

The Sexual Economy of American Slavery: Interracial Intimacy, Caste & the Shadow Family

Adrienne D. Davis

Reef C. Ivey II Research Professor of Law, University of North Carolina School of Law

Please do not quote, cite, or circulate without permission

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

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

Two narratives of interracial intimacy have dominated legal and popular thought in the U.S.

Law plays central roles in both. The first story, and the one probably most familiar to legal scholars, is

about the web of rules states erected prohibiting and punishing interracial intimacy. In this

understanding of history, criminal and civil bans on miscegenation repressed interracial intimacy much as

other Jim Crow statutes repressed other social relations between the races. Miscegenation regulation

appears to be the sexual manifestation of social apartheid, implementing in the bedroom what

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

²Shaw v. Brown, 35 Miss. 246 (1858).

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

Neither of these narratives are of purely historical interest. Both have on-going normative content and have shaped how we think about the politics and meaning of interracial intimacy today. For instance, contemporary commentators, including many legal scholars, have gained much traction from the notion of miscegenation regulation as sexual racial apartheid. The story goes like this: the injury of bans on interracial intimacy was in their repressive effect—prohibiting and punishing interracial sex—and hence rising rates of interracial intimacy, enabled by the repeal of laws banning such intimacy, are a bellwether of racial progress. In this version of the “repressive hypothesis,” interracial intimacy heralds true racial equality, or in a more extreme form, predicts and argues for the

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

demise of the racially conscious state.⁴ Remove the law and let them love.

Moreover, the ugly and brutal narrative of law as conferring on white men close to complete sexual autonomy vis-a-vis black women has shaped our understanding not only of slavery, but also of the subversive potential of interracial intimacy. Scholars of slavery have identified ways in which the antebellum South required elite whites to make substantial concessions of liberty, most notably, freedom of speech and control over slaves themselves. Yet, in the context of sexual and intimate relations, historians have concluded that the state declined to intervene in these relations, indeed expedited them, because within a broad sphere of sexual liberty, commodified and coerced sexual and reproductive relations reinforced the racial and gender orders comprising slavery. This vision of interracial sexual relations is an extremely juridical one, in which law confers sexual power on white men in some part because their sexual interests are seen as coterminous with the slaveholding state.⁵ According to the juridical imperative, sex between this dyad is in the broader service of structural supremacy.

This Article turns its attention to the two Mississippi case studies with which it started as examples of miscegenation regulation that fits neither the sexual racial apartheid nor sexual libertarian paradigms. Both of these cases involve challenges to white men's efforts to free and leave property to families they fathered and enslaved, or what I call their shadow families. On their face, these might seem to be familiar, if extreme, inheritance cases about "greedy heirs" claiming more than their due.

⁴ This term derives from Michel Foucault's later work on sexuality and is developed in Section I. *See infra* [add].

⁵ Or, in the most extreme view, the state is imagined as the agent of white male sexual autonomy. *See infra* notes [x] and accompanying text.

Certainly, rules restricting emancipation of slaves, known as manumission laws, have not figured much in legal studies of miscegenation regulation. Yet, by contrasting these two cases—one shadow family wins its freedom and its property and one shadow family loses—the Article exposes how apparently sexually neutral rules, such as manumission doctrine, operated as significant interracial sexual controls. It uses these conflicts and their resolution to show how a crucial, yet under-attended, task of rules managing interracial intimacy was to define the limits of otherwise authorized interracial intimacy—and, crucially, of white male sexual autonomy—at the point of threat to the social order: legitimized, manumitted shadow families owing substantial property. Understanding these rules that governed manumission as key mechanisms regulating sexual relations between blacks and whites does more than “add more law.” It also demonstrates the descriptive, and, as I’ll show, normative limits of both of the dominant accounts of interracial intimacy regulation. Neither an understanding of miscegenation rules as keeping blacks and whites apart—sexual racial apartheid—nor as giving white men free sexual rein—sexual libertarianism—predicts or accounts for the law’s management of the shadow family threat.

The goal of this Article is not to contradict the explanatory power of either sexual racial apartheid or sexual libertarianism as accounts of law’s role in managing interracial intimacy. To the contrary, each yields a central insight about the legal history of miscegenation regulation. Rather, the Article incorporates the shadow family cases with insights from the extant dominant narratives to suggest the presence of a broader paradigm governing interracial intimacy: caste. The central task of caste regulation is not to keep races apart, but rather, to manage the inevitable interaction between them—securing social hierarchies by regulating points of social contact. As the shadow family cases illustrate, sexual and intimate contact are places where property—racial, economic, and sexual

property—is particularly susceptible to re-distribution. When not properly managed, interracial sexual relations may pose threats to social hierarchies that are often missed or glossed over under narratives of intimacy as romance.

In conceiving interracial intimacy governance as caste regulation, this Article concludes by making two claims, one about the legal past and one about the legal present. Both of the dominant accounts have sponsored broader normative claims about intimacy, ones that the caste rubric challenges and complicates. First, the article deploys the caste rubric to identify the limits of the sexually libertarian slave state and the juridical imperative. It considers how a focus on restrictions on white male sexual autonomy might change how we conceive of not only the sexual regulation, but slavery itself. Second, the caste rubric challenges the bellwether hypothesis, arguing for a different understanding of the significance of interracial intimacy today.

A couple of caveats. First, the focus of this Article is on the regulation of interracial intimacy between blacks and whites in the U.S. South. Other legal scholars and historians have done broader studies or have focused on other groups.⁶ My argument, though, is not about intimacy itself. Rather, it

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

is about paradigms for understanding its management and the normative claims and understandings those paradigms have sponsored. Second, these case studies are fairly anomalous and should not be taken as indicative of broad trends in southern society. Few slaveholders manumitted their shadow families and even fewer transferred property of any note. As in prior work, claims are about legal and cultural ideology, not sociology. Finally, the Article does not mean to de-emphasize the horrors of lynching or the regularity and brutality of rape and overt sexual violence in American slavery. (Or to represent enslaved women as complicit succubi in a pornographic sexual schema. There is real risk that what we might lose is an appreciation for the moral repugnance of the system.) In short, the Article does not make the standard challenge to replace either of these standard accounts. To the contrary, I firmly believe that the scholarship on rape and forced reproduction implemented a critical paradigm shift in slavery studies, drawing attention (finally) to how endemic sexual exploitation was to slavery. Similarly, the maintenance of sexual racial apartheid between black men and white women was one of the most brutal manifestations of Jim Crow. Rather, my concern is that, by limiting our understanding to sexual racial apartheid and sexual libertarianism, we miss how other laws too have shaped our sexual racial landscape.

This Article proceeds in four parts. Section I explains the two dominant accounts of miscegenation regulation as sexual racial apartheid and sexual libertarianism. It reviews, briefly, the relevant regulatory regimes and the normative claims about interracial intimacy—the bellwether hypothesis and the juridical imperative—each has generated. Section II turns its attention to cases that these accounts cannot adequately predict or explain: efforts by slaveholders in Mississippi to manumit and leave property to what I describe as their shadow families. While these two cases yield opposite

outcomes, taken together they suggest the descriptive and normative limits of both of the dominant accounts. This Article does not seek to replace either of these accounts; to the contrary, each offers central insights about interracial intimacy regulation in the U.S. Rather, Section III makes the case that the common thread linking *all three accounts* is caste, or efforts to regulate interracial contact to reinforce and maintain racial and gender hierarchies while minimizing and managing the threats that certain forms of intimacy might bring. This Section attempts to offer a so-called “thick” description of what I mean by caste regulation, distinguishing it from others who have used this rubric, most notably Cass Sunstein, and William Forbath [and Andy Koppelman/Richard Epstein]. Section IV concludes the Article by suggesting some of the implications of the shadow family cases and the caste rubric for our understandings of American law’s interplay of sex, race, and power in history and today.

In some ways, this Article continues a story I began several years ago about how southern courts confronted with slaveholder wills manumitting and leaving property to shadow families could uphold these wills and yet secure racial hierarchies at the same time. I argued that testamentary manumissions allowed slaveholders to maintain power over their shadow families through their erotic and affective lives and speculated that *inter vivos*, or lifetime, manumissions would pose a far greater threat to white male sexual power. This Article takes up where that one left off, investigating such *inter vivos* manumissions and concluding that the threat they posed was actually to the slaveholding state itself.

