

# FRACTURED BONDS: POLICING WHITENESS AND WOMANHOOD THROUGH RACE-BASED MARRIAGE ANNULMENTS

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## INTRODUCTION

In 1924, Leonard Kip Rhinelander filed for an annulment from his wife of only five weeks, Alice Beatrice Jones.<sup>1</sup> Leonard asked the court to annul his marriage on grounds of fraud, asserting that Alice was “of colored blood” and had concealed this fact.<sup>2</sup> The story was splashed across newspapers throughout the nation.<sup>3</sup> One academic of the period referred to it as the “worst sort of scandal,” sensationalized by the press.<sup>4</sup> Many parties felt certain that Leonard would succeed in his suit. Betting odds were stacked in his favor “based on the belief . . . ‘that a jury of twelve white men would not compel Rhinelander to maintain the responsibilities of husband to the daughter of a mulatto taxi driver.’”<sup>5</sup> During closing statements, his attorney exhorted the jury that “[t]here is not a father among you . . . who would not rather see his son in a casket than wedded to this mulatto woman.”<sup>6</sup> None-

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1. EARL LEWIS & HEIDI ARDIZZONE, *LOVE ON TRIAL: AN AMERICAN SCANDAL IN BLACK AND WHITE* xi (2001).

2. *Rhinelander v. Rhinelander*, 219 A.D. 189, 189 (N.Y. App. Div. 1927), *aff'd*, 157 N.E. 838 (N.Y. 1927). As Frederic D. Schwarz explains:

The charge would be difficult to prove because on two occasions before their marriage Rhinelander and Alice had shackled up in a New York City hotel, the first time for a week and the second time for two weeks. Rhinelander admitted that he knew his wife’s skin was “dark” and had seen her father, who was considerably darker, but he said that he thought they were Spanish or perhaps that her father was a white man with jaundice.

Frederic D. Schwarz, *The Rhinelander Trial*, *AM. HERITAGE*, Nov. 2000, at 85.

3. LEWIS & ARDIZZONE, *supra* note 1, at xi–xii.

4. Joseph L. Holmes, *Crime and the Press*, 20 *AM. INST. CRIM. L. & CRIMINOLOGY* 246, 277 (1929) (describing front-page picture depicting “the colored female from whom a millionaire’s son sought an annulment of marriage”).

5. Schwarz, *supra* note 2, at 86.

6. *Lays Son’s Plight to Rhinelander, Sr.*, *N.Y. TIMES*, Dec. 3, 1925, at 3.

theless, Leonard lost. The jury voted against him, ten to two.<sup>7</sup> Three years later, the appellate court affirmed the marriage, finding that no fraud had occurred.<sup>8</sup>

In the hundred years before the United States Supreme Court declared anti-miscegenation statutes unconstitutional in *Loving v. Virginia*,<sup>9</sup> state courts decided thirteen recorded race-based annulment cases.<sup>10</sup> Courts repeated the reasoning of *Rhineland* in case after case, as they denied requests for annulments. During this time, legislative prohibitions on interracial sex and marriage played a vital part in both the practice and ideology of racial supremacy. Before *Loving*, the courts continually upheld miscegenation laws as essential to maintaining public order.<sup>11</sup> Outside the ambit of the judicial system, the corresponding social norms were even more strictly policed.<sup>12</sup> In a society governed by racial segregation, with increased stress placed on the importance of racial difference and racial purity, one would expect that race-based annulment cases would trigger the gut response called for by Leonard's lawyer, and that the courts would dissolve any marriage that potentially traversed racial lines. Instead, the judges continued to find for the women before them, dismissing the accusations of blackness brought by their husbands.<sup>13</sup>

7. LEWIS & ARDIZZONE, *supra* note 1, at 215.

8. *Rhineland v. Rhineland*, 219 A.D. 189, 190 (N.Y. App. Div. 1927).

9. 388 U.S. 1 (1967).

10. See Kirby v. Kirby, 206 P. 405 (Ariz. 1922); Ferrall v. Ferrall, 69 S.E. 60 (N.C. 1910); Dillon v. Dillon, 60 Ga. 204 (1878); Theophanis v. Theophanis, 51 S.W.2d 957 (Ky. 1932); Villa v. Lacoste, 35 So. 2d 419 (La. 1948); Sunseri v. Cassagne (*Sunseri II*), 196 So. 7 (La. 1940); Neuberger v. Gueldner, 72 So. 220 (La. 1916); Van Houten v. Morse, 38 N.E. 705 (Mass. 1894); Marre v. Marre, 168 S.W. 636 (Mo. Ct. App. 1914); *Rhineland v. Rhineland*, 157 N.E. 838 (N.Y. 1927); Baker v. Carter, 68 P.2d 85 (Okla. 1937); Calma v. Calma, 128 S.E.2d 440 (Va. 1962); Naim v. Naim, 90 S.E.2d 849 (Va. 1956).

11. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 545 (1896) ("Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the state."); *Dodson v. State*, 31 S.W. 977, 977-78 (Ark. 1895) (upholding twenty-five dollar fine for miscegenation as valid exercise of police power); *State v. Hairston*, 63 N.C. 439, 441 (1869) (holding that anti-miscegenation statute does not violate Fourteenth Amendment and marriage is not a contract within meaning of Civil Rights Act of 1866); *State v. Reinhardt*, 63 N.C. 547, 548 (1869) (holding that anti-miscegenation statute does not violate Fourteenth Amendment).

12. See, e.g., GUNNAR MYRDAL ET AL., AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 55 (1944) ("Even . . . [where] intermarriage is not barred by the force of law, the social sanctions blocking its way are serious. Mixed couples are punished by nearly complete social ostracism.").

13. For the most part, this Article addresses these cases within a black/white binary. While providing an inherently insufficient analysis, the courts generally applied the same rationale. Even when other ethnic groups were involved, such as Filipino or Mexican, the courts interpreted their status as either black or white. Additionally, the annulment cases were concentrated in the East Coast where black-white was the most highly maintained racial divide.

This Article presents a unified analysis of all race-based annulment cases for the first time. Using this unique set of thirteen cases, this Article argues that while declaring these women “white” appears to be a deviation from white supremacy, the courts’ decisions were used to preserve white racial dominance. Gender stereotypes were intricately intertwined with racial stereotypes and the concept of womanhood buttressed the structures of racial supremacy. Superficially, the courts in the annulment cases appear to disregard race in favor of their paternal concern for the distressed women before them, but in fact, race always remained paramount. Scrutiny of these cases shows that the courts continued to privilege white racial supremacy over other concerns.

The courts worked to protect the stability of whiteness and white society by protecting the image of white womanhood. The white husbands who claimed their wives were colored threatened the heart of racial norms and stereotypes upholding the racial system: the symbol of white womanhood. Men required white women as a demonstration of their whiteness. The concept of white womanhood was used to differentiate whiteness and as a symbol to galvanize support for the racial project. The focal premise was that womanhood required whiteness: a “lady” must be white.

This analysis sheds light on the way in which race and gender stereotypes interact today. The stereotype of white womanhood, as best demonstrated by the “cult of true womanhood,”<sup>14</sup> persists today. Racialized definitions of womanhood are still used to uphold the rhetoric of white supremacy. These stereotypes influence a diverse set of legal actions and opinions. As illustrated in the legal literature, the wide range of issues includes topics such as welfare policy, criminal prosecutions, customs, police searches, sexual harassment, and treatment of single mothers.<sup>15</sup>

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14. See *infra* notes 238–245 and accompanying text for a description of true womanhood.

15. For examples of the legal analysis chronicling the impact of the cult of true womanhood, see Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN’S L.J. 191, 198 (1991); Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817, 822 (2000); Rumna Chowdhury, *Kadic v. Karadzic—Rape as a Crime Against Women as a Class*, 20 LAW & INEQ. 91, 97–98 (2002); Lisa A. Crooms, *Don’t Believe the Hype: Black Women, Patriarchy and the New Welfareism*, 38 HOW. L.J. 611, 626 (1995); Deirdre Davis, *The Harm That Has No Name: Street Harassment, Embodiment, and African American Women*, 4 UCLA WOMEN’S L.J. 133, 174 (1994); Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 21–22 (1998); Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1, 33 (1995); Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L.

The race-based annulment cases threatened the purity of respectfully married women and thus the respectability of white families and white society as a whole. Like *Rhineland*, most cases involved a husband asserting his own whiteness and claiming that his spouse was “of colored blood,” although the converse scenario occurred as well. In response to both scenarios, the courts defended white womanhood: the white wives who brought suit were protected from colored men, while the women sued by their husbands were protected from accusations of being “colored.” In the majority of cases that involved a white husband and a woman of color, the courts denied or otherwise rejected the annulment.<sup>16</sup> The courts refused even to acknowledge the potential existence of an interracial relationship by voiding it. In contrast, in cases brought by women claiming whiteness against their colored husbands, courts seemed compelled to free the women from any potential taint the marriage might bring and acted quickly to dissolve the marriage, even if she had not sought this remedy.<sup>17</sup> Courts viewed white womanhood as frailer than white manhood; the purity of white womanhood was too essential to racial dominance to risk.<sup>18</sup>

Upholding gender stereotypes was essential to maintaining white privilege. Concepts of “true womanhood” are generally understood to incorporate racial stereotypes, setting standards considered applicable only to white women. This Article argues that the ideals of wo-

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REV. 2017, 2032–33 (2000); Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 23 (2005); Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 5 (2007); Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L.J. 2481, 2504 (1994); Mary Romero, *Unraveling Privilege: Workers’ Children and the Hidden Costs of Paid Childcare*, 76 CHI.-KENT. L. REV. 1651, 1657–58 (2001); Alfreda A. Sellers-Diamond, *Disposable Children In Black Faces: The Violence Initiative As Inner-City Containment Policy*, 62 UMKC L. REV. 423, 447–48 (1994); Lori A. Tribbett-Williams, *Saying Nothing, Talking Loud: Lil’ Kim and Foxy Brown, Caricatures of African-American Womanhood*, 10 S. CAL. REV. L. & WOMEN’S STUD. 167, 181–82 (2000); Joan Williams, *Implementing Antiessentialism: How Gender Wars Turn Into Race and Class Conflict*, 15 HARV. BLACKLETTER L.J. 41, 67 (1995).

16. See, e.g., *Neuberger v. Gueldner*, 72 So. 220, 220 (La. 1916). While short, *Neuberger* contains all the essential elements. See *id.* A white husband attempted to annul the marriage, but his wife was found to be white. *Id.* No annulment was granted. *Id.* Miss Gueldner had always passed for white. *Id.* Her mother passed for white and married an “unquestionably white” man. *Id.* She behaved as a white woman, “attended the public schools as such, and was married to plaintiff as such.” *Id.* Louisiana Supreme Court Justice Provosty noted that whether Miss Gueldner was “really [white] or not [was] left doubtful,” but for the law, she was now white. *Id.*

17. For annulment cases, see *People v. Godines*, 62 P.2d 787, 788 (Cal. Ct. App. 1936); *Calma v. Calma*, 128 S.E.2d 440, 441, 444 (Va. 1962); *Naim v. Naim*, 57 S.E.2d 749, 750, 756 (Va. 1955). For other relevant cases, see, for example, *Ellis v. State*, 42 Ala. 525 (1868); *Weaver v. State*, 116 So. 893 (Ala. Ct. App. 1928); *Jones v. Commonwealth*, 80 Va. 538 (1885).

18. See, e.g., MARTHA HODES, *WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH-CENTURY SOUTH* 49 (1997); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 178–79, 179 n.307 (1998).

manhood were not simply created with influences from racial stereotypes, but maintained the categories of race itself. As with the doctrine of common-law marriage,<sup>19</sup> the courts' refusal to annul placed the relationship within acceptable bonds of marriage, reinforcing racial structures and the patriarchal structure on which these racial systems depended. Marriage functioned as a coercive, normalizing force and defined who was incorporated into the fold of society.

Within the ideology of white supremacy, the stability of whiteness and white society depended on the stability of white womanhood. The courts upheld existing relationships to preserve the status quo racial hierarchy rather than rigidly enforce blood distinctions in a way that would disrupt the system as a whole. The sanctity of the privileges endowed by whiteness required the same degree of certitude as embodied in other property rights.<sup>20</sup> If one woman could lose her status so precipitously, then all were potentially at risk, devaluing the rights in question and destabilizing the system as a whole. By basing race on reputation, courts guaranteed that anyone already functioning in white society was white. Acknowledging the potential fluidity of racial boundaries would attack the very foundation of American society. The court decisions worked to preserve stability in racial categorization and hierarchy by maintaining societal expectations.

For a woman to prove whiteness, she first had to meet the definition of "lady" as defined by notions of white womanhood. Movements such as the "Cult of True Womanhood" viewed women as delicate and requiring protection.<sup>21</sup> A "true woman" projected "piety, purity, submissiveness and domesticity."<sup>22</sup> Before the court, the wives in question demonstrated full performance of both their gender and racial obligations. While whiteness remained intangible, a "lady" must remain white. Since those before the court appeared as ladies, they had to be white. Otherwise, neither white nor women could stand, and perhaps both would crumble, along with a system of racial hegemony supported by gender roles of mythic proportions.

Throughout United States history, the judicial system ensured that the marriage relationship functioned properly. Concern over interracial marriage has continued into the twenty-first century. Under the implicit understanding that society necessitated white racial domi-

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19. For an in-depth analysis of common-law marriage, see Ariela Dubler's groundbreaking work, Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957 (2000).

20. See generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

21. Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 AM. Q. 151, 152 (1966); see *infra* notes 238-245 and accompanying text.

22. Welter, *supra* note 21, at 152.

nance, miscegenation contained the potential for complete destruction. If a state permitted interracial marriages, mixed couples would reproduce and create a “mongrel breed of citizens,”<sup>23</sup> destroying white racial identity and corrupting the quality of the previously white citizenry.

A husband in white society had the obligation of maintaining his wife’s whiteness, the same way in which white men had general responsibility for protecting white womanhood. Gendered roles and obligations were an integral part of marriage. White male racial obligations required appropriate performance of a “gentleman’s” domestic commitments. By refusing to satisfy his obligations without any legitimate justification, a husband who filed for annulment attacked the very foundation of social organization. His actions violated the notion of reciprocity implicit in the marriage relation.

Unlike other cases involving miscegenation statutes, annulment cases did not arise from action by the state or a third party. Rather, one member of a fractured pair turned to a legal system of racial discrimination to disenfranchise his or her former love. Plaintiff and defendant, appellant and appellee, each had professed affection for each other at one time. Few outsiders participated. In the courts, lawyers spun tales of villainy, abandonment, and betrayal between the spouses. The judicial opinions left behind provide a glimpse of narratives constructed to tell these stories and to show which of the contesting parties was most worthy.

As men stood to benefit most by the annulment of their marriages, they brought the bulk of the legal claims.<sup>24</sup> Despite the inequalities marriage imposed on women,<sup>25</sup> the women saw themselves and were seen as benefiting from maintaining their marital status. Moreover, unlike divorce, an annulment obliterated any legal obligations of matrimony. Women stood to suffer most from abolishing the relationship: loss of the material privileges of alimony, child support, and legitimacy, as well as potential social exile.<sup>26</sup> The men seeking annulments

23. *Naim v. Naim*, 87 S.E.2d 749, 752 (Va. 1955).

24. See *infra* notes 64–68 and accompanying text for an explanation of the benefits accrued to a husband through annulment. *Naim v. Naim* provides one exception to this calculus, where the (non-white) man had citizenship concerns. 57 S.E.2d 749 (Va. 1955). The court declared the marriage void. *Id.* at 756.

25. See, e.g., SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 134 (1989) (discussing how “the gendered family radically limits the equality of opportunity of women and girls of all classes”).

26. In rare cases, alimony was available after an annulment. See, e.g., Henry H. Foster, Jr. & Doris Jonas Freed, *Family Law*, 1965 ANN. SURV. AM. L. 387, 402 (“[A]limony is obtainable upon annulment in New York.”); Note, *The Void and Voidable Marriage: A Study in Judicial Method*, 7 STAN. L. REV. 529, 530–32 (1955) [hereinafter *Void and Voidable Marriage*] (discuss-

clearly viewed these benefits as sufficient justification for endangering their own racial privilege.<sup>27</sup> The courts, however, rejected the husbands' attempts to avoid their masculine responsibilities.

By isolating the race-based annulment cases, this Article illustrates how the judges behaved in seemingly unpredictable ways to secure white supremacy. Despite continual requests from counsel and in contrast to prevailing legal and social trends, the courts repeatedly overruled attempts to apply the "one-drop rule"<sup>28</sup> and applied equitable arguments at odds with the applicable black letter law. Unlike cases involving fraud, marriages that violated the anti-miscegenation statutes were automatically void if proven.<sup>29</sup> Nonetheless, the courts considered the behavior of the parties pertinent, even if statutorily irrelevant. Moreover, unlike the common-law marriage doctrine and "true womanhood" theory, the reactions to the women in the annulment cases were not temporally defined. The affinities and impulses of the judges remained constant even as gender obligations changed in both law and society.

This Article unites thirteen court opinions where one party put forth a claim that his or her marriage was void based on race.<sup>30</sup> They span from 1878 to 1955,<sup>31</sup> and arise from ten different states: one each

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ing how annulments can still have "legal consequences"). Nonetheless, a "void marriage" was far less likely to have legal consequences than a voidable marriage. *Void and Voidable Marriage*, *supra*, at 530–32. For a discussion of void versus voidable marriages, see *infra* notes 61–73 and accompanying text.

