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WHAT COMES NATURALLY

Miscegenation Law and the Making of Race in America

Peggy Pascoe

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Chapter Four

The Facts of Race in the Courtroom

"All marriages of persons of Caucasian blood, or their descendants, with negroes, Mongolians or Indians, and their descendants, shall be null and void."

—*Arizona Revised Statutes, 1913*

TUCSON, ARIZONA

On March 21, 1921, Joe Kirby took his wife, Mayellen, to court. The Kirbys had been married for seven years, and Joe wanted out. Ignoring the usual option of divorce, he asked for an annulment, charging that his marriage had been invalid from its very beginning because Arizona law prohibited marriages between "persons of Caucasian blood, or their descendants" and "negroes, Mongolians or Indians, and their descendants." Specifically, Joe Kirby claimed that while he was "a person of the Caucasian blood," his wife, Mayellen, was "a person of negro blood."[1]

The *Kirby* case quickly disintegrated into a definitional dispute that bordered on the ridiculous. The first witness was Joe's mother, Tula Kirby, who gave her testimony in Spanish through an interpreter. Joe's lawyer laid out the case by asking Tula Kirby a few seemingly simple questions:

Q. To what race do you belong?

A. Mexican.

Q. Are you white or have you Indian blood?

A. I have no Indian blood. . . .

Q. Do you know the defendant [Mayellen] Kirby?

A. Yes.

Q. To what race does she belong?

A. Negro.

Then the cross-examination began.

Q. Who was your father? [Mayellen's lawyer asked Tula Kirby.]

A. Jose Romero.

Q. Was he a Spaniard?

A. Yes, a Mexican. . . .

Q. Was [your mother] a Spaniard?

A. She was on her father's side.

Q. And what on her mother's side?

A. Mexican.

Q. What do you mean by Mexican [do you mean] Indian, a native [?]

A. I don't know what is meant by Mexican. . . .

Q. Who was your grandfather on your [mother's] father's side?

A. He was a Spaniard. . . .

Q. Where was he born?

A. That I don't know. He was my grandfather.

Q. How do you know he was a [Spaniard] then?

A. Because he told me ever since I had knowledge that he was a Spaniard. . . .

Q. Then, as a matter of fact, you don't know what your blood is at all?

A. I do know that my mother is Mexican and my father is Mexican, half Spaniard.

Next the questioning turned to Tula's opinion about Mayellen. Joe's lawyer asked Tula:

Q. You said Mrs. [Mayellen] Kirby was a negress. What do you know about Mrs. Kirby's family?

She answered:

A. I distinguish her by her color and the hair; that is all I do know.[2]

The second witness in the trial was Joe Kirby himself, and by the time he took the stand, everyone in the courtroom knew they were in murky waters. When 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 of the witness. "Oh, no," said the judge, breaking into the proceedings, "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 that "I never knew any one of his people."[3]

Hesitant to go any deeper into this morass, Joe's lawyer rested his case. He told the judge he had established that Joe was "Caucasian." Mayellen's lawyer scoffed, claiming that Joe had "failed utterly to prove his case" and arguing that "[Joe's] mother has admitted that. She has [testified] that she only claims a quarter Spanish blood; the rest of it is native blood." At this point the court intervened again. "I know," said the judge, "but that does not signify anything."[4]

Know It When You See It

Most Americans are sure they know race when they see it, but very few can offer a definition of the term.[5] The question of what race signifies and what signifies race bedeviled the creators and enforcers of miscegenation law—from the state legislators who enacted the laws to the judges who tried to carry them out to the marriage license clerks required by law to turn some, but not other, interracial couples away.

Miscegenation law made race classification seem to be imperative—that is, in order to determine who could and couldn't marry, it was first necessary to identify every person's race quickly and correctly. The more imperative it seemed to assign people to racial categories, and the harder officials tried to pin down race, the more arbitrary—and less logical—the categories became. The next two chapters will trace this contradiction, between the imperative of race classification on the one hand and the unreliability of race categories on the other, as it emerged in two key arenas of miscegenation law enforcement: the courtroom and the marriage license bureau.

The imperative of race classification depended on an illusion of certainty that was reflected in the enactment of state laws defining race as well as in

the confident pronouncements of scientists who made it their business to define and categorize the races. During the 1920s, when Joe Kirby went to court, race was a central element of state policy-making, visible in everything from miscegenation law to school segregation, from railroads to the rules for immigration and naturalization. The white supremacist conviction that race was a compellingly significant factor in culture, history, and the development of civilization was everywhere on display, even, sometimes, among those who tried to challenge the presumptions of white supremacy in the name of racialized groups. But no matter how deeply people believed in the significance of race, or how often they linked race to power and resistance in everyday life, they had a devil of a time defining it. Despite its enormous social power, race was neither a natural essence nor a scientific reality, and pinning it down was often a logical impossibility.

This was nowhere more apparent than in the courtroom, where plaintiffs, defendants, lawyers, judges, and juries repeatedly puzzled over how to categorize by race. For every prosecutor who worked to translate the lists of races named by state legislators into identifiable, provable categories, there was a defense lawyer ready to poke holes in the kinds of evidence used to prove race. For every judge determined to enforce the most reliable categories he could find, there was a defendant ready to argue that his or her race had been misconstrued. And for every scientist who offered one answer to a problem of race classification, there was another scientist with a different answer.

These doubts were apparent to all concerned. But, as this chapter will show by exploring the history of race-making in law, science, and the courtroom, the perceived need to determine the legal "fact" of race survived despite repeated criticisms of the contradictions, gaps, and logical deficiencies of the process of race classification. Indeed, it was a measure of the power of miscegenation law in this period that, although many people recognized the arbitrary nature of race classifications and some individuals succeeded in persuading courts they had been misclassified, no one succeeded in dislodging the imperative of race classification, which remained at the very heart of miscegenation law.

Making Race in the Courtroom

In the courtroom, the imperative of race classification made its appearance early and often. The primary form it took was that of a logical, practical task: in order to enforce miscegenation law, it was necessary to classify individuals by race. Yet the process of determining race in a courtroom was anything but precise. It began at the local level, where, as historian Ariela Gross has shown in a fine study of southern courts, trials were structured by racial inequalities that were more personal and performative than mathematical.[6] Local juries cared little about the technicalities of legal standards of definition, but they cared a great deal about the White community's need to identify and place individuals in the local racial hierarchy. White male judges and juries sat in judgment on the race of local residents in a society in which White people were so deeply invested in supremacy that the mere charge that a person might be Black was considered humiliating. If the community was small enough, jurors might know some of the lawyers, litigants, or witnesses personally; in any case, they were likely to be participants in local knowledge and gossip networks about racial reputations.

The strategies lawyers used for determining race in miscegenation trials were formulated in cases involving charges of blackness and in circumstances that enabled juries to apply the nebulous definitions of race popular among White southerners without much concern for the niceties of legal definitions or scientific authority. Whenever they could, lawyers relied on the jury's visual scrutiny to determine the race of the plaintiff or defendant who appeared in the courtroom before them. Since lawyers, judges, and juries believed that the race of a person was usually obvious, visible in skin color and physical characteristics, this technique had the considerable advantage of appearing to rest on the common sense of jurors rather than legal strategy and thus appearing to be no technique at all. In other words, the visual scrutiny technique made it seem as if judges and juries were merely recognizing or identifying preexisting race rather than producing and enforcing race classifications.

