QUASI-COLONIAL BODIES: AN ANALYSIS OF THE REPRODUCTIVE LIVES OF POOR BLACK AND RACIALLY SUBJUGATED WOMEN

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This Article analyzes the relationship between the struggle for the recognition of Black women's reproductive rights in the United States and the fight for racial justice. Specifically, it argues that the problematization of poor Black women's fertility—evidenced by the depiction of single Black motherhood as a national crisis,[1] the condemnation of poor Black women who rely on public assistance,[2] and the portrayal of their children as

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[1] Anxiety about single Black motherhood has existed for decades. In 1965, Senator Daniel Moynihan (D-NY) sounded the alarm with his release of *The Negro Family*. This report concluded that Black family life was "a tangle of pathology," due, in large part, to the fact that unmarried Black mothers had assumed male roles—leading to a "matriarchal," and, consequently, pathological—Black family. *See* DANIEL P. MOYNIHAN, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 218–19 (1965).

[2] A recent example of this condemnation can be found in Representative John LaBruzzo's (R-LA) proposal to pay poor women to undergo tubal ligations. *See* Mark Waller, *LaBruzzo Sterilization Plan Fights Poverty: Tying Poor Women's Tubes Could Help Taxpayers, Legislator Says*, THE TIMES PICAYUNE (New Orleans, LA), Sept. 24, 2008, at 1. LaBruzzo's proposal conceptualizes the poor mother as a "dangerous demographic trend" that responsible governments should seek to curb. *Id.* ("LaBruzzo said he worries that people receiving government aid such as food stamps and publicly subsidized housing are reproducing at a faster rate than more affluent, better-educated people who presumably pay more tax revenue to the government."). When the poor mother is conceptualized as a "human debit" with the ability to somehow transmit the germ of her dependency to her offspring, her reproductive capacity may be justifiably precluded. *See id.* ("He described a sterilization program as providing poor people with better opportunities to avoid welfare, because they would have fewer children to feed and clothe."). Sociologist Loic Wacquant offers a particularly useful description and analysis of the condemnation of poor mothers in political and popular discourse. *See* Loic Wacquant, *Decivilizing and Demonizing: The Remaking of the Black American Ghetto*, *in* THE SOCIOLOGY OF NORBERT ELIAS 95 (Steven Loyal & Stephen Quilley eds., 2004). He argues that the poor mother, together with the

an embryonic "criminal class"[3]—ought to be understood as a form of

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figure of the "gang-banger," compose the iconography of the "underclass." *Id.* at 108. Paradigmatic teenage mothers "subsist 'on the backs' of the taxpayer via receipt of social assistance in large public housing estates [and] typically get photographed complacently sitting doing nothing, infants sprawled across their knees, in front of their lit television sets." *Id.* Poor mothers are condemned for the threat that they "pose for the integrity of American values and the nation itself." *Id.* As Wacquant explains:

> [T]he 'gang-bangers' represent moral dissolution and social disintegration on the public side, in the streets; the 'welfare mothers' are the bearers of the same dangers on the private side, inside the domestic sphere . . . . [I]t is not so much their poverty and desperation that is a problem as their *social cost*, which must be reduced by all means necessary.

Id.

[3] Some of the most damning evidence that the children of poor women are conceptualized as the future scourges of the nation comes from the federal government. The Personal Responsibility and Work Opportunity Reconciliation Act, which authorized the replacement of the Aid for Families with Dependent Children social welfare program with Temporary Aid for Needy Families (TANF), describes several "congressional findings" that are offered in support of TANF's emphasis on encouraging poor mothers to marry. Readers of the findings may be left with the impression that the children of welfare recipients are the primary causes of any and all social malaise within the nation, as such children are described as being "3 times more likely to be on welfare when they reach adulthood than children not born into families receiving welfare," as having compromised "school performance and peer adjustment," as having "lower cognitive scores, lower educational aspirations, and a greater likelihood of becoming teenage parents themselves," as being "3 times more likely to fail and repeat a year in grade school than are children from intact 2-parent families," as being "4 times more likely to be expelled or suspended from school," as living in neighborhoods with "higher rates of violent crime," and as overpopulating the "[s]tate juvenile justice system." *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 42 U.S.C. §601). Many scholars have criticized the marriage promotion provisions of TANF. *See, e.g.*, Julia M. Fisher, *Marriage Promotion Policies and the Working Poor: A Match Made in Heaven?*, 25 B.C. THIRD WORLD L.J. 475, 491 (2005) (arguing that enabling states to spend TANF funds on non-poor families in order to promote marriage is a gross injustice to the poor mothers who could benefit greatly from the monies); Judith E. Koons, *Motherhood, Marriage, and Morality: The Pro-Marriage Moral Discourse of American Welfare Policy*, 19 WIS. WOMEN'S L.J. 1, 5–6 (2004) (conducting a "socio-theo-historical" evaluation of moral keywords present in the debate surrounding welfare reform and TANF reauthorization); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647, 1653 (2005) (likening TANF's marriage promotion provisions to post-Civil War marriage laws, which were used to "privatize responsibility for individual economic stability within the families of newly-emancipated Blacks so that states' economic responsibility to provide for former slaves would be minimized"); Cara C. Orr, Comment, *Married to a Myth: How Welfare Reform Violates the Constitutional Rights of Poor Single Mothers*, 34 CHAP. L. REV. 211, 212 (2005) (arguing that TANF's marriage promotion provisions may violate beneficiaries'

contempt for Black women's reproductive rights.[4] Differently stated, the lack of acknowledgment in legal, political, and popular discourse that motherhood is a *legitimate* choice for poor Black women demonstrates that their right to reproduce is disparaged. Further, this censure of poor Black women's fertility ought to be understood not only as a failure of the reproductive rights movement, but also as a matter of racial injustice. That is, the struggle of poor Black women to have their reproductive choices respected is a struggle for racial equality.

Conceptualizing Black women's reproductive rights struggles as a *racial* injustice may seem counterintuitive. This is in part due to the widespread exclusion of gender-related issues from social movements for racial equality.[5] Many Black feminists have noted that the paradigmatic subject of racial justice movements has been the Black man, while the paradigmatic subject of gender justice movements has been the White woman.[6] As political scientist Shatema Threadcraft recently commented,

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fundamental right not to associate); Phoebe G. Silag, Note, *To Have, To Hold, To Receive Public Assistance: TANF and Marriage-Promotion Policies*, 7 J. GENDER RACE & JUST. 413, 435–36 (2003) (critiquing the heteronormativity of TANF marriage promotion provisions insofar as they "simply erase people who are involved in same-sex relationships" due to the fact that "the federal government and many states have passed laws that define marriage as a union between a man and a woman").

[4] Representative LaBruzzo's proposal to pay poor women to sterilize themselves should also be understood as an implicit condemnation of the children of poor women. While the proposal aims to prevent the state from having to assist women with the costs of raising their children, the proposal's more tacit aim is to prevent the state from having to assist *the children* of poor women with the costs of raising their own children. *See* Waller, *supra* note 2, at 1 (quoting Rep. LaBruzzo's statement, "What I'm really studying is [sic] any and all possibilities that we can reduce the number of people that are going from generational welfare to generational welfare.").

[5] For example, although "Health Advocacy" is one of ten initiatives articulated in the National Association for the Advancement of Colored People's "Strategic Plan," it fails to articulate a specific need for advocacy for the reproductive rights of Black women. NAACP, Strategic Plan Initiatives, http://www.naacp.org/pdfs/about_strategic_plan.pdf (last visited Oct. 1, 2009).

[6] Kimberlé Crenshaw argued this point persuasively over a decade ago. She wrote, "[R]acism as experienced by people of color who are of a particular gender—male—tends to determine the parameters of antiracist strategies, just as sexism as experienced by women who are of a particular race—white—tends to ground the women's movement." *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity, Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1252 (1991). Similarly, Angela Harris has noted that "gender essentialism—the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience," results in the experiences of White women being represented as the experience of all women. *See* Angela P. Harris, *Race and Essentialism in Feminist Legal*

"that our understanding of contemporary race problems is dominated by issues of criminal justice and public education, and that our understanding of gender politics assumes that the biggest struggles that women have faced are around access to legitimate public roles, reveals troubling gender and racial bias, respectively."[7]

In a similar vein, legal theorist Dorothy Roberts recounts an incident where she was asked to speak at a forum entitled *Civil Rights Under Attack: Recent Supreme Court Decisions*.[8] After giving a speech addressing obstacles facing Black women in their struggle for reproductive autonomy, Roberts was criticized by a male audience member, who admonished her to "stick to traditional civil rights concerns, such as affirmative action, voting rights, and criminal justice."[9] This list of civil rights priorities reveals a Black male subject—the subject for whom matters of racial justice have historically, and now intuitively, been thought to concern. This paper seeks to *re*gender the subject of racial justice movements and to comprehend the denial of Black women's reproductive rights as a contemporary race problem.

Two conceptualizations of race influence this paper. The first is a commonsensical understanding of race, which conceives of it as a visually distinct expression of phenotype. In Parts I and II, this definition of race predominates. Thus, references to "Black women" here refer to women who are Black because they possess the skin color, facial features, and hair texture that are commonly associated with the "Black race."[10] However,

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Theory, 42 STAN. L. REV. 581, 585 (1990). Although antiracism has been limited, inasmuch as it has failed to articulate the specific concerns of Black women, this limitation is not an inherent one. Instead, this Article argues that the subject of such movements has been unnecessarily circumscribed as male. When a female subject *also* comes to occupy the center of such discourses, antiracism will be capable of advancing Black women's interests.

[7] Shatema Threadcraft, Black Feminist Theory and the Post-Emancipation Struggle for Intimate Equality (Nov. 1, 2008) (unpublished manuscript at 3, on file with author).

[8] DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE REPRODUCTION AND THE MEANING OF LIBERTY 4–5 (1997).

[9] *Id.* at 5.

[10] It is worth noting that many theorists have challenged the idea of phenotypic race, arguing that the conditions of inclusion in phenotypic racial groups—and, therefore, who is deemed to be appropriately included within phenotypic racial groups—have been contested and, likely, will continue to be contested. *See e.g.*, Robert J. Cottrol, *The Historical Definition of Race Law*, 21 LAW & SOC'Y REV. 865, 868 (1988) (describing an eighteenth century Creole culture in Louisiana that racialized as "mulatto" French speaking persons of Black and White ancestry—persons who would be racialized as "Black" according to Anglo-American definitions of phenotypic race).

subsequent Parts rely on a more expansive understanding of race—using the term to denote categories of phenotypic expression as well as relative stations of marginalization and privilege. As Cheryl Harris aptly explains:

> "Black" and "White" signify ideological concepts and do not operate as phenotypic markers . . . . [They] are relationally constructed. Whiteness is the position of relative privilege marked by distance from Blackness; Blackness, on the other hand, is a legal and social construction of disadvantage and subordination marked by the distance from White privilege.[11]

Accordingly, Blackness is a position occupied not only by women who are "Black" because their appearance accords with historical understandings of race, but also those who, for sundry reasons, find themselves disqualified from White privilege. Under this definition, poor women, immigrant women, and women who receive welfare can all be understood to occupy a certain degree of Blackness, irrespective of their racial ascriptions.[12] This Article uses the term "racially subjugated

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[11] Cheryl I. Harris, *Whitewashing Race: Scapegoating Culture*, 94 CAL. L. REV. 907, 916 (2006). However, this binary ought to be complicated by the addition of a third term—the "foreigner," historically occupied by the Native American. This complication is discussed in Part I, *infra*, and even more expansively in Khiara M. Bridges, *Wily Patients, Welfare Queens, and the Reiteration of Race in the U.S.*, 17 TEX. J. WOMEN & L. 1 (2007); *see also* Nicholas De Genova, *Introduction: Latino and Asian Racial Formations at the Frontiers of U.S. Nationalism*, *in* RACIAL TRANSFORMATIONS: LATINOS AND ASIANS REMAKING THE U.S. 1, 122 (Nicholas De Genova ed., 2006) (arguing that the figure of the Native American as the inexorable savage that lay outside of the U.S. borders, together with the figure of the African American as the subjugatable other within the borders, was essential to the construction of Whiteness as synchronous with the nation).

