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A Different Type of Property: White Women and the Human Property They Kept

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A DIFFERENT TYPE OF PROPERTY: WHITE WOMEN AND THE HUMAN PROPERTY THEY KEPT

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INCIDENTS IN THE LIFE OF A SLAVE GIRL. By *Harriet A. Jacobs*. Boston: Thayer & Eldridge. 1861. (L. Maria Child & Jean Fagan Yellin eds., Harvard Univ. Press 1987). Pp. xxxiii, 306. $22.50.

THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH. By *Stephanie E. Jones-Rogers*. New Haven: Yale University Press. 2019. Pp. xx, 296. $30.

After a brief period of suspense, the will of my mistress was read, and we learned that she had bequeathed me to her sister's daughter, a child of five years old.

—Jacobs, pp. 7–8

Sexism and the abuse of male power, in part, define the American experience. Historically, sexism[1] (and racism)[2] pervaded legislative and judicial

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* Chancellor's Professor of Law & Founding Director of the Center for Biotechnology & Global Health Policy, University of California, Irvine. The author is grateful to the editors at the *Michigan Law Review* and to Jaime Allgood for her exemplary research assistance. Gratitude is also due to the Gilder Lehrman Postdoctoral Fellowship at Yale University, which in 2000 provided the support and resources to investigate archives on the American and Caribbean slave experience, particularly with a view of sex. That research continues to bear fruit. I valued the comments from my colleagues at the University of California, Irvine and other faculties.

1. *See, e.g.*, Minor v. Happersett, 53 Mo. 58, 64–65 (1873) (affirming state legislation denying women the right to vote); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (affirming an Illinois statute that denied female law graduates admission to the bar because "civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life"); Hoyt v. Florida, 368 U.S. 57, 61–62 (1961) (denying women participation in juries, opining that "woman is still regarded as the center of home and family life"); *see also* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1375 (2000).

2. For a catalogue of discriminatory "race" laws, see STATES' LAWS ON RACE AND COLOR (Pauli Murray ed., Univ. of Ga. Press 2017) (1951) (copiously documenting myriad race-based laws adopted by legislatures throughout the United States, including prohibiting integration in schools, segregating accommodations, imposing racial restrictions in cemeteries,

decisionmaking, shaping law and how we understand it. Laws that permitted marital rape and wife beatings buttressed those that forbade women from voting, becoming lawyers, and more. In this way, what male legislators imagined, male judges authorized. The reach of masculinity, domination, and power so permeates American thought that it obscures the ways in which women wield and abuse power—historically and in the present. This Review concerns the former, assessing the complicity of white women as power brokers, traffickers, and owners of enslaved African Americans during slavery. Taking seriously Harriet Jacobs's observation in 1861 that "the secrets of slavery are concealed like those of the Inquisition," this Review excavates the archives of American law to shine a light on an overlooked history relevant to how we understand women in American law and society.[3]

As such, this Review offers a compelling and complicated counterintuitive proposition. It challenges the archetypical accounts of sex, race, and slavery that claim white women played no meaningful role in the enterprise of slavery beyond passively managing antebellum households. It also challenges an alternative account of white women's involvement in slavery: that their only engagement was proximate to that of the white men in their lives. The latter, more reductive, account suggests that as white slaveholding men died, white women (spouses, mothers, and daughters) manumitted enslaved Black people who lived among them.[4] Both accounts suffer from historical inaccuracies and omissions. Failure to capture, chronicle, and understand these distinctions with greater nuance serves to conflate—at least at an epistemological level—white female abolitionists with white women who profited economically or symbolically from slavery (by means of stature in wealth and by means of race privilege in poverty).

In her detailed account of "the Southern Lady," Anne Firor Scott chronicles the skill white women exerted in buying and expanding plantations, as well as managing hundreds of enslaved Black people even in the wake of their husbands' deaths. She notes that many of these women were quite successful in purchasing land and establishing profitable plantations on their own throughout the South. In some instances, this included the "manage-

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ring interracial marriages, banning the interchange of textbooks between "white and colored schools," and imposing segregation in colleges and universities, among other racially discriminatory enactments, most of which were upheld by local courts and generally legalized by *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896)).

3. *See* Jacobs, p. 35 (pointing to the concealed record of blatant sexual abuse, rape, and incest among slave owners, noting, "My master was, to my knowledge, the father of eleven slaves. But did the mothers dare to tell who was the father of their children? Did the other slaves dare to allude to it, except in whispers among themselves? No, indeed! They knew too well the terrible consequences"); *see also* MARY R. BEARD, WOMAN AS FORCE IN HISTORY (1946) (critiquing a feminist account of American history that regards white women primarily as victims rather than as possessing agency, economic means, and rights secured by courts of equity).

4. Jones-Rogers, p. ix (describing the erasure of white women from the interstate slave trade as a "commonly held patriarchal view").

ment" of several hundred enslaved Black people on plantations that produced sugar, cotton, and other agricultural staples.[5]

To be clear, not all white women possessed the economic capacity or desire to enslave Black people. Equally, however, it would be historically inaccurate to suggest that poor whites were more closely aligned with abolitionists simply because they did not own slaves. To the contrary, antebellum poverty and hardship, though often cruel, did not align with social and political opposition to slavery. Rather, poor whites participated in the broader social and economic structures of slavery. As Elizabeth Fortson Arroyo writes, poor whites sought their own "self-interest" and were cognizant of "what improvements in their lives they hoped to effect, and which other members of southern society could help or hinder them."[6]

As diaries, other empirical records, and legal cases show, slaveholding white women, particularly (although not exclusively) of the South, strategically fought to maintain slavery, engaging in litigation with banks, siblings, and others when ownership of their "property" came under threat.[7] And while most common depictions of Black human bondage involved sprawling plantations, slavery also included more modest acquisitions of Black people. Importantly, as owners and traffickers in enslaved Black people, white women were not passive participants in slavery—nor were they silent allies to the Black women whom they enslaved.[8]

Slavery became a critical part of white women articulating independence through law. By suing their husbands for "separation of property," white

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5. ANNE FIROR SCOTT, THE SOUTHERN LADY 34–35 (1970) ("The skill with which many widows carried on plantations suggests that women knew a good deal more about the planting operation than has generally been supposed.").

6. Elizabeth Fortson Arroyo, *Poor Whites, Slaves, and Free Blacks in Tennessee, 1796–1861*, 55 TENN. HIST. Q. 56, 57 (1996). *But see* Stephen V. Ash, *Poor Whites in the Occupied South, 1861–1865*, 57 J.S. HIST. 39, 40 (1991) (arguing that poor whites of the South were "cowed" into supporting slavery and "seduced . . . into supporting secession and war").

7. *See, e.g.*, Atkinson v. Atkinson, 15 La. Ann. 491, 491 (1860) ("This suit is brought to enjoin the seizure of certain property [enslaved Black people] claimed by the plaintiff as her separate property, and seized under execution by certain creditors . . . ."); Bertie v. Walker, 1 Rob. 431, 431 (La. 1842) (plaintiff appealing the judgment upholding seizure of "a negro slave named Matilda," whom "she bought . . . in her own name, for the price of eleven hundred and fifty dollars"); Bourgeois v. Bourgeois, 17 La. 494, 496 (1841) ("The record shows however a judgment in her favor for $4,304[.]06, followed by a fi. fa. and alias fi. fa.; and an appraisement of the very slaves seized in this suit, made on the 12th of June, 1837 . . . ."). See also the Nancy Pinson Papers (1820–1890) (on file with the LSU Libraries Special Collections), and the collection of diaries and papers of women slave owners at LSU.

8. *See, e.g.*, Jacobs, p. 38 ("[M]y mistress, like many others, seemed to think that slaves had no right to any family ties of their own; that they were created merely to wait upon the family of the mistress. I once heard her abuse a young slave girl, who told her that a colored man wanted to make her his wife. 'I will have you peeled and pickled, my lady,' said she, 'if I ever hear you mention that subject again. Do you suppose that I will have you tending *my* children with the children of that nigger?' ").

women secured paraphernal rights in their slaves.[9] Some states, such as Louisiana, provided for such litigation and vindication of white women's rights.[10] In fact, a close reading of legal archives also reveals the lengths to which slaveholding white women would exercise agency and dominion over enslaved Black people, including committing fraud, in order to preserve their claims to slaves. This included white women making false claims of ownership for slaves they did not legally possess or that their husbands unwillingly relinquished through means of seizure and bankruptcy due to unpaid debts.[11]

Importantly, such mistakes and omissions in recounting and recasting American history ignore structural, political, and economic benefits white women gained from their personal involvement in chattel slavery.[12] From ignoring or discounting white women in their actual roles and capacities in chattel slavery, a simplistic, homogeneous rendering emerges, which affects how we understand centuries of U.S. law, cultural attitudes, and social relations from the seventeenth century through slavery's abolition in the nineteenth century. Further, recognizing the realities of white women's roles in slavery serves in turn to acknowledge on a broader scale the suffering Black

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9. Paraphernal property refers to property in which the wife possesses complete control and whereby the property is not subject to joint ownership and cannot be defined as conjugal property. *See* Bostwick v. Gasquet, 11 La. 534, 537 (1838) ("[A] judgment of separation of property is null under the code, if it has not been executed by the payment of the rights and claims of the wife, made to appear by authentic act, or at least by a *bonâ fide* non-interrupted suit, to obtain payment; and that when a judgment of separation has been duly obtained and published, the situation of the parties is as if no community had existed between them.").