27. The men risked loss of privilege by exposing their personal lives to public view and publicly admitting a marriage relation with a person of color. None of the records recount criminal sanctions, so that concern may have been absent. In *Naim*, a rare case of a man defending against an annulment action, the customary privilege structure was skewed: Mr. Naim was embroiled in an effort to get an immigrant visa and so had great incentive to maintain his marriage to a United States citizen. 57 S.E.2d at 749.

28. Under the one-drop rule, any person with "one drop" of "black blood" is considered black. F. JAMES DAVIS, *WHO IS BLACK? ONE NATION'S DEFINITION* 82 (1991).

29. ROY V. RHODES, *ANNULMENT OF MARRIAGE: A CONDENSED DIGEST OF MARRIAGE LAWS, ANNULMENT OF MARRIAGE LAWS AND DIVORCE LAWS RELATED TO ANNULMENT* 1 (1945).

30. Two of them dealt with voidable marriages. See *Van Houten v. Morse*, 38 N.E. 705 (Mass. 1894); *Rhineland v. Rhineland*, 157 N.E. 838 (N.Y. 1927). The rest involved potentially void marriages. See *Kirby v. Kirby*, 206 P. 405 (Ariz. 1922); *Dillon v. Dillon*, 60 Ga. 204 (1878); *Theophanis v. Theophanis*, 51 S.W.2d 957 (Ky. 1932); *Villa v. Lacoste*, 35 So. 2d 419 (La. 1948); *Sunseri II*, 196 So. 7 (La. 1940); *Neuberger v. Gueldner*, 72 So. 220 (La. 1916); *Marre v. Marre*, 168 S.W. 636 (Mo. Ct. App. 1914); *Ferrall v. Ferrall*, 69 S.E. 60 (N.C. 1910); *Baker v. Carter*, 68 P.2d 85 (Okla. 1937); *Calma v. Calma*, 128 S.E.2d 440 (Va. 1962); *Naim v. Naim*, 90 S.E.2d 849 (Va. 1956).

31. The one antebellum case, *Hansford v. Hansford*, 10 Ala. 561 (1846), was not included because of the time period. During the time of slavery, Girard Hansford brought an action for divorce against his wife on the grounds of adultery based on the birth of an extramarital child. *Id.* at 561. In the usual scenario for interracial adultery cases, a white husband filed to divorce

from Arizona, Georgia, Kentucky, Massachusetts, Missouri, New York, North Carolina, Oklahoma, two from Virginia, and three from Louisiana.<sup>32</sup> Eleven of these cases involved husbands alleging that they were white and their wives colored.<sup>33</sup> The women won nine cases.<sup>34</sup> In two cases, the court found insufficient evidence to support the women's claims.<sup>35</sup> The remaining two cases involved white women married to men of color.<sup>36</sup>

Out of the eight annulment cases in which the wife's whiteness was disputed and a clear determination was made, the court made a finding of whiteness six times. In the two cases where unquestionably white women married unquestionably Asian men—*Naim v. Naim* and *Calma v. Calma*—the court ordered annulments.<sup>37</sup> While they had much to lose in alimony and property division, their racial status was not in question. The women involved in unambiguously interracial marriages had already sullied the image of true womanhood. The court could only signal its disapproval of their transgressive behavior

his white wife after she gave birth to a non-white child, evidence of both adultery and a transgressive interracial relationship. See, e.g., *Inhabitants of Guilford v. Inhabitants of Oxford*, 9 Conn. 321 (1832); HODES, *supra* note 18, at 76–86 (providing additional examples). In contrast, Hansford, “a free man of color,” asserted that his wife gave birth to a child, “pronounced by individuals to be white, with blue eyes.” *Hansford*, 10 Ala. at 561. Mrs. Hansford not only “admitted [that] the child was white,” but also “declared her intention that all subsequently born should be of that color.” *Id.* Moreover, Maria Hansford asserted that she was white and the marriage was therefore invalid. *Id.* at 562. The Alabama Supreme Court dismissed any issues of race as having not been properly raised in the court below. *Id.* at 564. Martha Hodes suggests that, “[p]erhaps the judges wished to explain away the marriage of a white woman and a black man . . . by hastily agreeing that the woman was not really white at all.” HODES, *supra* note 18, at 107. Through this silence, the court transformed a potentially deviant marriage into a socially acceptable relationship.

32. These three cases were *Villa*, 35 So.2d at 419; *Sunseri II*, 196 So. at 7; *Neuberger*, 72 So. at 220. Louisiana has always been distinct. As Ariela Gross explains:

Louisiana was not like the rest of the South. Louisiana . . . sanctioned much “intermingling.” Louisiana recognized gradations of caste and color and tolerated an established elite community of free people of color. It should not be surprising that it was easiest to prove one’s whiteness in Louisiana or that these matters were litigated more often in Louisiana than anywhere else in the United States.

Gross, *supra* note 18, at 176; see also Ariela Gross, *Pandora’s Box: Slave Character on Trial in the Antebellum Deep South*, 7 YALE J.L. & HUMAN. 267, 273 (1995) (“Of the five states [studied], Louisiana had by far the most state supreme court litigation on these subjects.”).

33. *Kirby*, 206 P. at 405; *Ferrall*, 69 S.E. at 60; *Dillon*, 60 Ga. at 204; *Theophanis*, 51 S.W.2d at 957; *Villa*, 35 So. 2d at 419; *Sunseri II*, 196 So. at 7; *Neuberger*, 72 So. at 220; *Van Houten*, 38 N.E. at 705; *Marre*, 168 S.W. at 636; *Rhineland*, 157 N.E. at 838; *Baker*, 68 P.2d at 85. This number includes one breach of contract to marry case. *Van Houten*, 38 N.E. at 705.

34. *Ferrall*, 69 S.E. at 60; *Dillon*, 60 Ga. at 204; *Theophanis*, 51 S.W.2d at 957; *Villa*, 35 So. 2d at 419; *Neuberger*, 72 So. at 220; *Van Houten*, 38 N.E. at 705; *Marre*, 168 S.W. at 636; *Rhineland*, 157 N.E. at 838; *Naim*, 90 S.E.2d at 849.

35. *Sunseri II*, 196 So. at 7; *Baker*, 68 P.2d at 85.

36. *Calma v. Calma*, 128 S.E.2d 440 (Va. 1962); *Naim v. Naim*, 87 S.E.2d 749 (Va. 1955).

37. *Calma*, 128 S.E.2d at 440; *Naim*, 87 S.E.2d at 752.

by denouncing their marriages. This ruling would provide warning to other white women.

The court refused the claim to whiteness in circumstances where the result did not threaten white womanhood. In one case, the woman claiming whiteness presented no evidence regarding her race or behavior in the marriage that would demonstrate whiteness.<sup>38</sup> She did not perform white womanhood such that denying her that status presented a risk to the racial system as a whole. In the second case, the court expressed great regret for its decision, but ultimately the presence of a verified birth certificate with a designation of black forced its hand.<sup>39</sup>

These cases show striking similarities and common themes despite their factual and temporal differences.<sup>40</sup> Simultaneously public and private affairs, these dramas impacted far more than the individual couples or courtrooms.<sup>41</sup> Prior literature exists on a few of these opinions, but no previous examination has addressed the race-based annulment cases as a cohesive group.<sup>42</sup> The results of the cases are

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38. See *Kirby*, 206 P. at 405.

39. See *Sunseri II*, 196 So. at 9.

40. See, e.g., Eva Saks, *Representing Miscegenation Law*, RARITAN, Fall 1988, at 39, reprinted in *INTERRACIALISM: BLACK-WHITE INTERMARRIAGE IN AMERICAN HISTORY, LITERATURE, AND LAW* 61, 62 (Werner Sollors ed., 2000) [hereinafter *INTERRACIALISM*] (“[A]ny given state’s number of miscegenation cases was extremely limited. State courts were forced to refer frequently to cases from other states. All state miscegenation cases therefore drew on the same written sources.”). Ariela Gross notes:

Even a relatively small number of cases could have had a far greater cultural impact than a much larger number of cases today, because cases in the nineteenth century were public events, many of them notorious, and they took place at the central meeting-place of towns and rural areas: the county courthouses.

Gross, *supra* note 18, at 119. Additionally, “[m]iscegenation cases have a relative autonomy from other social definitions of miscegenation. This autonomy, along with their internal cohesiveness and cross-references, allow them to be analyzed as a genre: miscegenation discourse.” Saks, *supra*, at 40.

41. Gross, *supra* note 18, at 119 (“The courtroom conclusions about how to decide whether someone was black or white . . . reverberated throughout Southern culture because of the importance of the courtroom as a cultural arena.”).

42. A handful of authors have addressed a few of these cases. Some cases are better known than others, such as *Naim*, a more modern case, from Virginia, close in time to *Loving v. Virginia*. Due to the surrounding publicity, various academics have written about the Rhinelander trial. See generally LEWIS & ARDIZZONE, *supra* note 1; A. Cheree Carlson, “*You Know It When You See It*: The Rhetorical Hierarchy of Race and Gender in *Rhinelander v. Rhinelander*,” 85 Q. J. SPEECH 111 (1999); Holmes, *supra* note 4; Schwarz, *supra* note 2; Elizabeth Marie Smith, “Passing” and the Anxious Decade: The Rhinelander Case and the 1920s (Oct. 2001) (unpublished Ph.D. dissertation, Rutgers University).

For discussion of other cases, see generally RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 66–67, 235–241 (2003) (discussing briefly *Hansford v. Hansford*, 10 Ala. 561 (1846), *Kirby v. Kirby*, 206 P. 405 (Ariz. 1922), *Dillon v. Dillon*, 60 Ga. 204 (1878), *Ferrall v. Ferrall*, 69 S.E. 60 (N.C. 1910), but in *Hansford* describing Maria Hansford

startling and contrary to previous work on the subject. Together, they appear to contradict clearly developed cultural norms of racial purity and separation, yet they serve as a linchpin of racial supremacy. The analysis of the cases shows that anti-miscegenation and white purity were enforced in a counterintuitive way. Even after the Civil War, when standards of whiteness became stricter throughout the United States,<sup>43</sup> the courts blurred lines to protect whiteness.

Part II sets the stage for this analysis, providing the basic framework for annulment and anti-miscegenation law.<sup>44</sup> Part III situates the annulment cases within the greater context of racial determination cases.<sup>45</sup> Part IV discusses the interaction between race and gender stereotypes, describing how the notion of white womanhood supported white racial ideology.<sup>46</sup> Part V examines the courts' decisions to demonstrate how race, not gender, was the ultimate deciding factor in these cases.<sup>47</sup>

## II. ANNULMENT AND ANTI-MISCEGENATION LAW

Bans on interracial sex and marriage began in the colonial era and continued until 1967 when the United States Supreme Court held that anti-miscegenation laws violate the Constitution.<sup>48</sup> The exact definition of interracial marriage changed based on the state, the time, and the racial groups involved, but this much was constant: a marriage between a person considered white and a person whose blood contained a designated fraction of the blood of a particular non-white racial group was illegal.<sup>49</sup> The parties who entered into these mar-

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as "the mixed-race daughter of a white woman" and making no mention of her claim to whiteness); Katherine M. Franke, *What Does a White Woman Look Like: Racing and Erasing in Law*, 74 TEX. L. REV. 1231 (1996) (discussing *Sunseri v. Cassagne*, 196 So. 7 (La. 1940)); Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 J. AM. HIST. 44 (1996) (discussing primarily *Kirby*).

43. See *infra* notes 138–143 and accompanying text for changes in racial definition after the Civil War.

44. See *infra* notes 48–92 and accompanying text.

45. See *infra* notes 93–210 and accompanying text.

46. See *infra* notes 211–251 and accompanying text.

47. See *infra* notes 252–331 and accompanying text.

48. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). While no longer legally enforceable, many state laws remained on the books for decades afterwards. In 2000, Alabama voted on whether to repeal the state law requiring that the legislature "never pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro." See ALA. CONST. art. IV, § 102 (repealed 2000). While the amendment passed, forty percent of Alabama voters voted against exercising the provision. See *Alabama Repeals Century-Old Ban on Interracial Marriages*, CNN, Nov. 8, 2000, <http://archives.cnn.com/2000/ALLPOLITICS/stories/11/07/alabama.interracial>.

49. See *infra* notes 95–103 and accompanying text for discussion of anti-miscegenation laws.

riages or engaged in interracial sexual relationships violated criminal statutes and risked imprisonment.<sup>50</sup> As an illegal act, the marriage itself was void. While not technically necessary,<sup>51</sup> a court judgment provided an official declaration that the marriage did not exist. The courts also acted on non-annulment cases involving interracial relationships, such as criminal prosecutions or family law civil matters.<sup>52</sup>

In an annulment case, one party to the marriage brought the action. A spouse who had previously opted to enter the marriage—presumably out of love, affection or other benefit—now unilaterally desired to exit, giving the race of their spouse as the reason. The Rhinelanders, for example, had exchanged many a love letter and other expressions of affection. Mr. Rhineland introduced over one hundred of Alice's letters at trial.<sup>53</sup> Stirred by Leonard's writing, Alice flowed on about how "you make me feel very passionate for the want of you, telling me how happy my little hand has often made you feel, and several other things, but can't help to tell you."<sup>54</sup> Alice gushed to Leonard, "I have had some sweet hearts, but I have not loved them, like I have taken to you so. . . . [Y]ou make me feel so happy, and loveable towards you dear."<sup>55</sup>

In *Naim v. Naim*,<sup>56</sup> Han Say Naim and Ruby Elaine Naim struggled to preserve their marriage while aware of its illegal status. Living in Virginia, they escaped to North Carolina to evade the "Racial Integrity Act."<sup>57</sup> On June 26, 1952, the couple was married at about two

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50. The preponderance of the anti-miscegenation cases concerned criminal prosecutions brought by the state for illegal cohabitation or adultery. The majority of these actions did not involve questions of racial determinacy, centering on factual determinations or equality challenges. For other works analyzing these cases, see Mary Frances Berry, *Judging Morality: Sexual Behavior and Legal Consequences in the Late Nineteenth-Century South*, 78 J. AM. HIST. 835 (1991); Gross, *supra* note 18; Pascoe, *supra* note 42, at 44; Saks, *supra* note 40, at 61; Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s–1960s*, 70 CHI.-KENT L. REV. 371 (1994). The issue also arose in tax and inheritances cases, which required resolution of racial identity of the parties. See generally Berry, *supra*; Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999); Gross, *supra* note 18.

51. See, e.g., Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1195 (1966) (describing how Virginia code "specifically provided that any marriage between a white person and a Negro was absolutely void without further legal process").

52. Gross, *supra* note 18, *passim*.

53. Smith, *supra* note 42, at 206.

54. *Id.* at 214.

55. *Id.* at 208.

56. *Naim v. Naim*, 57 S.E.2d 749 (Va. 1955).

57. Gregory Michael Dorr, *Principled Expediency: Eugenics, Naim, and the Supreme Court*, 42 AM. J. LEGAL HIST. 119, 129 (1998). See *infra* note 296 for the full text of the Racial Integrity Act.

o'clock in North Carolina and was back in Virginia by four that afternoon.<sup>58</sup> For most of their twenty-month marriage, Mr. Naim was at sea, but his wife expressed her devotion through letters:

I do love you, and tho [sic] it has been very hard while your [sic] gone . . . it is still you I love with every breath in me. I won't ever give you up and you know it. . . . Even if you should leave the U.S. there are ways I can bring you back. . . . You and the baby are everything in the world to me. . . . You are mine Darling so never forget it. I would kill any other woman I even caught near you.<sup>59</sup>

The feeling soon faded. Barely a year later, Ruby filed for divorce.<sup>60</sup>

Once ready to escape the relationship, the plaintiff looked to the court for a declaration that the marriage never existed, based on the premise that the marriage was either void because it was “forbidden by law or regarded as against public policy,” or voidable due to “some imprecation, cognizable in equity.”<sup>61</sup> Void marriages involved matters of public policy, primarily by statutory restrictions based on age, race, prior marriage, incest, and other questions of capacity.<sup>62</sup> Voidable marriages turned on issues of consent, primarily the absence of understanding necessary to enter the marital relation, such as insufficient age, unsound mind, fraud, or other enumerated reasons.<sup>63</sup>

Typically, the husband was the party most interested in ending the marriage, as he stood most likely to benefit financially. A divorce presumes the existence of a valid marriage contract.<sup>64</sup> In contrast, an annulment declares that no the marriage ever existed.<sup>65</sup> As a result, none of the legal consequences of a marriage applied. The court “place[d] the parties in the same position as if the annulled marriage was never performed.”<sup>66</sup> Through this legal twist, a woman lost her right to alimony and property division.<sup>67</sup> Her children were now illegitimate, unable to request financial support, or inherit from their father. An annulment would deny a wife “the full measure of support . . . law entitles her.”<sup>68</sup>

58. *Dorr*, *supra* note 57, at 129.

59. *Id.* at 129–30 (alterations in original).

60. *Naim v. Naim*, 57 S.E.2d 749 (Va. 1955).

61. *See* RHODES, *supra* note 29, at 2.

62. *Id.* at 1.

63. *Id.* at 2–3.