[12] There is a long line of thinkers that conceptualize race in this relatively radical manner—that is, thinking of race as a mark of distance from privilege rather than as a phenotypic expression. *See, e.g.*, Barbara J. Flagg, *Foreword: Whiteness as Metaprivilege*, 18 WASH U. J.L. & POL'Y 1, 1, 6 (2005) (arguing that Whiteness has "the capacity to disguise [unearned] privileges behind structures of silence, obfuscation and denial"); RUTH FRANKENBERG, THE SOCIAL CONSTRUCTION OF WHITENESS: WHITE WOMEN, RACE MATTERS 1 (1999) ("[W]hiteness is a location of structural advantage, of race privilege."); Faye V. Harrison, Introduction, *Expanding the Discourse on Race,* 100 AM. ANTHROPOLOGIST 609, 612 (1998) ("In this country as well as in many others, unfortunately, blackness has come to symbolize the social bottom."); CHARLES W. MILLS, THE RACIAL CONTRACT 127 (1997) ("[W]hiteness is not really a color at all, but a set of power relations."); DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS 136 (1991) [hereinafter ROEDIGER, WAGES OF WHITENESS] (studying how the Irish were initially treated as a stigmatized minority group, and how they went on to achieve "whiteness," "entitling them to both political rights and to jobs"); DAVID R. ROEDIGER, TOWARDS THE ABOLITION OF WHITENESS 12 (1994) (noting that "whiteness and Blackness" are not "scientific (or natural) racial categories," but ideologies); John Tehranian, *Performing*

women"—referring to phenotypically Black women as well as unprivileged women of all races—to denote this expanded notion of race. It is important to note that this broad conception of race is not reducible to class; more affluent women and men who are phenotypically Black are *not* stripped of their Blackness by virtue of their wealth or education level. Stated differently, Black racial ascription is a mark that, regardless of the class status of the individual, disqualifies those so marked from enjoying the privileges associated with Whiteness.[13] Accordingly, Blackness denotes the experience of marginalization shared by all persons who, because of

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Whiteness: Naturalization Litigation and the Construction of Racial Identity in America, 109 YALE L.J. 817, 819 (2000) (arguing that because one's status as a "white person" determined the rights that one would have in the United States during much of the nation's history, "[w]hiteness was transformed into a material concept imbued with rights and privileges").

[13] That Black racial ascription, acting independently of class, disqualifies those with such an ascription from the privileges enjoyed by "White persons" is demonstrated most tangibly with reference to statistics documenting racial disparities in health. Infant mortality for phenotypically Black babies is nearly two-and-a-half times higher than the rate for phenotypically White babies. *See* Centers for Disease Control, Eliminate Disparities in Infant Mortality, http://www.cdc.gov/omhd/AMH/factsheets/infant.htm (last visited Oct. 1, 2009). The maternal mortality rate for Black women is almost four times the rate than that for White women. Centers for Disease Control, *State-Specific Maternal Mortality Among Black and White Women—United States, 1987–1996*, MMWR WEEKLY, June 18, 1999, at 492, *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm4823a3.htm. Moreover, White men and women can be expected to live almost ten years longer than their Black counterparts. *See* INST. OF MED., ADDRESSING RACIAL AND ETHNIC HEALTH CARE DISPARITIES: WHERE DO WE GO FROM HERE? 3 (2005) [hereinafter INST. OF MED., HEALTH CARE DISPARITIES]. Although Black people are disproportionately poorer than White people in the United States—and are therefore more likely to be uninsured and, consequently, to lack access to regular healthcare—poverty, alone, does not explain why Black people experience higher rates of morbidity and mortality. *See generally* INST. OF MED., UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE (2002). The Institute of Medicine (IOM) found that "racial and ethnic minorities receive lower-quality healthcare than White people—even when insurance status, income, age, and severity of conditions are comparable." INST. OF MED., HEALTH CARE DISPARITIES, *supra*, at 3. "Lower-quality health care" is not an amorphous, intangible concept; instead, it signifies the concrete, inferior care that physicians give their Black patients. Other studies have shown that African Americans are less likely to be offered similar therapeutic and non-therapeutic health care options as are their White counterparts, such as cardiac catheterization, treatment for early-stage malignancy, and adequate analgesia. *See* Margaret Harper et al., *Why African American Women are at Greater Risk for Pregnancy-Related Death*, 17 ANNALS OF EPIDEMIOLOGY 180 (2007). The IOM has spoken about the "uncomfortable reality [that] . . . some people in the United States were more likely to die from cancer, heart disease, and diabetes simply because of their race or ethnicity, not just because they lack access to health care." *See* INST. OF MED., HEALTH CARE DISPARITIES, *supra*, at 3. Racial disparities in health suggest that Blackness is not reducible to class; indeed, the privilege denied to those with Black racial ascription is often the "privilege" of remaining alive.

phenotype, belong to the socially constructed "Black race," as well as the experience of those who lack privilege due to poverty or immigration status, among other things. However, that said, this Article only discusses the reproductive lives of *poor* women—leaving discussion about wealthy Black women for another article.

This Article begins by discussing the obstetrics clinic of Alpha Hospital,[14] a large public hospital in New York City where I conducted a year of ethnographic field research. Noting the hostility and antipathy that characterized interactions between clinic staff[15] and their poor (predominately phenotypically non-White) patients, this Article explores the reproductive rights possessed by patients at the clinic—patients who provoked condemnation and scorn by the mere fact of their pregnancies. Therein, Part I questions the quality of the "reproductive rights" that poor Black women possess, considering that their decision to procreate jettisons them into a reviled and censured social position.

Part II goes on to examine the reproductive rights of poor, pregnant, racially subjugated women by turning to Eva Cherniavsky's brilliant exploration of capitalism and racialization—*Incorporations: Race, Nation, and the Body Politics of Capital*.[16] Through the lens of postcolonial theory, Cherniavsky analyzes racial embodiment[17] as it occurs in capitalist economic systems.[18] Cherniavsky defines colonies not merely as sites of capitalist expansion, but rather as sites where contradictory economic systems collide and coexist. Under this view, racialized difference is triggered, in part, by the imbrication of economic systems.[19] This Part uses

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[14] Pursuant to standard ethnographic practice, this Article has attempted to protect the identity of the Hospital through the use of a pseudonym.

[15] By "staff," I refer to the various categories of workers who provide support services for the clinic's physicians, midwives, and nurse practitioners. Accordingly, "staff" refers to the predominately Black and Latina registered nurses, who can perform minimally invasive procedures for patients (e.g., colposcopies, injections of prescribed medicines, blood draws); to "Patient Care Associates," who assist the providers by weighing patients before their examinations, taking their blood pressure, testing their urine for the presence of glucose and protein, and scheduling follow-up appointments; and to administrative workers, who work behind the reception desk and conduct patient intake.

[16] EVA CHERNIAVSKY, INCORPORATIONS: RACE, NATION, AND THE BODY POLITICS OF CAPITAL (2006).

[17] The concept of embodiment is discussed below in *infra* notes 85–94.

[18] CHERNIAVSKY, *supra* note 16, at 1–17.

[19] *Id.* at 8–11.

Cherniavsky to argue that the Alpha Hospital obstetrics clinic resembles the classic colony—an analogy that explains the racialization of the women seeking healthcare there.

Moreover, Cherniavsky's work elucidates why the reproductive rights and bodily integrity of Black and other racially subjugated women are compromised at the moment of their exercise. Part III considers Cherniavsky's argument that race ultimately signifies the ability or inability of a body to defend itself against invasive market forces[20]—linking this theory to the mandatory work requirements with which poor women are forced to comply when they receive welfare. This Part criticizes these programs for transforming the Black and racially-subjugated body into a laboring body. A brief conclusion follows.

I. THE ALPHA OBSTETRICS CLINIC AND THE REPRODUCTIVE RIGHTS OF POOR, BLACK WOMEN

Once described as the "best shot at public health care in the country,"[21] Alpha Hospital serves as the backdrop to this Article's ruminations on reproductive rights and racial justice. The vast majority of patients who receive care from Alpha, and who specifically receive care from Alpha's overtaxed obstetrics clinic, are Black and Latina women, including many undocumented immigrants.[22] However, Alpha is remarkable for the sheer diversity of its patients: on any given day, English, Spanish, Arabic, Mandarin, Cantonese, Bengali, French, and Hindi can be overheard in the halls and waiting rooms of the hospital. Most pregnant patients at Alpha are poor, and almost all rely upon Medicaid—specifically the Prenatal Care Assistance Program (PCAP)[23]—to cover the costs of their prenatal healthcare expenses.

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[20] *Id.* at xvii.

[21] Personal communication with Rayna Rapp, Professor of Anthropology, New York University, in New York, N.Y. (May 2008).

[22] Phenotypically White women were a small minority of the women served in the Alpha obstetrics clinic. These patients tended to be undocumented immigrants themselves—women from Poland, Russia, and the former Soviet Union who had overstayed their visas.

[23] The Prenatal Care Assistance Program (PCAP) is a special program within the New York State Medicaid program that provides comprehensive prenatal care services to otherwise uninsured or underinsured women. N.Y. STATE DEP'T OF HEALTH, PRENATAL CARE ASSISTANCE PROGRAM (PCAP): MEDICAID POLICY GUIDELINES MANUAL 5 (2007), *available at* http://www.emedny.org/ProviderManuals/Prenatal/PDFS/Prenatal-Policy_Section.pdf [hereinafter PCAP POLICY MANUAL]. PCAP is a generous extension of the Medicaid

From May 2006 until September 2007, I conducted ethnographic research in the obstetrics clinic, participating in and observing its quotidian life.[24] The vantage point from which I made my observations was ever-shifting—moving from the waiting areas to the receptionists' intake desk, to the nurses' triage rooms, to physicians' and midwives' examination rooms, to the offices of social workers, nutritionists, geneticists, health educators, and Medicaid financial officers. Over the course of my research, I compiled over 120 hours of in-depth interviews with patients, staff, and providers who were kind enough to let me ask questions about their experiences at Alpha and, with respect to resident doctors, their experiences at Omega Hospital, the private hospital where they spent half of their time.[25]

Elsewhere I have described the enmity that characterized the relationship between Alpha staff and their patients.[26] In that piece, I concluded that patient-staff hostility—a banality that could be observed whenever one spent more than a passing moment in the hospital—stemmed from the fact that Alpha patients were viewed by the staff as uneducated and unintelligent, yet exceptionally crafty manipulators of the Alpha "system."[27] These contradictory characteristics yielded the fiction of the "wily patient"—a figure who, although dim-witted and simple-minded, is nonetheless capable of shrewdly exploiting the hospital and gaining undeserved healthcare.[28] The wily patient parallels the fictive "welfare

program insofar as it is available to undocumented immigrant women as well as women who earn up to 200% of the federal poverty level and who would otherwise be ineligible for Medicaid. *Id.* at 5. With PCAP insurance, the pregnant woman can avail herself of not solely obstetrical services, but also the wide range of other healthcare services covered by Medicaid insurance, including dental, optometric, and dermatologic care. *See* N.Y. STATE DEP'T OF HEALTH, A HEALTHY BABY STARTS WITH A HEALTHY PREGNANCY (2008), *available at* http://www.health.state.ny.us/nysdoh/pcap/index.htm. PCAP coverage terminates eight weeks after the woman gives birth. PCAP POLICY MANUAL, *supra*, at 5.

[24] This research was made possible by a generous grant from the Wenner-Gren Foundation for Anthropological Research. Alpha became my field site through the help of Professor Rayna Rapp, author of *Testing Women, Testing the Fetus (1999)*, and an expert in the field of medical anthropology.

[25] Residents split their residency between the public Alpha Hospital and the private Omega Hospital, a hospital owned and operated by the Omega University School of Medicine. My research was only authorized at Alpha Hospital. As a result, I acquired information about Omega not through direct observation, but rather through second-hand sources.

