion for the Court in *Dred Scott* stated that "the right of property in a slave is distinctly and expressly affirmed in the Constitution" and that the Fifth Amendment Due Process and Just Compensation clauses prevented Congress from outlawing enslavement as that would deprive enslavers of their property.") *Id.* at 449-52.

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second, if at all.⁵⁵ Being an enslaved black woman meant that you were your master's sexual property as well.⁵⁶ It also meant that your children, including

⁵⁵FOGEL & ENGERMAN, *supra* note 12, at 128, 130 (“[W]hile the existence of slave marriages was explicitly denied under the legal codes of the states, they were not only recognized but actively promoted under plantation codes.... Of course, not all planters, and not all of their overseers, were men who lived by the moral codes of their day. That many of these men sought sex outside of the confines of their wives’ bed is beyond question. To satisfy their desires they took on mistresses and concubines, seduced girls of tender ages, and patronized prostitutes.”)

⁵⁶*See* KOLCHIN, *supra* note 11, at 124 (In the words of one former enslaved woman, Harriet Jacobs, in her searing autobiography, *INCIDENTS IN THE LIFE OF A SLAVE GIRL*, told of the abuse a black enslaved woman received from her white male masters: “I cannot tell how much I suffered in the presence of these wrongs or how I am still pained by the retrospect.”) Former slave, prolific writer, and public orator, Frederick Douglass declared that the “slave woman is at the mercy of the fathers, sons or brothers of her master.” FREDERICK DOUGLASS, *MY BONDAGE AND MY FREEDOM* 60 (1855). *See also*, PHILLIPS, *LIFE*, *supra* note 35, at 162 (“A slave could own no property unless by sanction of his master, nor make a contract without his master’s approval. His mating was mere concubinage in law, though in case of subsequent emancipation it would become a binding marriage. The rape of a female slave was not a crime, but a mere trespass upon the master’s property!”) *See generally* BLASSINGAME, *supra* note 3, at 172-73 (analyzing the negative impact miscegenation had on the black family: “Generally, however, the women had no choice but to submit to the sexual advances of white men. Henry Bibb (author of a slave autobiography, *Adventures*) wrote that ‘a poor slave’s wife can never be... true to her husband contrary to the will of her master. She can neither be pure or virtuous, contrary to the will of her master. She dare not refuse to be reduced to a state of adultery at the will of her

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those fathered by your white master, were enslaved.⁵⁷ In addition, enslaved blacks were legally prohibited from owning property,⁵⁸ including the “property” of

master....” (Emphasis added and footnote omitted.) The punishment for not submitting to the master’s sexual demands ranged from infliction of physical harm to separation through sale of either the husband or wife. *Id.* at 173-74.)

⁵⁷There is some controversy over the extent to which white men fathered children with their enslaved black women, although all agree that the “practice” was extensive. In order to get a fuller picture of when white men fathered children with black women, one must look to three circumstances. The first and the most horrible was when a wealthy white master forcibly raped his unwilling, and all too often underage, enslaved black woman. The second was when a wealthy white master participated in “consensual” sexual intercourse with an enslaved woman. And the third was when a wealthy white man participated in consensual sexual intercourse with a free black woman. See BERLIN, *supra* note 7, at 178-79 (noting that according to the 1860 U.S. Census, 10.4% of the enslaved population was of mixed racial ancestry, while 40.8% of the free black population was. With 4 million enslaved blacks and about 400,000 free blacks, this meant that there were about 600,000 blacks of mixed ancestry (enslaved and free), or about 15% were racially mixed. Statistical data and analysis concerning skin color as evidence of racial parentage are tainted by three questionable factors: First, no criterion for “mulatto” was given to the census takers, hence one must speculate on the accuracy and consistent use of that term. Second, one cannot assume that the offspring of a white man and a black woman would always produce a child whose skin is lighter than its black mother. And third, one cannot rule out that some “mulatto” children were the offspring of white women and black men, or of enslaved or free mulatto men or women with enslaved or free black men or women.)

⁵⁸See PHILLIPS, *supra* note 14, at 512 (“The law, for example, conceded no property rights to the slaves, and some statutes specifically forbade their possession of horses....”) See

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their labor.⁵⁹ Added to the legal prohibitions they faced, enslaved blacks also suffered from the emotional, psychological, physiological, economic, sociological, and spiritual impacts of being someone's property.⁶⁰ African Americans are still

generally ROBERT B. SHAW, *A LEGAL HISTORY OF SLAVERY IN THE UNITED STATES* 157 (1991) [hereinafter SHAW] (summarizing the legal status of enslaved blacks: "For all practical purposes, the legal status of a slave could be described very succinctly. He was the absolute property of his owner, possessing almost no rights of his own. To be more specific, he had no right to choose his own employment, to own property, to make contracts with any person, to select his place of residence, to marry or to enjoy genuine family life, to become educated, to inherit property or to utilize the system of justice in any way.") *See also*, QUIGLEY, *supra* note 51, at 159 ("A slave is one who is in the power of a master to whom he belongs. The master may sell him, dispose of his person, his industry, and his labor; he can do nothing, possess nothing, nor acquire anything but what must belong to his master." (citing the 1825 Louisiana Civil Code, Art. 35, p.6., *Id.* n.104.)) "Slaves were not allowed to own anything other than what the master allowed, and anything that the slave had belonged to the master. Slaves could not will anything to anyone.... Slaves could not donate or inherit or bequeath, but they could be donated, inherited or bequeathed to others." *Id.* at 176 (Footnotes omitted.)

⁵⁹The "property" right to the fruits of one's labor was generally denied to enslaved blacks, contrary to the "labor theory" of property of the famous philosopher John Locke (1632-1704). *See* JOHN LOCKE, *TWO TREATIES OF GOVERNMENT*, Book II, Ch. V (c. 1690), a slightly modernized version states: "Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person. This nobody has any right to but himself. The labor of his body, and the work of his hands, we may say, are property his." as cited in JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 15-16 (1998) [hereinafter DUKEMINIER].

⁶⁰*See generally* BLASSINGAME, *supra* note 3 (presenting a picture of the human face of

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haunted by the legal vestiges of having been whites' legal property through much of American legal history.⁶¹ Hence, African Americans have a strange relationship with the legal history of private property.

Therefore, this article does additional duty. It also presents and discredits a major "gender-race" enslavement myth that continues to cloud the contemporary American mind, as stereotypes of sex, race, and property paradigms. That enslavement myth is that of the "helpless, defenseless black woman." The myth proposes that throughout enslavement and after, black women were helpless and defenseless victims of the whims of their white masters. This article hopes to shed

enslavement from the enslaved black's perspective, successfully utilizing slave autobiographies, slave narratives, and interviews of previously enslaved blacks, in the 1930's Writers Project of the United States Work Progress Administration).

⁶¹*See, e.g.,* OWEN FISS, *A WAY OUT: AMERICA'S GHETTO'S AND THE LEGACY OF RACISM* 113 (Joshua Cohen et al., eds., 2003) [hereinafter FISS] (noting the vestiges of enslavement, Jim Crow segregation, and welfare policies have created poor black ghettos that cry out for "a bold program of reconstruction."); MICHAEL K. BROWN, DAVID WELLMAN, MARTIN CARNOY, ELLIOTT CURRIED, TROY DUSTER, DAVID B. OPPENHEIMER, & MARJORIE M. SHULTZ, *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003) [hereinafter BROWN] (showing how "durable racial inequality" persists today as the cumulative effects of inequality on blacks and the long-term positive effects of institutional discrimination on whites: e.g., the ratio of black to white income is 62 percent, but the ratio black to white median net worth is just 8 percent); *AMERICANS FROM AFRICA: SLAVERY AND ITS AFTERMATH* (Peter I. Rose ed., 1970).

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some new light on the myth and hopes to show that in reality, many black women were often masters of their own destinies and were capable business leaders, while many others were innocent and irresponsible victims of legally-sanctioned white physical and sexual oppression.

D. WHY THIS CASE STUDY IS RELEVANT

Perhaps the uninitiated critic would find this study of the regulation of miscegenation and of antebellum black women's property ownership too marginal to have any material effect, at least as it relates to our understanding of American property law principles,⁶² as well as its constitutional issues. Additionally, one might doubt that black women owned property in the antebellum South.⁶³ Yet this

⁶²The author recalls the Yale History Department's skeptical reaction to his Scholars of the House proposal to study blacks who owned slaves: "Great project, Crusto, but you cannot research something that did not exist."

⁶³The plight of enslaved and free black women must be viewed from the unfortunately low legal and social status that women in general (including married white women) held in Nineteenth Century American society. See generally FRIEDMAN, *supra* note 32, at 179-201, Chapter 6, "The Law of Personal Status: Wives, Paupers, and Slaves." For example, on the issue of rape of enslaved black women, sadly, even in modern times, it was not criminal for a husband

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article will prove the skeptics wrong on both fronts. And it tutors legal scholars on important sexual and racial aspects of our private property system that underpin contemporary policy debates.

One may anticipate criticism to this article along several lines of argument. First, what role does legal history have for contemporary legal problems? Second, why look at private property transactions and private case law, including sales, inter vivos transfers, and testamentary transfers, when public law in the form of state statutes are of primary importance? Third, why be concerned with a very limited universe of cases (e.g., white men and black women) of a very limited subset of an already marginal population (e.g., free black women owners of property, in an enslavement society where most blacks were enslaved)? Here are some answers for the critics.

First, legal history has proven to be a great source of wisdom in analyzing and solving contemporary legal issues.⁶⁴ The famous civil rights jurist, Judge

to rape his wife. *See, e.g., Statev. Haines*, 51 La. Ann. 731 (La. 1899) (Louisiana law prohibited a wife from charging her husband with rape “on account of her matrimonial consent which she has given, and which she cannot retract.”)

⁶⁴Contemporary debate on sex and race in the law have often benefitted from a historical analysis. *See, e.g., C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW* 13 (3rd ed. 1974)

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John Minor Wisdom, mastered the technique of using legal history to tackle contemporary racial (and other) problems, as represented in his majority opinion in the landmark voting rights case, *United States v. Louisiana*.⁶⁵ Although this case was not directly a traditional “property” right case, Judge Wisdom’s opinion serves two purposes. First, in his use of legal history (and arguably Critical Race

[hereinafter WOODWARD, STRANGE] (noting that the roots of Jim Crow segregation can be found in the treatment of free blacks in enslavement states, such as “[d]enied full rights and privileges of citizens, derived of equality in the courts, and restricted in their freedom of assembly and freedom of movement....”)

⁶⁵225 F. Supp. 353, 1963 U. S. Dist., LEXIS 10307 (E.D. La. 1963). In *United States v. Louisiana*, the majority (2-1) held that the Louisiana State Constitution’s “interpretation test” (requiring that an applicant for voter registration “be *able* to understand and give a reasonable interpretation of any section of [the Louisiana or Unites States] Constitution[s] when read to him by the registrar” (LA. CONST. of 1921, art VIII, §1(d) (amended 1960) (emphasis added)) was a “sophisticated scheme to disfranchise Negroes,” and was “unconstitutional as written and as administered.” *Id.* at 356. See Barry Sullivan, *The Honest Muse: Judge Wisdom and the Uses of History*, 60 TUL. L. REV. 314, 324 (1985) (“Historical research provides the stone and mortar from which Judge Wisdom’s opinions were crafted. History provides the ‘facts’ upon which the judgement of unconstitutionality is premised.”) See generally JACK BASS, UNLIKELY HEROES (1981); HARVEY C. COUCH, A HISTORY OF THE FIFTH CIRCUIT, 1891-1981 (1984); and FRANK T. READ AND LUCY S. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH (1978) (describing Judge Wisdom’s distinctive judicial style, especially in landmark desegregation decisions of the U.S. Fifth Circuit Court of Appeals).

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Theory), Judge Wisdom documents that “by 1860, free blacks⁶⁶ in Louisiana

⁶⁶“Free blacks” refer to people living in the American enslavement states who were of African ancestry and who were not enslaved, but were legally “free.” Enslaved blacks became “free” through a legal act of “manumission.” (There were other means of becoming “free” including migrating to a “free” state, for example, through use of the Underground Railroad.) Manumission was common throughout the history of American enslavement, often occurring at the death of the wealthy white master, by act of will, subject to full payments of mortgages for which enslaved blacks served as collateral. *See* PHILLIPS, *supra* note 14, at 426-29 (“John Randolph’s will set free nearly four hundred in 1833 (Virginia); Monroe Edward of Louisiana manumitted 160 by deed in 1840; and George W.P. Custis of Virginia liberated his two or three hundred at his death in 1857.” (Footnotes omitted and emphasis added.)) *See also*, SCHAFER, FREE, *supra* note 45.

Contrary to the norm, some enslaved blacks were able to obtain money, often with the permission of their master(s), and allowed or encouraged to “purchase” their freedom. *See, e.g.*, PHILLIPS, *supra* note 14, at 427-28 (“John McDonogh... of New Orleans... made a unique bargain with his whole force of slaves... by which they were collectively to earn their freedom and their passage to Liberia by the overtime work of Saturday afternoons.... The plan was carried to completion on schedule...they left America in 1842, some eighty in number.... McDonogh wrote: ‘... I can say with truth and heartfelt satisfaction that a more virtuous people does not exist in any country.’” (Footnotes omitted.))

Of course, there were “free blacks” who lived in “free,” northern states, but they are not the focus of this study. As to their legal status and condition, *see, e.g.*, KOLCHIN, *supra* note 11, at 82 (“Northern blacks, although free, were objects of both legal discrimination and vicious hostility. Excluded from most public schools, denied the right to vote (except in Maine, Vermont, New Hampshire, and Massachusetts, and-if they could meet a property requirement-New York), forbidden by (sporadically enforced) law from entering many states, jeered at and at times physically attacked by whites who refused to work with them or live near them, blacks

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owned real property and slaves valued at \$50 million.”⁶⁷ And second, Judge Wisdom introduces the basis for the thesis of this article, in that the disenfranchising “interpretation test” was a part of Louisiana’s “historic policy and the white citizens’ firm determination to maintain white supremacy in state and local government by denying to Negroes the right to vote.”⁶⁸ Following the “Wisdom model” of using legal history to address contemporary constitutional issues, in addition to Critical Race Theory, this article uses legal history to reflect

quickly came to appreciate the difference between freedom and equality.”)

⁶⁷As a part of his legal history analysis of African-American disenfranchisement, Judge John Minor Wisdom wrote:

Thus, from the *Code Noir* of 1724 until 1864, the organic law of the state ordained that only free white males could vote or hold office. This was in a state where there were thousands of free men of color. Many of these were well educated and owned slaves. Except for suffrage, they possessed the civil and legal rights of white citizens. (Emphasis added.)

Id. at 363. Judge Wisdom, using census figures and other primary sources, noted, “In 1810 New Orleans had 8,001 white persons, 5,727 free persons of color, 10,824 slaves.... A battalion of gens de couleur fought at the Battle of New Orleans in 1815. In 1860, Louisiana free blacks owned real property and slaves valued at \$50,000,000.” *Id.* at 363-64, n.9. (Emphasis added.)

⁶⁸*Id.* at 363.

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on the Supreme Court's decision in *Grutter*. (Critics of the majority opinion of *Grutter*, on the basis of "historical amnesia," would find support in another of Judge Wisdom's famous civil rights decisions, that of the integration of the then-racially segregated University of Mississippi at Oxford, by James Meredith, a black man, over thirty years prior to *Grutter*.⁶⁹)

Second, the analysis of private law transactions and private case law, such as those involving disputes over inter vivos and causa mortis legacies, have proven to be an important "window on a more general economy of race, status, and sex operative in the antebellum period and postbellum South."⁷⁰ The legal history of the property rights, from both its public and private law aspects, is perhaps an accurate barometer of what was actually occurring in nineteenth century society. But statutory or public law alone often is a poor reflection of life. Rather than

⁶⁹*Meredith v. Fair*, 306 F.2d 374 (5th Cir. 1962); see Mitchell F. Crusto, *The Supreme Court's "New" Federalism: An Anti-Rights Agenda?*, 16 GA. ST. U. L. REV. 517 (2000); Mitchell F. Crusto, *Federalism and Civil Rights: The Meredith Case*, 11 NAT'L BLACK L.J. 301 (1989).

⁷⁰See DAVIS, *supra* note 9, at 225, 288 (pioneering analysis of the legal history of private law in wealth transfer: "The claim of this article is that the ideological messages and distributional consequences of private law are at least as important-if not more important-than the public law criminalization of a particular kind of relationship.")

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present a clear picture of the norm, it often is an attempt to change the norm. This may be especially true of sexual and racial norms. For example, if white men and black women were not involved sexually, why would there be a need to pass a state statute prohibiting them from marrying?⁷¹

This article starts with the principles of private property, then presents the statutory norms of enslavement to show the context and the legal obstacles that enslaved black women faced in that economy system. It then plots the doctrinal axes of private property ownership, enslavement, and sexual paradigms that governed life for the greater majority of southern black women, in order to chart the property-enslavement-sexual legal matrix. This apparently harmless and

⁷¹See *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down, as unconstitutional, theretofore criminal bans on interracial marriage in Virginia and in fifteen other states and the District of Columbia). Cf. (sic) The Virginia judge who had upheld the state's anti-miscegenation laws, in *Loving*, justified his decision based upon God's will to separate the races: "Almighty God created the races white, black, yellow, malay (sic) and red, and he placed them on separate continents.... The fact that he separated the races shows that he did not intend for the races to mix.") *Id.* at 3. See MYRDAL GUNNAR, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 606 (1944) (observing that anti-miscegenation laws had "the highest place in the white man's rank order of social segregation and discrimination.") As this article will show, that may have been true as to the white man's laws, but it did not reflect the white man's sexual behavior. See also Robert A. Destro, *Law and the Politics of Marriage: Loving v. Virginia After Thirty Years Introduction*, 47 CATH. U. L. REV. 1207 (1998).

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pervasive matrix was the engine that created wealth, status, and entitlements, while at the same time it constructed barriers, obstacles, and disabilities. It was and is the foundation of our present sexual-racial economy.

Third, as to the small number of black mistresses, the uninitiated would like to believe that they were nonexistent. The free black population was a significant feature of southern society.⁷² And free black women outnumbered free black men.⁷³ The small number of black mistresses must be viewed in the context of the

⁷²See BERLIN, *supra* note 7, at 45-50 (observing “The spectacular increase in manumissions and runaways and the influx of West Indian people of color altered the size and character of the Southern free Negro caste. The change can best be viewed in Maryland. Between 1755 and 1790 the free Negro population of Maryland grew 300 percent to about 8,000, and in the following ten years it more than doubled. By 1810, almost one-quarter of Maryland’s Negroes were free, and they numbered nearly 34,000; this was the largest free Negro population of any state in the nation.... By 1810, the 108,000 free Negroes were the fastest-growing element in the Southern population.”) (“The Louisiana Purchase of 1803 brought a large number of free Negroes with American borders.... The free Negro population of the Gulf region was almost entirely the product of extramarital unions between white men and black women.” *Id.* at 108-09.) Combining the enslaved and the free groups, the black population in most of the South outnumbered the white population.

⁷³See BERLIN, *supra* note 7, at 177 (“In contrast to the white and slave population, there were many more free Negro women than men in the South. The great preponderance of free Negro women were confined almost entirely to the cities.... Urban emancipators tended to bestow favors on women, partly because slave women outnumbered slave men in the cities and

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times. In the antebellum South, only a small minority of the population, white or black, owned property, and particularly owned enslaved blacks.⁷⁴

And, then, there is the question of the relevance of studying the antebellum South to understand the development of American law. (This article relies heavily on Louisiana sources, dating between 1830 and 1860, as Louisiana's significant economic growth and prosperity, following the Louisiana Purchase in 1803, represents a critical developmental stage in America's history.⁷⁵) Some might

partly because close intermingling encouraged sexual liaisons which sometimes led to manumission.”)

⁷⁴See STAMPP, *supra* note 12, at 30 (noting that the “planter aristocracy was limited to some ten thousand families who lived off the labor of gangs (sic) of more than fifty slaves.”) KOLCHIN, *supra* note 11, at 180-84 (“As historian Gavin Wright demonstrated, the average wealth of slaveholders in the Cotton South in 1860 (\$24,748) was 13.9 times the average wealth of non-slaveholders (\$1,781); slaveholders owned 93.1 percent of the region's agricultural wealth.”)

⁷⁵It has been suggested that Louisiana is not representative of southern enslavement: DAVIS, *supra* note 9, n.152 (“Louisiana, for instance, had its own distinctive sexual economy of slavery that was consonant with its more liberal attitudes toward sexuality and the ideology of a civil law system.”) Yet the black mistress anomaly described in this article was not limited to Louisiana. It occurred in each and every enslavement state in this country (as well as in other countries). See WOODSON, *supra* note 29. See also SCHWENINGER, *supra* note 29, at 117-20:

The great majority of the area's affluent free persons of color—in 1860 nearly two out of
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three—were residents of Louisiana. Despite declines in New Orleans and a few other parishes, they remained by far the richest group of African descent in the United States, controlling substantially more property than prosperous free Negroes in the other states of the Lower South combined.... Even in New Orleans, where anti-free black sentiment seemed most pronounced, this was true. According to the credit reports of R.G. Dun and Company, Pierre Casenave, who invented a secret embalming process, was able to increase his income during the period 1850-1857 from \$10,000 to \$40,000 each year.... By 1860, five of the ten wealthiest free persons of color in the South—Bernard Soulie, Dumas, Lacroix, grocer J. Camps, worth an estimated \$86,000, and landlord Francois Edmond Dupry—claimed the Crescent City as their place of residence.... [I]n Louisiana... farmers and plantation owners controlled a total of \$1,850,000 worth of land, 24 percent of the property owned by Negroes in the entire South.... In 1850, the average realty holdings among these affluent mulattoes were worth \$10,221, more than ten times the average for whites (including nonproperty owners) in the nation. (Footnotes omitted.)

Louisiana was a great land of opportunity for many. *See* SCARBOROUGH, *supra* note 12, at 126-27 (“The quintessential example of the transition from commercial to agricultural capitalism occurred just before the Civil War when John Burnside, a wealthy New Orleans merchant, purchased Houmas, the vast Ascension Parish sugar estate of John Preston, for a reported \$1,000,000. An immigrant from Northern Ireland, Burnside had come to America as a teenager and had started life in this country as a grocer’s clerk for Virginia merchant Andrew Beirne. Subsequently, he moved to New Orleans and established a mercantile business in partnership with Oliver Beirne, the son of his former employer. After Beirne’s retirement in 1847, Burnside assumed full control of the firm, now known as John Burnside and Company, and five years later, he began acquiring sugar plantations. The Houma estate, which contained 12,000 acres of cultivable land and 550 slaves, was termed by one observer ‘the finest property possessed by any single proprietor in America.’ It became the nucleus of a multimillion-dollar sugar empire that endured long after the end of the Civil War. At his death in 1881, the bachelor

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believe that the Northern states constituted the “real” American society, and that the Southern states represented only a marginal aspect of American life. Nothing could be further from the truth. This is especially true when it comes to the law of enslavement. Enslavement was a major driving force in the economic development of this country,⁷⁶ and many Founding Fathers were slaveholders, including Presidents George Washington and Thomas Jefferson.

As this article evidences, our contemporary world is greatly influenced, if not controlled, by the vestiges of our property-enslavement-sexual legal history. One cannot adequately begin to understand and improve the plight of the African

Burnside left an estate valued at some \$8,000,000.” (Footnotes omitted.))

⁷⁶Especially in the twenty years prior to the Civil War, the Southern economy grew at a faster pace than that of the North. *See* ROBERT WILLIAM FOGEL, *WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY* 87 (1989) (“If we treat the North and South as separate nations and rank them among the countries of the world in 1860, the South was more prosperous than France, Germany, Denmark, or any of the countries of Europe except England.”) *Compare* KOLCHIN, *supra* note 11, 174-76:

Such a conclusion, although technically accurate, provides an incomplete and distorted picture of the slave economy.... Even measured in terms of per capita income, the statistic most supportive of Southern development, the Southern economy lagged behind the Northern: in 1860, the South’s per capita income stood at \$103, while the North’s totaled \$141. In all other aspects, the contrast was considerably more striking.

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American until we understand the African-American's property experience. We begin this journey with a presentation of the development of the white man's American Dream.

II. BLACK AS PROPERTY: THE "AMERICAN DREAM" OF CHEAP LAND, CHEAP LABOR, AND CHEAP SEX

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

– William Blackstone⁷⁷

Through the lens of black women's private property ownership, this article seeks to provide a unique perspective on sex, race, status, and private property law.

⁷⁷2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1766). *See generally* on property, DAVID SCHULTZ, PROPERTY, POWER, AND THE AMERICAN DEMOCRACY (1992); STEPHEN R. MUNZER, A THEORY OF PROPERTY (1990); and MARY JANE RADIN, REINTERPRETING PROPERTY (1993).

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It analyzes an enigma challenging three complementary paradigms: the private property paradigm, the enslavement paradigm, and the sexual paradigm. The private property paradigm promoted legal protection of private ownership. The enslavement paradigm promoted the enslavement economy and the perpetual legal status of blacks as both enslaved and property-less. The sexual paradigm was a by-product of the enslavement paradigm, namely, that white men exploited black women's sexuality as white men's sexual property. These three paradigms complemented one another and shared a quintessential nexus: white males generating wealth and sexual prowess, through cheap land, the exploitation of enslaved blacks' labor, and exploitation of black women's labor and sexuality. Black women, who were free and property owners, were an enigma that challenged the nexus connecting the paradigms. One study of the private property rights of free black women is to analyze the antithesis of the property-enslavement-sexual political economy of the antebellum South.

A. CHEAP LAND: THE AMERICAN PRIVATE PROPERTY OWNERSHIP PARADIGM

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In order to understand the context in which wealthy white men or “masters” and black women interacted in the antebellum South, e.g., the sexual economy, it is necessary to understand the legal world that the masters created: the “American Dream.” If one believes that law serves the interests of the powerful in society, then, in the antebellum South, the law served the interests of the white male master. The question is, what did powerful white men want in antebellum America (and colonial America)? The simple answer was primarily the ownership, use, and fruits of property, particularly land.⁷⁸

The common law, along with a cluster of privileges and rights, and indeed, the social system, revolved around private land ownership.⁷⁹ What is interesting is

⁷⁸See FREDERICK JACKSON TURNER, *THE FRONTIER IN AMERICAN HISTORY* (1920) [hereinafter TURNER] (presenting a ground-breaking view of the role of “frontier” on the American psyche).

⁷⁹See FRIEDMAN, *supra* note 32, at 202. See EDWARD E. CHASE, *PROPERTY LAW, CASES, MATERIALS, AND QUESTIONS* 3 n.7 (2002) [hereinafter E. CHASE] (“A.M. Honore likewise distinguished between the rights of exclusion and of use and enjoyment, listing the incidents of ownership as follows:

- (1) the right to *exclusive possession*; (2) the right to personal *use and enjoyment*; (3) the right to manage use by others; (4) the right to the income from use by others; (5) the right to the capital value, including alienation, consumption, waste, or destruction; (6) the right to security

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how American common law principles deviated from English principles to serve the unique needs of the American masters.⁸⁰ These American property law

(that is, immunity from expropriation); (7) the power of transmissibility by gift, devise, or descent; (8) the lack of any term on these gifts; (9) the duty to refrain from using the object in ways that harm others; and (10) the liability to execution for repayment of debts; and (11) residual rights on the reversion of lapsed ownership rights held by others.

Heller, *The Tragedy of the Anticommons: Property in Transition from Marx to Markets* (sic), 111 Harv. L.R. (sic) 621, 663 n.187 (1998), *citing* Honore, A.M. Honore, *Ownership*, in *Oxford Essays in Jurisprudence* (sic) 107, 112-128 (sic) (A.G. Guest ed., 1961) (emphasis added) (sic).”

To that list, one might add (12) the right to encumber, by mortgage, liens, and covenants; (13) the right to use as collateral; (14) the right of an insurable interest; (15) the right to shared ownership; and (16) the right of bailment. *See* the RESTATEMENT OF PROPERTY, AM. L. INST., Res. Prop. §§ 1-10 (1936) (analyzing “property” based upon four basic legal relations, “right–duty,” “privilege–absence of right,” “power–liability,” and “immunity–disability,” derived from W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 23-124 (1923)). *Compare* the Hohfeldian approach to that of the European civil law, e.g., the Louisiana Civil Code (derived from the French Code Napoleon) that states: “Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing.” LA. CIV. CODE ANN., art. 477 (1980).

⁸⁰*Compare, e.g.,* the issue of right of or delivery of possession in leasehold law. *See* DUKEMINIER, *supra* note 59, at 459, 461-62, *citing Hannah v. Dusch*, “The English rule is that in the absence of stipulations to the contrary, there is in every lease an implied covenant on the part of the landlord that the premises shall be open to entry by the tenant the time fixed by the lease for the beginning of his term.... [Under the American rule,] the landlord is not bound to put the tenant into actual possession, but is bound only to put him in legal possession, so that no obstacle in the form of superior right of possession will be interposed to prevent the tenant from obtaining

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principles involved the settlement and development of American title to land.⁸¹

To support the master's hunger for cheap land, early in its history, American law developed the paradigm of land as a private commodity: to be freely marketed (bought and sold), exploited, and freely willed.⁸² These private property law

actual possession of the demised premises.”) *See generally* NELSON, *supra* note 51; Morton J. Horowitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917 (1974) (showing that the modern will theory of contract did not appear until the late eighteenth and early nineteenth centuries with the spread of markets).

⁸¹As to the constitutional development procuring white control of native-American title to land, *see Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (wherein the court functionally disenfranchised native Americans from title to land they “occupied” (unless the United States government had expressly given specific recognition of title to specific lands): “Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring absolute title to others.” *See also* Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969) (analyzing the Supreme Court's struggle over the Indian land title issue).

⁸²*See* FRIEDMAN, *supra* note 32, at 206-15 (analyzing the transformation of land as a commodity, including changes in common tenancy presumption, the simplification of conveyancing, and efficiencies of land remedies: “‘The title of our lands,’ wrote Jesse Root proudly in 1798, ‘is free, clear and absolute, and every proprietor of land is a prince in his own domains, and lord paramount of the fee.’” (Footnote omitted.)) *See also*, NELSON, *supra* note 51, at 159 (analyzing postrevolutionary Massachusetts (1780-1830) property law cases, concluded: “The most important way in which nineteenth-century courts promoted economic development

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principles make up the American property paradigm, three pivotal aspects of which are of particular importance. The first is the abolishment of the law of primogeniture. This allowed the private owners of land to disinherit blood relatives or would-be “heirs” and to will their property to “strangers.”⁸³ Hence, Americanization of English common law principles made land more alienable, more like a commodity.

The second private property principle is the abolishment of the rule prohibiting foreigners, or “aliens,” from owning land. The English common law prohibited such ownership. Such a limitation would not facilitate the “melting pot” of the white ethnic minorities that were already a part of colonial America. Hence, the American rule took the position that prohibiting alien land ownership ““originated in ages of barbarism, out of the hatred and jealousy with which

in property cases was to overturn inherited rules that had conferred monopolistic privileges on initial users of valuable economic resources.”)

⁸³See FRIEDMAN, *supra* note 32, at 205-06 (“Land-law reform was well under way even before the Revolution. After the Revolution, legislatures carried on the work of dismantling the feudal past... Primogeniture, dead in most of New England, vanished from the South by 1800.”) Compare, Louisiana law that throughout the 19th Century maintained its civil law rooted “forced heirship” rights of legitimate children. See generally Kathryn Venturatos Lorio, *Roman Sources and Constitutional Mandates: The Alpha and Omega of Louisiana Laws on Concubinage and*

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foreigners were regarded... [To] those [aliens] who are actually resident amongst us, the best policy' would be 'encourage their industry by giving them all reasonable facilities in the acquisition of property.'"⁸⁴ This principle was especially significant to the integration into the United States of the people residing in the newly-acquired territory of the Louisiana Purchase, many of whom would have been considered "aliens" of French, Spanish, and even native American descent.⁸⁵

The third private property principle is the tightening of the law of perpetuities, through the abolition of the fee tail, and the invalidation of future interests, that unduly "suspended" the "power of alienation."⁸⁶ This attitude was part and parcel of the new American private property paradigm, that private property be easily alienable, free of land monopolies and land dynasties. This was reflected in the observation of Chancellor James Kent of New York State (1776-

Natural Children, 56 LA. L. REV. 317 (1995-1996) [hereinafter LORIO].

⁸⁴See FRIEDMAN, *supra* note 32, at 209 n.18, citing 1 AM. JURIST 87-88 (1829).

⁸⁵See generally GEORGE DARGO, JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS (1975).

⁸⁶See FRIEDMAN, *supra* note 32, at 210-11.

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1847):

Entailments are recommended in monarchical governments, as a protection to the power and influence of the landed aristocracy; but such a policy has no application to republican establishments, where wealth does not form a permanent distinction, and under which every individual of every family has his equal rights, and is equally invited, by the genius of the institutions, to depend upon his own merit and exertions. Every family, stripped of artificial supports is obligated, in this country, to repose upon the virtues of its descendants for the perpetuity of its fame.⁸⁷

Such was the American private property paradigm. It promoted availability of cheap land (usually at the expense of native Americans) through its free

⁸⁷KENT, *COMMENTARIES*, Vol. IV 12 (2nd ed., 1832), as quoted in FRIEDMAN, *supra* note 32, at 210-11 n.21-22.

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alienation under law, without encumbrances and other undue restraints on alienation. It maximized land utilization and promoted land as a commodity, allowing “aliens” to own land. And it supported the egalitarian view that land should be for the meritorious living, free from family control even at death, through the *causa mortis* transfer to strangers. Therefore, white male masters had a vested interest in the availability of cheap land, laws promoting free alienation, and free control over the use and disposal of private property.

B. CHEAP LABOR: THE AMERICAN ENSLAVEMENT PARADIGM

Next, in order to understand the context of the relationships between wealthy white men and black women, it is necessary to present the law of enslavement. As white masters obtained their primary dream of cheap, freely alienable land, what was the next item on their dream list? Consistent with the private property paradigm that promoted the availability of cheap land, white masters needed cheap labor to develop that land, to enhance the “American Dream.” While cheap labor in northern states was eventually provided through the influx of Irish and European

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immigrant labor, cheap labor in the southern states came mainly in the form of enslaved blacks.⁸⁸

Apparently, the development of the American private property law paradigm is consistent with the development of the American enslavement system. Early in our colonial history, blacks were tied intrinsically to land. For example, in 1705, Virginia law stated that enslaved blacks were legally classified as “real estate,” governed by the same laws as land, houses, and trees.⁸⁹ Other states had similar

⁸⁸See generally PHILLIPS, *LIFE*, *supra* note 35; LESLIE HOWARD OWENS, *THIS SPECIES OF PROPERTY: SLAVE LIFE AND CULTURE IN THE OLD SOUTH* (1976). See also, THADIOUS M. DAVIS, *GAMES OF PROPERTY, LAW, RACE, GENDER, AND FAULKNER’S GO DOWN, MOSES* (2003) [hereinafter T. DAVIS] (analyzing the interrelationship between race, property, agency, game theory, critical legal studies, feminist critique, and literature is very thorough and thought-provoking).

⁸⁹See FRIEDMAN, *supra* note 32, at 74 (“This law was meant to insure uniform rules of inheritance, and liability for debt, would govern the law of an estate—the land and its slaves.”) Friedman notes that in 1792, Virginia repealed this law, and, in 1794, passed a law prohibiting the sale of enslaved blacks to satisfy a master’s debts, unless all other personal property had been exhausted. (*Id.* at 197-98). See also, LOUISIANA’S BLACK CODE (1806) (“Slaves shall always be reputed and considered real estates (sic).”); LOUISIANA DIGEST OF 1808, Chap. 2, Art. 19 [hereinafter “DIGEST”] (“Slaves in this territory are considered as immovables by the operation of law, on account of their value and utility for the cultivation of the lands.”); CIVIL CODE OF THE STATE OF LOUISIANA (1825), Art. 461 [hereinafter CIVIL CODE] (“Slaves, though movables by their nature, are considered as immovables, by the operation of the law.”) See generally A. Leon

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laws, including Kentucky in 1789 and the Louisiana Territory in 1806.⁹⁰

Eventually, enslaved blacks were mainly classified as “chattel or movables,”

although for some purposes they remained classified as “real estate or

immovables.”⁹¹ As “property,” blacks were bought and sold, passed by will, stood

Higginbotham, Jr., & Barbara K. Kopytoff, *Property First, Humanity Second: the Recognition of the Slave’s Human Nature in Virginia’s Civil Law*, 50 OHIO ST. L.J. 511 (1989).

⁹⁰See FRIEDMAN, *supra* note 32, at 197 n.54, citing HENRY W. FARNAM, CHAPTERS IN THE HISTORY OF SOCIAL LEGISLATION IN THE UNITED STATES TO 1860, 183 (1938).

⁹¹See MORRIS, *supra* note 51, at 91, Chapter 3, “Slaves as Property– Chattel Personal or Realty, and Did It Matter? Compare SHAW, *supra* note 58, at 161-62:

...whether slaves were to be regarded as chattels or as real estate.... In several of the colonies slaves were designated, at a very period, as real estate.... In Louisiana Chapter XXXIII of the Black Code of 1806 declared slaves to be real estate.... Eventually, slaves came to be almost universally treated as chattels, or movable property, although certain characteristics of real estate were still applied to them. In particular, it was commonplace to mortgage them to creditors.

See also Judith Kelleher Schafer, *Open and Notorious Concubinage: The Emancipation of Slave Mistresses by Will and the Supreme Court in Antebellum Louisiana*, 28 LA. HIST. 165 (1987) [hereinafter SCHAFFER, OPEN]. Whether enslaved blacks were legally real estate or chattel was critical in determining certain concubinage cases in Louisiana, wherein it was illegal to gift “immovables” to concubines. Hence, when a white master sought to free his black concubine and their children, in his will, he could not do so if enslaved blacks were legally classified as

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attachable for debts, were insurable, and subject to taxation.⁹²

American enslavement of blacks, although clearly contrary to natural law, was equally a product of law.⁹³ “Enslavement law” has perhaps three features.

The first is the obvious: the state enacted “slave codes.”⁹⁴ The second is what one

“immovables.” LA. CIV. CODE, art. 1468 (1825). *See generally* QUIGLEY, *supra* note 51.

⁹²*See* FRIEDMAN, *supra* note 32, at 74.

⁹³*See* MORRIS, *supra* note 52, at 1 (e.g., enslavement and its relation to law was provided in the Code of Alabama (1852): “the state or condition of negro or African slavery is established by law in this State; conferring on the master property in and the right to the time, labor, and services of the slave, and to enforce obedience on the part of the slave to all his lawful command.” (Emphasis added.))

⁹⁴*See* PHILLIPS, *supra* note 14, at 514:

The statutes, copious and easily available, describe a hypothetical regime, not an actual one. The court records are on the one hand plentiful only for the higher tribunals, whither questions of human adjustments rarely penetrated, and on the other hand the decisions were themselves largely controlled by the statutes, perverse for ordinary practical purposes as these often were. It is therefore to the letters, journals and miscellaneous records of private persons dwelling in the regime and by their practices molding it more powerfully than legislatures and courts combined, that the main recourse for intimate knowledge must be had. Regrettably fugitive and fragmentary as these are, enough it may be hoped have been found and used herein to show the true nature of the living order.

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writer has referred to as “plantation law.”⁹⁵ And the third is the judicial pronouncements or enslavement case law.⁹⁶ The following section will focus on the “black or slave codes.” “Plantation law” is a study that needs to be developed.

⁹⁵See FOGEL & ENGERMAN, *supra* note 12, at 128-29:

Within fairly wide limits the state, in effect, turned the definitions of the codes of legal behavior of slaves, and of the punishment for infractions of these codes, over to planters. Such duality of the legal structure was not unique to the antebellum South. It existed in medieval Europe...; and in lesser degree, it exists with respect to certain large institutions today (for example, with respect to university regulations).

The importance of the dual legal structure of the antebellum South is that the latitude which the state yielded to the planter was quite wide. For most slaves it was the law of the plantation, not of the state, that was relevant. Only a small proportion of the slaves ever had to deal with the law-reinforcement mechanisms of the state. Their daily lives were governed by plantation law.

See also GENOVESE, ROLL, *supra* note 14, at 47 (referred to the master’s control in enslavement law, as a “system of complementary plantation law” in which the State empowered enslavement jurisdiction to the master.”)

⁹⁶Non-statutory or judicial case law is often referred to as the common law and composes a body of principles or precedents derived mainly by judges. *See generally* JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO, VOLS. 1-V (Helen Tunnickliff Catterall, ed., Octagon Books, Inc. 1968) (1926) [hereinafter CATTERALL] (composing a definitive enslavement, most annotated compilation of enslavement cases).

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And the judicial pronouncements, as they relate to miscegenation and black women's property rights, are discussed later in this article.