10. *See, e.g.*, Hickey v. Duplantier, 4 La. 314, 316 (1832) ("Mrs. . . . obtained a judgement of a competent tribunal by which a plantation and several slaves were decreed to her as her separate property . . . .").

11. *Id.* at 315 (reversing a lower court decision that held a decree of separation "null and void" in a case where a widow "pleaded a separation of property from her husband anterior to his death," and that the slaves were "transferred to her as separated in relation to the community of goods from her husband").

12. *Id.*; *see also* THAVOLIA GLYMPH, OUT OF THE HOUSE OF BONDAGE: THE TRANSFORMATION OF THE PLANTATION HOUSEHOLD 77 & n.44 (2008) (addressing southern white women's economic reliance on slavery to maintain sophisticated lifestyles, explaining "[n]ot only [that they] could [] not live without 'Negro help,' neither could they practice 'true economy,' if doing so meant living without extravagance. . . . Wealthy planter women adorned themselves and their homes with expensive kid gloves, French calico, black silk, organdy, embroidered handkerchiefs, damask napkins, and French towels"). The benefits white women gained then persist today in various ways, like the overrepresentation of white women in feminist organizations. *See, e.g.*, Caroline Kitchener, *'How Many Women of Color Have to Cry?': Top Feminist Organizations Are Plagued by Racism, 20 Former Staffers Say*, LILY (July 13, 2020), https://www.thelily.com/how-many-women-of-color-have-to-cry-top-feminist-organizations-are-plagued-by-racism-20-former-staffers-say [https://perma.cc/ECS4-HSSG] (describing how women of color struggle to find belonging in feminist organizations that seemingly shut them out, noting that "[w]omen of color have struggled to find that . . . sense of belonging at NOW").

women and their families endured at the mercy of their sisters—*quite literally in some instances*.[13]

This Review closely examines Harriet A. Jacobs's *Incidents in the Life of a Slave Girl* and Stephanie E. Jones-Rogers's *They Were Her Property: White Women as Slave Owners in the American South*,[14] adding to the canon on American slavery generally by providing a more accurate woman-centered account of the social and legal orders of antebellum America. However, the value of this project and its lines of inquiry extend beyond slavery's past as it foregrounds internecine feminist battles of the twentieth century, including suffrage and Jim Crow, as well as social and legal challenges in the present.[15] In this way, the Review contributes to correcting an "interpretive inertia" that results "in the study of women's history" being sidelined.[16]

This Review advances three claims in its contribution to the relatively nascent legal study of white women and their legal and social involvement with slavery as purposeful participants. First, it stresses that the common erasure of white women as slaveholders renders their culpability and complicity in human chattel slavery imperceptible. Simply put, they become blameless and guiltless in an enterprise in which their involvement was far more than proximate and was in fact, in many instances, dominant.[17]

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13. *See, e.g.*, *infra* note 75.

14. Stephanie E. Jones-Rogers is an Associate Professor in the Department of History at the University of California, Berkeley.

15. *See generally* Maryann Reid, *Black Women Are Paid Less than White Women: Here's Why It Matters*, FORBES (Aug. 22, 2019, 9:34 AM), https://www.forbes.com/sites/maryannreid/2019/08/22/black-women-are-paid-less-than-white-women-heres-why-it-matters [https://perma.cc/9GYN-5PTN] ("Putting white women at the forefront of the wage gap mimics the plight of the feminist movement in the 1960s when white women were at the forefront and black women at the bottom. There is a legacy of discrimination and a history of white women not standing side by side with black women when it comes to discrimination. This creates a distrust of white women in power. Which ultimately impacts the mental and physical health of black women when there is no allyship. When you are silent to the injustices of others who are impacted the most, it does nothing for your own liberation."); Kim McLarin, *Can Black Women and White Women Be True Friends?*, WASH. POST (Mar. 29, 2019, 12:15 AM), https://www.washingtonpost.com/nation/2019/03/29/can-black-women-white-women-be-true-friends/ [https://perma.cc/2DBB-L54Z] ("White women sit at the right hand of power, leaning in, not down. There have been 41 white female governors . . . but not a single black female one. . . . White women hold 4.4 percent of CEO positions, but black women hold 0.2 percent. Every 'Equal Pay Day,' white feminists decry that women average 80 percent of a man's salary but rarely mention that the figure applies mostly to white women: Latinas average 54 cents for every dollar, black women average 68 cents, American Indian and Alaskan Native women make 58 cents."); Toni Morrison, *What the Black Woman Thinks About Women's Lib*, N.Y. TIMES, Aug. 22, 1971, at SM14, https://www.nytimes.com/1971/08/22/archives/what-the-black-woman-thinks-about-womens-lib-the-black-woman-and.html [https://perma.cc/M5PW-SXT6].

16. *See* Hilary McD. Beckles, *White Women and Slavery in the Caribbean*, HIST. WORKSHOP J., Autumn 1993, at 66, 66–67.

17. SCOTT, *supra* note 5, at 36–37 ("Few aspects of women's work accorded so poorly with the image of delicate, frivolous, submissive women than the responsibility for managing

Second, scrubbing white women from the archives of antebellum history serves to deny not only their agency but also their capacities. In other words, removing white women as profiteers and commanders in slavery serves to erase the fact that some were successful, shrewd businesswomen, albeit in a horrid enterprise. Even those who "managed households" rather than large plantations wielded authority.

In troubling ways, this erasure both served to recast white women as disinterested in work and business, which defined Supreme Court jurisprudence on sex for many years, and contributed to the stereotype of white women as fragile, disempowered, weak, and vulnerable to lingering effect.[18] In recent decades, diligent efforts by historians correct inaccuracies in this record.[19]

Third, and perhaps most complicatedly, this Review argues that reading white women as passive or submissive participants in the business of antebellum slavery served to undermine their later employment attempts and business opportunities after slavery's abolition and through the 1900s. Contrary to the Supreme Court's patriarchal reading of women's capacities and destinies in *Hoyt v. Florida*,[20] *Goesaert v. Cleary*,[21] or *Bradwell v. Illinois*,[22] white women clearly were not wedded or destined to domestic duties but had experience in financial management and business.

The Review proceeds in three parts. In the brevity necessitated by the Book Review format, Part I addresses slavery as an unmined and generally ignored legal subject, particularly in legal education. Part II describes and analyzes slavery from a different point of view, centering the experience of

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slaves. . . . Supervising slaves was difficult, demanding, frustrating, and above all never-ending.").

18. *See, e.g.*, ELIZABETH FOX-GENOVESE, WITHIN THE PLANTATION HOUSEHOLD: BLACK AND WHITE WOMEN OF THE OLD SOUTH (1988) (problematically contributing to such stereotypes); ROBIN DIANGELO, WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM 132–33, 137 (2018) (addressing the perception of white women's fragility in particular detail); *see also* Ruby Hamad, Opinion, *How White Women Use Strategic Tears to Silence Women of Colour*, GUARDIAN (May 7, 2018, 2:00 PM), https://www.theguardian.com/commentisfree/2018/may/08/how-white-women-use-strategic-tears-to-avoid-accountability [https://perma.cc/S5YU-8ZZ8] ("And then there is a type of trauma inflicted on women of colour that many of us find among the hardest to disclose, the one that few seem willing to admit really happens because it is so thoroughly normalised most people refuse to see it. . . . [T]he 'weary weaponising of white women's tears.'" (quoting *About the Weary Weaponizing of White Women Tears*, AWESOMELY LUVVIE (Apr. 17, 2018), https://www.awesomelyluvvie.com/2018/04/weaponizing-white-women-tears.html [https://perma.cc/9W6W-S34P])).

19. *See, e.g.*, Jones-Rogers, p. xiv; SCOTT, *supra* note 5; GLYMPH, *supra* note 12; SUZANNE LEBSOCK, THE FREE WOMEN OF PETERSBURG: STATUS AND CULTURE IN A SOUTHERN TOWN, 1784–1860 (1984).

20. 368 U.S. 57, 61–62 (1961).

21. 335 U.S. 464 (1948).

22. 83 U.S. (16 Wall.) 130 (1873).

Black women and girls. It examines Harriet Jacobs's *Incidents in the Life of a Slave Girl* as a case study in American chattel slavery, as she and the women in her family were female owned. It further substantiates and contextualizes this Review's account of white women as holders and traders in human bondage.

Part III offers a more complex view of white women during the nation's founding and specifically the antebellum period. It brings to light slaveholding white women in the business and management of human capital. In their diaries, they confessed frustrations, anger, and stress, as well as joy at the birth of new slaves by whom they would profit.[23] Even as such historical accounts suffer for lack of nuance regarding sexual violence on slaveholding estates, the record of white women as capitalist businesswomen engaged in the enterprise of slavery becomes abundantly clear.

Recording this history of white women purchasing, leasing, holding, inheriting, disputing, and bequeathing enslaved Black people offers two important lanes of exploration and insight. First, it disputes prior accounts that dismissed white women's involvement in capitalism generally and human commodification specifically, which problematically placed them outside the margins of slavery and their own histories. Second, by strong implication, it shows that nineteenth- and twentieth-century jurisprudence disempowering women from voting, serving on juries, and becoming lawyers reflected paternalist norms baked into law by men for the purposes of honing and preserving male power.