[26] *See* Bridges, *supra* note 11, at 2–3.

[27] *Id.* at 3.

[28] *Id.*

queen"—a similarly uneducated and unintelligent woman with the uncanny ability to exploit government beneficence and obtain undeserved cash assistance. That article argued that the welfare queen and wily patient parallel one another because the wily patient is the welfare queen as she is envisioned in the context of a public hospital's obstetrics clinic, where poor women get "free" prenatal care to support their "illegitimate" pregnancies.[29]

A. Wily Patients, Welfare Queens, and the Reproductive Rights of Poor Black Women

Temporary Aid for Needy Families (TANF),[30] the federal program that provides cash assistance to poor families, reinforces the welfare queen trope by describing and treating its beneficiaries as problematic subjects. While TANF extends government assistance to poor mothers, it does so only begrudgingly: the unambiguous intent of the statute is not to support poor mothers, but rather to discipline them and eradicate the shameful qualities they are thought to possess.[31] In seeking out government subsidized prenatal care, wily patients become *suspected* welfare queens—women whose pregnancies are not read as positive events,[32] but rather are

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[29] *Id.* at 31.

[30] 42 U.S.C.S. § 601 et seq. (LexisNexis 1997). Temporary Aid for Needy Families is a federal block grant program that replaced Aid for Families with Dependent Children (AFDC) and provides cash assistance to indigent families. TANF, heralded as the "end of welfare as we know it," contains provisions that prohibit the disbursement of funds to an individual for more than sixty consecutive or non-consecutive months, 42 U.S.C.S. § 608(a)(7) (LexisNexis 1997), as well as provisions that require beneficiaries to work outside of the home. 42 U.S.C.S. § 607 (LexisNexis 1997). This Article explores the specificities of this latter characteristic of TANF in Part III.

[31] *See* 42 U.S.C.S. § 601(a)(2) (stating that the purpose of the statute is to prevent out-of-wedlock pregnancy as well as ending "the dependence of needy parents on government benefits by promoting job preparation, work, and marriage").

[32] *See* ROBERTS, *supra* note 8, at 9 ("White childbearing is generally thought to be a beneficial activity: it brings personal joy and allows the nation to flourish."). Roberts goes on to describe childbearing by Black women as "a form of degeneracy. Black mothers are seen to corrupt the reproduction process at every stage." *Id.* (emphasis omitted). There is a large literature on the different meanings that attach to reproduction for White and non-White women. *See, e.g.*, Bridges, *supra* note 11, at 43 (describing the condemnation of the fertility of a population of women because of their status as poor women of color); Faye D. Ginsburg & Rayna Rapp, *Introduction* to CONCEIVING THE NEW WORLD ORDER: THE GLOBAL POLITICS OF REPRODUCTION 1, 3 (Faye D. Ginsburg & Rayna Rapp eds., 1995) ("Low-income African American mothers . . . are stereotyped as undisciplined 'breeders' who sap the resources of the state through incessant demands on welfare . . . . [T]he concept of stratified reproduction helps us see the arrangements by which some reproductive futures

understood as the means that will enable the women to manipulate government systems. The pregnancies of these indigent wily patients make the welfare queen possible; pregnancy is the *condition precedent* of the "lamentable" TANF apparatus.[33] Accordingly, the pregnant wily patients at Alpha are treated with the same disdain that society shows for welfare queens.

In essence, staff contempt toward Alpha obstetrics clinic patients can be understood as a reflection of political and popular disgust of mothers who rely on the welfare state. The welfare queen and the wily patient are symbols of *delegitimized* motherhood. Because motherhood for the poor woman—particularly the poor, unmarried woman—has traditionally been construed as an *illegitimate* choice, Alpha staffers treat their pregnant patients as *legitimate* objects of scorn.[34] Patient-staff acrimony can thus be explained as a contest over the propriety of the poor woman's claim to the identity of "mother."

Yet, given the high cost of private prenatal care, the Alpha obstetrics clinic and Medicaid's Prenatal Care Assistance Program (PCAP) help poor, pregnant women realize their reproductive capacities—that is, the basic ability to procreate.[35] Without access to public funding, the ability

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are valued while others are despised."); Leith Mullings, *Households Headed by Women: The Politics of Race, Class, and Gender*, *in* CONCEIVING THE NEW WORLD ORDER, *supra*, (arguing that "[w]omen as mothers—who are involved in both biological and cultural reproduction—become master symbols of family, race, and civility, and are central to the authorized definition of the national community," and consequently, "[w]hen boundaries are threatened, rhetoric about fertility and pollution escalates, and native Euro-American women, preferably those of the dominant class, are exhorted to have children"); RICKIE SOLINGER, WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE *ROE V. WADE* 8–9 (1992) (arguing that White unwed pregnant women were perceived as having the "potential to become a wife and mother in the post-crisis phase of her life" and noting that these women escaped condemnation because they were thought to be "in the process of producing a white baby of value on the postwar adoption market," while Black unwed mothers, in contrast, "were often portrayed by politicians, sociologists, and others in the postwar period as unrestrained, wanton breeders, on the one hand, or as calculating breeders for profit on the other"); RICKIE SOLINGER, PREGNANCY AND POWER: A SHORT HISTORY OF REPRODUCTIVE POLITICS IN AMERICA 28–46 (2005) (describing how African and Native American reproduction was degraded at the dawn of the founding of the nation).

[33] For further discussion, see Bridges, supra note 11, at 31.

[34] *See* MOYNIHAN, *supra* note 1, at 35 (saying "Negro children without fathers flounder—and fail"); *see also supra* notes 2–4 and accompanying text.

[35] The relationship between prenatal care and low infant and maternal mortality and morbidity has been well-established in the sociomedical literature. A monograph released in 1994 by the Centers for Disease Control surveyed the existing research pertaining to prenatal healthcare and birth outcomes and found that the evidence overwhelmingly

of poor women to have safe and healthy pregnancies would be substantially eroded—leaving them with a theoretical reproductive right to bear children, secured by the Constitution, but little else.[36] However, describing the

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indicated the significance of prenatal care to the health of the infant and mother. *See* John L. Kiely & Michael D. Kogan, *Reproductive Health of Women: Prenatal Care*, *in* FROM DATA TO ACTION: CDC'S PUBLIC HEALTH SURVEILLANCE FOR WOMEN, INFANTS, AND CHILDREN 105 (Lynne S. Wilcox & James S. Marks eds., 1994), *available at* http://www.cdc.gov/Reproductivehealth/ProductsPubs/DatatoAction/DataToAction.htm (noting that "Adequate use of prenatal care has been associated with improved birth weights and the amelioration of the risk of preterm delivery. Inadequate use of prenatal care has been associated with increased risks of low-birth-weight births, premature births, neonatal mortality, infant mortality, and maternal mortality."). The importance of prenatal care in preventing poor birth outcomes is especially true for low-income women. *See id.* at 105 ("Several researchers have suggested that the beneficial effects of prenatal care are strongest among socially disadvantaged women.") (citations omitted). However, it is important that prenatal care not be understood as always synonymous with highly medicalized, intervention-driven care, which I have criticized elsewhere. Khiara M. Bridges, *Pregnancy, Medicaid, State Regulation, and the Production of Unruly Bodies*, 3 NW J. L. & SOC. POL'Y 62, 99 (2008) (arguing that because the prenatal care provided by the state through Medicaid is delivered in accordance with a highly technological, biomedical paradigm of pregnancy, poor women are produced as possessors of "unruly bodies," resulting in a "medicalization of poverty," with poor people "treated as biological dangers within the body politic"). Some scholars have argued that the therapeutic effects of prenatal care are not a result of medical intervention as such, but rather result from the creation of communities for pregnant women. For example, Alexander and Korenbrot have noted that "[w]hile lack of prenatal care has been highly associated with low birth weight in numerous studies, this relationship has been difficult to understand from a medical point of view as it has been observed that there is little done during the standard prenatal care visit that could be expected to reduce low birth weight." *See* Greg R. Alexander & Carol C. Korenbrot, *The Role of Prenatal Care in Preventing Low Birth Weight*, *in* THE FUTURE OF CHILDREN 103, 113 (Greg R. Alexander & Carol C. Korenbrot eds., 1995). The authors conclude that "[t]he ultimate success of prenatal care in reducing current low birth weight percentages in the United States may hinge on the development of a much broader and more unified conception of prenatal care than currently prevails. It has yet to be explored if interventions focused on building cohesive, functional communities can do as much or more to provide women effective social support and a caring, safe environment." *Id.* at 113–14.

[36] It should be noted that the reproductive rights of poor women are rather anemic within current interpretations of the Constitution and are, in practice, dramatically different from non-poor women's reproductive rights. The Court has found that, although women have the right to seek an abortion under *Roe v. Wade*, 410 U.S. 113, 154 (1973), the government is not obliged to help indigent women realize the right if they do not have the money to pay for an abortion. *See Maher v. Roe*, 432 U.S. 464, 470 (1977) (holding that the Connecticut Medicaid program did not violate the Constitution by denying funds for nontherapeutic abortions); *Harris v. McRae*, 448 U.S. 297, 317 (1980) (holding that the Hyde Amendment, which prohibits the use of federal Medicaid funds to pay for poor women's abortions—including those that are "medically necessary"—does not violate the Constitution). The abortion right is a *negative* right of governmental nonintervention, not a positive right to government assistance. *See Maher*, 432 U.S. at 473–74 (arguing that the

pregnancies of Alpha patients, and PCAP patients more generally, as an exercise of *reproductive rights* is perhaps a misnomer. Although privileged White women garner the "legitimate intimate identity" of *mother* when they bear a child,[37] poor Black women become objects of disdain.[38] Put in the context of lived reality—a context made knowable by ethnographic research—the reproductive rights that poor Black women possess are *inverted* rights: rights which disenfranchise and *take possession* of the rights-holder when materially enacted by her body. To the extent that this is a "right" at all, it is one that poor Black women exercise at their peril.[39]

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abortion right only "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy"); *Harris*, 448 U.S. at 316 ("[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency."). Accordingly, the federal and state governments have no affirmative obligation to pay for abortion services to poor women.

Moreover, the Court has never found that an affirmative right to prenatal care exists within the Constitution. Fortunately, the question has been, for the most part, irrelevant because states, if electing to participate in the Medicaid program by receiving federal funds under Title XIX, must provide prenatal care as part of their individual programs of medical assistance. *See* 42 U.S.C.S. § 1396a(a)(10)(c)(iii)(II) (LexisNexis 2009) (providing that participating states' medical assistance programs must include "prenatal care and delivery services"). However, under the reasoning of *Maher* and *Harris*, if the federal government elected to amend Title XIX and eliminate funding for prenatal care for poor women, it is unlikely that the Court would find the amendment unconstitutional, for it is unlikely that the Court will find the government has an affirmative obligation to pay for prenatal care. *See Maher*, 432 U.S. at 469 ("The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents.").

[37] *See* Threadcraft, *supra* note 7, manuscript at 2.

[38] *See supra* notes 1–2, and accompanying text.

[39] The use of "reproductive rights" here may be different from its use by legal practitioners and academics. Whereas "reproductive rights" commonly refers to a constellation of freedoms, the phrase is used narrowly here, only referring to a woman's entitlement to bear a child if she so desires, despite what others may desire. *See, e.g.*, Center for Reproductive Rights, Our Mission, http://reproductiverights.org/en/about-us/mission (last visited Oct. 1, 2009) (defining "reproductive rights" not only as the freedom "to decide whether and when to have children," but also the right "to have access to the best reproductive health care available," as well as the right to "exercise . . . choices without coercion"). Further, although this Article is critical of describing that which poor Black women presently possess as "reproductive rights"—inasmuch as, in theory, they appear comparable to the rights possessed by their privileged counterparts, while, in practice, the

Moreover, as I argued at the start of this Article, the false promise of poor Black women's reproductive rights is not just a failure of the women's movement; it is a failure of racial justice.

