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The Worth of the Black Disabled Body: An Excavation of Black Disabled Legal History

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Slave law was overwhelmingly concerned with the state of individual bodies, from the earliest colonial iterations of race-based statutes through to the end of the antebellum era, becoming a key index in shaping the concept of race from that point forward. In this time, white legislators were trying to answer several burgeoning questions including: Are enslaved bodies inherently damaged, broken, criminal, or worthy of manumission? The answer, it seems, is that every enslaved person's value was determined almost strictly on the value of their labor, and therefore, their ability to work (and thus, by implication, their value as salable property). In order to determine this worth on a semi-formal classified basis, slaveowners would often use classification structures like the "hand system" to evaluate the worth of their enslaved people. "Full hands" were those deemed the most able and valuable, three-quarter hands slightly less so, and so on until reaching the bottom of the scale with those deemed "chargeable" meaning that the cost of their care outweighed the value of their labor, and therefore was a liability to their owners.[1]

Slave laws, designed to arbitrate property disputes, dole out punishments, and determine the eligibility of an enslaved individual for manumission among other official tasks, were centered around black bodies and minds, particularly those considered possibly damaged and defective. These laws constructed a legal narrative of blackness that persistently embedded a range of qualities often associated with disabilities into the meta-discourse of race. Disability, much like race, class, or gender, is socially constructed, meaning that it has no inherent definition or reality. Therefore, it can be helpful to study the ways in which disability can be viewed intersectionally with other social constructions (race, class, gender, etc.), in order to shed

[1] Jenifer L, Barclay, ""The Greatest Degree of Perfection": Disability and the Construction of Race in American Slave Law," *South Carolina Review* 46, no. 2 (2014): 27.

light on how dominant groups use those qualities associated with the disabled to justify patterns of injustice and inequality both towards the disabled and non-disabled. Slave laws highlight the conceptual relationship between race and disability in particular, as well as the institutionalization of the perceived links between blackness, internally and externally visible disability, and a defective product. These links in the legal realm were, by the mid nineteenth century, completely fundamental to the structure of the society, their gradual introduction making it seem as though they'd always been a part of daily life. Nevertheless, in reality, these connections had only been building since the colonial era.

Courts viewed enslaved people as property first, foremost, and singularly. The enslaved were only "people" when it became necessary to hold them accountable for crimes they committed. Once introduced, physical punishment became one of the only significant and viable means of legal retribution against enslaved people. Generally, enslaved people could not be fined due to their status which, by law, often precluded them from legally owning property unless they were receiving some kind of wage for work outside of their own plantation. Similarly, imprisoning enslaved people meant depriving white slaveowners of their cheap forced labor, making it an undesirable outcome for most courts. Still, occasionally, those that owned slaves could choose to send their "property" to prison of their own volition.

As the Antebellum-era, pro-slavery legal thinker Thomas R.R. Cobb, author of the southern legal defense of slavery, An Inquiry into the Law of Negro Slavery in the United States of America, described it, "The condition of the slave renders it impossible to inflict upon him the ordinary punishments by pecuniary fine, by imprisonment, or by banishment...he can be reached only through his body."[2] For an example of this kind of embodied punishment, look no further

[2] Cobb, Thomas R. R. 1858. An Inquiry into the Law of Negro Slavery in the United States of America. Philadelphia: T. and J. W. Johnson and Company. (not in correct format)

than ear cropping, a common punishment for petty crimes which was often used to designate the person as a "criminal" in a conspicuous manner. The deliberate crippling of the legs of those who attempted to run away was also a common practice, as can be seen in the South Carolinian Act of 1712. There, authorities held that it was appropriate for fugitive enslaved people to be whipped after their first attempt at escape, branded with a letter R on the cheek after the second, have an ear cut off after the third, face castration for the fourth, and then "in case any negro or slave shall run away a fifth time…the cord of one of the slave's legs [may] may be cut off above the heel".[3] These punishments grow steadily worse from visible permanent maiming and scarring to debilitating permanent disability. Simultaneously, enslaved men convicted of sexual assault against white women were also disabled and disfigured through castration, and even those who were facing execution could also be disabled and maimed before death.