While contemporary American property textbooks avoid the subject,⁹⁷ “the fact remains that the slave as property is central to any consideration of the relationship between slavery and the law.”⁹⁸ There are a number of legal topics relative to the relationship between wealthy white men and enslaved black women that are useful to our understanding of the general relationship of sex, race, status, and the law of private property. The first is the legal status of the enslaved as “property.” The second is the criminality of white men raping enslaved black

⁹⁷See, e.g., DUKEMINIER, *supra* note 59, a leading Property Law textbook devotes three entries to the topic of “slavery:” “Chief Justice Holt was one of the greatest English judges.... He laid down the rule that the status of slavery could not exist in England; as soon as a slave breathed the air of England he was free. *Smith v. Brown & Cooper*, 2 Salk. 666, 90 Eng. Rep. 1172 (1703).” *Id.* at 30-31, n.12. “(Citing Justice Mosk’s dissent in *Moore v. Regents of the University of California*) Another is our prohibition against indirect abuse of the body by its economic exploitation for the sole benefit of another person. The most abhorrent form of such exploitation, of course, was the institution of slavery. Lesser forms, such as indentured servitude or even debtor’s prison, have also disappeared.” *Id.* at 77. “History shows that it is possible to maintain appropriate normative boundaries regarding market activities. Indeed, in many instances we have narrowed the role of markets and commodification, as with slavery and child labor.” *Id.* at 84.

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women. The third is the prohibition against interracial marriage. The fourth is the legal status of issue of white men and enslaved black women. The fifth is the prohibition against the enslaved owning property. And the sixth is the law's failure to recognize the marriage of enslaved persons.

Generally, the legal rules to these legal issues in the antebellum enslavement economy were as follows: First, enslaved blacks were, in every sense of the word, "property:" either real estate (land) or chattel (moveables).⁹⁸ Second, white men could freely rape enslaved black women, without adverse legal consequence.¹⁰⁰ Third, interracial marriage was strictly prohibited,¹⁰¹ although "concubinage" was

⁹⁸See MORRIS, *supra* note 51, at 2.

⁹⁹See PHILLIPS, *supra* note 14, at 499 ("Property in slaves, though by some of the statutes assimilated to real estate for certain technical purposes, was usually considered as of chattel character.") See also, *supra* note 89.

¹⁰⁰See MORRIS, *supra* note 51, at 305 ("Race, age, and status were all elements in the law of rape in the South. Every state that adopted statutes to deal expressly with rapes committed by slaves (and in some cases (by) free persons of color) added that the victim was to be a white female.... On the other side, no white could ever rape a slave woman." Emphasis added.) See also PHILLIPS, *supra* note 14, at 500 ("...although the wilful killing of slaves was generally held to be murder, the violation of their women was without criminal penalty.")

¹⁰¹See SHAW, *supra* note 58, at 44 ("One such crime was an illegal marriage; a Maryland

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legally recognized, with restrictions as to the ability to transfer property.¹⁰² Fourth, the legal status of the issue or children of white men and enslaved black women followed that of their mother, e.g., enslavement.¹⁰³ Fifth, enslaved blacks could

law of 1715 prohibited any white person from marrying any negro or a mulatto slave (the marriage of a white person and a free mulatto was not proscribed by this act.)”)

¹⁰²See STAMPP, *supra* note 12, at 350, 355, 356:

Everywhere in the ante-bellum (sic) South marriages between whites and Negroes or ‘mulattoes,’ whether free or unfree, were prohibited. The prohibition against marriages, however, did not prevent other forms of interracial sexual contacts.... The lower-class whites, however, were by no means the only Southerners who had sexual relations with slave women and fathered the mulatto population. Unmarried slaveholders and the young males who grew up in slaveholding families, some bearing the South’s most distinguished names, played a major role.... Though the cases of concubinage involving young Louisiana Creoles and quadroon women are familiar, these alliances were confined neither to persons of French or Spanish descent nor to Louisiana.... These sexual relationships with slaves did not always end when the master married; and others actually began after, rather than before, his marriage.

See also PHILLIPS, *supra* note 14, at 193-94 (“Concubinage itself was fairly frequent, particularly in southern Louisiana; but no frequency of purchase for it as a predominant purpose can be demonstrated from authentic records.”)

¹⁰³See PHILLIPS, *supra* note 14, at 77:

Then in 1662 it was enacted that ‘whereas some doubts have arrisen (sic) whether

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not legally own property; any property that they acquired was considered to belong to their master.¹⁰⁴ And sixth, enslaved blacks were not allowed to legally marry.¹⁰⁵

One of the most important tenets of the enslavement system was an enslaved black's total reliance on the master for support. As a result, the black codes generally forbade enslaved blacks from owning property.¹⁰⁶ Their ownership of property would be a direct contradiction of the enslavement economy. How would

children got by any Englishman upon a negro woman shall be bond or free,... all children born in this colony shall be bond or free only according to the condition of the mother.' (Hening, II, 26)

¹⁰⁴See STAMPP, *supra* note 12, at 197 ("Legally a bondman was unable to acquire title to property by purchase, gift, or devise; he could not be a party to a contract.") See also PHILLIPS, *supra* note 14, at 500 ("...any property they might acquire was considered as belonging to the master....")

¹⁰⁵See KOLCHIN, *supra* note 11, at 122 ("Legally, slave families were nonexistent: no Southern state recognized marriage between slave men and women, and legal authority over slave children rested not with their parents but with their masters.") See also PHILLIPS, *supra* note 14, at 494 ("Slave marriages, furthermore, were declared void of all civil effect....")

¹⁰⁶See *supra* note 104. See also SHAW, *supra* note 58, at 167 ("As an almost invariable rule, the slave had no right to contract with any party or, at least, no means of enforcing such a contract.") It is fair to say that enslaved blacks had no property rights that the law needed to respect. In some instances, white masters allowed their enslaved blacks to "hire out their time" or attempted to gift property to them.

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they obtain property? All the fruits of their labor belonged to the master. They were not allowed to receive gifts *inter vivos* or *causa mortis*.¹⁰⁷

It appears that the enslavement paradigm was a perfect corollary to the principles of private property ownership. First, enslaved blacks were private property, and were a commodity, like “chattel.” Second, they could be easily alienated and subjects of inheritance. Third, they could be used to maximize profits, including being leased and bred. Hence, the enslavement paradigm greatly complemented the private property ownership paradigm, and, as it related to enslaved black women, gave white men an added bonus.

C. CHEAP SEX: THE AMERICAN SEXUAL PARADIGM

In order to understand the context of the relationships between wealthy white men and black women, it is necessary to discuss the control white men had over the sexuality of black women. As masters got cheap land and cheap labor, there was only one thing they apparently needed or wanted to complete the “American Dream”: sexual prowess. Put in crude terms, white masters exploited

¹⁰⁷*See supra* note 104.

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enslaved black women to satisfy their desire for cheap sex.

The most unfortunate feature of the property-enslavement nexus was the reality that a white master not only owned and controlled his enslaved blacks' labor, but he also controlled their sexuality. From a property perspective, every white master who invested in enslaved blacks recognized the "dividend" of their investment in the form of enslaved offspring.¹⁰⁸ Not unlike cattle, enslaved blacks were expected to "breed" enslaved children, adding to their master's wealth. White masters often oversaw the breeding process, very much invested in the outcome—healthy enslaved black children to provide cheap labor, or to be sold or collateralized for capital. Unfortunately, some white masters also took liberty to

¹⁰⁸See STAMPP, *supra* note 12, at 245 ("The magnitude of the interstate slave trade caused some critics to charge that many of those who supplied the speculators with merchandise were engaged in 'slave breeding'—in raising slaves for the specific purpose of marketing them. In Virginia, Olmsted (a noted and respected Northern traveler throughout the South) remarked... 'It appears to me evident, however, from the manner in which I hear the traffic spoken of incidentally, that the cash value that of a slave for sale, above the cost of raising it from infancy to the age at which it commends the highest price, is generally considered among the surest elements of a planter's wealth.... That a slave woman is commonly esteemed least for her laboring qualities, most for those qualities which give value to a brood-mare is, also, constantly made apparent.'"(Emphasis added.))

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control enslaved black women sexually by rape or seduction.¹⁰⁹ And, consistent with the tenets of the legal support given to the property-enslavement nexus, the law added a third tenet: that of a white master to legally “rape” his enslaved black women. Adding one tragedy to another, one white master both sexually abused his enslaved black woman, and later sold her and their son to another white master.¹¹⁰

¹⁰⁹*See supra* note 100.

¹¹⁰*See* “Ex-Slave Story 11-A,” interview with Mary Harris and her son, by POSEY, WPA WRITERS PROJECT (10-28-1940), xerox from Louisiana Department, Louisiana State Library, Baton Rouge:

I never got a whippin’ either, because I was good an’ did my work an’ never talked back. My ma tol’ me she was brutally beaten an’ she was bitter all her life. The plantation was owned by Mr. Gaudet [Adam Gaudet, sugar planter, St. James Parish]-and I’ve learn tell that Frenchmen were the hardest people an’ almos’ sqes’d blood outen their slaves... so jes’ set it down when you hear of brutal treatment that it was foreigners. [and her mulatto son recounts:]

Bitter? Yes, I’m bitter- I have a right to be. My mother tells me about the brutality of those days, how they whipped unmercifully their slaves. Yes, I’m bitter and the more I think about it the madder I got. Look at me they say I could pass for white. My mother is bright too. And why? Because the man who owned and sold my mother was her father. But that’s not all. That man I hate with every fibre of my body and why? A brute like that who could sell his

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Such was the world the white masters made, their “American Dream,” one that gave them cheap land, cheap labor, and cheap sex. It was a world of white male control and domination. For the enslaved black women, it was the “American Nightmare:” no land, no right to their labor, and their sexuality exploited. Ultimately, the white man’s American Dream and the legal system that supported it would have an interesting challenge: How should the legal system respond to white men, who exercised their private property ownership rights, by bestowing on their enslaved black women sex partners (and their children) private property bequests, the issue of “wealth miscegenation?”

III. RESTRICTING BLACK INHERITANCE RIGHTS: REGULATING MISCEGENATION

A marriage between a person of free condition and a slave, or between a white person and a negro, or between a white person and a mulatto, shall be null.

– 1786 Virginia bill, drafted by Thomas Jefferson

own child into unprincipled hands is a beast- The power, just because he had

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(Jefferson 557, bill 86)¹¹¹

A. VARIOUS MISCEGENATION MODELS

the power, and thirst for money.

¹¹¹See INTERRACIALISM, BLACK-WHITE INTERMARRIAGE IN AMERICAN HISTORY, LITERATURE, AND THE LAW 3 (Werner Sollors ed. 2000) [hereinafter SOLLORS] (presenting a quintessential reader on the history and laws of miscegenation, and quoting Jefferson’s anti-miscegenation bill.) See also, *id.* at 5 (wherein Sollors points out that “Even the word used to describe interracial sexual and marital relations, *miscegenation*, in an Americanism. Sidney Kaplan’s essay in this volume (“The Miscegenation Issue in the Election of 1864,” at 219-65) reveals how the word was coined by two New York journalists in an 1863 pamphlet, a political hoax designed to hurt abolitionists and Republicans who were invited to endorse it. Derived from Latin *miscere* and *genus*, the made-up word that faintly echoes the term for the European class mismatch, *misalliance*, and replaced *amalgamation*. It became a catchall term, used in phases like “miscegenation law” that are hard to translate into some other languages.” (Emphasis added in parts.)) See also GARY B. NASH, FORBIDDEN LOVE, THE SECRET HISTORY OF MIXED-RACE AMERICA 92-93 (1999) [hereinafter NASH] (“As the election of 1864 approached, the Democrats played the race card to the hilt. Appealing to widespread white racism, they accused Lincoln’s Republican Party of turning the Civil War into a ‘nigger crusade.’ In campaign literature labeled ‘Miscegenation, or the Millennium of Abolitionism,’ they portrayed white women sitting on the laps of black men, white men with black wives strolling through the park, and intermarried blacks, in fractured English, exulting that they had reached the heaven of social and political equality. Democratic Party newspapers spread the word of a Republican leader who wanted to ‘add to emancipation, to confiscation, and to miscegenation, a policy of polygamy’ so that ‘a man could have a yellow wife from China, a brown wife from India, a black wife from Africa, and a white wife from his own country, and so have a variegated family and

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1. America's Varying Views on Miscegenation

Analyzing the legal history of miscegenation in the American South makes for an obvious conclusion: the law was generally pitted against interracial relationships.¹¹² Even in recent contemporary times, southern state legislatures

put a sign over the door: ‘United Matrimonial Paint Shop.’”)

¹¹²SOLLORS, *supra* note 111, at 3 (“One theme that has been pervasive in U.S. history and literature and that has been accompanied by a 300-year-long tradition of legislation, jurisprudence, protest, and defiance is the deep concern about, and the attempt to prohibit, contain, or deny, the presence of black-white interracial sexual relations, interracial marriage, interracial descent, and other family relations across the powerful black-white divide.”) *See generally* KENNEDY, *supra* note 12; PETER BARDAGLIO, *RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH CENTURY SOUTH* (1995); IN JOY AND IN SORROW: *WOMEN, FAMILY, AND MARRIAGE IN THE VICTORIAN SOUTH, 1830-1900* (Carol Bleser ed. 1991); *THE DEVIL’S LINE: SEX AND RACE IN THE EARLY SOUTH* (Catherine Clinton & Michele Gillespie eds., 1997); ROBERT B. MCNAMARA, et al., *CROSSING THE RACE LINE: INTERRACIAL COUPLES IN THE SOUTH* (1999); RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* (2001) [hereinafter MORAN]; NELL IRVIN PAINTER, *SOUTHERN HISTORY ACROSS THE COLOR LINE* (2002); JOSHUA D. ROTHMAN, *NOTORIOUS IN THE NEIGHBORHOOD: SEX AND FAMILIES ACROSS THE COLOR LINE IN VIRGINIA, 1787-1861* (2003); *WE ARE YOUR SISTERS: BLACK WOMEN IN THE NINETEENTH CENTURY* (Dorothy Sterling, ed., 1997); 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 (1988-89) [hereinafter HIGGINBOTHAM & KOPYTOFF]; CARTER G. WOODSON, *FREE NEGRO HEADS OF FAMILIES IN THE UNITED STATES IN 1830, TOGETHER WITH A BRIEF TREATMENT OF THE FREE NEGRO* x-xiv (1925)

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attempted to control the sexual lives of Americans along racial lines.¹¹³ These legal attempts to prohibit interracial sexual relationships had at least one intended effect— that of limiting the transference of wealth from whites to blacks, in other words, “wealth miscegenation.”¹¹⁴

America’s miscegenational legal history is rooted in its American Dream, that which gave white men, as a right of ownership, control of enslaved black women’s sexuality, as white property.¹¹⁵ Throughout the antebellum South, white

[hereinafter WOODSON, HEADS] and Carter G. Woodson, *The Beginning of Miscegenation of the Whites and Blacks*, 3 J. OF NEGRO HISTORY 335 (1918) [hereinafter WOODSON, MISCEGENATION].

¹¹³See *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down, as unconstitutional, theretofore criminal bans on interracial marriage in Virginia, fifteen other states, and the District of Columbia).

¹¹⁴See SOLLORS, *supra* note 111, at 69, excerpt from Eva Saks, “Representing Miscegenation Law” [hereinafter SAKS] (“Interracial sex and marriage had the potential to threaten the distribution of property, and their legal prohibition was an important step in consolidating social and economic boundaries.”) It is “Saks’s view of miscegenation’s rationale that this article refers to as “wealth miscegenation.”

¹¹⁵See THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 1, 235-39 (Univ. of Georgia Press 1999) (1858) [hereinafter COBB] (described by Paul Finkelman as “the most comprehensive antebellum restatement of the law of slavery and the only treatise on slavery written by a southerner.”) (Cobbs, on an enslaved black’s

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men sexually exploited their enslaved black women, even in front of their white wives with immunity.¹¹⁶ These sexual intimacies between white men and black women also led to miscegenational relationships that were more “involved” than

right of private property stated: “Of the other great right of a freeman, viz., the right of private property, the slave is entirely deprived. His person and his time being entirely of his master, whatever he may accumulate by his own labor, or is otherwise acquired by him, becomes immediately the property of his master.... Though our law allows no *peculium* to the slave, yet as a matter of fact, such *peculium* is permitted, ex gratia, by the master.... of which the master might at any time deprive him... (If a chattel is given and delivered to a slave, the title thereto would vest in the master; and it seems if land were conveyed to a slave, and possession given, by parity of reasoning, the master would be seized of the land. A slave cannot take by descent, there being in him no inheritable blood.... The slave not being capable of acquiring property, it follows, that he cannot convey or give it away.... As a consequence, a slave cannot make a testament, and this was true even in those nations where the slave was allowed his *peculium*; on his death, it belonged to his master.” (Footnotes omitted.)) *See also*, JUDITH KELLEHER SCHAFFER, *SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA* 6 (1994) [hereinafter SCHAFFER, *SLAVERY*] (noting, “The Black Code and the 1807 act together destroyed two of the great freedoms of Spanish slave law.... First, the right of self-purchase ceased because slaves could no longer own property....”)

¹¹⁶*See* KOLCHIN, *supra* note 11, at 124 (“Still those who dealt at all frankly with the subject noted—albeit from different perspectives—the prevalence of interracial sex. South Carolina ideologue William Harper turned it into a virtue, insisting that it helped account for the absence of Southern prostitution and the purity of white women. Patrician diarist Mary Boykins Chesnut, by contrast, countered that in fact, ‘we live surrounded by prostitutes... Like the patriarchs of old our men live all in one house with their wives and concubines, and the

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casual.¹¹⁷

Historically, the miscegenational law's options reflected white society's changing views on blacks as property. In the Colonial Period, when white America was still unclear about blacks' role and place, there was ambivalence about whether the races should interrelate sexually.¹¹⁸ There is strong evidence

mulattoes one sees in every family exactly resemble the white children.”)

¹¹⁷See, e.g., GARY B. MILLS, *THE FORGOTTEN PEOPLE, CANE RIVER'S CREOLES OF COLOR*, Chapter 2 (1977) [hereinafter MILLS] (documenting the romantic relationship (1768-1784) between a white master, Pierre Metoyer, and his enslaved black woman, Marie Thereze Coincoin, and how their children went on to become the wealthiest black family in antebellum Louisiana, owning about two hundred enslaved blacks, and building Melrose Plantation, which still stands today, in Natchitoches, Louisiana). See also, PHILLIPS, *supra* note 14, at 434 (documenting that a *free black* master, “Martin Donato of St. Landry (Parish, Louisiana) dying in 1848, bequeathed liberty to his slave wife and her seven children and left them eighty-nine slaves and 4,500 arpents of land as well as notes and mortgages to a value of \$46,000.”) There were numerous instances in which white masters sought to provide for their black mistresses and mixed-race offspring, *infra*.

¹¹⁸See PHILLIPS, *supra* note 14, at 74-76 (“Thus for two generations the negroes were few, they were employed alongside the white servants, and in many cases were members of their masters' households.... Until after the middle of the (17th) century the laws did not discriminate in any way between the races.”(Emphasis added.))

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showing that whites accepted blacks as equals, and as human beings.¹¹⁹ At the same time, there is strong evidence showing that whites denied blacks as equals, and relegated them to property.¹²⁰

Unfortunately, at least in the enslavement states, the proponents of blacks as (white) property won out.¹²¹ Certainly, by 1830 (the start of the antebellum period), in the enslavement states, it was legally accepted that enslaved blacks were property.¹²² By then, it was also clear that interracial marriage was illegal and miscegenation would not be promoted.¹²³ What is interesting is that, during the antebellum period, miscegenation would not be totally outlawed.¹²⁴ In fact, it was tolerated and legally recognized, at least when it came to white-men-and-

¹¹⁹See generally HIGGINBOTHAM AND KOPYTOFF, *supra* note 112.

¹²⁰See generally WOODSON, MISCEGENATION, *supra* note 112.

¹²¹See *supra* note 91. See generally MORAN, *supra* note 112.

¹²²*Id.*

¹²³See generally Karen Getman, *Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System*, 7 HARV. WOMEN'S L.J. 115 (1984).

¹²⁴See KOLCHIN, *supra* note 116.

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black-women relationships.¹²⁵

During Reconstruction, when legal enslavement of blacks was abolished, southern black-influenced, if not controlled, legislatures changed the antebellum rules on miscegenation, allowing whites and blacks to legally marry.¹²⁶ But this

¹²⁵See SLAVERY AND THE LAW 45 (Paul Finkelman ed., 1997) [hereinafter FINKELMAN] excerpt from William W. Fisher III, “Ideology and Imagery in the Law of Slavery” (“Lawmakers ostensibly sought to maintain a rigid separation of blacks and whites. Accordingly, they banned racial intermarriage, established severe penalties for interracial fornication and adultery, and frequently in related contexts expressed repugnance for ‘commingling’ of the races. In practice, however, they typically strongly condemned and harshly punished only sexual relations between black men and white women, while they commonly tolerated both consensual and forcible sex between white men and black women.” (Footnotes omitted.))

¹²⁶See KENNEDY, *supra* note 12, at 254:

During Reconstruction, the color bar at the altar was breached in several places. For a brief period, Alabama’s supreme court invalidated that state’s antimiscegenation law, and when reformers friendly to Reconstruction overhauled the laws of Arkansas, Mississippi, and South Carolina, they dropped existing antimiscegenation provisions from the statute books. Reconstructionists likewise repealed Louisiana’s bar on mixed marriages. (Footnotes omitted.)

See, e.g., supra note 568, *Cornelia Hart, Tutrix v. Hoss & Elder, Administrators*, 1874 WL 3865 (La. 1874) (wherein the Louisiana Supreme Court validated a “marriage” between E.C. Hart, a white man, and Cornelia Hart, a colored woman).

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change was short-lived, for along with post-Reconstruction restoration of white control of southern legislatures, pro-miscegenation rules were repealed.¹²⁷ Oddly, in their place, the law did not return to the ante-bellum laws that merely prohibited interracial marriage, yet tolerated miscegenational relationships, at least between white men and black women.¹²⁸ What the post-Reconstruction white legislatures decided was more stringent than before the Civil War: to criminalize interracial

¹²⁷See MORAN, *supra* note 112, at 5-6.

During Reconstruction, the state high court in Alabama declared a ban of interracial marriage unconstitutional but reversed itself shortly thereafter. The U.S. Supreme Court upheld an antimiscegenation statute in *Pace v. Alabama* (106 U.S. 583 (1883)) in 1883, thereby cementing the doctrine of ‘separate but equal’ marriages and families. Only one state court declared antimiscegenation laws unconstitutional after the Pace decision. In 1948, the California Supreme Court in *Perez v. Sharp* (32 Cal. 2d 711, 948 P.2d 17 (1948)) concluded that prohibition of interracial marriage violated the principle of racial equality and interfered with liberty to choose a spouse. (Footnotes omitted, case citations added.)

See also KENNEDY, *supra* note 12, at 22 (“During the reaction against Reconstruction, white supremacists exploited fears of interracial intimacy as perhaps the major justification for subverting the civil and political rights that had been granted to blacks, and the major reason for confining blacks to their degraded ‘place’ at the bottom of the social hierarchy.”)

¹²⁸See generally C. VANN WOODWARD, STRANGE, *supra* note 64.

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marriage.¹²⁹

This brief legal history of miscegenation raises an intriguing question: Why, in the antebellum South, was miscegenation not altogether prohibited, as it was in

¹²⁹See KENNEDY, *supra* note 12, at 76, 77:

Reconstruction's egalitarian spirit had posed challenges to antimiscegenation laws, but these challenges were typically short-lived. South Carolina's history is instructive in this regard. Prior to the Civil War, the state had declined to prohibit interracial marriage, but immediately following the abolition of slavery, white authorities enacted an antimiscegenation statute. Reformers removed the barrier in 1868, only to see it be reenacted in 1879. In 1895 white supremacists embedded the prohibition in the state constitution, where it remained for 103 years.

Id. at 76, footnote *, Kennedy points out,

The same dynamic led to revisions of existing antimiscegenation laws in Alabama and Mississippi. Alabama changed its laws to render all interracial marriages null and void, while Mississippi increased the punishment for the violation of its prohibition on interracial marriage: persons engaged in such unions, the state declared, could be confined to the penitentiary for life. See Alabama Constitution of 1865, art. 4, sec. 31; Miss. Session Laws ch. 4, sec. 3 (1865). See also Peter W. Bardaglio, *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South* (1995), 179.

See also, *Lee et al. v. New Orleans Great Northern R. Co.*, 127 La. 236, 51 So.182, at 183 ("By Act No. 87 of 1908 concubinage between a person of the Caucasian or white race and a

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the post-Reconstruction South and throughout much of the 20th Century South?

This question requires an analysis of the various options the miscegenational law had available to it, and an analysis of antebellum southern legislatures' reasons for their miscegenational regulations.

2. The Miscegenational Law's Options

Before answering the question as to why the antebellum South chose the miscegenational regulations it did, it would be insightful to look at the law's options. Hypothetically, the antebellum South had many options, when it came to miscegenation, particularly between white men and black women. Each option has two analytical aspects: The first aspect was a white man and a black woman's legal authority to have an interracial sexual relationship. The second aspect was a miscegenational black woman's resulting property interest in her white partner's estate.

The first of these miscegenational options, at one end of the rights' spectrum, is the "optimal rights" theory. With "optimal rights," a white man and a

person of the negro or black race was made a felony.")

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black woman (enslaved, subject to emancipation, or free) could legally marry. Under “optimal rights,” a black woman would receive all benefits of freedom and of marriage, including all inheritance rights for the offspring of herself and her white husband. The “optimal rights” option would have treated interracial relationships as white-men-white-women relationships, allowing for legal marriage, and resulting property rights in the marital estate.

The second option or theory, at the other end of the rights’ spectrum, is “total prohibition.” Under “total prohibition,” a white man and a black woman (enslaved or free) would be absolutely prohibited from any and all sexual contact of any kind. With “total prohibition,” interracial marriage, cohabitation, casual sexual relations, and a white man’s rape of a black woman would run afoul of both the criminal and the civil laws. Under “total prohibition,” a black woman would receive no property interests of any kind, resulting from any type of sexual activity with her white sex partner. The “total prohibition” option would treat miscegenational relationships between white men and black women just the same as the antebellum South treated similar miscegenational relationships between white women and black men.

There are several permutations between these two extremes, but two of them

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are particularly worth noting. One is the “marriage/no property” option, wherein a white man and black woman (enslaved or free) could legally marry, but the black woman (enslaved or free) would not be entitled to any property interest in her husband’s estate. This option would legitimize the sexual relationship, while not allowing for white-to-black wealth transference. The immediate beneficiary of the “marriage/no property” option would be the miscegenational offspring of the marriage who would be legally presumed legitimate, and thereby subject to inheritance rights from both parents’ estates.

The other is the “no marriage/property” option or theory, wherein a white man and a black woman (enslaved or free) could not legally marry, but the black woman would have some property interest in her white sexual partner’s estate. This option would not permit interracial marriage, but would reward a black woman with some property interest in her white sexual partner’s interest. Under the “no marriage/property” option, the miscegenational black woman would receive some property rights, but in exchange, it would not be presumed that the offspring of the relationship were legitimate.

There are a few other legal considerations that should be mentioned in analyzing these hypothetical miscegenational options. The first is what effect

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existing relationships should have on these options? For example, what if the interracial relationship is “extramarital,” as if the white man is already married to a white woman and has a white family? The second is what effect should the black woman’s legal status have? For example, what if the black woman is enslaved and another white man, who is not her sexual partner, owns her? The third is what effect should each option have, if any, on the property rights of the offspring or issue of those relationships? And the fourth, and most common in antebellum jurisprudence, is what effect should emancipation laws, and the white family’s interests, have on property rights?¹³⁰ For example, what should the law do with the property of a white man who died leaving white family members, but who directed in his will that his enslaved black female sexual partner and their children be gifted their freedom? If his enslaved black woman and their children were largely the testator’s only property, what property interest should the law provide on behalf of the white family members?

¹³⁰*See, e.g.*, Article 193 of the Louisiana Civil Code (1825) which stated, “The slave who has acquired the right of being free at some future time, is from that time, capable of receiving by testament or donation. Property given or devised to him must be preserved for him, in order to be delivered to him in kind, when his emancipation shall take place. In the mean time it must be administered by a curator.”

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Now that we have reviewed the many options from which antebellum southern legislatures had to choose, there is still the question, why didn't they choose to totally prohibit miscegenation; as they, in fact, permitted interracial affairs between white men and black women? Before we can answer the why, let us review the how: How did antebellum southern legislatures regulate miscegenation between white men and black women?

B. LEGISLATIVE REGULATION OF SEXUAL RELATIONSHIPS IN THE ANTEBELLUM SOUTH¹³¹

In the antebellum South, when it came to sexual relationships between the

¹³¹As to some sources on enslavement law, *see* COBB, *supra* note 115; FINKELMAN, *supra* 125; THE REVISED STATUTES OF LOUISIANA (U. B. Phillips, compiler, 1856); JOHN CODMAN HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES, VOLS. I AND II (Negro Universities Press 1968) (1858); J.D. WHEELER, A PRACTICAL TREATISE ON THE LAW OF SLAVERY (1837); JOHN CURTIS BALLAGH, A HISTORY OF SLAVERY IN VIRGINIA (Johnson Reprint Corp. 1968) (1902), THE NEGRO LAW OF SOUTH CAROLINA (John Belton O'Neall, collector and digest, 1848); THE CENTURY EDITION OF THE AMERICAN DIGEST: A COMPLETE DIGEST OF ALL REPORTED AMERICAN CASES FROM THE EARLIEST TIMES TO 1896, VOL. XLIV, SHIPPING—SUBSCRIBING WITNESS (1903); CATTERALL, *supra* note 96. *See also*, for excellent summaries on miscegenation legislation, MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 136-40 (1985).

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racism, the law of miscegenation was somewhat peculiar: it was race, gender, and status driven.¹³² This can be illustrated through an analysis of legislation

¹³²The law appeared, on the surface, less concerned with regulating sexual relationship between free white women and enslaved black men, that is, except for the presumption that such an arrangement was prima facie evidence of the black man's rape of the white woman. *See, e.g., MORRIS, supra* note 51, at 304-05 (quoting *Pleasant, (a slave), v. State (Arkansas, 1855)*, "The presumption that a white woman yielded... to the embraces of a negro, without force... would not be great." And citing Bertram Wyatt-Brown who argued, "it goes without saying that the penalty for a slave who dared lust after white women's flesh was castration, first by the law of the slave code, later by community justice alone." (Footnote omitted.))

Despite these legal and community-based restrictions, there is evidence that these types of miscegenational relationships existed. *See, e.g., STAMPP, supra* note 12, at 352: "Though white women were less involved in interracial sexual contacts than men, their role, especially in the colonial period when slaves and indentured servants worked on the same estates, was never entirely negligible. A Maryland statute of 1663 noted that 'divers freeborn *English* (sic) women, forgetful of their free condition, and to the disgrace of our nation, do intermarry with negro slaves'; but the penalties provided in this and other southern statutes did not put an end to the practice.... [t]hese women were not all paupers or prostitutes. In New Orleans a 'seemingly respectable' white female was arrested on charges of having been in an 'indecent companionship' with a slave.... Occasionally a white female who loved her colored paramour lived with him as a common-law wife." *See also, BLASSINGAME, supra* note 3, at 156 ("The evidence from a Virginia divorce petition is conclusive... a Norfolk white man asserted in 1835 that his wife had 'lived for the last six or seven years and continues to live in open adultery with a negro man....'")

Relative to miscegenational relationships between free black men and free white women, the law forbade marriage, but allowed intimate liaisons between them to exist. *See* BERLIN,

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regulating sexual relationships between white men and black women.¹³³ There

supra note 7, at 269 (“When a Richmond white woman claimed she had been raped by a free Negro, the police simply ignored the charge. Since she associated with ‘none other than the lowest and debased free Negroes in the Valley....’”) *But see* BERLIN, *supra* note 7, at 268 (“Yet Southern leaders despised these illicit combinations of whites and free Negroes.”)

¹³³*See* STAMPP, *supra* note 12, at 206 (“Fundamentally the slave codes were much alike. Those of the Deep South were somewhat more severe than those of the Upper South, but most of the variations were in minor detail.”) Hence, this article will focus on one state’s code, the State of Louisiana, as representative of southern states’ enslavement codes, including laws relative to free blacks. *See also* BERLIN, *supra* note 7, at 317 (noting that “as the nineteenth century wore on, Southern legislators reviewed each other’s statute books and gradually made their laws uniform. New states generally adopted the legal codes of the older states, thereby adding still greater uniformity to the system. By 1860, despite regional variations in racial ideology, the free Negro’s legal status was strikingly similar in every Southern state.”) *Compare* PHILLIPS, *supra* note 14, at 493-94:

Louisiana alone in all the Union, because of her origin and formative experience as a Latin colony, had a scheme of law largely peculiar to herself. The foundation of this lay in the Code Noir decreed by Louis XV for that colony in 1724.... Nearly all the provisions of this relatively liberal code were adopted afresh when Louisiana became a territory and then a state of the Union. In assimilation to Anglo-American practice, however, such recognition as had been given to slave *peculium* was now withdrawn, though on the other hand slaves were granted by implication a legal power to enter contracts for self-purchase.

Hence, despite some disclosed reservations, the following discussion of American enslavement law focuses on the law of the State of Louisiana, although not limited to that State’s laws. There are several reasons for this. First, while Louisiana law has a different history, being

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based on the Code Noir decreed by Louis XV for the French colony of Louisiana in 1724, its nineteenth century legislative pronouncements reflect the pressing enslavement legal issues experienced by all the enslavement states. Second, the United States' acquisition of the Louisiana Territory via the Louisiana Purchase of 1803 fueled the "private property" paradigm through the newly-available expanse of land. And third, the City of New Orleans was a major southern commercial hub that made the State of Louisiana important to nineteenth century economic development. The author acknowledged that there are some unique features of Louisiana's antebellum law, such as "forced heirship," its approach to "bastards" inheritance rights, and its attitude about concubinage that reflect its civil law roots. *See generally* LORIO, *supra* note 83; SCHAFER, OPEN, *supra* note 91.

Yet Louisiana may have been a more "permissible" state (along with South Carolina), for, as this article details, its legislature legally recognized concubinage between white men and black women (enslaved and free), formally allowed black women concubines limited property inheritance rights, and allowed white men to formally acknowledge their mixed-race children with black women (along with inheritance rights). *See supra* note 147. *But see* SCHAFER, SLAVERY, *supra* note 115, at 184-85:

Freeing a slave mistress meant not only overcoming legislative restrictions, but also surmounting two additional legal obstacles firmly embedded in the Louisiana *Civil Code*. The first of these was forced heirship. Forced heirship required that legitimate children, which the court call "descending heirs," at a minimum receive a specified portion of the property of the deceased parent or grandparent. Forced heirs could be disinherited for committing serious offenses against a parent.... If an individual died childless but one or both parents survived, they were forced heirs—"ascending heirs"—and entitled to a specified portion of the estate. With either ascending or descending heirs, the forced portion varied according to the number of forced heirs, and the *Code* clearly spelled out every possible configuration of heirship. Under Louisiana law, freeing a slave was considered a monetary donation to that person, and the state's forced heirship doctrine

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were different types of sexual relationships between white men and black women in the antebellum South, from rape to marriage.¹³⁴ We shall begin with the type that was unfortunately, the most prevalent of them, a white man's rape of his enslaved black woman.¹³⁵

came into play. Article 190 of the *Civil Code* held that 'any enfranchisement made in fraud of... the portion reserved by law to forced heirs, is null and void... [if] (sic) it shall appear that at the moment of executing the enfranchisement, the person granting it had not sufficient property... to leave to his heirs the portion to them reserved by law.

¹³⁴See generally KENNEDY, *supra* note 12, at 41, n. 2, 529-30 (providing a splendid overview of the subject and, inter alia, an exhaustive list of scholarship on interracial sex during the enslavement era).

¹³⁵See KOLCHIN, *supra* note 11, at 124-25:

Far more often, however, slaves who had sex with whites did so against their will, whether the victims of outright rape or of the powerlessness that made resistance to advances futile and the use of force in such advances unnecessary.... Sex between white men and black women was a routine feature of life on many, perhaps most, slaveholdings, as masters, their teenage sons, and on large holdings their overseers took advantage of the situation to engage in the kind of casual, emotionless sex on demand unavailable from white women.

See also, supra note 56.

See KENNEDY, *supra* note 12, at 163 ("The sexual abuse of enslaved women was a constant refrain, for example, in Frederick Douglass's indictment of bondage:

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1. White Men Could Legally Rape Their Enslaved Black Women.

The most significant miscegenational rule, in the antebellum South, was that a white man/master could legally rape his enslaved black woman, and the black woman had no legal recourse.¹³⁶ From the white master's perspective,

More than a million women, in the Southern States... are, by the laws of the land, and through no fault of their own, assigned to a life of revolting prostitution... Youth and elegance, beauty and innocence are exposed for sale upon the auction block; while villainous monsters stand around, with pockets lined with gold, gazing with lustful eyes upon their prospective victims.... Every slaveholder is a party, a guilty party, of this awful wickedness." (Footnote omitted.)

¹³⁶See HIGGINBOTHAM & KOPYTOFF, *supra* note 112, at 2008 ("In cases of interracial rape, in contrast, only black men were called to task. White men were not punished at all for the rape of black women, and black men were punished more severely than were white men who raped white women."). See also FINKELMAN, *supra* note 125, at 50 (citing from William W. Fisher III, "Ideology and Imagery in the Law of Slavery,"

In situations implicating the sexuality of female slaves, the Jezebel image predominated. For example, the supposed licentiousness and poorly developed parental instincts of Negro women were commonly invoked to justify denying them the right to marry or to retain custody of their children. Similar characterizations were used to justify the failure of almost all jurisdictions to criminalize rape of a slave woman. (Footnotes omitted.)

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miscegenation between himself and his enslaved black women was entirely unregulated.¹³⁷ Where it related to white masters and enslaved black women,

See also, SCHAFER, SLAVERY, *supra* note 115, at 85 (“No Louisiana law made rape of a black woman, slave or free, a crime. Rape was specifically limited to white women under the state’s law.”) *Compare* PAUL FINKELMAN, THE LAW OF FREEDOM AND BONDAGE: A CASEBOOK 260-1 (1986) [hereinafter FINKELMAN, CASEBOOK] (citing *George (a Slave) v. The State*, 37 Mississippi 316 (1859) (in the case of an enslaved black man’s indictment for the rape of enslaved female child under ten years old, the Court held that no indictment could be sustained either at common law or by statutory law. The Court stated the terrible legal position that enslaved black women (of any age) faced, when raped, “From a careful examination of our legislation, on this subject, we are satisfied that there is no act which embraces either the attempted or actual commission of a rape by a slave on a female slave.” One can be sure that if the law did not hold an enslaved man liable for raping an enslaved ten-year-old child, it would not have a white master liable for the same horrid act!))

¹³⁷*See* JOE GRAY TAYLOR, NEGRO SLAVERY IN LOUISIANA 20 (1963) [hereinafter TAYLOR]

The existence of extramarital relation between whites and Negroes can be accepted without doubt. To some extent this had occurred on the slave coast, and it continued amidst the stench of the slave ships. When the slave woman reached the New World she was in no position to resist white insistence.... Citations are after all unnecessary, because the increasing number of references to mulattoes as time went on and a realistic appreciation of the conditions which exist when women are the property of men make the conclusion inevitable that there were many children born of mixed parentage. Nor do the sources available indicate any strong disapproval. Men in court frequently accounted for their whereabouts at a certain time by asserting that they had been ‘sleeping with a

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plantation law (e.g., the master's desires) ruled.¹³⁸ An enslaved black woman legally had no will that her white master needed to respect, and she owed total obedience to him.¹³⁹

negress.' (Footnotes omitted.)

¹³⁸See COBB, *supra* note 115, at 99-100:

Another consequence of slavery is, that the violation of the person of a female slave, carries with it no other punishment than the damages which the master may recover for the trespass upon his property.... It is a matter worthy of consideration of legislators, whether the offence of rape, committed upon a female slave, should not be indictable; and whether, when committed by the master, there should not be superadded (sic) the sale of the slave to some other master. The occurrence of such an offence is almost unheard of; and the known lasciviousness of the negro, renders the possibility of its occurrence very remote. Yet, for the honor of the statute-book, if it does occur, there should be an adequate punishment. (Footnotes omitted.)

See also, supra note 56.

¹³⁹See FRIEDMAN, *supra* note 32, at 198:

Slaves themselves had little claim on the law for protection. A South Carolina judge, in 1847, put the case bluntly. A slave, he said 'can invoke neither magna charta nor common law.... In the very nature of things, he is subject to despotism. Law as to him is only a compact between his rulers.' The Louisiana Black Code of 1806 (sec.18) declared that a slave 'owes to his master, and to all his family, a respect without bounds, and an absolute obedience, and... is... to execute all... orders.'