But the technique of visual scrutiny worked better in some cases than in others. In so-called borderline cases, where the supposedly natural fact of skin color either was not so obvious or did not fit the social roles it was presumed to match, lawyers had to produce more explicit evidence. Some of these cases showed just how deep the belief that one could see the race of a person written on his or her body really ran. In the hope that race would surely become evident if juries were only allowed to see enough physical markers, judges sometimes allowed juries to see parts of the body that would not ordinarily have been visible in the courtroom. One woman was asked to display her fingernails and remove her shoes, another to partially disrobe before a jury in an attempt to uncover supposedly persuasive physical evidence of race.[7]

Yet very few lawyers were content to let borderline cases rest solely on a jury's impression of physical markers of race. In order to ensure that the jury saw the same race they wanted them to see, lawyers also called witnesses to offer additional opinions. Judges routinely allowed lawyers to ask, and

witnesses to testify, about a person's ancestry, associates, and reputation in the community; they even allowed testimony about the very physical characteristics that were supposed to be on obvious display in the courtroom. In one Alabama case, for example, when a woman indicted for miscegenation denied the charge that she was "a negro or a descendant of a negro," witnesses testified that "you can tell by her looks she is a negro," that "I know she has negro associates," and that "I saw negro women in the house all the time, and she has been on the streets with negroes."[8]

Family members were often asked to testify about the physical characteristics of their ancestors. So were local people with some claim to authority, such as physicians and midwives, police officers, court bailiffs, and the "colored" pastor of a local Black church. The most common witnesses, however, were friends and neighbors, called by both sides on the assumption that they had, as the Supreme Court of North Carolina put it, "had opportunities of observation."[9] In court, lawyers quizzed them for their observations about everything from a person's skin color to a person's racial reputation in the community to a person's links to segregated churches and schools.

Because race was believed to be a natural fact determinable by ordinary observation, nineteenth-century courts saw little need for expert witnesses, and lawyers made few references to scientific classifications of race. As the Supreme Court of North Carolina again explained, "It was not necessary that the witness should be an expert to testify to a matter which is simply one of common observation."[10] In local courts, judges allowed juries to hear a wide range of evidence, from unspoken observation of physical characteristics to testimony about friends and associations, then held that the race of the defendant was ultimately "an issue of fact" for the jury (or, in cases without a jury, for the judge) to decide.[11] In other words, in borderline trials judges and juries produced a legal fact of race that would, presumably, mirror the natural fact of race they also presumed must exist, even, and perhaps especially, in cases where race appeared to be much less than obvious.

Throughout the nineteenth century, lawyers who sought to challenge racial evidence found it very hard going. The appellate courts that considered local verdicts routinely upheld all sorts of evidence of race. Their decisions make for grim reading. "There was no error," the Supreme Court of Alabama insisted, "in allowing the State to make profert of [show] the person of John Blue to the jury, in order that they might determine by inspection whether he was a negro, as charged in the indictment." The Texas Court of Criminal Appeals upheld the use of a person's reputation for being of a particular race: "The fact that her first husband was a white man was a circumstance that might go to show that appellant was known and recognized as a white

woman." The Supreme Court of North Carolina agreed, seeing "no force" in objections "to the witness testifying that Anne Booth was a colored person and reputed to be such" and also upholding "the testimony of the witness who knew her and had had opportunities of observation, that in his opinion said Anne was of mixed blood."[12]

During the 1880s and 1890s, when the judicial consensus on the constitutionality of miscegenation law was relatively new and fragile, appellate courts routinely upheld convictions in miscegenation court cases. But the more the constitutionality of miscegenation law could be taken for granted, the more room there was for judges' doubts about racial proof to grow. Obliged to pay attention to the laws passed by state legislatures, appellate judges were sometimes receptive to defense lawyers who exposed the gaps between the vagaries of local race-making practices and the specific definitions enshrined in state law. As these doubts grew, appellate court decisions began to diverge from local court judgments. One reason for this gap was that since individual litigants rarely appeared in person in appellate courts, appellate judges were often unable to rely on the visual scrutiny that lower-court judges and juries took for granted. Without the evidence of their own eyes to persuade them of what they were seeing, appellate judges were in a position to notice the discrepancies and contradictions that marked race-making in local courts. Thus the Court of Appeals of Alabama overturned one man's conviction, after noting that a lower-court judge's belief that the defendant was "of Indian and Spanish origin" conflicted with a jury verdict that he was "of African origin." In such a case, the justices concluded, "one cannot help asking how the trial judge made this ascertainment," which was "in no wise evidence in the case." Appellate judges were also in a position to notice just how far local prosecutors stretched the commonplace custom of calling witnesses to testify to skin color or other physical characteristics. The Criminal Court of Appeals of Oklahoma, for example, freed one couple that had been indicted for fornication on racial evidence the court dismissed as the "unscientific opinions of ignorant men who worked for a livelihood in and around the territorial courts."[13]

The Illusion of Certainty

When judges who were charged with enforcing miscegenation laws had questions about racial categories, there were two obvious places to look for answers: the precise wording of the race definition laws passed by state legislatures and the authoritative expertise of race science.

Laws that tried to define race were a product of the difficulties southern and border states had long encountered in setting racial boundaries. The first such laws supported slavery by preventing free Blacks from voting, testifying, serving on juries, or attending public schools. After the Civil War, when miscegenation law inherited from slavery the task of defining race in the law, many states placed definitions of race directly in the text of their miscegenation laws. These definitions took one of two forms. The first, used by a handful of southern states, measured race by the yardstick of ancestry. Thus Alabama prohibited Whites from marrying "any negro, or the descendant of any negro, to the third generation, inclusive, though one ancestor of each generation was a white person." The second, and far more common, form, used by most southern states and a handful of border and western states as well, measured race by a mathematical fraction of racial blood, a so-called blood-quantum standard. Thus, Indiana voided marriages between "any white woman" or "any white man" and any person "having one-eighth part or more of negro blood." The vast majority of statutory definitions of race used the terms "Negro" or "colored," as Indiana did, to refer to African Americans, but a couple of western states applied blood-quantum standards to other racial groups as well. Oregon, for example, forbade "any white person, male or female" from marrying "any negro, Chinese, or any person having one-fourth or more negro, Chinese, or Kanaka blood, or any person having more than one-half Indian blood." The specific fractions used in blood-quantum laws varied a bit from state to state (and sometimes, as in Oregon, from group to group), but during the nineteenth century, most states settled on a one-eighth standard.[14]

Both definitions—ancestry and blood quantum—framed the imperative of race classification in ways that made charges of non-Whiteness hard to refute. Under the terms of most ancestry definitions, a person with seven White great-grandparents and one Black great-grandparent would be categorized as a "negro." Similarly, blood-quantum definitions translated one-eighth "negro blood" into the category "Negro" and one-fourth "Kanaka blood" into the category "Kanaka." The notion of racial blood was, of course, a fiction: there are no racial differences in blood, and therefore no way to measure them. In the final analysis, blood-quantum definitions, too, relied on ancestry. But no matter what statutory standard was adopted, or what it was called, a relatively small percentage of Black or Asian American or Indian blood or ancestry took on greater importance than a seemingly larger percentage of White blood or ancestry.

