



## **Data, the New Cotton**

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One could imagine that in 1853, Henrietta Wood had only recently begun acclimating to life as a “free” Black woman living in Cincinnati.<sup>1</sup> Wood, who was formerly enslaved, was brought to the free state of Ohio from New Orleans nearly a decade earlier by Jane Cirode, one of her previous enslavers.<sup>2</sup> However, Cirode’s daughter and son-in-law took umbrage with Wood’s newfound freedom and sought to recapture her value.<sup>3</sup> They hired a deputy sheriff from Kentucky, Zebulon Ward, to kidnap Wood and sell her back into slavery.<sup>4</sup> After an elaborate scheme to get Wood to cross over to the Kentucky side of the Ohio River, with the help of her employer, Wood was captured and ultimately taken to Natchez, Mississippi, where she was sold to the son of a former governor.<sup>5</sup>

It would be many years before Wood would taste freedom again, finally being freed in Texas several years after both the Emancipation Proclamation and the end of the Civil War.<sup>6</sup> While the tragedy of Wood’s story was far too common,<sup>7</sup> it is unique in the legal battle that came after.

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<sup>1</sup> W. CALEB MCDANIEL, *SWEET TASTE OF LIBERTY: A TRUE STORY OF SLAVERY AND RESTITUTION IN AMERICA* 11–14 (2019).

<sup>2</sup> *Id.* at 14, 16.

<sup>3</sup> *Id.* at 13.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 3, 102.

<sup>6</sup> *Id.* at 144–46, 159, 165–68.

<sup>7</sup> See SOLOMON NORTHROP, *TWELVE YEARS A SLAVE* (New York: Penguin Classics, 2012); CAROL WILSON, *FREEDOM AT RISK: THE KIDNAPPING OF FREE BLACKS IN AMERICA, 1780–1865* (Lexington: University Press of Kentucky, 1994); Paul Finkelman, *The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793*, 56 J.S. HIST. 397 (1990); Peter P. Hinks, “Frequently Plunged Into Slavery”: *Free Blacks and Kidnapping in Antebellum Boston*, 20 HIST. J. MASS. 16 (1992).

In 1870, Wood sued Ward in federal court, seeking \$20,000 in restitution.<sup>8</sup> After years of litigation, she finally won her case. While the jury would award her just \$2,500, it was one of the first and only awards of its size for restitution for slavery.<sup>9</sup>

The value that Henrietta Wood attached to her additional years in bondage, the equivalent of nearly \$450,000 in 2022 dollars, reflects an intimate understanding of the monies reaped through the exploitation of Black flesh. No one knew more than those who were enslaved—and had families torn apart through sales—the capital interests and values placed upon their bodies. In fact, in many of the recorded and documented accounts of those formerly enslaved are memories of knowing what price was fetched by the sale of family or the sale of themselves, and many such accounts quote the going rate.<sup>10</sup> At no point was that value higher than after the outlawing of the external slave trade to the United States, where between 1807 and 1808, over one million African Americans were moved from the Upper to the Lower South.<sup>11</sup>

At the heart of this movement was the production of cotton.<sup>12</sup> Cotton was the world's most widely traded commodity at the time.<sup>13</sup> Beginning in the late 1700s, the cotton boom helped transform the United States from a small European trading partner and outpost to one of the world's largest economies.<sup>14</sup> Cotton monopoly profits powered the modernization of the U.S. economy and ushered in large-scale industrialization, all but ensuring the entrenchment of the country as a

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<sup>8</sup> MCDANIEL, *supra* note 1, at 199.

<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.* at 27.

<sup>11</sup> CLINT SMITH, *HOW THE WORD IS PASSED: A RECKONING WITH THE HISTORY OF SLAVERY ACROSS AMERICA* 3 (2021).

<sup>12</sup> EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM*, at xxiii (New York: Basic Books, 2016).

<sup>13</sup> *Id.* at xxiii.