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2. White Men and Black Women Could Not Legally Marry.

The next most significant miscegenational rule was that a white man could not legally marry a black woman of any status, whether he owned her, whether another person owned her, or whether she was free.¹⁴⁰

See also ANDREA DWORKIN, *INTERCOURSE* (1987) (presenting the feminist view that under conditions of patriarchy, most, if not all, heterosexual sex amounts to coerced sex). *See generally* DEBORAH GRAY WHITE, *AR'N'T (SIC) I A WOMAN: FEMALE SLAVES IN THE ANTEBELLUM SOUTH* (1985).

¹⁴⁰*See* KENNEDY, *supra* note 12, at 219:

The race bar at the altar has a long history in America. In 1664, Maryland severely punished white women who married Negroes or slaves, calling such unions 'shameful matches.' To prevent 'abominable mixture and spurious issue'—meaning mixed-race offspring—the Virginia Assembly decreed that whites who married blacks, mulattoes, or Indians would be banished from the dominion forever. By 1800 ten of the sixteen states then constituting the United States proscribed interracial marriage. By 1913, when Wyoming became the last state to impose a statutory impediment to marital miscegenation, forty-one others had already enacted similar laws, and in doing so armed public authorities and private persons with the means to create and police racial divisions in matters of sex and matrimony.

See, e.g., La. BLACK CODE, art. VI (1724) (provided that marriage of whites to enslaved blacks

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was forbidden, and that concubinage of whites with manumitted or freeborn blacks was also forbidden.) Article 95 of the Louisiana Civil Code of 1825 prohibited marriage between a white person and a colored person. *Compare* KENNEDY, *supra* note 12, at 76 (noting that South Carolina did not prohibit interracial marriage during the antebellum period). *See also* MICHAEL P. JOHNSON & JAMES L. ROAKE, *BLACK MASTERS, A FREE FAMILY OF COLOR IN THE OLD SOUTH* 128-29 (1984) [hereinafter JOHNSON] (“In South Carolina, unlike many other Southern states, a marriage between a free person of color and a white person was perfectly legal.”)

As to marriage between free blacks and whites, *see* COBB, *supra* note 115, at 313:

Free persons of color, unless restricted by statute, may contract marriage with those of their own condition, or any free person capable of contracting. Intermarriage with the whites is prohibited in a large majority of the States of the Union. Public policy has made it necessary for the slaveholding States, by statute, to impose other restrictions upon free persons of color... to place them on the same footing with slaves as to their intercourse with white citizens....” (Footnotes omitted.)

See also STAMPP, *supra* note 12.

Compare A LAW UNTO ITSELF? *ESSAYS IN THE NEW LOUISIANA LEGAL HISTORY* 196-98 (Warren M. Billings & Mark F. Fernandez eds., 2001) [hereinafter BILLINGS], Ellen Holmes Pearson, “Imperfect Equality, The Legal Status of Free People of Color in New Orleans, 1803-1860:”

The Code Noir’s interdiction against interracial marriage was reiterated in the *Digest* of 1808 and the *Civil Code* of 1825, but it was not tested in the Supreme Court of Louisiana until 1855, in *Dupre v. Boulard*. That case arose out of a disputed succession, and the issue turned on the validity of a French marriage between a white man and a free woman of color. The children of Marie Elizabeth Boulard attempted to block Jean Pierre Michel Dupre from claiming any of their

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3. White Men Could Legally Buy and Sell Enslaved Black Women for Sexual Exploitation.

The next most significant miscegenational rule was that a white man could legally buy, and, if disobedient, sell, an enslaved black woman for any lawful purpose, including sexual exploitation.¹⁴¹ In fact, there is evidence that law

mother's estate because Dupre and Boulard's marriage was illegal in Louisiana. Writing for a unanimous court, Justice Henry Spofford expressed his disapproval, calling the marriage an "unnatural alliance" and refusing to sanction an evasion of Louisiana law by legitimating the union. The fact that the first challenge to this law came so close to the Civil War is somewhat surprising. Because New Orleanians tended to overlook cohabitation between white men and women of color, perhaps the marital status of Marie Elizabeth and Jean Pierre Michel Dupre would have gone unnoticed had it not been for the dispute over an estate worth almost \$23,000. (Footnotes omitted.)

See also, H.E. STERKX, *THE FREE NEGRO IN ANTE-BELLUM LOUISIANA* 243-44 (1972) [hereinafter STERKX].

¹⁴¹*See* STAMPP, *supra* note 12, at 196:

Some slaveholders preferred to use 'bright mulattoes' as domestics; a few paid premium prices for light-skinned females to be used as concubines or prostitutes." *Id.* at 259 ("Lewis C. Robards, Lexington's best-known trader in the 1850's, had special quarters on the second floor of his 'Negro jail' for his 'choice stock' of quadroon and octoroon girls.

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allowed white men to buy enslaved women merely for their sexual and physical attraction and pleasure, as there was quite a demand in the enslavement market for certain black women.¹⁴²

4. White Men Could Legally Cohabit with a Black Women, as

‘In several rooms,’ reported a visitor, ‘I found very handsome mulatto women, of fine persons and easy genteel manners, sitting at their needlework awaiting a purchaser. The proprietor made them get up and turn around to show to advantage their finely developed and graceful forms—and slaves as they were, this I confess, rather shocked my gallantry. New Orleans was known to be a good market for ‘fancy girls,’ but traders found purchasers elsewhere too.’ (Footnotes omitted.)

See also, supra notes 14 and 52.

¹⁴²The author has reviewed the enslavement sales found in the 1829-1831 Slaves Sales of Notary William Christy in the Orleans Parish Courthouse, New Orleans, Louisiana and found that the average price, between 1829 and 1831, for an 18-year-old black woman was \$400 (average of 100 such sales). And yet, in 1830, an agent of a Virginia white master bought an 18-year-old “mulatto” woman for \$1200! *See SIR EDWARD ROBERT SULLIVAN, RAMBLES AND SCRAMBLES IN NORTH AND SOUTH AMERICA* 210 (1853) (making observations about the desirability of attractive black women on the enslavement sale block: “Their movements are the most easy and graceful that I have ever seen.... A handsome quadroon could not, though the market is well supplied, be bought for less than one thousand or fifteen hundred dollars!”).

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Concubines.¹⁴³

The next most significant miscegenational rule was that a white man could

¹⁴³A “concubine” is defined as “a woman who cohabits with a man without being his wife; a kept mistress. A male paramour.” OXFORD DICTIONARY, VOL. III, *supra* note 5, at 674. This article defines a concubine as either a man or a woman (primarily) who live together, without being married. They were parties cohabiting out of wedlock. Often, the term was used to describe the woman (usually black) in such a relationship, while the more positive term “paramour” was used to describe the man (usually white). There were some other types of miscegenational relationships between white men and black women. These included a white man/master legally prostituting an enslaved black woman he owned for profit; a white man legally having casual sexual activities with an enslaved black woman he owned; a white man legally cohabiting secretly with an enslaved black woman he owned; and a white man having the same types of the aforementioned relationships with an enslaved woman that he did not own, or with a free black woman.

See JOHNSON, *supra* note 140, at 52-53:

Others among the women without co-residing spouses were concubines of white men. Some of the white men who fathered these women’s children were their former masters. Others were white men who chose not to reside with the women who bore their children. In the racial climate of antebellum South Carolina, most white men would not want to acknowledge their mulatto children or their Negro concubine. Although the exact proportion of concubines among the free Afro-American women without co-residing spouses cannot be known, a rough estimate is that they numbered about a third of these women, or about one free colored household in ten. In South Carolina, unlike many other Southern states, a marriage between a free person of color and a white person was perfectly legal. (Footnotes omitted.)

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legally cohabit “open and notoriously” with an enslaved black woman that he owned, or with a free black woman, a “concubine.”¹⁴⁴ In addition, the law in some instances provided that an enslaved black woman was capable of receiving property by will or inter vivos, if she had acquired the right to be set free in the future.¹⁴⁵

¹⁴⁴See LA. CIV. CODE, art. 1468, *infra* note 147. Compare HIGGINBOTHAM & KOPYTOFF, *supra* note 112, at 2003:

Cases in which white men were prosecuted for interracial sex rarely reached the highest courts of Virginia. We have found only two, despite the frequency with which mulatto children were born of black mothers. One reason lay in the rules of evidence: no black or mulatto could testify against a white at trial. Therefore, another white would have had to bring the complaint. Another reason was that society tended to wink at the casual liaisons of white men and black women.

¹⁴⁵See *supra* note 130, LA. CIV. CODE, art 193 (1825), stating “A slave who has acquired the right of being free at a future time, is from that time capable of receiving by testament or donation. Property given or devised to him must be preserved for him, in order to be delivered to him in kind, when his emancipation shall take place. In the meantime it must be administered by a curator.” Unfortunately, in 1855, the State of Louisiana followed other enslavement states and tightened the legal restrictions on blacks, enslaved and free. Some of its provisions included a prohibition against free blacks marrying both whites and enslaved blacks, essentially permitting free blacks to marry only other free blacks or to live illegally with whites or enslaved blacks. See SCHAFER, SLAVERY, *supra* note 115, at 183-84 (“On March 6, 1857, the Louisiana legislature eliminated all loopholes and totally prohibited emancipations: ‘From and after the

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5. White Men Could Transfer Limited Personal Wealth to Their Black Concubines.

Even though white men could and often did “cross the color line” to have sexual relations with enslaved black women, the law made it very difficult, but not impossible, for white wealth to cross over as well.¹⁴⁶ A statute did, in fact, formally allow for some property transfer in such “illicit” relationships.¹⁴⁷ It would appear from this study that white men wanted the right to reward their black women with property favors.¹⁴⁸

passage of this act, no slave shall be emancipated in this state.’’)

¹⁴⁶*See generally* DAVIS, *supra* note 9.

¹⁴⁷*See, e.g.*, LA. CIVIL CODE, art. 1468 (1825), which provided:

Those who have lived together in open concubinage are respectively incapable of making to each other, whether inter vivos or mortis causa, any donation of immovables; and if they make a donation of movables, it can not exceed one-tenth part of the whole value of their estate. Those who afterwards marry are excepted from this rule.

¹⁴⁸*See* BERLIN, *supra* note 7, at 268:

The strength and persistence of these liaisons were demonstrated whenever

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6. White Men Could Legally Transfer Personal Wealth to Their “Colored” Children, Their Offspring with Black Concubines.

One obvious concern over miscegenation between white men and black women was the procreation of mixed-race or “colored” children.¹⁴⁹ Consequently,

officials challenged them. An attempt to prevent black women from inheriting a portion of their white lovers’ estate brought howls of protest in the Louisiana legislature (in 1840). One representative assured the assembly that ‘a black woman who lived with a white man might be as virtuous as if she were his wife,’ and doubtless more virtuous than a white woman who lived in similar circumstances since she (the black woman) was (legally) prohibited from marrying her paramour.... (In 1860) the South Carolina General Assembly quietly buried a petition lamenting that whites were ‘frequently found living in open connection with negro and mulatto women’ by simply declaring ‘the evil complained of cannot be prevented by legislation. (Emphasis added, footnotes omitted.))

¹⁴⁹See HIGGINBOTHAM & KOPYTOFF, *supra* note 112, at 1994-95:

Significantly, the new and harsher legal attitude toward interracial sex appeared in the 1662 statute designed to solve the ‘problem’ of fitting the mulatto children of such unions into the social order. This suggests that what prompted the harsher punishment was not simply the act of interracial sex itself, but its likely outcome:

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early in the Colonial period and throughout the antebellum period, the law treated the offspring of miscegenational relationships between white men and black women as their white father's "bastards," or illegitimate, without the father's inheritable blood.¹⁵⁰ Their inheritance was that of their enslaved black mother, the legal status of "enslaved."¹⁵¹

The law clearly justified this rule to punish miscegenational relations. The alternative—the presumption of legitimacy—would reward miscegenational behavior, and would transfer wealth to mulatto children. (Imagine the psychological effect on the enslaved child, to be your father's legal property, to be bought, sold, or abused as he willed!¹⁵²) Oddly, the antebellum legislatures did not completely close the door to the inheritance rights of "colored" or "mulatto"

mulatto children.... A 1691 statute... stated... '[I]t is hereby enacted, that for the time to come, whatsoever English or other white man or women being free shall intermarry with a negroe (sic), mulatto, or Indian man or woman bond or free shall within three months after such marriage be banished and removed from this dominion forever.' (Footnotes omitted.)

¹⁵⁰See COBB, *supra* note 115.

¹⁵¹See RUSSELL, *supra* note 14.

¹⁵²See *supra* note 110.

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children of miscegenational relationships between white men and black women, allowing a more stringent but available means of legitimatization.¹⁵³

And what should the law do if a white master decided to exercise his private property rights so as to emancipate his enslaved black female lover and their enslaved children?¹⁵⁴ Unfortunately, later in the antebellum period (1840-60), southern state legislatures made manumission of enslaved persons a more difficult legal exercise, often requiring that the freed enslaved be sent out of the state.¹⁵⁵

¹⁵³See LA. CIV. CODE, art. 221 (1825), providing strict requirements for a white father to legally acknowledge a colored child as his offspring. This Article required that if a white father desired to legally acknowledge a colored child, he must provide evidence in a notarial act, in front of and signed by two witnesses.

¹⁵⁴See JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 103 (1988) [hereinafter D'EMILIO] (“When white men emancipated their mistresses and mulatto children in their wills they implied that more than mere physical exploitation characterized these relationships.”)

¹⁵⁵See BERLIN, *supra* note 7, at 138-139:

The master’s right to free his slaves shrank as slavery expanded.... By the 1850s, when many states prohibited manumission altogether, only the border states of Delaware and Missouri and newly settled Arkansas allowed masters to liberate their slaves and permitted manumitted blacks to remain in the state.” (Footnote omitted, lists various states’ manumission laws and source references.)

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The strength of the law's abhorrence of "colored" children receiving property from their white fathers is observed in the case of *Robinett v. Verdun's Vendees*.¹⁵⁶ In that case, the deceased, Alexander Verdun had sold certain tracts of land to Jean Baptiste Gregoire and six or seven other colored persons whom Verdun's white heirs alleged were Verdun's illegitimate children.¹⁵⁷ The court annulled the sale, finding that the deceased, Verdun, had not properly acknowledged his illegitimate colored children.¹⁵⁸ Justice Simon recognized the obstacles that white men faced in attempting to pass on property to their "colored" children:

'A part of the population of that (sic) state has been placed by law under certain disabilities and incapacities, from which it is not the province of the courts of justice to relieve them; and there are very important considerations which impose on our courts a stricter

¹⁵⁶*Robinett et al. v. Verdun's Vendees*, 14 La. 542, 1840 WL 1092 (La. 1840).

¹⁵⁷*Id.*

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observance of the laws relative to illegitimate children,
especially to those of color.¹⁵⁹

In summary, when it came to miscegenation between white men and black women, antebellum southern legislatures imposed a double standard, allowing white men to enjoy a black woman's sexual favors, while granting her and their offspring little or no property rights. Rather than completely prohibit any meaningful sexual contact between them, the law condoned them, and, at least in Louisiana, legislatively provided black women who participated in these relationships and their offspring an opportunity to enjoy limited property rights. Why the apparent inconsistency? Why not prohibit all interracial sexual relationships? And, even if some were recognized, why not cut off all property rights to black women in miscegenational relationships? The answers to these questions and whether those answers support or oppose Professor Bell's "interest-convergence" principle is analyzed next.

¹⁵⁸*Id.* at *4.

¹⁵⁹*Id.* at 3, citing *Jung et al. v. Doriocourt et al.*, 4 La. 175, 1832 WL 820 (La. 1832).
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C. WHY MISCEGENATION LAW PERMITTED WHITE MEN AND BLACK WOMEN TO COHABIT, AND GAVE BLACK WOMEN LIMITED PROPERTY RIGHTS?

As there is little legislative history explaining antebellum Southern legislatures' reasons for their approach to white man and black woman miscegenation, one is left to speculation. First, there is the Jeffersonian theory of enslavement status: once an enslaved black, always enslaved, even descendants of free white men and enslaved black women.¹⁶⁰ But Jeffersonian theory fails to explain the law's similar treatment of miscegenational relationships between white men and free black women, and its treatment of *free*, albeit presumptively illegitimate, children.

Another explanation is racism, or the boundary of color, that despite "free," non-enslaved status, white society aspired to remain "white" and racially segregated.¹⁶¹ This "racism" theory is embodied in the Higginbotham theory of

¹⁶⁰See RUSSELL, *supra* note 14.

¹⁶¹See FINKELMAN, *supra* note 125, at 395, excerpt from Jonathan A. Bush, "The British Constitution and the Creation of American Slavery" ("The colonial boundaries of skin color and

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racial purity and segregation, that to allow interracial sexual intercourse would lead to mulatto children.¹⁶² But the legislatures' failure to make criminal a white master's rape of his enslaved black refutes this theory.

Analyzing the law's handling of blood issue of white men and black women is illuminating.¹⁶³ Without racism, a white man would have been legally capable

white racism did not always succeed in separating the races, particularly before the eighteenth century.... For masters the general answer to these boundary challenges was the same: keep slaves as slaves and not free by keeping blacks separate. This explains the prominence of colonial penal statutes, miscegenation laws, restrictions on manumission, and similar acts.”)

¹⁶²See generally HIGGINBOTHAM & KOPYTOFF, *supra* note 112.

¹⁶³See P. Keith Daigle, *All in the Family: Equal Protection and the Illegitimate Child in Louisiana Succession Law*, 38 LA. L. REV. 189 (1977-1978) (discussing the various classifications of children and their inheritance rights). Historically, Louisiana has classified children as legitimates, natural (acknowledged by either parent but born out of wedlock), and illegitimates (unacknowledged and out of wedlock). Illegitimates had no inheritance rights except for nourishment, lodging and “alimony” (support), if the father or mother had legitimate children or descendants. An acknowledged natural child was ranked higher in the mother's succession, inheriting ahead of ascendants, collaterals, and the surviving spouse, if there were no surviving legitimate descendants. In the father's succession, an acknowledged natural child inherited only ahead of the state, and after any lawful relations and a surviving spouse. *Id.* at 189-91. See also, *In the Matter of the Succession of Joseph L. Robins*, 349 So. 2d 276 (La. 1977) (holding that Civil Code Article 1488 violated the Equal Protection Clause of the 1974 Louisiana Constitution, by treated “adulterous bastards” different from other “illegitimates”). *Id.* at 198-200.

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of marrying a black woman. Then, their children would have all the property and inheritance rights of legitimate children. Without racism, a white male could easily bestow, by inter vivos gift or by will, property upon his “concubine” and their children. On the other hand, with racism, a white father could not easily acknowledge his children with a black woman, as was the case under Louisiana law, which required greater formality¹⁶⁴ than when acknowledging a white child, and still faced legal limitations on the portion of his estate he could give by will. These legal restrictions and impediments were greater if the black woman was enslaved, not free, and if the children were enslaved.

Then there is the D’Emilio “romance theory,” that a white master who attempted to free his enslaved mistress and their mulatto children by will showed more than physical exploitation, and was likely in love.¹⁶⁵ But, as we shall see, in the case law, these attempts at emancipation by will often failed. One also has to wonder how romantic it was to the enslaved black mistress, to wait until her white master-lover died, to be emancipated (along with their children), when he could

¹⁶⁴La. CIV. CODE, art 221 (1845) (providing that acknowledgment of an illegitimate child should be made by a declaration before a notary public in the presence of two witnesses and no other proof of acknowledgment shall be admitted in favor of children of color).

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have done so while alive!

The usual justification for these statutes regulating interracial relationships was, according to the Schafer “family theory,” protection of the “institution of the family.”¹⁶⁶ That is, at least, the white family. But as the Schafer “family theory” points out, it is unfair to judge miscegenational relationships between white men and black women by “legitimate” marital standards, as the law prohibited them from marrying. At the end of the day, despite the law, white men and their black women often carried on relationships with them that mirrored, for better or worse, marriage.¹⁶⁷ Many defied the law and sought legal loopholes to reward their black

¹⁶⁵See D’EMILIO, *supra* note 152.

¹⁶⁶See SCHAFFER, *SLAVERY*, *supra* note 115, at 200 (“Louisiana’s continental legal heritage is evident in these rulings. Illicit and illegal liaisons were a threat to the institution of the family. The *Civil Code* ensured that the legitimate family of the free partners in an illegal relationship would not be deprived of their inheritance. Of course, slaves had no legitimate families under the law, could own no property, and were in fact property themselves. These factors operated in most court decisions to make these laws more burdensome on them than on whites.”)

¹⁶⁷See KOLCHIN, *supra* note 116.

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mistresses with wealth and property.¹⁶⁸

Can Bell's "interest-convergence" principle provide the answer? Should antebellum Southern legislatures have allowed black women and their miscegenational offspring with white men, to share in the American Dream? Reflecting on Bell's "interest-convergence" principle is the Saks "wealth miscegenation" theory, that whatever property rights antebellum Southern legislatures provided black women in relationships with white men coincided with the interests of privileged, wealthy, powerful white men.¹⁶⁹ The Saks "wealth miscegenation" theory is also consistent with the creation of the American Dream, based upon cheap land, cheap labor, and cheap sex.¹⁷⁰ To allow black women to enjoy property rights would arguably reduce what would be available for deserving white Americans: wealth, power, and privilege.

More critically, for antebellum Southern legislatures (and the contemporary U.S. Supreme Court) to provide black women property rights would undermine the very basis of the American Dream and of whites' important rationale for

¹⁶⁸See generally DAVIS, *supra* note 9.

¹⁶⁹See SAKS, *supra* note 114.

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enslavement: the inferiority of blacks. How could blacks be both inferior and treated as equal? The answer, in the eyes of antebellum Southern legislatures, was that black women were not equal.¹⁷¹ As enslavement was a human institution where white men ruled, the law bent to accommodate their sexual desires and guilt, so as to allow white men-black women miscegenation and to apparently reward black women some limited property rights.

While antebellum Southern legislatures provided some insights into the answers to these questions,¹⁷² one must look to case law and judicial pronouncement to get a full picture of how these laws were actually implemented and the judicial rationales for their decisions. Even though the legislature granted miscegenational black women some limited property rights, did antebellum Southern judges reinforce or impede such rules? And most important, why did the judges do what they did?

¹⁷⁰See *supra*, Section II.

¹⁷¹See BERLIN, *supra* note 7, at 268 (“Whites maintained their dominance by differentiating themselves from blacks and monopolizing the symbols of superiority.”)

¹⁷²See *supra*, Section III, B.

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IV. COURT DECISIONS RESTRICTING WHITE WEALTH
TRANSFERENCE TO BLACKS¹⁷³

In a market economy, property is freely bought and sold, and freely transferred by way of gift. Most gift transactions take place within the family. Few property owners make major gifts during their lifetime; but, when they die, all must be given away. Almost the entire stock of private wealth turns over each generation, by last will and testament, or through the intestacy laws, or by a gift in the light of death. Only public, corporate, and dynastic property is immune from this law of mortality.¹⁷⁴

– Lawrence M. Friedman

¹⁷³There are many cases from enslavement states providing examples of white men who attempted to transfer wealth to their enslaved black women and their children. *See generally* DAVIS, *supra* note 9. Louisiana, a state that Davis expressly does not cover, provides an abundant variety of these cases. *See* SCHAFER, SLAVERY, *supra* note 115, at 184.

¹⁷⁴*See* FRIEDMAN, *supra* note 32, at 218 (introducing the American law changes to the English rules concerning succession).

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A. LOUISIANA “PERMISSIVE” LEGISLATIVE TREATMENT OF CONCUBINAGE.

This next section will focus on the Louisiana Supreme Court’s reaction to the legislative concubinage wealth transfer statute, to determine whether Louisiana did, in fact, provide a greater wealth opportunity for enslaved black women (and their miscegenational children), as its legislative scheme implied. This will be followed by an analysis of cases wherein white men transferred wealth to *free* black women or “black mistresses.”

One scholarly study of nineteenth century case analyzed inheritance rights of enslaved women against postmortem transfers of wealth.¹⁷⁵ It concluded, “The distributive rules of succession reinforced the exploitative roles of enslaved women in the sexual economy.”¹⁷⁶ That study chose not to focus on two important areas:

¹⁷⁵See DAVIS, *supra* note 9.

¹⁷⁶*Id.* at 285 (continuing, Davis explains, “The reproduction of the enslaved could never produce property rights, only property. Sexual relationships never yielded economic rights, regardless of the degree of affect, length of commitment, or adherence to monogamy. Southern succession doctrine blocked the intimate sphere, as well as the commercial, as a source of economic personality for the enslaved.”)

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interracial transfers in the State of Louisiana and interracial transfers to free black mistresses.¹⁷⁷

The first important inquiry is that of postmortem, interracial transfers in the

¹⁷⁷*Id.* At first glance, the miscegenational relationships described in the following case study might appear somewhat romantic. Perhaps some of them were, but one should not assume that all such relationships were other than brutality. For an example of the extent of brutality in an antebellum concubinage relationship, *see* SCARBOROUGH, *supra* note 12, at 113-16:

Of all the great slaveholders included in this study, however, no others were more callous or more brutal in the treatment of their human property than Judge Samuel S. Boyd of Natchez and his partner, the former slavetrader Rice C. Ballard.... The records indicate that throughout the term of their joint planting venture Ballard and Boyd were constantly buying and selling slaves, apparently in utter disregard of family ties.... But trafficking in slaves was not the most egregious of Judge Boyd's sins. His treatment of a female house servant named Maria bordered on sadism.... The attorney described Maria's treatment in graphic detail. She was, he charged, 'lashed... like an ox, until the blood gushes from her.'.... Outrageous as was Judge Boyd's abuse of Maria, it was exceeded by his subsequent treatment of another female slave, his long-term mistress Virginia. The relationship had evidently been one of extended duration, for by 1853 she had already borne him two children and was pregnant with a third. Apparently fearful that the relationship was about to be revealed to his wife, Boyd, in March of that year, directed Ballard, acting through the agency of the slave dealer C.M. Rutherford, to send Virginia and her children—his own children—to Texas to be sold.... In early August, Rutherford informed Ballard that he had just received word from Texas

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State of Louisiana. And the second important inquiry is that of cases, involving white men's postmortem wealth transfers to *free* black women. The next section of this article will analyze cases in these two important areas: First, we analyze the Louisiana Supreme Court's interpretation of the state's "permissive" concubinage statute, allowing white men to transfer limited wealth to their black female sexual partners.

B. ENSLAVED BLACK WOMEN'S SEXUAL SERVICES LEGISLATIVELY PAID, JUDICIALLY DENIED

There are many ways by which wealth could be acquired in the antebellum South, including purchase, gift, or inheritance.¹⁷⁸ By way of summary, each of these wealth acquisition tools were denied to enslaved black women.¹⁷⁹ They were not legally allowed to own property,¹⁸⁰ acquire by gift,¹⁸¹ labor for money to

that Virginia and her youngest child had been sold.

¹⁷⁸*See supra* note 79.

¹⁷⁹*Id.*

¹⁸⁰*See supra* note 104.

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purchase,¹⁸² contract for purchase,¹⁸³ or inherit.¹⁸⁴ Their *inability* to acquire wealth or property was controlled by their legal status as property.¹⁸⁵

An enslaved black woman would have to be manumitted or freed in order to enjoy the full rights of private property ownership.¹⁸⁶ In the early days of enslavement, the laws of manumission made it easier for enslaved blacks to obtain their freedom.¹⁸⁷ Some legal avenues for manumission included allowing blacks to “hire out their own labor” and purchase their freedom,¹⁸⁸ successfully bring a lawsuit for their freedom,¹⁸⁹ travel with their master to a free state and be freed

¹⁸¹*Id.*

¹⁸²*See supra* note 115.

¹⁸³*Id.*

¹⁸⁴*Id.*

¹⁸⁵*See supra* note 51.

¹⁸⁶*See generally* SCHAFER, FREE, *supra* note 45.

¹⁸⁷*Id.*

¹⁸⁸*Id.*

¹⁸⁹*Id.*

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there,¹⁹⁰ or receive an inter vivos or causa mortis gifts of emancipation.¹⁹¹

Particularly, for the enslaved black woman, enslavement law and plantation practices greatly diminished her ability to use her sexuality as socio-economic bargaining chip, as her master had legal control over her sexuality and could rape her without legal repercussions.¹⁹² That being said, some enslaved black women were still able to negotiate their sexual relationships with white men, in exchange for their freedom and that of their miscegenational children.¹⁹³ Many of them were manumitted during their white masters' lifetimes.¹⁹⁴ Unfortunately, many white masters, for varying reasons from negligence to intent (and some because their

¹⁹⁰See STAMPP, *supra* note 12, at 2234-35 (“The truth was... that living masters in all the southern states—even in those which prohibited manumission by last will and testament—always had the right to remove their slave to a free state and there release them from bondage. Though no slave state could deprive them of this right, few made use of it.”) *But see, infra* note 213, *Cole v. Lucas*, 2 La. Ann. 946, 1847 WL 3490 (La. 1847) (wherein a white master, Samuel Miller, did just that, sending his enslaved black woman, Patsy, to Indiana, where she was emancipated).

¹⁹¹See generally SCHAFFER, FREE, *supra* note 45.

¹⁹²See *supra* note 136.

¹⁹³See *supra* note 117.

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miscegenational relationships were extramarital), chose to manumit their enslaved black female sexual partners when they died, by their wills.¹⁹⁵

It has already been established that the State of Louisiana, during the antebellum period, had legislatively established a “permissive” scheme for white men, living in “open and notorious” concubinage relationships with black women, to give them limited property interests in their estate.¹⁹⁶ Louisiana’s statutes were “permissive” in that they 1) legally recognized concubinage between white men and enslaved black women,¹⁹⁷ 2) expressly provided limited property rights to enslaved black women (and their miscegenational children) in concubinage relationships,¹⁹⁸ and 3) treated manumission and free blacks favorably.¹⁹⁹

¹⁹⁴*Id.*

¹⁹⁵*See* DAVIS, *supra* note 9.

¹⁹⁶*See supra* note 147.

¹⁹⁷*Id.*

¹⁹⁸*Id.*

¹⁹⁹*See* SCHAFER, FREE, *supra* note 45, at 2-3:

Slaves in Louisiana had two unique rights. State law allowed them to contract for

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The following analyzes antebellum Louisiana Supreme Court cases in which that “permissive” legislative scheme was challenged by white family members of miscegenational white men, seeking to frustrate the stated wills, to transfer property (usually freedom) to their enslaved black women and their miscegenational offspring.

1. Enslaved Women as Whore-ish White Property.

In the following cases, the Louisiana Supreme Court ruled on critical issues, involving a deceased white man’s will, providing that his enslaved women (and usually, their children) receive some property interest in his estate. In doing so, the Court was called upon to weigh the property claims of two competing groups: the testator’s mixed-race, enslaved family against his white, legitimate one. Should the testator’s desire to grant his enslaved black woman property be respected? Or

their freedom and to initiate a law suit for their liberty. Article 174 of the Civil Code of the State of Louisiana (1825) allowed slaves to enter into only one form of contract—for their freedom.... Slaves’ right to sue for their freedom constituted an exceptional legal act in antebellum Louisiana. Article 177 of the Civil Code held that slaves could not be parties in any civil action, either as plaintiffs or defendants, except to claim their freedom.

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should the testator's white relatives' interests supersede his miscegenational bequests?

But there was more at stake here than the mere disposition of probate property: usually at stake in these cases was the very freedom of the enslaved black woman and her miscegenational offspring. Typically, in these cases, *they* were the property in controversy.²⁰⁰ This reality raised and often turned on a legal fiction of great significance: that enslaved blacks were legally immovable property. Louisiana's concubinage statute expressly forbade gifts of immovables to concubines.²⁰¹ Could a white master will freedom as property to his enslaved black woman when the Louisiana law considered (for most purposes) enslaved

²⁰⁰The concubinage cases that the Louisiana Supreme Court heard clearly represent a limited universe of concubinage cases. There were many concubinage cases, that were likely properly disposed of at the lower court level, requiring no high Court review. For example, the high Court did likely not review cases, where the testator clearly complied with the 10% total value limitation, where the testator clearly failed to comply with the 10% rule, or where no one challenged the miscegenational bequest. Hence, the cases that the Louisiana Supreme Court reviewed usually involved fundamental issues, requiring their involvement. And then there were likely some concubinage matters that the Probate Court was able to hear.

²⁰¹*See supra* note 147, at 185-200 (Professor Schafer anticipated some of the case analysis in this section. The author is grateful for much of her foundational work in this area.).

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black people to be “immovables?”²⁰²

a. *Maria v. Destrehan*²⁰³

In an early case, in 1831, the Louisiana courts established a doctrine that would resonate throughout their handling of concubinage cases: that enslaved black women were not merely the immediate property of their white master, they were “indefeasible” property, a continuing legacy of the white master’s white heirs. In *Maria v. Destrehan*,²⁰⁴ the Court sought to balance a white daughter’s forced heirship claim to her white father’s estate, against his bequest of freedom for his enslaved black woman and her daughter.²⁰⁵ That estate consisted mainly of

²⁰²See SCHAFFER, SLAVERY, *supra* note 115, at 185 (“The second barrier, ignored by the Louisiana Supreme Court until the 1850s, was more formidable: people living in open concubinage could not donate immovable property of any value to each other while they were alive or by will—and slaves were immovables under Louisiana law.”)

²⁰³*Maria et al. v. Destrehan et al.*, 3 La. 434, 1832 WL 701 (La. 1831). See SCHAFFER, SLAVERY, *supra* note 115, at 186-87.

²⁰⁴*Maria et al. v. Destrehan et al.*, 3 La. 434, 1832 WL 701 (La. 1831).

²⁰⁵*Id.*

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her father's enslaved black woman, Maria, and her ten-year-old daughter.²⁰⁶

In *Maria v. Destrehan*,²⁰⁷ Jacob Philips died and willed that his enslaved woman, Maria, and her ten-year-old daughter, Angel, be freed.²⁰⁸ He instructed his white daughter to see to the emancipation "as a particular favor to her father."²⁰⁹ Additionally, he left Maria and Angel all of his movable property.²¹⁰ The entire estate was valued at \$1,497.25, of which Maria and Angel accounted for \$850.²¹¹ The lower court held that the daughter must be given her required portion of the Philips's estate, under Louisiana's forced heirship laws.²¹² (The Supreme Court remanded the case to the lower court on a procedural issue.)

²⁰⁶*Id.*

²⁰⁷*Maria et al. v. Destrehan et al.*, 3 La. 434, 1832 WL 701 (La. 1831).

²⁰⁸*Id.*

²⁰⁹*Maria et al. v. Destrehan et al.*, 3 La. 434, 1832 WL 701 (La. 1831).

²¹⁰*Id.*

²¹¹*Id.*

²¹²*Id.*

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b. *Cole v. Lucas*²¹³

In this case, the Louisiana Supreme Court denied Patsy, a formerly enslaved, then free, black woman, an inter vivos bequest of promissory notes for approximately \$24,000, secured by a plantation and enslaved blacks.²¹⁴ The case was determined on a technical issue of the date of delivery of the notes.²¹⁵ More important, the Court reiterated its doctrine of blackness as white property, in stating that a slave cannot inherit, nor receive inter vivos gifts of property.²¹⁶ The Court found that despite evidence that the white testator, Samuel Miller, had gone to great lengths to transfer title to Patsy, that at the time of the transfer, she was still a slave, even though she was shortly thereafter freed.

In *Lucas v. Cole*,²¹⁷ on May 11, 1843, Samuel Miller, a white man, sold his

²¹³*Cole v. Lucas*, 2 La. Ann. 946, 1847 WL 3490 (La. 1847). See SCHAFFER SLAVERY, *supra* note 115, at 277, n.35.

²¹⁴*Cole v. Lucas*, 2 La. Ann. 946, 1847 WL 3490 at *2 (La. 1847).

²¹⁵*Id.*

²¹⁶*Id.*

²¹⁷*Cole v. Lucas*, 2 La. Ann. 946, 1847 WL 3490 (La. 1847).

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plantation and enslaved blacks in Louisiana, taking the property as collateral for promissory notes of approximately \$24,000.²¹⁸ Patsy, his enslaved black woman, was Miller's concubine.²¹⁹ Miller desired to free Patsy, and made arrangements for her to travel to Indiana, and there she was emancipated on the 13th or 14th of May 1844.²²⁰ The miscegenational couple decided to move to St. Louis, Missouri, and did so in April of 1844.²²¹

Prior to Patsy's emancipation, Miller endorsed the notes and handed them to Miller's associate named Kirk to hold for Patsy's benefit.²²² The notes were redelivered from Kirk to Miller in St. Louis, and given to Patsy after her emancipation.²²³ The issue the Court faced was how Patsy's legal (enslavement) status at the time of the gift, and the concubinage, should affect Miller's

²¹⁸*Id.* at *2.

²¹⁹*Id.*

²²⁰*Id.*

²²¹*Cole v. Lucas*, 2 La. Ann. 946, 1847 WL 3490 at *3 (La. 1847).

²²²*Id.*

²²³*Id.*

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bequests.²²⁴

The tone of the Court's decision was most important: "She was the slave of *Miller* and his concubine, and we think the evidence establishes that their concubinage was open and notorious. Under the cumulated incapacity of slave and concubine, she could not receive these notes from Miller as a valid gift, under our laws. The concubines can only receive, in movables, one-tenth part of the whole estate of her paramour, and the slave can receive nothing by donation (gift)."²²⁵ (Emphasis added.) As to the validity of the gift, and its position on the importance of protecting versus punishing miscegenational relationship, the Court stated, "We have already stated our opinions of the relations subsisting between the parties to this donation. The disabilities under which the law places persons who have lived

²²⁴*Id.* at *2:

But it is said she was emancipated on the 13th or 14th of May, 1844, at Madison city, in the State of Indiana, and that her incapacity to receive as a slave was removed by the act of emancipation. To render the gift valid under that hypothesis, it would be incumbent on the plaintiff to show that the notes were transferred, or give, to her subsequent to the act of emancipation. The mere possession of the notes by her is no evidence of the time when they were delivered to her.

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in this condition, are created for the maintenance of good morals, or public order, and for the preservation of the best interests of society.”²²⁶ Therefore, the Court found that Miller’s gift to Patsy failed, as it was delivered when she was an enslaved concubine, and belonged to Miller’s white heirs.²²⁷

*c. Vail v. Bird*²²⁸

In 1851, the Louisiana Supreme Court clearly articulated its quintessential bias against white men’s bequests to free their enslaved black women and their miscegenational children in its dicta in *Vail v. Bird*.²²⁹ The Court found that the miscegenational bequest in that case, freedom for an enslaved black woman,

²²⁵*Id.* at *2, and *see supra*, Article 1468, note 147.

²²⁶*Id.* at *5.

²²⁷*Id.* at *5-6.

²²⁸*Abraham B. Vail et al. v. Abraham Bird, Executor*, 6 La. Ann. 223, 1851 WL 3583 (La. 1851). *See* SCHAFER, *SLAVERY*, *supra* note 115, at 187-88.

²²⁹*Abraham B. Vail et al. v. Abraham Bird, Executor*, 6 La. Ann. 223, 1851 WL 3583 (La. 1851).

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violated the expressly statutory prohibition of gifts of immovables.²³⁰ The Court grounded its decision on the well-founded Louisiana law that enslaved blacks were not only property, but were immovables.²³¹ *Vail v. Bird* established that an enslaved black is not merely the property of her present owner, but is a permanent fixture of the family's estate, and hence, indefeasible by will. It also established the Court's racist-sexist bias against the unfortunate position that enslaved black women often found themselves.

In *Vail v. Bird*,²³² Henry Clay Vail died, and his will provided freedom for his enslaved black woman, Jane, and left her two promissory notes of \$100 each.²³³ Vail's white heirs sought to annul the will, arguing that as enslaved blacks were legally classified as immovable property, Jane could not be the subject of Vail's gift.²³⁴ Following the "enslaved as indefeasible immovables" argument, the Court

²³⁰*Id.* at *2.

²³¹*Id.*

²³²*Abraham B. Vail et al. v. Abraham Bird, Executor*, 6 La. Ann. 223, 1851 WL 3583 (La. 1851).

²³³*Id.*

²³⁴*Id.*

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accepted the challenge of Vail's white heirs.²³⁵

In a very lucid moment, Justice Isaac Preston, for the majority, presented his “blackness as permanent white property” view of the operation of the statute on concubinage:

Slaves are made by our law immovable property. A donation which deprives the heir of the donor of a slave (sic) is a disposition of immovable property. The donation of freedom to a slave deprives the (master's white) heirs (ownership) of the slave, and is therefore the donation of an immovable.²³⁶ (Emphasis added.)

Vail's executor attempted to save the bequest to free Jane, arguing Jane could not have consented to be a concubine. Arguably, the statute should not have applied to enslaved black women, because, being “enslaved,” legally meant one was without will and, therefore, could not have consented to be a concubine.²³⁷ On this, the Court recognized that an enslaved black woman was vulnerable to her

²³⁵*Id.* at *2.