The Alpha obstetrics clinic, however, exemplifies more than just the mutually constitutive nature of reproductive rights and racial injustices. It is also a site where the critical scholar can observe the *reproduction* of race—that is, the reiteration of racialized differences and the meanings that attach to them. The argument that the Alpha obstetrics clinic is a site where racial reproduction can be observed assumes that race is not a biological essence possessed by genetic fiat,[40] but rather that it is a social construction

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exercise of poor Black women's "rights" produces a vastly dissimilar discursive result—this Article is not advocating for the dissolution of "reproductive rights" discourse. Patricia Williams' argument in favor of the continued utility to the dispossessed of rights discourse, as opposed to a discourse of "needs" that was advanced by many scholars within the Critical Legal Studies movement, is convincing. *See* Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 409-10 (1987). She writes that although rights might be unstable, indeterminate, and "overlaid with capitalist connotations of oppression, universalized alienation of the self, and excessive power of an external and distancing sort," for those who have had to exist within this nation *without* rights, it is incredibly transformative to be able to assert a right. *Id.* at 414. She goes on to say:

> For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of humanity: rights imply a respect which places one within the referential range of self and others, which elevates one's status from human body to social being. For blacks, then, the attainment of rights signifies the due, the respectful behavior, the collective responsibility properly owed by a society to one of its own.

Id. at 416. Accordingly, this Article cannot, in good faith, argue that because of the vastly dissimilar results that accompany the exercise of (narrowly understood) reproductive rights by poor, Black women and their wealthier complements, we need to replace the language of "reproductive rights" with "reproductive needs" or some other alternative. Rather, the reproductive rights of the poor and non-poor *ought* to be made equivalent to one another. A first step towards achieving this goal is to recognize their present dissimilarity.

[40] In 1998, the American Anthropological Association issued a *Statement on 'Race'* that might be understood as representative of philosophies that deny the biological basis of race while maintaining its social origins. The statement attempts to expiate some of the guilt that the discipline of anthropology carries as a result of its complicity with colonialism and the idea of race as radical difference locatable in the biology of individuals. Specifically, it states:

> With the vast expansion of scientific knowledge in this century . . . it has become clear that human populations are not unambiguous, clearly demarcated, biologically distinct groups. Evidence from the analysis of genetics (e.g., DNA) indicates that most physical variation, about 94%, lies *within* so-called racial groups. Conventional geographic "racial"

that *can* be produced through institutional operations.[41] To elaborate further: I began fieldwork at Alpha with the purpose of examining the mechanisms by which race is maintained as a relevant category of

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> groupings differ from one another only in about 6% of their genes. This means that there is greater variation within "racial" groups than between them. In neighboring populations there is much overlapping of genes and their phenotypic (physical) expressions.

AM. ANTHROPOLOGICAL ASS'N, STATEMENT ON "RACE" (1998) http://www.aaanet.org/stmts/racepp.htm. The statement offers race as a social "invention," reflecting the scholarship of those that argue that "'race' as it is understood in the United States was a social mechanism invented during the eighteenth century to refer to those populations brought together in colonial America: the English and other European settlers, the conquered Indian peoples, and those peoples of Africa brought in to provide slave labor." *Id.* This understanding of race is the platform from which this Article analyzes the production of race and the reiteration of racial inequalities.

[41] For several decades, social constructionists have been convincingly arguing that "races" are the products of *social*, and not biological, processes. Socio-cultural anthropologist Kamala Visweswaran offers a particularly poignant formulation of this argument:

> The middle passage, slavery and the experience of racial terror produce a race of African Americans out of subjects drawn from different cultures. Genocide, forced removal to reservations, and the experience of racial terror make Native American subjects drawn from different linguistic and tribal affiliations: a race. War relocation camps, legal exclusion, and the experience of discrimination make Asian American subjects drawn from different cultural and linguistic backgrounds: a race. The process of forming the southwestern states of the United States through conquest and subjugation and the continued subordination of Puerto Rico constitute Chicanos and Puerto Ricans as races.

Kamala Visweswaran, *Race and the Culture of Anthropology*, 100 AM. ANTHROPOLOGIST 70, 78 (1998). *See also* Robert S. Chang, *Critiquing 'Race' and Its Uses: Critical Race Theory's Uncompleted Argument*, *in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 87, 87, 89 (Francisco Valdes et al. eds., 2002) (noting that the phrase "[r]ace is a social construct" has become a "mantra," and pondering why social construction has not "caught on"); FRANKENBERG, *supra* note 12, at 6 (examining how Whiteness is constructed by interviewing White women who have lived their lives with racial privilege); Ian F. Haney-Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 11, 27 (1994) (rejecting biological race and concluding that "[r]ace must be viewed as a social construction"); IAN F. HANEY-LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 7 (1997) (exploring the ways in which the law helped to produce the "White race" via a study of several naturalization cases and arguing "that to say that race is socially constructed is to conclude that race is at least partially legally produced"); ROEDIGER, WAGES OF WHITENESS, *supra* note 12, at 13 (documenting how the Irish came to be socially constructed as "White").

experience in the United States. If race is a social construct, *how* is it constructed? By what processes? By what means? I proceeded from the assumption that race is constructed all the time—all day, every day. Hence, I approached the obstetrics clinic at Alpha as a site (among, probably, an infinite number of sites) of the social construction of race—a location where phenotypic differences are given racialized meanings and persons are treated accordingly. I was not interested in giving an account of when people are *first* perceived or treated as belonging to a particular race; nor was I interested in giving an account of when people *first* identify with a particular race or acquire a racial subjectivity. Instead, I aimed to tell a story about racialization *processes*—processes that can be duplicated (and contradicted) several times over the course of a day and boundless times over the course of an individual's life. So, while Alpha obstetrics patients are racialized during many other areas of their lives, they are most certainly racialized when at Alpha Hospital. Alpha, then, could be studied as a site of the reiteration, or *reproduction*, of race.

Given this background, Part II analyzes how and why race is reproduced when women attempt to exercise their reproductive rights at Alpha. This Article now turns to Eva Cherniavsky's treatise, *Incorporations*, as the theoretical groundwork for these explorations.[42]

II. THE (RE)PRODUCTION OF RACE: ALPHA AS A QUASI-COLONY

Eva Cherniavsky takes on the project of using subaltern studies—a discipline which has traditionally examined the extra-territorial colonized peoples *outside* of the colonial power—to analyze U.S. history as well as current events.[43] Her aim is to construct a conceptual framework through

[42] CHERNIAVSKY, *supra* note 16, at 1–17.

[43] *Id.* at 1–3. The school of "subaltern studies" began in the 1970s when a motley crew of "marginalized academics—graduate students yet to complete their dissertations, two or three very young scholars only recently admitted to the teaching professions, and an older man stuck at its lowest rung apparently for good"—confronted what they perceived to be major problems in studies of colonial India: histories of India focused on colonial authorities and dominant groups of the indigenous society to the exclusion of the non-elite majority. RANAJIT GUHA, *Introduction* to A SUBALTERN STUDIES READER: 1986–1995, ix, xiv (Ranajit Guha ed., 1997) [hereinafter GUHA, SUBALTERN STUDIES READER]. The scholars in the new discipline of "subaltern studies" define "subaltern" as those "classes and groups constituting the mass of the labouring population and the intermediate strata in town and country—that is, the people." *See* Ranajit Guha, *On Some Aspects of the Historiography of Colonial India, in* SUBALTERN STUDIES I: WRITINGS ON SOUTH ASIAN HISTORY & SOCIETY 1, 4 (Ranajit Guha ed., 1982). Subaltern studies scholars have strived to make "the subaltern" central to Indian historiography. By taking the subaltern as the point of departure for investigations of India's

which to map "the colonial dimensions of metropolitan life in Europe and North America,"[44] or the historic *inside* of colonial power. Cherniavsky situates "subaltern studies in a U.S. frame"[45] by refusing to conceive of

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colonial past and postcolonial present, subaltern studies would not only avoid marginalizing "the people" (again), but it would also reveal new, previously overlooked sites of politics, rebellion, and resistance. *See* GUHA, SUBALTERN STUDIES READER, *supra*, at xvi–xxi.

For examples of formative subaltern studies scholarship, *see* SHAHID AMIN, EVENT, METAPHOR, MEMORY: CHAURI CHAURA 1922–1992, at 94–95 (1995) (looking for evidence of the subaltern in legal texts); Edward Said, *Foreword* to SELECTED SUBALTERN STUDIES v, vi (Ranajit Guha & Gayatri Chakravorty Spivak eds., 1988) (defining the "subaltern" as "the emergent class of the much greater mass of people ruled by coercive or sometimes mainly ideological domination from above"); Gayatri Chakravorty Spivak, *Subaltern Studies: Deconstructing Historiography*, *in* SELECTED SUBALTERN STUDIES 11 (Ranajit Guha & Gayatri Chakravorty Spivak eds., 1988) (noting that although the purpose of subaltern studies is to recover the voice of the subaltern in the annals of history, the task is frequently thwarted because the subaltern voice is usually, if not always, mediated by the voices of the dominant groups and classes); Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, *in* MARXISM AND THE INTERPRETATION OF CULTURE 271, 308 (Cary Nelson & Lawrence Grossberg eds., 1988) (concluding that the subaltern cannot speak, because if they could, they would not be subaltern).

Although subaltern studies began with examinations of the specific case of colonialism in South Asia, it has expanded to include inquiries of colonialism in Latin America and the United States. *See generally* JOHN BEVERLEY, SUBALTERNITY AND REPRESENTATION: ARGUMENTS IN CULTURAL THEORY 5–24 (1999) (reflecting on the similarities and differences between the South Asian Subaltern Studies Group and the Latin American Subaltern Studies Group); Eva Cherniavsky, *Subaltern Studies in a U.S. Frame*, 23(2) BOUNDARY 85, 94 (1996) (arguing that subaltern studies might be applied to investigations of the U.S., enabling scholars to see similarities between colonization in South Asia via extra-territorial dominance and colonial practices of and in the United States, as marked by imperialism on U.S. soil).

[44] CHERNIAVSKY, *supra* note 16, at 9.

[45] An important component to Cherniavsky's argument is the conceptualization of the U.S. as a colonial power, this despite ideas of U.S. exceptionalism that have argued against understanding the United States as having ever engaged in colonialism. *See, e.g.*, Ann Laura Stoler, *Tense and Tender Ties: The Politics of Comparison in North American History and (Post) Colonial Studies*, 88 J. AM. HIST. 829, 833 (2001) (citing Amy Kaplan, *'Left Alone with America': The Absence of Empire in the Study of American Culture*, *in* CULTURES OF UNITED STATES IMPERIALISM 3–21 (Amy Kaplan & Donald E. Pease eds., 1993)) (discussing scholarship that suggested the existence of a "'resilient paradigm' of United States domestic and foreign scholarship . . . [that] cordoned off empire as a 'mere episode' in American history, little more than a twenty-year blip on the democratic and domestic national horizon," which, in turn, resulted in the "absence of empire from the study of American culture, and an absence of the United States from postcolonial studies of empire"). Cherniavsky's argument that colonialism necessitates the interface of incongruent economic modalities holds true when applied to the antebellum U.S.—providing further support for the position that the United States has indeed engaged in colonialism. She notes

colonialism as simply a *stage* in the development of capitalism—or alternately, a mechanism by which the capitalist modern state may "generalize itself" throughout the world.[46] Instead, Cherniavsky emphasizes that, as realized at specific sites throughout history, colonialism has not been coextensive with the logic of capitalism.[47] She explains, "rather than one particular form of capitalist expansion (among others) . . . colonialism represents *an expansion of capital that falls at least partially outside the logic of capitalist production*."[48]

Cherniavsky's views regarding colonial expansion suggest that colonialism should *not* be understood as the simple replacement of precapitalist modes of production with capitalist forms in extraterritorial sites. Instead, the actual practice of colonialism has been characterized by the coexistence in the colony of capitalist and precapitalist modes of production. Indeed, the profitability of colonialism for the colonial power traditionally depended on the underdevelopment of the colony—that is, the forced stagnation of indigenous economies while capitalist industries are built alongside the stagnated indigenous economy. And so, "[t]he heterogeneity of the 'combined formation' signals not the incompleteness of the colonial project, the still-unfinished business of assimilating the periphery, but rather the irreducible discontinuity between metropolis and colony, which capital not only tolerates but requires."[49] The colonial project, then, is identified by the juxtaposition of incommensurate economic modalities within an overarching capitalist framework:

> Colonialism in nearly all its permutations involves expanding metropolitan capital into zones of precapitalist production . . . . Arguably, then, a defining feature of colonialism in general is its absorption of colonized populations into heterogeneous regimes.[50]

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that "[a]lthough the disparity in [the U.S.] is not between an indigenous and an imported mode of production, since commercial capital and chattel slavery are equally foreign to the pre-invasion Americas, nonetheless capitalist development in the antebellum United States is crucially heterogeneous to its proper productive modes." CHERNIAVSKY, *supra* note 16, at 9.