The close of the Atlantic slave trade in 1808 largely shut off importations of enslaved Africans. This produced an immediate need to preserve the health and able-bodiedness (and therefore commercial and labor value) of American enslaved people and safeguard slaveholders' already existing property. The First Great Awakening, occurring in the 1730s and 40s, also leant some of its religious revivalism, which caused an even greater sense of paternalism, an ideology that centered around pity and charity for the less "civilized" by those who deemed themselves superior, among slaveholders. This shift in narrative eventually spurred the belief that slavery was, in reality, a positive good.[4]

This emerging proslavery ideology, in turn was directly connected to that of disability, as proven by an article on "Slavery in Kentucky", by the *Natchez Courier*, wherein the author

[3] An Act for the Better Ordering and Governing of Negroes and Slaves, vol VIII, Statutes at Large. Acts Relating to The City of Charleston, 1712, https://www.carolana.com/SC/Legislators/Documents/The_Statutes_at_Large_of_South_Carolina_Volume_VII_David_J_McCord_1840.pdf.
[4] Barclay, ""The Greatest Degree of Perfection"", 31.

recounted a story, of obvious bias, of a man who "cursed his slaves with freedom", particularly the "lame, blind, and aged", and how they have become a "tax upon…the community".[5] It was partially because of this exact same paternalism and self-righteous discussions of the Christian charity of enslavement, that disabilities initially recast as anomalies, or "errors" meant to be corrected by scientific advances, as well as conditions intellectualized as pity-worthy spectacles worthy of benevolent Christian compassion. These views contrasted greatly with former beliefs about disabilities as visible marks of God's wrath for sin or wondrous "freaks of nature" as it descended from the ideology of monstrous birth in earlier European doctoral theory.[6]

Southern slave codes reflected these changing ideas concerning disability and gradually established limits on the extent of physical injury allowed to be meted out on the bodies of enslaved people. By 1848, Georgia's slave codes declared that "the punishment of [a] slave for striking a white person" was whatever the justice "thought fit" with the exception that it could not "exten[d] to life or limb."[7] By the antebellum era, the act of whipping had become a proxy for what had previously been a spectrum of physically disabling punishments for those deemed criminal. These colonial era ideologies influenced the practices of the antebellum era and demonstrate the primary means through which the courts embedded disability into slave law and drew a violent, direct parallel between a particular racial group and actual physical disabilities.

Simultaneously, during the antebellum era, there was a small panic about the results from the 1840 U.S. Census in regard to disabled enslaved people. As discussed in the *Missouri Republican's* "Notes Upon the Census", many with access to census data noticed that there

[5] "Slavery in Kentucky," *Natchez Courier*, February 27, 1849, *Nineteenth Century U.S. Newspapers*, accessed November 15, 2021, https://link.gale.com/apps/doc/GT3016576548/NCNP?u=hollins&sid=bookmark-NCNP&xid=673dd28e.
[6] Bates, A.W. " Resembling Sins: Monstrous Births as Moralising Emblems". In Emblematic Monsters, (Leiden, The Netherlands: Brill, 2005) doi: https://doi.org/10.1163/9789004332997_006.
[7] Punishment of Slaves for Striking White Persons, second edition, Codification of the Statute Law of Georgia, (1848), https://academic.udayton.edu/race/02rights/slavelaw.htm.

seemed to be nearly the same number of people over the age of a hundred among the free black and white populations. Despite there being a significantly higher proportion of white to black residents, the number of free black people over the age of one hundred was 647, 150 above that of the white population, and enslaved people over the age of a hundred sat unequivocally at 1,393. The quote following from Cin. Gaz., argued that there must have been "some mistake in all this".[8] He explains that the idea that the state of slavery might be "much more favorable to longevity" than that of the privileged life of a white person was ridiculous.[9] Clearly, he remarked, the mistake must be on the part of the enslaved, owing to ignorance of their own age, or masters for not keeping accurate mental or physical records (the latter is likely accurate). Furthermore, when the same writer compares the numbers amongst the "deaf and dumb, blind and deranged", he concludes without much thought that although the numbers for black people and white people were proportionate to the whole number of "each class" it is still certain that the number of black people with other afflictions would be disproportionately higher because of the "lack of healing and comforting means".[10]

These statistics, although the data was likely inaccurate, caused confusion and discourse to break out all over the nation over the implications. This article was reprinted word for word at least seven different times, twice in the same paper with only one week difference, and responses and rebuttals to the argument presented were also reprinted in multiple. So followed a debate between some northern abolitionists and southern pro-slavery theorists on the validity of the statistics and whether they proved once and for all that slavery was a "moral good" for paternalistic white savior purposes.

[8] Cin. Gaz, "Notes upon the Census," *Missouri Republican*, 23 Oct. 1841, *Nineteenth Century U.S. Newspapers*, link.gale.com/apps/doc/GT3009134470/NCNP?u=hollins&sid=bookmark-NCNP&xid=e0c9997f. Accessed 16 Nov. 2021.
[9] Ibid.
[10] Ibid.