²³⁶*Id.*

²³⁷*Abraham B. Vail et al. v. Abraham Bird, Executor*, 6 La. Ann. 223, 1851 WL 3583 at *2 (La. 1851).

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white master's power.²³⁸ But they stated that generally an enslaved mistress willingly participated in sexual relations with her master:

It is true, the female slave is particularly exposed ... to the seductions of an unprincipled master. That is a misfortune; but it is so rare in the case of concubinage that the seduction and temptation are not mutual, that exceptions to the general rule cannot be founded upon it.²³⁹

In 1854, in *Bird v. Vail et al.*,²⁴⁰ Vail's executor continued to sue for Jane's and her child's freedom, claiming that Vail's heirs were not entitled to Louisiana's forced heirship rights, as they were neither ascendants nor descendants.²⁴¹ A newly-composed Court, Justice Campbell presiding, ignored the idea of an enslaved person as immovable issue, and acknowledged Jane's right to freedom.²⁴²

But the Court again sided with Vail's white heirs, by providing that Jane

²³⁸*Id.*

²³⁹*Id.*

²⁴⁰*A. Bird, Executor v. A. B. Vail, et al.*, 9 La. Ann. 176, 1854 WL 4038 (La. 1854). *See* SCHAFFER, SLAVERY, *supra* note 115, at 188.

²⁴¹*A. Bird, Executor v. A. B. Vail, et al.*, 9 La. Ann. 176, 1854 WL 4038 (La. 1854).

²⁴²*Id.*

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must remain in their enslaved service until she reached thirty (then the statutory age of manumission of an enslaved black, she was then twenty-five).²⁴³ Judge Campbell reasoned: That bequest to free enslaved black women did not free them at the time of probate, those enslaved black women are only “entitled to their freedom, upon compliance with the formalities prescribed by law for the emancipation of slaves; until [then]... the heirs had a right... [to] enjoy their services and labor.”²⁴⁴ The Court also found that her daughter, Louisa, was *permanently enslaved* to the heirs, as Vail’s will was silent about her fate.²⁴⁵

d. *Adams v. Routh and Dorsey*²⁴⁶

In 1853, in *Adams v. Routh and Dorsey*,²⁴⁷ the Court further assaulted

²⁴³*Id.*

²⁴⁴*Id.*, citing *Nimmo et. al v. Bonney et al., Executors*, 4 R. 179.

²⁴⁵*Id.*

²⁴⁶*William Adams v. Routh and Dorsey*, 8 La. Ann. 121, 1853 WL 4080 (La. 1853). See SCHAFFER, SLAVERY, *supra* note 115, at 189.

²⁴⁷*William Adams v. Routh and Dorsey*, 8 La. Ann. 121, 1853 WL 4080 (La. 1853).

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enslaved black women's property rights. The Court was asked to balance a white father's forced heirship claim against his son Adams's will, providing that his enslaved black woman, Nancy, be freed, and that their children receive \$1,000 each.²⁴⁸ The Court denied the miscegenational bequest, finding that it exceeded the statutory gift limitation.²⁴⁹ It decided that Adams's father continued to own Nancy and her children with Adams, despite Adams' specific bequest.²⁵⁰ And the Court authorized their new owner to partition or separate the interracial family to satisfy his property rights to one-fourth of the estate.²⁵¹

In *Adams v. Routh and Dorsey*,²⁵² William Adams, Jr., a white master, lived in "open concubinage" with an enslaved black woman, Nancy.²⁵³ He died in 1851 and, in his will, he ordered his executor to free Nancy, give her his watch,

²⁴⁸*Id.*

²⁴⁹*Id.*

²⁵⁰*Id. at* *1-2.

²⁵¹*Id.*

²⁵²*William Adams v. Routh and Dorsey*, 8 La. Ann. 121, 1853 WL 4080 (La. 1853).

²⁵³*Id.*

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furniture, and \$1,000 for each of their children.²⁵⁴ Adams's legitimate white father (who, under Louisiana law had "forced heirship" rights to one fourth of the estate, as the Court found that Adams had no legitimate children) sued to invalidate the will.²⁵⁵ Adams's father claimed that as the entire estate was worth only \$4,750, the donation to Nancy of her freedom could cost the estate her value, \$1,000, and that amount exceeded the one-tenth concubinage statutory limitation.²⁵⁶ The Louisiana Supreme Court agreed with Adams's father, ruling that Nancy could *not* be freed.²⁵⁷ It further held that Adams's father was "entitled to receive one-fourth of the entire succession of the testator, and to enforce a partition of it in kind or licitation (sic), as the case may be."²⁵⁸ This likely meant that Adams's interracial family would be divided by sale, to satisfy his father's inheritance rights. The Court also found in favor of Adams's bequests of \$1,000 to each of his colored

²⁵⁴*Id.*

²⁵⁵*Id.*

²⁵⁶*Id.*

²⁵⁷*Id.*

²⁵⁸*William Adams v. Routh and Dorsey*, 8 La. Ann. 121, 1853 WL 4080 at *1-2 (La. 1853).

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children, as Adams's father "had no interest or standing in Court to contest those legacies; and as the residuary legatees have not prosecuted their appeal from the judgment, it must remain undisturbed."²⁵⁹

2. "Adulterous and Incestuous Bastards:"

Miscegenational Offspring of White Men and Enslaved Black Women?

a. *Compton v. Prescott*²⁶⁰—the Case of the Black Princess

As seen in the following analysis, the Louisiana Supreme Court clearly disapproved of illegitimate children of white men and enslaved black women.²⁶¹

²⁵⁹*Id.* at *2.

²⁶⁰*John Compton et al, Heirs of Leonard B. Compton v. Aaron Prescott and Another, Executors of said Leonard B. Compton, et al.*, 12 Rob. (La.) 56, 1845 WL 1677 (La. 1845).

²⁶¹See BILLINGS, *supra* note 140, at 197:

Although white New Orleans tacitly accepted interracial cohabitation, the *Civil Code* made it difficult for a concubine or natural children of mixed race to make

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One reason was that they generally perceived white men-black women concubinage, as “immoral,” as many, if not most, of them were extramarital. Hence, the Court often felt morally obligated to punish the participants. But, at the same time, the Courts seemed to ignore the morality of the outcome of their position, which was to victimize the innocent offspring of these extramarital, miscegenational relationships. In the next case, the Court explained the various levels of illegitimacy in the enslavement society.

In *Compton v. Prescott*,²⁶² Leonard B. Compton, a white man, died without leaving any ascendants or legitimate descendants,²⁶³ but leaving an estate worth

substantial claims on a white man’s estate. The law allowed bastards of color to prove descent only from a father of color. Unless a white father formally acknowledged his natural child of mixed race either at birth or at a later date, the child had no claim to inherit any portion from his natural father. (Citing *Civil Code*, art. 221, 226; *Jung et al., v. Doriocourt et al.*, 4 La. 175 (1832); *Robinett et al. v. Verdun’s Vendees*, 14 La. 592 (1840) (sic).

See supra, note 156.

²⁶²*John Compton et al, Heirs of Leonard B. Compton v. Aaron Prescott and Another, Executors of said Leonard B. Compton, et al.*, 12 Rob. (La.) 56, 1845 WL 1677 (La. 1845).

²⁶³*Id.* at *2.

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approximately \$184,640.²⁶⁴ In this will, he made several bequests. The most significant one at issue provided that his plantation (545 acres), enslaved blacks, and \$10,000 each, go to his mulatto daughter, Loretta, and her mulatto brother, Scipio: “it being my intention to give them, and that they shall have one-fourth in value of my estate.”²⁶⁵ Compton had previously “acknowledged them, as his natural children, by regular notarial acts executed on the 14th of May, 1830, and 27th of December, 1837.”²⁶⁶ In doing so, the Court found that Compton complied with the statutory requirements for acknowledgment of illegitimate “colored” children, under Article 221, and for bequeathing one-quarter of his estate to his “natural” children, pursuant to Article 1474 of the Louisiana Civil Code, then in effect.²⁶⁷

²⁶⁴*Id.* at *7.

²⁶⁵*Id.* at *3.

²⁶⁶*John Compton et al, Heirs of Leonard B. Compton v. Aaron Prescott and Another, Executors of said Leonard B. Compton, et al.*, 12 Rob. (La.) 56, 1845 WL 1677, at *7 (La. 1845).

²⁶⁷*Id.* at *9, the Court stated,

Now, art. 221, says, in positive terms, that ‘the acknowledgment of an illegitimate child, shall be made by a declaration before a notary public, in the presence of

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In addition, Compton willed Fanchon, a “free woman of color” (and Loretta and Scipio’s mother), “all my household and kitchen furniture of all descriptions whatsoever; also one saddle horse, and my carriage, pair of horses, two patent gold watches, stock of cattle, &c. (sic)”²⁶⁸ The Court noted the special nature of the miscegenational relationship that Compton and Fanchon enjoyed:

The testimony established that the deceased was living in open and notorious concubinage with a mulatress (sic) named Fanchon, who, being formerly a slave, was emancipated in April, 1825; since then, she was always considered a free woman of color. Fanchon had several children, two of whom, Scipio and Loretta, are named in the will as being the testator’s children; he always treated them as such, and acknowledged them as his natural children, by regular notarial

two witnesses,’ and provides that ‘*No other proof of acknowledgment shall be admitted in favor of children of color.*’” See also, *id.* at *10, where the Court also stated, “It is perfectly clear that, under art. 1473, to wit: ‘when the natural father has not left legitimate children or descendants, the natural children, acknowledged by him, may receive by donation, inter vivos or mortis causa, to the amount of the following proportions, to wit: one-fourth of his property, if he leaves legitimate ascendants, or legitimate brothers and sisters; &c’. (sic)

²⁶⁸*Id.* at *3.

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acts executed on the 14th of May, 1830, and 27th of December, 1837.

The deceased caused one of them to be educated in Ohio at his own expense, and always showed them the affection of a father. It appears that Loretta is dead.²⁶⁹

In his will, Compton made two specific bequests and left the remainder of his estate to his four legitimate (white) nieces.²⁷⁰ During his lifetime, Compton had allegedly made, directly and indirectly, certain inter vivos gifts to his free black concubine and their children, Loretta and Scipio, including immovables.²⁷¹ In the lawsuit, the legitimate, white nieces sought to have the entire estate divided amongst themselves, voiding the provisional bequests to Fanchon, Loretta, and Scipio, recapturing the inter vivos gifts to themselves, and questioning the specific

²⁶⁹*Id. at* *7. A close reading of the decision shows that Loretta and Scipio were likely born after their mother, Fanchon, was emancipated. This would mean that they were free blacks and not enslaved (as there is no mention of the will's providing that they be freed).

²⁷⁰*John Compton et al, Heirs of Leonard B. Compton v. Aaron Prescott and Another, Executors of said Leonard B. Compton, et al.*, 12 Rob. (La.) 56, 1845 WL 1677, at *4 (La. 1845).

²⁷¹*Id. at* *7-8.

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bequests to others.²⁷²

This case is as interesting for its dicta, as for its surprising disposition. The disposition is easier to explain, so we will start there. In the end, the Court honored Compton's bequest that one-quarter of his estate go to his miscegenational children, Loretta and Scipio, "crediting" the alleged inter vivos gifts they had received previously.²⁷³ This was a major victory for miscegenational children. As to the gifts to the free black woman and concubine, Fanchon, she received nothing, but not because of her status as a concubine (although, but for the statutory prohibition of interracial marriage, she and Compton could have legally married, which would have resulted in the entire miscegenational family becoming legitimate, and likely entitled to most of Compton's estate).²⁷⁴ The remaining three-fourths of the estate went to Compton's four white legitimate nieces.²⁷⁵

²⁷²*Id.* at *1.

²⁷³*Id.* at *10-11.

²⁷⁴*John Compton et al, Heirs of Leonard B. Compton v. Aaron Prescott and Another, Executors of said Leonard B. Compton, et al.*, 12 Rob. (La.) 56, 1845 WL 1677, at *11 (La. 1845).

²⁷⁵*Id.*

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Now for the important dicta, the Court explained the nature of the Civil Code's definition of "adulterous and incestuous bastards."²⁷⁶ Overall, the Louisiana Code made it more difficult for a black child to inherit from a white father, mainly, because of its prohibition of interracial marriage. First, under Article 200, it provided for two classes of "natural" or illegitimate children: "those born from two persons who, at the moment when such children were conceived, might have legally contracted marriage with each other (white couples); and those who are born from persons to whose marriage (sic) there existed, at the time, some legal impediment (a miscegenational couple)."²⁷⁷ (Of course, the most common, intended legal impediment was the legal prohibition of interracial marriage.)²⁷⁸ Second, it established more stringent rules for a white father to acknowledge a black or mulatto child, by providing that the *sole* means to acknowledge a "colored" child was for the acknowledging father to make a declaration before a

²⁷⁶*Id.* at *9.

²⁷⁷*Id.*

²⁷⁸*See supra* note 140.

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notary public, in the presence of two witnesses.²⁷⁹ This more formal procedure differed from provisions for a white father acknowledging paternity of a white child or that of a black father acknowledging paternity of a child of either race.²⁸⁰

That brings us to the ultimate issue that the Court in *Compton* had to face: based upon the two classes of illegitimate children stated in Article 200, the Civil

²⁷⁹*John Compton et al, Heirs of Leonard B. Compton v. Aaron Prescott and Another, Executors of said Leonard B. Compton, et al.*, 12 Rob. (La.) 56, 1845 WL 1677, at *9, citing Art. 221 (La. 1845).

²⁸⁰*Id. See Succession of Melasie Hebert*, 33 La. Ann. 1099, 1103-07, 1881 WL 8776 (La. 1881), for a different twist, involving the “illegitimate” children of a free black man and a free white woman. In this post-antebellum case, the plaintiff, Emelia Hebert, represented herself as the natural daughter and sole issue of the deceased and sought to be put in possession of the entire estate. At the lower court, a judgment was rendered against her. On appeal, the court held that at the time of Emelia’s birth, her mother (white) and father (black) were unable to marry. But the court further held that as there was no legal impediment to interracial marriage at the time of the succession, Emelia’s right to inherit must be enforced. The court used as precedent *Compton v. Prescott*, holding that the legal prohibition against interracial marriage does not extend to the children of those relationships, such that they may prove maternal/paternal descent. The statutory requirement of written recognition of acknowledgment applied exclusive to children of color descending from a white father. The statute did not address the issue of a white mother and a black father. Hence, Emelia received her white mother’s estate through a loophole, not addressed by a legislature mainly concerned by protecting white men’s estates and not those of white women. *Succession of Melasie Hebert*, 33 La. Ann. 1099, 1103-07, 1881 WL 8776 (La. 1881).

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Code in Articles 202 and 203, defines two classes of “adulterous and incestuous bastards.”²⁸¹ Those of the latter class, whose marriage was subject to legal impediment, “can never be acknowledged.”²⁸² But here is where the Court departed from its generally racist doctrine of blackness as white property:

and although there is a legal impediment to the marriage of a white person, with a free person of color, (art 95,) (sic) the exception (that they as “adulterous and incestuous bastards,” can never be acknowledged) does not appear to extend to their illegitimate or natural children; for art. 222, says only: that ‘such acknowledgment, shall not be made in favor of the children produced by an incestuous or adulterous connection.’ Now, art. 221, says, in positive term, that ‘the acknowledgment of an illegitimate child, shall be made by a declaration before a notary public, in the presence of two witnesses,’ and provides that *‘No other proof of acknowledgment shall be admitted in favor of children of color.’* (Court’s own emphasis.)

²⁸¹*John Compton et al, Heirs of Leonard B. Compton v. Aaron Prescott and Another, Executors of said Leonard B. Compton, et al.*, 12 Rob. (La.) 56, 1845 WL 1677, at *9 (La. 1845).

²⁸²*Id.*, citing Article 222.

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This last proviso, which contains a negative pregnant with an affirmative, undoubtedly means, that, as we said in the case of *Robinett et al. v. Verdun's Vendees*, (14 La. 545,) any other proof of acknowledgment should be excluded, when offered by children of color. It cannot mean any thing (sic) else; for art. 226, by which illegitimate children who have not been legally acknowledged, are allowed to prove their paternal descent, provided also, that *free illegitimate children of color may also be allowed to prove their descent, from a father of color only*, and it is obvious, that this last restriction, was inserted in the law, because, with regard to his white father, an illegitimate child of color, is not allowed to prove that he has been acknowledged, but in the manner pointed out in art. 221, to wit: by authentic evidence, and that, therefore, he cannot resort to any other kind of proof, but when his father is a man of color. This interpretation... does not seem to us, to conflict in the least with art. 259, relative to the alimony which natural children may claim from natural parents. It is true, that article fixes the limit, to which such alimony should be extended, as to natural children of color; but it

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clearly corroborates our opinion, that illegitimate colored children are not on the same footing with adulterous or incestuous bastards, since by art. 262, the latter are not entitled to any alimony from their father, but can only claim it from their mother or her ascendants. We think therefore, that Scipio and Loretta could be acknowledged, and art. 1473 makes no distinction, they should be entitled to the rights allowed by law as such. (Emphasis added.)²⁸³

These dicta, although rather verbose, established that a white man could acknowledge, as his natural child (and thereby pass on limited inheritance rights in his will) a free colored child of a miscegenational relationship, between a white man and a free black woman (presuming that the child did not, in fact, result from an incestuous or adulterous relationship, such that the legal impediment was that the white man was already married). It also indirectly meant that the white man who acknowledged as his natural child an enslaved colored child from a miscegenational relationship with a free or enslaved black woman, did not receive inheritance rights, because an enslaved black, albeit acknowledged, could not

²⁸³*Id.* at *9-10.

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receive gifts and had no right to inherit.²⁸⁴ As we shall see in the next case, the miscegenational children were not as lucky.

b. *Turner v. Smith*²⁸⁵

In this next case, the miscegenational children were not so fortunate, as those in *Compton*. As a result of their black mother being enslaved and a legislative change prohibiting emancipation, they were denied their freedom, their inheritance, and their family unity. As this case will show, by 1857, the Louisiana Supreme Court's "blackness as permanent white property" doctrine seemed

²⁸⁴See COBB, *supra* note 115.

²⁸⁵*L.E. Turner, Curator v. C.D. Smith et al.*, 12 La. Ann. 417, 1857 WL 4878 (La. 1857). See SCHAFFER, SLAVERY, *supra* note 115, at 189-90. See also, MORRIS, *supra* note 51, at 379-80:

After a decade of bitter controversy among the members of the Georgia court, the state legislature, in 1859, adopted a law prohibiting all postmortem manumissions whether 'within or without the State.'... In some Southern states, in other words, public policy, especially after 1840, overrode (sic) the right of an owner of property to "discontinue" the claim to that property when the property was a slave. Public policy had cut deeply into possessive individualism. (Footnotes omitted.)

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complete. It coincided with a southern legislative movement prohibiting emancipating enslaved blacks.²⁸⁶ One enslaved black woman and her children were caught in the sea-change, and denied the freedom provided in her white lover's (or perhaps "rapist's"?) miscegenational bequests. As a result, the winning white heirs were allowed to divide the miscegenational family among them,

²⁸⁶See STAMPP, *supra* note 125, at 232-54:

In the Deep South the trend was toward increasingly severe legislative restrictions. In Louisiana (for many years the most liberal of these states) an act of 1807 limited the privilege of manumission to slaves who were at least thirty years old and who had not been guilty of bad conduct during the previous four years. In 1830, Louisiana required emancipated slaves to leave the state within thirty days; after 1852, they had to leave the United States within twelve months. Five years later, Louisiana entirely prohibited private emancipations within the state. The remaining states of the lower South had outlawed private emancipations early in the nineteenth century.... Several states in the Deep South... prohibited emancipation by last will and testament. South Carolina acted as early as 1841, when it voided all deeds and wills designated to free slaves before or after removal from the state. Mississippi, Georgia, Arkansas, and Alabama adopted similar laws during the next two decades.... [I]n 1859, only three thousand slaves were emancipated throughout the entire South. At that time both Virginia and Kentucky permitted manumissions by deed or will. Yet Virginia, with a slave population of a half million, freed only two hundred and seventy-seven; Kentucky, with a slave population of nearly a quarter million,

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destroying the black family, for the sake of blackness as white property.

In *Turner v. Smith*,²⁸⁷ the Court weighed white heirs' property rights against a black family's right to freedom.²⁸⁸ The facts of that case show that on December 19, 1855, John Turnbull formally acknowledged, before a notary and two witnesses, his five mulatto children, born of his twenty-three-year-old enslaved woman, Rachel.²⁸⁹ On the same day, Turnbull made a will, instructing his executor to free his children and their mother upon his death; and, if that were not possible, then the executor was to take them to their chosen country or state, where enslavement was prohibited.²⁹⁰ His will further provided that one-third of his estate should be divided equally between Rachel and the children.²⁹¹

freed only one hundred and seventy-six.

²⁸⁷*L.E. Turner, Curator v. C.D. Smith et al.*, 12 La. Ann. 417, 1857 WL 4878 (La. 1857).

²⁸⁸*Id.*

²⁸⁹*Id.*

²⁹⁰*Id.* at *1-2. See also *B. Price, Guardian v. John Ray, Executor*, 14 La. Ann. 697, 1859 WL 5929 (La. 1859); SCHAFER, *SLAVERY*, *supra* note 115, at 191-92 (similar facts and outcome).

²⁹¹*L.E. Turner, Curator, v. C.D. Smith et al.*, 12 La. Ann. 417, 1857 WL 4878, at *2 (La.1857).

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In 1856, Turnbull died.²⁹² The executor refused to free Rachel and the children; Turnbull's white heirs joined in, claiming that Turnbull's acknowledgment of the children, as his own, was "contrary to law and good morals."²⁹³ The lower court found for Rachel and her children, making a rare statement that Rachel could not be blamed for "her yielding obedience to his wicked desires," so as to "punish the weak and helpless for the sins of the strong and powerful."²⁹⁴ (Clearly, the court "did the math," recognizing that Turnbull sexually assaulted Rachel when she was still a minor.)

Unfortunately for Rachel and her children, in 1857, the Louisiana Legislature passed an act expressly prohibiting all emancipation of enslaved blacks.²⁹⁵ Following the Legislature's lead, the Louisiana Supreme Court reversed

²⁹²*Id.*

²⁹³*Id.*

²⁹⁴See SCHAFFER, SLAVERY, *supra* note 115, at 190.

²⁹⁵*L.E. Turner, Curator v. C.D. Smith et al.*, 12 La. Ann. 417, 1857 WL 4878, at *2 (La. 1857), quoting "the Act of the Legislature of the 6th March, 1857," which entitled "an Act to prohibit the emancipation of slaves": "Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened. That from and after the passage of this Act, no slave shall be emancipated in this State."

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the lower court, and ruled against Rachel and her children, holding that they could not be freed, nor could they inherit or own property.²⁹⁶ Adding insult to injury, the Court authorized Turnbull's white heirs to destroy the miscegenational family, by allowing them to divide Rachel and her children amongst themselves!²⁹⁷

Comparing *Turner* to *Compton*,²⁹⁸ notwithstanding the legislative prohibition, it appears that the Court in *Turner* considered as significant the fact that "*Turnbull* took no steps towards emancipating the children of *Rachel* during his lifetime, although he lived for six months after the so-called act of acknowledgment. His declaration, in his will, of an intention to enfranchise them, was only intended to be operative after his death; and could not produce any effect until after his death, because it was always in his power, up to the moment of his death, to revoke his will."²⁹⁹ This meant that Turnbull's miscegenational children fit the *Compton* court's definition of "adulterous bastards," in that they were

²⁹⁶*Id.* at *3.

²⁹⁷*Id.* at *3.

²⁹⁸*See supra* note 257.

²⁹⁹*L.E. Turner, Curator v. C.D. Smith et al.*, 12 La. Ann. 417, 1857 WL 4878, at *2 (La. 1857).

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offspring of a miscegenational relationship between a white man and an *enslaved*, versus a *free*, black woman. (In both case reports, it appears that the white man, in the relationship, was unmarried, and died without white or legitimate children.) This point raises an issue of status, did “free” status produce a different result in miscegenational, postmortem bequest cases? This is the subject of the next section.

C. WHITE MEN AND THE “BLACK MISTRESS”– A DIFFERENT STORY?

Did the Louisiana Supreme Court serve up the same bittersweet cup of justice to *enslaved* black female concubines, denying their bequests, as it did when the white master’s bequest benefitted a *free* black woman,³⁰⁰ a “black mistress?”

³⁰⁰See BILLINGS, *supra* note 140, at 193-94, n.5:

Among the earliest infringements on that (free blacks’ legal) status was one designed to set free blacks apart from whites in all acts of legal record. Formalizing a custom practiced by the French and Spanish, a territorial statute of 1808 required all officials to apply the designation ‘free man’ or ‘free woman of color’ in legal documents or public notices. To segregate the vital records of

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Free black women were, like their *enslaved* black sisters, handicapped by racially-based miscegenation laws.³⁰¹ Louisiana law, similar to laws throughout the country, forbade marriage between whites and blacks, *enslaved or free*.³⁰² But

whites and free blacks, the Legislative Council of the Territory of Orleans also decreed that separate books be kept for the birth and deaths of free persons of color. (Citing “An Act to Prescribe Certain Formalities Respecting Free Persons of Color,” Orleans Territorial Acts 92 (1808), “An Act to Provide for the Recording of Births and Deaths,” 1811 La Acts 74.) (Emphasis added.)

See generally CHAINED TO THE ROCK OF ADVERSITY, TO BE FREE, BLACK & FEMALE IN THE OLD SOUTH 36 (Virginia Meacham Gould ed., 1998) (using personal letters of free women of color before, during, and after the Civil War, to provide valuable insight into their lives and experiences):

Mary E. Williams Bingaman was a free woman of color who had grown up outside of Natchez. As an adult, she was involved in a liaison with the white colonial Adam Lewis Bingaman.... Before moving to New Orleans with Mary Williams, Adam Bingaman had been one of Natchez’s most distinguished citizens.... By 1819 Bingaman had become a planter, and between 1819 and 1841, he inherited much of the property that had previously belonged to his family. At one point he owned several plantations around Natchez and 235 slaves.... By 1850, Adam Bingaman had moved to New Orleans with Mary and their children, Charlotte, Elenore.

³⁰¹*See supra* notes 36-40.

³⁰²*See* BILLINGS, *supra* note 140, at 208:

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free black women had at least one legal weapon that enslaved black women lacked: the right to contract.³⁰³ In order to “self-regulate” illicit miscegenational relationships and to protect their offspring, some enterprising free black women turned to contract and property law for answers to their miscegenational troubles.³⁰⁴ They were able to use contract law to negotiate a “marital-like”

Free persons of color also maintained their right to own property. In most states with large free black populations, landowning percentages were low, indicative of the blacks’ general economic standing. In New Orleans, by comparison, property held by free persons of color in the late 1850s was estimated at around \$2.5 million. The unrestricted ability to acquire land and slaves helped free blacks maintain the status and influence they needed to starve off wholesale diminution of their personal and civil liberties. As long as they had economic standing, they had a voice. (Footnotes omitted.)

³⁰³See COBB, *supra* note 115, at 313-14 (“Free persons of color... may make contracts, and dispose of their estates by will. In the absence of a will, administration will be granted on their estate, and unless otherwise directed by statute, they will be subject to the ordinary and general law of distribution.”)

³⁰⁴This case is a precursor to a contemporary property case—that of *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 184 Cal. Rptr. 815 (Cal. Sup. Ct., 1976) (on the enforceability of a contractual arrangement for the disposition of property of unmarried cohabitation; although in *Marvin*, there were no legal implements to the couple marrying). This leads to a discussion of the concept of “common law marriage,” wherein a state recognized as legally married (granting the same rights as if married with a ceremony and a license) cohabiting parties that manifest their

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property arrangement, called the “placage.”³⁰⁵

1. Thomas Durnford and Rosaline Mercier: The Extra-Marital Contract or *Placee* or *Placage*

One very successful use of the placage, between a white man and a free black mistress, involved that of a wealthy white Englishman living in New Orleans, Thomas Durnford, and Rosaline Mercier, a “free woman of color.”³⁰⁶

intent to be husband and wife and hold themselves out to the public as husband and wife. The arrangement was abolished in most states for several reasons including that “common law marriage dignified immorality among persons in the lower socio-economic class who were more likely than the well-off to enter into such an arrangement.” DUKEMINIER, *supra* note 59, at 405, 406. *See also*, REPPY, *supra* note 48. *Compare* similar issues involving same-sex cohabitation, *see, e.g.*, Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L. J. 1965 (1997).

³⁰⁵*See* STERKX, *supra* note 140, at 250 (“Besides the legal family, there existed a distinctive concubinage or placage—(fn. 24, Taken from the term *une placee*. It was usually applied to those women who make arrangements for sexual connections with White men. *See* Olmstead, *A Journey in the Seaboard Slave States in the Years 1853-54*, II, 245) a liaison between a White man and Mulatto or Quadroon women.... As a matter of fact placage (literally a situation) developed into an institution because of the legal restrictions against intermarriage.”)

³⁰⁶*See* DAVID O. WHITTEN, ANDREW DURNFORD: A BLACK PLANTER IN ANTEBELLUM

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Thomas Durnford died on May 3, 1826, unmarried and without a will.³⁰⁷ The financial partnership between the white Thomas and the black Rosaline is evidenced in Durnford's succession papers.³⁰⁸ John McDonogh,³⁰⁹ a very

LOUISIANA 6-7, 9 n.25 (1982) [hereinafter WHITTEN] (Andrew Durnford was the offspring of a *placee* arrangement, wherein a *representant* or matchmaker would negotiate a contract “marriage” between the white male “husband” and a free black female “wife.” Rosaline Mercier, his mother, was an affluent free mistress, who owned a small plantation in Orleans Parish.) *See also*, ANNE RICE, *THE FEAST OF ALL SAINTS* (Simon and Schuster 1979) (presenting an historically accurate, fictionalized portrayal of the human working of a placage “marriage,” and its impact on the self image of young black women, as prostitutes).

³⁰⁷*See* WHITTEN, *supra* note 306, at 7.

³⁰⁸*Id.* (“February 28, 1827—the estate paid Rosaline Mercier \$1,095 for services rendered Thomas Durnford. This was the first installment of \$1,716 ordered by the probate court to be paid to her. July 2, 1837—“To expenses, paid Andrew Durnford, the son and heir of Rosaline Mercier, on the \$1,716 ordered paid per by decree of the court of probate of the parish and city of New Orleans, on the 3rd day of January 1827 for services rendered by her to the deceased, during his last illness, as per receipt. \$621.00.” (Footnotes omitted.))

³⁰⁹Perhaps the richest Louisianian of his time, John McDonogh willed, *inter alia*, substantial wealth to the City of New Orleans and the City of Baltimore for public utility purposes and the establishment of free schools, “wherein the poor, and the poor only, of both sexes, of all classes and castes of color, shall be admittance, free of expense....” *Executors of John McDonogh v. Murdoch*, 56 U.S. 367 (1853). The United States Supreme Court upheld McDonogh's will, which was the foundation for the establishment of the New Orleans public school system. *Id.* at 415.

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prominent white businessman in New Orleans, was the curator of the Durnford estate.³¹⁰

The miscegenational couple produced one son, Andrew Durnford, who became a large and prosperous plantation owner.³¹¹ By 1850, the mixed-race Andrew Durnford owned 1,200 acres of improved and 1,460 acres of unimproved land, farm machinery valued at \$10,000, livestock valued at \$2,800, and 70 enslaved blacks. His total assets were valued at \$80,000!³¹² This successful placage relationship was

³¹⁰See WHITTEN, *supra* note 306, at 9.

³¹¹See STERKX, *supra* note 140, at 202-03.

³¹²*Id.* at 203. See also, JOHNSON, *supra* note 140, at 128-9 (well documenting the story of another antebellum black man, William Ellison, from South Carolina who

possessed princely wealth.... In the entire state, only 5 percent of the population owned as much real estate as Ellison.... However, Ellison was neither the richest free person of color in the South nor the largest slaveholder. Louisiana contained six free Negro planters who were wealthier and owned more slaves. The richest was Auguste Dubuclet, a sugar planter whose estate was valued at \$264,000. The largest slaveholders were the widow C. Richard (sic) and her son P.C. Richard (sic), also sugar planters, who together owned 152. Outside Louisiana, only one free Negro in 1860 is known to have reported greater wealth than Ellison.

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non litigated, but is very similar to the next, celebrated miscegenation case.

2. *Eugene Macarty and Eulalie Mandeville: “Marital” Property of Unmarried Concubines*³¹³

The most notable antebellum miscegenation case involving a white man and a free black mistress, was that involving the interracial relationship between the white Eugene Macarty and the black Eulalie Mandeville, in 1848. In that case, the Court went to great lengths to protect the property rights of a free black mistress.

London Berry, a thirty-eight-year-old mulatto steward in St. Louis, owned real estate worth \$67,000, a sum larger than the wealth Ellison reported in the census but not above the actual value of his property. No free person of color outside Louisiana is known to have owned more slaves than Ellison in 1860. Since the Louisiana planters tended to be second- and third-generation free people, it is likely that Ellison was the richest Afro-American in the South who began life as a slave. (Emphasis added.)

See generally SCHWENINGER, *supra* note 29.

³¹³*Macarty et al. v. Mandeville*, 3 La. Ann. 239, 1848 WL 3762 (La. 1848).

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The matter of *Macarty v. Mandeville*³¹⁴ involved the scope of prohibitions on gifts (donations) of immovables and movables, whether inter vivos or causa mortis, between couples living in “open concubinage.”³¹⁵ In this case, the Louisiana Supreme Court was faced with interpreting the scope and applicability of the state’s statute on concubinage, that was clearly designed to prohibit or limit the amount of property a white male could transfer to his black female sexual partner.³¹⁶

Macarty was a white man who, from 1796 until his death in 1845, “lived in

³¹⁴*Id.*

³¹⁵The issue of what is “marital” property, even in “extra-marital” relationships, resembles one found in the contemporary property law case *In re Marriage of Graham*, 574 P.2d 75 (Sup. Ct. of Colorado, 1978), determining whether a spouse is required to share, as marital property, a master’s degree in business administration with a divorcing spouse.

³¹⁶*Macarty et al. v. Mandeville*, 3 La. Ann. 239, 1848 WL 3762, at *1 (La. 1848). (The Court noted, “This case arises under article 1468 of the Code (of 1808, book 3, title 2, art.10, p. 210) which provides that those who live together in open concubinage are respectively incapable of making to each other, whether *inter vivos* or *causa mortis* (sic) any donations of immovables, and if they make a donation of movables it cannot exceed one-tenth part of the whole value of their estate. Those who afterwards marry are excepted from this rule.” (Emphasis added.))

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concubinage” with Mandeville, “who is a person of color.”³¹⁷ Macarty’s white “collateral heirs” challenged Mandeville’s possession of \$111,200, in the Bank of Louisiana; \$11,000 that Macarty paid to a Lamothe; several other enslaved people; and lots and houses in the City of New Orleans, claiming that the property was a part of Macarty’s estate.³¹⁸

What is surprising about this case is the unconventional, relative wealth relationship between the parties. That is, the black woman, not the white man, was the wealthier of the two, and from her own business enterprises! The Court noted, “She is in possession of a fortune which, taking the estimate of her counsel, exceeds the sum of \$155,000.... She received, in 1799, a tract of land of three acres front and forty in depth on each side of the bayou of Terre aux Boeufs, and we think it is clear that her family gave her money.... There is no difficulty whatever in accounting for the capital requisite to commence her business of a retailer, which she afterwards followed.... She purchased from the importers, and retailed her goods by her slaves and persons who sold for her. She was intelligent, industrious and skilfull. (sic) Her business was extensive and lucrative, and her

³¹⁷*Id.*

³¹⁸*Id.*

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trade extended as far as Donaldsville and even to Attakapas.”³¹⁹

Apparently modifying its “blackness as white property” doctrine that the Court had previously used to dispose of postmortem bequests to *enslaved* black women, the Court took an “affirmative” approach to protect a *free* black woman’s property interests.³²⁰ The Court concluded, “At the same time that we are bound to give effect to our laws made in the interests of (white) families,³²¹ it would be an abuse to bring them in conflict with the *right of property*, under which the defendant claims the subject of the present suit. She bases her defence (sic) on that right, and we find no warrant in the law or in evidence for disturbing her in the enjoyment of the fruits of the (sic) labor and thrift of a long life.”³²² (Emphasis added.)

³¹⁹*Id.* at *1-2.

³²⁰*Id.* at *4. The Court specifically noted their decision in *Cole v. Lucas*, 2 La. Ann. 946, *supra* note 213, in which “we have, on a recent occasion, reversed the verdict of the jury, vindicated the rights of heirs and restored to them a large estate, which a party had attempted to deprive them of by an indirect donation to a concubine.”

³²¹*Macarty et al. v. Mandeville*, 3 La. Ann. 239, 1848 WL 3762, at *1 (La. 1848).

³²²*Id.* at *4.

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Read literally, the statute³²³ the Court cited would have applied a ten percent limitation on the movable gifts, and would have totally prohibited Macarty's gifts of immovables, to his concubine Mandeville.³²⁴ Instead, the Court narrowly read the "open and notorious" statute, and held that it provided for no other restrictions on the transfer of property, beyond the ten percent rule, stating, "The prohibition of donations of a particular character implies the right to make those not within the prohibition."³²⁵

The Court also noted that whatever Macarty contributed to the relationship was not covered by the statute.³²⁶ "It is contended, on behalf of the defendant, and we think with justice, that there was nothing in the relation of those parties that prevented the deceased from giving the defendant the benefit of his aptitude and judgment in the loaning of money and the discounting of notes.... The mortgage

³²³*See supra* note 147.

³²⁴*Macarty et al. v. Mandeville*, 3 La. Ann. 239, 1848 WL 3762, at *3 (La. 1848).

³²⁵*Id.*

³²⁶*Id.* at *3-4.

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transactions we think were of the same character.”³²⁷

This “pro-inheritance rights of a *free* black woman” case may have resulted from a number of factors. First, there was the literal reading of the statute in question. Second, there was the fact that the white man had been the primary beneficiary of the relationship.³²⁸ Third, the parties challenging the disposition of

³²⁷*Id.*

³²⁸*Id.* at *1:

It appears that she had, in all respects, rendered her condition as reputable and as useful as it could be made. Five children have been the fruits of her connexion (sic) with the deceased. They were all well educated. Two of her sons are in business in this city, and one is living on his income. The daughters were married and established in Cuba; one of them is since deceased, leaving two children.

See also, SCHWENINGER, *supra* note 29, at 117-18:

[D]ry goods broker Drausin McCarty, the son of Eulalie Macarty, was listed in Dun’s credit ledgers in 1848 as being worth \$30,000; twelve years later he had real estate valued at \$25,000 and personal possessions at \$10,000. Between 1850 and 1860, McCarty’s brother-in-law, merchant and exchange broker Bernard Soulie, doubled the estimated value of his real estate possessions, from \$50,000 to \$100,000. Soulie’s brother, Albin Soulie, a partner in the business was very prosperous. Together they were described in 1854 as ‘very wealthy, est. w[orth] from 250-300m.’ An R.G. Dun investigator exclaimed in 1857, they ‘are rich, w

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Macarty's estate were "collateral heirs," not descendants. Fourth, the relationship was in the eyes and words of Chief Justice Eustis, "the nearest approach to marriage which the law recognized, and in the days in which their union commenced the couple entered into serious moral obligations. The union received the blessings of her family, which was one of the most distinguished in Louisiana, and nothing appears to have occurred to forfeit or diminish their approbation and good will."³²⁹ And fifth, the black woman was a black mistress, a free, property-owning woman, not enslaved: in other words, a black woman with status and her own wealth.

3. *Sandoz v. Gary*³³⁰

\$500m.'

³²⁹*Macarty et al. v. Mandeville*, 3 La. Ann. 239, 1848 WL 3762, at *1 (La. 1848). See also, *Olivier, f.w.c. v. Blancq*, 2 La. Ann. 517 (La. 1848). Cf. *J. P. M. Dupre, Administrator v. F. Uzee, Widow*, 6 La. Ann. 280, 1851 WL 3797 (1851) (wherein the Louisiana Supreme Court found that Joseph Uzee, a white man, had lived in "open concubinage" with an enslaved black woman, Anna Sinnet, and violated the statute on concubinage, when (even though he later freed Anna) gave her title to a lot, a house, and her freedom, during his lifetime. The Court found that his estate belonged to his white widow and their white child).

³³⁰*David Sandoz, Administrator of the Succession of Jean Pierre Decuir v. Louis Gary*,

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The next two cases are earlier examples of those involving white men and free black mistresses. The first is the case of *Sandoz v. Gary*, decided in 1845.³³¹ In 1809, Jean Pierre Decuir emancipated “a mulatto girl named Josephine, who was his concubine, and who continued to live with him up to the time of his death.”³³² In 1818, Josephine purchased an enslaved black woman, Betsy, for \$1,100, and Decuir acted as her surety.³³³ In 1823, Decuir sold Betsy and her children for \$1,500, but the buyer defaulted, and Decuir purchased Betsy and her children at a sheriff’s sale.