History exposes with clarity how male Supreme Court justices (and those on lower courts) enshrined misogyny in law, conveniently erasing from the historical legal record white women's business engagement with capitalism and slavery. Equally, as their jurisprudence time and again revealed, justices ignored the historic, diverse labor of Black women and women of color in their expressed sophistry that women were destined for quaint domestic duties—as this for centuries had not been the role expected of Black women.[24] Indeed, the first female firefighter in the United States, Molly Williams, was an enslaved Black woman. She fought fires before New York's fire department existed.[25]

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23. *See, e.g.*, Diary of Lucilla McCorkle (July 1, 1846) (on file with the Southern Historical Collection, University of North Carolina Chapel Hill) ("My heart has been heavy with domestic care this week. . . . I fear I have not made due allowance for native depurity, nor for real bodily ailments. Business negligently done and much altogether neglected - some disobedience enough to identify [that] sullenness, slovenliness . . . be in him apart from respect, though inconsistent with it.").

24. *See Hoyt*, 368 U.S. 57; *Bradwell*, 83 U.S. (16 Wall.) 130.

25. Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 904 (2019); Ginger Adams Otis, *Molly Williams, a Black Woman and a Slave, Fought Fires Years Before the FDNY Was Formed Was a Pioneer for Fellow Female Smoke-Eaters*, N.Y. DAILY NEWS (Apr. 26, 2015), http://www.nydailynews.com/new-york/woman-slave-molly-williams-fought-fires-early-1800s-article-1.2197868

I. SLAVERY FROM A DIFFERENT POINT OF VIEW

Incidents in the Life of a Slave Girl and *They Were Her Property* tell a powerful American story even though published nearly 160 years apart. Beyond a doubt, the stories they record should be all too familiar and well known: the terrifying horror of American slavery, including kidnapping, confinement, coercion, rape, and torture.[26] These were the common markers of chattel slavery throughout the United States,[27] especially in the American South, as reported in newspapers,[28] abolitionist pamphlets,[29] daguerreotypes,[30] and autobiographies,[31] including some written by slaveholders—who

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[https://perma.cc/NT6B-8F5X] ("Molly Williams fought fires in the city even before the FDNY was organized 150 years ago.").

26. *See generally* THE DEVIL'S LANE: SEX AND RACE IN THE EARLY SOUTH (Catherine Clinton & Michele Gillespie eds., 1997) (addressing the rape and torture of Black women on plantations); RICHARD C. WADE, SLAVERY IN THE CITIES: THE SOUTH, 1820–1860 (1964) (detailing accounts of urban slave life in the southern cities, expanding the lens on American slavery beyond life for enslaved Blacks on plantations); SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT (Sven Beckert & Seth Rockman eds., 2016); ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY (1974); WILLIAM H. HARRIS, THE HARDER WE RUN: BLACK WORKERS SINCE THE CIVIL WAR (1982) (articulating the nexus of racial discrimination during slavery extending to Jim Crow); JOHN W. BLASSINGAME, THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH (1972) (chronicling the myriad hardships and abuses enslaved Blacks encountered in the antebellum South).

27. Goodwin, *supra* note 25, at 914–19.

28. *The Slave-Trade Still Prosperous*, N.Y. TIMES, Feb. 1, 1860, at 4 ("For more than half a century this odious commerce has withstood the denunciations of successive philanthropists; the proscriptive legislation of mighty States; the incessant surveillance, and destructive attacks of hostile squadrons—yet it is still prosperous, still flourishing."); *The Issue in the United States—the North and Slavery*, LONDON DAILY NEWS, *reprinted in* N.Y. TIMES, Jan. 18, 1860, at 2 ("The man who holds his fellow-man in slavery, treats him as a chattel, breeds from him with as little regard for marriage ties as if he were an animal, is a moral outlaw; society may find, or fancy it finds, its interest in protecting his life and his 'property' but it does so at its own peril. Before long a certain retribution overtakes it. In all ages of the world men have acknowledged rights which are older than civil society, and immutable . . . ."); *The United States and the Slave-Trade*, LONDON POST, Sept. 7, 1860, *reprinted in* N.Y. TIMES, Sept. 22, 1860, at 1.

29. The Library of Congress offers a collection of antislavery almanacs, newspapers, daguerreotypes, and other materials, including illustrations. *See The African-American Mosaic: Influence of Prominent Abolitionists*, LIB. CONG., https://www.loc.gov/exhibits/african/afam006.html [https://perma.cc/Q7AA-8NHC]; *see also* ANTI-SLAVERY TRACTS. FIRST SERIES, NOS. 1-20 (New York, Am. Anti-Slavery Soc'y 1855–1856).

30. The daguerreotype of Anthony Burns provides a particularly illustrative view into American slavery, as it maps his childhood, escape from slavery, life in Boston, capture, and return to slavery. The drawing captures slavery's tragic reach in the North, its cruelty in the South, and the horrific influences of fugitive slave laws in preserving slavery. *See* Illustration of Fugitive Slave Anthony Burns Drawn from a Daguerreotype, LIB. CONG., www.loc.gov/item/2003689280/ [https://perma.cc/L8DP-53M4].

31. Among some of the better known are SOLOMON NORTHUP, TWELVE YEARS A SLAVE (David Wilson ed., Auburn, Derby & Miller 1853); FREDERICK DOUGLASS, NARRATIVE OF THE

proudly engaged in such enterprise.[32] Despite robust contemporary debates as to what year best marks the start of the enterprise of American slavery—1619 versus the 1500s—what is clear is that slavery was a centuries-old enterprise, resulting in the dramatic expansion of capital[33] and laws that facilitated the steady flow of Black bodies into what would become the United States.[34]

Notwithstanding the compelling historical, feminist, and legal contributions of Harriet Jacobs's 1861 autobiography, law students over the past 160 years would be forgiven for never having heard of her, the suffering that she and millions of women like her endured at the hands of white women and men committed to the lucrative enterprises of slavery, or her bravery in escaping and penning a classic autobiography. She, like millions of others, especially women similarly situated during slavery, is invisible in her own narrative.

Law professors skip over the crucial ways in which slavery is linked to and foundational to first-year law classes ranging from property to criminal law, instead musing over *Pierson v. Post*[35] as the early American legal case of property, when *Brakkee v. Lovell*,[36] *Brom and Bett v. Ashley*,[37] *Quock Walker v. Jennison*,[38] and *Guardian of Sally v. Beaty*[39] already represented cases in property: human property. Even though the earliest legal disputes involving criminal law, contracts, constitutional law, civil procedure, torts, family law, and property (in the land that would become the United States) involved arguments over who owned, leased, and held rights in Black bodies, casebooks largely render enslaved persons invisible, incidental, and nonessential to the American legal story.

LIFE OF FREDERICK DOUGLASS (Belknap Press of the Harvard Univ. Press) (1853); and Jacobs's *Incidents*.

32. *See, e.g.*, THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 143 (William Peden ed., Univ. of N.C. Press 1996) (1785) ("I advance it therefore as a suspicion only, that the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of body and mind. . . . This unfortunate difference of colour, and perhaps of faculty, is a powerful obstacle to the emancipation of these people.").

33. SLAVERY'S CAPITALISM, *supra* note 26, at 12.

34. *See* Mary Elliott & Jazmine Hughes, *A Brief History of Slavery that You Didn't Learn in School*, N.Y. TIMES MAG. (Aug. 19, 2019), https://www.nytimes.com/interactive/2019/08/19/magazine/history-slavery-smithsonian.html [https://perma.cc/3TLL-8LVZ].

35. 3 Cai. 175 (N.Y. Sup. Ct. 1805).

36. BENJAMIN H. HALL, HISTORY OF EASTERN VERMONT, FROM ITS EARLIEST SETTLEMENT TO THE CLOSE OF THE EIGHTEENTH CENTURY 331 n.† (1858); *Patchwork Freedom*, UNIV. VT. (Jan. 29, 2014), https://www.uvm.edu/uvmnews/news/patchwork-freedom [https://perma.cc/DRJ8-7W39].

37. *Mumbet Court Records*, ELIZABETH FREEMAN, https://elizabethfreeman.mumbet.com/who-is-mumbet/mumbet-court-records [https://perma.cc/U24E-E84N].

38. *The Quock Walker Case: "Instructions to the Jury,"* PBS, https://www.pbs.org/wgbh/aia/part2/2h38.html [https://perma.cc/L2N8-WBKD].

39. 1 S.C.L. (1 Bay) 260 (1792).

These gaps in teaching from a broader historical legal record undoubtedly limit how students who later become practitioners of law come to understand that the earliest contracts and property disputes in these lands involved slavery.[40] Courts debated complicated rules of law deeply intertwined with slavery: generally, it was not illegal to harm or even kill your own slave, but if you leased a slave, were you still entitled to inflict injury on another's property?[41] If an enslaved woman escaped with her children, was this an act of larceny or theft?[42] Jurisdictional struggles ensued between courts regarding whose authority defined the law on a formerly enslaved Black person in a city or town, leading famously to the Supreme Court's decisions in *Ableman v. Booth*[43] and *United States v. Booth*.[44] Was an enslaved person still so after escape; were they *property* or *person*?