I. NARRATIVES OF INTERRACIAL INTIMACY: SEXUAL APARTHEID & SEXUAL LIBERTARIANISM

Legal regulation of miscegenation has generated two distinct regimes that dominate thinking

about interracial intimacy and its regulation. This Section describes the two sets of laws on which scholarly and popular understanding of interracial intimacy rests. It will then map the broader descriptive and normative claims derived from these regulatory regimes.

A. *Sexual Racial Apartheid*

One narrative, and perhaps the dominant one, of interracial intimacy derives from the web of rules states erected that directly prohibited and punished interracial intimacy. This understanding of interracial intimacy regulation is dominant in large part, I think, not only because of formal prohibitions on interracial marriage and sex, but also the supporting cast of uncompromising and brutal laws and practices that accompanied them. Here I explore, briefly, this legal regime, and the ways it sought to prevent and punish interracial sexual contact. What we encounter is the apotheosis of miscegenation regulation as prohibitory, repressive--and even lethal.

1. Sexual Segregation

a. Bans on Interracial Marriage

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

those who did marry members of another race.⁷ Some even prosecuted religious and other officials who performed such marriages.⁸ Penalties ranged from fines to imprisonment and hard labor.⁹ Georgia sentenced a woman to ten years in prison, and one religious official [fill in the sentence].

Legal nullification of the marital contract had significant civil effects, as well, which have been under-attended in legal scholarship on miscegenation, as well as on marriage.¹⁰ Without the formal,

⁷ Historical data is still very limited, but historians have begun excellent work in this area. *See, e.g.,* Novkov, *Racial Constructions*, *supra* note [], at 57 n.5, 2 (study of Alabama between 1883-1938 finding that Alabama attorneys general filed over 300 charges for violations of miscegenation laws, resulting in 177 convictions; 38 of these produced appellate court opinions); Novkov, *Best Interests*, *supra* note []. *See also*, HODES, *supra* note [], at 149 (white woman served two years in prison); Novkov, *Racial Constructions*, *supra* note [], at 34 (black woman sentenced to seven years in penitentiary); [cite Georgia case in which white woman was imprisoned for ten years]. One legal scholar has uncovered a fascinating use of the rule in a California murder trial. A Filipino man was charged with murdering his white wife's lover. He invoked spousal privilege in order to exclude the wife's testimony, but the State had the marriage declared void, thereby defeating his assertion of privilege. Volpp, *American Mestizo*, *supra* note []. This is reminiscent of criminal trials in the slave South in which courts had to determine whether spousal immunity applied to slave couples. *See* DANIEL FLANIGAN, *THE CRIMINAL LAW OF SLAVERY AND FREEDOM: 1800-1868* (1987).

⁸ [cite case where minister fined; statutes] *See* Novkov, *Racial Construction*, *supra* note [], at 5 (characterizing officiating the marriage of parties of different races as strict liability, regardless of knowledge). Interestingly, Novkov found that the only successful appeal to a miscegenation conviction in Alabama between the end of the Civil War and 1889 involved a justice of the peace/minister. Novkov, *Racial Constructions*, *supra* note [], at [] (discussing case cite); Novkov, *Best Interests*, *supra* note [], at 17. Novkov notes that only the statutes directed at officiates had a truly independent standing from other sexual regulations. Novkov, *Best Interests*, *supra* note [], at 15.

⁹ *See, e.g.,* Novkov, *supra* note [], at 5. [note post-civil war]

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

legal recognition of marriage, sexual families¹¹ do not yield the economic and other legal relationships that can be critical to sustaining a family.¹² And, contrary to popular belief, these economic abilities and disabilities of marriage affect much more than just inheritance among the wealthy. For instance, one major benefit to legally recognized families is the homestead exemption, which protects the “family” home against creditors. Hence, miscegenation regulation entailed economic as well as criminal surveillance and punishment.

b. Bans on Interracial Sex

Statutes criminalizing interracial sex worked in tandem with the legal bans on interracial marriage.¹³ Anti-fornication laws prescribed heightened penalties for non-marital sex between whites and non-whites.¹⁴ The anti-marriage statutes not only criminalized, but, as just mentioned, nullified the

¹¹ See generally MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) (quote defining sexual family).

¹² For further discussion, see Davis, *Private Law of Race and Sex*, *supra* note []. Contemporary advocates of same-sex marriage have identified at least [number] legal rights and abilities that inure to married couples. See, e.g., Ira Ellman, [cite]. But see MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) (arguing state should support bonds of dependency, not “horizontal” affective ones).

¹³ Julie Novkov offers a helpful description of the interplay of rules prohibiting adultery and fornication with anti-marriage laws. Novkov, *Best Interests*, *supra* note [], at 14-15. See also, Pascoe, *Race, Gender, and the Privileges of Property*, *supra* note [], at n.15 and accompanying text.

¹⁴ For instance, in Alabama, adultery and fornication were each misdemeanors, but miscegenation was a felony that could result in imprisonment. Novkov, *Racial Constructions*, *supra* note [], at 6; Novkov, *Best Interests*, *supra* note [], at 15. These were upheld in 1883. *Pace v. Alabama*, 106 U.S. 583 (1883) (upholding fornication laws giving heightened penalties for sex between members of different races.) The U.S. Supreme Court declared these laws unconstitutional three years before the *Loving* decision. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

legal effects of these interracial marital contracts. Once a marriage was declared void, the couple could be prosecuted for having unlawful sex outside of marriage, with more severe penalties than if they engaged in sex outside of marriage with someone of the same race.¹⁵ Paradoxically then, marriage across the color line entailed heightened risk of prosecution for fornication (thereby defying the logic of anti-fornication law). The anti-fornication laws also were the basis for wide-spread independent prosecutions. But they operated synthetically with the anti-marriage statutes to produce a unique Catch-22 for those who dared love across the color line.

c. The Southern Rape Complex

Undergirding these direct prohibitions on miscegenation were criminal and vigilante regulatory forces, directed primarily at interracial intimacy between black men and white women. Much has been written about how the South construed black men as sexual predators of white women, commandeering rape and lynching in the service of protecting white womanhood. Rape law incorporated massive racial disparities along two axes: prosecution and punishment.¹⁶ Jim Crow

¹⁵ See Novkov, *Racial Constructions*, *supra* note [], at 5-6 (Alabama's fornication prosecutions of nullified couples typified this pattern); *see also*, Pascoe, *Race, Gender, and the Privileges of Property*, *supra* note [], at 217 ("criminal courts treated offenders as if they had never been married at all; that is, prosecutors charged interracial couples with the moral offense of fornication or some other illicit sex crime, then denied them the use of marriage as a defense.").

¹⁶ *See, e.g.*, RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* [pin] (1997). Much has been written about the use of interracial rape to police racial and gender norms. *See, e.g.*, DOWD HALL, *supra* note [] (using biography of anti-lynching reformer to explore racial and sexual politics of both lynching itself and anti-lynching struggles); GILMORE, *supra* note [] (offering rich account of political historical context); *see also*, Holden-Smith, *supra* note [], (1996) (analyzing role of black on white rape in defending lynching); Valerie Smith, *Split Affinities: The Case of Interracial Rape*, in *CONFLICTS IN FEMINISM* 271 (Marianne Hirsch & Evelyn Fox Keller eds., 1990) (considering from literary perspective).

southern courts concluded that white women were presumed to have withheld consent from sexual relations with black men *as a matter of law*. While typically this sealed a conviction, one black defendant was the beneficiary of this presumption when a judge overturned his conviction, concluding that the exclusion of exonerating evidence was fatal because “without such evidence, the jury could be forgiven for presuming that no white woman would ever consent to crossing the racial boundary, even if she had transgressed sexual boundaries with white men.”¹⁷ As the second axis of analysis, punishment, shows, the consequences were serious. Until *Furman v. Georgia* in 1972, rape constituted a capital crime in every southern state.¹⁸ Black men suffered disparate treatment for sexual assault not just in prosecution and conviction, but also in penalty. Rape of a white woman by a black man was perceived as one of the most brutal crimes that could be committed and was punished accordingly.¹⁹ (Its converse was, and remains, the least serious.²⁰) Not only executions, but also non-capital sentencing for rape was starkly racially disparate.²¹

¹⁷*Story v. State*, 59 So. 480, [pincite] (Ala. 1912).