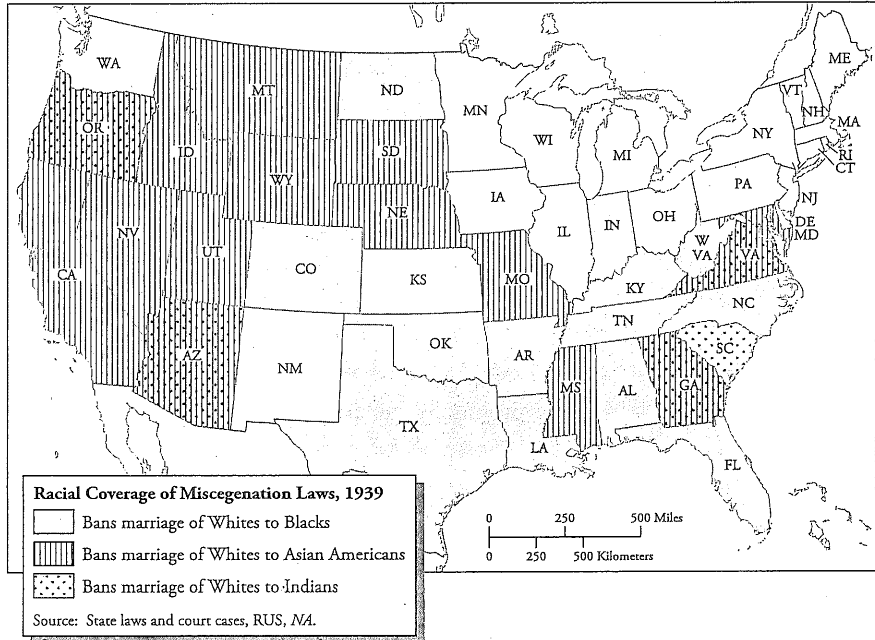
If race definition laws were one place judges could look for the illusion of certainty, another was to the pronouncements of race scientists. Since the early 1800s, white supremacy and race science had been largely interdependent enterprises. A century-long parade of experts—beginning, in the nineteenth century, with naturalists, physicians, ethnologists, and physical anthropologists and ending, after the turn of the twentieth century, with eugenicists—had claimed scientific authority over the study of race, and all had lent their authority to various forms of white supremacy one after another. These scientists are often described as biological determinists, but that description is more than a little misleading. Physical difference was the indicator race scientists used to refine their classification schemes, but physical difference was not, in their eyes, the essence of race. In their formulations, racial essence stretched seamlessly from physical shape to character, morality, psychology, social organization, even, in the more elaborate schemes, to language. In other words, race scientists invested the term "race" with all the explanatory power we now associate with the term "culture."[15]

Race scientists convinced themselves and many others of the significance of race, but their expertise rested on decidedly shaky foundations. While racialists agreed that race signified a great deal, they did not—and they knew they did not—even agree on such a seemingly simply matter as how many races there were. Early estimates were low: in the first decades of the nineteenth century, for example, natural historians debated whether there were three, four, or five major races. Most of these groupings corresponded with geography or skin color, and when they didn't, no matter. When scientists found an area of the world, such as the Pacific Archipelago, that showed substantial intermarriage, they took it as a challenge to separate the mixtures into their supposedly pure original categories.

And when scientists ran into difficulty classifying races, they tried to straighten out their confusion by subdividing their classification schemes into more and more categories. As a result, the number of scientifically recognized races increased steadily over the course of the nineteenth century. The more links Americans had drawn between race and public policy, the more attention they had given to listing and identifying races, and the harder they had looked for scientific systems to ground their classifications. Yet even among scientists, there was an enormous gap between the perceived necessity to classify the races and the ability to agree about who fit into which one. For much of the nineteenth century, ethnologists and physical anthropologists had stood as the authoritative experts on scientific race classification, but despite their supposed expertise, they disagreed—often sharply—over the number and variety of races. Rather than give up the project of racial classification entirely, though, ethnologists solved their disagreements (and retained their professional authority) by either adding more categories or rearranging the ones already at hand into major and minor groups. By the time the United

States Immigration Commission published the *Dictionary of Races and Peoples* it designed to enforce its racially based National Origins immigration policy, the dictionary listed forty-five different races or peoples and spoke of grand racial divisions with multiple subdivisions. By the 1920s, some ethnologists, like eugenicists, were shifting the focus of racial definition schemes by building on distinctions that T. H. Huxley, a nineteenth-century ethnologist, had drawn between so-called Xanthochroi, or "fair whites," of northern Europe and Melanochroi, or "dark whites," of Southern Europe.[16]

As racial categories multiplied, in science as well as in the law, the map of miscegenation laws grew increasingly complex. More than a dozen states added new groups to their lists of the races prohibited from marrying Whites. Montana (1909) and Nebraska (1913) added "Japanese" and "Chinese."[17] Missouri (1909) and Idaho (1921) added "Mongolians"; and Nevada (1911), Wyoming (1913), California (1933), and Maryland (1935) added "Malays."[18] South Dakota added "Corean, Malayan, or Mongolian" to its state law in 1913, and Arizona added "Malays" and "Hindus" in 1931.[19] In some states, the lists of named races grew longer with each successive revision. Georgia's 1927 law named "West Indian, Asiatic Indian, Malay, Japanese, or Chinese"; Arizona's 1931 law named "Negroes, Hindus, Mongolians, members of the Malay race, or Indians, and their descendants"; Utah's 1939 law used the phrase "Mongolian, member of the malay race or a mulatto, quadroon, or octoroon."[20] And,



under the influence of race scientists' constant search for racial purity, several states, including Oklahoma (1907), Arkansas (1911), Tennessee (1917), Virginia (1924), Alabama (1927), and Georgia (1927), adopted one-drop standards of white purity.[21]

By end of the 1930s, the list of races named in miscegenation law was so complex and convoluted that its logic was apparent to no one. In one state or another, all of the following groups were prohibited from marrying Whites: Negroes, Mulattoes, Quadroons, Octoroons, Blacks, Persons of African Descent, Ethiopians, Persons of Color, Indians, Mestizos, Half-Breeds, Mongolians, Chinese, Japanese, Malays, Kanakas, Coreans, Asiatic Indians, West Indians, and Hindus. In judicial rhetoric, the presumption that race classifications were natural and obvious buttressed the claim that interracial marriage was unnatural. In practice, though, the obvious illogic of these race classifications stretched this conceit close to the breaking point.

So Little Certainty to Offer

Faced with puzzles like that of Joe and Mayellen Kirby while trying to enforce the sprawling, ungainly state-by-state network of increasingly complicated miscegenation laws, it is no wonder that judges longed for clearer definitions of race and more consistent lists of categories. Judges who lived in states like Arizona, which had no race definition law on its books, might have longed for such a blood-quantum statute, though those in states that had such laws soon learned that their seemingly mathematical precision of blood quantum was also an illusion. Others, like the Oklahoma judge who had dismissed the opinions of casual acquaintances as "unscientific," seemed to yearn for the authority of scientific expertise. But if, at first glance, race science seemed to provide a handy solution to these problems—and it did, indeed, offer the authority of widely acknowledged expertise—it soon became clear that expertise only compounded the problem. Science had so little certainty to offer that resorting to scientists only made the problem worse.