64. *Id.* at 1.

65. *Id.*

66. J. Jeffrey Gunn, *Utah's Annulment Statute: Are Annulments Underused as a Result of Liberal "No-Fault" Divorce Laws?*, 6 J.L. & FAM. STUD. 385, 386 (2004).

67. *See, e.g.*, *Pascoe*, *supra* note 42, at 52 (“By granting Joe Kirby an annulment, rather than a divorce, the judge not only denied the validity of the marriage while it had lasted but also in effect excused Joe Kirby from his obligation to provide economic support to a divorced wife.”).

68. *Dillon v. Dillon*, 60 Ga. 204, 206 (1878).

If a relationship violated the local anti-miscegenation statute, the marriage was inherently void.<sup>69</sup> Under these circumstances, consent by the parties was irrelevant. Parties of different races, as delineated by local law, were incapable of contracting to marry. Even after the death of one or both partners, the relationship was subject to collateral attack by a third party.<sup>70</sup>

In the absence of an anti-miscegenation statute, parties turned to fraud claims. As voidable, but not void marriages, the parties were capable of contracting for marriage and could continue the marriage if they chose.<sup>71</sup> One party could request an annulment if he or she had been induced into marriage without sufficient knowledge to give informed consent. The standard was rigorous, requiring more than simple feelings of social and personal incompatibility. Fraud required active concealment of facts “that touche[d] a vital spot in the marriage relation.”<sup>72</sup> As one court stressed, “character and social standing are not essential elements of the marriage, and it is contrary to public policy to annul a marriage for fraud or misrepresentations as to personal qualities.”<sup>73</sup>

In *Van Houten v. Morse*,<sup>74</sup> one such fraud action, Anna Van Houten sued her fiancé for breach of promise of marriage.<sup>75</sup> Miss Van Houten and Asa P. Morse had entered into a mutual promise to marry,<sup>76</sup> the beginning step in the process of marrying and an act that carried its own contractual obligations.<sup>77</sup> After breaking off the engagement, Mr. Morse asserted that no obligation to marry existed because the

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69. A marriage in violation of an anti-miscegenation statute is void as opposed to voidable. See *Hoover v. State*, 59 Ala. 57, 58–59 (1877); RHODES, *supra* note 29.

70. See, e.g., *Intermarriage with Negroes: A Survey of State Statutes*, 36 YALE L.J. 858, 863 n.18 (1927) [hereinafter *Intermarriage*]. For examples of collateral attacks after the death of one of the parties, see, for example, *Stevens v. United States*, 146 F.2d 120 (10th Cir. 1944); *In re Walker's Estate*, 46 P. 67 (Ariz. 1896); *In re Monks' Estate*, 120 P.2d 167 (Cal. Dist. Ct. App. 1941); *McGoodwin v. Shelby*, 206 S.W. 625 (Ky. 1918); *Bailey v. Fiske*, 34 Me. 77 (1852); *Johnson v. Johnson*, 30 Mo. 72 (1860); *Wilbur v. Bingham*, 35 P. 407 (Wash. 1894).

71. HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 3 (2000).

72. *People v. Godines*, 62 P.2d 787, 788 (Cal. Dist. Ct. App. 1936) (finding material fraud by Filipino man who led his white wife to believe he was Spanish); see also *Rhineland v. Rhineland*, 157 N.E. 838, 838 (N.Y. 1927) (finding no fraud despite claims that defendant had concealed that she was mulatto).

73. *Bielby v. Bielby*, 165 N.E. 231, 233 (Ill. 1929).

74. 38 N.E. 705 (Mass. 1894).

75. *Id.*

76. *Id.*

77. See MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 53 (1985) (discussing rigid enforcement of “breach-of-promise suits” by the courts).

intended marriage was voidable under state law.<sup>78</sup> Among his defenses, Mr. Morse asserted that Miss Van Houten had concealed the “negro blood in her veins.”<sup>79</sup>

Mr. Morse argued for a definition of fraudulent concealment that included omission. While the court assumed race could be a material issue at the essence of marriage, it held that a potential spouse had no obligation to reveal racial descent before committing to an engagement.<sup>80</sup> As the court stated, “the fact, if it was a fact, that the plaintiff had some negro blood in her veins would not justify him as matter of law in breaking the contract.”<sup>81</sup> Miss Van Houten only had to show that she did not provide misleading information.<sup>82</sup> Mr. Morse was responsible for his own assumptions and his own ignorance.<sup>83</sup>

While racial differences did not bar interracial marriage in all states, race remained a crucial consideration in the decision to marry. In fraud cases, instead of being framed as a vital issue of public concern and social order, interracial marriages were evaluated as a matter of private concern and preference: the relevance of race depended on personal characteristics of the pair in relation to each other, the information previously disclosed, and contemporaneous societal prejudices.<sup>84</sup> A claim of fraud could succeed only if the fraud went to “the essence of the marriage relation.”<sup>85</sup>

78. See *Van Houten*, 38 N.E. at 707. The breach of contract to marry carried its own incentives and gendered assumption. The husband faced less risk of status loss by denouncing his fiancé, because he had not already sullied himself with a nonwhite marriage. GROSSBERG, *supra* note 77, at 54. Grossberg discusses the gender significance of “breach-of-promise suits,” brought primarily by women, who were seen as “victims of male perfidy and passion and as paragons of wronged virtue.” *Id.* In the later half of the nineteenth century, “Victorian visions of proper feminine behavior encouraged the belief that womanly modesty and passivity would make a virtuous lady blush at the thought of airing romantic intimacies in a public courtroom.” *Id.* “[W]omen who filed breach-of-promise suits found themselves denounced as mercenaries who used the courts to gain lifetime sinecures.” *Id.*

79. *Van Houten*, 38 N.E. at 705. Mr. Morse’s other defenses included misrepresentations as to the cause of her previous divorce. *Id.* at 706.

80. *Id.* at 706 (holding that Miss Van Houten “was under no obligation to tell the defendant about [her parentage and family] in the absence of inquiry by him”).

81. *Id.* at 705. As the court explained:

[I]t was not the duty of a party, before making or accepting an offer of marriage, to communicate all the previous circumstances of his or her life; . . . parties would be bound, if they became engaged . . . even though matters were discovered subsequently which, if known at the time, would have prevented the engagement.

*Id.*

82. *Id.*

83. *Id.*

84. See HARTOG, *supra* note 71, at 3.

85. David H. Vernon, *Annulment of Marriage: A Proposed Model Act*, 12 J. PUB. L. 143, 156–57 (1963). For examples, see *Hyslop v. Hyslop*, 2 So. 2d 443, 445 (Ala. 1941) (“Few, if any, kinds of fraud or trickery will warrant a nullity suit . . .”); *Marshall v. Marshall*, 300 P. 816, 818

Whiteness litigation subjected litigants to the most profound scrutiny. By entering the courtroom and presenting such intimate issues, litigants shed any illusion of privacy.<sup>86</sup> The courts examined every piece of their daily existence. Family lineages were dissected back four or more generations.<sup>87</sup> The courts considered factors such as with whom these women<sup>88</sup> were friends,<sup>89</sup> where they went to school,<sup>90</sup> and whether their family members voted.<sup>91</sup> The court in *Marre v. Marre* hinted at the impact of this examination and exposure, suggesting that the “defendant had not brought forward [her family’s] white associates in the city, because of shame over this attack . . . [and a desire] to avoid publicity.”<sup>92</sup>

### III. DEFINING AND MAINTAINING RACIAL BOUNDARIES

#### A. *Anti-Miscegenation Laws*

Laws banning interracial marriage formed the basis of status differentiation and systems of racial hegemony. Enforcing these laws was essential to maintaining white supremacy. A system of racial supremacy became increasingly vulnerable if the barrier between black and white was not rigidly defined. The specter of increasing numbers of “light” black people caused by intermixing haunted white

(Cal. 1931) (“A marriage contract should not be annulled upon this ground, except in an extreme case where the particular fraud goes to the very essence of the marriage relation.”); *Bielby v. Bielby*, 165 N.E. 231, 233 (Ill. 1929) (“Fraud sufficient to vitiate a marriage must go to the essence of the marriage relation.”); *Richardson v. Richardson*, 140 N.E. 73, 73 (Mass. 1923) (“It is settled by our decisions that fraud, in order to avoid a marriage, must go to the essence of [the marital] contract.”); *Inhabitants of Cummington v. Inhabitants of Belchertown*, 21 N.E. 435 (Mass. 1889) (finding no annulment in absence of “fraud of such a character as to effect the basis or the essential character of the [marital] contract”); *Reynolds v. Reynolds*, 85 Mass. (3 Allen) 605, 607–08 (1862) (“[A]ny error or misapprehension as to personal traits or attributes, or concerning the position or circumstances in life of a party, is deemed wholly immaterial . . . [Fraud is grounds for annulment only when it] amount[s] to a fraud in the essentialia of the marriage relation.”).

86. *See, e.g.*, Gross, *supra* note 18, at 133–36 (discussing the trial of Abby Guy).

87. *Sunseri v. Cassagne (Sunseri I)*, 185 So. 1, 3 (La. 1938) (discussing the race of the defendant’s great-great grandfather). *See, e.g.*, *Doe v. Louisiana. ex rel. Dep’t of Health & Human Res.*, 479 So. 2d 369, 372 (La. Ct. App. 1985); *White v. Tax Collector of Kershaw Dist.*, 37 S.C.L. (3 Rich.) 136, 136 (S.C. Ct. L. 1846); *Thomas v. Boon*, 28 S.C.L. (1 Speers) 268, 268 (S.C. Ct. App. L. 1843). For further examples, see generally Gross, *supra* note 18 (discussing ways in which whiteness was performed in the eyes of the court).

88. Primarily, the women were dissected in this fashion. In ten of the thirteen cases, women were accused of non-whiteness.

89. *Sunseri I*, 185 So. at 5; *Marre v. Marre*, 168 S.W. 636, 640 (Mo. Ct. App. 1914).

90. *Sunseri I*, 185 So. at 4; *Marre*, 168 S.W. at 640.

91. *Sunseri I*, 185 So. at 5. Given the inability of women to vote, this criterion only applied to male family members.

92. *Marre*, 168 S.W. at 640.

Southerners.<sup>93</sup> These “liminal individuals” inherently “challenged a system ideologically based on the ‘impassable gulf’ between black and white . . . [and] tapped into white Southerners’ deep anxieties about the stability and security of white identity.”<sup>94</sup> White supremacy depended on maintaining clear racial differences and the principle of racial purity. Society could not protect and define a barrier it could no longer see.

Maryland enacted the earliest known anti-miscegenation statute in the United States in 1661.<sup>95</sup> The statute bound into perpetual slavery any “freeborn *English* woman” who married a black man, free or enslaved.<sup>96</sup> By 1900, twenty-eight states had banned interracial marriage.<sup>97</sup> In 1927, the *Yale Law Review* noted that the nineteen states remaining without an anti-miscegenation statute could “neither be commended for lack of prejudice, nor condemned for laxity in dealing with social problems, since in no one of these states do the Negroes comprise more than five . . . per cent of the total population.”<sup>98</sup>

The courts emphasized the dangers interracial marriage posed for the white race and racial purity. If such marriages were permitted to exist, mixed-race couples would reproduce and create a “mongrel breed of citizens,” corrupting the quality of a previously white citizenry.<sup>99</sup> In the words of the Mississippi Supreme Court:

To all persons acquainted with the social conditions of this state and of the Southern states generally it is well known that it is the earnest desire of the white race to preserve its racial integrity and purity, and to maintain the purity of the social relations as far as it can be done by law . . . [T]he dominant purpose of the [segregation and

93. Gross, *supra* note 18, at 129 (discussing fears “of people of African descent lurking unknown in their midst”).

94. *Id.* at 180.

95. Carter G. Woodson, *The Beginnings of Miscegenation of the Whites and Blacks*, J. NEGRO HIST., Oct. 1918, at 335, reprinted in *INTERRACIALISM*, *supra* note 40, at 42. As early as 1630, the Virginia courts disciplined those engaging in interracial sex. Charles Frank Robinson II, *The Anti-miscegenation Conversation: Love’s Legislated Limits (1868–1967)*, 3–4 (May 1998) (unpublished Ph.D. dissertation, University of Houston). For a history of miscegenation laws, see generally Wadlington, *supra* note 51.

96. Woodson, *supra* note 95, at 45.

97. Robinson, *supra* note 95, at 25.

98. *Intermarriage*, *supra* note 70, at 859 n.3 (“In Arizona, Connecticut, Illinois, Kansas, Massachusetts, Michigan[,] . . . New Jersey, New Mexico, New York, Ohio, Pennsylvania and Rhode Island, the Negroes comprise from 1–5% of the total population. In Iowa, Maine, Minnesota, New Hampshire, Vermont, Washington and Wisconsin, the Negroes comprise less than 1% of the total population.”).

99. Reginald Oh, *Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination*, 39 U.C. DAVIS L. REV. 1321, 1331 (2006) (quoting *Naim v. Naim*, 87 S.E.2d 749, 755–56 (Va. 1955)).

anti-miscegenation provisions] of the Constitution of our state was to preserve the integrity and purity of the white race.<sup>100</sup>

The Mississippi Supreme Court further noted that, “[r]ace amalgamation has been frowned on by Southern civilization always, and our people have always been of the opinion that it was better for all races to preserve their racial purity.”<sup>101</sup>

Throughout the country, “while states differed with respect to which races were not allowed to marry whites, *all* banned black/white intermarriages and/or sexual intercourse.”<sup>102</sup> In most cases, the relevant anti-miscegenation statute provided a fixed criterion for determining blackness, although such definitions varied widely, ranging from one-fourth to one-sixteenth to simply voiding all marriages between “white persons and Negroes or mulattoes.”<sup>103</sup> Harvey M. Applebaum posits, “[t]his is due to the fact that a white person is defined in the statutes by the negative implication that he does not possess any of the Negro characteristics described in the statutes.”<sup>104</sup> Whiteness and blackness changed with the state and the court. In one state, a Filipino woman was white,<sup>105</sup> while in another a Filipino man was

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100. *Rice v. Gong Lum*, 104 So. 105, 108 (Miss. 1925), *aff'd*, 275 U.S. 78 (1927). Similarly, the Virginia Supreme Court explained how the “preservation of racial integrity is the unquestioned policy of this State.” *Naim v. Naim*, 87 S.E.2d 749, 752 (Va. 1955) (citations omitted). The court found no provisions in the United States Constitution:

which prohibit the State from enacting legislation to preserve the racial integrity of its citizens, or which denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens. We find there is no requirement that the State shall not legislate to prevent the obliteration of racial pride, but must permit the corruption of blood even though it weaken or destroy the quality of its citizenship. Both sacred and secular history teach that nations and races have better advanced in human progress when they cultivated their own distinctive characteristics and culture and developed their own peculiar genius.

*Id.* at 756.

101. *Rice*, 104 So. at 110.

102. Ruth A. Chananie-Hill, *Framing and Collective Identities in the Legal Setting: Comparing Interracial Marriage and Same Sex Marriage* 61 (Aug. 2007) (unpublished Ph.D. dissertation, Southern Illinois University Carbondale).

103. *Intermarriage*, *supra* note 70, at 862, 862 n.16, 863.

104. Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49, 52 (1964). As Applebaum describes:

[T]here is diversity in the statutory definitions of what constitutes a “Negro.” The most popular type of definition employs a “percentage of-blood” test. A number of states classify a Negro as “any person of one-eighth or more Negro blood.” Other definitions of Negro include persons of Negro descent to the third generation, and persons with any ascertainable trace of Negro blood. These varying definitions mean that a person can find himself a white person in one state and a Negro under the statute of another state.

*Id.* at 52.

105. *Villa v. Lacoste*, 35 So. 2d 419, 420 (La. 1948).

not.<sup>106</sup> A Chinese man was not white.<sup>107</sup> A Native-American man was white,<sup>108</sup> as was a Greek man.<sup>109</sup> A woman with “a strain of Indian or Portuguese blood”<sup>110</sup> or Mexican ancestry<sup>111</sup> remained white.

For the most part, particularly on the East Coast, race was only an issue when it involved blackness. In 1946, in New Orleans, Charles Stephen Villa filed suit to annul his marriage to Josephine Lacoste “on the ground that she [was] a Negro.”<sup>112</sup> Louisiana barred “[m]arriage between white persons and persons of color.”<sup>113</sup> Mr. Villa presented evidence that Catherine Lacoste, Josephine Lacoste’s mother, had registered both her daughter and grandson as “colored” before the Deputy Recorder of Births, Marriages and Deaths.<sup>114</sup>

The defense countered that Mrs. Lacoste’s mother was Filipino, but signed as colored “under the erroneous belief that persons of Filipino extraction are colored.”<sup>115</sup> At the New Orleans Recorder’s office, notorious for its strict policing of racial boundaries, the Deputy Recorder “would always record Filipinos as ‘colored’ and . . . would not record them as Filipinos unless they insisted on being registered as white.”<sup>116</sup> Told to register as colored, Catherine did. The defense asserted, that, as Fillipinos, neither Josephine nor her child was “colored in the sense that they are Negroes or have any Negro blood in their veins.”<sup>117</sup> The court’s final judgment was unequivocal. Louisiana law barred marriage “between white persons and Negroes.”<sup>118</sup> There was “nothing in the evidence to indicate that there was ever any Negro blood in the family of either the plaintiff or the defendant. The only

106. *Calma v. Calma*, 128 S.E.2d 440, 441 (Va. 1962).