Equally, because the matter of sexual abuse and violence against Black women and girls was so frequent and common, legislatures sought to resolve parentage and legal status with alacrity. *Was the offspring of a white man and an enslaved Black woman free or enslaved?* Early American law answered this question with painful clarity: offspring would take the status of their enslaved mothers, which further tied capitalism to rape, embedding a horrific practice into the culture of southern economics.[45]

In addition, in sorting out questions of criminal law, *was the murder of an enslaved Black person a criminal offense?* There, too, legislatures acted with haste and precision:

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40. *See, e.g.*, State v. Mann, 13 N.C. (2 Dev.) 263, 263 (1829).

41. *Id.*

42. *See* Julius Yanuck, *The Garner Fugitive Slave Case*, 40 MISS. VALLEY HIST. REV. 47 (1953); *see also* Rebecca Carroll, *Overlooked: Margaret Garner*, N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/obituaries/margaret-garner-overlooked.html [https://perma.cc/8428-8X5P].

43. 62 U.S. (21 How.) 506 (1859) (querying whether the Wisconsin Supreme Court had the authority to issue writs of habeas corpus for the release of Sherman Booth, an abolitionist who aided in the escape of Joshua Glover, a "runaway slave," held in federal custody in Wisconsin and ruling that it did not).

44. 59 U.S. (18 How.) 476 (1856).

45. In 1662, the Virginia Grand Assembly enacted one of its first "slave laws" to settle this point, expressing,

> Whereas some doubts have arrisen whether children got by any Englishman upon a negro woman should be slave or free, *Be it therefore enacted and declared by this present grand assembly*, that all children borne in this country shalbe held bond or free only according to the condition of the mother, *And* that if any christian shall committ fornication with a negro man or woman, hee or shee soe offending shall pay double the fines imposed by the former act.

Act XII, *reprinted in* THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 170 (William Waller Hening ed., New York, R., W. & G. Bartow 1823); *see also id.* at 260, 266, 270.

> [I]f any slave resist[s] his master (or other by his masters order correcting him) and by the extremity of the correction should chance to die, that his death shall not be [accounted a felony], but the master (or that other person appointed by the master to punish him) be acquit from molestation, since it cannot be presumed that [premeditated] malice (which alone makes [murder a felony]) should induce any man to destroy his owne estate.[46]

Fugitive slave laws of 1793 and 1850 were early examples of interstate commerce regulations. Exhilarant on an already raging fire, they legalized an enterprise whereby nonelite, white bounty hunters and "slave catchers" traveled to northern states and territories to hunt Black people who, by skill and wit, escaped.[47] It was not unusual that by threats of death and clever means bounty hunters kidnapped Black children, women, and men who had never been enslaved.[48]

States enacted laws mandating Black people carry documents or "passes" proving that their "owners" granted permission for them to be in public spaces, such as along a road or in town. The origins of police, "police patrols," and policing emerge from slavery.[49] Police-patrol violence emerges from the culture of slavery. Failure to produce a pass could result in severe physical punishment by the local slave police patrol. Children and women

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46. *Id.* at 270 (cleaned up).

47. WADE, *supra* note 26, at 218, 227 (detailing accounts of slave life in the southern cities, diversifying the literature on slavery, and expanding beyond research of enslaved Blacks' lives on plantations).

48. *See, e.g.*, Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 543 (1842); *see also* RICHARD BELL, STOLEN: FIVE FREE BOYS KIDNAPPED INTO SLAVERY AND THEIR ASTONISHING ODYSSEY HOME (2019).

49. In North Carolina, where Jacobs was enslaved, ordinances like the following were not uncommon:

> 1st. Patrols shall be appointed, at least four in each Captain's district.
>
> 2d. It shall be their duty, for two of their number, at least, to patrol their respective districts once in every week; in failure thereof, they shall be subject to the penalties prescribed by law.
>
> 3d. They shall have power to inflict corporal punishment, if two be present agreeing thereto.
>
> 4th. One patroller shall have power to seize any negro slave who behaves insolently to a patroller, or otherwise unlawfully or suspiciously; and hold such slave in custody until he can bring together a requisite number of Patrollers to act in the business.
>
> 5th. Previous to entering on their duties, Patrols shall call on some acting magistrate, and take the following oath, to wit: "I, A. B. appointed one of the Patrol by the County Court of Rowan, for Captain B's company, do hereby swear, that I will faithfully execute the duties of a Patroller, to the best of my ability, according to law and the regulations of the County Court."]

PATROL REGULATIONS FOR THE COUNTY OF ROWAN (Salisbury, Philo White 1825), *reprinted in* DOCUMENTING AM. S. (2001), https://docsouth.unc.edu/nc/rowan/rowan.html [https://perma.cc/D8QK-SLWG].

were not spared. In his 1857 memoir, Austin Steward detailed early police violence. He recounts:

> Slaves are never allowed to leave the plantation to which they belong, without a written pass. Should any one venture to disobey this law, he will most likely be caught by the patrol and given thirty-nine lashes. This patrol is always on duty every Sunday, going to each plantation under their supervision, entering every slave cabin, and examining closely the conduct of the slaves; and if they find one slave from another plantation without a pass, he is immediately punished with a severe flogging.[50]

Substantively, students may learn about the infamous *Dred Scott* opinion, in which Chief Justice Roger Taney claimed:

> [Black slaves] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.[51]

Despite the importance of *Dred Scott* to canons of law beyond constitutional law, such as contracts, property, civil procedure, criminal law, and even feminist jurisprudence, the case receives relatively little attention. Further, though the Supreme Court's decision and most attention surrounding the case focuses on Mr. Scott, he also sought to free *his wife and daughters*.[52] Their underlying claims to freedom also pass uncontested through the annals of American law. One reason for the obscurity may be the Court's stunning claim that it lacked jurisdiction over the matter because Mr. Scott and his family were not citizens of the United States, but rather slaves.[53] Interestingly, Justice Taney and fellow justices did not bother to test this notion against Scott's daughter who was born at sea, not in a slave state.[54] Even so, little of a law student's education in the United States engages slavery.

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50. AUSTIN STEWARD, TWENTY-TWO YEARS A SLAVE AND FORTY YEARS A FREEMAN 10 (Syracuse Univ. Press 2002) (1857) (emphasis omitted).

51. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857). History marks Justice Taney's opinion as uncharitable and regrettable, but it did not tarnish his reputation. His bust still sits in the halls of Congress.

52. *Id.* at 457 (Nelson, J., concurring) ("The suit was brought in court below by the plaintiff, for the purpose of asserting his freedom, and that of Harriet, his wife, and two children.").

53. *Id.* at 406 (majority opinion).

54. *See id.* at 398.

II. SLAVERY AS THE ORIGINAL #METOO

As Jacobs and Jones-Rogers show, and countless records teach us, slavery itself was the horrible practice of human trafficking and kidnapping, although not described as such by those who practiced and profited from it. This legacy marks society as much as it marred Black bodies. For example, a recent study[55] focusing on the genetics of slavery reveals that "the brutal treatment of enslaved people has shaped the DNA of their descendants" such that it further confirms "one of the darkest chapters of world history, in which 12.5 million people were forcibly taken from their homelands in tens of thousands of European ships."[56] The study's authors grapple with their troubling findings, particularly as the DNA of African Americans also reveals centuries of sexual violence and rape of Black women by white men.[57] Rapes were so extensive in the United States by white men that they "contributed three times more to the modern-day gene pool of people of African descent than European women did."[58]

For these reasons, Ms. Jacobs's autobiography is particularly relevant and important: it disrupts the common chronicles of slavery in two distinct ways, as if plucking a scab and offering a look at what festers beneath it. First, the autobiography disturbs the common, gendered framing of American slavery, which casts slave owning as a white male enterprise not only in society but also in law. Instead, Harriet Jacobs exposes white women as common legal participants in the owning, leasing, and bequeathing of slaves.[59] Second, the autobiography is disruptive in that it narrates slavery from the perspective of an enslaved Black girl and later woman. Reconfiguring the landscape of slavery in this way makes visible the overlooked central cast in the saga of slavery—namely, enslaved children, women, and men—not as objects or others but as complex human beings caught within a lawless system.

Substantively, examining slavery through a gendered lens also rereads women beyond stereotypes and caricatures articulated by men. Doing so through a Black woman's lens in this case further enhances our view into estates and plantations in which slavery was the standard way of life, making

55. Steven J. Micheletti et al., *Genetic Consequences of the Transatlantic Slave Trade in the Americas*, 107 AM. J. HUM. GENETICS 265 (2020).

56. Christine Kenneally, *Large DNA Study Traces Violent History of American Slavery*, N.Y. TIMES (July 23, 2020), https://www.nytimes.com/2020/07/23/science/23andme-african-ancestry.html [https://perma.cc/3RR7-LUPM].

57. *Id.*

58. *Id.* In the Caribbean, the rate of white male carnage on Black women is borne out in DNA evidence; they contributed "25 times more" to the modern-day gene pool of Black people in the British Caribbean. There are social and political reasons that explain these differences, including that white women generally did not settle the Caribbean whereas they did settle in what would become the United States. *See* Cecily Jones, *Contesting the Boundaries of Gender, Race and Sexuality in Barbadian Plantation Society*, 12 WOMEN'S HIST. REV. 195, 207 (2003).