Concurrently, these mid-century censuses started to include the number of black people (free and enslaved), at the public and private charge indicating a new concern about the number of manumitted enslaved people. Those who were deemed "liabilities", a title reserved for enslaved people whose cost of care outweighed the profits produced by their labors, were of particular public concern. In 1705 Virginia mandated that, "if such servant be so sick and lame, or otherwise rendered so uncapable [sic] that he or she cannot be sold for such a value.. .the said court shall then order the church-wardens...to take care of and provide for the said servant."[11] Furthermore, "[T]he said court, from time to time, shall order the charges of keeping the said servant to be levied upon the goods and chattels of the master or owner of the said servant."[12] This indicated that enslaved people, who were no longer profitable assets, and thus defective, could be manumitted and left in the care of the "church-wardens", local volunteer religious leaders, at the expense of their owners. However, later, lawmakers placed even greater financial and personal responsibility on slaveholders who emancipated their "defective property".

During the Revolutionary era, manumission laws became more and more specific, southern slaveholders could only free their enslaved property if they met a series of qualifications and owners posted bonds to pay for their care in the event that they became disabled and unable to care for themselves. According to *Trustees of Poor v. Hall* (1841), as of 1845, Delaware law stated that if a slaveholder emancipated an enslaved person who "was likely to become chargeable to the county," including those who were deemed mentally or physically defective, the "overseers of the poor" would charge the owner or their estate an annual sum to

[11] Hening, William Walter, ed. 1821 v. II, v. Ill, v. VIII, v. XI. Statutes at Large of Virginia Being a Collection o f All the Laws of Virginia, From the First Session of the Legislature in the Year 1619. Richmond, VA: J & G Cochran.
[12] Ibid.

provide for the freeperson.[13] For states that did not require removal, one of the given stipulations required emancipated people to be able-bodied and potentially remain independent.

The antebellum era issue of great discourse, pauperism, likely contributed to even more aggressive manumission laws for those deemed defective, and therefore, unsaleable. Immigration, industrialization, and urbanization all contributed to a substantial, and noticeable, increase in the number of people in the US who sought social welfare, many of whom were disabled. With regards to the national pauperism rate, the total number receiving "poor relief from public funds during the year, per thousand persons" skyrocketed from 5.8 in 1850 to 10.2 in 1860. Southerners, especially those in slaveholding states, argued that the institution of slavery mitigated local and state governments' need to establish significant social welfare systems for the physically disabled and "feeble-minded", because most of them, due to strict manumission laws, were not legally allowed to be turned onto the streets to be cared for at public cost. Instead, slaveholders were technically legally responsible for the care of disabled and dependent enslaved people, and social pressures also encouraged them to be honorable "good" masters, by keeping and "caring for" enslaved people who were disabled and consequently considered charity projects for the white and Christian.

Regardless, occasionally, some enslaved people qualified for and received public assistance. This generally happened when the owner was also poor, disabled, and unable to provide for them or if the owner abandoned their "worthless" enslaved people in spite of laws that criminalized this behavior. Louisiana, for example, in 1806 had as part of their black codes that slaveholders were required to care for "slaves disabled through old age, sickness, or any

[13] *Trustees of Poor v. Hall*, 3 Del. 322, 1841 Del. LEXIS 7, 3 Harr. 322 (Superior Court of Delaware SPRING SESSIONS, 1841). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WX7-9SJ0-00KR-F4S4-00000-00&context=1516831.

other cause" or face a fine of 25 dollars.[14] Despite the presence of such laws, the autobiographical narratives of the enslaved often assert that especially cruel slaveholders had little qualms with abandoning the enslaved they deemed useless and worthless because of age or disability. Frederick Douglass, recounted how his own elderly grandmother was "turned out to die" like an animal despite her many years of faithful service, even as she was still caring for young children at her old age.[15] In his own words, "she had become a great grandmother in his service. She had rocked him in infancy, attended him in childhood, served him through life, and at his death wiped from his icy brow the cold death-sweat, and closed his eyes forever. She was nevertheless left a slave—a slave for life."[16]

He also recalled the story of Henny, "a lame young woman" who fell into a fire "burn[ing] herself horribly" as a child and consequently lost the use of her hands, to the point that she "could do very little but bear heavy burdens."[17] According to Douglass, "she was to master a bill of expense...[and] a constant offense…. He seemed desirous of getting the poor girl out of existence [and].. .gave her away once to his sister; but, being a poor gift, she was not disposed to keep her. Finally, my benevolent master, to use his own words, "set her adrift to take care of herself."[18] Here, regardless of the laws and social attitude agreeing that slaveowners should not turn out disabled slaves, she was deemed of negative value due to her disability, and therefore was illegally manumitted nevertheless.