[46] CHERNIAVSKY, *supra* note 16, at 8.

[47] *Id.* at 8–11.

[48] *Id.* at 8 (emphasis in original).

[49] *Id.* at xviii.

[50] *Id.* at xvii-xviii.

Cherniavsky's discussion is illuminating when applied to the Alpha obstetrics clinic. Taking her work as a foundation, the next Section theorizes the ways that the Alpha obstetrics clinic may be conceived of as an analogue (albeit an imperfect one) to the classic colony.

A. The Illogic of Alpha within a Capitalist Frame

Documenting the similarities between Alpha and the classic colony requires the recognition that the Medicaid PCAP program lies outside the logic of capitalism. Within capitalist economic systems, goods and services are commodities that are ultimately sold on the market in exchange for money.[51] Healthcare services in the United States have not been shielded from commodity markets;[52] instead, they are goods that are traded and made available for purchase, largely through the mechanism of private health insurance.[53]

PCAP is not simply a "public version" of private health insurance; many of the programs' features are exceptional. First, PCAP is distinctive because of its temporariness: whereas most private insurance plans cover prenatal care as part of a larger healthcare program of unlimited duration

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[51] Perhaps the most expansive study of capitalism, as well as its most compelling critique, is presented in KARL MARX, CAPITAL: VOLUME 1 (Ben Fowkes trans., Vintage Books 1976) (1867). In his work, Marx explains the logic of capitalism through the dual form of commodities—goods that are both useful (i.e., possessing a use value) and exchangeable (possessing an exchange value, which itself assumes a monetary form). As Marx observes, "[T]hey only appear as commodities, or have the form of commodities, in so far as they possess a double form, i.e., natural form and value form . . . . Everyone knows . . . that commodities have a common value-form which contrasts in the most striking manner with the motley natural forms of their use-values. I refer to the money-form." *Id.* at 138–39.

[52] Peter P. Budetti, *Market Justice and U.S. Health Care*, 299 J.A.M.A. 92, 92 (2008) ("In the United States, health care competes for consumers with other items in the marketplace. Individual resources and choices determine the distribution of health care, with little sense of collective obligation or a role for government.").

[53] CARMEN DENAVAS-WALT ET AL., INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2005 at 21 (2006), *available at* http://www.census.gov/prod/2006pubs/p60-231.pdf (showing that in 2005, 67.7% of persons in the U.S. had health insurance coverage through a private insurer, 27.3% of persons had health insurance coverage through government insurance, and 15.9% of persons remained uninsured entirely). The failure of the mechanism of private health insurance to distribute healthcare to more individuals in the United States forms the basis of most calls for the systemic reformation of the distribution of healthcare in the nation. For an example of this argument, see Mark A. Hall, *Paying for What You Get and Getting What You Pay For: Legal Responses to Consumer-Driven Health Care*, 69 LAW & CONTEMP. PROBS. 159, 159–60 (2006).

(that is, as long as the insured remains employed by her employer or pays directly into the program), PCAP coverage terminates sixty days after a woman's pregnancy ends.[54] Second, PCAP is notable for the invasiveness of its application process. Upon enrolling in PCAP, low income women are required to submit to mandatory consultations with nutritionists,[55] social workers,[56] and Medicaid financial officers;[57] they are forced to reveal private, intimate information about themselves that frequently exceeds the purview of their medical care. The arguable effect of these statutorily obliged consultations is to eviscerate the poor pregnant woman's right to privacy.[58] Lastly, and most importantly to the present argument, PCAP differs from private health insurance programs because governmental subsidization of health care services—the government's assumption of the private health insurer's role—radically changes the nature of the enterprise by which healthcare services are distributed. Instead of the consumer entering the market and purchasing healthcare goods and services through the private health insurance mechanism, PCAP essentially amounts to the *government* entering the market, purchasing the goods and services, and then distributing these healthcare commodities to non-consumers. If

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[54] Hope v. Perales, 83 N.Y.2d 563, 571–73, 577 (1994) (comparing PCAP to other related programs and recognizing the validity of PCAP's denial of funding for medically necessary abortions under the New York Constitution).

[55] *See* N.Y. COMP. CODES R. & REGS. tit. 10, § 85.40(f) (2009) ("The PCAP provider shall establish and implement a program of nutrition screening and counseling which includes: (1) individual risk assessment including screening for specific nutritional risk conditions at the initial prenatal care visit and continuing reassessment as needed . . . [and] (3) documentation of nutrition assessment, risk status and nutrition care plan in the patient medical record.").

[56] *See id.* tit. 10, § 85.40(h) ("A psychosocial assessment shall be conducted and shall include: (1) screening for social, economic, psychological and emotional problems; and (2) referral, as appropriate to the needs of the woman or fetus, to the local Department of Social Services, community mental health resources, support groups or social/psychological specialists.").

[57] *See id.* tit. 10, § 85.40(b)(2) ("Following the determination of a pregnant woman's presumptive eligibility for Medicaid benefits, the PCAP provider shall act as a pregnant woman's authorized representative in the completion of the Medicaid application process if the woman provides consent for such action.").

[58] *See* Bridges, *supra* note 35, at 83–86. Although it may seem counterintuitive, this is especially true when the information requested is relatively benign. Forced to confess the details of their relationships as well as daily cravings for food, in addition to less benign information like histories of substance abuse or sexual violence, women become the targets of total state surveillance.

capitalism presupposes that consumers will acquire commodities through the exchange of money, PCAP lies decidedly outside of the logic of capitalism insofar as it provides healthcare commodities to consumers without requiring a commodity exchange.

Accordingly, as it actualizes the PCAP program, the Alpha obstetrics clinic may be understood as an incongruous, exceptional moment within an overarching capitalist system. Its means of service provision is a decidedly non-capitalist transaction, existing within the general capitalist healthcare market. If the distinctive feature of colonies is the juxtaposition of disparate economic forms, as Cherniavsky asserts, Alpha might be understood as a "quasi-colony," since it represents a juxtaposition of disparate forms of commodity distribution.[59] Although Cherniavsky's framework is not perfectly conducive to an analysis of Alpha—*inter alia*, Cherniavsky describes the classic colony as having *both* non-capitalist and capitalist modes of production within its borders, while I describe Alpha as having solely a non-capitalist mode of commodity distribution within borders that, importantly, buttress a capitalist healthcare market—this Article describes Alpha as a quasi-colony to denote its discontinuities with Cherniavsky's analysis, as well as its similarities to the colony proper.[60]

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[59] The analysis on quasi-colonies is only implicated in cases where subsidies themselves are "heterogeneous," when the market for a particular good is subsidized for some, but not all. Accordingly, the Canadian healthcare system, for which the Canadian government subsidizes healthcare goods and services for all of its citizens, can and should be distinguished from the U.S. case. *See* Sierra Dean, *Canada's Landmark* Chaoulli *Decision: A Vital Blueprint for Change in the Canadian Health Care System*, 13 LAW & BUS. REV. AM. 417, 421 (2007) (describing the Canadian healthcare system as a "single-payer system where the government is the sole financier of healthcare"). Thus, the Canadian state cannot be said to also engage in a quasi-colonial enterprise. In Canada, the distribution of the *entire* market of healthcare goods and services lies outside the logic of capitalism; although the Canadian healthcare market exists within a larger capitalist landscape, the healthcare market itself is homogeneously non-capitalist. *Id.* In contrast, the distribution of goods and services in the U.S. healthcare market is heterogeneous, with capitalist distributions abutting non-capitalist distributions of the same commodities. As such, the U.S. market exhibits the "disparate economic forms" that describe the colonial encounter, while the Canadian market fails to exhibit the same feature.

[60] Cherniavsky does not assert that colonies are a permanent feature of capitalism—that is, that capitalism requires the existence of colonies at all times. She recognizes that colonialism proper has ended and we are now living in the era of postcolonialism. CHERNIAVSKY, *supra* note 16, at 13 (describing the "postcolonial contexts" in which "'the poor, black and female' subject in the United States" presently lives). So, the perception of Alpha as a "*quasi*-colony" is a bit anachronistic in its lack of fidelity to the *post*coloniality that characterizes the present. Nevertheless, the analogy is a productive one.

In exploring the links between quasi-colonialism and racial reproduction at Alpha, the critical scholar returns to Cherniavsky's *Incorporations*. Cherniavsky does not proffer a theory on how racialized difference is exploited or exacerbated during colonial expansions. This is because such inquiry presumes the existence of racial difference prior to colonial contact—a premise that Cherniavsky rejects. Instead, taking as her starting point the presupposition that "[t]here is no raced body prior to or apart from [the] relation between subjects,"[61] Cherniavsky explores how racial differences are *produced* in the contacts between colonial powers and the colonized. She concludes that race appears, or is produced, at sites of contact between dissimilar economic modes of production.[62] Here, she cites to cultural theorist Stuart Hall, who makes similar observations, pointing to "the way different modes of production can be *combined* within the same social formation leading . . . to differential modes of incorporating so called 'backward' sectors within the social regime of capital."[63] Hall provides several examples of this differential incorporation—for instance, the significance of slave societies in "primitive capitalist development of metropolitan powers," and the importance of migrant workforces within domestic labor markets.[64] Ultimately Hall concludes that "what needs to be noticed is the persistent way in which these specific, differentiated forms of 'incorporation' have consistently been associated with the appearance of racist, ethnically segmentary and other similar social features."[65] Reading Hall to suggest that "race or ethnicity marks the social relations of production in 'differentially incorporated' sectors,"[66] Cherniavsky concludes:

> [T]he racialized body registers the irreducible contradiction of capital's social regime, which cannot assimilate the colonized if it is to dominate them; at the same time, the racialized body veils

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[61] CHERNIAVSKY, *supra* note 16, at xiii.

[62] *Id.* at 10.

[63] Stuart Hall, *Gramsci's Relevance for the Study of Race and Ethnicity*, 10 J. COMM. INQUIRY 5, 24 (1986) (cited in CHERNIAVSKY, *supra* note 16, at 10–11).

[64] *Id.* at 25 (cited in CHERNIAVSKY, *supra* note 16, at 11).

[65] *Id.*

[66] *Id.*

> the contradiction by assuming it as a 'fact' of its own visible difference.[67]

Since Alpha Hospital is not a site of initial contact between those who will dominate and those who will be subjugated, Cherniavsky's analysis must be adapted. If, as Cherniavsky argues, "there is no raced body prior to or apart from [the] relation between subjects,"[68] patients receiving prenatal care at Alpha *already* inhabit raced bodies, due to the long history of racialized relations in the United States. Although Alpha is not a site of initial racial production, it can nevertheless be apprehended as a site of racial *re*production, where extant racialized differences are reiterated, exacerbated, and filled with new content. When understood as a quasi-colonial enterprise, standing as a non-capitalist or non-market irruption on a capitalist landscape,[69] the Alpha obstetrics clinic is a point of contact between incongruous economic modes. That is, if one thinks of Alpha as a circle of non-capitalism, and if one imagines that circle floating on a capitalist plane (representing the larger healthcare market in the United States), then the borders of the Alpha circle—its circumference—are points of contact between capitalism and non-capitalism. Moreover, consistent with Hall's observations concerning the link between the appearance of "racist and ethnically segmentary" social features at sites of contact of differing economic modalities,[70] the appearance of race—indeed, the reproduction of race—can be observed in the Alpha obstetrics clinic.