Judges who ventured into the writings of race scientists came back appalled by the seemingly limitless lists they encountered there. In California, for example, one judge discovered that if the latest writings of ethnologists were taken as the basis of race classification, Californians who had prohibited "whites" from marrying "Mongolians" would have been targeting more groups than just Chinese, Japanese, Koreans, and Filipinos. This judge had learned, much to his consternation, that "Laplanders, Hawaiians, Estonians, Huns, Finns, Turks, Eskimos, American Indians, native Peruvians, Native

Mexicans and many other peoples . . . are included within the present-day scientist's classification of 'Mongolian.'" The more race scientists had to say about Europeans, the more uncomfortable even the staunchest defenders of white purity seemed to become. In 1935, for example, when a Washington state legislator proposed a miscegenation law that would have defined Whites so as to exclude "those of eastern and southeastern Europe embracing the Balkan peninsula or states, and Russia as now delineated," protests from the Slavic-American Federation helped ensure that the bill went down to defeat.[22]

Resorting to race science pushed defenders of miscegenation law into one logical contortion after another. Consider, for example, the logical inconsistency between the scientific concept of racial purity and the legal structure of white supremacy. Whether the scientist in question was an eighteenth-century naturalist, a nineteenth-century ethnologist, or a twentieth-century eugenicist, the project of race science was ultimately based on a belief that it was scientifically possible to identify, and politically desirable to maintain, a particular number of "pure" races.

Miscegenation law, however, depended on playing fast and loose with the logic of maintaining several pure races; it translated a theoretical commitment to racial purity into an actual commitment to white supremacy by using the legislative and administrative race-defining powers of the state to protect only the racial purity of Whites. So even as judges clung to the constitutional fiction that miscegenation laws "applied to all races alike," miscegenation laws actually prohibited Whites from marrying other groups, like "Negroes," "Mongolians," or "Malays," without prohibiting "Negroes," "Mongolians," or "Malays" from marrying each other. In California, for example, Blacks were prohibited from marrying Whites, but they could, and did, marry Indians and Asian Americans. Likewise, the addition of "Malays" to California's miscegenation law meant that Filipinos could no longer marry Whites, but they could, and did, continue to marry Blacks and Indians.

Like California, most states tried to grasp both sides of this contradiction—the "white purity" structure of miscegenation law on the one hand and the "equal application" rationale on the other—at one and the same time. But as the white supremacist drive for purity increased the pressure to segregate not only Whites and Blacks but also those who were neither Whites nor Blacks, a few states began to experiment with miscegenation laws that applied solely to groups labeled "non-White." North Carolina and Louisiana, for example, passed laws that prohibited Indians from marrying Blacks. North Carolina's list of the specific Indians forbidden to marry "Negroes" evidently required a good deal of fine-tuning. In 1887, the state prohibited "Negroes" from

marrying "Croatan Indians," and in 1911 it revised that provision to cover marriages to "Indians of Robeson County," but in 1913, it revised this category again to cover "Cherokee Indians of Robeson County."[23] Louisiana's law, passed in 1920, prohibited all "persons of the Indian race" from marrying "persons of the colored and black race."[24] Maryland passed a 1935 law banning marriages between "a negro and a member or the Malay race, or between a person of negro descent, to the third generation, inclusive, and a member of the Malay race."[25] These laws were awkward attempts to smooth the jagged edges of southern race classifications by reconciling the movement for one-drop white purity with the history of marriages between Whites and Indians or the presence of groups, like Filipinos, that were considered both non-White and non-Black.

The ragged edges of western race classifications were on display in Oklahoma, where lawmakers also struggled to cut the trend toward one-drop standards of white purity to fit the history of a place where Indians, who had a long history of marriage with Blacks, still held a little political power and quite a lot of land. In a transparent effort to avoid offending the Indians of the Five Civilized Nations, whose political support Oklahoma lawmakers needed and whose land Oklahoma boosters coveted, Oklahoma lawmakers concocted a unique legal definition of race. Oklahoma's state constitution, adopted in 1907, defined the terms "colored" and "negro race" to include "all persons of African descent" and the phrase "white race" to "include all other persons," bringing Indians within the "white" classification.[26] After the constitution was ratified, Oklahomans made the implications of this definition perfectly clear. Boosters celebrated statehood with the symbolic marriage of a White man and a Cherokee woman, but the state's first legislature prohibited "any person of African descent" from marrying "any person not of African descent."[27] From its passage in 1907 until the late 1960s, Oklahoma courts interpreted this law so as to allow White men to marry and inherit property from Indian women while preventing Black men from doing the very same thing.[28]

The classification problems that applied to supposedly distinct racial groups, like "whites," "negroes," "Indians," or "Malays," grew even more convoluted when it came to groups that scientists considered "mixed race." Here again, scientists were very little help. Take, for example, the case of Mexican Americans. In the history of miscegenation law, the experience of Mexican Americans is studded with contradictions.[29] On the one hand, no American state ever explicitly named Mexican Americans, or any other Latino group, in a state miscegenation law, and Mexican Americans had a long and well-documented history of intermarriage.[30] Marriages between Spanish/Mexicans and Anglos had taken place ever since the early nineteenth century, when much

of the Southwest was under first Spanish, then Mexican control. During this period, White men who married Spanish/Mexican women gained entrance into local trade networks and circles of landholding, and the practice was no more controversial than marriages between White men and Indian women. But after the American conquest, the treatment of Mexican Americans hinged on the contradiction between treaties that guaranteed that Mexican citizens who remained in the now-American territory would enjoy the legal privileges of White citizens and the stubborn determination of growing numbers of white supremacists to racialize "Mexicans" in every way they possibly could.[31] Race scientists, whose goal was to link their classifications to original, supposedly pure races, considered Mexicans such an irredeemably mixed-race population that they never produced a racial term for "Mexican" that carried the same aura of scientific authority as terms like "Mongolian" or "Malay."

Their absence from miscegenation laws did not mean, however, that Mexican Americans were unaffected by them. As the move toward one-drop definitions of white purity put pressure on mixed-race peoples of all kinds, courts began to distinguish between mixed-race peoples whose origins could be traced to "Spanish" (and therefore White) roots, and those whose origins could be traced to Indian or African (and therefore non-White) roots. So although a "Mexican Indian" man or woman might legally marry a White in states like California and Texas, which did not name either "Indians" or "Mexicans" in its miscegenation law, they could not necessarily have done so in states like Arizona, Oregon, or North Carolina, which did name "Indians" in their miscegenation laws, or in Virginia, where the state registrar of vital statistics voided marriages between "whites" and "Mexicans" in the belief that "Mexicans" were a mixture of "Spanish or Portuguese, Indian and negro."[32] In practice, the treatment of Mexican Americans depended a great deal on local officials' perceptions of individual ancestry and skin color. Anecdotal evidence shows a good deal of confusion on the part of licensing clerks, who sometimes considered Mexicans too "white" to marry partners from groups clerks assumed were non-White, like Punjabi Indians, and other times considered Mexicans too "dark" to marry Whites.[33] It was uncertainties like this that Mayellen Kirby's lawyer hoped to raise by suggesting that if Joe Kirby had a "Mexican" mother, he could not be a "white" man. In the end, then, despite their official absence from the text of miscegenation laws, Mexican Americans were subjected to them in an especially bewildering, and often unpredictable, manner. Indeed, for the rest of the twentieth century, the racial categorization of Mexican Americans would befuddle bureaucrats, lawyers, and judges alike.[34]

Yet in order for miscegenation law to survive, judges had to push these edges into alignment, conflating racial purity with white supremacy, bridging gaps between the races listed in the miscegenation laws of different states, and borrowing what authority they could from race science without allowing its labyrinthine subclassifications to make enforcing the laws seem impossible.