¹⁸ 408 U.S. 238 (1972) (finding death penalty unconstitutional).

¹⁹ Rape prosecutions took on a gruesomely voyeuristic quality. Black men rapists were big, burly, and brutish; the age of the victim was often reduced; the victim was repeatedly assaulted; the victim was sexually innocent and/or information was withheld. *See, e.g.*, [cites].

²⁰ According to a 1988 study quoted in Kennedy, the rapes taken most seriously are black men/white women; the least serious: white men/black women. The average prison term for raping black woman is two years; a Hispanic woman five years, and a white woman ten years. KENNEDY, *supra* note [], at 73.

²¹ Randall Kennedy’s in-depth research demonstrates how this affected punishment. In Virginia between 1908 and 1949, no white men and 45 black men were put to death for rape. During those same years, of those *convicted*, twice as many blacks as whites were sentenced to life. In Florida between 1935 and 1955, 23 blacks were executed for rape and 1 white. KENNEDY, *supra* note [], at

Thus rape in the post-Reconstruction South, the reality and the doctrine, evolved into an expressly and intensely racialized phenomenon.²² Rape was construed as an assault on both *white* womanhood (which it was not when white men raped white women²³) and, most outrageously, on white male authority.²⁴ Significantly, the racial politics of black on white rape resulted in racial consolidation, eroding class distinctions between white women.²⁵ For instance, under slavery, prosecutions of (enslaved) black men for alleged rapes of white women did not *uniformly* result in convictions.²⁶ Failure to conform to class-coded norms of gender and sexuality could severely harm a white woman's ability to be a credible prosecutrix.²⁷ But as southern white elites regained power following Reconstruction, they developed a monolithic construct of white womanhood, one that took its meaning in no small part from interracial rape.²⁸ Abandoning previous condemnations of white women who did not conform to elite norms of gender and sexual performance, courts now proclaimed that

312, 316.

²² GILMORE, *supra* note [], at []; *see also*, DOWD HALL, *supra* note [], at [] (insert quote into parenthetical).

²³ Indeed, white male rape of white women was largely understood as an assertion of male authority, an entitlement of marriage or other relationship, or the deserved “due” of women who did not conform to social sexual norms. *See, e.g.*, [cites].

²⁴ *See, e.g.*, DOWD HALL, *supra* note [], at []; GILMORE, *supra* note [], at []. Under slavery, the combination of these two represented southern sovereignty.

²⁵ On class divides among southern whites in the nineteenth century, see [cites].

²⁶ This is discussed *infra* notes [] & accompanying text.

²⁷ I certainly don't mean to endorse this; see *infra* notes [] & accompanying text.

²⁸ This had not always been the case. For discussion of impact of class and reputation on antebellum rape litigation in the South, see *infra* notes [] and accompanying text.

“though a white woman be a prostitute, the presumption is strong, nearly conclusive, among both the races, that she will not yield--has not yielded--even in her confirmed depravity, to commerce with a Negro charged with an offense against her person.”²⁹ Southern courts sacrificed rape law’s function as a tool of gender and class discipline to deploy it as a tool of racial supremacy.

This leads to the most brutal and disturbing manifestation of the southern rape complex, lynching. In fact, expressions by black men of a desire for interracial sexual intimacy were construed as racial rebellion, justifying the most brutal of regulatory practices, lynching. As several scholars have noted, most victims of lynching were not accused of rape. Assertions of economic, political, and social equality were at least as likely to generate these brutal tortures and murders. Yet, southern whites filtered these other apparent racial transgressions through the emotionally charged filter of interracial rape. Despite on-going public outcries against it, black lynching was justified by white southerners as necessary in light of the propensity of black men to rape white women.³⁰ One man said (presumably to white men in the North): “You have never had to leave your home with a feeling that upon coming back you might find your wife or daughter outraged and probably dead. Well that is the condition that faces the Southern people day-to-day, and there is no law to stop it . . . until the negro comes to realize that it is sure death for him to commit this outrage.”³¹ Similarly, southerners denounced the federal Dyer bill

²⁹[case cite] (), *discussed in*, Novkov, *Racial Constructions*, *supra* note [], at 14.

³⁰*See* Holden-Smith, *supra* note [], at [] (in *actual lynchings*, charges of rape accounted for only roughly one third of the murders); DOWD HALL, [pin cites]; HODES, *supra* note [], at 75 (probably expand her citation); KENNEDY, *supra* note [], at 39, 45 (while rape was the most emotional and potent rationale for lynching, murder was the most widely used excuse); Coleman Jordan, *supra* note [], at 562.

³¹ [find citation]

to prevent lynching as a bill to encourage rape.³² Lynching was an extreme, but necessary form of regulation because “black men lusted after white women with such powerful longing that ordinary means of control were insufficient.”³³

While it might be tempting to condemn lynching but ultimately dismiss it as the individual deviancies of brutes, it was understood by all involved as a quasi-legal (and highly effective) institution. Lynching functioned as quasi-legal in at least three ways. First, southerners, white and black, understood it to be connected to the prosecution (or abdication) of justice. Hence the celebration/condemnation of “Judge Lynch.”³⁴³⁵ Second, legal officials at all levels were implicated in

³² See Holden-Smith, *supra* note [], at [] (examining failure of federal policy to enact anti-lynching laws during Progressive era); KENNEDY, *supra* note [], at 49-58 (analysis of federalism in lynching regulation, in part comparing opposition to Dyer anti-lynching bill with passage of the Mann Act).

³³ KENNEDY, *supra* note [], at 45. Kennedy continues: “According to the white supremacist intellectual Philip Alexander Bruce, white women so arouse black men that they are moved ‘to gratify their lust at any cost and in spite of every obstacle.’” *Id.* at 45 (footnote omitted).

³⁴ On the origins of “Judge Lynch,” see FRANK SHAY, JUDGE LYNCH: HIS FIRST HUNDRED YEARS (1938); WALTER WHITE, ROPE AND FAGGOT: A BIOGRAPHY OF JUDGE LYNCH (1929) As Angela Harris powerfully put it: “The ironic term “Judge Lynch” captures the sense that lynching was both against the law and constituted the most extreme enforcement of the law.” Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 1967 (2000). See also, Robert Chang, [cite] (discussing Judge Lynch in context of Asian violence). Similarly, the phrase “lynch law” is telling. The origins of the phrase are unclear. Compare Harris, *supra* note [], at 197 n.5 (parenthetical) with JAMES E. CUTLER, LYNCH-LAW: AN INVESTIGATION INTO THE HISTORY OF LYNCHING IN THE UNITED STATES (1905) (parenthetical).

³⁵ In Emma Coleman Jordan’s description, “Lynching with ritual mutilation became a dark system of law as firmly enforced as statutes and cases of formal laws. . . . Lynch mobs were formed to displace conventional legal processes. However, at the same time, this pattern of lawlessness redefined the meaning of law itself.” Coleman Jordan, *supra* note [], at 565 (footnote omitted).

lynching, either actively or passively. While the complicity of sheriffs and other local law officials is well-documented, southern leaders in the highest political offices—including the governors of South Carolina and Mississippi (two from the latter) and at least one United States senator—also endorsed lynching and even boasted that they had led mobs.³⁶ Finally, murders committed in the context of lynchings enjoyed immunity from prosecution.³⁷ After 1900, fewer than one percent (.8%) of lynchings were followed by convictions.³⁸ In this sense, they were viewed by the white community as justice proceedings. By the early twentieth century, lynching atrocities had become one of the most brutal forms of American miscegenation regulation.