As described in Part I and elsewhere, the wily patient at Alpha parallels the figure of the welfare queen, insofar as both are contradictorily described as woefully stupid, yet uncannily cunning.[71] However, another

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[67] *Id.* at 11 (quoting Hall, *supra* note 63, at 24–25).

[68] *Id.* at xiii.

[69] Referring to PCAP, or any other social welfare program, as "non-capitalist" should be done with caution because it may elide how the capitalist state *must* attend to the excesses of capitalism through the provision of various forms of social security. *See generally* FRANCIS FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE (1971). That is, the capitalist state has to alleviate the effects of the intemperance that frequently accompanies capitalist exploitation by providing social welfare programs where private capital cannot or will not do so. Such social security is necessary to capitalism. Inasmuch as PCAP is an example of the state's indispensable attempt at mitigating the effects of the capitalist economic system, it may rightfully be considered a "capitalist" feature.

[70] Hall, *supra* note 63, at 25 (cited in CHERNIAVSKY, *supra* note 16, at 11).

[71] *See supra* notes 27–34 and accompanying text.

characteristic is shared by the wily patient and the welfare queen: an implicit racialization. Like the welfare queen, the wily patient is implicitly racialized, or *raced*, as non-White. A critical review of the wily patient reveals that the perceived stupidity of Alpha patients is often a function of their ascribed "racial Otherness."[72] Likewise, perceptions of patient duplicity are oftentimes a function of the "foreignness" ascribed to non-English speaking patients, or patients who come more generally from Latin American backgrounds.[73]

The racialization of Alpha patients involves a complex process of being "Blackened" or disqualified from Whiteness.[74] Patients are "Blackened" when they are figured as the undeserving recipients of Medicaid and welfare. However, this "Blackening" is not mutually exclusive to patients' figuration as non-White, "alien outsiders"—a racialization that occurs when patients are perceived through the lens of their "foreignness," "immigrantness," "Third World-liness," and/or "U.S. Otherness."[75] When "Blackened," patients become the despicable bottom of

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[72] Bridges, *supra* note 11, at 25.

[73] *Id.*

[74] *Id.* at 47–48.

[75] There is a robust literature that discusses the processes by which certain racialized groups have been constructed as possessing characteristics that are not "American." Such characteristics form the substance of "foreignness," "immigrantness," etc., while "American-ness" becomes defined as the absence of those problematized traits, etc. *See, e.g.*, Robert S. Chang, *A Meditation on Borders*, *in* IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 244, 249 (Juan F. Perea ed., 1997) (discussing the way foreignness is imputed to Asian American bodies in order to "render[] them suspect, subject to the violence of heightened scrutiny at the border, in the workplace, in hospitals, and elsewhere"); De Genova, *supra* note 11, at 12–13 (discussing the "racialized equation of Latinos and Asians with foreignness and their figuration as inassimilable aliens and permanent virtual immigrants"); Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1692–94 (2000) (examining how "foreignness" was attributed to a Chinese nuclear scientist accused of espionage and noting that attributions of "foreignness" to Asian-Americans characterize the United States's relationship to its Asian citizens and immigrants); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, 'Foreignness,' and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 268–78 (1997) (considering how "foreignness" is a characteristic or a set of characteristics that prevent the "foreigner" from being able to be considered "American" and allowing that which is "American" to be constructed in a way that excludes certain racialized groups); Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of 'Foreignness' in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71, 80 (1997) (discussing "the construct of foreignness, based more on what is perceived as not-American than on the realities of another nationality or culture"); Francisco Valdes, *Under Construction: LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087, 1122–25 (1997) (discussing how Asian Americans and Latinas/os share a label of

American society; when "U.S. Othered," they are figured as "un-American" outsiders who have managed to penetrate the U.S. borders.[76] These racial figurations are dynamic and interrelated, occurring simultaneously yet distinctly. Importantly, whether "Blackened" or "U.S. Othered," the poor patients who rely on the Alpha obstetrics clinic are *always* disqualified from Whiteness.[77] In this manner, the Alpha obstetrics clinic can be understood as a site of the reproduction of race, through the reiteration of racial meanings and racial inequalities.[78]

While the above explains *how* race is *re*produced in the Alpha obstetrics clinic, Cherniavsky's and Hall's theories offer an explanation for *why* race is reproduced there at all. Namely, Alpha Hospital is a site for racial reproduction because it is a node where differing economic logics meet—with race marking or registering the contradictory logic of capitalism at a site of its own contradiction.[79]

Moreover, if race in the classic colony functioned to justify the "withholding of modernity's social benefits (democracy, rule of law) from the colonized,"[80] then race in Alpha Hospital functions to justify the censure of Alpha patient's reproductive rights. At times "Blackened," at times "foreign," yet always *racially subjugated*, the wily patients of the Alpha obstetrics clinic invite stigma and disapproval of their reproductive capacities because of their imbrications within and dependence upon public assistance—an apparatus that defies capitalist modes of distribution. Furthermore, the "fact" of their racial difference is commonly tendered as a cause, rather than an effect, of this dependency. Therefore, race in the quasi-colony signals when a woman illegitimately claims the identity of mother, and indicates when her reproductive rights can and should be legitimately denounced.

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foreignness); Neil Gotanda, *"Other Non-Whites" in American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1188 (1985) (book review) (commenting on the importance of the idea of "foreignness" to understanding the treatment of Asian Americans in law and writing: "One of the critical features of legal treatment of other non-Whites [i.e., non-Black racial minorities] has been the inclusion of a notion of 'foreignness' in considering their racial identity and legal status").

[76] Bridges, *supra* note 11, at 47-48.

[77] *Id.* at 48.

[78] *Id.*

[79] CHERNIAVSKY, *supra* note 16, at 8–11.

[80] *Id.* at xviii.

B. Alpha, Omega, and the Play of Racial Differences

Enriching this analysis is the fact that Alpha is located only steps away from the privately-funded Omega Hospital—an institution that refuses to accept Medicaid insurance.[81] Patients who seek treatment at Omega are privately-insured persons who tend to be wealthier, Whiter and more privileged than patients at Alpha Hospital. As a result, Omega Hospital provides an important site of comparison against which the raced bodies of Alpha patients become intelligible. As Cherniavsky argues, bodies are *raced* only when they are put in relationship with other bodies; moreover, once races are produced, one race inevitably will be subordinate to the other.[82] Consistent with the view that race is a logic of *hierarchies*, Alpha patients are the *differentiated term,* subordinated to the privileged social position inhabited by Omega patients. What is at stake in this play of racial differences are the reproductive rights of Alpha patients and the *respect* that will be given to their claim of the identity of "mother."

III. RACE, CAPITAL, AND TANF MANDATORY WORK REQUIREMENTS

Having considered the role that capitalism plays in the racialization of Alpha patients—specifically, through their dependence upon non-capitalist distributions (represented by Alpha), which serves to justify the condemnation of their reproductive rights—this Part considers the role that capitalism plays in weakening the bodily integrity of Alpha's racially subjugated patients and how this enervation relates to their exercise of reproductive rights.

Cherniavsky struggles to find a conception of race that explains it as more than a bodily mark or inscribed difference. Notions of racial inscription presuppose an essential bodily likeness across racial lines and thus ignore the possibility that race may effect and signal the differing *embodiment* of racialized subjects.[83] Refusing to presume corporeal similarity across racial lines, and holding open the possibility that race is not an *inscription* of difference onto bodies that are organically and corporeally similar, Cherniavsky arrives at the following thesis, which describes race as:

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[81] *See supra* note 25 and accompanying text.

[82] CHERNIAVSKY, *supra* note 16, at xiii.

[83] *Id.* at xiv, 84.

> [A]n apparatus (a set of institutionalized practices) for the (re)production—the (dis)assembly—of human bodies, rather than an apparatus for their inscription. In this reading, race signals the radically uneven capacity of bodies to serve as the shell (the organic container) of the subjects they embody. Even if one wishes to insist that our sense of the body as a bounded domain is only the perception of our "real" biological condition as discrete organism, there is certainly nothing given or immediate in the way that boundary is observed, maintained, patrolled, investigated, and violated.[84]

For Cherniavsky, embodiment is that which holds together a subject that is threatened by her own dispersal.[85] This dispersal of the subject comes from the requirement within capitalism that the individual alienate herself by selling her own capacities: her labor power.[86] Within capitalism, the subject's physical, organic body cannot be sold; that is, persons cannot sell themselves or others as slaves.[87] But, slavery and the selling of entire, physical, organic bodies is not made illegal because it is repugnant in some way; rather, it is prohibited so that individuals are able to sell their physical and intellectual capacities—that is, so that individuals may *disperse* their labor power.[88] So that individuals may disperse *themselves*. In this way, Cherniavsky conceptualizes bodies and embodiment as mechanisms that protect the subject from dispersion by market forces.

Further, for Cherniavsky, the body's race signals its effectiveness as a protective entity against those forces.[89] Moreover, U.S. history demonstrates that non-White racial embodiments fail to protect the dispersion of the subject; the non-Whiteness of bodies functions to render them more soluble to capital and more susceptible to the taking of their labor power.[90] Cherniavsky offers the case of plantation slavery in the United States as a dramatic demonstration of her point. She writes:

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[84] *Id.* at xiv-xv.

[85] *Id.* at xv, 84.

[86] *Id.* at xv.

[87] *Id.* at xvii.

[88] *Id.*

[89] *Id.* at xiv, xx, 85.

[90] *Id.* at 84 ("[W]here the European colonizer claims an inalienable property in the body (one may commodify one's bodily or intellectual labor, but not one's flesh), the bodies of the colonized are made in varying degrees susceptible to abstraction and exchange."). The

> [I]t is not sufficient to think of plantation slavery as inscribing bodies with a servile condition, although no doubt the obsession with the legible servility of the captive body's surfaces was pervasive, encompassing enlightened men of science no less than slavery's most vulgar apologists. But the very primeness of the slave body's surfaces for inscription, for the breathtaking superfluity of bizarre and contradictory renderings . . . is an index to the crisis in—the suspension of—incorporated embodiment for the slave. The captive body is all surfaces; it is the scene of the evacuation of the captive person, rendered wholly soluble in capital. Rather than incorporate the mobile subject of contractual social relations, then, this body tropes the conditions of the chattel slave's dispersal as so many atomized, exchangeable quantities. In the context of plantation slavery, I am proposing that race marks the status of the body that is not one—an inorganic body, fully opened to capital.[91]

Accordingly, Black racial ascription in the context of plantation slavery indexed the failure of bodies to resist capitalist exploitation. Slaves were subject to commodification, expropriation, and alienation in every conceivable aspect, through a "most thorough extroversion of personhood."[92] Although chattel slavery represents an extreme case of capitalist dispersion, race maintains a similar operation outside of those conditions. Today, raced subjects are open and exposed to capitalist exchange—lacking the legal, social, and political protections that "wholly embodied" individuals would have.[93] As such, Cherniavsky proffers race as a present day indicator of the body's ability to shield itself from capital, with Whiteness representing the most effective shield available.[94]

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springboard for Cherniavsky's analysis is Cheryl I. Harris's article, *Whiteness as Property*. She quotes Harris's argument that "[b]ecause whites could not be enslaved or held as slaves, the racial line between white and Black was extremely critical; *it became a line of protection and demarcation from the potential threat of commodification*, and it determined the allocation of the benefits and burdens of this form of property." *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1720–21 (1993) (emphasis added).

[91] CHERNIAVSKY, *supra* note 16, at xvii.

[92] *Id.* at xix.

[93] *Id.* at xx.

[94] *Id.* at 85 (concluding that only White people can claim "an organic embodiment, in which the body functions as a naturalized limit on capitalist abstraction or, in [Walter] Benjamin's terms, as the 'shell' that restricts what may be 'pried' from the human subject").