In 1825, Decuir and Josephine moved to France, leaving Betsy and her children on Decuir’s plantation.³³⁴ Decuir sold his plantation to another owner, it was sold once again, and then finally to the defendant in this case, Louis Gary.³³⁵ In 1826, Dec

11 Rob. (La.) 529, 1845 WL 1662 (La. 1845).

³³¹*Id.*

³³²*Id.*

³³³*Id.*

³³⁴*Id.* at *2.

³³⁵*David Sandoz, Administrator of the Succession of Jean Pierre Decuir v. Louis Gary*,
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Louis Gary.³³⁷ The Court stated that the issue was “whether she (Josephine) has lost it (title to Betsy and her children) by any of the kinds of prescription (statute of limitations) known to our law.”³³⁸

Sandoz argued, *inter alia*, that Josephine’s purchase of Betsy and, therefore, her title to Betsy and her children was Decuir’s “disguised” donation to his concubine, Josephine. On that issue, the Court stated, “If it disguised a donation of this slave by Decuir to his concubine,... such donation was not prohibited by the law in force at the time it was made.”³³⁹ As to the effect that concubinage had on the issue, the Court stated:

The circumstances disclosed by the record, in relation to Josephine’s neglect of her rights, her silence when Decuir sold Betsy, the state of concubinage in which she lived with him, and her discontinuance of the suit brought in 1835, cannot, in our opinion, destroy or affect her

11 Rob. (La.) 529, 1845 WL 1662, at *2 (La. 1845).

³³⁶*Id.* at *1.

³³⁷*Id.* at *2.

³³⁸*Id.* at *2 (emphasis added).

³³⁹*Id.* at *3, citing Civil Code of 1808, p. 210, art. 10.

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title in a contest with the heir of said Decuir.³⁴⁰

Hence, the Court upheld Josephine's, and thereby Gary's, title to Betsy and her children.³⁴¹

4. *Valsain v. Cloutier*³⁴²

The second early free black mistress case was *Valsain v. Cloutier*.³⁴³ In that case, the right of a black concubine (and her children) to inherit from their white master went before the Louisiana Supreme Court.³⁴⁴

In July 1810, Joseph Dupe willed \$6,400 to his half brother Jean B.S. Cloutier. Dupe also willed "the remainder, consisting of lands, slaves, &c after paying for his debts... to some mulatto woman Adelaide, and his natural children

³⁴⁰*David Sandoz, Administrator of the Succession of Jean Pierre Decuir v. Louis Gary*, 11 Rob. (La.) 529, 1845 WL 1662, at *3 (La. 1845).

³⁴¹*Id.*

³⁴²*Valsain et al. v. Cloutier*, 3 La. 170, 1831 WL 717 (La. 1831).

³⁴³*Id.*

³⁴⁴*Id.*

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by her.”³⁴⁵ Dupre’s legal (white) heirs challenged the will.³⁴⁶ The Probate Court set aside the legacies to Adelaide and her children.³⁴⁷ On appeal, Dupre’s white heirs argued that Adelaide and her children should lose. They reasoned that Dupre and Adelaide could not have been legally married, and as their children were not properly acknowledged, they were incapable of inheriting. Further, Adelaide and her children were enslaved, which meant they were not lawfully able to inherit.³⁴⁸

Adelaide and her children countered that, *inter alia*, if they were, as enslaved people, incapable of inheriting, Dupre’s legacy to them belonged to their owner, Marie Louise.³⁴⁹ Marie Louise Mariotte was “the mother of Adelaide, and was a free woman of color before the death of Dupre the testator.”³⁵⁰ Adelaide further argued that she and her children were legally free, because her mother, Marie

³⁴⁵*Id.*

³⁴⁶*Id.*

³⁴⁷*Id.*

³⁴⁸*Valsain et al. v. Cloutier*, 3 La. 170, 1831 WL 717, at *1-2 (La. 1831).

³⁴⁹*Id.* at *2.

³⁵⁰*Id.*

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Louise, was free, and that her mother had provided that she would be free upon her mother's death.³⁵¹ Adelaide concluded "that as Marie Louise is dead, she be decreed to inherit her succession, and that the legacies and interest on them since 1815, be included."³⁵²

In addressing the issues of concubinage in this case, the Court decided the following: first, the Court found that Adelaide was a free woman.³⁵³ Her mother's act, dated December 28, 1797, manumitted Adelaide upon her mother's death in 1815.³⁵⁴ Second, the Court found, "that a legacy given to a slave, shall belong to the master of that slave in the same manner as if the gift was directly made to him."³⁵⁵ Third, the Court stated, "We think as the freedom of mother took place the instant the (children's) grandmother died, there was capacity to inherit."³⁵⁶

³⁵¹*Id.*

³⁵²*Id.*

³⁵³*Id.* at *4.

³⁵⁴*Valsain et al. v. Cloutier*, 3 La. 170, 1831 WL 717, at *2-3 (La. 1831).

³⁵⁵*Id.* at *5.

³⁵⁶*Id.*

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In concluding, the Court found in favor of Adelaide, in her own capacity, rejecting any claims she made, on her children's behalf.³⁵⁷ (The Court recognized that while Adelaide and Dupre lived in concubinage, it was not necessary to examine whether "natural" children (born out of wedlock) could be considered persons, interposed to convey a donation to their mother, a concubine, whom the law considered incapable of receiving.)³⁵⁸ Therefore, the Court allowed a free black mistress "to recover of the defendant the sum of six thousand, six hundred, and eighty-six dollars, with interest at the rate of five per cent. (sic) from the 28th April, 1830, until paid."³⁵⁹ In this case, free status or white lineage played a part in the law's allowing a free black mistress to inherit from her white male lover.

It appears from the case law involving free black mistresses, a black woman's status, enslaved or free, had some bearing on the Louisiana Supreme Court's decisions concerning the validity of white men's postmortem bequests to black women. If a white man chose a *free* black concubine, the Court was more likely to protect the property distributed to her, especially if, as in *Macarty*, the

³⁵⁷*Id.*

³⁵⁸*Id.* at *4.

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black mistress brought some wealth of her own to the table. If, on the other hand, the white man chose an *enslaved* black concubine, as in *Vail*, the Court rejected the property transfer arrangement. That is because the enslaved black woman's sexuality already belonged to her white master. Enslaved blacks were not merely their white master's property; enslaved blacks were "white property," indefeasible, and incapable of being released from white bondage, by will!³⁶⁰

Fortunately, antebellum legislatures and courts did not totally control black people's destiny. Otherwise, their real world would have perfectly reflected racially and sexually-oppressive laws, requiring that all blacks be enslaved and held incapable of owning or inheriting property. As noted earlier, enslavement had many loopholes, and early on and throughout the antebellum period, many blacks were free or freed. This next section discusses and analyzes the "black mistress," the free black woman, who was not enslaved, and who managed to acquire property. As we shall see, as evidenced by Eulalie Mandeville,³⁶¹ some black mistresses came into their own, acquiring land, businesses, plantations, and,

³⁵⁹*Id.* at *5.

³⁶⁰*See supra* note 51.

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following the unfortunate example of their white counterparts, even owned enslaved blacks.

V. THE BLACK MISTRESS: A PARADOX CHALLENGING BELL'S “INTEREST-CONVERGENCE” PRINCIPLE³⁶²

‘A WEALTHY NEGRO FAMILY.– An immense estate in Louisiana, embracing over four hundred acres of land, with two hundred and fifty negroes belonging to the plantation was recently sold for a quarter of a million dollars. The purchaser was a free negro, who is said to be one of the wealthiest men in the South.’

The above is from a New York paper, and refers to the Harrison property, which was purchased by Cypian (sic) Ricard, a free man of color of our parish.... It lies in the rear of Madame Ricaud’s (sic) plantation; and the two plantations, now owned by that family,

³⁶¹*See supra* note 313.

³⁶²*See supra* notes 27, 30, for the definition of “black mistress.”

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probably do comprise the number of acres of land and slaves as above stated, making them, doubtless, the richest black family in this or any other country.³⁶³

³⁶³As quoted in Calvin D. Wilson, *Negroes Who Owned Slaves*, POPULAR SCIENCE MONTHLY 488, at 492 (Nov. 1912) [hereinafter WILSON]. Pierre Cyprian Ricard was the son of Madame Cyprian Ricard, a black mistress. They both lived in Iberville Parish, Louisiana. The 1850 United States Population Census shows Madame Ricard and her son, owning 74 enslaved blacks and a 1,050 acre plantation. The 1860 United States Population Census shows the Ricards, owning 168 enslaved blacks and two plantations, with 1,300 total acres. Free black ownership of enslaved blacks was not limited to black women or to Louisiana, as free men and women owned enslaved blacks, and did so throughout the South. *See supra* note 29.

There is a view that all free blacks were all light-complexioned and “looked white.” *See supra* note 57. Many free blacks were dark-complexioned and did not have “white” or European facial features. *See WILSON, infra*, at 492, quoting the landscape architect Frederick Law Olmstead, who spent fourteen months roaming the South, preparing articles for *The New York Times*:

An intelligent man, whom I met in Washington, who had been travelling most of the time for two years, in the planting districts of Louisiana, having business with planters, told me of free negroes of the state in general, so far as had observed, were just equal in all respects to the white creoles. There are many opulent, intelligent and educated. The best houses and the most tasteful grounds that he had visited in the state belonged to a *nearly full-blooded negro—a very dark man*. He and his family are well educated, and though French is their habitual tongue they speak English with freedom, and one of them with more elegance than most

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A. SIGNIFICANCE OF THE BLACK MISTRESS

When it came to enslaved black women's property rights in the antebellum South, Bell's interest-convergence principle³⁶⁴ described how law was reflective of powerful white men's interests: that economic and sexual oppression required that enslaved black women have *no* property rights including rights to their labor, their sexuality, property, to receive gifts, or to inherit.³⁶⁵ The limited property rights that black women concubines enjoyed, enslaved or free, were also reflective of powerful white men's interests: that concubines be encouraged to be loyal, faithful,

liberally educated whites in the south. They had a private tutor in their family.
(Emphasis added.)

This account likely described the household of Joseph A. Metoyer, whose household listed Oscar Dubreuil as a tutor (United States 1850 Population Census Manuscript), and whose portrait (a copy is in the author's possession) shows a man with dark complexion, and "Negroid" features.

Compare KOLCHIN, *supra* note 11 ("Very large plantations were a rarity: a mere .01 percent of slave owners held estates of 200 or more slaves, and such estates contained only 2.4 percent of the slaves." This data makes Madame Ricard's holdings ever more remarkable!) *See generally* WOODSON, HEADS, *supra* note 112.

³⁶⁴*See supra* note 4.

³⁶⁵*See Cole v. Lucas*, 2 La. Ann. 946, 1847 WL 3490 (La. 1847), *supra* note 213.

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and true.³⁶⁶ What about the broad property rights that the law provided to the black mistress? Were they consistent with Bell's interest-convergence principle? To answer that question, we turn to an analysis of the black mistress's property rights. For white masters, the American "property-enslavement-sexual" Dream³⁶⁷ of cheap land and cheap labor worked to make many of them very wealthy.³⁶⁸ Along with wealth came power, and often a greater desire for control.³⁶⁹ When it came to a master's control over his enslaved blacks, there was a nexus between the private property ownership paradigm and the enslavement paradigm.³⁷⁰ The control nexus was made stronger by the white master's control over the sexuality of enslaved black women.³⁷¹

But there was an inherent contradiction in the property-enslavement-sexual

³⁶⁶See *Macarty v. Mandeville*, 3 La. Ann. 239, 1848 WL 3762 (La. 1848), *supra* note 313.

³⁶⁷See *supra* note 110.

³⁶⁸See *supra* notes 12, 76.

³⁶⁹See *supra* note 109.

³⁷⁰See *supra* notes 99-105.

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nexus. What if a master decided to exercise his property ownership rights, in a manner inconsistent with the enslavement paradigm?³⁷² In other words, what should the law do when a white master wanted to free his enslaved black woman, in exchange for, or with gratitude for, love, loyalty, or sexual favors?³⁷³

The paradox of the property-enslavement-sexual nexus, then, resulted mainly from a white master's desire to free or manumit his enslaved property. Overall, there were four sources that could have contributed to the existence of the free black population. The first and greatest source was the manumission, inter

³⁷¹See *supra* note 109.

³⁷²See DAVIS, *supra* note 9.

³⁷³See BERLIN, *supra* note 7, at 151-52:

Limiting emancipation to a few favorites also shifted the balance of the manumitted population toward women. Slave women not only made up a disproportionate number of the domestic workers, but they were more apt to win the sympathy and affection of their masters. Black men, on the other hand, were more of a threat to white rule and also brought higher prices in the slave markets of the South. If a master chose but one slave for emancipation, there were many more reasons to pick a woman than a man.

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vivos or causa mortis, of enslaved blacks.³⁷⁴ The second source was through children of a legitimate marriage between a black slave and a white person; this source was not legally possible, due to prohibition of interracial marriage.³⁷⁵ The third source was children of an enslaved black man and a white free woman, which was extremely rare.³⁷⁶ And the fourth source was the relocation of free blacks into

³⁷⁴White men most often freed enslaved black women, because they mothered their children and took care of their personal needs. *See supra* note 203. White men manumitted enslaved black men (who were not their children) for public service, successful military service, and heroics. *See* PHILLIPS, *supra* note 14, at 428. (“Pierre Chastang of Mobile who, in recognition of public service in the war of 1812 and the yellow fever epidemic of 1819 was bought and freed by popular subscription.”) *See generally* ROLAND C. MCCONNELL, *NEGRO TROOPS OF ANTEBELLUM LOUISIANA, A HISTORY OF FREE MEN OF COLOR* (1968) [hereinafter MCCONNELL]; Donald E. Everett, *Free Persons of Color in Colonial Louisiana*, in 7 *LA. HIST.* 21-50 (1966) (when Spain, then an ally with France, declared war against the British in the American Revolution, Governor Bernardo de Galvez had a force that included 169 free black men.) *See also*, RODOLPHE LUCIEN DESDUNES, *OUR PEOPLE AND OUR HISTORY* 3-9 (Sister Dorothea Olga McCants ed., trans., 1973) [hereinafter DESDUNES]. (At the Battle of New Orleans in 1815, Commander (soon President) Andrew Jackson praised the black troops, who successfully fought at his side against the British.)

³⁷⁵*See supra* note 140.

³⁷⁶*See* BERLIN, *supra* note 7, at 6:

In the colonial South... [m]ost mulattoes were children of white indentured

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the South from a free country (such as Haiti, after the Revolution³⁷⁷) or a free state (not a common occurrence).

From the primacy of the private property paradigm,³⁷⁸ a white master's desire to free an enslaved black person was a logical derivation, for if private property comes under the owner's sovereignty, then the owner is empowered to dispose of it as he or she pleases, including setting it free. From the primacy of the enslavement paradigm,³⁷⁹ a master's desire to free an enslaved black person was weighed against its impact on the entire enslavement system. Hence, the legal status of the black mistress presented antebellum society with a peculiar challenge. That challenge became more acute with the rise in the number of free blacks.

Another question that a study of the black mistress will answer is, why did

servant men and black women, and frequently, as William Gaston suggested, they were the offspring of black men and white servant women. Indeed, despite the antipathy toward such unions, masters often connived to push black men and white women into bed together because the law gave them the services of the children born of such interracial matches for thirty-one years, and it locked the white mother into additional terms of servitude. (Footnote omitted.)

³⁷⁷See BERLIN, *supra* note 7, at 114-18.

³⁷⁸See *supra* note 78.

³⁷⁹See *supra* note 88.

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antebellum Southern law close the doors to emancipation prior to the Civil War, and seek to drive out of the South blacks who were already free?³⁸⁰ Were these pre-Civil War actions necessary to defend the very rationale of enslavement, that is, black inferiority?³⁸¹ *Arguendo*, if blacks were really *not* inferior to whites, how could the enslavement political economy justify enslavement, other than for what it really was: social, economic, and sexual oppression, based on race. As the black mistress became a more significant feature of antebellum society, and as Southern, white society increasingly questioned the status of free blacks in general, these questions took on greater meaning.

Assuming that the white master's private property ownership right to free his enslaved black woman won out over the enslavement right (and sometimes it did), what property rights did the enslavement social order want a black mistress to have? Should they have the property rights of their enslaved black sisters? In other words, should they have no rights? Or should they have the rights of their

³⁸⁰See *L. E. Turner, Curator v. C. D. Smith et al*, 12 La. Ann. 417, 1857 WL 4878 (La. 1857), *supra* note 285.

³⁸¹See generally HIGGINBOTHAM & JACOBS, *supra* note 43 (analyzing the nexus between white concepts of black inferiority as a precept function to enslavement, blacks as property, and black powerlessness).

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white masters, full civil rights? Or should their property rights be somewhere between that of the enslaved and the fully free?

B. PRIVATE PROPERTY RIGHTS OF THE BLACK MISTRESS

As we have seen, in the antebellum South, black women were generally enslaved, and not legally allowed to acquire property, by purchase, not even by gift or inheritance.³⁸² Some black women were legally free, often by manumission.³⁸³ What property rights should Southern society provide the black mistress? Legally, should the black mistress be treated as a first class citizen as was her white counterpart? Or should she be treated as a non-citizen as were her enslaved sisters? Or should she be treated somewhere in between? Were the property rights that Southern society gave the black mistress reflective of Bell's interest-convergence principle? The answers to their questions will be discussed in the next section on the property rights of the black mistress.

The black mistress was the ultimate enigma to the American "property-

³⁸²*See supra* note 106.

³⁸³*See, e.g.,* SCHAFER, FREE, *supra* note 45.

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enslavement-sexual” Dream.³⁸⁴ As private property ownership was such an overarching paradigm in American law,³⁸⁵ what would prevent a black woman, once freed, from acquiring property? If a black woman became a free person, shouldn’t she enjoy *all* legal private property rights of a citizen, including the right to purchase and sell property, to transfer title to property, to gift and receive gifts inter vivos and causa mortis, inheritance and rights of succession, and all other aspects of private property ownership?³⁸⁶

As previously discussed, the common law, along with a cluster of privileges

³⁸⁴See *supra* note 111.

³⁸⁵See *supra* note 88.

³⁸⁶*But see* COBB, *supra* note 115, at 312-13:

Manumission once effected, removes forever the dominion of the master.... To incorporate a new citizen into the body politic, is only within the power of the State. The freed negro does not become a citizen by virtue of his manumission. It requires another the act of another party, the State, to clothe him with civil and political rights. Before such act he stands in the position of an alien friend, and in the absence of legislation he would be entitled to all such privileges as are allowed to such residents. (Footnotes omitted.)

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and rights, revolved around private land ownership.³⁸⁷ There are many indices of private property ownership, from which one might evaluate the black mistress's private property rights in the antebellum South.³⁸⁸ The following section focuses on eight indices of private property ownership rights by which to analyze the black mistress's legal status, in the antebellum South. These are 1) the right to earn wages; 2) the right to contract; 3) the right to acquire, by purchase; 4) the right to

³⁸⁷*See supra* note 79.

³⁸⁸*Id.* (“A.M. Honore likewise distinguished between the rights of exclusion and of use and enjoyment, listing the incidents of ownership as follows:

(1) the right to *exclusive possession*; (2) the right to personal *use and enjoyment*; (3) the right to manage use by others; (4) the right to the income from use by others; (5) the right to the capital value, including alienation, consumption, waste, or destruction; (6) the right to security (that is, immunity from expropriation); (7) the power of transmissibility by gift, devise, or descent; (8) the lack of any term on these gifts; (9) the duty to refrain from using the object in ways that harm others; and (10) the liability to execution for repayment of debts; and (11) residual rights on the reversion of lapsed ownership rights held by others.

Heller, *The Tragedy of the Anticommons: Property in Transition from Marx to Markets* (sic), 111 *Harv. L. R.* (sic) 621, 663 n.187 (1998), citing Honore, A.M. Honore, *Ownership*, in *Oxford Essays in Jurisprudence* (sic) 107, 112-128 (A.G. Guest ed. 1961) (emphasis added) (sic).”

To that list, one might add (12) the right to encumber, by mortgage, liens, and covenants; (13) the right to use as collateral; (14) the right of an insurable interest; (15) the right to shared

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acquire, by inter vivos gift; 5) the right to acquire, by will; 6) the right to acquire, by marriage; 7) the right of disposition, by sale, inter vivos gift, will, and inheritance (succession), and 8) the right to own enslaved blacks.

In addition to those property rights that the black mistress exercised, there was another property right that caused the black mistress particular concern. That was the black mistress's ownership of enslaved blacks. Because of the unique nature of and issues concerning the black mistress's ownership of enslaved blacks, there will be a separate discussion of that topic. But first, a caveat: the following discussion of the black woman's property right should not be misunderstood. Their property rights are presented in the best light, during the best of times.³⁸⁹ In

ownership; and (16) the right of bailment.

³⁸⁹See FINKELMAN, CASEBOOK, *supra* note 136, at 142-69 (presenting an antebellum case, in which the court expressed its views about free blacks in general. In *Bryan v. Walton*, 14 Georgia 185 (1853), involved the right of a free black, James Nunez, to will property to his son, Joseph Nunez. The case “underscores southern hostility to the existence of the free population.” Justice Lumpkin found that free blacks had no rights in the state of Georgia, except those that the state legislature expressly granted. The Court concluded that “under the Act of 1818, James Nunez, the father of Joseph Nunez, should not be divested of the title to the slaves which he thus held: but that the property should *remain with him*, during his lifetime, and at his death, *go to his descendants*. It is by virtue of this section of the Act... and not under the will of his ancestor, that Joseph Nunez held these slaves.” *Id.* at 146.) See generally WOODSON, HEADS, *supra* note 112, at xxi-xlv, “III. The Free Negro Before the Law” and “IV. Economic Achievement.”

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reality, there was constant and increasing legal and societal hostility to the black mistress throughout the antebellum period.³⁹⁰ For many reasons, it can be said that the following property rights are ones that the black mistress exercised, as a result of consistent success over legal and economic adversities.

1. The Right to Earn Wages.

Perhaps the greatest legal distinction between the black mistress and an enslaved black woman is that the black mistress had the right to the fruits of her

³⁹⁰See JACKSON, *supra* note 29, at 3 (“This hostility toward the free Negro in Virginia was expressed in law, in politics, in literature, and in actions by organized groups. The state legislature and the local units of government heaped up laws to restrain him, and candidates for office, governors, mayors, and other officials condemned him. Similarly, the proslavery writers vilified free Negroes, and the American Colonization Society made every effort to get them out of Virginia into Africa.”) *Id.* at 32 (“In this connection a sympathetic Northern writer of that day compared the hardships of the free Negroes of the country to those suffered by the Jews of medieval Europe.” (Footnote omitted.))

See also, BERLIN, *supra* note 7, at 381 (“‘The ex-slave was not a free man; he was only a free Negro.’ George Washington Cable, *The Negro Question* (1888).”); WOODSON, HEADS, *supra* note 112, at xxi (“The status of the free Negro did not materially change for the worst until the ‘twenties and ‘thirties of the nineteenth century when practically all of the Southern and Middle States and a few communities of the North began to restrict and, in some cases, to debase

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labor, unlike an enslaved woman, who was not allowed to benefit from her labor, as both she and her labor belonged to her master.³⁹¹ By comparison, the free mistress was allowed to earn wages.³⁹² Some chose to work independently of

the free Negro to a status next to that of a slave.”)

³⁹¹See BERLIN, *supra* note 7, at 233 (“Ultimately, the right to collect wages, accumulate property, and control their own family life distinguished them from slaves. Free Negroes, like whites, needed meaningful work not merely to support themselves and their families but to bolster their self-esteem. Its absence often drained free blacks of self-respect and robbed them of a sense of purpose.”)

Id. at 234-38:

The nature of the Southern work force and Southern attitudes towards blacks and work often allowed many free Negroes to turn their status and their color to their advantage in seeking employment.... In many places, free Negroes monopolized work as caterers, stable owners, bathhouse keepers, and tailors as well as lesser jobs as carters, butchers, coachmen, and delivery boys.... Many of the jobs deemed ‘nigger work’ were drudgery deserving that epithet, but others provided steady work and lucrative wages. Some were skilled trades that demanded craftsmanship of the highest order.... Indeed, skill was an essential element in many of the jobs deemed ‘nigger work’.... Skilled free Negro artisans and tradesmen clustered in these stigmatized occupations... barbering, carpentering, plastering, blacksmithing, bricklaying, and shoe-making.

Compare SHAW, *supra* 58 (on the status of enslaved blacks).

³⁹²See generally BERLIN, *supra* note 7.

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employers, owning their own businesses, and often employing others.³⁹³ Many

³⁹³See PHILLIPS, *supra* note 14, at 433 (Often the success of the black mistress was envied by whites, who thought wealth was too good for a black woman:

The keeper of one good tavern in the Louisiana village of Bayou Sara in 1831 was a colored woman of whom Anne Royall wrote: ‘This *nigger* or mulatto was rich, owned the tavern and several slaves, to whom she was a great tyrant. She owned other valuable property and a great deal of money, as report (sic) said; and doubtless it is true. She was very insolent, and, I think, drank. It seems one Tague [an Irishman], (sic) was smitten with her charms and her property, made love to her and it was returned, and they lived together as man and wife. She was the ugliest wench I ever saw, and, if possible, he was uglier, so they were well matched.’ (Footnote omitted.)

See also BERLIN, *supra* note 7, at 241-42:

[T]he increasing number of free Negro and slave hirelings, especially in the cities, provided a small but growing market for black entrepreneurs. In every Southern city, free Negroes ran boardinghouses for free Negroes and slaves whose owners allowed them to live on their own. African churches and schools supported black ministers and teachers, and a few Negro merchants profited from trade with Liberia and Haiti. But the most common black enterprise were small cookshops and groceries, which usually doubled as saloons and gambling houses where free Negroes, slaves, and occasionally whites gathered.

See also, SCHWENINGER, *supra* note 29, at 85-86:

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free mistresses successfully did so,³⁹⁴ in spite of laws prohibiting free blacks from competing in certain professions.³⁹⁵ Others chose to commercialize their physical beauty and have control over their sexuality, with the hope of attracting a wealthy white suitor, to enter into a placage arrangement.³⁹⁶

In most large cities, and in some small towns, free women of color were able to establish themselves in service enterprises. They managed eating houses, hairdressing shops, fruit and vegetable stands, confectioneries, bakeries, and grocery stores.... In Savannah, Susan Jackson ran a pastry shop in Reynolds Ward, the leading business section of the city, and eventually purchased her place of business, a brick building appraised at \$10,000. Her neighbor, free mulatto Ann Gibbons, the descendant of a West African Ibo chieftain, lived comfortably on the income from her various rental properties. (Footnotes omitted.)

³⁹⁴Such as Eulalie Mandeville, *supra* note 313, and Madame Ricard, *supra* note 363.

³⁹⁵See BERLIN, *supra* note 7, at 230 (“Proscriptive laws, pressure on white employers, and sporadic violence slowly drove free Negroes from many trades.... Free Negro mechanics had to pay high licensing fees to work in Charleston and Savannah, free Negro butchers were barred from the city market in Memphis, and free Negro masons in Georgia had to have their work approved by whites.”) See also, WOODSON, HEADS, *supra* note 112, at xxiii (“Most of the States had restrictions having a direct bearing on earning a subsistence.”)

³⁹⁶See RACE CONSCIOUSNESS: AFRICAN-AMERICAN STUDIES FOR THE NEW CENTURY at 67-92 (Judith Jackson Fossett and Jeffery A. Tucker eds., 1997), excerpt by Monique Guillory, entitled “Under One Roof: The Sins and Sanctity of the New Orleans Quadroon Balls,” (analyzing the commercialization and exploitation of creole women of color, in the New Orleans

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2. The Right to Contract.

The black mistress had the legal capacity to contract.³⁹⁷ This legal right facilitated a black mistress's right to acquire property.³⁹⁸ One notable Southern judge recognized that the right to contract was essential for a black mistress to acquire property.³⁹⁹

quadroon balls).

³⁹⁷See COBBS, *supra* note 115, at 313 (“They may make contracts.”) Compare, COBB, *supra* note 115, at 240 ([W]e may properly notice another disability of the slave, and that is, his inability to contract, or to be contracted with.”)

³⁹⁸See BENJAMIN QUARLES, *THE NEGRO IN THE MAKING OF AMERICA* 88 (1969) (concluding that as free blacks throughout the antebellum South were allowed to make contracts and to own property, “some things operated in their favor.”).

³⁹⁹See, e.g., CATTERALL, *supra* note 96, at Vol. I, at 392-93 (citing in 1856, Judge Buchanan's summary of free blacks' legal rights:

[I]n the eye of the Louisiana law, there is, (with the exception of political rights, of certain social privileges, and of the obligations of jury and militia service) all the difference between a free man of color and a slave, that there is between a white man and a slave. *The free man of color is capable of contracting.* He can acquire by inheritance and transmit property by will. He is a competent witness in all civil suits. If he commits an offence against the

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3. The Right to Acquire, by Purchase.

The black mistress had the legal right to acquire property by purchase, the most significant of which was land.⁴⁰⁰ Most black mistresses who owned land

laws, he is to be tried with the same formalities, and by the same tribunal, as the white man. (Emphasis added.)

See also, id., at vol. II, 334-35 and vol. III, 176, *as cited* in BERLIN, *supra* note 7, at 196 (A South Carolina judge saw nothing strange in the fact that many free blacks had “passed” for whites, and “now enjoy all the rights of citizens; as well as lands, and even seats in the legislature.”)

⁴⁰⁰*See* BERLIN, *supra* note 7, at 244:

Despite all whites could do, some free Negroes prospered. Their success was reflected in the growth of free Negro property holding.... In Nansemond County in tidewater Virginia, the number of free Negro farmers increased steadily between 1830 and 1860, although the free Negro population remained relatively constant.... The growth of a black landowning class in Nansemond County mirrored that of the state generally.... The growth of free Negro property holding followed a similar pattern throughout the South.

See also, WOODSON, HEADS, supra note 112, at xxxi:

On the whole, however, there was a striking difference between the status of the free Negro and that of the slave. The free Negro gradually lost ground during the

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owned small farms.⁴⁰¹ There were some, on the other hand, who owned large

reactionary period, but he did not become as helpless as the slave. The free Negroes still retained their right to acquire property and dispose of property and to do so could employ the general means effecting the transfer of property. The courts early upheld the right of the Negro to devise property to another. Laws to this effect were enacted as were also other measures to validate titles to real estate and other property with the exception of dogs and guns mentioned above. Russell points out that the inviolability of the property rights of the free Negro was an effective argument against the frequent proposals to remove the entire free Negro population from Virginia. It was considered a hardship to bring their property into market all at once to sacrifice by one precipitated sale. (citing Russell, *The Free Negro in Virginia*90).

Along with property ownership, came the burden of property taxes:

In fact, instead of being exempt from taxation, the free Negro was sometimes required to pay higher poll taxes than the white man.... There were some exceptions in this case, as it happened in Virginia in 1769, with the exemption of free Negroes, mulatto and Indian women and all wives other than slaves of free Negroes, mulattos and Indians.... The Negroes in Baltimore paid \$50 in school taxes in 1859, although their children could not attend the city schools.

(Footnotes omitted.)

Id. at xxxii.

⁴⁰¹See BERLIN, *supra* note 7, at 244. See also, JOHNSON, *supra* note 140, at 58 (“[O]ne free person of color in ten was a farmer who owned any real estate.”)

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plantations and built large plantation homes.⁴⁰² The incredible history of the black woman's property transactions is told in the conveyance records throughout the South.⁴⁰³

4. The Right to Acquire, by Inter Vivos Gift.

The black mistress had the legal right to acquire property by inter vivos gift,

⁴⁰²See references to Madame Ricard contained in note 363, and see PHILLIPS, *supra* note 14, at 434 (“In Louisiana colored planters on a considerable scale became fairly numerous. Among them... Marie Metoyer of Natchitoches Parish had fifty-eight slaves and more than two thousand acres of land when she died in 1840.”) See also, KOLCHIN, *supra* note 11, at 83 (“In Louisiana’s Natchitoches Parish a colony of free Creoles, descended from an eighteenth-century French settler and an African slave, grew and flourished until by 1860 it contained 411 persons who owned 276 slaves....”) See also WOODSON, HEADS, *supra* note 112, at xxxiv-xxxv (“Using what limited opportunities they had, moreover, some of the free Negroes accomplished what might be considered exceptional. Many of them owned slaves who cultivated their large estates.... Marie Metoyer, of Natchitoches Parish, possessed fifty slaves and an estate of more than 2,000 acres.”)

⁴⁰³See, e.g., CARL A. BRASSEAU ET AL., CREOLES OF COLOR IN THE BAYOU COUNTRY 134-35 (1994) [hereinafter BRASSEAU] (documenting the black mistresses’ property transactions, in the Conveyance Books, Clerk of Court’s Office, St. Landry Parish Courthouse, such as “Auzenne, Carlostin, estate of, to Laurette Guidry, F.W.C. (free woman of color), wife of Theodore Chenier, F.M.C., Public Auction, Book U-1, p. 237. On November 14, Laurette Guidry entered the high bid of \$1,200 for half lot #55 in town of Washington, Louisiana.”)

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although, as discussed, such gifts resulting from interracial concubinage relationships were problematic.⁴⁰⁴

5. The Right to Acquire, by Will.

Gifts by will to the black mistress lacked many legal obstacles faced in gifts to enslaved black women.⁴⁰⁵ The black mistress had the legal right to inherit

⁴⁰⁴See, e.g., *Macarty et al. v. Mandeville*, 3 La. Ann. 239, 1848 WL 3762 (La. 1848), *supra* note 313.

⁴⁰⁵See MORRIS, *supra* note 51, at 373-74:

In 1830, in *Lenoir v. Sylvester*, O’Neill wrote: ‘...a legacy cannot be given to a slave, for he can have no right, whatever, which does not, the instant it is transferred to him, pass to his master (sic). In other words, he is in law himself chattels personal; and it would be absurd to say, that property can own property....’ In North Carolina, Ruffin, in *White v. Green* (1840), ruled that ‘Slaves have not (sic) capacity to take by will, and a legacy to them is, like the direction for their emancipation, void.’ Judge Alexander M. Clayton of Mississippi, in *Wade v. American Colonization Society* (1846), adopted a different position. The ‘right to freedom is inchoate, and becomes complete when the subjects of it are removed. The bequest to the slaves is not void for want of capacity in the legatees to take.’ (Footnotes omitted.)

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property by will, but again, when her father was white, she faced some legal obstacles.⁴⁰⁶

6. The Right to Acquire, by Marriage.

As we have discussed, marriage is a major source of wealth transference, that was unavailable to the black mistress in miscegenational relationships with white men.⁴⁰⁷ The black mistress was legally prohibited from marrying an enslaved black, as enslaved blacks were legally unable to marry even other enslaved blacks.⁴⁰⁸ That left the black mistress only one legitimate marital option:

⁴⁰⁶See *John Compton et al. Heirs of Leonard B. Compton v. Aaron Prescott and Another, Executors of Said Leonard B. Compton et al.*, 12 Rob (La.) 56, 1845 WL 1677 (La. 1845), *supra* note 260.

⁴⁰⁷See *supra* note 140.

⁴⁰⁸See MORRIS, *supra* note 51, at 29 (“...a North Carolina law of the 1830s. Free blacks who married or lived as husband or wife with a slave would be punished. (fn. 64, *Revised Statutes... North Carolina*, 1:590.) Insofar as the law included a marriage between a slave and a free black, it was an absurdity. Slaves lacked the necessary ‘will’ to enter into a marriage contract, and slave jurisdictions universally refused to recognize any slave marriage.”) (Footnotes omitted.)

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to marry a free black man, but many chose not to marry at all.⁴⁰⁹

See also, COBB, *supra* note 115, at 242-43 (“The inability of the slave to contract extends to the marriage contract, and hence there is no recognized marriage relation in law between slaves.” (Footnote omitted.)) *Compare* SCHWENINGER, *supra* note 29, at 84-85:

Some black women chose to live with a partner without formalizing marital vows. This could have the ironic effect of a woman losing all she had sought to preserve by not marrying. In 1827, Nancy Munford, a Virginia slave, was purchased by her husband and emancipated, but the couple never legalized their union. In subsequent years, they built up a substantial estate, but in 1845, Nancy’s husband, Thomas Walden, a carpenter, was murdered. To her surprise, Nancy discovered that she was not entitled to any of their jointly acquired property—a house, three lots, and 150 acres of farmland—all listed in her husband’s name. Although she eventually petitioned the state legislature and was awarded the property others were not so fortunate.” (Footnotes omitted.)

⁴⁰⁹*See* COBB, *supra* note 115, at 313 (“Free persons of color, unless restricted by statute, may contract with those of their own condition, or any free person capable of contracting.”) As nearly all antebellum Southern states prohibited interracial, black-white marriage, a black mistress could legally marry another free black, and perhaps other free persons of color, such as native Americans. *See, e.g.*, JOHNSON, *supra* note 140, at 209 (“About four out of ten free Negro women in Charleston in 1860 could not expect to find husbands among the city’s free Negro men. A good many of them had to choose between remaining unmarried and accepting a slave husband.”) *Compare* SCHWENINGER, *supra* note 29, at 128:

Among wealthy creoles of color in Louisiana, endogamous marriages were almost universal. Antoine Decuir and Antoine Dubuclet, the richest blacks in Point Coupee Parish, signed formal contracts concerning their children. In the case of

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7. The Right of Disposition, by Sale, Inter Vivos Gift, Will, or Inheritance.

The black mistress could transfer ownership of property by sale.⁴¹⁰ She engaged in extensive property transactions, as evidenced in the parish courthouse records, throughout the South.⁴¹¹ In addition, the black mistress could apparently dispose of property by inter vivos gift, by will, and by inheritance, through the

Decuir's son, Antoine, Jr., and Dubuclet's daughter, Josephine, they drew up a four-page document (in French) specifying the date of the wedding, the size of the dowry, and arrangements for the distribution of property. Decuir contracted for his second son, Augustin, to marry the granddaughter of Iberville Parish planter Cyprien Ricard, at the time the wealthiest free person of color in Louisiana.

⁴¹⁰*See, e.g.,* Luther P. Jackson, *The Virginia Free Negro Planter and Property Owner*, 24 J. NEGRO HIST. 390, 392 (1939) ("Having employment, many free Negroes turned their earnings to good account and bought property. The right to own and transfer property was one right which an otherwise hostile society never took away from this minority group.") He supports this observation with the fact that in Virginia, there was a one hundred percent increase in free black land ownership between 1830 and 1860, even though the Virginia free black population only increased twenty percent in that time period.) *But see* WOODSON, HEADS, *supra* 112, at xxxiv-xxxv ("In 1805 Maryland prohibited Negroes from selling corn, wheat or tobacco.... North Carolina... [i]n 1826, there followed an act which restricted the right of free Negroes to trade in certain articles and to peddle beyond their county without a license." (Footnotes omitted.))

⁴¹¹*See, e.g.,* BRASSEAU, *supra* 403.

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laws of succession.⁴¹² At least one Southern state expressly forbade the black mistress from the right to pass their wealth onto the next generation.⁴¹³ Some were able to will sizable estates to their black heirs.⁴¹⁴ The black mistress faced the same problem that white men faced when trying to will property to enslaved black loved ones, that is, the law often refused such efforts at wealth transference.⁴¹⁵

⁴¹²See COBB, *supra* note 115, at 313-14, n.1 (“They may... dispose of their estates by will. In the absence of a will, administration will be granted on their estates, unless otherwise directed by statute, they will be subject to the ordinary and general law of distribution.” “In Georgia, their estates go to their ‘descendants,’ which has been held not to include collaterals.” (Cases omitted.)) Some wealthy black mistresses made substantial charitable donations to their community. One such wealthy black mistress was a philanthropist who founded New Orleans’s Couvent School, in 1847. SCHWENINGER, *supra* note 29, at 129. See also DESDUNES, *supra* note 374, especially the chapter on free women of color.

⁴¹³Compare JULIA SMITH, *SLAVERY AND PLANTATION GROWTH IN ANTEBELLUM FLORIDA* 112-13 (1973) (noting that in Florida free blacks were *not* allowed to will their property to their heirs).

⁴¹⁴See *supra* note 403.

⁴¹⁵See PHILLIPS, *supra* note 14, at 435:

[S]uch petition was that presented in 1832 by Marie Louise Bitaud, free woman of color, which recited that in the preceding year she had bought her daughter and grandchild at a cost of \$700; that a lawyer had now told her that in view of her

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8. The Right to Own Enslaved Blacks

Another issue the law faced was, if the black mistress could acquire property, should she have the right to acquire and own enslaved blacks?⁴¹⁶ The

lack of free relatives to inherit her property, in the case of death intestate her slaves would revert to the state; that she had become alarmed at this prospect; and she accordingly begged permission to manumit them without having to leave Louisiana. The magistrates gave her their consent on the condition that the petitioner furnish a bond of \$500 to insure support and education of the grandson until his coming of age. This was duly done and the formalities completed. (Footnote omitted.)