107. *Naim v. Naim*, 87 S.E.2d 749, 750 (Va. 1955).

108. *Baker v. Carter*, 68 P.2d 85, 86 (Okla. 1937).

109. *Theophanis v. Theophanis*, 51 S.W.2d 957, 958 (Ky. 1932).

110. *Ferrall v. Ferrall*, 69 S.E. 60, 60 (N.C. 1910); *Sunseri I*, 185 So. 1, 3 (La. 1938).

111. *Kirby v. Kirby*, 206 P. 405, 406 (Ariz. 1922); *Marre v. Marre*, 168 S.W. 636, 640 (Mo. Ct. App. 1914); see also Pascoe, *supra* note 42, at 51 (“[U]nless it can be shown that they are mixed up with some other races, why [sic] the presumption is that [Mexicans] are descendants of the Caucasian race.” (quoting from trial records)).

112. *Villa v. Lacoste*, 35 So. 2d 419, 420 (La. 1948). Mr. Villa also sought “to disclaim the paternity and legitimacy of his offspring.” *Id.*

113. LA. CIV. CODE ANN. art. 94 (1908).

114. Josephine’s father, Leopold Lacoste, was uncontestedly French. *Villa*, 35 So. 2d at 420–21.

115. *Id.* at 420. As explained to the court, Catherine’s mother was a white woman, while her father was Filipino. *Id.* at 421. Consequently, Josephine herself would have been “one-fourth” Filipino, as passed on by her maternal grandfather.

116. *Id.* at 421.

117. *Id.*

118. *Id.* at 420 n.1.

color involved at all is that of the Filipino.”<sup>119</sup> White was white, black was black, but at least Filipino was not colored.

In Virginia, another view prevailed. State law deemed it “unlawful for any white person in this State to marry any save a white person.”<sup>120</sup> In *Naim v. Naim*, race was not disputed: Mr. Naim was Chinese; his wife was white.<sup>121</sup> The marriage was invalid.<sup>122</sup> Similarly, in *Calma v. Calma*, Rosina Calma alleged that “her husband [wa]s not a ‘white person’ within the meaning of” Virginia law.<sup>123</sup> While his “wife [wa]s a member of the white race . . . [Cezar Calma was] a Filipino, a member of the Malayan race.”<sup>124</sup> The lower court quickly enjoined the Calmas from “cohabiting as husband and wife in the State of Virginia.”<sup>125</sup> In the end, the Virginia Supreme Court refused to grant a divorce. Albeit legal in New Jersey when contracted, Virginia would not recognize the marriage.<sup>126</sup>

Social and sexual integration often served as smokescreens for other racial concerns. The dangers of economic success and autonomy made a complicated rallying point, but the perils of miscegenation were easily demonstrated and vividly accessible to whites.<sup>127</sup> Fears about interracial marriage were used to distract attention from other

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119. *Id.* at 420.

120. VA. CODE ANN. § 20-54 (1950).

121. *Naim v. Naim*, 87 S.E.2d 749, 750 (Va. 1955).

122. *See, e.g.,* *Dorr*, *supra* note 57, at 119 (“His wife of twenty months, Ruby Elaine Naim, a white woman, sought a divorce on the grounds of adultery. . . . [Instead, the judge granted her] an annulment under part of the Virginia Code entitled, ‘An ACT to Preserve Racial Integrity.’”).

123. *Calma v. Calma*, 128 S.E.2d 440, 441 (Va. 1962).

124. *Id.*

125. *Id.*

126. *Id.*

127. *See* OLIVER C. COX, *CASTE, CLASS AND RACE* 387 (1948) (“Protecting the ‘honor and sanctity of white womanhood’ constitutes a most convincing war cry and an excellent covering for the basic purpose that colored people must never be given the opportunity to become the cultural peers of white.”). Bans on interracial marriage provided financial benefits for the white community:

[Such laws] could—and often did—prevent the conveyance of wealth from white to nonwhite. Whiteness brought wealth—absorbed it, retained it, kept it out of the hands of people who, aside from their racial identity, had an entirely legitimate claim on property they nonetheless could not get. . . . The law of racial identities contributed to a flow of wealth—property; economic well-being; resources and access to them—from one community to another.

PETER WALLENSTEIN, *TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY* 162 (2002); *see also* Julie Novkov, *Racial Constructions: The Legal Regulation of Miscegenation in Alabama, 1890–1934*, 20 *LAW & HIST. REV.* 225, 230 (2002) (“[W]hites had a common interest in preserving the purity of whiteness as a racial identity for a myriad of concrete legal and economic privileges, as well as for the psychological benefits.” (citing Cheryl Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1709, 1709–95 (1993))); Novkov, *supra*, at 247–48 (“[Miscegenation] fears [may have] related to a sense among whites that they had a

forms of racial segregation. For whites, the issue of interracial relationships was a standard-bearer for the notion of racial supremacy in general. In 1944, in his famous sociological study, Gunnar Myrdal asked black and white participants to rank the importance of various forms of racial discrimination.<sup>128</sup> The “white man’s rank order of discriminations” was as follows: interracial sex and marriage, social interaction, public facilities (including schools), political disenfranchisement, legal discrimination, barriers to obtaining property and employment.<sup>129</sup> Myrdal found that “the closer the association of a type of interracial behavior is to sexual and social intercourse on an egalitarian basis, the higher it ranks among the forbidden things” for whites.<sup>130</sup> African Americans’ concerns were reversed. They were most distressed about economic barriers and least concerned with interracial marriage.

For those who believed that society necessitated white racial dominance, miscegenation contained the potential for complete destruction<sup>131</sup>: “Nothing was better calculated than the prospect of interracial sex and marriage to stir up fears that the color line was crumbling completely.”<sup>132</sup> Interracial couplings could place the entire county at risk. The country would “drop from her exalted position as a world power, her boasted civilization would disappear, and she would ultimately become the vassal province of some civilized State.”<sup>133</sup>

### B. Dissecting “Black Blood”

The enforcement of anti-miscegenation laws required legal constructions of racial definitions. Racial designations affected which laws applied, in which court one was tried, and, in the antebellum period, whether one was free or enslaved. Enforcement of these laws necessitated a similar legal regime to define race.<sup>134</sup> Definitions of

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property interest in their blood. The fear of taint arose from an interest that people had in their blood and its dispensation in future generations.”)

128. MYRDAL ET AL, *supra* note 12, at 60–61 (emphasis omitted).

129. *Id.*

130. *Id.* at 61.

131. *See, e.g.*, Chananie-Hill, *supra* note 102, at 58 (“[T]he children of mixed-raced parents symbolized every social evil . . . [including] the downfall of the (white Southern) American way of life.”).

132. *Id.* at 61.

133. Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 57 (1996) (citing 62 CONG. REC. 458, 1427 (1921) (statement of Rep. Rankin)).

134. *Naim v. Naim*, 197 Va. 80, 80 (Va. 1955) (“The only way by which the statute could be made effective was by classification of the races. If preservation of racial integrity is legal, then

race were designated by exacting—albeit ever changing—standards.<sup>135</sup> Racial classification in the United States depended on ancestry and quorum of “black blood.” Social factors could be relevant as well. From the antebellum period onwards, the courts made clear that race was not just a matter of physical makeup, but also an issue of privilege and property.<sup>136</sup>

While adjudication of race in marriage cases followed the conventional patterns of racial determination cases, the courts nonetheless repeatedly overruled attempts to apply the one-drop rule in annulment cases. After the Civil War, hypodescent<sup>137</sup> played an increasing role in racial classification as a response to perceived threats of black people infiltrating white privilege.<sup>138</sup> In the antebellum period, “the institution of slavery protected the fundamental assumption of absolute white superiority.”<sup>139</sup> With the demise of slavery, patrolling the white/black divide became more urgent.<sup>140</sup> Under hypodescent, or the one-drop rule, anyone with an iota of black ancestry was black.<sup>141</sup>

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racial classification to effect that end is not presumed to be arbitrary.”); *see also* Oh, *supra* note 99, at 1330 (“A social system based on preserving white privilege and supremacy must maintain clear boundaries between white and nonwhite people.”).

135. *See, e.g., Legal Definition of Race, in* 3 RACE RELATIONS LAW REPORTER 571, 580 (1958).

136. In 1835, the South Carolina Supreme Court laid out its criteria for determining whiteness:

We cannot say what admixture of negro blood will make a coloured person, and by a jury, one may be found a coloured person, while another of the same degree of blood may be declared a white man . . . But his admission to the[ ] privileges [of a white man] . . . will very much depend on his own character and conduct; and it may be well and proper, that a man of worth, honesty, industry, and respectability, should have the rank of a white man, while a vagabond of the same degree of blood should be confined to the inferior caste.

State v. Cantey, 20 S.C.L. (2 Hill) 614, 615 (S.C. Ct. L. 1835).

137. The term hypodescent was coined by Marvin Harris, who wrote that the concept “requires Americans to believe that anyone who is known to have had a Negro ancestor is a Negro . . . ‘Hypo-descent’ means affiliation with the subordinate rather than the superordinate group in order to avoid the ambiguity of intermediate identity.” MARVIN HARRIS, PATTERNS OF RACE IN THE AMERICAS 56 (1964).

138. *See* HODES, *supra* note 18, at 177; Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana’s Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255, 281 (1983) (discussing how the ‘traceable amount’ standard was meant to ensure . . . that even blacks who did not look black were kept in their place”); Gross, *supra* note 18, at 178 (“Whereas most states before the Civil War had defined ‘negro’ according to fractions of ‘blood’—usually one-eighth or one-fourth—many moved to one-drop-of-blood rules.”).

139. Barbara Y. Welke, *When All the Women Were White, and All the Blacks Were Men: Gender, Class, Race, and the Road to Plessy, 1855–1914*, 13 LAW & HIST. REV. 261, 272 (1995).

140. Gross, *supra* note 18, at 177 (“[W]hereas before the Civil War there had been some space for relationships between black men and white women, now there was an intense commitment on the part of whites to racial ‘purity.’”).

141. *See* DAVIS, *supra* note 28, at 82 (describing the development of racial ideology in the United States).

This rigid interpretation of race was “crucial to maintaining the social system of white domination in which widespread miscegenation, not racial purity, prevailed.”<sup>142</sup> Statutory definitions changed to invoke a strict interpretation of racial descent.<sup>143</sup>

Judges rejected the one-drop rule despite repeated requests from counsel and in contrast to prevailing trends.<sup>144</sup> The counsel in *Marre v. Marre* endeavored to reinterpret the applicable statute to apply hypodescent.<sup>145</sup> Under Missouri law, “[a]ll marriages between white persons and negroes, and white persons and mongolians, are prohibited and declared absolutely void.”<sup>146</sup> The provision did not define white, negro, or Mongolian. In absence of a definition, Mr. Marre argued that the one-drop rule should apply. Judge Allen categorically rejected Mr. Marre’s attempt to impose hypodescent.<sup>147</sup> Instead, he employed Missouri’s criminal statute, under which “[n]o person having one-eighth part or more of negro blood shall be permitted to marry any white person.”<sup>148</sup> Applying these statutes in conjunction, he found that whatever trace Mrs. Marre might have had of “negro blood,” it did not reach one-eighth.<sup>149</sup> Furthermore, he admonished, “there is not a particle of tangible evidence in this case . . . on which it can be held that this defendant is a negro.”<sup>150</sup>

*Dillon v. Dillon*, *Ferrall v. Ferrall*, and *Marre v. Marre* applied a one-eighths or third generation standard.<sup>151</sup> The determination of race depended on the exact “black blood” of one great-grandparent. In *Dillon*, Mr. Dillon argued that Mrs. Dillon could not be his lawful

142. *Id.* at 63; see also Cox, *supra* note 127, at 517.

143. Gross, *supra* note 18, at 118 n.22 (“After the Civil War, many states passed laws enlarging the definition of ‘negro’ to include everyone with any African ancestry—what is known as a ‘one-drop’ rule.”).

144. For another case example of this trend, see *infra* notes 166–173 and accompanying text, discussing *Theophanis v. Theophanis*, 51 S.W.2d 957 (Ky. 1932).

145. *Marre v. Marre*, 168 S.W. 636, 640 (Mo. Ct. App. 1914).

146. MO. ANN. STAT. ch. 50, § 4312 (1906).

147. *Marre*, 168 S.W. at 640 (“Learned counsel for respondent argues . . . that any drop of African blood makes one a negro. We think this is an incorrect assumption.”).

148. MO. ANN. STAT. § 2174 (1906).

149. *Marre*, 168 S.W. at 640.

150. *Id.*

151. *Dillon v. Dillon*, 60 Ga. 204, 205–07 (1878) (setting the standard at “one-eighth of African or negro blood”); *Marre*, 168 S.W. at 640 (citing MO. REV. STAT. § 4727 (1909) (“No person having one-eighth part or more of negro blood shall be permitted to marry any white person, nor shall any white person be permitted to marry any negro or person having one-eighth part or more negro blood.”); *Ferrall v. Ferrall*, 69 S.E. 60, 61 (N.C. 1910) (“All marriages between a white person and a negro or Indian or between a white person and a person of negro or Indian descent to the third generation inclusive . . . shall be void.” (alteration in original) (quoting N.C. GEN. STAT. § 2083 (1905))).

wife because she had “more than one-eighth of African blood.”<sup>152</sup> He was unable to convince the jury, who found that Mrs. Dillon was his wife.<sup>153</sup> Paradoxically, they remained undecided on one question: whether Mrs. Dillon had “one-eighth or more of African or negro blood in her veins.”<sup>154</sup> The trial judge held Mrs. Dillon was Mr. Dillon’s lawful wife. The Georgia Supreme Court did not examine Mrs. Dillon’s racial status, only noting that Mrs. Dillon was “of a complexion approximating that of many white persons of pure blood.”<sup>155</sup> For Justice Bleckley, her near white complexion made tracing her lineage unseemly and unnecessary.

In *Ferrall*, the determination of whiteness hinged on Mrs. Ferrall’s great-grandfather, Julius Coley.<sup>156</sup> The trial judge charged the jury with deciding whether “Julius Coley was a real negro” and “that by real negro he meant one that did not have any white blood in him.”<sup>157</sup> The jury found that he was not. Mr. Ferrall took issue with the court’s definition of a “real Negro.” His attorney advocated for the use of the one-drop rule, claiming that “as long as there remains a touch of negro blood in a [person’s] veins, that touch gives the [person her] character and indelibly fixe[s her] with the stamp of inferiority.”<sup>158</sup> At trial, he cited Mark Twain as authority, quoting from a character in *Pudd’nhead Wilson*: “Thirty-one thirty seconds of you is white and one thirty-seconds is nigger, and that part of you is your soul.”<sup>159</sup> Mr. Ferrall moved to have the verdict set aside for what he considered a faulty jury charge. The court complied with his request and found the marriage invalid.

The North Carolina Supreme Court disagreed.<sup>160</sup> Phenotype, one’s physical manifestation of genotype, was not the decisive—or necessarily even relevant—factor. Furthermore, the court refused to apply hypodescent, engaging instead in an intricate discussion of the applicable blood quantum. Writing for the court, Justice Hoke dissected

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152. In response to his wife’s action for divorce, Mr. Dillon asserted that Mrs. Dillon was incapable of contracting a “lawful marriage with a white man,” and therefore the marriage was void. *Dillon*, 60 Ga. at 204, 207. According to Georgia law, “[t]he marriage relation between white persons and persons of African descent is forever prohibited, and such marriage shall be null and void.” GA. II CODE § 2422 (1895).

153. *Dillon*, 60 Ga. at 207.

154. *Id.* at 205, 207.

155. *Id.* at 207.

156. *Ferrall v. Ferrall*, 69 S.E. 60, 60–61 (N.C. 1910).

157. *Id.*

158. KENNEDY, *supra* note 42, at 238 (quoting brief on the behalf of Mr. Ferrall).

159. *Id.* (quoting brief on the behalf of Mr. Ferrall).

160. *Ferrall v. Ferrall*, 69 S.E. 60 (N.C. 1910).

what “to the third generation inclusive” meant in practice.<sup>161</sup> Justice Hoke rejected Mr. Ferrall’s argument “that the negro ancestor, whose blood must determine the issue, should be considered not a negro of pure African blood, but one who has his status as a negro ascertained and fixed by the recognition and general consensus of the community where his lot is cast.”<sup>162</sup> Instead, he asserted the “ordinary and usual” understanding that “in order to bring a marriage within the prohibited degree, one of the ancestors of the generation stated must have been of pure negro blood.”<sup>163</sup> In a reverse one-drop rule, the relevant ancestor could not be only part black.<sup>164</sup> Justice Clark’s concurring opinion ultimately described Mrs. Ferrall as “a wife, who, if she had any strain of negro blood whatever, was so white [her husband] did not suspect it till recently.”<sup>165</sup>

*Theophanis v. Theophanis* applied a stricter one-fourth standard. The Kentucky Court of Appeals found that Mrs. Theophanis’s person included at least one drop of black blood, but not enough to void the marriage.<sup>166</sup> Mrs. Theophanis’s father was “admittedly a white man.”<sup>167</sup> Her maternal grandmother, Mary Jane Walker, however, presented a quandary. Kentucky law forbid “marriage between a white person and a negro or mulatto.”<sup>168</sup> The court identified three of Mrs. Theophanis’s four grandparents as white. If the fourth “were a negro, then [Lillian] would be a quadroon, and a mulatto.”<sup>169</sup> By the court’s reading of mulatto, less than twenty-five percent of black blood did not qualify. Applying this lenient “one-fourth rule” to Mrs. Theophanis, her whiteness depended on whether Mary Jane Walker was “of pure negro blood.”<sup>170</sup> On this, the court was clear: the evidence showed that Mrs. Walker “had long black straight hair, a very straight nose, high cheek bones, and thin lips” and “was of copper color . . . [with] a smooth and beautiful complexion.”<sup>171</sup> Such a

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161. *Id.* at 61 (quoting N.C. GEN. STAT. § 2083 (1905)).