<sup>14</sup> *Id.* at xx.

slavocracy.<sup>15</sup> Today, the United States seems poised to make another transformative economic move, again through forced extraction from racial minorities, but now with data as the prized commodity instead of cotton.

For many years, particularly at the beginning of the twentieth century when historians rewrote the history of U.S. enslavement, the profit motive of racial domination and oppression was downplayed and outright dismissed.<sup>16</sup> Yet, recognizing the relationship between race and capital, and the impact of that relationship on the rise of modern capitalism, is at the heart of the theory of racial capitalism. Racial capitalism is the process by which capital accumulation is built from the creation and leveraging of racial difference.<sup>17</sup> This purported difference is further used to justify and naturalize the inequality necessary for the disparate distribution of resources, power, and rights.<sup>18</sup> Thus, racial capitalism can be viewed as a frame for understanding, historically and currently, how capitalism operates.

Racial capitalism as a framework can help us to understand the emerging world of surveillance capitalism. In her book *The Age of Surveillance Capitalism*, Shoshana Zuboff argues that tech companies have turned to the commodification of data emittance and exhaust in a new kind of marketplace for behavioral predictions.<sup>19</sup> She equates what companies like Google, Facebook, and Amazon do to what companies like Ford Motors, and auto manufacturing more broadly, did to shape how capitalism operates.<sup>20</sup> This new marketing potential of data has led many people to refer to data as the new oil or the new gold, given increasing efforts to mine, capture,

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<sup>15</sup> NICOLE HANNAH-JONES, *THE 1619 PROJECT: A NEW ORIGIN STORY* 18–19 (2021).

<sup>16</sup> BAPTIST, *supra* note 12, at xviii.

<sup>17</sup> DESTIN JENKINS & JUSTIN LEROY, *HISTORIES OF RACIAL CAPITALISM* 3–4 (2021).

<sup>18</sup> *Id.* at 3–4.

<sup>19</sup> SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* 8–9 (2019).

<sup>20</sup> *Id.* at 85–88.

and commodify it.<sup>21</sup> Yet, Zuboff views surveillance capitalism as “parasitic,” feeding on the human experience and exploiting digital connection for commercial ends in ways that disregard important social norms, undermine individual autonomy, and threaten a democratic society.<sup>22</sup>

Despite its central focus on exploitation, much of the literature that has developed on surveillance capitalism has failed to wrestle with and examine how race works within and through surveillance capitalism. More recent scholarship has shown, however, that “racial subjugation is not a special application of capitalist processes, but rather central to how capitalism operates,” even within emerging structures of data marketing.<sup>23</sup> Connecting the production and exploitation of racial difference to monetary extraction and profit accumulation, rather than individual biases, is critical to adequately see, understand, respond to, and ultimately dismantle surveillance capitalism. It is not an ancillary focus or concern—it is central. Thus, it may be more apt to think

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<sup>21</sup> See *The World’s Most Valuable Resource Is No Longer Oil, But Data*, THE ECONOMIST (May 6, 2017), <https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data>; Joris Toonders, *Data Is the New Oil of the Digital Economy*, WIRED (July 2014), <https://www.wired.com/insights/2014/07/data-new-oil-digital-economy/>; Kiran Bhageshpur, *Data Is the New Oil—and That’s a Good Thing*, FORBES (Nov. 15, 2019), <https://www.forbes.com/sites/forbestechcouncil/2019/11/15/data-is-the-new-oil-and-thats-a-good-thing>; Khofiz Shakhidi, *Information Is the New Gold*, FORBES (June 18, 2020), <https://www.forbes.com/sites/forbesfinancecouncil/2020/06/18/information-is-the-new-gold>; David Doty, *Data Is Gold for Publishers in a New Media World Order*, FORBES (July 29, 2021), <https://www.forbes.com/sites/daviddoty/2021/07/29/data-is-gold-for-publishers-in-a-new-media-world-order>; Tshilidzi Marwala, *Data Is the New Gold*, FORBES AFRICA (July 18, 2020), <https://www.forbesafrica.com/technology/2019/07/18/data-is-the-new-gold>; Arvind Singh, *Is Big Data the New Black Gold?*, WIRED (Feb. 2013), <https://www.wired.com/insights/2013/02/is-big-data-the-new-black-gold/>; Bernard Moon, *Cultivated Data Is the Next Gold Rush*, TECH CRUNCH (Aug. 8, 2019), <https://techcrunch.com/2019/08/08/cultivated-data-is-the-next-gold-rush>.