See also BERLIN, *supra* note 7, at 156:

Many more blacks depended on their friends and relatives to extricate them from bondage. Hundreds of free Negroes used their small savings to purchase and free loved ones, especially their immediate families. In New Orleans, better than a third of the petitions for manumission between 1827 and 1851 came from Negro freemen. Sometimes relatives in the free states helped to buy enslaved brethren out of bondage.... Wealthy free Negroes occasionally used their privileged position to aid bondsmen.... At times, the black community pitched in to help one of their number. (Footnotes omitted.)

⁴¹⁶ *See* MORRIS, *supra* note 51, at 30 (“A touchier issue concerned the right of free blacks

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answer, in most states, was yes, and some states expressly confirmed the black mistress's right to own enslaved blacks.⁴¹⁷ In some other states, the answer was no, a black mistress's property rights were expressly limited to prohibit ownership

to own slaves. In some jurisdictions the right was affirmed, and in others it was denied.”)

⁴¹⁷*Id.* at 30 (“In cases in the Carolinas in 1833, for instance, the right of free blacks to own slaves was upheld. In *State v. Edmund*, (a slave), Judge Thomas Ruffin observed that in North Carolina ‘a free man of colour may own... lands and personal property, including slaves.’... In *Cline v. Caldwell* (1833), Judge O’Neill noted that as ‘free persons’ they could own slaves without restrictions.” (Footnotes omitted.))

See also, WOODSON, HEADS, *supra* note 112, at xxxii:

This right to own property extended even to that of owning white indentured servants and slaves. Early in the history of the colonies, as in the case of Virginia, in 1670, Negroes and Indians were prohibited from owning white indentured servants, but were still permitted to acquire property in persons of their own color... free Negroes, for benevolent reasons, often purchased members of their family that they might thereafter be manumitted for a nominal sum. An effort was made to prohibit this by restricting manumission, but free Negroes thereafter continued to purchase their wives, or husbands, or children and to hold them in slavery since they could not manumit them if they were to remain with them. A man, therefore, often purchased his wife, or the wife her husband, or the parents their children. This led to unusual complications upon the death of the free owner if he died intestate. If there were no relatives legally qualified to receive the inheritance, such property escheated to the State, inasmuch as slaves were not considered as persons before the law. (Footnotes omitted.)

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of enslaved blacks.⁴¹⁸ Allowing the black mistress to own enslaved blacks would

⁴¹⁸ See TUSHNET, *supra* note 16, at 149-52:

The issue of a free black's right to own slaves arose in a representative form in Georgia. (Fn. 96, *Bryan v. Walton*, 14 Ga. 185 (1853)).... Then he addressed to 'main point,' the ability of free blacks to own slaves. Judge Lumpkin stated his 'strong inclination... to give [his] (sic) sentiments pretty fully upon this subject,' and he did, in a virulently racist opinion. First, he presented his conclusion, that free blacks were 'in a state of perpetual pupilage or wardship' and had only those rights expressly granted by the legislature.... To the extent that he supplied reasons for the result, they were found in the manumission, being the private act of the master, could convey no public rights on the free black. Nor had the legislature acted to eliminate the 'unconquerable prejudice, if it can be so called, of race'; rather the free black was 'associated still with the slave in this State, in some of the most humiliating incidents of his degradation....' 'In no part of this country, whether North or South, East or West, does the free negro stand erect and on a platform of equality with the white man. He does, and must necessarily feel this degradation.... Civil freedom among whites, he can never enjoy.... [T]he Courts of this country should never lean to that construction, which puts the thriftless African upon a footing or civil or political equality with a white population which are characterized by a degree of energy and skill, unknown to any other people or period.' (Footnotes omitted).

See also MORRIS, *supra* note 51, at 30 ("By a statute of 1818 Georgia prohibited such ownership.... How far this prohibition extended was debated in *Bryan v. Walton* (1856). Judge Lumpkin... (clarifying that the restriction did not apply to all blacks), 'that if a person has any negro blood, he is disabled from conveying slaves... we should say that to put him under such a

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challenge the very basis of enslavement, black inferiority.⁴¹⁹ Equally important, the black mistress, who owned land and enslaved blacks, challenged the white male-dominated hierarchy.⁴²⁰ Another court supported the black mistress's right to

disability, he must have one-eighth of African blood in his veins.” (Emphasis added; footnotes omitted.) See FINKELMAN, CASEBOOK, *supra* note 136, at 389.

Compare WOODSON, HEADS, *supra* note 112, at xxviii (“Virginia... provided that no free Negro or mulatto should be capable of purchasing or otherwise acquiring permanent ownership, except by descent to any slaves, other than his or her husband or wife and their children.”)

⁴¹⁹See MORRIS, *supra* note 51, at 31:

One Arkansas judge in *Ewell v. Tidwell* (1859) provided the following logic for not allowing free blacks to own enslaved blacks: “The ownership of slaves by free negroes is opposed to the principles upon which slavery exists among us... its foundation is an inferiority of race.... The bondage of one negro to another has not this solid foundation to rest upon. The free negro finds in the slave his brother in blood, in color, feelings, education and principle... civilly and morally disqualified to extend protection, and exercise dominion over the slave.” (Footnotes omitted.)

⁴²⁰See TUSHNET, *supra* note 16, at 149:

Racism and its associated notions of hierarchy overcame the impulse to draw lines based solely on status when courts in Georgia, Mississippi, and Arkansas held, during the 1850s, that free blacks, although entitled to own certain forms of property, could not own slaves, even in the absence of a statutory bar such as existed in other states. The opinions contain as feverish a rhetoric as can be found

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own land,⁴²¹ but drew the line there, holding that the free black mistress could not

in any area of the law, which plainly resulted from the sensitivity of the issue at a time of heightened sectional conflict. The Mississippi Supreme Court's opinion, indeed, consisted in large measure of quotations from Chief Justice Taney's opinion in the *Dred Scott* case, followed by a peculiarly inappropriate essay on the status of aliens in international law. (fn. 95, *Heirn v. Bridault*, 37 Miss. 209 (1859).

⁴²¹*Id.* at 152-53:

A property dispute similar to that in *Bryan v. Walton* arose a few years later in Arkansas. (fn. 97, *Ewell v. Tidwell*) The facts, drawn from a more complex situation, that are relevant to this discussion are that Jonathon Koen bequeathed land and a slave named Charles to a free black. The Arkansas Supreme Court rejected the proposition, drawn from *Bryan v. Walton*, that manumission conferred no rights to contract or hold land.

'The negro, though morally and mentally inferior to the white man, is, nevertheless, an intellectual being, without feelings, necessities and habits common to humanity. By the act of emancipation... no one is interested in the protection of the negro. If, under such circumstances, he could not make and enforce contracts, it is difficult to understand how he could, with any certainty, supply his commonest necessities. Such a condition would be inconsistent with civilization. And, besides this, the negro, having no power to acquire property, or certain means of gathering the fruits of his labor, every incentive to industry would be at once destroyed; and, sinking into idleness and deprivation, he would become an

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own enslaved blacks.⁴²² Another court had the opportunity to discuss the subject

intolerable nuisance.’

⁴²²*Id.* at 153-54:

But the situation was different when a free black sought to own, not land, but a slave.

‘Without attempting to discuss slavery in the abstract, it may be said that it has its foundation in an *inferiority of race*. (sic) There is a striking difference between the *black* and *white* man, in intellect, feelings and principles. In the order of providence, the former was made inferior to the latter; and hence the bondage of the one to the other. For government and protection, the one race is dependent on the other. It is upon this principle alone, that slavery can be maintained as an institution. The bondage of one negro to another has not (sic) this solid foundation to rest upon. The free negro finds in the slave his brother in blood, in color, feelings, education and principle. He has but few civil rights, nor can have, consistent with the good order of society; and is almost dependent on the white race as the slave himself. He is, therefore, civilly and morally disqualified to extend protection, and exercise dominion over the slave.’

In 1846, the same court had summarized the general view in upholding the state’s requirement that free blacks post a \$500 bond against becoming a public charge or injuring any person. (fn. 98, *Pendleton v. State*, 6 Ark. 509 (1846).)

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of the black mistress owning enslaved blacks, in a case in which a black mistress owned her own child.⁴²³ Some whites recognized the importance of having free

The statute did not violate the privileges and immunities of citizens, because free blacks could not be citizens: ‘The two races, differing as they do in complexion, habits, conformation and intellectual endowments, could not nor ever will live together upon terms of social or political equality. A higher than human power so ordained it, and a greater than human agency must change the decree.’

⁴²³*Id.* at 155-56:

This discussion can be summarized by examining a Delaware decision in which the impossibility of using race as the categorizing device is evident to the observer as it was concealed from the judges. *Tindal v. Hudson* was a suit for freedom by Isaac Tindal. (fn. 99, 2 Del. (2 Harr.) 441 (1838)) His father, a free black, had been ‘legally married’ to a slave. When Isaac was born, his father held him as a slave and in his will bequeathed him to serve until he reached twenty-five. The suit for freedom from one who bought Isaac from the estate was said to pose two ‘novel and interesting’ questions: can a free black own slaves, and ‘whether a father can hold his own children in slavery.’ The court’s opinion dealt with the questions separately. On the first, it argued that slavery as it existed involved black slaves and white owners and that it would ‘not institute a new species of slavery.’ Further, free blacks were ‘almost as helpless and dependent’ on whites as slaves; their limited civil capacity made it impossible for them to provide the ‘support and protection’ that slaveowners had to give in a system of ‘mutual and reciprocal obligations and duties.’ On the second question, the court said that ‘humanity revolts at the idea of a parent selling his own children into slavery’; ‘the natural rights and obligations of a father are paramount to the

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blacks as allies in the enslavement enterprise.⁴²⁴ Despite white society's and the law's views on the subject, there is clear evidence that the black mistresses owned enslaved blacks.⁴²⁵

acquired rights of the master.' But of course fathers owned their children throughout the South. Although lawyers's distinctions might be drawn between children born of legal marriages and 'illegitimate' children, the Delaware court could say what it did on the second question only by ignoring the reality of race on which its answer to the first question rested.

See also, Valsain et al. v. Cloutier, 3 La. 170, 1831 WL 717 (La. 1831), *supra* note 342 (another case in which a black mistress owned her daughter as an enslaved black).

⁴²⁴*See* JOHNSON, *supra* note 140, at 169 ("The free Negro's 'right to hold slaves gives him a stake in the institution of slavery, and makes it his interest as well as his duty to uphold it. It identifies his interests and his feelings, in this particular, with those of the white population...'"")

⁴²⁵ For empirical evidence that the southern black mistress did, in fact, own enslaved blacks, *see* SCHWENINGER, WOODSON, *supra* note 29. *See also* PHILLIPS, *supra* note 14, at 433-36 ("...a negro planter in St. Paul's Parish, South Carolina, was reported before the close of the eighteenth century to have two hundred slaves as well as a white wife and son-in-law, and the returns of the first federal census appear to corroborate it.... In Louisiana colored planters on a considerable scale became fairly common.... In rural Virginia and Maryland also there were free colored slaveholders in considerable numbers. Slaveholding by colored townsmen were likewise fairly frequent. Among the 360 colored taxpayers in Charleston in 1860, for example, 130, including nine persons described as of Indian descent, were listed as possessing 390 slaves.")

See also JACKSON, *supra* note 29, at 217 ("Frankey Miles was one of the largest

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Some black mistresses owned *no* enslaved blacks, while some owned family members who were still enslaved.⁴²⁶ On the other hand, as this study will show, there were a few black mistresses, who like their white “aristocratic,” wealthy

slaveholders among the free Negroes in Virginia during the entire period under review. In 1860 this woman, as previously noted, owned a plantation of 1,100 acres; and doubtless she had need for the nineteen slaves she owned.” (Footnote omitted.); RUSSELL, *supra* note 14, at 77, 90-95 n.34 (citing, *inter alia*, Lower Norfolk County Antiquary, vol. iv, pp. 174-82, “for negro slave-owners enumerated in a list, prepared by the commissioners of the revenue,... of Princess Anne County in 1840.”); FRANKLIN, *supra* note 29 at 159 (“At no time during the ante-bellum period were Negroes in North Carolina without some slaves.”); JAMES M. WRIGHT, *THE FREE NEGRO IN MARYLAND, 1634-1860* (1921) [hereinafter WRIGHT]; Horace E. Fitchett, *The Origins and Growth of the Free Negro Population in Charleston, South Carolina*, 25 J. NEGRO HIST. 430 (1941); LARRY KOGER, *BLACK SLAVEOWNERS: FREE BLACK SLAVE MASTERS IN SOUTH CAROLINA, 1790-1860* (1985); MARINA WIKRAMANAYAKE, *A WORLD IN SHADOW: THE FREE BLACK IN ANTEBELLUM SOUTH CAROLINA* (1973); and LITITIA WOODS BROWN, *FREE NEGROES IN THE DISTRICT OF COLUMBIA, 1740-1846* (1972). *See generally* BERLIN, *supra* note 7, at xvii-xx (providing a list of published and unpublished doctoral theses on free blacks in virtually every enslavement state).

⁴²⁶*See* FRANKLIN, *supra* note 29, at 160. (Not all black mistresses, of course, owned slaves. Most of them, like the majority of antebellum southern whites, were poor, and owned no property of any kind. The majority of black mistresses, who did own enslaved blacks, owned only a few, leading to the observation “that by far the larger portion of free Negro owners of slaves were the possessors of this human chattel for benevolent reasons. There are numerous examples of free Negroes having purchased relatives or friends to ease their lot. Many of them manumitted such slaves, while others held title to slaves who were virtually free.” (Footnote

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counterparts, were in the “planter” class.⁴²⁷

C. ORIGIN, EXISTENCE, AND GROWTH OF THE BLACK MISTRESS CLASS⁴²⁸

omitted.))

⁴²⁷ For these black mistresses, there were the greatest status differences with the enslaved population. Black mistresses were also the greatest challenge to enslavement’s white supremacy premise. *See supra* note 30.

⁴²⁸ *See generally* BERLIN, *supra* note 7 (presenting a definitive study of the origins, demographics, and development of the free black class in the antebellum South). *See also* WOODSON, HEADS, *supra* note 112, at vi. (“The period in which it was possible for Negroes to come as servants and later acquire freedom terminated near the end of the seventeenth century. The free Negro population thereafter found recruits only from children born of free Negro parents, mulatto children born of free Negro mothers, mulatto children born of white servants or free white women, children of free Negro and Indian mixed parentage, and manumitted slaves.”) *See also* SCHWENINGER, *supra* note 29, at 100:

Whatever the specific circumstances, and despite the different traditions in various sections of the Lower South, prior to 1840, most free people of color who reached the upper economic levels were of mixed ancestry and had received assistance from whites. Often they were children of white planters or merchants. In South Carolina, the father of a free mulatto owner Robert Collins was a white landowner in St. Thomas Parish; the father of farmer Henry Glencamp was a white planter in St. Stephens Parish; Charleston hotel owner Jehu Jones, described

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Why did some white men in the antebellum South choose black women as sexual partners? Perhaps it was merely rape and exploitation in an enslavement system that was sheerly barbaric.⁴²⁹ Perhaps it was exotic, some strange attraction

as ‘almost white,’ tinner William Penceel, and barber Thomas Inglis claimed white ancestry; the father of Sumter County cotton gin maker William Ellison was probably Fairfield District planter and slave owner Robert Ellison. Charleston slaveholder Margaret Noisette and other members of the Noisette family were children and grandchildren of French-born Philip Stanislas Noisette and his Haitian-born slave wife. In Georgia, fisherman and farmer Anthony Odingsells, one of the largest Negro property holders, received his land and nine slaves from Charles Odingsells, an officer in the American Revolution, a state legislator, and the owner of three plantations. The most prominent ‘colored creole family’ in Florida, the Ponis family, who engaged in various business activities, claimed descent from two Spanish officers. In Alabama, the two largest Negro slaveholders, cattle ranchers Zeno and Basile Chastang, were the children of Dr. John Chastang, a prominent Mobile surgeon who had served as a medical consultant at the Spanish fort of San Esteban de Tombeche. In Mississippi, the plantation and slaveowning Baran brothers— Andrew, David, and John— and probably the Natchez barber William Johnson, the wealthiest Negroes in the state, were children of white slave owners and slave women. (Footnotes omitted.)

⁴²⁹*See supra* note 136. *See also* WOODSON, *HEADS*, *supra* note 112, at xiv (“The masters of the female slaves, however, were not always the only persons of loose morals. Many women of color were also prostituted to the purposes of young white men, and overseers. Goodell reports a well-authenticated account of a respectable ‘Christian lady’ at the South, who kept a

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to another race. Perhaps it was sheer physical attraction.⁴³⁰ Perhaps it resulted from the seductive actions of black women. Or perhaps, it was romantic, the result of true love.⁴³¹ Whatever the reason, it appears that there was a lot of sexual activity between white men and black women, and that miscegenation between white men and black women was a reality.⁴³²

An analysis of key demographics explains why white men often chose black

handsome mulatto female for the use of her genteel son, as a method of deterring him, as she said, ‘from indiscriminate and vulgar indulgences.’” (Footnotes omitted.))

⁴³⁰For example, many white travelers in Louisiana remarked at the beauty of the black women they saw. See THOMAS ASHE, TRAVELS IN AMERICA 315-16 (1809) (“... still there is an assembly held every Sunday evening at the Bayou, about two miles out of town, where the beauty of the country concentrates, without regard to birth, wealth, or colour.”); F. TROLLOPE, DOMESTIC MANNERS OF THE AMERICANS 33 (1832) (“... the gentle Quadroon has the sweet but dangerous vengeance of possessing that of attraction. The union formed with this unfortunate race are said to be often lasting and happy, as far as any unions can be....”); and SAXE-WEIMER EISENACH, TRAVEL THROUGH NORTH AMERICA DURING THE YEARS 1825 AND 1826, vol.2, 62 (1828) (“The quadroons both assume the names of their friends, and, as I was assured preserve this engagement with as much fidelity as ladies espoused at the altar. Several of these girls have inherited property from their fathers or friends, and possess handsome features.”)

⁴³¹See *Macarty et al. v. Mandeville*, 3 La. Ann. 239, 1848 WL 3762 (La. 1848), *supra* note 113.

⁴³²See, e.g., BLASSINGAME, BLACK, *supra* note 27 (presenting, *inter alia*, a statistical

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women as sexual partners in the antebellum South.⁴³³ First, white men outnumbered white women in the antebellum South, and most enslaved blacks lived on small farms, with resident white masters.⁴³⁴ Second, free black women outnumbered free black men, making for an imbalance in the free black community.⁴³⁵ Third, many free blacks were descendants of white men and black women, and therefore, were more closely connected to whites.⁴³⁶

analysis on interracial relationships in Reconstruction New Orleans).

⁴³³See generally BERLIN, *supra* note 7.

⁴³⁴See KOLCHIN, *supra* note 11, at 101 (“Regional variations qualify but do not negate the generalization that most Southern slaves lived on holdings of modest size... in the South as a whole, the medium figure was 23. In rough terms, about one-quarter of Southern slaves lived on very small holdings of 1 to 9, one half lived on middle-range holdings of 10 to 49, and one-quarter lived on large estates of 50 or more.” (Tables omitted.))

⁴³⁵See BERLIN, *supra* note 7, at 177 (“In contrast to the white and slave populations, there were many more free Negro women than men in the South.”)

⁴³⁶See BERLIN, *supra* note 7, at 178 (“In 1860 fully 40 percent of the Southern free Negro population were classified as mulattoes... throughout the South a light skin was the freeman’s distinguishing characteristic.”) Berlin noted that the census takers were not given any criterion for distinguishing “black” from “mulatto,” so as noted we must view census figures on color with “usual skepticism.” *Id.* at 178-79 n.62.

See also SCHWENINGER, *supra* note 29, at 101:

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A federal census-driven study of the free mistress in rural Louisiana shows both the triumph of the unique group, their relationship to white masters, and their contribution to the antebellum Southern political economy.⁴³⁷ In 1850, in “rural”

Even when there were no direct kinship ties prosperous free persons of color often received some assistance from whites. Alabama bridge builder Horace King, emancipated in 1829 by Georgia slaveholder John Godwin, was assisted by his former master when he constructed a bridge across the Chattahoochee River, and later the two became partners in a construction company. In New Orleans, Pierre A.D. Casenave, who worked for many years as a clerk in the office of philanthropist Judah P. Touro, was given a bequest of \$10,000 by his employer to start a mercantile firm. Later, Casenave established the first large-scale, black-owned undertaking business in the South. Between 1828 and 1832, Plaquemines Parish sugar planter Andrew Durnford purchased St. Rosalie plantation from New Orleans merchant-planter John McDonogh, a friend of Durnford’s white father, who allowed Durnford to pay the \$72,000 purchase price over a period of more than twenty years, at a 6 percent interest, when mortgage notes for such amounts usually called for lump sum payments over a period of three or four years at 8 or 10 percent. By 1840, with rare exceptions, affluent free persons of color in the Lower South were directly related either to whites or mulattoes who had been assisted by white benefactors. (Footnotes omitted.)

⁴³⁷The author completed this analysis in fulfillment of his Scholar of the House thesis at Yale University in 1974-75, under the direction of Professor John W. Blassingame. The full, unpublished thesis and statistical analysis is available.

See also SCHWENINGER, *supra* note 29, at 101:

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Louisiana, there were 169 households headed by free black women and men; a large majority of whom were the offspring of Spanish and French white masters

Similarly, affluent free persons of color in Louisiana were often directly related to whites. In New Orleans, among the approximately 535 succession (estates) probated for free blacks in the District Court between 1805 and 1846, nearly two-thirds were for women. Their names—Marie Allemand, Charlotte Burle, Marguerite Beaudouin, Charlotte Colbert, Catherine Lachiapella, Magdeleine Jourdain, Marie Pierre, Madeleine Rillieux—bore witness to their relationships with white Creoles. At the same time, a majority of the city’s property-holding free men of color, including prosperous merchants Leon Sindoz and Erasme Legoaster and speculator Francois Edmund Dupuy, were of mixed African and Spanish or French heritage. Similar interracial family backgrounds existed among affluent free persons of color in rural parishes, including those of Plaquemines Parish sugar planters Andrew Durnford, Louise Oliver, and Adolphe Reggio; St. John the Baptist Parish slave owners, George Deslonde, Cyprian Ricard, and Antoine Dubuclet; St. Landry Parish planters Adolphe Donatto and Jean Baptiste Meullion; and Natchitoches Parish slave masters Nicholas Augustine Metoyer, Marie Suzanne Metoyer, and Dominique Metoyer. Meullion was the one of white planter Luis Augustin Meullion, and his slave Maria Juana, while the Metoyers were the children of French immigrant and planter Claude Thomas Pierre Metoyer, and his slave mistress Marie Thereze Coincoin. (Footnotes omitted.)

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and their African slaves.⁴³⁸ Three facts, abstracted from the 1850 manuscript census, indicate the origin of the black mistress in antebellum rural Louisiana: their average age, their place of nativity, and their skin color. As to age, the average age of the black mistress in antebellum, rural Louisiana was 46 years old in 1850. As to place of nativity, 96.6% of them had been born in Louisiana. And as to skin color, 93.5% of them were described as “mulatto.”⁴³⁹ These three facts provide evidence that the black mistress had her origin in “Latin” Louisiana, in the late 18th and early 19th Centuries, from racially-mixed parentage. This conclusion is further supported by the high incidence of black mistresses, who had French and Spanish surnames.⁴⁴⁰

⁴³⁸These facts were extracted from the 25 microfilmed reels of the free population, slave population, and agricultural schedules returned by those who took the census of Louisiana in 1850. The term “rural” is used to define the State of Louisiana, except for Orleans Parish, which comprises the City of New Orleans. As previously mentioned, *see* the English and colored creole ancestry of Andrew Durnford, *supra* note 306, not all free blacks in Louisiana derived from “Creoles” and Africans. Some of these black mistress households were held by free black men. As common when referring to men so as to include women by inference, the following discussion uses the term “black mistress” to include black masters, free black men who owned enslaved blacks.

⁴³⁹As compiled from the 1850 manuscript census, out of 169 households, the average age for the black mistress was 45.7 years; 6 were born outside of Louisiana; and 11 were listed of “black” skin color.

⁴⁴⁰Although it is often difficult to say what nationality a name is, it is conservative to say that 90% of the names of free mistresses, listed in the 1850 manuscript census, are Spanish or

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The number of mulattoes listed in the Census provides proof enough of the mixing of the races.⁴⁴¹ In 1850, there were 17,462 free blacks in the entire state of Louisiana, of which 81% were listed as mulatto and 19% were listed as black (14,083 mulattoes; 3,379 blacks).⁴⁴² And in Louisiana's enslaved community in

French. The majority of the white masters were also Catholic. There has been some literature on the effect that religion played on enslavement. Some have argued that the laws of the Catholic Church greatly affected enslavement. See FRANK TANNENBAUM, *SLAVE AND CITIZEN: THE NEGRO IN THE AMERICAS* (1947), and STANLEY ELKINS, *SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE* (1976) (for a discussion of the humanizing effects of the Catholic Church on enslavement). Others have argued that the behavior of the Church and its authority did not significantly affect the life of enslaved blacks. Compare Carl N. Degler, *Slavery in Brazil and the United States: An Essay in Comparative History*, 75 *AM. HIST. REV.* 1004-28 (1970).

See also KOLCHIN, *supra* note 11, at 82 ("The great majority of free blacks in the antebellum South were descendants of those who received their freedom between 1780 and 1810.") This is evidence that the Louisiana free mistress phenomenon was not unique to location, culture, or religious affiliation. It appears that as the economics of enslavement changed, whites' and the law's attitudes towards manumission and to free blacks became more "conservative."

⁴⁴¹As per instructions, the census takers classified the "free" population in 1850, 1860, and 1870 manuscript censuses, as "white," "mulatto," and "black," in an effort to describe race based on skin color. See BERLIN, *supra* note 7, at 178 n.62 ("In 1850 and 1860, the census distinguished between 'mulatto' and 'black' members of the free Negro and slave populations. However, census marshals were not given any criterion for distinguishing mulattoes from blacks or even whites. Presumably, all those who were not full-blooded blacks yet were unable to pass for whites were listed as 'mulattoes.' Naturally, census figures on the color of both the free Negro and slave populations should be viewed with even more than usual skepticism. *Negro Population, 1790-1915* (Washington D.C., 1918), pp. 207, 220-1.")

⁴⁴²Calculations are based on the statistics found in STATISTICAL VIEW OF THE UNITED

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1850, there were 244,809 enslaved people, of which 8% were listed as mulatto and 92% were listed as black (19,835 mulattoes; 224,974 blacks).⁴⁴³

One might assume that being “mulatto” meant special treatment by whites and automatic freedom, but this was not the case.⁴⁴⁴ The greater percentage of free blacks was mulatto: 400 mulattoes to every 100 blacks.⁴⁴⁵ This percentage was far greater than that for enslaved blacks: the ratio of mulattoes to blacks in the slave community was about nine mulattoes for every 100 blacks.⁴⁴⁶ However, one cannot conclude that if a black person were mulatto, that meant that they were free: not all mulattoes were free and not all blacks were enslaved. There were, in fact, more *enslaved* mulattoes than there were *free* mulattos, at least in antebellum, rural Louisiana: out of the total mulatto population, 4,083 were free, compared to 19,835

STATES— COMPENDIUM OF THE SEVENTH CENSUS 83 (J.D.B. DeBow 1970) [hereinafter DEBOW, SEVENTH], at 83.

⁴⁴³*Id.*

⁴⁴⁴“Mulatto” is defined as “[o]ne who is the offspring of a European and a Black; also used loosely for anyone of mixed race resembling a mulatto.” OXFORD DICTIONARY, VOL. IX, *supra* note 5, at 68.

⁴⁴⁵*See* DEBOW, SEVENTH, *supra* note 442, at 83.

⁴⁴⁶*Id.*

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who were enslaved!⁴⁴⁷ These figures support two important conclusions: first, that despite the laws, miscegenation was practiced in antebellum, rural Louisiana, and second, that white masters often abandoned their mulatto children to enslavement.

Some white masters in Louisiana had relationships with black women that were “the nearest approach to marriage which the law recognized, and in the days in which their union commenced it imposed serious moral obligations,” defying the law and social disapproval.⁴⁴⁸ This was especially true of white masters of Iberville, West Baton Rouge, and Pointe Coupee Parishes.⁴⁴⁹ A large number of manumissions resulted from these miscegenational relationships.⁴⁵⁰ It has been estimated that, prior to the Civil War, three-fourths of the free black population in the Lower South had some white ancestry.⁴⁵¹ In some Lower South port cities, like

⁴⁴⁷*Id.*

⁴⁴⁸*See Macarty, supra* note 329, per Chief Justice Eustis.

⁴⁴⁹In the emancipation document of 1829, five mulatto women who might have been sisters (all have the same maiden name of “Belly”) are listed as being married to wealthy (presumably) white planters. *See* Emancipation document of “Henriette” by A. Dubuclet, et al., June 8, 1829, Iberville Parish Courthouse, Plaquemines, Louisiana, a copy of which is in the author’s possession.

⁴⁵⁰*See generally* SCHAFFER, FREE, *supra* note 45.

⁴⁵¹*See* BERLIN, *supra* note 7, at 180.

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New Orleans, nearly 90 percent of free blacks had white ancestry.⁴⁵² Many emancipation documents describe a young, enslaved black woman with mulatto children.⁴⁵³

One example of such a miscegenational relationship, in Latin Louisiana, occurred in 1764, between a white master, Luis Augustin Meullion, and his mulatto, enslaved woman, Maria Juana, which produced a son, Jean Baptiste Meullion. In 1776, Jean Baptiste Meullion and his enslaved mother were emancipated, on the condition that they serve their former owner until his death.⁴⁵⁴ After his father's death, Jean Baptiste Meullion moved to St. Landry Parish and, in 1830, owned 52 enslaved blacks.⁴⁵⁵ The origins of many black mistresses can be traced back to miscegenational relationships, between white masters and their

⁴⁵²*Id.*

⁴⁵³*See generally* SCHAFER, FREE, *supra* note 45.

⁴⁵⁴MS. Deed of Emancipation, February 21, 1776, microfilmed on Meullion Papers (Louisiana State University Archives).

⁴⁵⁵Compiled from over 20 reels of microfilmed manuscript schedules of population reported in Louisiana by the 1830 census takers.

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enslaved black women.⁴⁵⁶

During the antebellum period, there were increased pressures throughout the South to send the black mistress out of the State, efforts to take away their property, and even efforts to re-enslave them.⁴⁵⁷ As a result of these pressures, including a decline in the number of newly-manumitted blacks, the free black population in Louisiana declined from 25,502 in 1840 to 17,462 in 1850.⁴⁵⁸ Many black mistresses migrated to the states in the North and the West, while others immigrated to Mexico, the Caribbean islands, and to France.⁴⁵⁹

The black mistress, especially in miscegenational relationships with white men, and those descendants of white masters and black mistresses, often relied on

⁴⁵⁶See generally SCHWENINGER, *supra* note 29. See generally BRASSEAU, *supra* note 403.

⁴⁵⁷See BERLIN, *supra* note 7, at 316-40, Chapter 10, entitled “The Mechanics of White Dominance.” (“‘Humanity, self-interest and consistency all require that we should enslave the free negro.’ George Fitzhugh, *What Shall Be Done with the Free Negro* (1851).”) *Id.* at 343.

⁴⁵⁸See DEBOW, SEVENTH, *supra* note 442, at 63.

⁴⁵⁹See, e.g., Josephine Decuir who moved to France, in David Sandoz, *Administrator of Pierre Decuir v. Louis Gary*, 11 Rob. (La.) 529, 1845 WL 1662 (La. 1845), *supra* note 330.

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their “family ties” to support their legal rights.⁴⁶⁰ After all, the black mistress was at best a quasi-citizen, despite her wealth and status, for in the South, there was really no such thing as a half-black or a part white.⁴⁶¹ The question that the enslavement law faced was, when a white master exercised his property rights and freed an enslaved black woman, or when he chose to have a sexual relationship with a free black mistress, should he be allowed to transfer his wealth to them?

* * *

In summary, the black mistress was an enigma to the American “property-enslavement-sexual” Dream. That is, she was allowed to exercise three prized possessions of American life: freedom, right to contract, and the right to privately own property, including enslaved blacks.

While the black mistress made significant progress in exercising her property rights in the antebellum South, her legal status was under constant

⁴⁶⁰See CATTERALL, *supra* note 96, vol. 3 (1932) (citing examples of how white relatives of free blacks testified on their behalf in court).

⁴⁶¹See BERLIN, *supra* note 7, at 182 (“‘You may manumit a slave but you cannot make him into a white man.’ Robert G. Harper, *Letter to E.B. Caldwell* (1818).”)

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scrutiny, and the subject of continuous debate.⁴⁶² Other American civil rights of full citizenship, such as the right to vote, were hardly forthcoming.⁴⁶³ Prior to the

⁴⁶²See BERLIN, *supra* note 7, 182-216, at Chapter 6, “A White Man’s Country: Racial Attitudes and Policies.”

⁴⁶³See KOLCHIN, *supra* note 11, at 17:

As the status of white migrants gradually improved, that of blacks in America became more clearly defined as well. Whereas the legal status of the few blacks who resided in the colonies remained uncertain prior to the 1660s, a spate of legislation passed during the subsequent century regulated the condition of the growing population of black slaves and set them off from white settlers. These acts established that slaves— and the children of slave women— would serve for life; limited the rights of slaves and even of free blacks (they could not vote, testify in court against whites, or marry whites)....

Limited civil rights, such as voting rights, that the black mistress exercised, must be viewed in the context of the limited rights, that women and free blacks exercised generally, even in the North.

Northern blacks, although free, were objects of both legal discrimination and vicious hostility. Excluded from most public schools, denied the right to vote (except Maine, Vermont, New Hampshire, Massachusetts, and – if they could meet a property requirement– New York), forbidden by (sporadically enforced) law from entering many states, jeered at and at times physically attacked by whites who refused to work with them or live near them, blacks quickly came to

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Civil War, even their property rights were eroding.⁴⁶⁴ Perhaps their eroded legal status reflected a decline in their percentage of the general population, due to an increase in the white population.⁴⁶⁵ Or perhaps it reflected the white population's increased fear of the black mistress's role in enslavement revolts.⁴⁶⁶

White fear and resentment of the black mistress often resulted in legal and extralegal restraints on their "freedom."⁴⁶⁷ As clearly reflected in the post-

appreciate the difference between freedom and equality.

Id. at 82.

⁴⁶⁴See BILLINGS, *supra* note 140, at 91. ("While the state's politicians undercut incrementally such freedoms as public assembly, education, and travel, they barely touched other rights. Thus, free blacks managed to cling to a quasi-citizenship down to 1860.")

⁴⁶⁵See BERLIN, *supra* note 7, at 46, 136, 398-99 (showing that in 1810, free blacks comprised of 18 percent (or 7,585 people) of the Louisiana population, but by 1860, they comprised of only 5.3 percent (or 18,647) of the State's population; while the white population grew in Louisiana from 34,311 in 1810 to 357,456 in 1860).

⁴⁶⁶*Id.* at 345-49. (This would help explain the focus on free assembly, education, and travel of anti-free black legislation. And with some justification, there was sufficient evidence that many free blacks were anti-slavery and promoted black liberation.)

⁴⁶⁷See, e.g., A. Leon Higginbotham, Jr. & Greer C. Bosworth, *Rather Than Free: Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C. R.-C. L. L. REV. 17 (1991). See generally WOODWARD, STRANGE, *supra* note 64.

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enslavement, “Jim Crow” era, many white Southerners “could not conceive of a society in which whites and blacks were equal.”⁴⁶⁸

Overall, for whatever the reasons, Southern white society allowed the black mistress to exercise many private property rights. This represents a triumph of the

⁴⁶⁸See BERLIN, *supra* note 7, at 182:

The desire to get rid of free Negroes, perhaps all Negroes, stood at the heart of racial policies of the Upper South. Believing that blacks were a people yearning for liberty but forever barred from enjoying it in America, Upper South whites saw only three alternatives: amalgamation, race war, or physical separation.... ‘... the only rational and Christian alternative is colonization.’

Id. at 200. Greed was a major factor in laws against free blacks, and led whites to propose a fourth alternative for free blacks’ fate, that of re-enslavement:

It took but scant provocation for whites to chip off another piece of the freemen’s ever-shrinking liberty. In 1822, for instance, when a Virginia legislator found the state penitentiary crowded and the treasury low, they ordered free Negro felons to be whipped and sold into slavery. Enthusiasm for the new penal system quickly spread to nearby Maryland and Delaware, both of which barred free Negro convicts from the state penitentiary and local jails and subjected them to the lash or to sale for a term of years out of the state.... A minor fiscal crisis was enough to encourage some whites to drive free Negroes into permanent bondage.

Id. at 182-83.

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private property ownership paradigm over the enslavement paradigm. As we shall see, the black mistress class, and the free black population, grew in number and prominence in the antebellum South, making them less marginal.⁴⁶⁹ The question that Professor Bell's "interest-convergence" principle implores is, why did white masters empower the black mistress with private property rights? And, in particular, was it in the best interest of the white power structure to do so?

VI. "JIM CROW" SEGREGATION AND THE BLACK WOMAN'S STRUGGLE FOR SEXUAL AND RACIAL EQUALITY

This next section discusses the black mistress's fate in the years just prior to the Civil War, her reaction and that of her racially-mixed offsprings, to the Civil War, and their experiences during Reconstruction. It also examines the effect the Reconstruction rules allowing interracial marriage had on pre-War legacies that

⁴⁶⁹*Id.* at 46-47, 396-403. (In 1810, there were 108,265 free blacks in the South, out of a southern white population of 2,208,785, and an enslaved black population of 1,163,854. By 1860, there were 261,918 free blacks in the South, compared to a southern white population of 8,097,463, and an enslaved black population of 3,953,696. More important than their numbers, they provided a "legacy of freedom," as important as the legacy of enslavement.) *Id.* at 395.

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white men provided their black concubines. And lastly it glimpses at the challenges that “Jim Crow” segregation posed for the black mistress in her struggles for sexual and racial equality.

A. A “DYING GENERATION”

The black mistress was born near the end of the eighteenth century and, as a result, most died or were old by 1860, the end of the antebellum period.⁴⁷⁰

Looking over its life span the black mistress class reached its height in the 1830s, and their children benefitted from economic expansion over a thirty-year period.⁴⁷¹

These black mistresses laid the foundation for the financial success of their mixed-race children, for example, Nicholas Metoyer of Natchitoches, the son of a prominent black mistress, died in 1856, after he had been a wealthy planter for most of his eighty-eight years of life.⁴⁷² His two younger brothers died in 1864, at

⁴⁷⁰See BERLIN, *supra* note 7, at 176-77.

⁴⁷¹See WOODSON, HEADS, *supra* note 112, at v.

⁴⁷²See generally SISTER FRANCES JEROME WOODS, MARGINALITY AND IDENTITY (1972) [hereinafter WOODS], and MILLS, *supra* note 117.

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the ages of sixty-seven and sixty-nine.⁴⁷³ Many of the black mistress class and their children died by 1860, through natural causes as a result of the Civil War or war-related causes.⁴⁷⁴

This generational phenomenon can be seen in the life of Rosaline Mercier, a black mistress who, with her white paramour Thomas Durnford, produced Andrew Durnford, a wealthy and influential black master.⁴⁷⁵ Andrew Durnford was reaching thirty years old on June 27, 1829, when he was listed as the purchaser of a large tract of land in Plaquemines Parish.⁴⁷⁶ In that land sale, he was listed as a “f.m.c. [free man of color] residing in this City [New Orleans].”⁴⁷⁷ On July 22, 1829, Andrew Durnford purchased another tract of land in Plaquemines Parish, and, by 1830, Andrew Durnford, with his black mother’s assistance, became

⁴⁷³See MILLS note 117.

⁴⁷⁴See *supra* note 428.

⁴⁷⁵See *supra* note 306.

⁴⁷⁶Land sale of John McDonogh to Andrew Durnford, New Orleans, June 27, 1829, Orleans Parish Courthouse Archives.