2. The Bellwether Hypothesis

³⁶ KENNEDY, *supra* note [], at 46-47. “Cole Blease, governor of South Carolina, received the finger of a lynched black in the mail and planted it appreciatively in the gubernatorial garden.” *Id.* at 46 (footnote omitted).

³⁷ “In some of the pictures, some members of the mob posed brazenly, without hiding their faces, or showing any sign that they were engaged in murder. The photographs bore testimony to the undeniable legal immunity conferred by whiteness.” Coleman Jordan, *supra* note [], at 549 (reviewing photographs of lynchings from Library of Congress and Tuskegee files); *see also*, KENNEDY, *supra* note [], at 46. And, according to Hodes:

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

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

³⁸ KENNEDY, *supra* note, at 47 (citing Professor James Chadbourn). In addition, the trial in which an all-white jury acquitted Emmett Till’s murderers was in 1955. *See supra, infra* notes [].

What then do we make of this immense sexual apparatus? And, in particular, what light does this legal history shed on our understanding of interracial intimacy regulation? Several prominent scholars have argued that lynching is this nation's hidden shame, the dark secret that remains hidden.³⁹ In contrast, I would argue that the relentless and uncompromising measures taken to prevent and punish interracial intimacy dominates the nation's consciousness and comprehension of interracial intimacy.⁴⁰

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

In light of this sexual history understood as apartheid, increasingly, interracial family formation,

³⁹ Emma Coleman Jordan, Martha Hodes, and Randall Kennedy offer related, but slightly different accounts of the prevalence of lynching in the American imaginary. HODES, *supra* note [], at [] (parenthetical quote); KENNEDY, *supra* note [], at 48 (“Along with the unpunished raping of black women, lynching stands out in the minds of many black Americans as the most vicious and destructive consequence of racially selective underprotection.”); Coleman Jordan, *supra* note [], at 552 (“The hidden legacy of ritual lynching feeds a deep and treacherous undertow of competition between white and black women for economic and cultural power today. This competition is more intense because it takes place with the constricted boundaries of gender defined by white men.”).

⁴⁰ [add taboo dyad footnote]

or families that transcend “difference,” has taken on normative content. They are depicted as “bellwethers” of enlightened politics and racial progress. A diverse array of legal scholars has endorsed this hypothesis. For instance, Professors Kennedy and Chen share relatively few positions with regard to race and the law.⁴¹ Hence, it is intriguing that both ascribe normative content to interracial intimacy.

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

In my view, black-white intermarriage is not simply something that should be tolerated—it is a mode of partnership that should be applauded and encouraged. Intermarriage is good because it signals that newcomers or outsiders are gaining acceptance in the eyes of those in the dominant population and are perceived by them as persons of value on whom it is worth risking one’s future. Intermarriage is also good because it breaks down the psychological boundaries that separate and distance people on racial grounds, opening up new expectations and experiences that would otherwise remain hidden.⁴²

For Kennedy, interracial families are what might be thought of as a miner’s canary. To him, the far lower numbers of black/white marriage compared to other racially exogamous marriages is a primary and overlooked indicator of continuing racial inequality: “That blacks intermarry with whites at strikingly lower rates than others is yet another sign of the uniquely encumbered and peculiarly isolated status of African Americans. It is also an impediment to the development of attitudes and connections that will

⁴¹ Randall Kennedy’s aspirational vision of racial harmony is complete color blindness, but his views on race consciousness as an interim strategy are complex. He believes there is a real and material role for race to play in American law and life, but also argues that there are some areas in which racial recognition is spurious and unconstitutional. The body of his work, encompassing criminal law, speech, legal scholarship and pedagogy, and even judging racial passing, comprises an effort to discern and distinguish those instances that warrant race consciousness (including attention to disparate impacts) from those in which it is permissible from those that mandate its strict exclusion. Jim Chen on the other hand believes in color blindness *über alles* and views all race consciousness as both legally and morally repugnant.

⁴² Kennedy, *Race, Law, and Intermarriage*, *supra* note [], at 819 (footnote omitted?). [Add quote from Forde-Mazrui re Interracial Intimacies]

be necessary to improve the position of black Americans and, beyond that, to address the racial divisions that continue to hobble our nation. Marriage matters.”⁴³ In short, for Kennedy, interracial intimacy is a bellwether of black racial progress.

In the most extreme characterizations, interracial family formation is defended as the ideal mode of racial equality, preferable to public sphere civil rights. According to Jim Chen, Nearly four centuries of positive lawmaking by the United States and its predecessor sovereigns have contributed less toward overcoming racial tensions at the person-to-person level, *at the level that counts*, than discrete acts of family-building across racial lines. All the law and legalism that the positive state can spew can scarcely match the power of “an explosion of joy or a

⁴³ Kennedy, *Race, Law, and Intermarriage*, *supra* note [], at 819. [include different numbers for groups]. Kennedy, *Race, Law, and Intermarriage*, *supra* note [], at 817-21; *see also, id.* at 821 (“[a]s long as black people are kept in a state of relative social, political, and economic deprivation, others will be less inclined to want to marry them.”).

miracle like
love, . . . [t]he
deep
commitment of
a loving couple,
[or] the birth of
a baby” to
spark “the
building of
communities
not based on
color but based
on
conscience.”⁴⁴

Elsewhere, Chen describes interracial family formation as an optimal strategy for achieving racial harmony, describing “miscegenation as an engine of racial healing”⁴⁵ and contending that “[t]hrough the intensity and virtual voluntariness of the bonds created by marriage or parenthood, family relationships hold the key to the resolution of racial conflicts.”⁴⁶ Likewise, in arguing for the abolition of race on the federal and state censuses he predicts that the rise of interracial families will “smash strict racial categorization.”⁴⁷ In the end, for Chen, rising numbers of interracial families are more than the logical result of desegregation. They also signal the inexorable power of personal relationships to shatter racial hierarchies.

This narrative of interracial intimacy, what we might call the bellwether hypothesis, is a

⁴⁴ Chen, *Unloving*, *supra* note [], at 167 (quoting []).

⁴⁵ Chen, *Unloving*, *supra* note [], at 165.

⁴⁶ Chen, *Unloving*, *supra* note [], at [pin cite].

⁴⁷ Chen, *Unloving*, *supra* note [], at 170 (footnote omitted); *see also*, [add other census quotes].

seductive one. It gains its analytic traction from the sexual racial apartheid narrative. When the goal and effect of miscegenation regulation is understood as sexual segregation, the remedy appears not unlike the one courts applied to water fountains and buses: to strike de jure rules and allow the contact that state prohibitions repressed. Remove the law and let them love.

B. *Sexual Libertarianism*

The second narrative of interracial intimacy regulation is about antebellum slavery and its sexual injustices and injuries.

[Readers: This Section will fill in how criminal law excluded enslaved black women from protection from rape, while the status rule of *partus sequitur ventrem* dictated that a child's status as slave or free was inherited from the mother, without regard to the father.]

These rules of rape and reproduction supported market regimes in which, with every sale of an enslaved woman, a slaveholder acquired not just rights to compel productive labor, but to commodify and coerce her sexual and reproductive relations.⁴⁸ Like the brutal prohibitory rules underpinning sexual racial apartheid, commodification and coercion also yields an ugly and disturbing narrative of interracial sex: that law allowed white men to rape black women and then reap the economic benefit by enslaving their own children. This commodification and coercion narrative comprised a marked step forward in slavery historiography, replacing previous accounts in which the primary injuries of slavery were racial ones.⁴⁹

⁴⁸ State v. Celia & warranty cases.

⁴⁹ [generated since the 1950s]

2. The Juridical Imperative

The very idea of slavery and law is counter-intuitive to many. Many imagine southern slavery to have been a lawless state in which only the law and logic of property intervened to confer complete autonomy on whites, particularly on slaveholding whites. (I call this the “pure property paradigm.”) Scholars have demonstrated the limits of this understanding of slavery. As an initial matter, like other totalitarian societies, the slaveholding South could not tolerate the free circulation of ideas and thought. [Drew Faust quote re closed nature of antebellum south⁵⁰] Managing this threat required that whites concede significant civil liberties. As the antebellum period progressed, Southern states rabidly repressed anti-slavery speech, censoring mail and prosecuting opponents for treason, even seeking extradition of abolitionists from free states.⁵¹ Nor did southern states capitulate to slaveholders’ demands for complete deference to their “property” rights, meaning unfettered control. Laws restricted masters in hiring out enslaved workers;⁵² prohibited whites from trading with enslaved people;⁵³

⁵⁰ Drew Faust, *The Sacred Circle*.