59. *See* Jacobs, p. 8.

visible norms that were either overlooked in negligence or by intent. Like adjusting the lens on a microscope or binoculars, we gain a better view and understanding of both Black and white women. *Why is this important?*

Accounts of white historians rarely center Black women. For example, when Professor Elizabeth Fox-Genovese writes of Black women in *Within the Plantation Household: Black and White Women of the Old South*, she hastily dispenses with discussions of slavery's key features: sexual violence and rape committed against Black girls and women.[60] She writes that while "[t]he white men were not saints . . . slave women who worked in the fields were clothed scantily, with skirts hitched above their knees."[61] Arguably, through this lens, Black women and girls were blameworthy or co-conspirators in the American conditions of enslavement, from rape to the inadequate clothing they were provided to the insufferably hot and musty conditions of picking cotton and field labor.

Similarly, Anne Firor Scott's *The Southern Lady: From Pedestal to Politics, 1830–1930* offers important insights relating to slavery, from marriage and work to the Civil War and suffrage. The book copiously details white women's direct involvement with owning and managing enslaved Black people. The author combs through countless letters, diary entries, and other communications.[62] She provides a narrative foundation that ultimately supports the conclusions drawn in Jones-Rogers's *They Were Her Property* and this Review. Yet, the book renders Black girls and women invisible even as they are central to the southern (white) lady's life (as cooks, cleaners, wet nurses, field laborers, house laborers, and objects of their husbands' predations).

In chapter two, "The Reality: Love, Marriage, Work, and Family Life,"[63] Firor Scott writes about white women and "miserable" marriages, filled with "grief and regret," including disappointments related to a lack of emotional commitment from their husbands, unhappiness, and sexual discomforts.[64] In a later chapter, she capture's white women's "discontent."[65] She explains that a key factor to white women's discontent and anger was the complex relationship to slaves, encompassing "marriage, family life, and sexual mores . . . defined by the patriarchal doctrine."[66] She describes how some white women sought emotional and religious refuge to escape their troubling marriages.[67]

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60. FOX-GENOVESE, *supra* note 18, at 49.

61. *Id.* at 189.

62. SCOTT, *supra* note 5, at xii.

63. *Id.* at 22–44.

64. *Id.* at 40; *id.* at 11 ("There are references to sins too awful even to be recorded in a private journal, accompanied by allusions to cold hearts.").

65. *Id.* at 45–79.

66. *Id.* at 46 ("For women, . . . slaves were a troublesome property.").

67. *Id.* at 11–14.

Glaringly absent is nuanced analysis about marital misery as it relates to slavery, adultery, and sexual assaults committed on Black girls and women. After all, sexual predations and pedophilia in a spouse would reasonably trigger unhappiness, disappointment, dissatisfaction, and even rage. That said, these matters, which are central to social, legal, and cultural politics of slavery, are virtually hidden from view. Firor Scott refers to white women's discontent with "miscegenation" as a "grievance," but not rape and sexual assault of the hapless victims.[68] What becomes clear from the record Firor Scott amasses is that enslaved Black women were perceived as sexual interlopers, "prostitutes," and members of "a hideous black harem" rather than disempowered victims of both the white women and men who claimed ownership of them.[69]

By contrast, Jacobs's powerful testimonials (directly and indirectly affirmed by others)[70] speak clearly to what historians of the white female experience during slavery avoided or seemingly rendered unnoteworthy.[71] Like the literal excavation of Sally Hemings's existence at Monticello in recent years,[72] more than 150 years ago, Harriet Jacobs exhumed and deftly reported on the hidden horrors of Black girls' experiences, some of which was already visible on the faces of enslaved children who resembled their white fafathers.

Jacobs describes being owned as a young girl in North Carolina by a relatively benign, older white woman, Margaret Horniblow (Jacobs, p. 7 & n.9). Margaret—who had also owned Jacobs's mother before her premature

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68. *Id.* at 54.

69. *Id.* at 52 ("Under slavery we live surrounded by prostitutes . . . like patriarchs of old, our men live in one house with their wives and concubines. . . . Any lady is ready to tell you who is the father of all the mulatto children in everybody's household but her own." (quoting Mary Chestnut)).

70. For example, Professor Jean Fagan Yellin, one of the nation's leading scholars on the literature of slavery, spent more than six years confirming the very accounts documented by Jacobs, reading the letters sent by Jacobs to abolitionists (found at the University of Rochester), searching through archives in North Carolina, and more to corroborate the memoir. Jean Fagan Yellin, *Preface* to Jacobs, pp. vii–viii.

71. Jean Fagan Yellin, *Introduction* to Jacobs, pp. xv ("Newly found documents make it possible to trace Harriet Jacobs's life, to establish her authorship of *Incidents*, and to identify the people and places she presented pseudonymously in her book.").

72. For nearly two centuries, most white historians wrote Sally Hemings (an enslaved Black teenager and then adult) out of Thomas Jefferson's life—as a subject of his gaze and predations—even though she mothered six of his children, traveled to France with him, and slept in a windowless chamber next to his. At some point, her existence was literally papered over as managers of his estate converted her bedroom into a men's bathroom, quite literally micturating on her very existence. *See* Farah Stockman, *Monticello Is Done Avoiding Jefferson's Relationship with Sally Hemings*, N.Y. TIMES (June 16, 2018), https://www.nytimes.com/2018/06/16/us/sally-hemings-exhibit-monticello.html [https://perma.cc/8FPT-WB26] ("The newly opened space at Monticello, Thomas Jefferson's palatial mountaintop plantation, is presented as the living quarters of Sally Hemings, an enslaved woman who bore the founding father's children. But it is more than an exhibit.").

death—instructs young Harriet in reading, spelling, and writing, which laws prohibited in many slave states.[73] Horniblow is described as relatively benevolent, such that Jacobs convinces herself that one day she will be manumitted by her (Jacobs, p. 7). Indeed, Ms. Horniblow promises Harriet's dying mother "that her children should never suffer for any thing . . . . But, alas! [W]e all know that the memory of a faithful slave does not avail much to save her children from the auction block" (Jacobs, p. 7).

Instead, Harriet experiences the profundity of American law and the system it supported: slavery holds no compassion or moral exemptions for children. They, too, carry the burden of being commonly traded goods of no higher moral, social, or legal standing than cattle in the fields, domesticated animals, or household items.[74] This disruptive and cruel awakening visits Harriet at twelve years old when Margaret Horniblow dies, bequeathing Harriet to her five-year-old niece. As Ms. Jacobs recounts:

> She possessed but few slaves; and at her death those were all distributed among her relatives. Five of them were my grandmother's children, and had shared the same milk that nourished her mother's children. Notwith-

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73. Jacobs, pp. 6–7, 6 n.8; *see, e.g.*, VA. CODE tit. 54, ch. 198, § 32 (1849) ("If a white person assemble with negroes for the purpose of instructing them to read or write, or if he associate with them in an unlawful assembly, he shall be confined in jail not exceeding six months and fined not exceeding one hundred dollars . . . ."). See also Act of 1831, ch. VI, 1831 N.C. SESS. LAWS 11, which reads:

> An act to prevent all persons from teaching slaves to read or write, the use of figures excepted:
>
> Whereas the teaching of slaves to read and write, has a tendency to excite dissatisfaction in their minds and to produce insurrection and rebellion, to the manifest injury of the citizens of this State: Therefore,
>
> *Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same*, That any free person, who shall hereafter teach, or attempt to teach, any slave within this State to read or write, the use of figures excepted, or shall give or sell to such slave or slaves any books or pamphlets, shall be liable to indictment in any court of record in this State having jurisdiction thereof; and upon conviction, shall, at the discretion of the court, if a white man or woman, be fined not less than one hundred dollars, nor more than two hundred dollars, or imprisoned; and if a free person of color, shall be fined, imprisoned, or whipped, at the discretion of the court, not exceeding thirty nine lashes, nor less than twenty lashes.
>
> II. *Be it further enacted*, That if any slave shall hereafter teach, or attempt to teach, any other slave to read or write, the use of figures excepted, he or she may be carried before any justice of the peace, and on conviction thereof, shall be sentenced to receive thirty nine lashes on his or her bare back[.]
>
> III. *Be it further enacted*, That the judges of the Superior Courts and the justices of the County Courts shall give this act in charge to the grand jurors of their respective counties.

See also Important for the Future, HARPER'S WKLY., June 21, 1862, at 386 ("The law of 1830 in North Carolina forbids all persons to teach 'slaves' to read or write.").

74. *See* Jacobs, p. 7.

> standing my grandmother's long and faithful service to her owners, not one of her children escaped the auction block. (Jacobs, p. 8)

Ms. Jacobs and her female relatives were all owned by white women: Harriet's mother and her grandmother (Jacobs, pp. 6–8). Harriet's mother and Margaret Horniblow both nursed at her grandmother's breasts and played together in childhood.[75] This, too, was not uncommon on estates and plantations. Yet, hierarchy was never disrupted, and that became startlingly clear as playmates grew older and roles took shape. Indeed, these relationships were not uncomplicated, such as gaining legal dominion over one's playmate.

Being owned by a five-year-old presented additional challenges. Harriet had no protection from her owner's licentious father, Dr. Flint, who, although forty years senior to Harriet and an esteemed local doctor, made explicit his desire to sexually assault and rape her (Jacobs, Chapter Five). In a chapter titled "The Trials of Girlhood," she describes the complicated effort to stay safe, avoid the wrath and jealousy of Mrs. Flint, and stay beyond reach of Dr. Flint—while a girl herself (Jacobs, pp. 27–28). She writes, "I saw a man forty years my senior daily violating the most sacred commandments of nature. He told me I was his property; that I must be subject to his will in all things" (Jacobs, p. 27; footnote omitted).