⁴⁷⁷*Id.*

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Andrew Durnford, the black sugar plantation owner.⁴⁷⁸

By 1840, Andrew Durnford had begun to make his mark in the planter class. According to the 1840 Census (he was then about forty years old), Durnford owned sixty enslaved blacks, and was listed as the head of a household of four members.⁴⁷⁹ By 1850, he was listed in the manuscript census as being fifty years of age, a sugar planter, heading a household of seven members, owning seventy enslaved blacks, and having a sugar plantation valued at \$80,000, showing the growth of this estate.⁴⁸⁰ Just prior to the 1860 Census-taking, and prior to the Civil War, Andrew Durnford died, as recorded in the July 13, 1859 obituary column of the *New Orleans Bee*: “on his plantation in the Parish of Plaquemines 12th instant at 4½ (sic) o’clock, a.m., Dr. (sic) A. Durnford, aged sixty years.”⁴⁸¹ Andrew Durnford’s death marked the end of the black mistress and their interracial

⁴⁷⁸Land sale of John McDonogh to Andrew Durnford, New Orleans, July 22, 1829, Orleans Parish Courthouse Archives.

⁴⁷⁹See the 1840 manuscript census for rural Louisiana.

⁴⁸⁰See the 1850 manuscript census for rural Louisiana.

⁴⁸¹See David O. Whitten, *Slave Buying in 1935 Virginia as Revealed by Letters of a Louisiana Negro Sugar Planter*, 11 L. A. HIST. 231-32 (1970) [hereinafter WHITTEN, BUYING].

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offspring.

Parenthetically, one wonders about the attitude black mistresses and their racially-mixed children held toward ownership of enslaved blacks. Some of them owned enslaved blacks in small numbers and probably for benevolent purposes.⁴⁸² Some mistresses and their offspring, who owned large numbers of enslaved blacks, did so for economic exploitation and profit.⁴⁸³ Such was the case of Andrew Durnford, as evidenced through his extensive correspondences with a prominent white businessman and personal friend, John McDonogh, on many issues of the day.⁴⁸⁴

Andrew Durnford, a black man who enslaved black people, can be classified

⁴⁸²See WOODSON, HEADS, *supra* note 112, at xxxv:

In some of these cases, as in that of Marie Louise Bitaud, a free woman of color in New Orleans, in 1832, these slaves were purchased for personal or benevolent purposes, often to make their lots much easier.... Samuel Martin, a benevolent slaveholder of color residing at Port Gibson, Mississippi, purchased two mulatto women with their four children, brought them to Cincinnati in 1844, and emancipated them.

⁴⁸³See generally WHITTEN, *supra* note 306.

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as a “progressive” enslaver (if such a classification makes any sense). He, along with McDonogh, favored the re-colonization of blacks to Africa, particularly Liberia.⁴⁸⁵ While traveling to Philadelphia in 1835, Durnford met with the outspoken abolitionist of American enslavement, Elliott Cresson.⁴⁸⁶ From his St. Rosalie Plantation on March 23, 1844, Andrew Durnford wrote to John McDonogh, praising him for establishing a voyage to Africa for New Orleans people:

I see by your letter of the 4 that a vessel is to leave here for Africa: I have heard since with pleasure, from different sources, that you have been engaging some of our New Orleans people to go to Africa; act. This is the right way to do things my friend.⁴⁸⁷

⁴⁸⁴*Id.* at 57-67.

⁴⁸⁵*Id.* at 58.

⁴⁸⁶See WHITTEN, BUYING, *supra* note 481, at 233-35.

⁴⁸⁷Andrew Durnford to John McDonogh, St. Rosalie, March 23, 1844, McDonogh MSS, Tulane University Library. *See also, supra* note 66: “Contrary to the norm, some enslaved blacks were able to obtain money, often with the permission of their master, and allowed or encouraged to ‘purchase’ their freedom.”

See, e.g., PHILLIPS, *supra* note 14, at 427-28:

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Durnford himself had a burning interest in the American Colonization Program:

the article of the colonization Herald of March 20th, from the Biblical repository and Princeton review for January 1844; is a clear topographical and commercial &c. (sic) of the colonies of Africa. It is worth reading. I have sent for it, if it can be had in New Orleans.⁴⁸⁸

Andrew Durnford apparently wished to send his enslaved blacks to Africa, and obviously influenced his friend John McDonogh, who willed that eighty-five of his enslaved blacks be liberated and sent to Liberia with transportation expenses, tools, provisions, and money to get settled.⁴⁸⁹ Durnford wrote on January 6, 1844: “ . . . (it will interfere with my future projects, if I am spared long enough, to send

John McDonogh... of New Orleans... made a unique bargain with his whole force of slaves...by which they were collectively to earn their freedom and their passage to Liberia by the overtime work of Saturday afternoons.... The plan was carried to completion on schedule...they left America in 1842, some eighty in number.... McDonogh wrote: ‘... I can say with truth and heartfelt satisfaction that a more virtuous people does not exist in any country.’ (Footnotes omitted.)

⁴⁸⁸*Id.*, June 13, 1844.

⁴⁸⁹See WHITTEN, BUYING, *supra* note 481, at 234.

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my mite to the African shore) . . .”⁴⁹⁰ The Plaquemines Parish conveyance index lists Durnford’s emancipation of enslaved blacks, indicating he did free some of his people.⁴⁹¹ Yet, the 1860 manuscript census lists the estate of Andrew Durnford as owning seventy-five enslaved blacks and showing that Durnford freed few, if any, of them.⁴⁹² Unlike McDonogh, Durnford was greatly in debt (to McDonogh’s estate) when he died; this might have affected his decision or bettered Durnford ability to liberate his enslaved blacks. Durnford did not live to see the Civil War, but some of his fellow black masters did, as discussed next.⁴⁹³

⁴⁹⁰Andrew Durnford to John McDonogh, St. Rosalie, January 6, 1844, McDonogh MSS, Tulane University Library.

⁴⁹¹Index to the Plaquemines Parish Civil Records, New Orleans Public Library Archives.

⁴⁹²See the 1860 manuscript census for rural Louisiana.

⁴⁹³See SCHWENINGER, *supra* note 29, at 192:

Following the death of their mother in 1866, Andrew Durnford, Jr., and his sister Rosema Durnford struggled desperately to regain the antebellum production of sugar that made their father one of the richest free Negroes in the United States, but in 1874, besieged by creditors, they were forced to sell St. Rosalie plantation for a few thousand dollars.

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B. FIGHTING FOR HER PROPERTY

The ten years between 1860 and 1870 brought the Civil War and the Reconstruction to the South, along with social confusion and economic ruin to the black mistress.⁴⁹⁴ In the late 1850s, the black mistress faced a change in white attitudes toward her. New laws made it impossible to emancipate an enslaved black in Louisiana and throughout the South, limited her free movement, and even

⁴⁹⁴*Id.* at 190:

Despite such professions of ‘common sympathy,’ the war and its aftermath spelled disaster for the great majority of affluent free persons of color in the Lower South. This was especially true in rural areas that had experienced the brunt of Union attacks, but even in towns and cities, despite the ability of some wealthy families to maintain their real estate holdings, there was a marked decline in the wealth holdings of the majority. Following three successive postwar crop failures, South Carolina rice planter Robert Collins, who had once owned a 3,100-acre plantation and seventeen bondsmen and women, was forced to borrow money from the Freedmen’s Bureau to purchase supplies for his former slaves. Collins’s sister, Margaret Mitchell Harris (both children of Elias Collins), owner of 44 slaves and a 981-acre rice plantation in Georgetown District, had a premonition of the coming disaster. In 1860, she sold her slaves, disposed of her plantation, and invested \$35,000 in stocks and bonds, only to lose everything as the stock certificate became worthless during the war.

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encouraged her to select a white master and voluntarily become enslaved.⁴⁹⁵ One politically astute free black taught his children to do menial tasks normally done for them by their enslaved blacks: “And he made his children, mind you, every week one of those daughters had to cook and another would take the house. Learning housekeeping. Because he saw that things were going to change. He told them its going to be different. You are going to have to do (sic)–to work.”⁴⁹⁶

Not all black mistresses and their privileged children resolved the possible future changes in such an easy and committed manner. As reported in September 1861, two free blacks argued over their positions concerning the Civil War, and one man was killed in the ensuing duel.⁴⁹⁷ While many opposed the Civil War, others took up arms to defend their homeland, volunteering to fight for their property rights, as expressed in a 1864 communication to the *New Orleans Daily Delta* stating:

The free colored population (native) of Louisiana . . . own slaves, and

⁴⁹⁵See TAYLOR, *supra* note 137, at 157.

⁴⁹⁶See WOODS, *supra* note 472, at 36-37.

⁴⁹⁷See BLASSINGAME, BLACK, *supra* note 27, at 33.

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they are dearly attached to their native land, . . . and they are ready to shed their blood for their defense. They have no sympathy for abolitionism; no love for the North, but they have plenty for Louisiana. . . . They will fight for her in 1861 as they fought in 1814-'15. . . . If they have made no demonstration it is because they have no right to meddle with politics, but not because they are not disposed. All they ask is to have a chance, and they will be worthy sons of Louisiana.⁴⁹⁸

Free blacks who proposed to defend their homeland followed a well-established tradition of fighting foreign invaders.⁴⁹⁹ They had participated in the Battle of New Orleans with success, as noted in President Andrew Jackson's recognition, that General Sir Edward Pakenham, the British commander, had been shot by "a free man of color, who was a famous shot and came from the Attakapas region of Louisiana," perhaps a certain "Captain" Savary.⁵⁰⁰ It was not surprising

⁴⁹⁸See PHILLIPS, *supra* note 14, at 435-36.

⁴⁹⁹See generally MCCONNELL, *supra* note 374.

⁵⁰⁰See EDWIN ADAMS DAVIS, LOUISIANA, A NARRATIVE HISTORY 85 (1971) [hereinafter E. A. DAVIS].

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that as the Civil War approached, a free black, Jordan Noble, who was the drummer boy at the Battle of New Orleans in 1815, advertised and held meetings in New Orleans, for those free blacks, who wanted to defend their homes.⁵⁰¹

Accordingly, on April 23, 1861, the New Orleans Delta reported, “these men who distinguished themselves at the Battle of New Orleans are determined to give new evidence of their bravery.”⁵⁰²

Free blacks in Louisiana’s Pointe Coupee and Natchitoches Parishes formed companies of Home Guards, soon after the Civil War began, and were reportedly used to prevent uprisings of enslaved blacks.⁵⁰³ An affluent free black, Metoyer of Natchitoches, was reported a Confederate captain in the cavalry, and another free black from that area was a colonel.⁵⁰⁴ Free blacks in Plaquemines Parish organized a militia company.⁵⁰⁵

⁵⁰¹See Mary F. Berry, *Negro Troops in Blue and Gray: The Louisiana Native Guards, 1861-1863*, 8 LA. HIST. 165, 167 (1967) [hereinafter BERRY].

⁵⁰²See BLASSINGAME, BLACK, *supra* note 27, at 33.

⁵⁰³See generally MCCONNELL, *supra* note 374.

⁵⁰⁴See WOODS, *supra* note 472, at 38-39.

⁵⁰⁵See generally MCCONNELL, *supra* note 374.

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One should not assume that the free blacks' call to arms meant that they agreed with the Confederate cause, as clearly evidenced in the Confederate leaders' decision not to employ the free black "Home Guard" regiment, formed in New Orleans.⁵⁰⁶ One noted scholar concluded that this disinclination of the state militia to use the colored regiment evidenced their distrust of the free black soldier, evidenced a Confederate policy not to use black troops, or evidenced some free black soldiers were forced to join the Confederacy.⁵⁰⁷ One free black, Charles Gibson, testified he was taken from his home, and forced to join the Confederacy. Another colored officer reportedly said, "We were ordered out and dared not refuse, for those who did so were killed and their property confiscated."⁵⁰⁸ These examples show the complexity of the motives that free blacks had for joining the Confederate Army.

While the Confederacy apparently chose not to employ free black soldiers, the Union leaders used them; they were outstanding soldiers in the Battle of Port

⁵⁰⁶*Id.*

⁵⁰⁷*See* BERRY, *supra* note 477, at 169.

⁵⁰⁸*Id.* at 172.

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Hudson.⁵⁰⁹ Andrew Cailloux, a free black from New Orleans, was reportedly one hero of the Battle.⁵¹⁰ While the black mistress and her children were engaged in some aspect of the Civil War, many of them who had thrived against legal obstacles during the antebellum period did not live to see the ravages of the Civil War.

C. THE ECONOMIC AND SOCIAL EFFECTS OF THE CIVIL WAR

As for most southerners of every background, the Civil War had devastating effects on the black mistress's property ownership.⁵¹¹ For those black mistresses

⁵⁰⁹*Id.* at 179-89.

⁵¹⁰*Id.*

⁵¹¹*See* SCHWENINGER, *supra* note 29, at 190:

Despite such professions of 'common sympathy,' the war and its aftermath spelled disaster for the great majority of affluent free persons of color in the Lower South. This is especially true in rural areas that had experienced the brunt of Union attacks, but even in towns and cities, despite the ability of some wealthy families to maintain their real estate holdings, there was a marked decline in the wealth holdings of the majority.

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and their offspring, who owned enslaved blacks, the Civil War's most significant effect economically was the loss of their investment in enslaved blacks, resulting from the Emancipation Proclamation.⁵¹² Enslaved blacks were the most significant capital investment and a great source of virtually free labor; hence, with the emancipation, work greatly slackened and a large decrease in profits resulted.⁵¹³

⁵¹²*Id.* at 191:

When war commence (sic) it purty (sic) hard on folks,' a free Negro in St. Mary Parish, Louisiana, recalled. First came the Confederates who swept up the slaves, including those owned by blacks, and took them away to build fortifications. 'Dey (sic) line my daddy up with de others, but a white man from town say, 'Dat (sic) a good, old man. He (sic) part Indian and he (sic) free'.... So dey (sic) let him go.' Then Yankee raiding parties rode through, burning, pillaging, and looting. 'Dey (sic) tak (sic) a whole year crop of sugar and corn and horses.' Everywhere the Union army advanced free blacks told of death and destruction. 'The road all the way to Natchitoches,' one observer said, describing the region where some of the wealthiest free persons of color in America owned their plantations, 'was a solid flame.' His heart was 'filled with sadness' at the sight of those lovely plantations being burned to the ground. (Footnotes omitted.)

⁵¹³See Joe Gray Taylor, *Slavery in Louisiana During the Civil War*, 8 LA. HIST. 27, 33 (1967). See also, SCHWENINGER, *supra* note 29, at 193-94:

In addition, free persons of color in the city (of Charleston) lost an estimated

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The black mistress class, especially those with significant wealth, lost substantial fortunes as a result of the economic effects of the Civil War.⁵¹⁴ Still, some free

\$216,000 in slave property when they were forced to free their bondsmen. In New Orleans, a close study of creoles of color in the Fourth, Fifth, and Sixth wards, the heart of the free mulatto community, reveals a similar decline. Among the 98 free persons of color listed in the 1860 and 1870 census returns, nearly half experienced losses, only one of four kept their holdings intact, and 23 expanded their wealth... carpenter Casimir Labat... was joined by 31 other propertied antebellum men and women in the three wards who had lost everything. (Footnotes omitted.)

⁵¹⁴See SCHWENINGER, *supra* note 29, at 191-93:

While some of the Metoyer family escaped destruction, in St. Landry Parish, despite declarations of loyalty to the United States, Antoine Meullion lost 30 head of cattle, 150 sheep, 26 hogs, 5,000 fence rails to a band of Union soldiers under the command of Nathaniel Banks. Pierre and Cyprian Ricard, descendants of the wealthiest free person of color in the State, lost virtually everything during the war. In 1868, a final 161 acres was seized by the Iberville Parish sheriff for nonpayment of debts and sold at public auction. Similarly, the Ponis family in St. John the Baptist Parish, the Verdun family in St. Mary Parish, the Deslonde in Iberville Parish, and the Porche family in Pointe Coupee Parish witnessed the disintegration of their antebellum fortunes during the war.... As with their white neighbors, the problems in securing farmhands, the flooding and crop failures in 1866 and 1867, and the difficulties in obtaining credit forced many landholders off the land, while pushing others to the brink of disaster. Within a few years

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mistresses and their offspring thrived financially, as a result of the War.⁵¹⁵

after the war the vast majority of the wealthiest rural Negroes in antebellum America—Louisiana’s creoles of color—had lost not only their slaves, farm machinery, livestock, buildings, and personal possessions, but their land as well.... In 1860, 121 Negro real-estate owners in Charleston (including a few near the city but in the county) boasted holdings of more than \$2,000; they owned a total of \$618,900, or \$5,115 per property owner. A decade later, only 81 realty owners were listed in the same category; they held \$423,000, still \$5,222 per owner, but a large majority of the 1870 group—two out of three—had acquired their holdings during the postwar period. (Footnotes omitted.)

⁵¹⁵*Id.* at 193-94:

Only a few affluent free persons of color escaped the war years unscathed. Those who did had usually invested heavily in urban real estate (rather than slaves) or maintained profitable businesses. In Charleston and New Orleans, despite occupational declines and wartime destruction, a few prosperous free blacks actually improved their economic standing following the Civil War. Charleston engineer Anthony Weston, wood dealers Richard Dereef and Robert Howard, butcher George Shrewsberry, and realtor William McKinlay, among the richest antebellum mulattoes, either maintained their estates or improved their economic position.... A similar situation existed in the Crescent City. Land speculator Thomy Lafon, who became a large contributor to various black charities, increased his wealth from \$10,000 to \$55,000 by speculating in swampland during the Union occupation... another broker, Drauzin Barthelemy McCarty, increased his fortune from \$45,000 to \$77,300 during the same period... landlord Edmond Dupuy, whose \$200,000 worth of real estate made him the second wealthiest Negro in the South. (Footnotes omitted.)

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An analysis of the 1870 federal manuscript census shows the devastating effect the Civil War and post-War economy had on the black mistress's property ownership. But first, a caveat: despite the War and post-War economic disasters, it has been suggested that, in analyzing the plantation system in Louisiana, it not only survived the Civil War, but also grew.⁵¹⁶ This observation may be true of the plantation system, but it hides the devastating effect the War had on individual owners. Therefore, in analyzing the effects of the Civil War on the economic situation of the black mistress, it is important to follow the names of the black plantation owners and their families.

The following conclusions about the social and economic effects that the Civil War had on the black mistress class are based on the author's analysis of the 1870 manuscript census for rural Louisiana. We begin with an analysis of black mistress's property ownership in rural Louisiana, as, prior to the Civil War, some of the wealthiest black masters in the South resided in Louisiana.⁵¹⁷

The black mistress class in Iberville Parish, for example, experienced a great

⁵¹⁶Roger Wallace Shugg, *Survival of the Plantation System in Louisiana*, 3 J. OF SO. HIST. 311 (1937).

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decline in their property ownership.⁵¹⁸ In 1860, there were six blacks in the black mistress class, one of whom, Durand, was in partnership with Dubuclet, owning plantations of over 3,299 acres (of which 1,595 were improved), valued at a total

⁵¹⁷See SCHWENINGER, *supra* note 29, at 191-92.

⁵¹⁸*Id.* at 121:

In Iberville Parish, by 1860, nine (black) plantation owners were listed as having \$646,000 in real estate, or \$71,778 per family. Census takers probably included some personal property in these valuations, but even so Zacharie Honore increased his land holdings from \$20,000 to \$60,000; Antoine Dubuclet, from \$87,500 to \$200,000; George Deslonde (and his wife), from \$65,000 to \$115,000; and Madam and Pierre Ricard, from \$80,000 to \$200,000. In 1859, one observer described the Ricard family as ‘doubtless the richest black family in this or any other country. (Emphasis added, footnotes omitted.)

Id. at 191-92:

Pierre and Cyprien Ricard, descendants of the wealthiest free person of color in the state, lost virtually everything during the war. In 1868, a final 161 acres was seized by the Iberville Parish sheriff for nonpayment of debts and sold at public auction.... During the war, Antoine and Josephine Decuir, once among the richest free mulattoes in America, were forced to mortgage their house, the adjoining land, and even their crops.

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of \$125,730.⁵¹⁹ By 1870, only two of them—Augustin Dubuclet and Madame F. Z. (sic) Honore—were still listed as “planters,” owning a total of 488 acres worth \$1,650 (in 1860, they owned a total of 348 acres, worth \$42,006).⁵²⁰ (The reason for the increase in the total acreage owned by the two was due to Madame C. Ricard, who is not listed in the agricultural census, but as living on the Honore household. It is likely that some of her property was credited to Honore.)

An example of the economic ruin suffered by the black mistress class following the Civil War was that of the Ricard family. Before the Civil War, Madame C. Ricard and her sons had purchased their second plantation; the two plantations had been valued at a quarter of a million dollars.⁵²¹ In the 1870 manuscript census, Widow P.C. Ricard, aged eighty years old, is listed as living in the house of Madame F.Z. Honore, and is listed as not owning any real or personal property.⁵²² Her son, Pierre, is not listed and is presumably dead. And although three of her other sons are listed Emile T. Ricard—music teacher; Joseph Ricard—

⁵¹⁹See the 1860 population and agricultural manuscript censuses for rural Louisiana.

⁵²⁰See the 1870 population and agricultural manuscript censuses for rural Louisiana.

⁵²¹*See supra* note 363.

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carpenter; and Lucien Ricard—carpenter, none of them is listed as owning any real or personal property.⁵²³ The Ricard family, one of the wealthiest black families in the country, had become impoverished.

A review of the changed fortunes of Claire Poland and Antoine Dubuclet shows how some black mistresses faced economic ruin following the War. In 1852, the succession papers of Dubuclet's wife, Claire Polard Dubuclet, show that she left \$82,076.25 of real property and enslaved blacks to her family.⁵²⁴ According to the 1860 manuscript census, Antoine Dubuclet owned real property worth \$200,000.⁵²⁵ But, by 1870, the value of his real property was \$40,000.⁵²⁶ And, in 1888, in Antoine Dubuclet's succession papers, he left his family

⁵²²See the 1870 population and agricultural manuscript censuses for rural Louisiana.

⁵²³See the 1870 population and agricultural manuscript censuses for rural Louisiana.

⁵²⁴Succession papers of Claire Polard Dubuclet, November 18, 1852, Iberville Parish Courthouse.

⁵²⁵See the 1860 population and agricultural manuscript censuses for rural Louisiana.

⁵²⁶See the 1870 population and agricultural manuscript censuses for rural Louisiana.

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\$1,130.76 of real estate, rights, and credits.⁵²⁷

The free black mistress class went from landed gentry to other occupations, including Antoine Dubuclet, who became Louisiana's State Treasurer; Alcide Durand (probably Pierre Durand's son) who became a carpenter (along with Pierre Cyprien Ricard, who was not listed and was perhaps dead; and his mother Widow P.C. Ricard, listed as "at home," probably retired).⁵²⁸ The most accomplished of all the Iberville Parish black mistress class was Antoine Dubuclet. He became State Treasurer during Reconstruction, using the accounting skills that he learned as a planter to help the freedmen and the State of Louisiana to "keep the books." White critics sought to hold him responsible for the heavy spending on social programs (like the first public school system) and accused him of corrupt dealings during his service from 1868 to 1879. One free black writer, Rodolphe Lucien Desdunes, defended Dubuclet's integrity and his accounting abilities:

Some of the most eminent politicians of Louisiana came—determined to find irregularities in Dubuclet's records, but to no avail. The Aldiger Committee was at this time actually created for the one

⁵²⁷Succession papers of Antoine Dubuclet, April 2, 1888, Iberville Parish Courthouse.

⁵²⁸*Id.*

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purpose of examining Dubuclet's accounts.

The men of the committee, in order to achieve this end, secured the services of three of the most reliable experts in the field of accounting. For six months the investigation continued. The group made every effort to prove Dubuclet guilty but his integrity prevailed. In any other case, a person who had proved himself so clean would have been given high commendation but not Dubuclet, for he was a Creole of color.⁵²⁹

Another effect that economic ruin had on the black mistress class was a social one: the loss of status that the white enslavement social-economy provided, and the fear of being classified commonly with the newly freed, formerly enslaved blacks.⁵³⁰ As in the case of Antoine Dubuclet and others, the response was one of

⁵²⁹See DESDUNES, *supra* note 374, at 74-75.

⁵³⁰See BERLIN, *supra* note 7, at 390-92:

Black life from Reconstruction to present cannot be fully understood without taking into account the long-standing differences between these free Negroes and the masses of the former slaves. Well into the twentieth century, the descendants of the free Negro elite maintained their lofty status within black society.... The legacy of the free Negro caste was not confined to these lingering enmities. Most

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leadership, about 30% of the black leadership in New Orleans during Reconstruction had owned enslaved blacks before the War.⁵³¹ Some of the black mistress class “passed over” into the white race if they could. Two such cases of “passing over” that appear in the 1870 manuscript census, were those of Augustin Dubuclet and Emile T. Ricard.⁵³² Both had been listed in previous censuses as being “mulattoes.”⁵³³ But, in the 1870 census, they were listed by the census-taker, who happened to be P.G. Deslondes, a free mulatto and a family friend, as being

free Negroes did not belong to the elite and felt little sympathy for its pretensions. Tied closely to the former slaves by blood, marriage, religious affiliation, and work habits and alienated from whites, the vast majority of free blacks greeted Emancipation with the same wild enthusiasm as did the mass of enthralled blacks. If freedom within the slave society had made free Negroes leaders without a following, Emancipation restored their constituency.... Economic changes unleashed by Emancipation also pushed freemen and freedmen together. Emancipation eroded the paternalism which had encouraged whites to patronize free Negro tradesmen by depriving these whites of the gratification they received from being served by those of lower status than themselves.

⁵³¹See David C. Rankin, *The Origins of Black Leadership in New Orleans During Reconstruction*, 40 J. SO. HIST. 417 (1974) [hereinafter RANKIN].

⁵³²See the 1870 population and agricultural manuscript censuses for rural Louisiana.

⁵³³See the 1850 and 1860 manuscript censuses for rural Louisiana.

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“white.”⁵³⁴ (Pierre G. Deslonde was Louisiana’s Secretary of State during Reconstruction, 1872-1876.)

Some black mistresses were less affected by the Civil War. One group in Louisiana that prospered, for example, despite the War, was the sugar and rice planters in Plaquemines Parish.⁵³⁵ In Plaquemines Parish in 1850, there were three in the black mistress class who were sugar planters—Andrew Durnford, Charles Reggio, and Adolphe Reggio—who produced a total of 730 hogsheads of cane sugar and 36,000 gallons of molasses (the Reggio brothers had produced 530 hogsheads of cane sugar and 2,000 gallons of molasses of those total figures).⁵³⁶ Andrew Durnford died shortly before the Civil War and the 1870 manuscript census does not list any Durnfords in Plaquemines Parish.⁵³⁷ And Charles and Adolphe Reggio were not listed in the 1870 agricultural census.⁵³⁸

⁵³⁴See the 1870 population and agricultural manuscript censuses for rural Louisiana.

⁵³⁵*Id.*

⁵³⁶*Id.*

⁵³⁷*Id.*

⁵³⁸*Id.*

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However, there is a strong indication that the Reggio brothers did continue sugar production after the Civil War. In the 1850 manuscript census, Charles Reggio is listed as a “sugar planter,” who owned \$18,000 of real property,⁵³⁹ and Adolphe Reggio is listed as a “sugar planter,” who owned \$70,000 of real property.⁵⁴⁰ In the 1870 manuscript census, they are both still listed as “sugar planters,” with Charles owning \$35,000 of real property, and Adolphe owning \$25,000 of real property.⁵⁴¹ It seems obvious that the Reggio brothers of Plaquemines continued their economic holdings and production after the Civil War.

Black mistresses who were rice planters in Plaquemines Parish did even better. The 1850 manuscript census listed the names of six black masters families who grew rice: Duplessis, Lafrance, Larche, Barthelemy, Paul, and Baptiste, producing 178,000 pounds of rice in 1850.⁵⁴² According to the 1870 manuscript census, they continued rice production, after the War: Duplessis, Lafrance,

⁵³⁹See the 1850 population and agricultural manuscript censuses for rural Louisiana.

⁵⁴⁰See the 1850 population and agricultural manuscript censuses for rural Louisiana.

⁵⁴¹See the 1870 population and agricultural manuscript censuses for rural Louisiana.

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Barthelemy, and Baptiste, with their relatives Ancar, St. Anne, Sylve, File, Lightell, Dinet, Encalador, Moliere, and possibly others, producing 131,220 pounds of rice, or 1.5% of the 8,639,026 total pounds of rice produced in Plaquemines Parish according to the 1870 agricultural census.⁵⁴³

After the Civil War, the black mistress class spread its landholdings to family members. With the loss of their enslaved labor, the black mistresses faced the problem of holding on to the land and farming it. For example, in 1860, Jesse Ashworth of Calcasieu Parish owned \$31,500 of real property and personal property,⁵⁴⁴ in 1870, he is listed as owning \$1,500 of real and personal property.⁵⁴⁵ Yet in 1870, there are four other Ashworth households, listed in 1870, with a total of \$1400 of real property and personal property.⁵⁴⁶

Another example of the black mistress distributing land to her family was

⁵⁴²See the 1850 population and agricultural manuscript censuses for rural Louisiana.

⁵⁴³See the 1870 population and agricultural manuscript censuses for rural Louisiana.

⁵⁴⁴See the 1860 manuscript census for rural Louisiana.

⁵⁴⁵See the 1870 population and agricultural manuscript censuses for rural Louisiana.

⁵⁴⁶See the 1870 manuscript census for rural Louisiana.

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that of the Boutte family of St. Mary Parish (Iberia in 1870). The 1860 census listed four families named Boutte in St. Mary Parish, owning a total of \$8,800 of real property, two of which owned a total of 22 enslaved blacks.⁵⁴⁷ With the emancipation of their 22 enslaved blacks, the Bouttes apparently divided their farms between their children and relatives to continue production. In the 1870 census, there are fifteen families named Boutte listed as owners of a total of \$15,200 of real property.⁵⁴⁸ So that the Bouttes, in distributing their land to relatives, increased (nearly doubled) the value of their land.

Was it possible that the same Bouttes named in the 1870 census were the former enslaved blacks that the Bouttes owned? This seems unlikely, because all of the Bouttes' enslaved blacks, according to the 1860 "slave" schedule, were listed as "black," while all of the Bouttes listed in 1860, were listed "mulatto."⁵⁴⁹ In 1870, all the Bouttes who owned property were listed as "mulatto," and probably were not former enslaved blacks (this assumes that having real property did not automatically "change" one's skin color in the census-takers' eyes).

⁵⁴⁷See the 1860 population and agricultural manuscript censuses for rural Louisiana.

⁵⁴⁸See the 1870 population and agricultural manuscript censuses for rural Louisiana.

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In some cases after the Civil War, some blacks, other than of the black mistress class, obtained large tracts of land, including some former enslaved blacks and some Northern blacks who fought for the Union in the Civil War. An example of the former was Arthur Sheff, a black born in Louisiana, and listed in the 1870 manuscript census as being 27 years old and owning an estate in Iberville Parish worth \$20,000.⁵⁵⁰ An example of a Northern black owning property in Louisiana was Edward Butler of Plaquemines Parish, who was 27 years old, born in Massachusetts, was the parish recorder of Plaquemines, and owned \$1,900 in real and personal property.⁵⁵¹

The black mistress class that survived the Civil War faced economic depression and increased taxes in the 1870s. There was a decrease in the value of the property in Natchitoches Parish, for example, from \$8 million in 1861, to about \$1.25 million by 1873. The result was an increase in the parish tax from 1.6 mills in Natchitoches Parish in 1861, to 64.5 mills in 1873. The result of this economic depression and increased taxes was the forced tax sales of land. The Natchitoches

⁵⁴⁹See the 1860 population and agricultural manuscript censuses for rural Louisiana.

⁵⁵⁰See the 1870 population and agricultural manuscript censuses for rural Louisiana.

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People's Vindicator reported 30,000 acres of land "offered at sale for taxes." The Shreveport Times a few weeks sooner had protested: "Under the present government [William Pitt Kellogg, who led white rule against black political leadership during the Reconstruction] of thieves, in God's name, what hope have the people of Louisiana before them?"⁵⁵²

Hence, the black mistress class was impacted by the Civil War and Reconstruction. The social response varied—some became leaders for the newly freed, formerly enslaved blacks, while some "passed over" to the white race. Some continued their land ownership, by distributing it to their relatives, but few continued their production after the War. While different black mistresses experienced the War in different ways, one fact is clear: the group was generally economically ruined by the Civil War, and by the depression and rise in taxes, during the following Reconstruction. Few were to enjoy the property and social status they had once enjoyed during the enslavement period.

D. RECONSTRUCTION: U.S. CONSTITUTIONAL EFFORTS AT

⁵⁵¹*Id.*

⁵⁵²*See* E. A. DAVIS, *supra* note 500, at 274.

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BLACK CITIZENSHIP AND MISCEGENATION⁵⁵³

As a result of the Civil War and its aftermath, the legal status of enslaved blacks changed radically.⁵⁵⁴ The Thirteenth Amendment to the U.S. Constitution

⁵⁵³See generally Charles Vincent, *Black Constitution Makers: the Constitution of 1868*, in IN SEARCH OF FUNDAMENTAL LAW: LOUISIANA'S CONSTITUTIONS 1812-1974 (Warren M. Billings & Edward F. Haas, eds., 1993); ROGER A. FISCHER, THE SEGREGATION STRUGGLE IN LOUISIANA 1862-1877 (1974); Germaine A. Reed, *Race Legislation in Louisiana, 1864-1920*, 6 LA. HIST. 379 (1965); HOWARD N. RABINOWITZ, RACE RELATIONS IN THE URBAN SOUTH Ch. 8 (1978); BLASSINGAME, BLACK, *supra* note 27, HOWARD ASHLEY WHITE, THE FREEDMEN'S BUREAU IN LOUISIANA (1970).

⁵⁵⁴See BELL, RACE, *supra* note 36, at 55-63:

Historians have cited humanitarian concerns, political realities, and a desire to punish the South as factors explaining the enactment of the civil rights amendments. But Dr. Mary Frances Berry suggests that the necessity and self-interest in utilizing large numbers of black troops during the conflict largely determined the measures aimed at securing emancipation and granting citizenship and suffrage during the postwar years.... Even without Dr. Berry's theory, it is beyond dispute that the Republicans recognized that unless some action was taken to legitimate the freedmen's status, Southerners would utilize violence to force blacks into slavery, thereby renewing the economic dispute that had led to the Civil War. To avoid this result, the Fourteenth and Fifteenth Amendments and Civil Rights Acts of 1870-1875 were enacted. They were the work of the Radical

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legally abolished enslavement.⁵⁵⁵ Unfortunately, it did not abolish or eradicate

Reconstructionists, some of whom were deeply committed to securing the rights of citizenship for the freedmen. For most Republicans, however, a more general motivation was the desire to maintain Republican party control in the Southern states and in Congress.

See also, RECONSTRUCTION, AN ANTHOLOGY OF REVISIONIST WRITINGS (Kenneth M. Stampp & Leon Litwack eds., 1969) [hereinafter STAMPP, RECONSTRUCTION], especially Chapter 9, Joel Williamson's "The Meaning of Freedom," at 193-219:

Thus, even in the early days of freedom, former slaves with amazing unanimity revealed—by mass desertion, migration, idleness, by the breaching of the infinite minor regulations of slavery, by a new candor in relationships with whites, and by their ambition to acquire land—a determination to put an end to their slavery.... In a sense, far from being the disaster so often described, Reconstruction was for the Negroes of South Carolina a period of unequal progress.

⁵⁵⁵The Thirteenth Amendment provides:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have the power to enforce this article by appropriate legislation.

as cited in BELL, RACE, *supra* note 36, at 56 n.6.

But see BELL, RACE, *supra* note 36, at 56 ("Enactment of the Thirteenth Amendment
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economic enslavement.⁵⁵⁶ In order to ensure their citizenship, Congress passed the Civil Rights Act of 1866, expressly recognizing that former enslaved blacks, now called “freedmen,”⁵⁵⁷ required the right to property and the right to contract.⁵⁵⁸

ended the Constitution’s protection of slavery, but did not resolve the issue of the newly freed slaves’ political status.”) Nor did it resolve the issue of the newly free blacks’ economic status!

⁵⁵⁶*See generally* BLASSINGAME, BLACK, *supra* note 27.

⁵⁵⁷The term “freedmen” is the term that the federal government used to describe the newly freed, formerly enslaved black following the Civil War. From a critical perspective, it hints of white property rights in the newly freed blacks. An alternative, liberating term, such as “free people,” would have been better descriptive of blacks’ self-determination, and of their new and inherent status as full citizens. On the contrary, the term “freed”-men has as an underlying connotation, that someone (Northern whites) had freed enslaved black “*men*,” and, as a result, the “freedmen” should be politically grateful, and, therefore, had a debt or obligation to pay (northern white Republicans) for their “emancipation” or freedom.

⁵⁵⁸The rights of the formerly enslaved blacks, to contract for property, and to enjoy other property rights, were expressly provided for in Section One of the Civil Right Act of 1866:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, **to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full**

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That effort at guaranteeing freedmen full rights of citizenship resulted in the passage of the Fourteenth Amendment.⁵⁵⁹ The Fifteenth Amendment provided the freedmen the right to vote, but only freed black *men*.⁵⁶⁰ On the other hand, the

and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding. (Emphasis added in bold-faced.)

Civil Rights Act of 1866, ch. 31, 1, 14 Stat. 27, 27 (1866).

⁵⁵⁹Section 1 of the Fourteenth Amendment provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

as cited in BELL, RACE, *supra* note 36, at 56, n.7.

⁵⁶⁰*See* BELL, RACE, *supra* note 36, at 55, n.10:

Adopted in 1870, the Fifteenth Amendment prohibited the denial of the right to vote to United States citizens because of ‘race, color, or previous condition of servitude.’ Congress was empowered to enforce the provision ‘by appropriate legislation.’ The fate of post-Civil War laws is reviewed in name Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH L. REV. 1323 (1952) (sic).

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black woman's struggle for full economic and legal equality in America was not won, either by constitutional amendments or by federal legislation; it had merely entered into another phase.

After Reconstruction, a new era of white oppression of blacks would begin.⁵⁶¹ In the meanwhile, during Reconstruction, many blacks especially those

Of course, the Fifteenth Amendment did **not** provide protection for the right to vote, on the basis of **gender!**

⁵⁶¹*See generally* VAN WOODWARD, STRANGE, *supra* note 64. *See also supra* note 129:

See KENNEDY, *supra* note 12, at 76, 77: 'Reconstruction's egalitarian spirit had posed challenges to antimiscegenation laws, but these challenges were typically short-lived. South Carolina's history is instructive in this regard. Prior to the Civil War, the state had declined to prohibit interracial marriage, but immediately following the abolition of slavery, white authorities enacted an antimiscegenation statute. Reformers removed the barrier in 1868, only to see it be reenacted in 1879. In 1895 white supremacists embedded the prohibition in the state constitution, where it remained for 103 years.'

Professor Kennedy also points out:

The same dynamic led to revisions of existing antimiscegenation laws in Alabama and Mississippi. Alabama changed its laws to render all interracial marriages null and void, while Mississippi increased the punishment for the violation of its prohibition on interracial marriage: persons engaged in such unions, the state

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who were formerly enslaved enjoyed the many benefits of American citizenship for the first time.⁵⁶² That included the right to contract to marry with a person of the opposition race; the interracial sexual order was changed briefly during Reconstruction, allowing for many, for the first time, the right of interracial couples to legally marry.⁵⁶³ This change provided some Reconstruction state

declared, could be confined to the penitentiary for life. See Alabama Constitution of 1865, art. 4, sec. 31; Miss. Session Laws ch. 4, sec. 3 (1865). See also Peter W. Bardaglio, *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South* (1995), 179.

Id. at 77, n.*.

⁵⁶²See generally STAMPP, RECONSTRUCTION, *supra* 554.

⁵⁶³See *supra* note 126:

See KENNEDY, *supra* note 12, at 254: ‘During Reconstruction, the color bar at the altar was breached in several places. For a brief period, Alabama’s supreme court invalidated that state’s antimiscegenation law, and when reformers friendly to Reconstruction overhauled the laws of Arkansas, Mississippi, and South Carolina, they dropped existing antimiscegenation provisions from the statute books. Reconstructionists likewise repealed Louisiana’s bar on mixed marriages. (Footnotes omitted.)’

See, e.g., *infra* note 577, *Cornelia Hart, Tutrix v. Hoss & Elder, Administrators*, 1874 WL 3865 (La. 1874), wherein the Louisiana Supreme Court validated a “marriage” between E.C. Hart, a

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Supreme Courts the opportunity to remedy some of the wrongs committed during enslavement. In Louisiana, this changed how antebellum laws on concubinage operated, by focusing in on the “afterwards married” exception in the statute.⁵⁶⁴

white man, and Cornelia Hart, a colored woman.

But see, supra note 127:

See MORAN, supra note 112, at 5-6: ‘During Reconstruction, the state high court in Alabama declared a ban of interracial marriage unconstitutional but reversed itself shortly thereafter. The U.S. Supreme Court upheld an antimiscegenation statute in *Pace v. Alabama* (106 U.S. 583 (1883)) in 1883, thereby cementing the doctrine of ‘separate but equal’ marriages and families. Only one state court declared antimiscegenation laws unconstitutional after the *Pace* decision. In 1948, the California Supreme Court in *Perez v. Sharp* (32 Cal. 2d 711, 948 P.2d 17 (1948)) concluded that prohibition of interracial marriage violated the principle of racial equality and interfered with liberty to choose a spouse. (Footnotes omitted, case citations added.)