Some free blacks, perhaps in similar situations to Henny, could be allowed to receive "outrelief", aid that came by way of cash assistance, food provisions, and/or medical care that

[14] Black Code, vol 1, A New Digest of the Statute Laws of the State of Louisiana: From the Change of Government to the Year 1841, (1841), https://play.google.com/books/reader?id=IIU0AQAAMAAJ&pg=GBS.PP6&hl=en.
[15] Douglass, Frederick, and William Lloyd Garrison. *Narrative of the Life of Frederick Douglass, an American Slave* (Boston: Anti-Slavery Office, 1849), 56.
[16] Douglass and Garrison. *Narrative of the Life of Frederick Douglass, an American Slave*, 47.
[17] Douglass and Garrison. *Narrative of the Life of Frederick Douglass, an American Slave*, 52.
[18] Douglass and Garrison. *Narrative of the Life of Frederick Douglass, an American Slave*, 56.

did not involve residency at a poorhouse. By way of explanation for their financial dependence, enslaved people were deemed a lazy racial group, due to some innate defect, instead of as a result of their lack of social, legal, political, or economic protections in southern society. This further associated dependence and disability with blackness and "slaves without masters".[19]

Pauperism was a common outcome among free black people, with and without other intersecting factors, and was clearly of significant concern, an outcome that lawmakers understood as a phenomenon with its basis in race. That racialized phenomenon reflected what was, to them, a "natural state of dysfunctionalism", the assumption black people were predisposed to poverty as some inherent incapability to function without white overseers, which they sought to mitigate through their manumission laws. These were not, however, the only category of slave law that would end up interconnecting disability, race, and class.

The egregious property laws of slavery also revolved in obvious ways around the state of enslaved peoples bodies, further melding together ideas about blackness and disability. Civil disputes involving contested warranties about the soundness of enslaved people's bodies and minds were common by the antebellum years, as were those in which slaveholders sought compensation for damage done to their property. This subset of slave law involved debatable notions of what constituted "unsoundness", socially constructed markers of disability and defectiveness, affixed with corresponding value of diminished monetary worth. The Arkansas case, *Johnston v. Ashley* (1847), actually had to create an exact definition of "soundness" (and figure out a legally functional way to determine whether or not an enslaved person was legally "sound") in their jury instructions. They instructed the jury of these six things:

[19] James W. Ely, "'There Are Few Subjects in Political Economy of Greater Difficulty': The Poor Laws of the Antebellum South," *American Bar Foundation Research Journal* 10, no. 4 (1985): 849-79, and Ira Berlin, *Slaves without Masters: The Free Negro in the Antebellum South.* (New York: Pantheon Books, 1974), 25-35, quoted in Barclay, ""The Greatest Degree of Perfection": Disability and the Construction of Race in American Slave Law," 33.

1. That the question under the pleadings is whether the negro was sound or unsound at the time of the execution of the bill of sale.
2. That if he was lame at that time so as to disable him in any degree, it is a breach of the warranty.
3. That it is immaterial whether the defendant knew of his unsoundness.
4. That if the unsoundness was of long standing prior to the summer of 1840, they may believe that it existed prior to and at the date of the bill of sale.
5. That if they find the negro unsound, the measure of damages will be the difference between the price paid and the actual value.
6. That in the absence of proof to the contrary the presumption is that the bill of sale was executed on the day it bears date, &c.[20]

From these instructions it is clear that the legal determination of whether or not the enslaved person was "unsound" was of great importance as a measure of the "defectiveness" of an enslaved person.

Laws that secured slaveholder's property rights and safeguarded their ability to seek compensation for disabilities sustained by their enslaved "property" through careless accidents and acts of cruelty by other liable parties remained in force, all the way from the colonial to antebellum periods. In Louisiana, courts handed down even greater penalties to those responsible for disabling enslaved people. The state required that the person responsible "pay the value of said slave" to his or her owner *and* forever "maintain and feed said slave".[21] *Mayor & Council of Columbus v. Howard* (1849) determined something similar in Georgia, wherein an enslaved