162. *Id.* at 61–62.

163. *Id.* at 61. This decision overruled the holding of the trial court. *Id.* at 62.

164. *Id.* at 61–62.

165. *Id.* at 62 (Clark, C.J., concurring).

166. *Theophanis v. Theophanis*, 51 S.W.2d 957, 958 (Ky. 1932). Lillian Theophanis initially received a divorce from her husband of nine years, George J. Theophanis. *Id.* at 957. The trial court awarded her \$1000 in alimony and \$100 for attorney’s fees. *Id.* Miss Theophanis appealed, asking for \$14,000 in alimony and \$1500 for attorney’s fee. *Id.* In return, Mr. Theophanis asserted that Miss Theophanis was a “mulatto” and the marriage void. *Id.* at 958.

167. *Id.* at 958.

168. KY. STAT. (CARROLL’S STATS.) § 2097 (1903).

169. *Theophanis*, 51 S.W.2d at 958.

170. *Id.*

171. *Id.*

woman was indisputably “not of pure negro blood.”<sup>172</sup> Consequently, Mrs. Theophanis was white.<sup>173</sup>

In *Marre*, the Missouri Court of Appeals extensively discussed both performance and blood as evidence of race.<sup>174</sup> The judge began his discussion by stressing that “the prohibition of the statute is not against color, but blood, or race.”<sup>175</sup> According to the local grocer, “the understanding in the neighborhood” was that Agnes’s family was black.<sup>176</sup> Witnesses testified to seeing Mrs. Marre’s family accompanied by black members of the community, both in public and in the (imagined) privacy of their home. Judge Allen dismissed these remarks as “neighborhood gossip-talk.”<sup>177</sup> Contesting this testimony, Agnes’s mother explained that while they had acquaintances in the black community, her family was clearly white, by both blood and association. Her other daughters married white men and “their associates [we]re with white people.”<sup>178</sup> Moreover, “there was no negro blood in the family, in the veins of herself, her husband or her children,” although she had one Mexican ancestor.<sup>179</sup>

The court dissected the race of a man in only one case, *Kirby v. Kirby*.<sup>180</sup> In 1921, Joe R. Kirby brought an action to annul his marriage of seven years.<sup>181</sup> He put forth an aggressive case, introducing testimony that his “mother . . . was a Mexican with no admixture of Indian blood[,] . . . [his] father, Frank Kirby, was an Irishman, and [his wife, Mayellen Kirby wa]s a Negro.”<sup>182</sup> Mr. Kirby’s testimony, how-

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172. *Id.*

173. *Id.* In a similar case in 1877, Virginia brought indictments against Rowena McPherson and George Stewart for “living in illicit intercourse.” *McPherson v. Commonwealth*, 69 Va. 939, 939 (1877). Mr. McPherson and Miss Stewart argued that they were married. *Id.* at 940. As Mr. Stewart was commonly acknowledged as a white man, the legality of the marriage hinged on Miss McPherson. *Id.* The court enforced a one-fourth rule, but applied a literal interpretation in Miss Stewart’s favor, reasoning that “[i]f it be but one drop less, she is not a negro.” *Id.* Miss Stewart had three white grandparents, with a “brown skin woman” as her fourth grandparent. *Id.* The color of her skin indicated that she was “not a full-blooded African or negro, whose skin is black, and never brown.” *Id.* As McPherson’s grandmother was not one-hundred percent black, McPherson could not be twenty-five percent black. *Id.* Under the law, she was white. *Id.*

174. *Marre v. Marre*, 168 S.W. 636 (Mo. Ct. App. 1914).

175. *Id.* at 640.

176. *Id.* at 639.

177. *Id.* at 639–40.

178. *Id.* at 640.

179. *Id.*

180. 206 P. 405, 406 (Ariz. 1922).

181. Under Arizona law, “all marriages of persons of Caucasian blood, and their descendants, with negroes, Mongolians or Indians and their descendants, are null and void.” ARIZ. CIV. CODE § 3837 (1913).

182. *Kirby*, 206 P. at 406 (quoting from trial records). Miss Kirby denied she was black, but presented no testimony to support this denial. See *infra* notes 203–206 and accompanying text for discussion of Miss Kirby.

ever, only served to show the difficulty of making such determinations. On the witness stand, he was unable to articulate his own claim to whiteness:

Joe's lawyer opened with the question "What race do you belong to?" Joe answered "Well . . .," and paused, while Mayellen's lawyer objected to the question on the ground that it called for a conclusion by the witness. "Oh, no," said the judge, "it is a matter of pedigree." Eventually allowed to answer the question, Joe said, "I belong to the white race I suppose." Under cross-examination, he described his father as having been of the "Irish race," although he admitted, "I never knew any one of his people."<sup>183</sup>

The Arizona Supreme Court found the testimony that his mother was a "Mexican with no admixture of Indian blood" and his father an Irishman sufficient to demonstrate Mr. Kirby's whiteness.<sup>184</sup> The court annulled the marriage.

### C. Racial Determination Cases

When forced to address directly the question of racial identity, the courts found the majority of the women white, allowing them to retain their racial privilege and social status. Of the eight annulment cases in which the wife's whiteness was in dispute and the court made a clear determination of race,<sup>185</sup> the court made a finding of whiteness six times.<sup>186</sup> While a small sampling of cases, the numbers stand in great contrast to the numbers Ariela Gross observed in her seminal work on the racial determination cases.<sup>187</sup> Courts found whiteness in seventy-five percent of the annulment cases in contrast to Gross's finding of twenty-five percent.<sup>188</sup>

183. Pascoe, *supra* note 42, at 45 (emphasis omitted).

184. *Kirby*, 206 P. at 406. As the trial court explained:

Mexicans are classed as of the Caucasian Race. They are descendants, supposed to be, at least of the Spanish conquerors of that country, and unless it can be shown that they are mixed up with some other races, why the presumption is that they are descendants of the Caucasian race.

Pascoe, *supra* note 42, at 51 (quoting from trial records).

185. In *Baker v. Carter*, for example, Billy Baker accused his wife of being black. 68 P.2d 85, 85 (Okla. 1937). The appellate court left the issue for the trial court. *Id.* at 86. *Calma, Naim, Rhinelanders*, and *Van Houten* are also not included in this count. *Id.*

186. *Dillon v. Dillon*, 60 Ga. 204 (1878); *Theophanis v. Theophanis*, 51 S.W.2d 957 (Ky. 1932); *Villa v. Lacoste*, 35 So. 2d 419 (La. 1948); *Neuberger v. Gueldner*, 72 So. 220 (La. 1916); *Marre v. Marre*, 168 S.W. 636 (Mo. Ct. App. 1914); *Ferrall v. Ferrall*, 69 S.E. 60 (N.C. 1910).

187. See Gross, *supra* note 18, App.

188. Gross addresses only nineteenth century cases, which could also explain the differing results. *Id.* at 120. There is no showing, however, that findings of whiteness became more likely after the turn of the century. See Pascoe, *supra* note 42, *passim*. For an extreme example of the opposite effect, see *Doe v. State Dep't of Health & Human Res.*, 479 So. 2d 369, 372 (La. Ct. App. 1985) (acknowledging that the "very concept of the racial classification of individuals . . . is

In two cases, the court found the women to be colored.<sup>189</sup> In *Kirby v. Kirby*, Mrs. Kirby denied she was black in her complaint, but did not take the witness stand herself or introduce other evidence to support her claim.<sup>190</sup> The trial focused instead on whether her husband was truly white.<sup>191</sup> In *Sunseri v. Cassagne*, the court expressed its dismay at being forced into the position of finding Mrs. Cassagne black.<sup>192</sup>

In the nineteenth century, skin tone did not provide a definitive answer as to race. As one judge told his jury, “[c]olor . . . was sometimes a deceptive test,”<sup>193</sup> particularly as an unambiguously black phenotype was unlikely to appear in a racial determination case. Some judges emphasized that they would not follow hypodescent, as “it is not every admixture of negro blood, however slight and remote, that will make a person of colour, within the meaning of the law.”<sup>194</sup> Indeed, the court in *State v. Cantey* mocked the idea as an “absurdity”: “If we should say that such [a person] is to be regarded as a person of colour, on account of any mixture of negro blood, however slight or remote, we should be making, instead of declaring the law, and making a very cruel and mischievous law.”<sup>195</sup>

Basing race on reputation guaranteed that all those functioning as white were white. Specific acts performed in the community demonstrated blackness. In *Dillon v. Dillon*, after dismissing an examination into Rachel Dillon’s racial background as unconstructive, the court focused on the fact that she had lived openly with her husband of twenty years, and their family was accepted as members of white society in Savannah.<sup>196</sup> In Miss Van Houten’s case, she allegedly told Mr. Morse that her “father and mother were both of the best white fami-

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scientifically insupportable,” but refusing to reclassify Susie Guillory Phipps as white on her birth certificate).

189. *Sunseri II*, 196 So. 7, 7 (La. 1940); *Kirby*, 206 P. at 405.

190. Pascoe, *supra* note 42, at 51 (quoting from trial records).

191. *Kirby*, 206 P. at 406; Pascoe, *supra* note 42, at 45.

192. *Sunseri II*, 196 So. at 26 (“It is with regret that we have to arrive at this conclusion, but the evidence in this case leaves us no alternative.”). For further discussion of *Sunseri*, see *infra* notes 319–331 and accompanying text.

193. *Johnson v. Boon*, 28 S.C.L. (1 Speers) 268, 269 (S.C. Ct. App. 1843).

194. *State v. Cantey*, 20 S.C.L. (2 Hill) 614, 615 (1835).

195. *Id.* at 614; see also *White v. Tax Collector of Kershaw Dist.*, 37 S.C.L. (3 Rich.) 136, 137 (S.C. Ct. L. 1846). In 1832, a South Carolina court admonished that “one, bearing all the features of a white, to be ranked with the degraded class, designated by the laws of this State *persons of colour*, because of some remote taint of the negro race.” *State v. Davis*, 18 S.C.L. (2 Bail.) 558, 558 (S.C. Ct. App. 1823). Such a disqualification would be “dangerous and cruel.” *Id.* The court noted nevertheless, “where there is a *distinct* and *visible* admixture of negro blood, the individual is to be denominated a mulatto, or person of colour.” *Id.*

196. *Dillon v. Dillon*, 60 Ga. 204, 206 (1878).

lies in Charleston” but omitted the fact that her mother’s second husband “was a colored barber and an octoroon and [Miss Van Houten’s] reputed father.”<sup>197</sup> In *Villa v. Lacoste*, while the court quickly dismissed the notion that a Filipino background constituted blackness, the opinion describes how the Lacoste family had performed and been accepted as white in the New Orleans community.<sup>198</sup> As the court explained, the “family has always been considered white; [Mrs. Lacoste] and her brothers attended white schools and have associated exclusively with white people.”<sup>199</sup>

The courts explicitly discussed phenotype in a handful of opinions. Regardless, in all cases, the women were always on display in one way or another. In *Rhineland v. Rhineland*,<sup>200</sup> Mrs. Rhineland appeared literally naked before the court, forced to display her unclothed body in closed chambers.<sup>201</sup> Anna Van Houten submitted for the court’s inspection family photographs that she had shown to Mr. Morse to demonstrate his knowledge of her race.<sup>202</sup> In *Kirby*,<sup>203</sup> Mayellen Kirby never testified, nor did she present evidence to establish her claim of whiteness.<sup>204</sup> The judges never heard her voice nor her story. Nonetheless, she remained on display. As Mr. Kirby explained, “her color and the hair” were ample evidence that she was a “negress.”<sup>205</sup> Furthermore, the trial judge “had the opportunity to gaze upon [her] dusky countenance . . . and could not and did not fail to observe the distinguishing characteristics of the African race and blood.”<sup>206</sup> Gazing upon her, the judge unquestioningly accepted Mrs. Kirby as black. In *Dillon*,<sup>207</sup> Mrs. Dillon was also on display, both in voice and body, but with different results. In her case, the judge noted that she was “not black, but of a complexion approximating that of

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197. *Van Houten v. Morse*, 38 N.E. 705, 706 (Mass. 1894).

198. *Villa v. Lacoste*, 35 So. 2d 419, 420 (La. 1948). Mr. Villa sought to annul his marriage and disclaim paternity “to disclaim the paternity and legitimacy of [his] offspring.” *Id.* at 419. He presented evidence that Miss Catherine Lacoste, Miss Lacoste’s mother, had registered her daughter and grandson as “colored” before the Deputy Recorder of Births. *Id.* at 419–20. The defense countered that Miss Lacoste’s mother was Filipino but signed as colored, “under the erroneous belief that persons of Filipino extraction [were] colored.” *Id.* at 420. Consequently, neither Josephine nor her child was “colored in the sense that they are Negroes or have any Negro blood in their veins.” *Id.*

199. *Id.* at 420.

200. *Rhineland v. Rhineland*, 219 A.D. 189, 189 (N.Y. App. Div. 1927).

201. Smith, *supra* note 42, at 344.

202. *Van Houten*, 38 N.E. at 707.

203. *Kirby v. Kirby*, 206 P. 405 (Ariz. 1922).

204. Pascoe, *supra* note 42, at 51.

205. *Id.* at 51 (quoting from Joe Kirby’s testimony before the trial court).

206. *Id.* (quoting from the appellee brief to the Arizona Supreme Court).

207. *Dillon v. Dillon*, 60 Ga. 204 (1878).

many white persons of pure blood.”<sup>208</sup> Under these circumstances, it was “not an open, bald case of the intermarriage of an African with a Caucasian.”<sup>209</sup>

After the Civil War, litigation of whiteness appeared less frequently, even as racial status became increasingly contested. Gross hypothesizes that this ostensibly contradictory result “may have been precisely because the statutory boundaries of whiteness were growing so narrow that it became increasingly difficult to raise a credible claim in court if there was any disagreement at all about one’s racial status.”<sup>210</sup> Furthermore, in the formerly slave states during Reconstruction, the judicial system was not a reliable upholder of white racial privilege; the prevalence of extra-legal and terrorist means of imposing conditions of near servitude on the former slaves explains in part why the former slaves did not look to the courts for assistance. The rate of annulment cases, however, was unaffected.

#### IV. CONSTRUCTION OF GENDER ROLES

##### A. *Marriage Roles and Obligations*

Throughout United States history, the judicial system has played an essential role in guaranteeing the proper functioning of the marriage relationship. Courts have consistently reiterated the role of marriage as the fundamental basis of civil society and an important subject of judicial and legislative restrictions.<sup>211</sup> Marriage has served a multitude of purposes, from channeling undesirable sexual activity into socially

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208. *Id.* at 207.

209. *Id.*

210. Gross, *supra* note 18, at 178.

211. *See, e.g.,* *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”); *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (“Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. . . . It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.”); *Reynolds v. United States*, 98 U.S. 145, 165 (1878) (“Upon [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.”); *Guilford v. Oxford*, 9 Conn. 321, 327 (1832) (discussing how “the marriage contract, on which so much depends for the protection, and maintenance, and education of the children, and in which the public have so essential a stake, demands a higher principle” than ordinary contracts); *Noel v. Ewing*, 9 Ind. 36, 48 (1857) (“[M]arriage is . . . a great public institution, giving character to our whole civil polity.”); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) (“[T]here are three partners to every civil marriage: two willing spouses and an approving State.”); *Inhabitants of the Town of Milford v. Inhabitants of the Town of Worcester*, 7 Mass. 48, 52 (1810) (“Marriage, being essential to the peace and harmony, and to the virtues and improvements of civil society, it is . . . among the first attentions of the civil magistrate.”).

acceptable practices to protecting the sanctity of white womanhood as a means of maintaining racial dominance. Marital relations hinged on an ostensibly symbiotic partnership in which husband and wife exchanged benefits and responsibilities. Neither prospective spouse would enter the relation without these anticipated benefits.

With most annulment action, as in any quotidian family law case, money remained central, as husbands attempted to escape with all of it. In *Dillon v. Dillon*, after twenty years of marriage, Mr. Dillon wanted to leave unburdened by any support obligations to his wife and children.<sup>212</sup> With few alternatives for terminating the relationship, he sought a judicial annulment. The Georgia Supreme Court denounced Mr. Dillon for marrying Mrs. Dillon, “living with her as his wife for many, many years, rearing by her a family of children, some of them to the age of manhood and womanhood,” and now “repudiating [his wife and] his family when they come to him for needed support.”<sup>213</sup>

In 1910, Frank S. Ferrall brought an annulment suit against his wife, Susie Patterson Ferrall, on the grounds of miscegenation.<sup>214</sup> Their marriage was less than four years old, but they had one child already, with another on the way.<sup>215</sup> According to Mrs. Ferrall, their marriage disintegrated after the birth of their first child.<sup>216</sup> After this point, Mr. Ferrall “cruelly treated her, would get drunk and abuse her in the vilest manner, refuse to provide her with the common necessities of life, abandoned her and his own child, and left her without providing her any support.”<sup>217</sup> The specter of race had haunted this marriage since its beginning. Mrs. Ferrall denied any black ancestry, but conceded “a strain of Indian or Portuguese blood in [her] veins” of which she “re-

212. *Dillon*, 60 Ga. at 207.