Cherniavsky's theory apprehends the bodies of Black and other racially subjugated individuals as indicating a *compromised ability* to resist capitalism's demand that the subject's labor power be alienated on the market. Although the total loss of the body is rare today (complete bodily loss only occurs under conditions of chattel slavery), living within conditions of global market capitalism, modern raced bodies are marked by their relative *openness* to the demands of capital—that is, their relative inability to resist the demand that their labor power be sold. Viewing race as an indication of the body's permeability to capital helps explain the work requirements contained within Temporary Aid for Needy Families (TANF), the federal welfare program that has arguably had the most adverse effect on the reproductive rights of racially subjugated women.

A. TANF Work Requirements and the Porosity Of Bodies

A major, controversial component of the 1996 welfare reform—reflected in the replacement of Aid for Families with Dependent Children (AFDC) by Temporary Aid for Needy Families (TANF)—was the requirement that the individuals who received TANF benefits perform work outside their homes.[95] TANF work requirements only affect *some* women

[95] The mandatory work requirements in TANF have been roundly criticized by scholars. *See, e.g.*, Craig. L. Briskin & Kimberly A. Thomas, *The Waging of Welfare: All Work and No Pay?*, 33 HARV. C.R.-C.L. L. REV. 559, 591 (1993) (arguing that TANF beneficiaries who are compelled to work outside of their homes in satisfaction of the mandatory work requirements set out in the legislation should be protected under the Fair Labor Standards Act and the National Labor Relations Act); Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 250 (2000) (arguing that mandatory work requirements deny welfare recipients the "freedom that other parents enjoy to make their own choices regarding how to rear their children" as a result of a state disregard of their interest in parental autonomy and an assumption that "[b]ecause their mothering is deemed to set a bad example, the government is justified in placing limitations on it"); Karen Syma Czapanskiy, *Parents, Children, and Work-First Welfare Reform: Where is the C in TANF?*, 61 MD. L. REV. 308, 361 (2002) (critiquing the mandatory work requirements because "welfare officials often do not engage in discussions and planning with recipients as to what kind of work situation is respectful of the recipient's family and work responsibilities," because "the work available to former recipients is usually low-wage work in family-hostile environments," and, finally, because "when a low-wage worker loses a job because her employer is disrespectful of her family responsibilities, the welfare system is permitted to label her a failure rather than a person who is struggling to meet responsibilities both at work and at home"); Andrew S. Gruber, *Promoting Long-Term Self-Sufficiency for Welfare Recipients: Post-Secondary Education and the Welfare Work Requirement*, 93 NW. U. L. REV. 247, 299 (1998) ("[F]ederal welfare law should be amended to include participation in a four-year post-secondary education program as a work activity."); Shruti Rana, *Restricting the Rights of Poor Mothers: An International Human Rights Critique of 'Workfare,'* 33 COLUM. J.L. & SOC. PROBS. 393, 394 (2000) (examining TANF mandatory work requirements through the lens of international human rights and arguing that they violate

relying on PCAP/Medicaid insurance who receive their prenatal care from Alpha. This is because TANF's strict eligibility requirements make it so that people who qualify for TANF are considerably needier than those who qualify for Medicaid's PCAP program. In New York, a pregnant woman whose income is at or below 200% of the federal poverty line is eligible for Medicaid assistance through the PCAP program; moreover, no other resource limits affect eligibility—meaning that the woman can own a house, car, and other assets and still qualify for the program.[96] In contrast, TANF eligibility limitations are more constricted: qualified applicants whose households include a pregnant women must have family income that does not exceed 100% of the federal poverty line, nor 185% of the "Public Assistance Standard of Need"—a measurement containing "six separate items whose value must be added together to arrive at a needs level for a particular applicant/recipient."[97] Consequently, not all Alpha patients who are eligible for PCAP are also eligible for cash assistance under TANF. Moreover, while PCAP/Medicaid is available to undocumented immigrants in New York, TANF cash assistance remains unavailable to them.[98]

Although only a portion of Alpha patients receive TANF as well as Medicaid, at the Alpha obstetrics clinic it was generally assumed that all patients were receiving TANF "welfare" assistance. This is partially because it is impossible to know, without looking into a patient's records, whether she receives Medicaid assistance alone, or TANF cash assistance as well. The result is that when Alpha patients are spoken about in the

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"the human rights of poor single mothers through [their] attempt to define and restrict their roles as mothers, workers, and citizens"); Dorothy Roberts, *Low Income Mothers' Decisions About Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029, 1031 (2004) (arguing that TANF's incentives "devalue and penalize poor mothers' care work"); Lindsay Mara Schoen, Note, *Working Welfare Recipients: A Comparison of the Family Support Act and the Personal Responsibility and Work Opportunity Reconciliation Act*, 24 FORDHAM URB. L.J. 635, 662 (1997) (arguing that TANF work requirements "simply forc[e] welfare recipients to work" and suggesting that "[i]f work requirement programs are to succeed in actually reducing poverty, they must combine services such as education, training, child care, and health care, enabling people to attain long-term employment and self-sufficiency").

[96] Human Resources and Services Administration, New York Medicaid and S-Chip Availability, http://www.hrsa.gov/reimbursement/states/New-York-Eligibility.htm (last visited Oct. 1, 2009).

[97] *Id.*

[98] *See* N.Y. STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, NEW YORK STATE PLAN AND EXECUTIVE CERTIFICATION 4 (2006) (providing the categories of persons that are eligible for the Family Assistance Program, which is administered with TANF funds).

abstract in the clinic, it is almost assumed that they *all* receive TANF cash assistance. Clinic staff rely on familiar stereotypes when speaking about Alpha women, disparaging them as "women who don't work," who sit at home, and who "collect welfare."[99] Consistent with the trope of the welfare queen, staffers also decry patients' consumption habits and their expenditures on clothing. As one nurse stated, "[Patients] have Dooney & Burke bags and all this stuff that I can't afford—stuff that, if I bought it, I wouldn't be able to eat." Indeed, even some Alpha patients assume that all Alpha patients receive welfare. Representative of this was the time when one patient who was complaining about the long wait that she was experiencing, said to me, "I can't sit around here all day. These people [pointing to the other women in the waiting area] can wait all day because they don't have jobs. They sit at home and get a check every month. I don't. I have a job."

With respect to work requirements, TANF is clear. TANF recipients are expected to work an average of thirty hours per week,[100] with "work activities" defined as:

> (1) unsubsidized employment;
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> (2) subsidized private sector employment;
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> (3) subsidized public sector employment;
>
> (4) work experience (including work associated with the refurbishing of publicly assisted housing) if sufficient private sector employment is not available;
>
> (5) on-the-job training;
>
> (6) job search and job readiness assistance;
>
> (7) community service programs;
>
> (8) vocational educational training (not to exceed 12 months with respect to any individual);
>
> (9) job skills training directly related to employment;

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[99] Discussions with Clinic Staff, in New York, N.Y. (January 2007).

[100] 42 U.S.C.S. § 607(c)(1)(B)(i) (LexisNexis 2009).

> (10) education directly related to employment, in the case of a recipient who has not received a high school diploma or a certificate of high school equivalency;
>
> (11) satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence, in the case of a recipient who has not completed secondary school or received such a certificate; and
>
> (12) the provision of child care services to an individual who is participating in a community service program.[101]

Although the definition of "work" encompasses a rather heterogeneous group of activities, the work of raising a child is notably excluded. Therefore, the unmarried mother who engages in the all-consuming task of caring for a newborn is not "working" within the letter of the law.[102] Instead, while she may be "exempted" from TANF work requirements, she is not understood to have *fulfilled* them via the rigors of caring for an infant on her own.[103] The single mother who devotes her time to raising a child between the ages of twelve months and six years does not "work" either; instead, the time that she devotes to parenting earns her a ten-hour credit on her mandatory labor ledger.[104] Finally, the married mother who cares for her child engages in no cognizable work under TANF, irrespective of the child's age.[105] In circumstances where a

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[101] 42 U.S.C.S. § 607(d) (LexisNexis 2009).

[102] *See* 42 U.S.C.S. § 607(a)(5) (LexisNexis 2009) (providing states with the "option for participation requirement *exemptions*," and stating that "a State may, at its option, not require an individual who is a single custodial parent caring for a child who has not attained 12 months of age to engage in work") (emphasis added).

[103] 42 U.S.C.S. § 607(a)(5).

[104] 42 U.S.C.S. § 607(c)(1)(B)(i) (LexisNexis 2009) ("[A] recipient who is the only parent or caretaker relative in the family of a child who has not attained 6 years of age is deemed to be engaged in work for a month if the recipient is engaged in work for an average of at least 20 hours per week during the month."). For a similar reading of the TANF statute as providing for a ten-hour labor credit for single parents of young children, as opposed to recognizing parenting as ten hours of "work," see Noah Zatz, *Welfare to What?*, 57 HASTINGS L.J. 1131, 1142 (2006) (stating that TANF recognizes the care of young child "only as a basis for an excuse from or a reduction in work requirements, not as a way to meet them").

[105] However, the married mother whose husband works outside of the home for at least thirty-five hours per week is, herself, not compelled to seek out-of-home employment, as her husband's labor satisfies the statute's mandatory work requirement. 42 U.S.C.S. §

beneficiary fails to meet the TANF mandatory work requirements, the statute accords states vast discretion to reduce the level of assistance provided or to terminate it altogether.[106]

The requirement that mothers get a job—any job—outside of the home facilitates the ease with which the market can access their labor. Insofar as the statute understands job training, job search, and unpaid childcare services for others as "work," it does not require the strict exchange of labor power for money.[107] Nevertheless, the statute effects the commodification of poor mothers by forcing women located in the state welfare apparatus to make their labor available for exchange—whether for cash, or solely for continued government assistance.[108] In so doing, the state

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607(c)(2)(B) (LexisNexis 2009) (stating that beneficiaries within "2-parent families" are "engaged in work" for the purposes of the statute if "the individual and the other parent in the family are participating in work activities for a total of at least 35 hours per week"). If the family receives federally funded child care assistance, however, the husband must labor at least fifty-five hours outside of the home in order to satisfy the statute. *Id.* These provisions are fascinating because they impute, in one swift, fantastical movement, the husband's commoditized labor to the body of the wife, since the statute presumes that *she* has engaged in work that satisfies the statute's mandates. These provisions make such a fantastical switch possible because they give greater focus to the institution of patriarchal heteronormative marriage. Under this interpretation, her *private* labor is the condition of possibility for his *public* labor; yet her labor is made invisible inasmuch as it is *subsumed* by his. Accordingly, the statute secures the woman's body either for capital or, alternately, for her husband, provided that *his* body belongs to capital.

[106] 42 U.S.C.S. § 607(e)(1) (LexisNexis 2009). However, the statute does provide that a State cannot reduce or terminate the benefits of a single parent who is caring for a child under the age of six and who does not work within the meaning of the statute because of the unavailability of appropriate child care. 42 U.S.C.S. § 607(e)(2) (LexisNexis 2009).

[107] Zatz offers helpful examples of "work" as defined by TANF. *See* Zatz, *supra* note 104, at 1140–41. While a beneficiary "works" within the meaning of the statute when she is conventionally compensated by an employer for her time and labor, she also "works" when she is compensated by her employer with a combination of federal and state funds. *Id.* She "works" when she receives nothing for her time and labor but a continuation of welfare benefits. She also "works" when she engages in activities that relate to future employment, like job search and job training. *Id.* However, the latter category of activities is not sufficiently capacious to include "non-vocational post-secondary education." *Id.* at 1142. Moreover, lest the statute be misconstrued as providing for the unfettered vocational education of poor mothers by understanding them as "working" when they are simply engaged in job training, the statute limits the number of individuals understood as working "by reason of participation in educational activities" to thirty percent of all TANF beneficiaries in any given state. 42 U.S.C.S. § 607(c)(2)(D) (LexisNexis 2009).

[108] Zatz similarly concludes that the statute's emphasis is on moving welfare recipients into the unsubsidized labor market. He writes that, although "'work' cannot be encapsulated in a single definition or concept under TANF," insofar as "one can be 'engaged in work' without getting paid, and even without being prepared to get paid," he remains

exposes poor women's bodies to capital and invasive market forces and, in turn, renders them vulnerable to capitalist expropriation.[109]

To the extent that poor persons are racialized by virtue of their "undeserving" receipt of TANF,[110] race once again comes to mark the body that is made porous to capital. In line with Cherniavsky's theory that race indicates the body's compromised ability to shield itself from the pressures of labor alienation, race for TANF recipients signals a decreased ability to keep invasive market forces at bay.