The Imperative of Race Classification

The needs of judges differed, however, from the needs of lawyers, who quickly realized that they might be able to turn the slippery borderlines of race classification to the advantage of mixed-race clients. If a lawyer could persuade a judge that his client's race classification was in error, his client might prevail. So lawyers raised questions that troubled judges, who then had to struggle through the sorts of questions raised in the *Kirby* case. To judges and juries who believed that setting racial boundaries was crucial to the maintenance of ordered society, the criteria used to determine who fit in which category were more notable for their malleability than their logical consistency. Genealogy, appearance, claims to identity, or that mystical quality, "blood"—any of these would do, and they might be mixed and matched with (il)logical abandon.

In Arizona, Judge Samuel L. Pattee demonstrated this malleability in deciding the *Kirby* case. Although Mayellen Kirby's lawyer later maintained that Joe Kirby "appeared" to be an Indian, the judge insisted that parentage, not appearance, was the key to Joe's racial classification. "Mexicans," the judge said, "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."[35]

Yet at the same time that the judge decided that ancestry determined that Joe Kirby was a "Caucasian" man, he simply assumed that Mayellen Kirby was a "Negro" woman. Mayellen Kirby sat silently through the entire trial; she was spoken about and spoken for but never allowed to speak herself. There was no testimony about her ancestry; her race was assumed to rest in her physical characteristics. Neither of the lawyers bothered to argue over Mayellen's racial designation. As Joe's lawyer would later explain, "The learned and discriminating judge . . . had the opportunity to gaze upon the dusky countenance of the appellant [Mayellen Kirby] and could not and did not fail to observe the distinguishing characteristics of the African race and blood."[36]

In the end, the judge accepted the claim that Joe Kirby was "Caucasian" and Mayellen Kirby "a Negro" and held that the marriage violated Arizona miscegenation law; he granted Joe Kirby his annulment. By granting Joe

Kirby an annulment rather than a divorce, the judge not only avoided recognizing the validity of the marriage while it had lasted but also excused Joe Kirby from his obligation to provide economic support to a divorced wife. In so doing, the judge resolved the miscegenation drama by adding a patriarchal moral to the white supremacist plot. In this case and others like it, White men involved with non-White women were able to avoid the social and economic responsibilities they would have been expected to carry in legally sanctioned marriages with White women.

For her part, Mayellen Kirby had nothing left to lose. She and her lawyer appealed to the Arizona Supreme Court. This time they threw caution to the winds, moving beyond their limited argument about Joe's individual racial classification to challenge the entire racial logic of miscegenation law. The Arizona statute provided a tempting target for their attack, for under its "descendants" provision, a person of "mixed blood" could not legally marry anyone. Pointing this out, Mayellen Kirby's lawyer argued that the law must therefore be unconstitutional. He failed to convince the court. Relying on an individual exception of its own, the court brushed aside these objections. The argument that the law was unconstitutional, the court held, "is an attack . . . [Mayellen Kirby] is not entitled to make for the reason that there is no evidence that she is other than of the black race. . . . It will be time enough to pass on the question she raises . . . when it is presented by some one whose rights are involved or affected."[37]

Mixed-race clients were subjected to the imperative of race classification even in cases where their lawyers tried to offset the seeming certainties of race science by asking for help from a pioneering group of modern social scientists who were willing to challenge the authority of race science head-on. Led by cultural anthropologist Franz Boas, these new scientists believed that human difference and human history were much better understood in terms of cultural imperatives than racial ones. Because they interpreted character, morality, and social organization as cultural rather than racial phenomena, they are perhaps best described as culturalists, as opposed to the racialists whose compulsion to classify by race was so deeply embedded in the structure of miscegenation law.

Two of the arguments made by culturalists caught the attention of defense lawyers in miscegenation cases. The first of these was the argument that the key notion of race science—race itself—made no biological sense. In their most dramatic mode, culturalists went so far as to insist that physical indicators were completely unreliable indicators of race; in biological terms, they insisted, race must be considered indeterminable. Thus, in an influential encyclopedia article on race, Boas insisted that "it is not possible to assign

with certainty any one individual to a definite group." Perhaps the strongest statement of this kind came from Julian Huxley and A. C. Haddon, British scientists who maintained that "the term *race* as applied to human groups should be dropped from the vocabulary of science." In this and other forms, the culturalist argument that race was biologically indeterminable captured the attention of both contemporaries and later historians.[38]

The second argument that culturalists put forth started from the other end of the spectrum, maintaining not that there was no such thing as biological race but that race was nothing more than biology. Since biology was a phenomenon culturalists considered to be of remarkably little importance, consigning race to the realm of biology pushed it out of the picture. Thus Boas ended his article on race by concluding that although it remained "likely" enough that scientific study of the "anatomical differences between the races" might reveal biological influences on the formation of personality, "the study of cultural forms shows that such differences are altogether irrelevant as compared with the powerful influence of the cultural environment in which the group lives."[39]

Following this logic, contrasts between important and wide-reaching culture and unimportant (but biological) race stood as the cornerstone of many culturalist arguments. Thus cultural anthropologist Ruth Benedict began her widely influential pamphlets *Race: Science and Politics* and *The Races of Mankind* with an analysis of "what race is *not*," including language, customs, intelligence, character, and civilization. Real "racial differences," Benedict maintained, occurred only in "nonessentials such as texture of head hair, amount of body hair, shape of the nose or head, or color of the eyes and the skin." Following these distinctions, Benedict could argue that, while race was a scientific "fact," racism, which she saw as "the dogma that the hope of civilization depends upon eliminating some races and keeping others pure," was no more than a "modern superstition."[40]

Culturalists set these two seemingly contradictory depictions of race—the argument that biological race was nonsense and the argument that race was merely biology—right beside each other. The contradiction mattered little to them. Used either alone or in conjunction with each other, these arguments appeared to take a giant step away from popular common sense on the issue of race. Recognizing—even at times celebrating—this gap between themselves and the public, culturalists devoted a good deal of their work to dislodging popular racial assumptions. Seeing the public as lamentably behind the times and sadly prone to race prejudice, they used their academic credentials to emphasize the gulf between expert and ordinary opinion, insisting that racial categories not only did not rest on common sense but made little sense at all.

This, of course, was just what lawyers challenging miscegenation laws wanted to hear. Because culturalist social scientists could offer their arguments with an air of scientific and academic authority that might prove persuasive to judges, attorneys began to invite them to appear as expert witnesses. But when culturalists appeared in court, they entered an arena where their argument for the biological indeterminacy of race ran headlong into the imperative of race classification, which shaped trial outcomes in ways neither social scientists nor the lawyers who recruited them could control.