Relevantly, she notes, "there is no shadow of law to protect [Black girls] from insult, from violence, or even from death; all these are inflicted by fiends who bear the shape of men" (Jacobs, p. 27). As she turns fifteen, she explains that it marks "a sad epoch in the life of a slave girl" as they soon become sexual chattel (Jacobs, p. 27). Indeed, to comprehend the banality of rape as part of the American slave experience is to understand that Dr. Flint was also the father to at least eleven other enslaved Black people (Jacobs, p. 35). Focusing the lens of slavery on a Black girl's experience, Jacobs tells us, "[s]he listens to violent outbreaks of jealous passion, and cannot help understanding what is the cause. She will become prematurely knowing in evil things. Soon she will learn to tremble when she hears her master's footfall" (Jacobs, p. 28).

Harriet's grandmother, after securing her own liberty, made numerous attempts to purchase her granddaughter's freedom to no avail (Jacobs, p. 35). The grandmother's concerns were rooted in her personal knowledge about the predatory nature of slavery. Girls barely beyond childhood became targets for sex and breeding, which was true in Harriet's case. As white men placed their mixed-race offspring for sale at auction, they literally engaged in creating capital out of slavery (Jacobs, p. 55). In response to the offers made by Harriet's grandmother to purchase her freedom, Dr. Flint frequently responded that the matter was beyond his control. He claimed, Harriet "does

75. Jacobs, pp. 6–7 ("In fact, my mother had been weaned at three months old, that the babe of the mistress might obtain sufficient food[ ]. . . when they became women, my mother was a most faithful servant to her whiter foster sister.").

not belong to *me*. She is my daughter's property, and I have no legal right to sell her" (Jacobs, p. 35). The irony of evoking law in such instances speaks to the duplicity of slavery.

Sexual assault on Black girls in antebellum life is also the story of white women's rage, violence, disappointment, and victimization in adulterous relationships.[76] As Jacobs explains, "[e]ven the little child, who is accustomed to wait on her mistress and her children, will learn, before she is twelve years old, why it is that her mistress hates" particular enslaved Black women—and muse that "[p]erhaps the child's own mother is among those hated ones" (Jacobs, p. 28). In Harriet's case, although a child, she becomes the target of Mrs. Flint's loathing and rage. What Mrs. Flint could not inflict on her husband, she cowardly wreaked on Harriet (Jacobs, pp. 32–34).

What in other accounts of antebellum history is described as hardened, distanced institutional management of the estate or plantation's affairs—including inflicting physical punishment—from a detached, objective point of view, Jacobs reveals as personal, emotional, and intentional. Whether spitting in every kettle after a meal so that the cook and her family could not eat the meager remaining morsels (Jacobs, p. 12), or retaliating in the forms of whippings, brining, or selling off slaves who dared verbalize contempt at being commodified, exploited, and raped, white women who owned enslaved Black people could be as calculating and cruel as the men in their lives. These were not arm's-length transactions but rather intimate operations in the slave economy.

III. WHITE WOMEN AND THE HUMAN PROPERTY THEY KEPT

Incidents in the Life of a Slave Girl provides a crucial foundation for correcting impressions and assumptions baked into social understanding that slavery was exclusively or even primarily controlled and governed by men. *They Were Her Property: White Women as Slave Owners in the American South* further advances that record. Both works expose the *intentional* involvement of white women—not as proximate investors to their husbands and fathers. Nor as passive, unaware subordinates. Instead, they disrupt the common narratives of slavery that careful readers of that history thought they already knew: *white women were slave owners too*. As such, they, too, are implicated not only in the social constructions of slavery but also in its legal story.

A. *The Master's Power: Rethinking Slavery from a Gendered Perspective*

Professor Jones-Rogers reminds us that in the instances when historians have portrayed the authority that white women wielded over enslaved people, they typically framed this involvement as "obligatory, rather than volun-

76. *See, e.g.*, Jacobs, pp. 27–28.

tary or self-initiated, management and discipline of enslaved people" (Jones-Rogers, p. xii). Such writers of history claim that white women were only "fictive masters" (Jones-Rogers, p. xii), as if the transgressions they committed could only be viewed through the imagination rather than reality. Jones-Rogers critiques the assumption that these capable women "did not relish their power" (Jones-Rogers, p. xii). As Professor Jones-Rogers notes, even scholars who examine slavery, acknowledging white women's skills, desire to work, and interest in profit, typically find that they lacked a "master's" power (Jones-Rogers, pp. xii, xvii). They portray the authority by which white women wielded the whip (or imposed on someone else to lift it) as by degrees different than that of white male counterparts or suggest "that slave-owning women's acts of violence differed from those of slave-owning men" (Jones-Rogers, p. xii).

Professor Jones-Rogers builds upon these accounts, but her authoritative study dramatically differs from them. For example, she concentrates her examination on women who owned enslaved people outright—not as shared or joint property (Jones-Rogers, p. xii). She also centers her research on white women's relationship "to slavery as a relation of property . . . that was, above all, economic at its foundation" (Jones-Rogers, p. xiii). The value of this shifted research lens where the aperture opens on women's economic investment in slavery is that it informs the "process of nation-making" (Jones-Rogers, p. xiii).

Provocative questions emerge from this critical reexamination of American slavery from a gendered lens. Namely, "if we considered the very real possibility that some of the enslaved people . . . men compelled to work in southern cotton fields actually belonged to their wives," how might the American story of capitalism be understood and rewritten? (Jones-Rogers, p. xiii). Might it be, as Jones-Rogers queries, "strikingly different?" (Jones-Rogers, p. xiii). Understanding, as the history of American capitalism teaches us, that "slave-grown cotton was the most valuable export made in America,"[77] how then might we rethink white women's roles in building the nation's capital and their desire, if not economic hunger, to maintain the international slave trade?[78]

Further, Jones-Rogers counters accounts that southern white women were repulsed by slavery. She writes, "[w]omen could examine enslaved people's bodies . . . [and] [i]f what they saw piqued their interest, they could enter the trader's establishment and be assured that the proprietor would cater to their needs" (Jones-Rogers, p. 131). She concludes this passage by noting that white southern women were neither "repulsed or alienated from slave markets" nor "ignorant of the details of slave transactions" (Jones-Rogers, p. 131).

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77. SVEN BECKERT & SETH ROCKMAN, INTRODUCTION, *in* SLAVERY'S CAPITALISM, *supra* note 26, at 1, 1.

78. *See* Jones-Rogers, pp. 130–32.

Jones-Rogers explains that "[r]esidential and business directories and censuses of merchants show that hundreds of women conducted business in the same places where slave traders plied their trade" (Jones-Rogers, p. 132). In other words, not only were white women slave owners; they also built businesses adjacent to slavery, such as retail shops, restaurants, and other businesses near auction houses that traded in kidnapped and enslaved Black people, further demonstrating their sophistication in building slavery-related capital. History could suggest that these women were crafty at following the wealth generated by men. However, Jones-Rogers writes, "The directories also show that female merchants outnumbered individuals who identified themselves as slave traders in the commercial center of [New Orleans], thereby suggesting that these men were locating their businesses in proximity to the female merchants" (Jones-Rogers, p. 132).

Despite the invisibility of white women to modern accounts of antebellum slavery, records show that "[t]he slave market offered a range of possibilities for white women" (Jones-Rogers, p. 149). The economic stability and wealth generated by slavery "brought [white women] wealth that they would not have accumulated otherwise" (Jones-Rogers, p. 149). Jones-Rogers offers a powerful critique. Slave owning women "had an immense economic stake in the continued enslavement of African Americans, and they struggled to find ways to preserve the system when the Civil War threatened to destroy the institution of slavery and their wealth along with it" (Jones-Rogers, p. 150).

Indeed, even as efforts to stem the kidnapping and importation of slaves were enacted into law, such efforts were not taken seriously. For example, Congress enacted the 1807 Act Prohibiting Importation of Slaves.[79] However, as an 1860 *New York Times* article reported, "The laws are on the statute-book, and anybody who likes to obey them may do so; but any one who does not like to obey them need not."[80]

> Several cargoes of negroes have, it is notorious, been imported from Africa within the last year, and have been distributed through the interior with greater or less publicity. The perpetrators of the offence have been well known; in fact, so far from concealing their share in it, have gloried in it. We have not yet heard of the conviction and punishment of one of them. The Federal officials have either winked at the crime, or pursued it with such laxity that they might better have suffered it to pass altogether unnoticed.[81]

In *Slavery's Capitalism: A New History of American Economic Development*, Sven Beckert and Seth Rockman explain that human trafficking was so

79. Act of Mar. 2, 1807, ch. 22, 2 Stat. 426.

80. *The Slave-Trade and the Election*, N.Y. TIMES, Sept. 19, 1860, at 4 , https://www.nytimes.com/1860/09/19/archives/the-slavetrade-and-the-election.html [https://perma.cc/5YC2-EKZG].