<sup>22</sup> ZUBOFF, *supra* note 19, at 9–11.

<sup>23</sup> JENKINS & LEROY, *supra* note 17, at vii. For scholarship examining race and surveillance capitalism, see BRIAN JEFFERSON, DIGITIZE AND PUNISH: RACIAL CRIMINALIZATION IN THE DIGITAL AGE 3–7 (2020); Nicholas Mirzoeff, *Artificial Vision, White Space and Racial Surveillance Capitalism*, 36 AI & SOCIETY 1295 (2021); Yvonne Jooste, *Surveillance Capitalism as White World-Making*, 53 ACTA ACADEMIA 44 (2021); Gary Kafer, *Surveillance Capitalism and Its Racial Discontents*, JUMP CUT, <https://ejumpcut.org/archive/jc59.2019/Kafer-Zuboff/index.html> (last visited May 27, 2022).

of data as the new cotton, not only because of the uniquely transformative role cotton played in grounding and catapulting the American economy, but also because the racial connections evoked by cotton forces us to see the real source of exploited value beyond the commodity itself, as the cotton empire was powered by stolen labor off of the scarred backs of millions of enslaved Africans.<sup>24</sup> Indeed, from the late eighteenth century through the mid-nineteenth century, enslaved bodies were America's largest financial asset, valued at nearly double the yearly national income for the entire United States. Using this lens elevates and centers views from the margins, in ways that reveal how surveillance capitalism acts to reproduce, harness, and entrench racially exploitative processes and systems.

As a criminal law scholar and former public defender, I have been interested in how these practices take form in criminal laws, policies, and institutions. Through my work, I have observed that racial capitalism logics play a significant role in deepening carcerality and criminalization in at least three ways. First, racial capitalism is manifest in criminal data enterprising in instances where Black bodies are exploited as sources for extracting raw data. Take, for example, voice recognition companies that have turned to prisons, where there are disproportionate numbers of Black people, to use inmate phone calls in developing and testing voice prints.<sup>25</sup> Second, racial capitalism can be seen in commercial practices that target Black communities as locations to experiment with new surveillance technology. For example, one of the first attempted residential uses of facial recognition technology in New York City was at a majority-Black apartment

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<sup>24</sup> I recognize the role that race has also played in the pursuit of oil and gold, through the extermination of racialized Indigenous peoples and occupation of Native lands.

<sup>25</sup> George Joseph & Debbie Nathan, *Prisons Across the US Are Quietly Building Databases of Incarcerated People's Voice Prints*, THE INTERCEPT (Jan. 30, 2019), <https://theintercept.com/2019/01/30/prison-voice-prints-databases-securus>.

complex in Brooklyn.<sup>26</sup> Third, racial capitalism is at work when myths of Black inherent criminality are proffered as justification for the development and deployment of police and correctional surveillance technology.<sup>27</sup> For example, the widespread use of electronic ankle monitors<sup>28</sup> and police aerial surveillance<sup>29</sup> has been achieved through technology companies pitching their strategies as necessary to ensure public safety in “high-crime urban areas.” Such language acts as a code to signal Black neighborhoods.