Take, for example, the *Monks* trial, held in the Superior Court of San Diego County in 1939. By all accounts, Marie Antoinette Monks was a woman with a clear eye for her main chance. In the early 1930s, she had entranced and married a man named Allan Monks, potential heir to a Boston fortune. Shortly after their marriage, which took place in Arizona, Allan Monks declined into insanity. Whether his mental condition resulted from injuries sustained in a motorcycle crash or from drugs administered by Marie Antoinette, the court

Marie Antoinette Monks, in a photograph taken by the *Los Angeles Examiner* in 1932. (Courtesy of University of Southern California, on behalf of the USC Special Collections)

would debate at great length. In any case, Allan Monks died. He left two wills: an old one in favor of a friend named Ida Lee and a newer one in favor of his wife. Ida Lee submitted her version of the will for probate; Marie Antoinette challenged her claim, and Lee fought back. Lee's lawyers rested their hopes on their contention that the Monks marriage was illegal. They charged that Marie Antoinette Monks, who had told her husband she was a French countess, was actually "a Negro," and therefore prohibited by Arizona law from marrying Allan Monks, whom the court presumed to be "Caucasian."[41]

Much of the six-week trial was devoted to determining the race of Marie Antoinette Monks. To prove that she was "a Negro," her opponents called five people to the witness stand: a disgruntled friend of her husband, a local labor commissioner, and three expert witnesses, all of whom offered arguments that emphasized biological indicators of race. The first so-called expert, Monks's hairdresser, claimed that she could tell that Monks was of mixed blood from looking at the size of the moons of her fingernails, the color of the "ring" around the palms of her hands, and her "kinky" hair. The second, a physical anthropologist from the nearby San Diego Museum, claimed to be able to tell that Monks was "at least one-eighth negroid" from the shape of her face, the color of her hands, and her "protruding heels," all of which he had observed casually while a spectator in the courtroom. The third expert witness, a surgeon, had grown up and practiced medicine in the South and later served at a Southern Baptist mission in Africa. Having once walked alongside Monks when entering the courthouse (at which time he tried, he said, to make a close observation of her), he testified that he could tell that she was of "one-eighth negro blood" from the contour of her calves and heels, the "peculiar pallor" on the back of her neck, the shape of her face, and the wave of her hair.[42]

To defend Monks, her lawyers called a friend, a relative, and two expert witnesses of their own, one anthropologist and one biologist. Her experts started out by testifying to the culturalist position that it was impossible to tell a person's race from physical characteristics, especially if that person was, as they put it, "of mixed blood." This was the argument culturalists used whenever they were cornered into talking about biology, a phenomenon they tended to regard as so insignificant a factor in social life that they preferred to avoid talking about it at all.

But this argument did not play very well in the *Monks* courtroom. Seeking to find the definitiveness they needed to offset the experts who had already testified, Monks's lawyers paraded their client in front of the witness stand, asking her to show the anthropologist her fingernails and to remove her shoes so that he could see her heels. They lingered over the biologist's testimony that Monks's physical features resembled those of the people of southern

France. In the end, Monks's lawyers backed both experts into a corner; when pressed repeatedly for a definite answer, both reluctantly admitted that it was their opinion that Monks was a "white" woman.[43]

The experts' dilemma reveals the limitations of the argument for racial indeterminacy in the courtroom. Faced with a conflict between one set of experts, the culturalists, who offered uncertainty and indeterminacy, and their opponents, who offered concrete biological answers to racial questions, judges were predisposed to favor the latter. To judges, culturalists appeared to be frustratingly vague and uncooperative (in other words, to be lousy witnesses), while their opponents seemed to be good witnesses willing to answer direct questions.

In the *Monks* case, the judge admitted that his own "inexpert" opinion that Marie Antoinette "did have many characteristics that I would say . . . [showed] mixed negro and some other blood" was not enough to justify a ruling. Turning to the experts before him, he dismissed the hairdresser (whose experience he was willing to grant, but whose scientific credentials he considered dubious), and he dismissed the two anthropologists, whose testimony, he said, more or less canceled each other out. The only expert the judge was willing to rely on was the surgeon, because, as he put it, the surgeon "seemed to me to hold a very unique and peculiar position as an expert on the question involved from his work in life."[44]

Relying on the surgeon's testimony, the judge declared that Marie Antoinette Monks was "the descendant of a negro" who had "one-eighth negro blood . . . and 7/8 caucasian blood"; he said that her race prohibited her from marrying Allan Monks or from inheriting his estate. Marie Antoinette's race invalidated the marriage, both because it made the marriage impermissible under Arizona miscegenation law and because, in telling her husband-to-be that she was French, she had committed a fraud serious enough to render the marriage legally void. The court's decision that she had also exerted undue influence over Monks was hardly necessary to the outcome.[45]

The Rule Born of Necessity

In both the *Kirby* and *Monks* cases, lawyers tried to build on the doubts that appellate judges had expressed about questions of racial proof in the early twentieth century. In *Kirby,* the challenge relied on the illogicality of tying race to ancestry; in *Monks,* it relied on the emerging authority of a group of culturalist scientists eager to oust their racialist predecessors. Both challenges were thoughtful, logical, strategic attempts to take advantage of well-known weaknesses in the structure and enforcement of miscegenation laws, but both fell well short of their mark. By the end of the 1930s, the imperative of race classification was more deeply embedded in miscegenation law than ever before.[46]

It is not that these, and other, challenges had no effect at all. Compared to the 1890s, judges of the 1930s were less likely to regard the racial "facts" produced and enforced in courts as indications of the fundamentally different "natures" of the races. Rather than waxing eloquent about "unnatural connections" and illicit sex, courts increasingly focused on the relatively narrow, and seemingly more objective, task of determining the supposedly simple biological "fact" of race. In so doing, they constructed a version of race that mediated between the language of white supremacists and their allies in race science, who believed that the very "future of the white race" rested on maintaining one-drop standards of white purity, and modern social scientists, who described biological markers of race as nonessential foils to the all-important phenomenon of culture.[47]

The more race seemed like a biological fact, the less it seemed, to judges at least, like a moral or political judgment, and the easier it was to believe that recognizing race was exercising common sense. As early as 1924, courts in some states were ready to close the door on the doubts early twentieth-century appellate judges had expressed about the uncertainties of race classification in miscegenation law. In *Wilson v. State,* the Alabama Court of Appeals capped two decades of dispute about standards of racial proof in Alabama with a decision that showed the limits of the challenges it would henceforth tolerate from lawyers. The case involved a mixed-race woman whose lawyer had tried to defend his client by insisting that it was "necessary and incumbent upon the state to fully trace the antecedents of a defendant in order to establish the race of an accused." The court rejected that claim, explaining:

> A rule of that kind, where the inquiry is material, might, and no doubt would, often defeat the ends of justice, because of the impossibility clearly apparent in making such proof. We think that, if for no other reason, the rule born of necessity should and does permit a witness, if he knows such to be the fact, to testify that a person is a negro, or is a white person, or that he is a man, or that she is a woman; for courts are not supposed to be ignorant of what everybody else is presumed to know, and in this jurisdiction certainly every person possessed of any degree of intelligence knows a negro.[48]

Here, in a nutshell, was the imperative of race classification that grounded miscegenation law. To the appellate judges who held the last word on the

facts of race in the courtroom, the legal requirement of proving the fact of race appeared to be a "rule born of necessity" that served "the ends of justice." Although they were aware of "the impossibility clearly apparent" in pinning race down, the transformation of competing, disputed, and partial proofs of physical characteristics, ancestry, associations, and reputation offered by witnesses and recorded on documents into the legal "fact" of race was simply too important to be derailed for long by logical objections from lawyers. In order to enforce miscegenation law, lawyers and local officials were required to place individuals in racial categories, and judges were required to justify doing so.