213. *Id.*

214. Mr. Ferrall asserted that his wife “was and is of negro descent within the third generation,” and therefore incapable of contracting for marriage with a white man. *Ferrall v. Ferrall*, 69 S.E. 60, 60 (N.C. 1910). The North Carolina constitution proclaims, “[t]hat all marriages between a white person and a negro or between a white person and a person of negro descent to the third generation inclusive are hereby forever prohibited.” *Id.* (citing N.C. CONST. art. XIV, § 8).

The “prior history” section refers to *Ferrall* as an action for “divorce” by both parties, but the majority opinion only discusses whether the marriage is “void.” *Id.* at 60–61. The headnotes describe the legal endeavor as “bring[ing] an action for divorce . . . [within the statute which] declares void a marriage.” *Id.* at 60 (majority opinion). The concurring opinion contrasts the action with one for divorce where the “divorced wife might in some circumstance have been still entitled to alimony and dower.” *Id.* at 62 (Clark, C.J., concurring).

215. *Id.* at 60 (majority opinion).

216. *See id.*

217. *Id.* at 62.

peatedly informed” Mr. Ferrall during their courtship.<sup>218</sup> She acknowledged that “some people insisted . . . there was a strain of negro blood in [her] veins,” but claimed that Mr. Ferrall was always aware of these rumors.”<sup>219</sup> In an attempt to avoid tarnishing his name, she initially refused to “marry him on account of these rumors,” but eventually Mr. Ferrall’s insistence prevailed.<sup>220</sup>

Louis Marre claimed miscegenation and duress as grounds for annulment of his marriage to Agnes E. Nash Marre.<sup>221</sup> Before the wedding, the Marres were already living together. Moreover, Agnes was pregnant. Mr. Marre urged Agnes to obtain an abortion, leaving her “in imminent danger of death from the effects of treatment she had undergone at his direction,” although still pregnant.<sup>222</sup> Aghast, Agnes’s relatives advocated for formal recognition of the relationship. Mr. Marre swore that he agreed only after her mother and “mentally unsound” brother threatened to kill him.<sup>223</sup> The court was almost mocking in its disregard for Louis’s claims of fear, which it considered “[in]sufficient to overcome the mind and will of a person of ordinary firmness.”<sup>224</sup>

Mr. Marre was presented as the unambiguous villain of the case, “a man in the full vigor of life” facing up the women he had taken advantage of and then discarded, the “imbecile brother” and her mother, “an old lady some sixty-six years of age.”<sup>225</sup> The court showed no sympathy: “To all appearances [Mr. Marre] was a free actor; the voluntary, the procuring, cause, of the marriage.”<sup>226</sup> He not only lived with Agnes and got her pregnant, he induced her to have an abortion that almost killed her.<sup>227</sup> After such actions, “there was a strong moral obligation on the part of [Louis] . . . to agree to marry and to marry defendant,”<sup>228</sup> responsibilities he was now attempting to evade.

Similarly, Mr. Ferrall had clearly desecrated his marriage contract. He abused his wife and neglected his child.<sup>229</sup> He was an excessive drinker who failed to support his family and abandoned his pregnant

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218. *Id.*

219. *Id.*

220. *Farrell*, 69 S.E. at 62.

221. *Marre v. Marre*, 168 S.W. 636, 637 (Mo. Ct. App. 1914).

222. *Id.* at 638.

223. *Id.* at 637–38.

224. *Id.* at 638.

225. *Id.* at 637–38.

226. *Id.* at 639.

227. *Marre*, 168 S.W. at 638.

228. *Id.*

229. *Ferrall v. Ferrall*, 69 S.E. 60, 60 (N.C. 1910).

wife without compunction.<sup>230</sup> Justice Clark emphasized the reprehensible nature of Mr. Ferrall's conduct, holding that Mr. Ferrall discarded his marriage "after the youth of his wife ha[d] been worn away for his pleasure and in his service" and "household drudgery and childbearing have taken the sparkle from her eyes and deprived her form of its symmetry."<sup>231</sup> In contrast, Mrs. Ferrall performed flawlessly in her role. As Justice Clark reasoned, if Mr. Ferrall "could show fault in her conduct in any way, it is to be presumed that in these days of easy divorce he would have sued on that ground."<sup>232</sup> She complied with all the legal and social expectations required of her as a wife. For Mr. Ferrall, the sole actionable deficiency against his wife was race.

By refusing to satisfy his obligations without any legitimate justification, a husband who filed for annulment attacked the very foundation of social organization. In *Dillon*, Mrs. Dillon fulfilled her part of the marital compact by taking care of the home and children. Mr. Dillon attempted to violate the natural social order and shirk his responsibilities as a husband. In the language of Justice Bleckley, Mr. Dillon "shun[ned] his civil obligations to his family and to society" by deserting his wife "when her youth, beauty and strength have all waned."<sup>233</sup>

Gendered roles and obligations were an integral part of marriage. In Blackstone's oft-repeated words, "the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated with that of the husband: under whose wing, protection, and cover she performs everything."<sup>234</sup> In practical terms, marriage functioned "as a relationship in which the husband agreed to provide food, clothing, and shelter for his wife, and she agreed to return frugal management and obedient service. To 'act like a man' meant to support one's wife."<sup>235</sup>

The actions of these husbands violated the notion of reciprocity implicit in the marriage relation. While the wives had fulfilled their obligations, the husbands attempted to avoid theirs. The refusal to "act

230. *Id.*

231. *Id.* at 62 (Clark, C.J., concurring).

232. *Id.*

233. *Dillon v. Dillon*, 60 Ga. 204, 208 (1878).

234. 1 WILLIAM BLACKSTONE, COMMENTARIES 430. Various nineteenth century courts employed Blackstone's words. See, e.g., *Kelly v. Neely*, 12 Ark. 657, 663 (1852); *Gardner v. Maroney*, 95 Ill. 552, 554 (1880); *Shute v. Sargent*, 36 A. 282, 282 (N.H. 1893); *Appeal of Darlington*, 86 Pa. 512, 520 (1878).

235. Nancy F. Cott, *Eighteenth Century Family and Social Life Revealed in Massachusetts Divorce Records*, in A HERITAGE OF HER OWN: TOWARD A NEW SOCIAL HISTORY OF AMERICAN WOMEN 107, 120 (Nancy F. Cott & Elizabeth Hafkin Pleck eds., 1979).

like a man” threatened the stability and functioning of the social system. The *Dillon* court expressed its fears of the potential responsibilities that could fall on civil society: allowing a man to “repudiat[e] his family when they come to him for needed support” would cause “a weighty burden on the public” to support his dependents.<sup>236</sup> Similarly, the *Ferrall* Court indignantly denounced the intentions of any such errant husband, who most certainly had “no reason to ask any court to aid him in such a purpose.”<sup>237</sup>

### B. *White Woman as Definer of Race*

Gender stereotypes were intricately intertwined with racial stereotypes; the concept of womanhood buttressed the structures of racial supremacy. Men could not be men without women in the same way that whites could not be white without those defined as not white. White men required white women to serve as a demonstration of whiteness. The concept of white womanhood was essential to differentiate whiteness from and galvanize support for white supremacy. Above all, womanhood required whiteness: a lady must be white.

The “Cult of True Womanhood” began in the 1820s, but remained relevant throughout the nineteenth and twentieth centuries.<sup>238</sup> In her definitive work, Barbara Welter divides “[t]he attributes of True Womanhood . . . into four cardinal virtues—piety, purity, submissiveness and domesticity. Put them all together and they spelled mother, daughter, sister, wife—woman.”<sup>239</sup> “True” women were seen as weak and needing protection, not only for themselves, but also for the survival of society. While seemingly colorblind, the concept was inherently linked to race: “[t]he cult of true womanhood, like white supremacist conceptions of race, evolved by contrasting white women as the embodiment of morality with Black women as degraded, immoral, and sexually promiscuous others.”<sup>240</sup>

The simultaneous development of common-law marriage doctrine relied on the image of helpless and mistreated women: a “vision of an innocent femininity vulnerable to scheming men.”<sup>241</sup> Common-law marriage allowed family members to claim the rights and benefits of marriage without having to conform to governmental marriage re-

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236. *Dillon*, 60 Ga. at 207.

237. *Ferrall*, 69 S.E. at 63 (Clark, C.J., concurring).

238. Welter, *supra* note 21, at 152. While the cult of true womanhood peaked from 1820–1860, its influence extended well into the twentieth century. *Id.*

239. *See id.* at 152.

240. Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 339 (1996).

241. Dubler, *supra* note 19, at 964.

quirements and assisted those otherwise left adrift and destitute.<sup>242</sup> In response, the courts intervened to hold accountable those men who failed to fulfill their social responsibilities. Such interventions ensured that the wives would not suffer the fate of becoming “fallen women.”<sup>243</sup>

Gender stereotypes “define[d] true women as White women and true men as White men. . . . [R]ace and gender not only intersect[ed]—they construct[ed] one another.”<sup>244</sup> Race and gender were mutually constitutive: whiteness and womanhood were indivisible, each existing as a facet of the other. If the whiteness was erased, so was their womanhood. Lady could never mean black: “the reference ‘black lady’ was an oxymoron . . . . [‘Lady’] always included the unstated racial modifier ‘white.’”<sup>245</sup>

Upholding gender stereotypes was essential to maintain white privilege. These stereotypes worked “towards solidification of the fortress of white supremacy through an increasing fetishization of white womanhood.”<sup>246</sup> As “the embodiment of the idea of the South,” the “unwavering goal of white Southerners was to protect white womanhood.”<sup>247</sup> Targeted use of racial segregation supported this system

242. See *id.* (“[C]ommon law marriage . . . took as its premise that the law should protect innocent women from the whims and contrivances of irresponsible or rakish men.”). Common-law marriage protected claims to rights and benefits owed legal family members after the death of the relevant family. In death-related cases, the wife would not make accusations of immoral or exploitive behavior on the part of her deceased spouse. On the contrary, such women usually argued that they were deserving spouses because of their husbands’ devotion and proper treatment. See generally Dubler, *supra*, note 19.

243. See Welter, *supra* note 21, at 154. Welter explains that “[p]urity was as essential as piety to a young woman, its absence as unnatural and unfeminine. Without it she was, in fact, no woman at all, but a member of some lower order. A ‘fallen woman’ was a ‘fallen angel,’ unworthy of the celestial company of her sex.” *Id.* Moreover, the “extreme social stigma attached to the fallen women helped to reinforce the ideal of female purity.” JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 70–71* (1988). Given the importance of virginity, women were particularly helpless abandoned after freely cohabiting outside the bonds of marriage. See Welter, *supra* note 21, at 154–55 (“[Behaving as a wife,] she bestowed her greatest treasure upon her husband, and from that time on was completely dependent upon him, an empty vessel, without legal or emotional existence of her own.”); see also Jones v. Jones, 60 Tex. 451, 460–61 (1882) (“[A woman’s] reputation for chastity . . . is the immediate jewel of her soul; and, when an attempt is made by her husband, who should be her protector, to rob her of it, cruelty on his part has reached its utmost limit.”).

244. Tanya Kateri Hernandez, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER RACE & JUST. 183, 211 (2001).

245. Welke, *supra* note 139, at 296; see also JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW 59* (1986) (“To apply the term ladylike to a black woman was apparently the height of sarcasm; by socially prescribed definition, black women could never become ‘ladies,’ though they might display pretensions in that direction.”).

246. Ariela Gross, *Beyond Black and White: Cultural Approaches To Race And Slavery*, 101 COLUM. L. REV. 640, 674 (2001).

247. Welter, *supra* note 21, at 152. As Welter explains:

and its differentiation. After the Civil War, the rise of legislative racial segregation further “gendered race by segregating all Blacks from the purity of White women.”<sup>248</sup> These laws “provided an absolute protection of white womanhood and thus of white supremacy in the South by protecting the enclave of white women from encroachment by women and men of color.”<sup>249</sup>

The stability of whiteness and white society depended on the stability of white womanhood. A woman who could lose her status would threaten the complete racial structure, which depended on a system of gender stereotypes. For the most part, according to courts, the women represented in these annulment cases were “white women,” though it remained unclear what a white women looked like.<sup>250</sup> They behaved as ladies and consequently, they had to be white. The southern system of racism was built around this gender concept, which was an essential foundation for the ideology of white supremacy.

For a woman to prove whiteness at trial, she first had to prove her womanhood. To be a “lady,” one had to demonstrate specific behaviors. This performance was a necessary element of whiteness, but could also serve as sufficient proof on its own. Irrespective of skin color, a black woman could not be a lady because she lacked the essential refinement and moral characteristics to behave as a true woman. If black women could perform as ladies, the whole soliloquy would tumble. Lady equaled white, but nonwhite could not equal white, or else white is meaningless. Consequently, nonwhite could not equal lady; nonwhite women could not pass and behave as ladies in

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If anyone, male or female, dared to tamper with the complex of virtues which made up True Womanhood, he was damned immediately as an enemy of God, of civilization and of the Republic. It was a fearful obligation, a solemn responsibility, which the nineteenth century American woman had—to uphold the pillars of the temple with her frail white hand.

*Id.*

248. Hernandez, *supra* note 244, at 198.

249. Welke, *supra* note 139, at 312. In the decades following *Brown v. Board of Education*, 347 U.S. 483 (1954), with the preliminary dismantling of legal racial segregation, segregationists turned to gender separation to create legal partitions between white women and black men through institutions such as single-sex schools. Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 YALE J.L. & HUMAN. 187, 198 (2006) (first alteration in original).

250. Katherine M. Franke posits:

[I]f a person could look white, but not be white, then what does it mean to be white? Could one be white but not look white? Perhaps looking white is a necessary yet not sufficient condition of being white. What does a white woman look like anyway? If phenotype is not what racial identity means, then is how you look a representation of racial identity? If so, a representation of what? Finally, who should decide the answers to any of these questions?

Franke, *supra* note 42, at 1232 (emphasis omitted).

white society. As Ariela Gross explains, in the racial determination trial of Sally Miller, the lawyer “was not saying that Sally Miller was white because a majority of people believed her to be white or because she associated with whites . . . [but because], only a white woman could exercise the moral power to convince others of her virtue through her performance.”<sup>251</sup> Demonstrating true womanhood demonstrated whiteness.

## V. JUDICIAL INTERPRETATION

### A. *Finding Whiteness to Reify Racial Boundaries*

The law constructed categories of identity in sync with prevailing social hierarchy. The courts upheld the status quo to preserve the existing racial hierarchy rather than rigidly enforcing blood distinctions in a way that would disrupt the system as a whole.<sup>252</sup> Potentially subversive interracial marriages were made intraracial to reinforce racial hierarchy. The court repeatedly stressed that the women in these cases were not socially threatening. To the contrary, they performed exactly as true women were supposed to, observing their obligations as wives and mothers and meeting all the social expectations of proper white women. To consign these women to “the infamy of social degradation [created by] the slightest infusion of negro blood” would threaten white womanhood as a whole.<sup>253</sup> The definition of womanhood required qualities that black women did not possess. If these women were both ladies and black, then womanhood no longer held meaning. In their opinions, the courts conveyed a critical message: if a woman behaved in a certain way and fulfilled social obligations, her status would be protected, despite a potential racial taint.<sup>254</sup>

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251. Gross, *supra* note 18, at 168. Sally Miller sued for her freedom in 1845, claiming “to be a German Redemptioner who had been separated from her family off the boat from Holland and then sold or bound to service.” *Id.* at 167. As the judge explained, “the perseverance, the uniform good conduct, the quiet and constant industry, which are found in those she claims as relatives, have always been found in her . . . and these traits prove her white nature.” *Id.* at 167.

252. As Eva Saks articulates, in order to stabilize the property value of race, “the law [becomes] mimetic: it reflects and enforces a prior, external social arrangements, rather than imposing its own semiotic system of adjudicating property rights through the metaphor of blood.” Saks, *supra* note 40, at 70.

253. *Ferrall v. Ferrall*, 69 S.E. 60, 62 (N.C. 1910) (Clark, C.J., concurring).

254. See Jessica A. Clarke, *Adverse Possession of Identity: Radical Theory, Conventional Practice*, 84 OR. L. REV. 563, 641 (2005). Clarke posits:

Doctrines of race determination recognizing whiteness as performance played fundamentally conservative roles in the antebellum South. These conservative roles included both shoring up normative premises about the value of whiteness, as well bolstering segregation as a totalizing institution by classifying persons of contested racial status on one or the other side of the color line.