⁵¹ *See, e.g.*, [add cites]; *see also*, Garrett Epps, *The Slave Power*, DUKE LAW & CONTEMP. PROBS. (2004); A. Leon Higginbotham, Jr., “*The Law Only as Enemy*”: *The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C.L. REV. 969, 1016-1019 (discussing criminal restrictions on freedom of speech in Virginia).

⁵² Many states determined that slaves hiring themselves out on their “own accounts” posed several public policy threats and banned this altogether. On the other hand, slaveholders might seek to make such contracts themselves in order to manage periodic surplus labor or to profit from skilled enslaved artisans. [find the urban slavery cite; look at James Sidbury’s work; see also, Ira Berlin, *Slaves Without Masters*, supra note [], at []; Ira Berlin, *Many Thousands Gone*, supra note [], at []].

⁵³ [Add cites]

restricted manumissions;⁵⁴ and mandated that slaveholders permit state agents to search their property for slave-related “contraband.”⁵⁵ As the antebellum period progressed, slave states increasingly identified ways that slaveholders pursued their own economic and privacy interests, i.e., combining slave and wage labor, at-will manumissions leading to increases in the free black population, the growth of an underground economy of trading with slaves, could threaten the stability of slavery itself.

This insight—that slavery imposed significant restrictions on white civil liberties and property rights—comprises a crucial insight into how whites could not “do whatever they wanted”, but, rather, that certain market relations or ideological positions posed a substantial threat to the slaveholding order itself. Yet the same analysis has not been extended to sexual relations. In the context of intimate or domestic relations, the assumption of the libertarian slave state remains unchallenged.⁵⁶

Even scholars who have devoted substantial attention to the slaveholding household and sexual regulation have largely adhered to this view. Assumptions about the sexually libertarian slave state rest on two related ideas. First, that law conferred on white men close to complete sexual autonomy vis-a-vis women in the enslaved workforce. This argument first appeared in the 1970s in early scholarship on slavery and gender, and reached its apotheosis in the work of legal historians in the 1980s who set forth

⁵⁴ [Add cites]

⁵⁵ See generally Sally Hadden, *Slave Patrols*.

⁵⁶ To the contrary, historians identified how apologists deployed interracial intimacy to defend slavery. [quotes re ideology & defense against white prostitutes] According to this logic, unfettered sexual access could actually be rhetorically deployed to reinforce slavery’s hierarchies and defend its sexual economy against northern sexual norms.

the first comprehensive accounts of laws of rape and forced reproduction.⁵⁷ A. Leon Higginbotham, Jr. argued that [**add the Celia quote].⁵⁸ Similarly, Karen Getman concluded [**add quote].⁵⁹

The second, related, assumption was that the state declined to intervene in these relations, indeed expedited them, because within a broad sphere of sexual liberty, coercing sex and commodifying slave reproduction reinforced the racial and gender orders comprising slavery. Articulated perhaps most powerfully by Angela Davis, [**sexual terrorism quote].⁶⁰ Significantly, in this account, when individual white men enact sexual terrorism against enslaved women, or are sexually opportunistic or subject them to sexual discipline, it reinforces white dominance over everyone in the black enslaved workforce. In short, slavery comprised a sexually libertarian regime in which the sexual

⁵⁷ See, e.g., Catherine Clinton's early work on plantation mistresses stressed white male control over women's sexuality, white and black; Angela Davis's characterization as "sexual terrorism" against an enslaved workforce.

⁵⁸ A. Leon Higginbotham, Jr., *Race, Sex, and Missouri Jurisprudence: Shelley v. Kraemer in a Historical Perspective*, 67 WASH. U. L.Q. 673 (1989) [hereinafter, Higginbotham, *Race, Sex, and Missouri Jurisprudence*]. Elsewhere, Higginbotham concluded that [**insert quote] 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 (1989) [hereinafter, Higginbotham & Kopytoff, *Racial Purity and Interracial Sex*]; see also, A. Leon Higginbotham, Jr., In the Matter of Color (identifying emergence of sexual regulation in colonial codes); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103 (1983) (**parenthetical).

⁵⁹ Karen A. Getman, *Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System*, 7 HARV. WOMEN'S L.J. 115, (1984).

⁶⁰ ANGELA Y. DAVIS, WOMEN, RACE & CLASS; Angela Y. Davis, "Reflections on the Black Woman's Role in the Community of Slaves," in THE ANGELA Y. DAVIS READER 111, 124 (Joy James ed., 1998) (originally published in 3/4 THE BLACK SCHOLAR 3, 13 (1971)).

interests of white men were co-terminous with the slaveholding state.⁶¹ Even today, many continue to adhere to the juridical imperative, viewing sexual relations between black women and white men as an on-going instance of white male sexual autonomy in the service of a larger project of racial subordination.

C. *Summary*

While commodification and coercion plays a critical role in documenting the widespread sexual abuse that American slavery entailed, it doesn't take account of the complexity of sexual relationships and regulation between black women and white men. It cannot describe the valence of sexual regulation within slavery, and its effects on not only black women, but southern culture more broadly. Nor did sexual racial apartheid fully capture miscegenation regulation, in particular, the role of bans on interracial marriage in shaping our racial sexual landscape. The next section examines other rules regulating interracial intimacy in our history, rules that challenge both of these dominant stories and some of the claims they have generated.

III. MISCEGENATION & MANUMISSION & THE SHADOW FAMILY

A. *Manumission & Miscegenation*

In 1826, Elisha Brazealle, a white resident of Jefferson county, Mississippi, took “a negro

⁶¹ Or, in the most extreme view, the state is imagined as the agent of white male sexual autonomy. [add Higginbotham quote]

woman” he enslaved and their son, John Monroe Brazealle, to Ohio to manumit them.⁶² After executing a deed of emancipation, he brought them back to Mississippi. At his death, he left a will reciting and ratifying the earlier Ohio emancipation; acknowledging John Monroe as his son; and devising his entire estate to John Monroe. Apart from this shadow family, Brazealle’s closest relatives were what inheritance law calls collateral ones, siblings, nieces and nephews, aunts and uncles, relatives legally conceived as more remote than a son, yet, who could claim to be the legitimate heirs at law because their relations were sanctioned by marriage.⁶³ These (white) putative heirs challenged not only the testamentary gift of property to John Monroe, but the manumission itself, claiming Brazealle’s son as part of the estate to which they were entitled. On appeal from chancery, the court invalidated Brazealle’s efforts to manumit his shadow family by deed in Ohio and by will at death.⁶⁴ The deed of emancipation executed in Ohio was void for two reasons. First, the court found that it was made in fraud of the laws and policy of Mississippi.⁶⁵ “No state is bound to recognise [sic] or enforce a contract made elsewhere, which would injure the state or its citizens; or which would exhibit to the

⁶²Hinds v. Brazealle, 3 Miss. 837, 2 How. 837 (Miss. 1838). She remains unnamed in the case.

⁶³See infra note [].

⁶⁴The chancery court overruled the shadow family’s demurrer to the white heirs’ bill challenging the will.

⁶⁵“As we think the validity of the deed must depend upon the laws of this state, it becomes unnecessary to inquire whether it could have any force by the laws of Ohio. If it were even valid there, it can have no force here.” 3 Miss. 843.

citizens an example pernicious and detestable.”⁶⁶ The court then explained that, in Mississippi, as a matter of policy, “free negroes are deemed offensive,” reciting removal statutes requiring free blacks to leave the state with thirty days notice and post bonds in the interim; prohibitions on free blacks emigrating to the state; the requirement that those blacks permitted to stay to register and carry certificates of their status or risk jail; and the concession of very few privileges accorded to free whites and the imposition of heavy penalties for violations.⁶⁷ In emancipating his shadow family in Ohio, Brazealle had tried to circumvent these policies: “The state of the case shows conclusively, that the contract had its origin in an offence against morality, pernicious and detestable as an example. But above all, it seems to have been planned and executed with a fixed design to evade the rigor of the laws of this state. The acts of the party in going to Ohio with the slaves, and there executing the deed, and his immediate return with them to this state, point with unerring certainty to his purpose and object. The laws of this state cannot be thus defrauded of their operation by one of our own citizens.”⁶⁸ The act of emancipation, then, violated the state’s strong policy against black Mississippians who were not enslaved.