These surveillance practices not only take advantage of the legacies of racial subordination to control vulnerable communities and reap profits but actively maintain racial hierarchies.<sup>30</sup> The proliferation of digitized monitoring and tracking constrains freedom of movement, impinges on rights to organize and civically engage, limits liberties in a form of second-tier citizenship, and contributes to a social marginalization that restricts Black people to the outskirts of the U.S. polity.<sup>31</sup> The sad irony is that this continued hypersurveillance has always sought to render the humanity of Black lives invisible.<sup>32</sup> From the moment that they walk out of their homes, Black

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<sup>26</sup> Mutale Nkonde, *Automated Anti-Blackness: Facial Recognition in Brooklyn, New York*, HARV. KENNEDY SCH. J. AFR. AM. POL’Y, 2019–20, at 30; Erin Durkin, *New York Tenants Fight as Landlords Embrace Facial Recognition Cameras*, THE GUARDIAN (May 29, 2019), <https://www.theguardian.com/cities/2019/may/29/new-york-facial-recognition-cameras-apartment-complex>; J. Khadijah Abdurahman, *Organizing as Joy: An Ocean-Hill Brownsville Story, with Tranae Moran and Fabian Rogers*, LOGIC (Dec. 25, 2021), <https://logicmag.io/beacons/organizing-as-joy-an-ocean-hill-brownsville-story-with-tranae-moran-and/>.

<sup>27</sup> See Chaz Arnett, *Race, Surveillance, Resistance*, 81 OHIO ST. L.J. 1103 (2020); Amba Kak & Rashida Richardson, *Suspect Development Systems: Databasing Marginality and Enforcing Discipline*, 55 U. MICH. J. L. REFORM (forthcoming 2022), draft available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3868392](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3868392), at 10–12, 38.

<sup>28</sup> See Chaz Arnett, *From Decarceration to E-carceration*, 41 CARDOZO L. REV. 673 (2019).

<sup>29</sup> See Arnett, *supra* note 27.

<sup>30</sup> *Id.*

<sup>31</sup> See Arnett, *From Decarceration to E-carceration*, *supra* note 28.

<sup>32</sup> See Chaz Arnett, *Black Lives Monitored* (forthcoming 2022).

people are inundated with high-tech modes of watching like crime camera networks.<sup>33</sup> If they choose to drive they are disparately targeted by traffic cameras.<sup>34</sup> If they are using cell phones they are more likely to be the targets of police stingray technology,<sup>35</sup> and their use of social media to organize against racial injustice and express themselves is more likely to be the focus of police surveillance.<sup>36</sup> Yet, when this hypervisibility leads Black people to being subject to police violence, justice is denied and they are portrayed as less than human.<sup>37</sup> If they are minors, they are not seen as children nor given the benefit of youthful innocence.<sup>38</sup> When complaints about efforts

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<sup>33</sup> See Gracie Todd, *Police Cameras Disproportionately Surveil Nonwhite Areas of DC and Baltimore, CNS Finds*, CAPITAL NEWS SERVICE (Nov. 19, 2020), <https://cnsmaryland.org/2020/11/19/police-cameras-disproportionately-surveil-nonwhite-areas-of-dc-and-baltimore-cns-finds/>; *Inside the NYPD's Surveillance Machine*, AMNESTY INTERNATIONAL, <https://banthescan.amnesty.org/decode/> (last visited May 27, 2022).

<sup>34</sup> Emily Hopkins & Melissa Sanchez, *Chicago's 'Race-Neutral' Traffic Cameras Ticket Black and Latino Drivers the Most*, PROPUBLICA (Jan. 11, 2022), <https://www.propublica.org/article/chicagos-race-neutral-traffic-cameras-ticket-black-and-latino-drivers-the-most>; William Farrell, *Predominately Black Neighborhoods in D.C. Bear the Brunt of Automated Traffic Enforcement*, DC POLICY CENTER (June 28, 2018), <https://www.dcpolicycenter.org/publications/predominately-black-neighborhoods-in-d-c-bear-the-brunt-of-automated-traffic-enforcement>.

<sup>35</sup> George Joseph, *Racial Disparities in Police 'Stingray' Surveillance, Mapped*, BLOOMBERG CITYLAB (Oct. 18, 2016), <https://www.bloomberg.com/news/articles/2016-10-18/u-s-police-cellphone-surveillance-by-stingray-mapped>.