For the phenotypically Black women who disproportionately receive TANF,[111] the TANF work requirements reiterate that the identity of

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convinced that "there is also an undeniable emphasis on paid employment." Zatz, *supra* note 104, at 1143. His conclusion is based not only on the letter of the statute, but also on how the statute has been applied in the states. Not only is some connection to current or future employment required for most of the specified work activities, but TANF also provides for "individual responsibility plans . . . for moving the individual immediately into private sector employment." *Id.* at 1142. More generally, TANF has been implemented in ways that consistently prioritize employment. At both the federal and state levels, the relevant agencies place great emphasis on a pervasive, albeit informal, message that welfare recipients should be seeking a paycheck in order to avoid a welfare check. This more symbolic aspect can be seen, for instance, in renaming "Income Maintenance Centers" as "Job Centers" and in hanging banners in welfare offices with messages like "Welcome Job Seekers!" and "You Have A Choice, Choose a Job—Work First." In this less technical sense, the ubiquitous references to work—in state programs named "CalWorks" and "Wisconsin Works," in federal "Welfare-to-Work" grants, and elsewhere—clearly invoke unsubsidized, private sector employment. Zatz, *supra* note 104, at 1142–43 (citations omitted). *See also* Roberts, *supra* note 95, at 1029–30 ("The primary goal of [TANF] is to move mothers from welfare to the paid workforce.").

[109] Interestingly, Cherniavsky cites welfare reform as an example of "dominance without hegemony," where subjects are subordinated (that is, dominated) by the state without the state simultaneously working, hegemonically, to integrate the subordinated subjects as a "nation." CHERNIAVSKY, *supra* note 16, at 26–31. Whereas dominance without hegemony was once only a feature of the colony, Cherniavsky notes that the technique "is now becoming generalized in the metropole." *Id.* at 28. For Cherniavsky, welfare reform "force[s] the unemployed into service work at below-subsistence wages . . . thereby actively support[ing] the expansion of a prostrated (sub)proletariat absolutely marginal to the traditional institutions of civic discipline . . . and to the arena of consumption through which civic entitlement is increasingly secured." *Id.* (footnote omitted). Since the Alpha obstetrics clinic can be likened to a colony, *see* discussion *supra* Part II, Alpha patients, as subjects of punitive welfare reforms, may be likened to a "colonial population," insofar as a technique of colonial rule is now being used to manage them. *See infra* Part III.B for expanded discussion.

[110] *See supra* notes 60–64 and accompanying text.

[111] According to statistics compiled by the Department of Health and Human Services and released in 2006, Black women accounted for 35.7% of persons receiving welfare in the form of TANF; the percentages accounted for by White, Latina, Asian, and

"mother" is not a legitimate one for them, to the same extent as enjoyed by wealthier White women throughout this nation's history. White mothers are recognized as empowered to provide for the quotidian needs and desires of the child within the home, and they are lauded for doing so.

Further, the work requirements reiterate that the Black female body, which disproportionately represents the body of TANF recipients and which has at least *some* causal relationship to the punitive turn that TANF has made,[112] is a laboring body.[113] In addition, they reproduce the Black female body as a *public* body, rather than one secured in the privacy of a domestic realm.[114] Lastly, they reproduce the raced body as one that is permeable to the expropriation of its capacity to labor.[115]

Native American women were 33.4%, 26.5%, 1.8% and 1.4%, respectively. U.S. Dep't of Health and Human Servs. Admin. for Children and Families, Table 8: Temporary Assistance for Needy Families—Active Cases, Percent Distribution of TANF Families by Ethnicity/Race, October 2005-September 2006, http://www.acf.hhs.gov/programs/ofa/character/FY2006/tab08.htm (last visited Oct. 1, 2009).

[112] Onwuachi-Willig makes this point forcefully when she writes:

> Racist assumptions have turned public opinion and policy against providing the American poor with welfare benefits as the image of its primary beneficiaries changed from deserving, chaste white widows to lazy, never-married black baby-makers. As welfare recipients became racialized as black, standard rhetoric changed to implicitly blame unwed welfare mothers for the impoverished conditions in which they and their families live.

Onwuachi-Willig, *supra* note 3, at 1664.

[113] *See generally* JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT 165–85 (1985) (demonstrating that, throughout history, Black women have worked as laborers outside of the home).

[114] This domestic realm, of course, may be one that is patriarchal—where a woman's labor is still wholly "owned" and subordinate to a husband. This suggests that the "privileges" of White womanhood are at least analogous to the loss of the body—the openness to the expropriation of labor power—attributed to slavery. Future scholarship might analyze how Cherniavsky's conception of race would be complicated, and revised, by recognizing and addressing White women's subordination as wives. Thanks to Nick De Genova for this point.

Cherniavsky is, in the last instance, interested in applying her theory of race to studies of film. She enunciates a theory of the commodified filmic image as one of "inorganic, depthless form," and juxtaposes this depthlessness with the recognition that the bodies of White women are frequently the substance from which the filmic image is derived. *See* CHERNIAVSKY, *supra* note 16, at 85. She observes a contradiction between the White body as the "naturalized limit on capitalist abstraction" and the commoditized White filmic

Moreover, when one considers that motherhood is the condition precedent for the operation of the TANF statute—namely, that it is the exercise of her reproductive rights and her status as mother that brings a woman within the punitive mandatory work requirements set out in TANF—one better understands the complicity that this "reproductive right" has with the attenuation of the body's ability to repel the forces of market capitalism. It is the reproductive rights of poor Black and racially subjugated women that attenuate their bodies. Again, do we overstate that which is possessed when we call this a "right"?

B. Reflections on Decolonization

One could argue that TANF underdevelops poor mothers through a combination of denying them the opportunity to mother their children in the

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body as completely opened to capitalist abstraction. She concludes, "[W]hiteness manifests in Hollywood cinema as the impossible lure of protection from the invasive forces of capital (the prying open of human shells) through ecstatic consumption." *Id.* at 89. Hence the hyperbolic whiteness of White bodies—they appear to positively glow as they excessively refract light—in the "soft style" that characterized Hollywood productions in the early 20th century. *Id.* at 86–90. Although White women in film appear to experience a "loss of the body" that is tantamount to the loss that Cherniavsky attributes to slavery, they experience a total bodily loss *only in film*; her argument does not speak to the bodily loss that they may experience as *wives*.

[115] It is essential to recognize that prior to TANF, welfare assistance (in the form of AFDC) could actually be seen to have shielded beneficiaries from capital. This was precisely the meaning of the "end of welfare as we know it" and the welfare-to-work doctrine. A. Mechele Dickerson has argued this position:

> Congress ended "welfare as we knew it" in 1996 because of its conclusion that too many non-working but able-bodied mothers were receiving welfare benefits, that they were financially dependent because they were lazy, that lazy people did not deserve welfare benefits, and that the best way to force these lazy, able-bodied women to become economically self-sufficient was to push them off the welfare rolls and into the work force . . . . The "problem" with welfare, critics argued, is that welfare recipients are lazy and refuse to earn wages to support themselves and their children. Welfare reforms then proceeded based on the premise that non-work created the welfare crisis and that the "solution" to the non-work problem is to force people into the labor market. This solution should solve the welfare problem if laziness (as evidenced by non-work) is the cause of the problem.

A. Mechele Dickerson, *America's Uneasy Relationship with the Working Poor*, 51 HASTINGS L.J. 17, 17 (1999). TANF thus reasserted the disciplinary power of money and the market over bodies that could previously evade the mandates of capital.

home and in the capacity that they see fit, while forcing them to labor in jobs that offer little in terms of stability, advancement, or fulfillment. Further, one could argue that TANF does not help poor, racially subjugated women become equal, respected citizens of the nation; rather, it compels them into a project of exploitation. This interpretation is persuasive, since in the process of turning poor women into wage laborers, the program coerces them to labor in jobs that are avoided by those with a choice in the matter. If these arguments are accepted, then TANF appears to do to poor women what the classic colony did to its subjects: underdevelop and exploit them without actually bestowing equal citizenship upon them.[116] The analogy between the poor mothers populating Alpha and classically colonized peoples is compelling, and the conclusion that poor mothers are colonized by PCAP and TANF appears irresistible.

However, an important divergence between the classic colony and the quasi-colony that Alpha represents may be the intention of the "metropole." In the former, the colonizing state engages in the colonial project with the aim of exploiting the indigenous peoples while denying them the benefits of citizenship. In the quasi-colony, the intentions of the authors of PCAP and TANF are not quite so clear. While there are persuasive arguments to be made that PCAP and TANF, like other regulations that target the poor, are *intended* to exploit their beneficiaries while denying them the rights and dignity enjoyed by non-poor citizens,[117] it is not an argument that this Article makes.[118] This Article does not try to divine the intent of the state with regard to PCAP and TANF; rather, it is enough to establish that while colonization was achieved subsequent to clear intention in the classic colony, in the quasi-colony, quasi-colonization is achieved without such clear intention. Although this difference in the "mens rea" of the colonial and quasi-colonial state is quite significant, the distinction does not exculpate the quasi-colonial state. The similarities

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[116] *See* CHERNIAVSKY, *supra* note 16, at 28 (describing the condition of colonial rule as one where the "subordination of the colonized does not coincide with their interpellation as citizen-subjects").

[117] *See, e.g.*, PIVEN & CLOWARD, *supra* note 69 (arguing that, throughout history, programs that have provided relief to the poor have been enacted by governments that have been captured by the interests of capital and, consequently, have been intended to produce a workforce incapable of defending itself from capitalist exploitation).

[118] Moreover, it is likely that a review of the legislative history of PCAP, if not TANF, would reveal ambivalent, conflicted intentions: some legislators may actually have intended to help poor women by providing them with prenatal care, while others may have intended to punish them for being poor and pregnant by compromising their reproductive rights through the conditions that attach to the program of prenatal care.

between the colony and the quasi-colony —the compromising of rights, the production of subjugated races, and the underdevelopment and exploitation of subjects—are sufficiently damning that society ought to demand a change in the policies that produce the quasi-colony and, consequently, demand its decolonization.

So the question becomes: what would the "decolonization" of Alpha Hospital entail? Other scholars are better situated to make suggestions regarding solutions. However, if, as this Article has argued, Alpha can be analogized to the classic colony because of the contact of non-capitalist and capitalist economic forms (e.g., the distribution of healthcare goods at Alpha, and the modes of production in the colony proper), then the decolonization of Alpha might be accomplished by homogenizing the distribution of healthcare goods. This solution means eliminating the United States' current dual system of healthcare—one that is composed of private, capitalist distribution of goods alongside a public system where goods are distributed by non-capitalist means. Simply put, the decolonization of public hospitals like Alpha, and a step towards the realization of racial justice and reproductive freedom, may require the implementation of a system of universal healthcare in the United States.

IV. CONCLUSION

This Article has tried to illuminate a facet of the complex, tangled relationship of capitalism, reproductive injustice, and racial inequality, and to demonstrate that each node in the trinity supports and reinforces the other. As such, it is futile to strive for reproductive justice without simultaneously imagining an end to racial inequality; likewise, it is folly to hope for racial justice without concurrently planning for reproductive freedom. Indeed, for poor Black and other racially subjugated women, those two goals are one and the same. Furthermore, it appears patent that capitalism has played some role in producing and maintaining the racial and reproductive inequities that poor Black and racially subjugated women experience on a daily basis in the United States.

Although it may seem odd for a discussion of reproductive rights to utilize insights from anthropology, subaltern studies, and theories of the body and embodiment, hopefully such interdisciplinary examinations will become more common as more scholars unpack the complex and embedded ways that motherhood is stigmatized and pathologized when it is pursued by poor women. There is much work to be done; the reproductive lives of Black and racially subjugated women lie in the balance.