In *Dillon*, the judge turned to issues of reputation and public policy, finding that these factors indicated both Mrs. Dillon's whiteness and the existence of a valid marriage.<sup>255</sup> Justice Bleckley's decision worked to preserve stability in racial categorization and hierarchy by maintaining societal expectations. Through this analysis, Mr. Dillon's actions mattered more than any deed or characteristic of Mrs. Dillon. Dismissing an examination into Mrs. Dillon's racial background as unconstructive, the court looked to reputational factors.<sup>256</sup> Basing race on reputation guaranteed that anyone already functioning in white society was white. In contrast, acknowledging the potential fluidity of racial boundaries by allowing Mr. Dillon's allegations would threaten the very foundation of southern society. Bleckley hinted at the implication of Mr. Dillon's contentions:

Of [Mrs. Dillon], he begat children; and the parents and children were grouped as a family, and as such lived, openly, in the city of Savannah, the largest city of Georgia, and one of the most respectable cities of the world. If the marriage tie had been wanting, would this have occurred?<sup>257</sup>

Savannah would not be the society its citizens depended on if any marriage could turn out to be illicit fornication and any white person could be declared black. Acknowledging that a black person had been admitted, with full privileges, into white society—particularly in “one of the most respectable cities of the world”<sup>258</sup>—had substantial repercussions for the sanctity of racial stratification as a whole. For societal reasons, possessing the property of whiteness was enough to make one deserving of whiteness. Ultimately, privilege as perceived and exercised was more important than skin tone or ancestry.

In this vein, one antebellum South Carolina judge instructed the jury that, “when men had been acknowledged as white men, and allowed all their privileges, it was bad policy to degrade them to the condition of free negroes.”<sup>259</sup> The sanctity of the privileges endowed by whiteness required the same degree of certitude embodied in other property rights. If one woman could lose her status so precipitously, then all were at risk, which devalued the rights in question and destabilized the system as a whole. Moreover, if whiteness was primarily an issue of status and privilege, then status could determine race, instead of vice-versa. If a woman had the characteristics of whiteness

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255. *Dillon v. Dillon*, 60 Ga. 204, 206 (1878).

256. *Id.*

257. *Id.*

258. *Id.*

259. *Johnson v. Boone*, 28 S.C.L. (1 Speers) 268, 268 (S.C. Ct. L. 1843) (upholding the jury's decision that the plaintiffs were white and thus excluded from the tax against free mulattos).

and obtained sufficient social status, she could acquire the legal property of whiteness. As another antebellum judge acknowledged, “people tinged with African blood [may be] worthy to be rated as white.”<sup>260</sup> For those such as Mrs. Dillon, the performance of their duties as wife and upright member of society was considered worthy enough to maintain the position they already held.

In *Ferrall*,<sup>261</sup> Justice Clark wove these threads into his discussion of family roles. As discussed above, Justice Clark berated Mr. Ferrall for inducing his wife into marriage and then abandoning her after receiving benefit from her services.<sup>262</sup> Through marriage, Mrs. Ferrall became the responsibility of her husband. In this role, Mr. Ferrall had the obligation of maintaining his wife’s whiteness in the same way white men had general responsibility for protecting white womanhood.<sup>263</sup> Mr. Ferrall, “if [he] possessed of any sentiment of manhood, would have shielded his wife and children” from any rumors about their racial origin.<sup>264</sup> Instead, Mr. Ferrall was so contemptible that he would “consign [his wife] to the association of the colored race which he so affects to despise” and “brand [his children] for all time.”<sup>265</sup>

### B. Moving Beyond Gender

The women found to be white demonstrated full performance of both their gender and racial obligations. As Ariela Gross articulates, “[f]or a woman, performing whiteness meant acting out purity and moral virtue.”<sup>266</sup> In this way, “[t]hey appealed to a vision of white womanhood as beauty, purity, and physical and moral goodness that was increasingly the rhetorical center of Southern laws regarding race relations.”<sup>267</sup> In particular, the litigants “dazzled their neighbors and jurors with feminine evidence of whiteness: beauty and goodness.”<sup>268</sup> Likewise, women such as Mrs. Dillon beguiled the court with their

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260. *White v. Tax Collector of Kershaw Dist.*, 37 S.C.L. (3 Rich.) 136, 136 (S.C. Ct. App. L. 1846).

261. *Ferrall v. Ferrall*, 69 S.E. 60 (N.C. 1910)

262. See *supra* notes 229–232 and accompanying text.

263. Interracial adultery cases provide one example of this trend. White husbands were responsible for, among other things, the wife’s transgression of racial boundaries through adultery. See, e.g., *Sargent v. Sargent*, 114 A. 428, 428 (N.J. Ch. 1920) (holding white husband accountable for permitting his white wife’s continued adultery with Negro chauffeur). For further discussion and examples, see HODES, *supra* note 18, at 132–37.

264. *Ferrall*, 69 S.E. at 62 (Clark, C.J., concurring).

265. *Id.*

266. Gross, *supra* note 18, at 157.

267. *Id.* at 176.

268. *Id.* at 166.

conduct as model wives and mothers even in the face of scoundrel husbands.

Randall Kennedy explains *Dillon* and *Ferrall* solely in light of the quotidian family law considerations.<sup>269</sup> He notes that in these two cases race fell to the wayside in the face of countervailing concerns:

[A]bhorrence of racial mixing in marriage ran up against contempt for cads eager to use any means available to rid themselves of matrimonial and parental responsibilities. Faced with this conundrum, judges frequently view the legitimizing of even a racially tainted marriage as the lesser of the evils.<sup>270</sup>

Both Mrs. Dillon and Mrs. Ferrall swayed their respective appellate judges by performing as innocent and faithful wives. More than performing gender, however, they performed race, proving their whiteness through their womanhood.

The refusal to annul functioned similarly to the creation of common-law marriages, in which dissident extramarital relationships were transformed into legally recognized partnerships. The courts created a legal marriage relationship based on the appearance of marriage, such that society was assured that a couple that appeared married, was married.<sup>271</sup> In this way, the courts used common-law marriage “as a conservative, threat-subduing doctrine,”<sup>272</sup> normalizing extramarital relationships and silencing any potential social upheaval. As Ariela Dubler explains, by creating common-law marriages, “states literally made threatening nonmarital relations disappear.”<sup>273</sup> Similarly, the courts made potential racial distinctions disappear. With one judgment, Mrs. Marre was white, her marriage existed and her children were legitimate.<sup>274</sup> The judges affirmed a marriage existed where social expectations had been created, while admonishing the husband for disruptive attempts at escaping his marital obligations.

Unlike the common-law marriage doctrine, the reactions to the women in the annulment cases were not temporally constricted. By the beginning of the twentieth century, the view of women as in-

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269. KENNEDY, *supra* note 42, at 235–41.

270. *Id.* at 236. While Kennedy refers to “cases,” he only uses *Dillon* and *Ferrall*. *Id.* There is no indication that he had other cases in mind.

271. *See also* Dubler, *supra* note 19, at 963 (“Common-law marriage . . . took a nonsolemnized relationship and granted it the legal title of marriage because, in a social sense, the parties to the relationship acted like they were married. The doctrine . . . explicitly functioned by relying on a set of social judgments . . . to articulate a legal rule . . . .” (emphasis omitted)).

272. *Id.* at 1014; *see also* Clarke, *supra* note 254, at 564 (“[S]uch performance reification might simultaneously and unpredictably shore up the power of the underlying norm to exact conformity from individuals.”).

273. Dubler, *supra* note 19, at 1014.

274. *Marre v. Marre*, 168 S.W. 636 (Mo. Ct. App. 1914).

nocents facing corruption shifted to a “vision of a dangerous femininity, of conniving and gold digging women preying on the goodwill of innocent men (or their estates) through false performances of wifely conduct.”<sup>275</sup> Women, not men, now schemed and misled. The courts extended protection from, instead of to, women. As a result, even those who had faithfully performed their wifely duties and given themselves to their “husbands” no longer had claim to the security of marriage.<sup>276</sup> In contrast, when bringing a race annulment case and claiming whiteness, the right to that privilege continued uninterrupted.

### C. Use of Legally Irrelevant Equity Issues

The courts applied equitable arguments at odds with the black letter law before them. Unlike cases involving fraud, marriages that violated anti-miscegenation statutes were void. Therefore, issues of reliance, consent and knowledge were all irrelevant: the marriage remained invalid regardless.<sup>277</sup> Nonetheless, the courts devoted substantial time to considering these essentially immaterial factors. Two threads persist throughout the court opinions: (1) these men had freely undertaken their marriages and were responsible for the obligations they had undertaken, and (2) after relying on their wives’ representations of whiteness, husbands were barred from contesting this status.

In the case of void marriages, however, “[w]here the annulment statute is interpreted as being mandatory, the defense that plaintiff was in *pari delicto* or had ‘unclean hands’ is inapplicable, unless there is some statutory provision to the contrary.”<sup>278</sup> Missouri law contained no such statutory provision. The parties’ actions were irrelevant. They had no ability or authority to marry. The law already established that they lacked the requirements for that status. As the Louisiana Supreme Court emphasized:

The prohibition contained in [the anti-miscegenation statute] is one eminently affecting the public order. Hence the nullity declared by

275. *Id.* at 964.

276. *Id.* at 965 (“Patterns of performance no longer sufficed to constitute a legally recognizable family. Acting like a wife, in other words, no longer made one a wife.”).

277. See *supra* notes 51–73 and accompanying text for discussion of void versus voidable marriages.

278. *Annulment for Bigamy: Plaintiff's Misconduct or Un-Clean Hands: Property Incidents*, 7 WIS. L. REV. 108, 109 (1932) [hereinafter *Annulment*] (“The theory is that society is an interested party to every marriage, that it is beneficial to society that the status of the marital relationship be and remain unclouded, and consequently, that the usual equitable and legal considerations must be subordinated to public policy.”).

the same is absolute, and cannot be cured by ratification. The law . . . will not permit a marriage to exist between persons of two different races for a moment.<sup>279</sup>

Faced with Mrs. Marre, the court applied a very different doctrine. Mr. Marre's actions were statutorily irrelevant, but incorporated into the courts' calculation nonetheless. While the court discussed the issues of duress and coercion, prevailing social interests held sway. The threat to society from extramarital sex and illegitimate children was such that "there exist[ed] a social situation in which marriage is desirable to regularize the status, without too close a regard for the desires of the man."<sup>280</sup> Consequently, when a "man seeks annulment of a marriage to a woman whom he had seduced . . . [it creates a presumption] that the man married from motives of honor to rectify the social wrong done by him, rather than from fear of the injury threatened."<sup>281</sup> Even though Mr. Marre lacked such intentions, the court imposed them for him.

The court considered these actions pertinent even if statutorily irrelevant. In the words of one academic, these issues served "as make-weight arguments in otherwise denying an annulment,"<sup>282</sup> thrown in to justify disregard for the statute when it provided a result contrary to their notions of social justice and potentially threatened white dominance. Yet again, the judges ranked protecting standards of white womanhood above patrolling racial barriers. Regardless of Mr. Marre's appeal to racial status, the court would not allow him to disregard his social obligations in such a ruthless manner.

The judges were bound by fixed anti-miscegenation statutes. Unlike fraud, where the actions of the parties involved affected the ability to seek redress, the violation of state law required no findings of intent or fault. Either the marriage was void or it was not. The relationship was either heteroracial or homoracial. In the eye of the law, there was no in-between. Nonetheless, the courts spent much of their time considering "in-between."

In *Dillon*, the court relied on the theory of estoppel, "one broad principle that holds in its grasp the whole body of the case," to prevent Mr. Dillon's action.<sup>283</sup> Mr. Dillon had not previously questioned

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279. *Carter v. Veith*, 71 So. 792, 793 (La. 1916) (quoting *Succession of Minvielle*, 15 La. Ann. 342, 343 (1860)).

280. Robert Kingsley, *Duress as a Ground for Annulment of Marriage*, 33 S. CAL. L. REV. 1, 7 (1959).

281. *Id.* at 7 & n.31 (citing *Marre* as one example).

282. Edmond R. Anderson, Jr., *Annulment of Marriages in Missouri*, 21 MO. L. REV. 119, 150 (1956).

283. *Dillon v. Dillon*, 60 Ga. 204, 205 (1878).

the validity of his marriage or his wife's whiteness. To the contrary, "[f]or years and years, Mr. Dillon lived with Mrs. Dillon as his wife, recognizing and treating her as such."<sup>284</sup> They lived openly in Savannah, a factor of great importance for the court, as it was the "the largest city of Georgia" and a bastion of southern society.<sup>285</sup> Moreover, in 1857, Mr. Dillon petitioned the Georgia legislature for an act naming Mrs. Dillon and her children and asserting their rights and privileges as citizens of Georgia, a determination generally reserved for whites.<sup>286</sup> The proclamation emphasized their capacity to "inherit[ ], hold[ ] and receiv[e] all manner of property, real or personal, by bequest, deed, or in any other manner whatever."<sup>287</sup> The act constituted a public declaration of his commitment to Mrs. Dillon's whiteness, although such efforts suggest that he acted out of concern about his wife's public status.

The proclamation indicated that Mrs. Dillon's status was questionable, noting that, "doubts have existed whether [Mrs. Dillon] . . . is entitled to the rights and privileges of citizenship."<sup>288</sup> During the annulment case, the court took the proclamation as an assertion of whiteness by Mr. Dillon, "for at that period, to be a citizen of this state, was to be white, white persons only being then members of our body politic."<sup>289</sup> The integrity of Georgia's racial division required the court to uphold racial declarations of this sort. To acknowledge one of its "citizens" as black would mean that "citizen" no longer stood for white. Subjecting such a legislative decree to modification called into question the very value of whiteness and could prove destabilizing to all of Georgia, not just its largest city.

Justice Bleckley used the decree to further his estoppel argument against Mr. Dillon: "The act does not make her white, but is conclusive evidence against Mr. Dillon . . . that she is white."<sup>290</sup> As Mr. Dillon previously argued for Mrs. Dillon's whiteness, he could not later deny it. In the same way that he benefited from Mrs. Dillon's services as a wife, he benefited from her performance as white. Consequently, he was now barred from renouncing her status as either.

The same analysis occurred in *Ferrall*. As with *Dillon*, however, the arguments were statutorily irrelevant. According to North Carolina

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284. *Id.* at 206.

285. *Id.*

286. *Id.* at 204.

287. *Id.*

288. *Id.*

289. *Dillon*, 60 Ga. at 208.

290. *Id.*

law, the only legal consideration was whether Mr. Ferrall was white and Mrs. Ferrall “of negro descent to the third generation.”<sup>291</sup>

Likewise, in *Marre*, the court considered Mr. Marre’s improper behavior towards his wife.<sup>292</sup> Under common law, “[a]nnulment is fundamentally a creature of equity; a suit seeking annulment is a proceeding in equity.”<sup>293</sup> Under equity standards, for “all actions in which a court of conscience is applied to for relief, plaintiff must appear with clean hands.”<sup>294</sup> Consequently, for voidable marriages, “misconduct and ‘unclean hands’ are valid defenses to any suit for annulment.”<sup>295</sup> As a court of equity, it appropriately took into account the circumstances surrounding the Marres’ separation.

### D. Cases Not Threatening to Whiteness

#### 1. Women Married to Men of Color

The two times that unquestionably white women married unquestionably Asian men, the court ordered annulments. In *Naim*, Mrs. Naim sued for divorce on the grounds of adultery, based on the Racial Integrity Act passed five years earlier.<sup>296</sup> Mr. Naim had his own incentive to retain the marriage: a citizen of China, Naim needed to remain married for his immigrant visa. The case bounced between courts, twice making its way to the United States Supreme Court.<sup>297</sup>

291. See N.C. CONST. art. XIV, § 8 (“[All marriages between a white person and a negro or between a white person and a person of negro descent to the third generation inclusive are hereby forever prohibited.]”).

292. *Marre v. Marre*, 168 S.W. 636, 640 (Mo. Ct. App. 1914).

293. *Taylor v. Taylor*, 355 S.W.2d 383, 387 (Mo. Ct. App. 1962) (internal citations omitted). As *Marre* explains, “courts of equity . . . have always assumed jurisdiction in . . . [annulment suits], and applied to them the rules governing suits in equity brought to annul contracts.” *Marre*, 168 S.W. at 640.

294. *Marre*, 168 S.W. at 640.

295. *Annulment*, *supra* note 278, at 109.

296. *Naim v. Naim*, 197 Va. 80, 80 (1955). The Racial Integrity Act states:

It . . . [is] unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian . . . [T]he term “white person” shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons.

V.A. CODE ANN. § 20-54 (1950).