81. *Id.*

profitable to the growth of American capital that economists and sociologists have yet to fully calculate "the capital stored in slaves."[82] Nevertheless, what is understood even if framed in the crudest economic terms is that the value embedded quite literally in enslaved persons' bodies "exceeded the combined value of all the nation's railroads and factories."[83] This enterprise by its nature was of course global, but within the United States, slavery's economic reach extended far beyond Mississippi, Louisiana, and other agrarian states. Foreign investments "underwrote the expansion of plantation[s]," and the "highest concentration of steam power in the United States was to be found along the Mississippi."[84]

Thus, if we reimagine female antebellum slaveholders as mindful, engaged capitalists, how might we rethink women's roles in society, social relations, law, and virtually every other aspect of American society since the Civil War? At the very least, taking seriously *married* white women as capitalists who independently and purposefully engaged in slavery challenges the notion that white women's economic viability and wealth depended on their husbands (Jones-Rogers, p. xiii).

As Professor Jones-Rogers points out, the traditional view of women's economic security, in part shaped by Adam Smith, contended that a married woman's financial security was inextricably tied to her husband's ingenuity, brawn, hard work, skill, and thoughtful management of *his* affairs.[85] This dominant view was very likely true in many instances, but importantly not all. And conflating white women's experiences not only, then, participates in the expungement of their records of complicity in slavery but also contributes to the enterprise of casting white women as powerless and thoughtless to the conditions that surrounded them, lacking for more than two centuries in intellectual and business capacity or the desire to build wealth along the same lines as men. Such reductive accounts also ignore white women's seventeenth-, eighteenth-, and nineteenth-century capitalist interests, greed, and desire to maintain the status quo. Finally, reading white women slaveholders as intentional rather than proximate or negligent actors gives rise to a broader spectrum of questions and concerns (albeit beyond the scope of this Review) that relate to "young mistresses" and what Jones-Rogers calls "mistresses in the making" (Jones-Rogers, Chapter One).

Professor Jones-Rogers provides ample evidence why discounting slaveholding white women's pecuniary desires tied to slavery simply does not accord with history. Female slaveholders were as likely as their male counterparts to blind themselves to the wrongs they perpetuated or to justify them, disputing abolitionist accounts of slavery and claiming enslaved Blacks relished their condition, satisfied and even "light-hearted, . . . enjoy[ing] the

82. Beckert & Rockman, *supra* note 77, at 1.

83. *Id.*

84. *Id.*

85. *See* Jones-Rogers, p. xiii.

service they render."[86] Slaveholding women, in their own words, help to rewrite this misunderstood or misrepresented history.

Harriet Jacobs offers an alternative, intimate starting point—a Black woman's point of view—for dismantling the misconception of white women as distant, disinterested, passive, and uninvolved holders in human capital. Her family's experience in human bondage was defined through white women's slave practice in life and death, transferring their human property through legal documents, including wills at death.[87] As historians like Professor Jones-Rogers build upon this record through diaries, op-eds, and other sources, this Review turns to case law to further demonstrate and demarcate a gendered view of U.S. slavery.

B. *Excavating Law: Telling a Woman's Story*

In 1946, Mary Beard, arguably a pioneer in the then-nascent field of women's history, argued in her important work *Woman as Force in History*[88] that antebellum accounts of slavery completely misread the status of white women. For this she held contempt, not only for male scholars who lazily relied on sophistic tropes rather than rigorous review of the historic record[89] but also for feminists who attempted to achieve twentieth-century liberation by casting eighteenth- and nineteenth-century white women as helpless, fragile, and completely subordinate to and dependent on men.[90] While acknowledging the laws of coverture as relevant to women's lives, she refuted what passed as the standard feminist expression of women's status: that law effectively denied women independence, vindication of rights, and dignity in personhood. While the common law defined women's legal status and experiences in large part, women were not limited to governance under that legal system.

She argued that courts in equity provided an alternative to the common law for women. This alternative, as she described it, focused on equity and justice and not simply precedent as governing within the common law system.[91] As such, vindicating women's rights through equity freed women from the common law—a theory of practice or jurisprudence inherently indifferent to social justice concerns and instead rooted in preserving women's unequal and vulnerable status. Given the dominant account that women were subordinate in nature and law, Beard's analysis may seem revolution-

86. *See* Jones-Rogers, p. 14 (quoting Caroline Gilman, editor of a juvenile newspaper in the 1830s).

87. *See* Jacobs, pp. 7–8.

88. BEARD, *supra* note 3.

89. *Id.* at 56–58.

90. *Id.* at 31–32.

91. *Id.* at 136.

ary.[92] She writes that "[o]f the original thirteen states, by 1850 several had recognized or adopted equity jurisprudence and had vested jurisdiction over cases in equity either in special courts of Chancery or in the ordinary courts of law."[93] However, a turn to the case law helps to clarify and substantiate arguments made by Beard and Jones-Rogers.

Taking a cue from Beard, one learns that in cases dating back centuries, married women could demand the administration of their paraphernal estate. Under such administration, a married woman, who might otherwise be subject to the rules of coverture, could appeal to courts for the restitution of her estate. Moreover, she could appeal that her estate be self-administered rather than governed by her husband. This included all manner of property, including enslaved persons, notes, bonds, and even debts. If her husband sold property to which she had a claim, she could receive the value of the proceeds. Importantly, this was not divorce court, nor did these situations imply separation.[94]

Rather, married white women who owned slaves had legal tools at their disposal to ensure protection of their assets regardless of if and when they used them. Literally hundreds of cases litigated throughout the nineteenth century *prior* to slavery's abolition address paraphernal rights.[95]

For example, in *Joly v. Weber*, the Louisiana Supreme Court held that where a widow contracted with her future husband prior to marriage that each party would pay his and her respective debts that existed prior to marriage and the husband reneged on his agreement, the wife could seek restoration of her possessions and the administration of her paraphernal property.[96] The court upheld the appellate court judgment in favor of the wife, which demanded the full restitution of her estate. The Louisiana Supreme Court found that the husband was reasonably bound and correctly accountable for the terms of the contract. In affirming the appellate judgment, the court expressed that the burden of demonstrating the "true state of things" was on the husband. His failure to account for his management of his wife's assets inured to her favor.

More specifically, in cases involving property that included enslaved peoples, white women also litigated for separation of property and pursued the restoration of their paraphernal effects—the property they reserved for

92. *Id.* at 122–25 (explaining that the common law "could not gain undisputed mastery in America" even though "multitudes of American lawyers" shared Blackstone's views, and further documenting the growth of equity jurisprudence in the original thirteen states).

93. *Id.* at 125.

94. *Id.* at 137.

95. Paraphernal rights in property law refer to property in which the wife possesses complete autonomy and control. *See supra* note 9. Traditionally, this meant that the property was outside of a dowry. In searching terms related to "paraphernal" and "separation of property" in the LexisNexis database, the author found over 300 cases.

96. 35 La. Ann. 806, 810 (1883).

themselves. In many cases they were successful, so long as they could demonstrate legal proof of "separation of property" followed by a demand for the restoration of paraphernal property.[97] Consider *Gonor v. Gonor*, where creditors sought review of a lower-court judgment that rejected their intervention in a suit for separation of property based on the husband's disordered affairs. In that case, the wife sought a separation of the property, whereby she could retain her paraphernal rights in her slave and the slave's descendants.[98]

At trial, the wife provided evidence in the form of a notarized receipt of $200—an act of sale—transacted between herself and her mother in exchange for the enslaved mother. Witnesses testified that the enslaved woman, described mostly in the case simply as "property," did in fact belong to the wife.[99] According to the court, the "slave" and her "descendants" were acquired with the wife's funds.[100] On review of the case, the Louisiana Supreme Court considered whether the enslaved Black woman and her offspring were paraphernal. The court concluded that, while all the property acquired during a marriage is community property, that rule is suspended in cases where the property received is part of one spouse's individual rights. In this instance, the court found that ample evidence existed showing that the enslaved woman was never part of the husband's estate or community property.[101]

Gonor v. Gonor is not an unusual holding, and much can be learned from it and similar cases. Three immediate matters are worth surfacing here. First, as a rule-of-law matter, courts also perpetuated the social and ultimately legal norm of erasing Black women's identities, rendering them objects of families and law. In this case, Adelaide, the enslaved woman, is often simply referred to as "slave" or interchangeably "that thing."[102] Indeed, we never learn the names of Adelaide's children; they are simply referred to, in mathematical terms, as "increase."[103] Second and importantly, such descriptors translated out of court, too, whereby women such as Adelaide were simply "things," objects to be acted upon. Yet, there is more to learn from *Gonor v. Gonor*, especially if we consider that "the slave was given to the plaintiff, by her mother, as an advance upon her inheritance."[104] Thus, third, enslaved Black women were traded between white women (just as in Harriet Jacobs's

97. Gonor v. Gonor, 11 Rob. 526, 526 (La. 1845).
98. *Id.*
99. *Id.* at 527.
100. *Id.* at 529.
101. *Id.* at 528.
102. *Id.*
103. *Id.* at 527.
104. *Id.*

case) like pieces of silver or furniture, making human traffickers of white women and commodities of Black girls and women.[105]

What is also clear from *Gonor v. Gonor* is that of all the value that creditors could claim in a defaulting estate, its enslaved persons were the most valuable.[106] Despite the brevity of the case—barely four pages—much can be gleaned if our reading of the case is daringly focused on Adelaide rather than creditors alone or Mrs. Gonor. Notably, the court described Adelaide as "a mulattress" who joined the Gonors at twelve years old.[107] Thus, inherent to her very existence and DNA were the intersecting occurrences of rape and commoditization. Her offspring in the years after her enslavement with Mrs. Gonor were also part of the dispute—though they are nameless. The question for the court and the desire of the creditors was whether, even if she was the property of Mrs. Gonor, her offspring should have been the property of the community.[108]