[20] Johnston v. Ashley, 7 Ark. 470, 1847 Ark. LEXIS 60 (Supreme Court of Arkansas January, 1847, Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YVK-FM80-00KR-D3SK-00000-00&context=1516831.
[21] Bullard, Henry A. and Thomas Curry, eds. 1842. A New Digest of the Statute Laws of the State of Louisiana. New Orleans: E. Johns & Company, 54.

person, Braden, owned by a Mrs. Howard, was hired out to the city Council "to be employed, specifically, in working the streets of said city, in cleaning and repairing the same… to work upon, by and under the precipitous bank at the mouth of the sewer or drain of said city," and that by the breaking and falling of said bank the boy was killed.[22] Mrs. Howard's lawyer determined that the young boy was worth six-hundred to six-hundred and fifty dollars and asked the Council to pay it. They initially refused, claiming that the death of the boy was his own fault, but were eventually made to pay eight-hundred dollars in damages.[23] It is clear from the proceedings here, that these laws were not made to protect enslaved people, and instead were for their owner's benefit alone. In fact, related laws forbid enslaved people from personally bringing any type of civil suit against whites "no matter how atrocious may have been the injury".[24]

These antebellum property laws also encompassed cases in which slaveholders disputed the physical and mental health of recently purchased enslaved people warranted as "sound", or free from disability, defect, and vice. These civil disputes generally centered on complex and detailed descriptions of the condition of enslaved people's bodies and minds, particularly common are those cases where a recently purchased enslaved person might have died from or exhibited terminal illness that was arguably present before they were sold. In other instances, recently purchased enslaved people might have exhibited "vices", like being a habitual runaway or drunkard, that potentially revealed their innate defects of character, depending on how white slaveholding men interpreted their actions. While these cases blurred the lines between racialized emotional states, like desperation for freedom, and those of disease and disability, the argument

[22] Mayor & Council of Columbus v. Howard, 6 Ga. 213, 1849 Ga. LEXIS 28 (Supreme Court of Georgia January, 1849, Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W8R-WGF0-00KR-F0G9-00000-00&context=1516831.
[23] Ibid.
[24] George Stroud. 1968. A Sketch of the Laws of Slavery in the Several States of the United States of America. New York: Negro Universities Press, 38.

which essentially sought to discover once and for all the legal definition of disability (as well as more specific amorphous conditions like “insanity” and “feeble-mindedness”) and the categories of visible versus invisible afflictions.

“Defects”, imagined by slaveowners as a type of disability, that impeded enslaved people in invisible ways, sometimes manifested as behaviors such as repeatedly running away, served as ambiguous signs in the courtroom. Sometimes litigants explained this type of behavior as either damning evidence of “dishonorable slave character” or as cause to believe that the masters where ineffectual and encouraged resistance with their incompetence. These interpretations were used to imply or prove either dishonesty on the part of the seller for hiding the enslaved person’s “defects” at the time of sale or lack of proficiency on the part of the buyer for failing to manage their “property” well. These readings of the behavior of enslaved people ultimately hinged on a shared understanding of enslaved people’s “innate” defects and abnormalities of race and comparing them with the perceived “added disabilities” of age or accident. This again reinforced the imagined links between blackness and disability that were intimately bound to constructions of enslaved people as dishonorable.

Conclusively, slave law was entirely consumed with black bodies and their ability or inability to be profitable assets to their owners. This was indicative of a widespread belief that not only were black people somehow inherently feebleminded and childlike, but that when their disability was externalized to the point of clear and present inability to complete the laborious tasks assigned to them, they were nothing more than a charity case, either at the charge of the community or the slaveowner. Those enslaved people were thereafter determined to be “defective” products, a category which was inextricably linked to the predominant ideologies

surrounding disability at the time. Consequently, they were treated as non-functioning machines, understood as people only so far as the aforementioned paternalistic view of them would allow.

These ideologies were solidified and legitimized through law, property and manumission laws in particular, which dictated not only the purpose of enslaved people, but how to determine which ones were incapable of fulfilling that purpose, becoming essentially "useless", and nothing but a liability to their owners. Cases which dealt with individual disabled or "non-functioning" enslaved people engaged with this pre-existing narrative of defectiveness through use of language, including referring to the sale contracts and "warranties" to determine who was owed what for the sale of a non-able bodied enslaved person. Over time, these narratives about black bodies, their defectiveness, disability, and feeble-mindedness, became built in pre-existing conditions of the law, and even as people were no longer identified simply as property, these narratives about the purpose and worth of black bodies lived on. Without a deep and continuous reckoning with the past, the intersections of those identities most affected by these deeply ingrained historical themes, race, class, and disability, will always be rendered nothing more than defective property.

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