See also KENNEDY, *supra* note 12, at 22:

During the reaction against Reconstruction, white supremacists exploited fears of interracial intimacy as perhaps the major justification for subverting the civil and political rights that had been granted to blacks, and the major reason for confining blacks to their degraded ‘place’ at the bottom of the social hierarchy.

⁵⁶⁴*See* LA. CIV. CODE, art. 1481 (1870), repealed by 1987 La. Acts No. 468, § 1:

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Louisiana Reconstruction courts were, for a short time, presented a rare opportunity to provide long-overdue property inheritance rights to black women. These cases, as were those during the antebellum period, involved “concubine” relationships, between white men and their now *formerly*, enslaved black women, and her miscegenational children.⁵⁶⁵ The following cases show how the political-economic order changed in the South during Reconstruction.⁵⁶⁶

In 1873, the Louisiana Supreme Court decided the case of *Fowler, Morgan and als. (sic) v. Ellen Morgan Individually and as Tutrix*.⁵⁶⁷ In *Morgan*, the deceased James S. Morgan was a white man whose legitimate white children from a prior marriage (“forced heirs” under Louisiana law) sued to void an inter vivos

Those who have lived together in open concubinage are respectively incapable of making to each other, whether inter vivos or mortis causa, any donation of immovables, ; and if they make a donation of movables, it can not exceed one-tenth part of the whole value of their estate. Those who afterwards marry are excepted from this rule. (Emphasis added.)

⁵⁶⁵See *supra*, Section IV, for a discussion and analysis of Louisiana’s antebellum statute and cases on concubinage.

⁵⁶⁶See *supra* note 126, on the changes concerning miscegenation law in the South, during Reconstruction.

⁵⁶⁷*Fowler, Morgan and als. (sic) v. Ellen Morgan Individually and as Tutrix*, 25 La. Ann.

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gift Morgan made to his then enslaved mixed-race daughters. Morgan had also granted them along with their then enslaved black mother, Ellen Morgan, their freedom at a future time.⁵⁶⁸ Morgan's inter vivos to his mixed-race children was given before the parish recorder, where he also legally acknowledged them,⁵⁶⁹ and was accepted by a third party to hold until the children were freed.⁵⁷⁰ (Today we would analyze such a transaction as a semi-secret trust.⁵⁷¹)

206, 1873 WL 6956 (La. 1873).

⁵⁶⁸*Id.*

⁵⁶⁹*Id.*

⁵⁷⁰*Id.* at *2.

⁵⁷¹*Id.*, although Louisiana did not, at the time, embrace trust law. *Morgan* is a precursor of the “semisecret” trust. *See, e.g., Pfahl v. Pfahl*, 10 Ohio Misc. 234, 225 N.E.2d 305 (1967). The semisecret trust came into vogue in the 1920s, when wealthy white, married “gentlemen” established financial security for their “flapper” mistresses. *See also* JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUST, AND ESTATES* 616-17 (2000) (citing Restatement (Second) of Trust § 55, Comment h (1959), as expressing the viewpoint that a constructive trust should be imposed in favor of the intended beneficiary in the semisecret, as well as secret, trust situation. *But see* Restatement (Third) of Trusts § 18, Comment c (T.D. No. 1, 1996), agrees, but admits that enforcing a semisecret trust by imposing a constructive trust “probably does not reflect the current weight of authority.”)

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The Court noted that under Article 193 of the Louisiana Civil Code⁵⁷² Morgan's miscegenational children whom he had legally acknowledged could receive gifts when they became free and, thereby, could inherit.⁵⁷³ The Court held that, as these events had occurred, it "could see no circumstances in this case which would have defeated the rights of the (miscegenational) children of the defendant, whatever may be the moral view of the question. (Emphasis added.)"⁵⁷⁴

In 1864, Louisiana as well as all Southern states amended its State Constitution to comply with the federal constitutional changes which represented a

⁵⁷²*Fowler, Morgan and als. (sic) v. Ellen Morgan Individually and as Tutrix*, 25 La. Ann. 206, 1873 WL 6956, at *2 (La. 1873), quoting La. Civ. Code, art. 193 (1825) stated:

The slave who has acquired the right of being free at a future time, is from that time capable of receiving testament or donations. Property given or devised to him must be preserved for him, in order to be delivered to him in kind, when his emancipation shall take place. In the meantime it must be administered by a curator.

In this author's mind, this arrangement is very similar if not identical to a semisecret trust.

⁵⁷³*Morgan*, 1873 WL 6956 (La. 1873) at *2.

⁵⁷⁴*Id.*

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sea change from the “Black Code” of antebellum enslavement days.⁵⁷⁵ The effects of this change are seen in the case of *Cornelia Hart, Tutrix v. Hoss and Elder, Administrators*.⁵⁷⁶ In that case, there was a battle over a large estate in Caddo Parish, Louisiana, for which succession was opened in 1869.⁵⁷⁷ Cornelia Hart, a former enslaved black woman, sued on behalf of her children with E. C. Hart, who was a white man.⁵⁷⁸ The black Cornelia Hart and white E. C. Hart had lived in open concubinage for several years and produced several children. They were married in November, 1867.⁵⁷⁹

E. C. Hart’s white collateral heirs also sued claiming that Cornelia Hart was

⁵⁷⁵See generally QUIGLEY, *supra* note 51.

⁵⁷⁶*Cornelia Hart, Tutrix v. Hoss and Elder, Administrators*, 26 La. Ann 90, 1874 WL 3865 (La. 1874).

⁵⁷⁷*Id.* at *1.

⁵⁷⁸*Id.*

⁵⁷⁹*Id.* at *1-2. According to the Court, a Roman Catholic priest performed the marriage, and the verbal process was written out and signed by the couple, three witnesses, and the officiating priest. “No marriage license was issued, and no return was made of the act of celebration for record. Subsequently the children were baptized by the same priest, of which he furnished a certificate.” *Id.* at *2.

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a woman of color and was legally prohibited from marrying E. C. Hart and their miscegenational children “could not be legitimated by a marriage subsequent to their conception and birth.”⁵⁸⁰ They also claimed that even if the marriage occurred, it was a “private marriage,” and that “proof of that class of marriages can only be made by notarial act executed by the parties in conformity with the provisions of that act.”⁵⁸¹ They further claimed that illegitimate children could not inherit until they were legitimated.⁵⁸²

The black Mrs. Hart’s counsel argued that “at the date of the marriage of E. C. Hart to Cornelia there was no law prohibiting the marriage; that the children of that marriage may and have availed themselves of the existing laws of the State to establish their legitimacy and their right to inherit their father’s estate. Civil Code,

⁵⁸⁰*Cornelia Hart, Tutrix v. Hoss and Elder, Administrators*, 26 La. Ann 90, 1874 WL 3865, at *2 (La. 1874).

⁵⁸¹*Id.*, citing Louisiana Statute “of 1868, No. 210, pages 278 and 279.”

⁵⁸²*Id.* at *2, citing Louisiana Civil Code, articles 180, 198, and 200. . . 204 (sic), stating that acknowledgment of an illegitimate child should not be made in favor of children whose parents were incapable of contracting marriage at the time of conception, and that legitimization, as prescribed in articles 180, 198, and 200 of the Louisiana Civil Code, could only occur by the formal acknowledgment of a white father, before a notary and two witnesses.

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articles 208 and 209.”⁵⁸³ As such, the moment the law was changed permitting interracial marriage, it was arguably lawful to legitimate the black children of white men in the same way that their white children were legitimated.

In disposing of the case, the Court first reviewed the language of the Civil Rights Act.⁵⁸⁴ The Court next noted that, under Louisiana’s State Constitution of

⁵⁸³*Cornelia Hart, Tutrix v. Hoss and Elder, Administrators*, 26 La. Ann 90, 1874 WL 3865, at *2 (La. 1874).

⁵⁸⁴The first section of the Civil Rights Act declares ‘that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property as enjoyed by white citizens, and shall be subject to like punishment, pains and penalties and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding.’

Id. at *3, Civil Rights Act of 1866, ch. 31, 1, 14 Stat. 27, 27 (1866).

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1864, title 1, article 1, “Slavery and involuntary servitude, except a punishment for crime, whereof the party shall have been convicted, are hereby forever abolished and prohibited throughout the State.”⁵⁸⁵ The Court found that Louisiana law considered marriage as a civil contract (C.C. art. 86),⁵⁸⁶ “Cornelia Hart, therefore, in November 1867, was vested with the right to enter into a contract of marriage.”⁵⁸⁷ The Court concluded that the religious ceremony that the Harts used to marry fulfilled the requirements for a valid marriage,⁵⁸⁸ and, as the Louisiana Constitution (Article 149), retroactively recognized prior “marriages made in good faith,”⁵⁸⁹ their marriage was valid.⁵⁹⁰

⁵⁸⁵*Cornelia Hart, Tutrix v. Hoss and Elder, Administrators*, 26 La. Ann 90, 1874 WL 3865, at *3 (La. 1874).

⁵⁸⁶*Id.*, citing Article 90 of the Code: “As the law considers marriage in no other view than that of a civil contract, it sanctions all those marriages where the parties at the time of making them were, first willing to contract; second, able to contract; and third, did contract pursuant to the forms and solemnities presented by law.” *Id.* at *3.

⁵⁸⁷*Id.*

⁵⁸⁸*Id.*

⁵⁸⁹*Id.* at *4, citing Code, Art. 149, in pertinent part: “All... marriages and executed contracts, made in good faith and in accordance with existing laws in this State, rendered, made

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The Court next discussed the issue of the legitimacy of the Harts' mixed-race children.⁵⁹¹ The issue was whether E. C. Hart could legally recognize the children in that "acknowledgment," under Louisiana law, must be proven by "a transcript from the birth or baptism kept agreeably to law or the usages of the county,"⁵⁹² and other means of proving legitimacy.⁵⁹³ The Court decided that Mrs. Hart, on behalf of her children, had met those tests.⁵⁹⁴ Hence, the Court awarded the E. C. Hart's estate to his black wife and mixed-race children.⁵⁹⁵

or entered into between the twenty-sixth day of January 1861, and the date when this constitution shall be adopted, are hereby declared to be valid..." *Id.* at *4.

⁵⁹⁰*Cornelia Hart, Tutrix v. Hoss and Elder, Administrators*, 26 La. Ann 90, 1874 WL 3865, at *4 (La. 1874).

⁵⁹¹*Id.*

⁵⁹²*Id.*

⁵⁹³*Id.* at *4-5, wherein the Court found that according to La. Rev. Civ. Code, article 198, acknowledgment may be made by the contract of marriage; or under article 208, there were other ways that legitimacy could be proven, such as private writings, public acknowledgments, education, and open concubinage.

⁵⁹⁴*Id.* at *5.

⁵⁹⁵*Id.*

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In summary, for a brief time during Reconstruction, Southern state legislatures recognized the importance of transferring wealth from white men to their black wives and mixed race children. In Louisiana, the Reconstruction Legislature did so, by permitting interracial marriage contracts, and by making it easier than it had been for antebellum miscegenational children to prove paternity. This allowed miscegenational families born out of “concubinage” to receive the state’s blessings of marriage and legitimacy, and allowed them to prove paternity in the same way as for white children.⁵⁹⁶

E. THE BLACK WOMAN’S STRUGGLE FOR RACIAL AND SEXUAL EQUALITY

During the post-Reconstruction period, the black woman entered into another phase in her continuing legal battle for economic and civil equality, if not

⁵⁹⁶See La. Rev. Civ. Code, art. 208. See also *Blasini v. Succession of Silvestre Blasini*, 30 La. Ann. 1388, 1878 WL 8609 (La. 1878), wherein “colored” children of a white man and a Mexican woman established their parents lived in “open concubinage” and thereby were awarded to share in their father’s estate along with their white half-brothers and half-sisters.

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civility.⁵⁹⁷ In 1896, the U.S. Supreme Court in *Plessy v. Ferguson*⁵⁹⁸ set the legal standard for three decades of legal racial discrimination.⁵⁹⁹

Less known is the case of Mrs. Josephine Decuir, a black women of the black mistress class, who, like Plessy, fought for racial equality, in addition, to sexual equality.⁶⁰⁰ In 1873, “Madame” Decuir filed suit against a steamboat

⁵⁹⁷See generally KEITH WELDON MEDLEY, *WE AS FREEMAN: PLESSY V. FERGUSON* (2003). In 1890, as Reconstruction was failing, the New Orleans Comite des Citoyens was founded to fight “Jim Crow” racial segregation legislation. It targeted an 1890 local statute requiring passenger railroads in Louisiana to provide “equal but separate accommodations for the white, and the colored races.” In *Louisiana ex rel. Abbott v. Hicks*, 44 La. Ann. 770, 11 So. 74 (La. 1892) the Louisiana Supreme Court held the segregation statute unconstitutional, as applied to interstate commerce. As a result, the Comite encouraged Homere Plessy to challenge the applicability of the statute vis-a-vis interstate transportation. Plessy established the constitutionality of racial segregation under the banner of “separate but equal,” which meant social and economic inequality became the law of the land until *Brown v. Board of Education*, 387 U.S. 483 (1954).

⁵⁹⁸163 U.S. 537 (1896).

⁵⁹⁹See generally ROBERT J. COTTROL ET AL., *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* (2003).

⁶⁰⁰*Mrs. Josephine Decuir v. John G. Benson*, Docket #7800, Supreme Court of Louisiana Collection, Department of Special Collections, University of New Orleans; Frederick Way, Jr., comp., *Way’s Packet Directory, 1848-1943* (Athens, Ohio, 1983), as cited in Kathryn Page,

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owner, citing Article 13 of the Louisiana Constitution of 1868, and a state statute, both of which forbade racial discrimination in certain public places.⁶⁰¹ Decuir, like many black mistress, faced the loss of favored status, that white society had

“Defiant Women and the Supreme Court of Louisiana,” in BILLINGS, *supra* note 140:

On 20 July 1872, the widow boarded the steamboat *Governor Allen* at New Orleans. Because she was of mixed white and black racial background, a *femme de couleur*, Decuir was denied a stateroom in the so-called ladies cabin, an area reserved for the exclusive use of white women. Instead, the cabin steward directed her to a stateroom set aside for freedwomen and freedmen located in an area called the ‘colored bureau.’ Decuir declined to accept such accommodations and spent the night sitting in a chair at the rear of a public area reserved for white women. She was not permitted to eat in the dining area with other cabin passengers; instead, her meals were brought to her, and a second chair served as her table. (Footnote omitted.)

Id. at 184-85.

It is noteworthy that although there was a designated white women’s cabin separate from the white men’s cabin, there was no distinction made between the sexes in the area reserved for African Americans. Female and male black passengers were assigned rooms in the same area. (Footnote omitted.)

Id. at 186. *See also* FOX-GENOVESE, *supra* note 30.

⁶⁰¹*See* BILLINGS, *supra* note 140, at 185.

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provided her prior to the Civil War.⁶⁰² Madame Decuir won the case at the trial level, and was awarded a thousand dollars in actual damages.⁶⁰³

Benson, the ship's owner, appealed to the Louisiana Supreme Court, and

⁶⁰²*Id.*, at 186-87.

Madame Decuir's presence before the bar posed a dilemma. Here was an educated woman, described by the white trial judge... as a genteel 'lady of color' who was modest, neat, and 'quite fair for one of mixed blood' and whose facial features were 'rather delicate.' Decuir was never a slave, but the color of her skin defined her not as a 'lady' but as a black woman. Were she white, there would be no question that Josephine Decuir fit the southern definition of an ideal 'lady'; a woman of purity, modesty, and refinement, fully deserving of male protection—be they black or white. (Footnote omitted.)

Id. at 187.

One of her attorneys attempted to establish her claim for equal treatment, arguing that a lady such as Decuir plainly could not undress for bed on deck 'on account of delicacy.' Furthermore, he averred, she was shocked, shamed, and mortified when subjected to the vulgar conversation of the crew and everyone else on the boat who passed by her.

Id.

⁶⁰³*Id.*

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lost.⁶⁰⁴ He then took the case to the United States Supreme Court, who, in 1877, found that the Louisiana State Constitutional provision prohibiting racial desegregation was unconstitutional, as it involved interstate commerce which was under federal jurisdiction.⁶⁰⁵ The Court then concluded that the steamboat owner had the right to adopt such “reasonable regulations,” as appropriate to conduct his business, including racially discriminating against black women.⁶⁰⁶ Hence, the Court held that a state could not *prohibit* segregation on a common carrier.⁶⁰⁷

⁶⁰⁴*Id.*

⁶⁰⁵*Id.* at 188.

⁶⁰⁶*Id.*

⁶⁰⁷*See* VAN WOODWARD, STRANGE, *supra* note 64, at 70-71:

The cumulative weakening of resistance to racism was expressed also in a succession of decisions by the United States Supreme Court between 1873 and 1898 that require no (sic) review here. In the *Slaughter House Cases* of 1873 and in the *United States v. Reese* and *United States v. Cruikshank* in 1876, the court drastically curtailed the privileges and immunities recognized as being under federal protection. It continued the trend in its decision on the Civil Rights Cases of 1883 by virtually nullifying the restrictive part of the Civil Rights Act. By a species of what Justice Harlan in his dissent described as ‘subtle and ingenious verbal criticism,’ the court held that the Fourteenth Amendment gave Congress

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Hence, Mrs. Josephine Decuir, a black mistress's offspring, joined the ranks of other African-American women, including the modern day Rosa Parks,⁶⁰⁸ in

the power to restrain states but not individuals from acts of racial discrimination and segregation. The court, like the liberals, was engaged in a bit of reconciliation- reconciliation between federal and state jurisdictions, as well as between North and South. Having ruled in a previous case (*Hall v. de Cuir*, (sic) 1877) that a state could not *prohibit* segregation on a common carrier, the Court in 1890 (*Louisville, New Orleans, and Texas Railroad v. Mississippi*) ruled that a state could constitutionally *require* segregation on carriers. In *Plessy v. Ferguson*, decided in 1896, the Court subscribed to the doctrine that 'legislation is powerless to eradicate racial instincts' and laid down the 'separate but equal' rule for the justification of segregation. Two years later, in 1898, in *Williams v. Mississippi*, the Court completed the opening of the legal road to proscription, segregation, and disenfranchisement by approving the Mississippi plan for depriving Negroes of the franchise.

⁶⁰⁸See generally JUAN WILLIAMS, *EYES ON THE PRIZE, AMERICA'S CIVIL RIGHTS YEARS, 1954-1965*, 66-67 (1987):

In 1955, Rosa Parks was a quiet but strong-willed woman of forty-three.... On Thursday, December 1,... Parks boarded a bus at Court Square. She sat down in the first row of the middle section of seats, an area open to blacks as long as no whites were left standing. At the next stop—the Empire Theatre—some whites got on, filing all the white-only seats. One white man was left standing. The bus driver... told Parks and the other three blacks in the fifth row to get up so that the white man could sit down. Nobody moved.... Parks was taken in a police car to the city jail, where she was booked for violating the law banning integration. She

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fighting for both racial and sexual equality. Their legacy and perseverance have served all Americans.

* * *

Black women who were enslaved enjoyed no property rights, were legally deemed property, and did not control their own sexuality. Black women who were free enjoyed limited property rights, but as friendly aliens, not as full citizens. For a time during the Civil War, free and enslaved blacks fought, voluntarily and involuntarily, for the Confederacy. During Reconstruction, many of the restrictions on black property rights, including prohibitions against interracial marriage, were lifted, allowing some miscegenational relationships to receive the property benefits of marriage. But this was short lived, and post-Reconstruction, “Jim Crow” laws were harsher than the antebellum, anti-miscegenation laws. While black enslavement was formally abolished with the Thirteenth Amendment, black women were just beginning to face new and long-lasting struggles for racial and sexual equality.

longed for a drink of water to soothe her dry throat. ‘But they wouldn’t permit me to drink out of the water fountain,’ she recalls. ‘It was for whites only.’

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VII. BLACKNESS AS PROPERTY AND CURRENT REFLECTIONS ON
BLACK PROPERTY OWNERSHIP

A. MISCEGENATION, BLACK WOMEN'S PROPERTY RIGHTS
AND BELL'S "INTEREST-CONVERGENCE" PRINCIPLE

Antebellum, Southern legal principles, regulating sexual relationships between white men and black women, and black women's property rights, test Professor Bell's "interest-convergence" principle. Bell's "interest-convergence" principle, relative to Critical Race Theory, states: "Translated from judicial activity in racial cases both before and after Brown, this principle of 'interest convergence' provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."⁶⁰⁹

This article described and analyzed the nature of sex, race, status, and wealth, through the law of miscegenation and black women's property rights, in the antebellum South. It found that black people in the antebellum South were generally enslaved and legally treated as property. Black women's sexuality was

⁶⁰⁹BELL, *supra* note 4.

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merely another aspect of property ownership that white men controlled. In rare instances, in which white men chose to reward their black sexual partners with the gift of freedom, the law often denied white men the power to do so. Even granted a legacy of freedom, white society often deemed black people as incapable of being freed and made them infeasible property of white families, passed on from one generation to the next. It is clear that when it came to enslaved black people, their property rights reflected Bell's interest-convergence principle, in that they had no property rights, and were legally deemed property, because it was in white society's best interests to keep blacks powerless and dependent on white support.

This article also evaluated private property principles through their application to the antebellum South's ultimate anomaly: nineteenth-century, southern black women who owned property; the black mistress. The relationship between wealthy white men and black women, and how the law regulated white men's attempts at property transference to black women, is particularly challenging to Bell's interest-convergence principle.

The existence of the black mistress in the antebellum South is a peculiar legal anomaly or perhaps "a mystery wrapped in an enigma."⁶¹⁰ The black

⁶¹⁰BLASSINGAME, *supra* note 3, at viii, used this phrase to describe George Bentley's

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mistress existed within the context of the property-enslavement-sexual paradigm nexus, which held that enslaved black women were white men's private economic and sexual property. Their existence and success challenged that doctrine.

This article served to answer three probing questions about the relationship between sex, race, status, and wealth: first, why did the law allow some blacks to be freed and to remain free, despite the general legal proposition of enslavement law that all blacks be enslaved? The answer to that question is that the laws of manumission and the legal status of free blacks reflect Bell's "interest-convergence" principle, in that those laws allowed wealthy white males to manipulate enslaved blacks to do their masters' bidding. White men's bidding included sexual favors from enslaved black women, family loyalty from the white master's mulatto children, and extraordinary military accomplishments and heroic

ministry:

One Lynn Creek, Giles country, Tennessee, there is a Hardshell Baptist Church, supported by a number of wealthy communicants of that "persuasion," who for several years past have had for their regular pastor a negro man, black as the ace of spades, named George.... George is the "preacher in charge" of a large congregation, nearly all of whom are slaveholders, and who pay him a salary of \$600 to \$700 for his personal services.

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achievements from enslaved black men.

Second, why did the law allow free blacks to own private property, despite the general legal proposition that all blacks be property-less? The right to private property was the greatest operative paradigm of nineteenth century America.⁶¹¹ It is what drove the American economy, the opportunity to achieve wealth, power, and status, through the acquisition of and development of property, particularly land and enslaved blacks in the antebellum South. Even for non-property-holding whites in the Promised Land of America, the promise of land and enslaved blacks (at least in enslavement states and territories) was a driving force. To deny free blacks the opportunity to own property would be to negate the single driving element of frontier expansion, indeed *the* core value of American society.

And third, why have African-American women been stereotyped as un-industrious, helpless victims of white domination, despite a history of self-determination and achievement? This study showed that black women, even in the most difficult of enslavement times, were able to acquire property, develop it, and accumulate wealth. It serves to explode the “helpless, defenseless” black woman

(citing the *African Repository* 1859 reprint from a Tennessee newspaper, at vii).

⁶¹¹*See supra* note 78.

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myth that plagues the contemporary mind.

Why is our contemporary view of African Americans so far removed from our history? It is because negative African-American stereotypes are a part of white America's historical attempt to maintain America as "white man's country."⁶¹² Such that, as Reconstruction ended in the South, and Union troops were removed, there grew a white "democratic" movement, promoting white domination over the black population, requiring that the status of the lowest white

⁶¹²See JORDAN, *supra* note 49, at 73-74:

The history of the proposition that America was and is meant to be "a white man's country" is found in words of a "liberal" patriarch: "Benjamin Franklin, who was as attuned to American destiny as anyone, nervously expressed the idea that the continent belong to 'White People.' 'I could wish their Numbers were increased. Why increase the Sons of Africa, by Planting them in America, where we have so fair an Opportunity, by excluding all Blacks and Tawneys, of increasing the lovely White and Red? But perhaps I am partial to the Complexion of my Country,' he concluded with his usual self-conscious good sense, 'for such Kind of Partiality is natural to Mankind.' Franklin was expressing an important feeling, one which a famous Virginian, William Byrd, expressed more directly: 'They import so many Negros (sic) hither, that I fear this Colony will some time or other be confirmed by the Name of New Guinea.'

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be the ceiling for the highest black.⁶¹³ For the formerly prosperous black mistress, reflecting their failed ties to the wealthy white men, this new political order required a great reduction in their status. This also coincided with a renewed status of white women, as “pure, lily white,” “innocent,” and “frail,” there to serve the sexual needs of white men.⁶¹⁴

Ultimately, antebellum society even controlled white men’s property rights. Despite their success in transferring freedom and wealth to some fortunate blacks, white men were eventually prohibited by white legislatures and courts from

⁶¹³*See generally* WOODWARD, STRANGE, *supra* note 64, at 31:

The Redeemers who overthrew Reconstruction and established ‘Home Rule’ in the Southern states conducted their campaign in the name of white supremacy.... Separation of the races continued to be the rule in churches and schools, in military life and public institutions as it had been before (during Reconstruction). (Emphasis added.)

See also C. VANN WOODWARD, REUNION AND REACTION, THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (1966). *Compare* WILLIAM IVY HAIR, BOURBONISM AND AGRARIAN PROTEST, LOUISIANA POLITICS 1877-1900, 107 (1969) (for a state-focused study of the change in post-Reconstruction politics and racially-based brutality, and of a “regime remarkably powerful, backward, and corrupt”).

⁶¹⁴*See generally* FOX-GENOVESE, *supra* note 30.

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effectively transferring wealth to black families. This is one of the roots of today's wealth gap between whites and African Americans, and of American society's failure to assimilate African Americans. As seen in antebellum cases involving white heirs who challenged property transfers to black women and miscegenational children, the law failed to provide white men the right to will wealth, and blacks the right to inherit or obtain wealth, consistent with Bell's interest-convergence principle.

A. "BLACKNESS AS PROPERTY" DOCTRINE

This legal history study of antebellum Southern anti-miscegenation laws and of black women's private property ownership rights evidences the existence and features of the "blackness as property" legal doctrine. In addition, it provides insights into the development of American private property (wealth) law.

America's private property ownership paradigms promoted the development of property, particularly land, through principles of free alienation, inter vivos by gift or sale, and causa mortis, by will. It sacrificed the traditional property principle of primogeniture and reduced family inheritance obligations and expectations. That paradigm represents the victory of development, living for today, property as a

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commodity, and the struggle for wealth and greed.

Consistent with the private property ownership paradigm, America's enslavement paradigm promoted many of the same aspects of the private property paradigm. As enslaved blacks were legally deemed to be "property," they were, in the antebellum South, a major (if not the major) investment in property. But the enslavement system was more than a business; it was a political-racial-sexual economy.⁶¹⁵ And enslaved blacks were more than mere property. They were people with feelings, aspirations, and needs.

America's sexual paradigm stripped enslaved and free black women of their sexual freedom. It allowed white men the right to rape black women without criminal or civil sanctions. It took from black women the personal and economic value of their person, thus de-valuing their position as stakeholders.

Paradoxically, even in light of these legal, economic, and personal barriers, in many instances, the black mistress enjoyed great property rights and privileges in the antebellum South. Many were virtually on par with their white male counterparts, as related to private property acquisition. A few, such as Madame

⁶¹⁵See PHILLIPS, *supra* note 14, at 401 ("Plantation slavery had in strictly business aspects at least as many drawbacks as it had attractions. But in the large it was less a business than a

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Ricard, held exceptionally large tracts of land and impressive plantation homes, exceeding the success of their white counterparts in wealth creation and personal gain.

Black mistresses' property ownership, like their freedom, did not come easily or go unchallenged. They faced many legal obstacles specifically designed to prevent obtaining property, hindering their ownership, and defeating their success. It was the strength of the private property paradigm, along with their personal perseverance and determination, and concurrent interests and support of their white benefactors that created their success as property owners.

In the post-Reconstruction days of "Jim Crow," the political economy changed from wealthy-white master-driven to powerful-white male politician-driven. The privileged position of the black mistress was greatly marginalized, reduced to that of the newly freed enslaved black. As a result, many former black mistresses led the legal battle for equality and civil rights for all Americans, seeking to regain the great property and civil rights privileges they enjoyed during the antebellum period. Many of them were truly sympathetic with the plight of the freedmen. Others merely sought to protect their own interests, seeking to escape

life; it made fewer fortunes than it made men.")

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the political and social forces “lowering” them in society. A few left the South, and along with some who stayed, “passed for white” (if they were light enough), abandoning their enslaved, African heritage.

The existence of the black mistress, then, represents the triumph of the private property paradigm over the enslavement paradigm. It clearly challenged the enslavement paradigm that all blacks should be enslaved property and never free. It also challenged the enslavement paradigm that no black should own property. On the other hand, the black mistress’s existence and her ownership of property resulted directly from the legal operation of the private property paradigm that promoted the interests of wealthy white men. Hence, the political economy, the sexual economy, and the enslavement economy had one main defining feature: the domination, supremacy, and privilege of the wealthy white men.

As reflective of Professor Bell’s “interest-convergence” principle, black women’s exercise of property rights needed to coincide with the interests of the wealthy.⁶¹⁶ Educated, physically attractive and available, socially-sophisticated, and even wealthy free black women served all the sexual, political, economic, and

⁶¹⁶See BERLIN, *supra* note 7, at 182 (noting “The desire to keep the South a (wealthy) white man’s country governed white racial thoughts and policies throughout the antebellum

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social needs of the wealthy white men. In the end, they are, at best, reminders of the struggles that black women endured and overcame against all odds. At worst, they are examples of the universality of greed and abuse in a political economy. And lastly, their success, as competent business leaders, debunks the anti-empowerment myth, which is an underpinning of contemporary sexism and racism.

Hence, the antebellum South developed legal principles that exhibited the “blackness as property” doctrine. Its elements included the supposition that black people were an inferior race, and legal principles that enslaved blacks were legally white property; enslaved black women’s sexuality belonged to their white masters; white men could legally rape black women; concubinage or consensual sex between white men and black women was legally regulated; free blacks were legally friendly aliens, not citizens; and all blacks, no matter their status, remained subject to the political whims of white society. Unfortunately, the blackness as property doctrine did not die with the legal end of black enslavement, but continues as a part of today’s constitutional framework.

years.” (Emphasis added.)

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B. THE CONTEMPORARY BLACK WOMAN'S ECONOMIC PLIGHT

This article analyzes how the antebellum South developed legal principles, regulating miscegenation and black women's property rights. Miscegenation and enslavement laws have contemporary effects on African-American wealth and wealth creation.⁶¹⁷ This article casts new light on an old myth, relative to sex, race, status, and private property, that of the "helpless, defenseless black woman." According to the myth, it is believed that black women are helpless, incapable of controlling their destiny. This is a disturbing image, for it seems to reflect the apparent plight of many African-American women (and families) enslaved in today's capitalist political-sexual-racial economy.⁶¹⁸

⁶¹⁷*See generally* SHAPIRO, *supra* note 42.

⁶¹⁸Contrary to Professor Davis's findings (*see* DAVIS, *supra* note 9, at 282-84), this author believes that today there is a unitary racial-sexual political economy. At the core of that economy are the impoverished, inner city poor blacks, for whom limited educational opportunities, limited access to capital, and high unemployment are continuously taking its toll on African-American women, men, and, most importantly, their families. Evidence of the unitary nature of that economy is its duplication throughout each and every region of the country, in black ghettos, in Atlanta, Chicago, Detroit, Los Angeles, Miami, New Orleans, New York,

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In today's political-sexual-racial economy, the welfare mother parallels the nineteenth century enslaved black woman. Not only is she practically devoid of property in the world's richest economy, she is downtrodden and generally denied opportunities for property advancement.⁶¹⁹ She is enslaved (along with her family) in a world of crime, drug-abuse, public housing, HIV and other STDs, mental illness, and sometimes spiritual hopelessness.⁶²⁰ She is often legally denied even the minimum of property interest: that of her welfare benefits.⁶²¹

The low-to-non-existent legal status of the welfare mother vis-a-vis property rights reflects Professor Bell's "interest-convergence" principle,⁶²² in that her interests have little-to-no convergence with the interests of the white, male power structure. No value to rich white America equals no private property rights. These African-American women are often propertyless, not due to their inability to

and Washington D.C., and in every major and minor city and town, where African Americans reside in great number.

⁶¹⁹*See* FISS, *supra* note 61 .

⁶²⁰*Id.*

⁶²¹*See generally* BROWN, *supra* note 61.

⁶²²*See* BELL, *supra* note 4.

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achieve or lack of talent, but due to society's failure to value their worth. (This case study demonstrates how, despite the nineteenth century enslavement sexual economy, black women were often masters of their destiny and were capable business leaders.) They are, unfortunately, like the enslaved black women of the nineteenth century, who served white men's sexual and labor needs: the victims of an often brutally unfair society.

Then there is the African-American middle class woman. She parallels the free black women of the antebellum South. Consistent with Bell's "interest-convergence" principle, she is given greater property rights, such as limited educational opportunities, when and as those rights converge with the interests of the white, male power structure. It is the African-American middle class woman, who is perhaps most affected by the Supreme Court's decision in *Grutter*.⁶²³ *Grutter* has the effect of increasing the number of college-bound African-American women, attending elite, predominantly white (male) campuses.⁶²⁴ As

⁶²³*Grutter v. Bollinger*, 123 S. Ct. 2325 (2003), *supra* note 18.

⁶²⁴*See* JOURNAL, *supra* note 25. It does so without regard to the effects on the African-American, such as adding to wealth-gender imbalance: the preponderance of educated African-American women over the dearth of educated black men. (The author suggests that there should be a conscious effort to *add* more African-American men to elite, predominantly white,

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such, she is allowed to participate in, and exercise the benefits of, a “white” university education, but solely to add “diversity” or enrichment to the white (male) majority.⁶²⁵ An abundant number of educated, sophisticated black and brown women, provides white men a trophy of political-racial-sexual conquest.⁶²⁶

And last, but not least, there is the wealthy and powerful African-American woman. She parallels the antebellum black mistress, who was at the height of society’s power and wealth. She assuages the guilt of white society. These rich and successful African-American superstars, such as Oprah Winfrey and Condoleezza Rice, exemplify today’s American Dream, achieving economic or political success against all odds, through their own extraordinary talent, hard work, and good fortune. Their property rights support Bell’s “interest-

educational institutions (and not just as athletes). The author does not suggest reducing the numbers of African-American women on those campuses.) Due to the fact that there are more African-American men in America’s prisons than on its college campuses, we have inherited a social order founded upon our racist, enslavement past. That is, except as laborers, soldiers in time of war, and the hero (today, the gifted athlete), the dominate white male culture has little use for African-American men (similar to society’s attitude towards poor, uneducated African-American women).

⁶²⁵See *Grutter v. Bollinger*, 123 S. Ct 2325, 2733 (2003), *supra*, note 19.

⁶²⁶See generally ELRIDGE CLEAVER, *SOUL ON ICE* (1969).

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convergence” principle, in that, for white America, these African-American superstars serve as symbols of racial progress, and the triumph of America democratic-capitalism, over all other forms of political economy. They also allow the white, male power structure to ignore the need to develop meaningful solutions to persistent problems of gender and racial wealth disparity in this country. (One needs only to visit local and state prisons or inner city schools throughout this country to appreciate the failing of our present political-sexual-racial economy.)

VIII. CONCLUSION

In analyzing contemporary constitutional issues, Critical Race Theory and legal history are valuable tools. This article utilizes such tools to seek the roots of the Supreme Court’s rationale in the *Grutter* case. The result of that inquiry is that *Grutter* is rooted in the antebellum South’s “blackness as property” legal doctrine.

The blackness as property doctrine embodied the political-economic-sexual tenets of antebellum Southern society. It was based upon the then politically-correct assumption that black people were an inferior race and, therefore, required white control. It justified society’s treatment of enslaved black people as legally

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classified white people's property. It devalued black women's sexuality, treated it as a commodity or a mere dividend of a white's purchase of a black woman. It dictated the legal status of free blacks, who were legally permitted to exercise some property rights, not as citizens, but as friendly aliens. It even prevented wealthy white men from controlling their own property when they attempted to bequest freedom to their enslaved black sexual partners and their children. The blackness as property doctrine derived from antebellum Southern legal principles, regulating miscegenation and black women's property ownership rights.

The blackness as property doctrine also reflects and supports Professor Derrick Bell's "interest-convergence" principle. As such, enslaved black women were given no property rights, as it was in white society's interest to keep them powerless and dependent on white support. They were also denied the right to their own sexuality. When it came to concubinal sexuality, between white men and black women, at least one state's law provided black women some limited property interest, as it was in white society's interest to give white men an incentive to encourage black women to participate as concubines. And when it came to the black mistress, white society allowed them to exercise many property rights, as friendly aliens as it was in white society's interest to create black allies,

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supportive of a corrupt enslavement social order. Hence, the law regulating and negotiating the sexual-racial economies of property acquisition and transfers, including testamentary transfers and intestate succession, served to reinforce a greater social and economic order in the antebellum South: the domination, supremacy, and privilege of wealthy white men.

As it relates to *Grutter* and contemporary constitutional matters, Justice O'Connor's rationale in *Grutter* has its roots in the antebellum South's blackness as property doctrine. First, it reiterates the racist foundation of that doctrine, by finding that African Americans who apply to elite, predominantly white, public universities and professional schools are intellectually inferior to their white counterparts. Second, it ignores a critical legal history analysis of black property disenfranchisement and white immorality, by finding that African Americans are undeserving of any consideration for wealth reparations, as victims of centuries of white wealth oppression. And third, it treats African Americans as white property, by expressly stating that those few chosen African Americans that whites pick to integrate these elite educational institutions, are merely "diversity commodity" (the author's term, not the Court's), expressly there to enhance the white majority's educational experience. Overall, *Grutter* adopts the blackness as property doctrine,

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reducing African Americans to white property, by assuming the power to control their destiny, and by permitting a selected number of them, for some uncertain (but limited) time, to integrate elite, predominantly white, educational institutions.

Grutter's “anti-affirmative action” rationale also reflects Professor Bell’s “interest-convergence” principle, in that it provides some chosen African Americans a chance at wealth transference, while providing whites with many benefits. These white benefits, supporting the contemporary constitutional blackness as property doctrine, include the appearance of an open and free society (particularly to world opinion during the “war on terror”), a source of sexual exploitation (particularly of black women), athletic exploitation (usually of black men), military leadership (especially important to the Iraqi invasion), and an expected cadre of African Americans, loyal to the American Dream (a source of Republican converts, such as Justice Clarence Thomas). The blackness as property doctrinal analysis may also prove valuable in analyzing other contemporary constitutional disenfranchisement questions, relative to the right to control one’s sexuality.⁶²⁷

⁶²⁷The blackness as property doctrine and the regulation of miscegenation and of black women’s property rights parallels the contemporary, constitutional debate on same-sex marriage.

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See generally EVAN GERSTMANN, *SAME-SEX MARRIAGE AND THE CONSTITUTION* (2004) (wherein the author analyzes the legal debate relating to same-sex marriage, and whether the courts or the electorate should settle the question: “Does the Constitution protect the right to same-sex marriage?”)

As this article shows, many times antebellum Southern Supreme Courts denied a white “husband” and father the right to free his enslaved black mistress and their children, through an act of inheritance. The single reason that state justices provided in these cases was “defense of the family.” By “family,” these justices did not mean the miscegenational family, but the “white family.” The result was to ignore the miscegenational family, and to abandon its black members, so that they remained the property of the white family. One is compelled to compare the contemporary debate concerning the Defense of Marriage Act (“DOMA”), and ask, what effect does a narrow legal definition of heterosexual “marriage,” have on the homosexual family? *See* in DOMA, Pub. L. No. 104-99, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000) and 28 U.S.C. § 1738c (2000)), Congress bars federal recognition for as-of-then, nonexistent same-sex marriages. *See also*, Rebra Carrasquillo Hedges, *The Forgotten Children: Same-Sex Partners, Their Children’s Unequal Treatment*, 410 B.C. L. REV. 883 (2002).