Demonstrating the centrality of slavery to marriages and *ownership of married women*, the court referenced precedent, differing authority, and revisions in the Civil Code—all related to the question of whether the "increase of a female slave, constituting the paraphernal property of the wife, belongs to the community" or the wife alone.[109] Far from a case of first impression, this case—random and yet typical in so many regards—rather explained many things. By last example, the court spoke to the 1808 revisions of the Civil Code whereby "a child, the issue of a paraphernal slave, follows the condition of the mother, and, as such, is paraphernal."[110] The court explained the principle that " 'all that is produced by a thing, whether moveable or immovable, belongs to the owner of that thing,' and the young of slaves" fit this category.[111]

In some instances, a claim of paraphernal property and separation of property amounted to fraud, measures used to avoid creditors bearing down on collective property or the debts of husbands. Specifically, in those instances, white women were willing to commit fraud in order to wrestle the family's enslaved Black people from "seizure," not because they loved or cared about them but rather because they were valuable. *Spencer v. Rist*,[112]

105. *See also* Jones v. Morgan's Heirs, 6 La. Ann. 630, 631 (1851) (addressing an action for "lands, lots, slaves, houses, &c.," in which a widow claimed her slaves and other property were hers outright due to a successful separation of property).

106. *See* 11 Rob. at 527.

107. *Gonor*, 11 Rob. at 526.

108. *Id.* at 527.

109. *Id.*

110. *Id.*

111. *Id.* at 528 (quoting A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS, WITH ALTERATIONS AND AMENDMENTS ADAPTED TO ITS PRESENT SYSTEM OF GOVERNMENT (New Orleans, Bradford & Anderson 1808)).

112. 16 La. Ann. 318 (1861).

Plicque v. Perret,[113] *Peck v. Vandenberg*,[114] and many other cases demonstrate that to defeat the conveyance of enslaved persons to creditors, wives were willing to use available legal tools, even if exercised in fraud.

In addition, trusts and estate litigation involving disputes over ownership of enslaved Black people were common. Slaveholding women used courts to vindicate ownership, contest the ownership of others, and push back against creditors' claims on enslaved persons within their reach. In *Jones v. Morgan's Heirs*, although we never learn the identities of the "six slaves," a widow fought creditors by claiming that the persons who were either the property of her husband or their joint estate really belonged to her outright. She specifically told the court they were "her possession, and under her control[—] . . . her paraphernal property."[115]

Finally, slaveholding white women vindicated their rights related to the persons they owned even when doing so might cause hardship and humiliation to their spouses. Consider *Holmes v. Barbin*, a case from 1858 involving a husband who was insolvent.[116] When Joyce Holmes inherited two enslaved Black people (the court did not humanize them with names), she successfully sought a judgment against her husband for separation of property, "whereby she . . . had her title recognized to two slaves free from the control or interference of her husband."[117] The court dismissed the claim of creditors who argued the enslaved persons were part of the common property of the estate. In finding for her heirs, the court noted, "She merely desired to have her right to a separate administration of her . . . property recognized, and the community dissolved, on account of the disorder of her husband's affairs."[118]

C. *Whitewashing History*

Mary Beard and scholars engaged in documenting women's history offer a more complex view of white women during the nation's founding and specifically the antebellum period. Even where gaps in the record exist, such as the failure to account for their emotional connection to slavery, these authors nonetheless make clear that slaveholding white women were in the business and management of human capital—and were successful. The legal record bears this out.

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113. 19 La. 318 (1841).

114. 30 Cal. 11 (1866) (discussing several cases that address the admission of parole evidence to show that a slave is the independent property of a wife).

115. 6 La. Ann. 630, 631 (1851).

116. 13 La. Ann. 474 (1858).

117. *Id.* at 474.

118. *Id.* at 475.

In diaries, these women confessed frustrations, anger, and stress, as well as joy at the birth of new slaves whom they would profit by.[119] Even as historical accounts of the last half century suffer for lack of nuance regarding sexual violence on slaveholding estates, the record of white women as capitalist businesswomen engaged in the enterprise of slavery nevertheless becomes abundantly clear. Even as Black women are rendered invisible, white women's clever and deep involvement with slavery materializes.

Recording this history of white women purchasing, leasing, holding, inheriting, disputing, and bequeathing enslaved Black people offers two important lanes of exploration and insight. First, it disputes prior accounts that dismissed white women's involvement in capitalism generally and human commodification specifically, which problematically placed them outside the margins of slavery and their own histories. The cases discussed in Part III contribute to correcting these decades-long misperceptions.

A second lane of insight begs rereading post–Civil War, nineteenth- and twentieth-century jurisprudence that depicted women as incapable of performing labor, voting, becoming lawyers, serving on juries, or maintaining a life beyond the care of their children and husband. This rebranded history, created largely by courts, including the U.S. Supreme Court, served not only to whitewash white women from slavery's domestic history but also to stereotype women as incapable of conducting "business" of any sort when, in fact, white women had been key participants in the strongest capitalist business that the United States had known up to that time.

Why does this matter? Male power, control, and dominion over women's lives historically served political purposes and entrenched social and cultural norms that framed women's capacities almost exclusively as service to a husband, mothering, reproducing, and sexual chattel. In a series of laws and cases after the Civil War, legislatures and the Supreme Court denied women suffrage based on the sophistry that women lacked good judgment. They cast women as incapable of thinking and acting independent of male guidance and authority. What a dramatic change from only years before!

For example, in *Minor v. Happersett*, the Supreme Court ruled that although the Constitution granted women citizenship, it did not confer upon

119. *See, e.g.*, Letter from Annie to Lollie (Dec. 14, 1859) (on file with the Lucy Cole Burwell Papers, Manuscript Department, William R. Perkins Library, Duke University) ("I see much of sin—so many things to correct—that I almost despair of being a perfect christian"); Private Journal of Sarah Lois Wadley, Manuscript Volume No. 3, at 37A (Aug. 20, 1963) (on file with the Southern Historical Collection, University of North Carolina at Chapel Hill) ("[V]ain desires that every now and then trouble this prevailing one, and my flesh is so weak, I am always failing."); Diary of Lucilla McCorkle (July 5, 1846) (on file with the Southern Historical Collection, University of North Carolina at Chapel Hill) (noting that white women who believed their slaves to be slovenly used "the rod" to impose punishment); Diary of Lucilla McCorkle, *supra* note 23.

them a right to vote. Legislatures and the Court did not foist similar constraints on white men.[120]

Equally, the Supreme Court played a profound role in conscribing women to second-class citizenship and denying them broad civic participation—not only denying the right to vote but also constraining women's ability to participate in juries and engage in professional employment. For example, in *Bradwell v. Illinois*, the Supreme Court upheld a law barring women law graduates from practicing law.[121] Justice Joseph Bradley found that nature and law deemed it "repugnant" for a woman to adopt "a distinct and independent" civic life from her husband because by law she lacked fundamental capacities.[122] How different than decades prior, when in the business of human chattel, courts recognized women's business savvy even when separating their estate and finances from their husbands'.

Nor are these solely matters of the past. Rather, they remain today. In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Court limited a woman's right to file suit under Title VII of the Civil Rights Act for gender pay claims;[123] in a separate case, it denied female plaintiffs class action status to sue their employer for sex discrimination.[124] Each case was decided by an all-male majority.[125] No woman on the Supreme Court voted in favor of these rulings—and that is no surprise.[126] In essence, men have rewritten the history of women in the United States, creating fictions that serve their interests at the expense of women.

CONCLUSION

This Review contributes to the remarkably limited legal scholarship on women's roles in slavery, both as capitalists and as victims of human trafficking and commodification. It offers an alternative analysis by specifically casting its lens on white women as slaveholders and Black women as the survivors of economic, physical, and emotional tyranny. It rereads white

120. Minor v. Happersett, 88 U.S. 162 (1875).

121. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).

122. *Id.* at 141.

123. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

124. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

125. *Minor*, 88 U.S. 162 (unanimous majority opinion written by Chief Justice Waite); *Bradwell*, 83 U.S. (16 Wall.) 130 (majority opinion written by Justice Miller, and joined by Justices Clifford, Davis, Strong, and Hunt; concurring opinion written by Justice Bradley and joined by Justices Swayne and Field); *Ledbetter*, 550 U.S. 618 (majority opinion written by Justice Alito and joined by Chief Justice Roberts and Justices Kennedy, Scalia, and Thomas); *Dukes*, 564 U.S. 338 (majority opinion written by Justice Scalia and joined by Chief Justice Roberts and Justices Alito, Kennedy, and Thomas).

126. Justice Ginsburg did write a concurrence in part for *Wal-Mart Stores, Inc. v. Dukes* that Justices Kagan and Sotomayor joined, but the three female justices did not join the Court's reasoning in this case and would have dismissed it on other grounds. *See* 564 U.S. at 367 (Ginsburg, J., concurring in part and dissenting in part).

women as capable, and even powerful, rather than merely vulnerable or proximate to power. The Review adds nuance to the terribly reductive account that all women were property prior to the Civil War. Rather, married white women were subject to coverture norms, but they also invested in and owned Black children, women, and men as property.