The court also found the deed of emancipation void because of several defects, including failure to provide proof of meritorious service to either the master or the state and to secure legislative

⁶⁶ “It is a settled and sound principle that no state will enforce a contract made by its citizens elsewhere in violation and fraud of its laws.” 3 Miss. 842 (quoting Story’s Conflict of Laws, 198).

⁶⁷3 Miss. 842. Among slaveholding states, Mississippi had some of the strongest anti-manumission regulations. Cite Thomas Morris; others?

⁶⁸3 Miss. 843.

ratification of such.⁶⁹ These were the only conditions under which a slaveholder could manumit a slave in Mississippi.⁷⁰ Finally, the court addressed Brazealle’s testamentary language regarding the manumission. It concluded that he could not ratify a failed deed. Nor was the language valid as a testamentary manumission because it suffered from the same defects as the deed. In the end, neither the lifetime nor the testamentary efforts at manumissions were valid.

This initial conclusion, that a slaveholder could not free his family for purely affective reasons, or reasons of conscience, but only for “meritorious service” proved to the satisfaction of the legislature, dictated the rest of the outcome. The court voided Brazealle’s devise of his estate to his son because, according to both the common law and statutory laws of Mississippi, enslaved persons could own no property of any kind, including as legatees of a will.⁷¹ Citing statutory prohibitions against slaves holding what the court took to be relatively innocuous economic assets such as cattle, hogs, and horses, the court concluded that, “They cannot be prohibited from holding such property in consequence of its being of a dangerous or offensive character, but because it was deemed impolitic for them to hold property of any description.”⁷² Nor, crucially, could Brazealle establish a trust on behalf of his shadow son as long as he was enslaved. The trust’s conceptual division of legal and equitable title requires

⁶⁹[replace with statutory language: “No owner can emancipate his slave, but by a deed or will properly attested, or acknowledged in court, and proof to the legislature, that such slave has performed some meritorious act for the benefit of the master, or some distinguished service for the state; and the deed or will can have no validity until ratified by special act of the legislature.”

⁷⁰Morris.

⁷¹As the lawyer for Brazealle’s white heirs’ argued: “He has no more political capacity, no more right to purchase, hold, or transfer property, than the mule in his plough.” Hinds, 3 Miss. 837.

⁷²3 Miss. 843-44.

beneficiaries who can enforce the equitable obligations of the trustee, and, without civil legal capacity, enslaved persons could not do so.⁷³ Invalidating both the manumission and the legacy, as an outright gift and under the trust rubric, the court ordered distribution of Brazealle's estate by operation of law to his legitimate heirs. Accordingly, Brazealle's shadow family, mother and son, were re-enslaved and distributed as part of his estate to their white relatives.

Twenty years later, James Brown took his enslaved shadow family, a "mulatto woman named Harriet" and their four children, Francis, Jerome, Teresa, and Louisa to Ohio to manumit them.⁷⁴ Like, Elisha Brazealle, James Brown acknowledged the children as his own. Unlike Brazealle, following the Ohio manumission, Shaw sent his shadow family to Indiana, where they lived, and, as multiple witnesses agreed, were treated, as free blacks. In 1855 Brown went to Indiana and stayed with his shadow family until 1856 when he died. His will, executed in 1853, instructed his executors to liquidate his estate (i.e., sell his plantation and remaining slaves), pay his debts, and deposit the surplus in the Bank of Louisiana for the benefit of his sons, who would remain in Indiana, and, crucially to the court,

⁷³As the putative heirs put it, a trust in favor of a slave "imposes no obligation upon the trustee; it cannot be enforced in favor of the cestui que trust, who, being a slave, can maintain no action to have the trust executed." 3 Miss. 837 [check this against Cobb] [compare Alabama] [Bynum v. Bostick] 4 Des. [S.C.] 266 Even, they argued, if John Monroe left Mississippi "The policy of the state would forbid that any portion of its wealth should be prostituted to serve a purpose, or that its own free citizens should become the stewards or overseers of a foreign slave." 3 Miss. 840 [check this pin cite].

⁷⁴Shaw v. Brown, 35 Miss. 246 (1858). Apparently, Brown put significant thought into the emancipation, a point noted by the court. Initially he planned to manumit them in Louisiana, but then learned that state's rules had changed. In 1849 he attempted to take his family to Ohio to emancipate them; however the river was too low for them to cross. He successfully completed the manumission the following year.

out of Mississippi.⁷⁵

As in *Brazealle*, it was a collateral relative who challenged the will, here, James Brown's brother, John, who brought suit on behalf of their other siblings, as well. Again, the putative heirs at law challenged the manumissions and the legacies, arguing they were void, against policy, and in fraud of laws of state. First, like Brazealle's collateral relatives, they claimed that Brown had taken his shadow family to Ohio to free them and *bring them back to Mississippi*, in violation of the clear law and policy of the state. Second, even if the manumissions were valid, free blacks, the object of so much state animus, should be construed as having the status of alien enemies, banished persons, or outlaws, none of whom could not hold property in the state or sue in its courts.⁷⁶ The chancery court awarded the heirs an injunction against the execution of the trusts Brown bequeathed to his sons.

Perhaps surprisingly to many contemporary readers, the Mississippi Supreme Court overturned the chancellor's decree and determined that the emancipations and the legacies were both valid. As it did twenty years earlier, the Court noted that the validity of the testamentary legacies depends on the validity of the emancipations. Intriguingly, the court did not frame the legal question as whether Brown had intended to defraud the state, but, rather, whether he had in fact done so by bringing his shadow family back to the state. Mere intent, without acting on it by bringing them back would not be sufficient

More specifically, Shaw instructed that the fund should be subject to draft by Francis, his elder son, or, at his death, by Jerome. While several witnesses referred to other legacies to the rest of his family, Harriet and his two daughters, the court never addresses this and refers to the disposition solely as to Francis and Jerome. Speculate re Louisiana and economy more used to this

⁷⁶[quote from heirs]

to invalidate the manumission.⁷⁷ The court heard voluminous, detailed, and contradictory testimony about when and how many times Brown's sons had returned to Mississippi; how long they had stayed and how they had behaved while in Mississippi; Brown's proclamations about their legal status; and how had Brown behaved towards them. All of the witnesses agreed that the shadow family spent time in both Indiana and Mississippi, yet there was no agreement on the crucial question as to which state was considered their permanent residence.

In what can only be described as circular reasoning, the court concluded that, because Brown's overriding intent was manumission, he must not have intended any actions that would have defeated that ultimate goal.⁷⁸ Analyzing the evidence in accord with this conclusion, the court characterized the shadow sons as having only limited visits to Mississippi and residing on land Brown had purchased for them in Indiana; accepted the testimony that Brown had declared to others the children to be free and had not treated them as slaves during their visits "home"; noted that the sons' mother resided in Indiana;

⁷⁷Echoing the language in *Brazealle*, "This illegal intent only becomes material to vitiate the emancipation, and can only render it void, when it is carried into action by bringing the slaves back to this State, in pursuance of the original design to evade our laws." The court cited a statute passed four years after *Brazealle*. [get cite to 1842 Miss statute allowing for manumissions outside of the state]

⁷⁸The court noted that he consulted with two lawyers, who advised him that he could not successfully manumit slaves either within the state to live free in Mississippi or elsewhere, or, manumit them outside of the state and then bring them back to Mississippi to live. "It must be presumed that he acted with reference to this knowledge, in executing the deeds; and accordingly it appears that, at that time, he declared to the notary, that his object was to settle them either in Ohio, or Indiana, for education and residence, and that he would himself return to this State." 35 Miss. 306. Additionally, apparently Brown had considered purchasing land for his family in Louisiana or Texas, but one witness testified that he advised Brown to purchase property and settle them in a free state.