297. In 1955, upon receiving the case, the Supreme Court remanded to the Virginia Supreme Court on the grounds that the inadequacy of the record prevented the constitutional question from being considered “in clean-cut and concrete form, unclouded.” *Naim v. Naim*, 350 U.S. 891, 891 (1956) (citing *Rescue Army v. Municipal Court*, 331 U.S. 549, 584 (1947)). The Supreme Court of Virginia held that the record was sufficiently developed and affirmed the original decision of the trial court that the marriage was void. *Naim v. Naim*, 90 S.E.2d 849, 850 (Va. 1956). When returned, the United States Supreme Court held that the decision by the Virginia

In the Supreme Court, the only remaining question was whether Virginia's anti-miscegenation statute violated the Fourteenth Amendment.<sup>298</sup> The Supreme Court punted the case to avoid addressing the constitutional issue.<sup>299</sup>

In *Calma*, Mr. Calma initiated the suit, requesting a divorce or an annulment, based on cruelty, constructive desertion, bigamy and illegal miscegenation.<sup>300</sup> Mrs. Calma denied all counts.<sup>301</sup> The court declared the marriage invalid and enjoined the Calmas from "cohabiting as husband and wife" in the State of Virginia.<sup>302</sup> Mrs. Calma filed a second suit avowing desertion by her husband and requesting a divorce or annulment.<sup>303</sup> Subsequently, however, she asserted that as her marriage was legal in New Jersey when contracted,<sup>304</sup> Virginia had a constitutional obligation to recognize it.<sup>305</sup> The court reverted to a res judicata rationale, finding that the first court had already adjudicated the issue. Mrs. Calma received no divorce and no marital benefits.<sup>306</sup>

While Mrs. Naim and Mrs. Calma both risked losing alimony and any marital property, the court did not question their racial status. Nonetheless, by involving themselves in unambiguously interracial marriages, they had already sullied the image of true womanhood. The court signaled its disapproval of their transgressive behavior by denouncing the marriages. This ruling would provide warning to

Supreme Court "leaves the case devoid of a properly presented federal question." *Naim v. Naim*, 350 U.S. 985 (1956).

298. *Naim v. Naim*, 87 S.E.2d 749, 751 (Va. 1955).

299. When facing the constitutional issue, the courts most often responded with resounding support for the statutes. The Supreme Court used procedural grounds as its "'prudent avoidance' of an obvious test case." DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* 268-69 (1973). Justice Frankfurter, in particular, advocated that the Court avoid the case, urging that "the Court could defer the case for lack of 'a properly presented federal question.'" Dorr, *supra* note 57, at 119. According to the Solicitor General at the time, "[t]he record did present the constitutional issue clearly and squarely, but the Court wanted to duck it. And if the Supreme Court wants to duck, nothing can stop it from ducking." Phillip Elman, *The Solicitor General's Office, Justice Frankfurter, And Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 846-47 (1987). As a result, Justice Frankfurter and the Court "extended the life of miscegenation statutes eleven years—until the Court struck them down in *Loving v. Virginia*." Dorr, *supra* note 57, at 119.

300. *Calma v. Calma*, 128 S.E.2d 440, 442 (Va. 1963).

301. *Id.*

302. *Id.*

303. *Id.* at 441.

304. *Id.* The Calmas relocated to Virginia, when Mr. Calma, a member of the U.S. Army, transferred to the Norfolk military base under army orders. Wallenstein, *supra* note 50, at 419.

305. *Calma*, 128 S.E.2d at 441.

306. *Id.*

other white women to avoid racial mixing and other socially unacceptable relationships.

The court acted similarly in *Baker v. Carter*,<sup>307</sup> albeit under a slightly different analysis. In 1936, after only three months of marriage, Ernestine Baker filed for a divorce from Billy Baker “on the ground of habitual drunkenness and extreme cruelty.”<sup>308</sup> In response, Mr. Baker asserted he was a “full-blood Indian” while his wife was “of African descent.”<sup>309</sup> The record does not show that Mrs. Baker disputed this racial designation. In this case, the court faced a clearly non-white woman. As such, she presented no threat to the image of a lady or whiteness. Mrs. Baker did not and could not perform white womanhood, either in her role as wife and mother. Moreover, as her husband identified himself as a Seminole Indian, Mrs. Baker had already repudiated life in white society. She was beyond its confines.

## 2. *Finding Blackness*

The courts refused to accept claims to whiteness in only two cases.<sup>310</sup> In the first, *Kirby v. Kirby*, Mrs. Kirby denied she was black in her complaint, but presented no evidence.<sup>311</sup> Instead, the trial focused on whether her husband, Joe Kirby, was truly white.<sup>312</sup> In the second, *Sunseri v. Cassagne*, the court stressed that it was “with regret that we have to arrive at this conclusion, but the evidence in this case leaves us no alternative.”<sup>313</sup>

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307. Mr. Baker sought a writ of prohibition against the trial judge for granting his wife a divorce, thus providing the case name. *Baker v. Carter*, 68 P.2d 85, 86 (Okla. 1937).

308. *Id.* at 85. She requested alimony, attorneys’ fees and a restraining order, which the trial court provided pending divorce proceedings. *Id.* at 85–88. Mr. Baker appealed the application of any provisional orders, given that no valid marriage existed on which to base them. *Id.* The appeals court ultimately agreed with Mr. Baker on the legal principles involved. The opinion made no judgment as to the race of the parties, but emphasized, “if it appears that the marriage is in fact a nullity . . . ‘it would be monstrous that the law should require the payment of alimony pendente lite to one who clearly never was a wife.’” *Id.* at 86 (quoting *Reed v. Reed*, 37 So. 642, 642 (1905)). The Supreme Court remanded, suspending all orders by the trial court until a hearing on the validity of their marriage. *Id.* at 84.

309. *Id.* at 86. Under Oklahoma law, “[t]he marriage of any person of African descent, as defined by the Constitution of this State, to any person not of African descent, or the marriage of any person not of African descent to any person of African descent, shall be unlawful and is hereby prohibited within this State.” OKLA. STAT. § 1677 (1931).

310. *Sunseri II*, 196 So. 7 (1940); *Kirby v. Kirby*, 206 P. 405 (Ariz. 1922). In several cases, the court never definitively answered the question. See *Hansford v. Hansford*, 10 Ala. 561 (1846); *Baker v. Carter*, 68 P.2d 85 (Okla. 1937).

311. *Pascoe*, *supra* note 42, at 51.

312. *Kirby*, 206 P. at 406; *Pascoe*, *supra* note 42, at 45.

313. *Sunseri II*, 196 So. at 10.

In *Kirby*, Mayellen Kirby claimed whiteness, but called no witnesses and did not take the witness stand herself.<sup>314</sup> Faced with this silence, the trial court took Mrs. Kirby's race as black, an assumption subsequently adopted by the Arizona Supreme Court.<sup>315</sup> In most annulment cases where the race of the wife was at issue, she took the witness stand while the court examined her performance and embodiment of whiteness and womanhood. Here, no "white" woman stood pleading before the court; the court saw no white womanhood to defend. When women did appear before the court to tell their story and show their status as white woman, the judges generally moved to protect that status. Mrs. Kirby, however, was just another black woman of little consequence. As such, the court extirpated her marriage and any protection she drew from it.

For scholar Peggy Pascoe, *Kirby* demonstrates how anti-miscegenation statutes reinforced the patriarchal system by allowing white men to skip out on their obligations.<sup>316</sup> In her words, "the judge resolved the miscegenation drama by adding a patriarchal moral to the white supremacist plot."<sup>317</sup> Pascoe elucidates:

[Under] miscegenation laws . . . it proved easy for white men involved with women of color to avoid the social and economic responsibilities they would have carried in legally sanctioned marriages with white women. By granting Joe Kirby an annulment, rather than a divorce, the judge not only denied the validity of the marriage while it had lasted but also in effect excused Joe Kirby from his obligation to provide economic support to a divorced wife.<sup>318</sup>

In essence, he does: Joe escaped, leaving behind Mayellen and all his incumbent responsibilities. The case, however, constitutes an anomaly. When contrasted with the other annulment opinions, the arguments presented to the court and the issues addressed by the judge were poles apart.

Previous cases hinged on the ability to define the wife as black. Race was embodied in the woman. Her life and body were presented for analysis and adjudication, while the men bypassed such scrutiny. The court constructed a white woman before it and consequently did not permit her husband to desert her in such a manner. The *Kirby* case had no woman to be figuratively—or literally—disrobed for evaluation by the male judges. Mayellen sat there silently, reduced to a

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314. *Kirby*, 206 P. at 406.

315. *Id.*

316. Pascoe, *supra* note 42, at 52.

317. *Id.* at 51–52.

318. *Id.* at 52.

mute spectator. She did not demonstrate that she had fulfilled her duties as wife or that Joe had failed in his obligations. She presented no narrative to engage and compel the judges, no showing that she was deserving of white status by performing her white womanhood such that denying her that status presented a risk to the racial system as a whole.

*Sunseri v. Cassagne* presents a different story. Initially, *Sunseri* duplicated the themes in the previous cases.<sup>319</sup> In response to a prosecution for alimony, Cyril P. Sunseri asserted that he was white, while his wife, Verna Cassagne, was black, in violation of Louisiana law.<sup>320</sup> The court traced Mrs. Cassagne's lineage back to 1808 and her great-great grandmother, a "femme couleur libre."<sup>321</sup> Mrs. Cassagne presented her litany of whiteness. She had grown up as white, was born in a white maternity ward, baptized as white, and was a student at a white school.<sup>322</sup> She participated in civic society as white, registering as a white Democratic voter and voting as white.<sup>323</sup> She had performed socially as white, sitting in the white sections of railroad cars, streetcars and buses, as well as in hotels and restaurants.<sup>324</sup> Moreover, her "friends and associates [we]re apparently exclusively of the white race."<sup>325</sup>

In response, Mr. Sunseri presented documentation of Mrs. Cassagne's family, including birth certificates listing Mrs. Cassagne and her aunts as colored.<sup>326</sup> The court found that:

[a]part from these certificates, the evidence . . . does not warrant us in holding that defendant is a member of the colored race, particularly in view of the overwhelming testimony that she and her immediate associates have always been regarded as members of the white race and have associated with persons of that race.<sup>327</sup>

Mrs. Cassagne asserted she had records disproving the certificates. The North Carolina Supreme Court remanded the case, emphasizing

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319. *Sunseri v. Cassagne* went through several rounds of litigation, moving up and down through the courts. *Sunseri I*, 185 So. 1, 3 (La. 1938). Initially, the court was so reluctant to annul the marriage and leave Verna Cassagne to undeserved infamy, that it punted the case instead. The court remanded, overruling the original decision and providing Miss Cassagne another chance to prove her whiteness. *Id.*

320. *Sunseri I*, 185 So. at 2; LA. CIVIL CODE ANN. art. 94 (1908) ("Marriage between white persons and persons of color is prohibited, and the celebration of all such marriages is forbidden, and such celebration carries with it no effect and is null and void.").

321. *Sunseri I*, 185 So. at 3.

322. *Id.* at 4.

323. *Id.* at 5.

324. *Id.*

325. *Id.*

326. *Id.*

327. *Sunseri I*, 185 So. at 5.

that "her marriage should not be annulled on the ground that she is a member of the negro race unless all the evidence adduced leaves no room for doubt that such is the case."<sup>328</sup>

When considering the case a second time, however, the supreme court said it had no choice but to rule against Mrs. Cassagne and upheld the lower court's judgment that Cassagne was black.<sup>329</sup> The court acted with great reluctance, stressing, "[i]t is with regret that we have to arrive at this conclusion, but the evidence in this case leaves us no alternative."<sup>330</sup> The physical documents would not disappear with a wave of judicial discretion.

Moreover, undermining a verified birth certificate could create great social upheaval. By invalidating this document, thousands of people who were designated black on their birth certificates might now claim whiteness if they were able to pass as white. A "true" white woman and lady would not have a birth certificate designated black. She would not allow it,<sup>331</sup> and her family would not have allowed it. To do so would create a racial taint and, by implication, make such a woman part of the degraded class and not deserving of protection. Although the court's decision had ramifications for Mrs. Cassagne, her fall created no dangers for white womanhood as a whole, but protected whiteness instead.

## VI. CONCLUSION

Concern over interracial marriage has continued from the colonial era into our twenty-first century life. Since their inception, anti-miscegenation bans have been rigidly and violently enforced through both legal regulation and social norms. Courts across the nation unambiguously stressed the importance of maintaining anti-miscegenation laws. As the court in *Naim* avowed, "it is for the peace and happiness of the colored race, as well as of the white, that laws prohibiting intermarriage of the races should exist."<sup>332</sup> Or in Judge Leon Bazile's infamous words:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the

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328. *Id.*

329. *Sunseri II*, 196 So. 7, 9 (La. 1940).

330. *Id.* at 9.

331. In the early eighties, Susie Guillory Phipps spent eight years and over fifty thousand dollars in an unsuccessful attempt to have the designation on her Louisiana birth certificate changed from black to white. See *Doe v. State Dep't Health & Human Res.*, 479 So. 2d 369, 372 (La. Ct. App. 1985); Art Harris, *Louisiana Court Sees No Shades of Gray in Woman's Request*, WASH. POST., May 21, 1983, at A3.

332. *Naim v. Naim*, 87 S.E.2d 749, 752 (Va. 1955).

interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.<sup>333</sup>

As Sister Annella Lynn wrote in the early sixties, “[t]here is probably no subject so highly charged with emotionalism as is the subject of interracial marriage.”<sup>334</sup> The “bulk of White Americans were just as horrified at the thought of interracial marriage in 1950 as they had been in 1900 or 1850.”<sup>335</sup> Even today, this legacy remains. A 1990 study “found that 65% [of white people] object to a close relative marrying an African American.”<sup>336</sup> In 2000, Alabama held a referendum on whether to remove the last anti-miscegenation statute in the United States from their law books. Forty percent of voters favored maintaining the unenforceable law.<sup>337</sup> In the twenty-first century, black-white unions constitute less than one percent of marriages in the United States.<sup>338</sup>

Marriage has always been critical for the state, society and individuals: “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>339</sup> In the words of the courts, marriage is: “a public institution established by God himself . . . essential to the peace, happiness, and well-being of society”;<sup>340</sup> “the first step from barbarism to incipient civilization, the purest tie of social life and the true basis of human progress”;<sup>341</sup> “one of the ‘basic civil rights of man’”;<sup>342</sup> and, always, a “great public institution.”<sup>343</sup> Marriage is both government action and an intimate undertaking, such that “there are three partners to every civil marriage: two willing spouses and an approving State.”<sup>344</sup>

Marriage continues as a government institution vested with copious state benefits, a linchpin used to construct and administer the country.

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333. Record at 15, *Loving v. Commonwealth*, 147 S.E.2d 78 (Va. 1966) (No. 6163).

334. ANNELLA LYNN, *INTERRACIAL INTERMARRIAGE IN WASHINGTON, D.C., 1940–47*, at 1 (1953) (“This holds particularly true in regard to the marriage of whites and Negroes.”).

335. KENNEDY, *supra* note 42, at 88 (quoting Professor Paul R. Spickard).

336. Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 HARV. C.R.-C.L. L. REV. 255, 269 n.64 (2002) (internal citations omitted).

337. *Gay Marriage Opponents Mimic Objections to Interracial Marriage*, UNIVERSITY OF VA. L. SCH., Oct. 4, 2004, [http://www.law.virginia.edu/html/news/2004\\_fall/forde.htm](http://www.law.virginia.edu/html/news/2004_fall/forde.htm).

338. KENNEDY, *supra* note 42, at 127.

339. *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

340. *State v. Gibson*, 36 Ind. 389, 403 (1871).

341. *Adams v. Palmer*, 51 Me. 480, 485 (1863).

342. *Loving*, 388 U.S. at 13.

343. *Noel v. Ewing*, 9 Ind. 36, 48 (1857).

344. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

Nonetheless, the debate persists as to who may marry. The argument remains, a lingering issue to be hurled up as a rallying cry by politicians whenever needed. Despite notions of marriage as an ancient, inherent, and steadfast institution for all of human kind, the legal and social bond remains socially, temporally, and geographically contingent. Marriage allocates legal rights and benefits. It is a means of distributing and maintaining privilege and, as such, is zealously guarded, particularly in moments of tension and social fear.

People still fight “in defense of marriage,” no longer for whiteness, but instead against such mounting terrors as polygamy and same-sex marriage. Mimicking earlier debates, we argue these barriers remain necessary to prevent society from plunging into disaster. Sex-based annulment cases provide one modern yet burgeoning example. Fractured couples must still turn to the courts for answers, leaving in judicial hands the final settlement of whether their marriages exist. For some, their marriage was not a legal mirage.<sup>345</sup> For others it was.<sup>346</sup>

Looking back at the crushing environment of legal racial segregation, the annulment cases stand out as an apparent anomaly. In actuality, race remained fundamental. Through the annulment case decisions, the courts stepped in to protect women with a taint of blackness, declaring them pure and worthy of the mantle of whiteness. By legally erasing the women’s potential racial taint, the courts seemingly choose to protect obedient women against their husbands, affirming marriage and domesticity over racial prejudices. In reality, the courts acted to protect the ideology of whiteness. To preserve notions of white womanhood, this status had to be defended, even as it violated standards of racial purity.

In these tiny slivers of time, the courts took up the task, one moment to apply their judgment onto the parties with resulting vibrations across the community. In these cases, Mayellen, Alice, Lillian, and others turned their fate over to the white men in robes. One after another, they were sheltered. Their lives and their status were maintained; they had not fallen. Nonetheless, the courts did not act out of sheer kindness, moved by the women’s compelling narratives. These women were held to be white and protected as white, in order to protect whiteness itself.

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345. See, e.g., *M.T. v. J.T.*, 355 A.2d 204 (N.J. 1976); *Vecchione v. Vecchione*, Civ. No. 96D003769 (Cal. Sup. Ct. 1997).

346. See, e.g., *B. v. B.*, 355 N.Y.S.2d 712 (N.Y. Sup. Ct. 1974); *Kantaras v. Kantaras*, Case No: 98-5375CA (Fla. Cir. Ct. 2003).