Buried in the language of the Alabama court's decision in *Wilson v. State* was a phrase that might have given the judges pause. The rule born of necessity, the judges had intoned, allowed witnesses "to testify that a person is a negro, or is a white person, or that he is a man, or that she is a woman." From its earliest stages, the development of miscegenation law, and before that, laws against interracial marriage, had depended on hierarchies of sex and gender as well as on hierarchies of race. In order to make an interracial marriage, a couple had to cross both racial dividing lines (to be interracial) and sexual dividing lines (to be a legal marriage), so criminal trials for miscegenation might well have required proving both the race and the sex of the partners on trial. Before leaving the topic of the imperative of race classification behind, it is worth noting that although lawyers, judges, and juries spent an enormous amount of energy debating the race classification of the partners to a marriage, the issue of sex classification only rarely entered their minds.[49] This, too, shows the extent to which the imperative of race classification had come to structure the enforcement of miscegenation law.

56. Nevada legislators, for example, engaged in heated discussion about how to treat Indians in the broad-based miscegenation bill they enacted in 1861. One representative objected to naming "Indians" at all, while others railed against "white men living with squaws" who were raising "disgraceful half-breeds"; still others hoped that the passage of a miscegenation law might reduce tensions with local Indians by ending some of the sexual abuse Indian women encountered from White men. Marsh, *Letters from Nevada Territory,* 247.

57. "A Bill to Prohibit Amalgamation and the Intermarriage of Races," H.B. no. 1, "House Bills no. 1–111," Box 13, 1866 Legislature, 4th Session, Record Group 61–117, Secretary of State, Oregon State Archives, Salem.

58. An Act to Prohibit Amalgamation and the Intermarriage of Races, sec. 1, 1866 Or. Gen. Laws 10; "Oregon Legislature," *Oregonian,* October 5, 1866, 2. Washington's 1854 Color Act also set a "one-half" standard for Indians but a "one-fourth" standard for "negroes."

59. "Oregon Legislature," *Oregonian,* October 6, 1866, 2.

60. An Act to Amend an Act, Entitled "An Act to Regulate Marriage," 1854–55 Wash. Terr. Laws 33; Asher, *Beyond the Reservation,* 63–64, 67–68, 71; An Act to Regulate Marriages, January 20, 1866, in *Laws of Washington: A Publication of the Session Laws of Washington Territory* (Seattle: Tribune Printing, 1896), 2:354; An Act to Amend an Act Entitled an Act to Regulate Marriages, January 23, 1868, in *Laws of Washington* 2:431.

61. Asher, *Beyond the Reservation,* 66–67, 71–73. For additional detail on these cases, see Peyton Kane, "The Whatcom County Nine: Legal and Political Ramifications of Metis Family Life in Washington Territory," *Columbia: The Magazine of Northwest History* 14 (Summer 2000), 39–44. The prosecutions had, however, made their point. According to Kane, seven of the nine men who had been indicted married their Indian partners between the indictment and the trial (40, 43).

62. Smith, "Wedding Bands and Marriage Bans," 66–73.

63. *In re Estate of Megginson,* 21 Or. 387, 392 (1891). The quote continues "and bastardized the children."

64. *In re Walker's Estate,* 5 Ariz. 70, 74 (1896).

65. *Banks v. Galbraith,* 149 Mo. 529, 531–32, 533 (1899).

66. "A Real Romance," *Skagit* [Washington] *News,* March 27, 1893, 1. Three years later McBride's ruling would be upheld by the Washington Supreme Court in *Follansbee v. Wilbur,* 14 Wash. 242 (1896).

67. John D'Emilio and Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* (New York: Harper & Row, 1988), 149–56, 171–73, 208–15.

68. *Walker,* 5 Ariz. at 75. On the Walker case, see Roger D. Hardaway, "Unlawful Love: A History of Miscegenation Law," *Journal of Arizona History* 27, no. 4 (1986) 378–79.

69. *Banks,* 149 Mo. at 537.

70. *Kelley v. Kitsap,* 5 Wash. 521, 524 (1893).

71. Initial estimates of the value of the estate were much higher, ranging from $4,500 to $12,500. I have relied on the figure of $2,528.50 provided by court-appointed assessors. Inventory and Appraisement, June 15, 1920, PaPF; Respondent's Brief, 2–5, November 1, 1920, PaCF; Appellants Abstract of Record, 10–16, September 3, 1920, PaCF.

72. Appellants Abstract of Record, 1–3, 3–7, PaCF; Judge A. M. Hare, Findings of Facts and Conclusions of Law, February 3, 1920, PaPF.

73. *In re Paquet's Estate,* 200 P. 911, 914 (1921).

74. I am grateful to Nancy Cott for pointing this out to me.

75. Respondent's Brief, 7, PaCF. Using typical imagery, they added that the Paquet relationship was "a case where a white man and a full blooded Indian woman have chosen to cohabit together illictly [*sic*], to agree to a relation of concubinage, which is not only a violation of the law of Oregon, but a transgression against the law of morality and the law of nature" (16).

76. Appellant's First Brief, 2, PaCF.

77. *In re Paquet's Estate,* 200 P. at 914.

78. Eva Saks, "Representing Miscegenation Law," *Raritan* 8 (Fall 1988): 39–69; Derrick Bell, "Remembrances of Racism Past," in *Race in America: The Struggle for Equality,* ed. Herbert Hill and James E. Jones Jr., (Madison: University of Wisconsin Press, 1992), 73–82; Cheryl I. Harris, "Whiteness as Property," *Harvard Law Review* 106 (June 1993): 1707–91; George Lipsitz, "The Possessive Investment in Whiteness: Racialized Social Democracy and the 'White Problem' in American Studies," *American Quarterly* 47 (September 1995): 369–87; Patricia J. Williams, "Fetal Fictions: An Exploration of Property Archetypes in Racial and Gendered Contexts," in *Race in America,* 425–37.

79. Respondent's Brief, 6, March 14, 1920; Index to Transcript, 2–3, August 25, 1920, both in *Henkle v. Paquet,* Oregon Supreme Court Case no. 10313, File no. 4267, Oregon State Archives, Salem. R. N. Henkle, a creditor of the estate, had sued to remove John Paquet from his role as administrator of the estate.

80. Decree, June 2, 1924; Bill of Complaint in Equity, 4, 6–7; Stipulation, June 2, 1924; Decree; all in U.S. v. Paquet, Judgment roll 11409, Register no. 8-8665, NARA, Pacific Alaska Region, Seattle, Washington. As late as 1928, John Paquet's major creditor complained to a judge that Paquet had repeatedly turned down acceptable offers to sell the land; perhaps he had chosen to live on it himself. Petition of J. S. Cole, June 7, 1928, PaPF.