<sup>36</sup> See Arnett, *Black Lives Monitored*, *supra* note 32

<sup>37</sup> Phillip Atiba Goff, Jennifer L. Eberhardt, Melissa J. Williams & Matthew Christian Jackson, *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCH. 292 (2008); Calvin John Smiley & David Fakunle, *From 'Brute' to 'Thug': The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV'T 350 (2016).

<sup>38</sup> See KRISTIN HENNING, *THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH* (2021); Rebecca Stone & Kelly M. Socia, *Boy with Toy or Black Male with Gun: An Analysis of Online News Articles Covering the Shooting of Tamir Rice*, 9 RACE AND JUSTICE 330 (2017); Kristin Dukes & Sarah E. Gaither, *Young, Black, and Endangered: Examining the Deaths of Trayvon Martin, Michael Brown, and Tamir Rice through a Psychological Lens*, in STEREOTYPES AND STEREOTYPING: MISPERCEPTIONS, PERSPECTIVES AND ROLE OF SOCIAL MEDIA 87 (Claude Fields ed., 2016).



to police “white spaces”<sup>39</sup> are levied by those seeking to live normal lives,<sup>40</sup> such complaints are dismissed as racist themselves. Finally, petitions to take reparative action for years of race-based discrimination and inequities are portrayed as unworkable, narrow claims that come at the expense of helping all Americans.<sup>41</sup> Thus, the burden that Black people carry is one of being constantly monitored while remaining unseen and unheard.

Before Zebulon Ward died as a very wealthy man, he signed the restitution check to Henrietta Wood with a mocking note indicating that it was “to pay for the last Negro that will ever be paid for in this country.”<sup>42</sup> Although his sardonic words still haunt today, Wood may have had the last laugh. Her efforts not only set a precedent, they also spawned a formidable legacy.<sup>43</sup> Yet, as we head further into an era of increasing attempts to digitally extract capital on the backs of

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<sup>39</sup> See Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being out of Place from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1151 (2017); Elijah Anderson, *The White Space*, 1 SOCIO. RACE & ETHNICITY 10 (2015).

<sup>40</sup> See Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness as Nuisance*, 69 AM. U. L. REV. 863 (2020).

<sup>41</sup> See Juliet Hooker, *Black Lives Matter and the Paradoxes of US Black Politics: From Democratic Sacrifice to Democratic Repair*, 44 POL. THEORY 448 (2016); Jasson Perez, *Don't Blame 'Defund'*, DISSENT, Winter 2021, at 68, <https://www.dissentmagazine.org/article/dont-blame-defund>; David McNally, *Race, Class, the Left, and the US Elections*, 102 STUD. IN POL. ECON. 77 (2021); Eric Bradner, Sarah Mucha & Arlette Saenz, *Biden: “If You Have a Problem Figuring out Whether You’re for Me or Trump, Then You Ain’t Black,”* CNN (May 22, 2020), <https://www.cnn.com/2020/05/22/politics/biden-charlamagne-tha-god-you-aint-black/index.html>; Tal Alexrod, *Warner Blames Democratic Losses on “Defund the Police,”* THE HILL (Nov. 14, 2020), <https://thehill.com/homenews/senate/525983-warner-blames-democratic-losses-on-defund-the-police>.

<sup>42</sup> MCDANIEL, *supra* note 1, at 232.

<sup>43</sup> Wood’s son, Arthur H. Simms, who was also born during enslavement, became a prominent attorney in Chicago and practiced well into his nineties. Likely inspired by his mother’s legal battles, Simms used his law degree to fight for racial justice causes. For example, in the aftermath of the 1919 race riots in Chicago, Simms was part of a legal team that successfully made a self-defense argument for four Black people who were charged with killing a White man during the riots.

people that look like Wood, we must wrestle with the plantation logics inherent in exploitative data practices, if we are to ever achieve anything resembling justice in technology.