Brown visited them there; and he died there.⁷⁹

Having determined that the outcome did not rest on Brown's intent, the court proceeded to focus on his clear desire to manumit his shadow family, which required resolving all of the disparate and contradictory evidence in favor of their residence being elsewhere.⁸⁰

Because the *Brazealle* court concluded that Elisha had not enacted a valid manumission, they could determine that, as a slave, his shadow son could not hold any property, including the legacy bequeathed in his will. In contrast, in *Shaw v. Brown*, having determined that James Brown had freed his family, the court next had to address the opponents' argument that state policy prohibited them as free blacks from taking the legacies. According to counsel for the opponents, [add quote]. The court rejected the will opponents' argument that free negroes, sharing the status of alien enemies, banished

⁷⁹Latter two raise fascinating series of questions re how slavery and freedom are "performed." Gross. Testimony differed, intriguingly, over whether to characterize his control as "quote" or "as slaves quote." According to one witness for challengers, while claiming he still considered them as slaves, lived in same house, ate at table with him and white guests; employed a man, presumably white, who lived on plantation, traveled with sons to Indiana; instructed to take family to Indiana if Brown died while they were there. According to another, "Francis went when and where he pleased, hunted, fished, exercised authority on the place, as any young man would do on his father's plantation, ordered the negroes to do what he considered necessary."

⁸⁰"[T]he illegal design was never consummated, and the legal force of the emancipation is not impaired." 35 Miss. 313.

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

35 Miss. 311.

persons, or outlaws had no rights the state was bound to support.⁸¹ The court conceded though that “to allow [free blacks] to become the owners of a plantation and slaves, would be dangerous to the slave population here, and in contravention of the spirit of our laws and public policy with regard to slaves.”⁸² But, that particular question was not before the court.⁸³ Brown’s (presumably careful) structuring of his will did not require his sons’ presence in Mississippi. In this instance, “The enjoyment of their rights did not require their presence in Mississippi because the executor was required by the will to sell the testator's property and to deposit the money in a bank for the testator's sons' use and enjoyment.” Drawing an odd but telling analogy to banks, which, like free blacks, were strongly disfavored in Mississippi, the court concluded that the legislature could prohibit the circulation of both free blacks and bank notes in the state, yet that would not disable legal rights of free blacks or banks resident elsewhere to sue or take a legacy in Mississippi.⁸⁴ The Supreme Court overturned the

81

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

35 Miss. 315.

⁸²35 Miss. 314.

⁸³“If the question of the right of a free negro residing in another State to hold specific property in this State, not forbidden by the spirit of our laws, or dangerous to our institutions, is an open one. it is not now presented for determination by the case before us.” 35 Miss. 314.

⁸⁴the court draws an intriguing analogy to banks, which, like free blacks, were strongly disfavored in Mississippi. Yet, while the bank could not circulate its notes within the state (presumably the notes are the analogical equivalent of free blacks) the court notes that a foreign bank could sue to enforce a legacy or other right within the state. Elaborate this point re how slave economy particularly hostile to banks. 319-20. Banks, credit, wage labor, and free blacks all seen as part of market based (wage labor based?) economy. Preferred status regulations of slavery, ie, our family black and white;

chancery court's injunction against the distribution of the legacies to Brown's shadow sons.

In both *Brazealle* and *Brown*, white collateral heirs charged that bequests in favor of testators' shadow families were illegal and void and sought to enjoin the executor from executing the will. In upholding the validity of the emancipations and the bequests *Brown* had a different outcome from *Brazealle*. Yet, the court followed the same logic in both: rendering judgment in light of the threats posed by the presence of free blacks.⁸⁵ As the judge said in *Brown*:

It is true, they are prohibited from coming into this State. But the reason of that policy has reference solely to their presence. Hence they are not allowed to be manumitted here, to take effect here or elsewhere, though they are permitted to be taken out of the State and there manumitted. The mischief intended to be prevented, was their improper interference with our slaves, or the force of their example, in producing discontent and insubordination among them; and that could only arise from their presence here and intimate personal intercourse with the slaves. It could not possibly come within that mischief, that they should take pecuniary legacies here or should acquire a right of property here which did not require their presence and could not bring them in connection with the slaves of the State; for their presence is by no means necessary to the enjoyment of such rights.⁸⁶

see post-slavery.

⁸⁵As numerous historians have noted, free blacks posed an increasing threat to the southern way of life. IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* (1974); JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 157-79 (1980 5th edition)*; EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 398-413 (1972); LEON LITWACK, [FILL IN]; *SLAVERY AND FREEDOM IN THE AGE OF THE AMERICAN REVOLUTION* (Ira Berlin & Ronald Hoffman eds., 1983); *see also*, BARBARA JEANNE FIELDS, *SLAVERY AND FREEDOM ON THE MIDDLE GROUND: MARYLAND DURING THE NINETEENTH CENTURY* (offering in-depth regional analysis); JAMES OLIVER HORTON & LOIS E. HORTON, *IN HOPE OF LIBERTY: CULTURE, COMMUNITY AND PROTEST AMONG NORTHERN FREE BLACKS 1700-1860* (1997) (free blacks in the North).

⁸⁶35 Miss. 318-19. The court's language, surprisingly, appears largely indifferent to the status of slavery elsewhere. Compare *Hooper v. Hooper*, 669 (Al. Sup. Ct. 1858) (where white testator directs his executor brother to remove his shadow family (his lover and their six children) to Ohio, establish them in the country, put \$10,000 in bank to be used for their support, and then divide the estate, held, his family was free, not by virtue of the will, but because of the agreement of the white

The two crucial points for the *Brown* court were that the shadow family would never permanently reside in Mississippi and that the estate was to be liquidated and the assets deposited elsewhere.⁸⁷ This latter point is crucial in that it avoided even the specter of an empty plantation haunted by an shadow family who owned it. Instead, the Brown plantation was liquidated and presumably sold back into the hands of a proper, racially conscious, white slaveholder. In short, Brown avoided Brazealle's fate for his shadow family by severing any human or economic links between them and Mississippi.

B. Manumission & Miscegenation

[This section describes how one family wins and one family loses for reasons that go the very heart of the sexual logic of racial slavery in the antebellum South. Alternate explanations would focus on heightening federalism issues or the difference between neo-secessionist and reformist judges. But I do a more purely “formal” reading based on the judicial opinions themselves, and argue that the logic of removal is key in conceding rights: The remainder of the section derives the “shadow family threat”, ie., emancipated families holding substantial property with some legitimized relationship to the white father. It will then discuss how

legatees to the estate, and testamentary distribution of property to shadow family invalid). Compare [Garrett Epps, Law & Cont. Problems article on slave power.]

⁸⁷Randall Kennedy uncovered a more recent example that is eerily reminiscent. In Louisiana in the 1950s', state agencies and courts refused to allow a black couple to adopt a child who appeared to some to be scopically black but was legally classified. Instead she was placed in an orphanage for black children and sent to black schools. However, subsequently, a black couple from Illinois was permitted to adopt her and take her out of the state. See Kennedy, *Interracial Intimacies*, *supra* note [] (discussing *Green v. City of New Orleans*, 88 So. 2d 76 (La. Ct. App. 1956)).

neither sexual racial apartheid, with its emphasis on law as keeping people apart, or sexual libertarianism, with its assumption that white men had free rein in to pursue their intimate interests and doing so was in the service of the state, predicts or accounts for the shadow family threat]

III.Caste

[Readers: The remainder of this section does two things. First, it will show how these case studies demonstrate the incompleteness of both of the dominant narratives of interracial intimacy, sexual racial apartheid and sexual libertarianism. Neither captures these shadow family conflicts or their resolution. Next, this section will incorporate these two case studies together with the two narratives to derive a broader governing paradigm, caste. The typical use of caste is to describe the rigid implementation of hierarchies along lines of race (or ethnicity). I mean to capture this meaning and an additional one. By caste I mean the vulnerability of hierarchies at points of contact. Hence, caste requires management of these through sexual and gender regulation, in addition to the more commonly thought of racial or ethnic restrictions. It will end by suggesting ways in which my derivation of caste differs from, or enriches, the dominant articulations of caste in the legal literature, primarily those offered by Cass Sunstein, Willie Forbath, and to a lesser extent Richard Epstein and maybe Andy Koppelman]

IV.A SEXUAL POLITICAL ECONOMY

What then do we make of the caste rubric? What difference might it make for how we understand the past, the present, and the operation of law in each? This Section considers, briefly, some of the implications of understanding miscegenation regulation as caste regulation. Specifically, it shows that the caste rubric's focus on managing the threat posed by inevitable suggests the limits of both the bellwether and the sexual libertarian hypotheses.

A. *Beyond the Sexually Libertarian Slave State*

Incorporating the sexual black sheep from Mississippi and the caste rubric of miscegenation regulation suggests the limits of the sexually libertarian understanding of southern slavery. In the process, it also challenges the juridical imperative. As was the case with social and economic relations, in most instances the sexual and intimate interests of individual white slaveholders appeared to coincide with those of the slave order. Slavery's commodification and coercion of enslaved women's sexual and reproductive relations conferred immense sexual autonomy on slaveholding men and ensured enslaved women would reproduce the workforce. Yet, like other so-called "market" or "political" relations, sexual relations too could threaten the interests of the slaveholding state.⁸⁸ As this Article showed, attempts to create autonomous, propertied, perhaps even slaveholding shadow families demonstrate that unfettered sexual liberty, like completely free speech, also threatened the distribution of economic, racial, and sexual power under slavery. Like the line between contraband and licit with regard to more conventional economic transactions with or involving enslaved people, the shift from sexual property or

⁸⁸ An earlier Essay debunked the intuitive line between "public" and "private" in slavery. [Add Rutgers cite; see also Angela Y. Davis; Jacqueline Jones]

to emancipated African-American plantation mistress challenged slavery's fundamental ideology. The conceptual converse of libertarian economies, caste societies can tolerate the free circulation of neither ideas and speech, nor of desire.

As the caste rubric foregrounds, southern miscegenation regulation answered these threats, installing limiting state power at crucial points of interracial contact. Manumission restrictions managed the interracial intimacy otherwise authorized by the political economy. The conceptual analog to censorship and patrol provisions, manumission, miscegenation, and marriage rules operated in tandem to define the limits of white male autonomy in the sexual arena. My argument here is not that these restrictions on white male autonomy should be understood as the primary, or even as terribly significant, injuries of miscegenation regulation. Relative to the brutal regulation inflicted on other groups there is no comparison. Rather, my point is that attention to limits on white male autonomy offers a more subtle and nuanced understanding of how caste and racial supremacy functioned under slavery.

Attributing enslaved women's sexual exploitation solely to two doctrine, reproductive rules of *partus sequitur ventrem* and criminal rape, obscures the range of coercive sexual techniques slavery brought to the table. Moving beyond the sexual libertarian account of complete autonomy exposes how other laws collaborated with rules of rape and reproduction in enslaved women's sexual manipulation and exploitation. Overwhelmingly, white men's interests did appear to coincide with the slave state. Yet, at the times when they did not, other laws stepped in to curtail the threat of rogue men legitimizing their shadow families. Contra the juridical imperative, law cannot blindly leave power in the hands of white men, assuming that their self-interest will always serve the state.

If the caste rubric suggests the limits of the juridical imperative, it does not mean to then devolve

into the standard liberal response, either. Advocates of the bellwether hypothesis might be chomping at the bit to conclude that today's fears of white male sexual exploitation have been answered by the lifting of the old restrictions and the availability of marriage. In other words, black women are no longer sexual property and interracial intimacy between this dyad is presumptively now equal and heralds progress. Yet, the next section suggests the limits of this interpretation.

B. *Beyond the Romance of Racial Apartheid*

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

The caste rubric reminds us that the mere fact of interracial intimacy and contact does not tell us very much at all. As this Article showed, interracial intimacy can reinforce, as much as challenge, racial and gender hierarchies. Intimate relations do not occur in a legal vacuum. Rather, individuals approach each other with an already defined set of legal and political abilities and disabilities. Or, as Section I.B demonstrated, can be commandeered into them because of the social allocation of sexual capabilities and autonomy. We understand, most of us, why President Jefferson's relationship with Sally Hemings and, not much more than a century later, Senator Thurmond's with Carrie Mae Butler, should give us pause—at a minimum. They occurred in legal regimes that vastly skewed legal, social, and economic power between this dyad. We intuitively would distinguish those relationships from contemporary interracial intimacy. But why? *Because the background legal regimes have changed.*

No act or practice (or change) in a sexual regime is inherently liberatory (or subordinating). Rather, such judgments must attend to the background rules against which intimacy unfolds, or what we might characterize as the sexual political economy. [this point needs to be developed]

Today, when black women and white men meet in the sexual arena it is on terms of at least formal equality.⁸⁹ While there remain immense disparities between this dyad, law no longer secures black women as the sexual property as white men. Hence, what is arguably laudatory about interracial intimacy is that it is being conducted under conditions of (or vastly closer to) equality. This is largely a product of the very civil rights and anti-discrimination laws that Chen would declare superfluous. And while Kennedy may be correct, that whites falling in love with blacks is a sign of racial progress, it is not because intimacy itself heralds equality. To the contrary, it is the conditions of equality that herald a salutary intimacy.

This shift in emphasis also demands a shift in empirical and sociological inquiry. The bellwether hypothesis contents itself with analysis based purely on rates. The caste rubric, on the other hand, asks a different set of questions. [describe these]

One potential response to this argument is that, while it glorifies interracial intimacy broadly, the bellwether hypothesis is particularly focused on rising rates of interracial family formation as a proxy for interracial *marriage*. Unlike President Jefferson or Senator Thurmond, in the post-*Loving* environment, whites can and are marrying non-whites. This distinction is not without its attractions. While discussing interracial intimacy broadly, Kennedy emphasizes what he calls “intermarriage,” and

⁸⁹ [Discuss still troubling discrepancies in rape prosecution, sentencing, etc; income disparities, etc.]

this distinction is arguably latent in Chen's rather vague calls for interracial family formation. But, a quick example suggests the irrelevance of the distinction.

Consider "mail-order" brides. In the last few decades the importation of women into this country to marry men who are U.S. citizens has increased at a rate of [check]%. In many cases, third party agencies mediate these matches, making a significant profit. Known in popular culture as "mail order brides," and inevitably from lesser developed nations or countries in crisis, these women are frequently depicted as lucky to have fallen in love with American largesse. By the same token, the matches are sometimes lauded as a sign of America's increasing diversity. [quotes] The caste rubric would take a different approach. It would caution us to be attentive to how citizenship, domestic violence, and language barriers affect the "romantic" trajectory of such relationships. Indeed, feminists have shown how the denial of legal rights to immigrant women has made them susceptible to violence, even homicide.

Let me clear here. Suggesting the logical limits of the bellwether hypothesis should not be read as an indictment of interracial intimacy more broadly, but, rather, of the social meanings attributed to it. The caste rubric defeats universal accounts of any intrinsic politics of interracial intimacy and family formation. This is certainly a more accurate account, if a less romantic one.

In short, caste rubric's focus on managing threat of property transmission posed at points of contact suggests limits of both bellwether and sexual libertarian hypotheses. The bellwether hypothesis assumes repression of interracial sex and hence that its proliferation is always subversive. Yet, the meaning of such relations can only be discerned through attention to background rules and conditions. The juridical imperative assumes that operated solely in a libertarian fashion, to confer sexual autonomy

on white men and that this was co-terminous with the racist and sexist state. The caste rubric suggests the need to attend to regulation outside of rape and reproduction rules that restricted white men's sexual autonomy at the point of threat. These laws too functioned to shape slavery's sexual landscape.

Both of these suggest the need for complex and nuanced investigation of the processes of sexual regulation today.