81. *In re Paquet's Estate,* 200 P. at 913.

Chapter 4

1. Ariz. Rev. Stat. Ann. sec. 3837 (1913); "Appellant's Abstract of Record," August 8, 1921, 1–2, KCF.

2. "Appellant's Abstract of Record," 12–15.

3. "Appellant's Abstract of Record," 16–18.

4. "Appellant's Abstract of Record," 19.

5. Evelyn Brooks Higginbotham, "African-American Women's History and the Metalanguage of Race," *Signs* 17 (Winter 1992): 253.

6. Ariela J. Gross, "Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South," *Yale Law Journal* 108 (October 1998): 111–88.

7. Earl Lewis and Heidi Ardizzone, *Love on Trial: An American Scandal in Black and White* (New York: W. W. Norton, 2001), 156–74; Reporter's Transcript, 5:1511–12, MCF.

8. *Wilson v. State,* 20 Ala. App. at 138–39 (Ala. Ct. App., 1924).

9. *Wilson v. State; Jones v. Commonwealth,* 80 Va. at 542 (1885); *Succession of Gilmore,* 5 Pelt. 17 (La. Ct. App., 1921); *Hopkins v. Bowers,* 111 N.C. at 178 (1892).

10. *Hopkins,* 111 N.C. at 178.

11. *Wilson,* 20 Ala. App. at 140.

12. *Linton v. State,* 88 Ala. at 218 (1889); *Bell v. State,* 33 Tex. Crim. at 164 (Tex. Crim. App., 1894); *Hopkins,* 111 N.C. at 178.

13. *Reed v. State,* 18 Ala. App. at 354 (Ala. Ct. App., 1922); *Bartelle v. U.S.,* 2 Okla. Crim. at 85 (Okla. Crim. App., 1908).

14. Ala. Code sec. 5001 (1923); Ind. Code Ann. sec. 2641 (1914); Ore. Rev. Stat. sec. 2163 (1920).

15. George W. Stocking Jr., *Race, Culture, and Evolution: Essays in the History of Anthropology* (1968; University of Chicago Press, 1982), 244–53.

16. U.S. Immigration Commission, *Dictionary of Races or Peoples* (Washington: GPO, 1911), 2; T. H. Huxley, "On the Geographical Distribution of the Chief Modifications of Mankind," *Journal of the Ethnological Society of London,* 2, no. 4 (1870): 406–7.

17. An Act Prohibiting Marriage Between White Persons and Negroes, Persons of Negro Blood, and Between White Persons, Chinese and Japanese, and Making Such Marriage Void, ch. 49, 1909 Mont. Laws 57; An Act to Amend Sec. 5302 of Cobbey's Ann. Stat. for 1911, Relating to Void Marriages, to Further Regulate the Marriage of White Persons with Those of Alien Blood, ch. 72, 1913 Neb. Laws 216.

18. An Act to Amend Sec. 4312 of Ch. 50 of the Revised Stat. of Missouri for 1899, Relating to Marriages and Marriage Contracts, 1909 Mo. Laws 662; An Act Amending Sec. 4596 of Art. 1, ch. 182 of the Compiled Stat. of Idaho, Relating to Marriages of Caucasians with Negroes, Mulattoes or Mongolians, ch. 115, 1921 Ida. Sess. Laws 291; Nev. Rev. Stat. sec 6514 (1912); An Act to Prohibit the Marriage of White Persons with Negroes, Mulattoes, Mongolians or Malays, ch. 57, 1913 Wyo. Sess. Laws 48; An Act to Amend Sec. 60 of the Civil Code, Relating to Illegal and Void Marriages, ch. 104, and An Act to Amend Sec. 69 of the Civil Code, Relating to Marriage Licenses, ch. 105, 1933 Cal. Stat. 561; An Act to Repeal and Re-enact with Amendment Sec. 365 of Art. 27 of the Code of Pub. Gen. Laws of Md. (1924 ed.), title "Crimes and Punishments," subtitle "Marrying Unlawfully," Prohibiting Marriages Between White Persons and Members of the Malay Race and Between Negroes and Members of the Malay Race, ch. 60, 1935 Md. Laws 101.

19. An Act Prohibiting the Inter-marriage and Illicit Cohabitation of Persons Belonging to the Caucasian Race, with Persons Belonging to the African, Corean, Malayan, or Mongolian Race, ch. 266, 1913 S.D. Laws 405; An Act to Amend Sec. 2166, Rev. Code, 1928, Relating to Prohibited and Void Marriages, ch. 17, 1931 Ariz. Sess. Laws 27.

20. An Act to Define Who Are Persons of Color and Who Are White Persons, to Prohibit and Prevent the Intermarriage of Such Persons, and to Provide a System of Registration and Marriage Licensing as a Means for Accomplishing the Principal Purpose, no. 317, sec. 14, 1927 Ga. Laws 272; An Act to Amend Sec. 2166, Rev. Code, 1928, Relating to Prohibited and Void Marriages, ch. 17, 1931 Ariz. Sess. Laws 27; An Act Amending Sec. 40-1-2, Rev. Stat. of Utah, 1933, Relating to Prohibited and Void Marriages, ch. 50, sec. 6, 1939 Utah Laws 66.

21. An Act Providing for Uniformity of Marriage, ch. 55, 1907–8 Okla. Sess. Laws 553; An Act to Prohibit the Amalgamation of the Caucasian Race and Persons of the Negro Race by Concubinage Between a Person of the Caucasian Race and a Person of the Negro Race, Making the Same a Felony, no. 320, 1911 Ark. Acts 295; *A Compilation of the Tennessee Statutes,* ed. Robert T. Shannon, vol. 4 (Nashville: Tennessee Law Book Publishing, 1917), sec. 4178a1 (reinstating a law originally passed in 1866 but omitted from the state's 1884 and 1896 codes); An Act to Preserve Racial Integrity, 1924 Va. Acts ch. 371; An Act to Amend Sec. 5001 of the Code of 1923, no. 214, 1927 Ala. Gen Laws 219; An Act to Define Who Are Persons of Color and Who Are White Persons, to Prohibit and Prevent the Intermarriage of Such Persons, and to Provide a System of Registration and Marriage Licensing as a Means for Accomplishing the Principal Purpose, no. 317, 1927 Ga. Laws 272. In Arkansas, Virginia, Alabama, and Georgia, the one-drop provisions were lodged directly in miscegenation laws, but Oklahoma's miscegenation law of 1907 relied on a race definition embedded in the state's constitution, and Tennessee's one-drop law, which appeared in a section of the state code entitled "Descent and Distribution Among Persons of Color," contradicted the state's miscegenation law, which appeared in the section on "Marriage" and was keyed to the phrase "negroes, mulattoes, or persons of mixed blood descended from a negro, to the third generation inclusive." See *Compilation of the Tennessee Statutes,* sec. 4186.

22. Opinion by Judge Thomas C. Gould of the California Superior Court, in *Murrillo v. Murillo,* Los Angeles Superior Court no. D 97714, reprinted in "American Jurists and Lawyers Agree That Filipinos Are Not Mongolians," *Three Stars,* December 1931; Daniel Kwang Lee, "Why Washington State Did Not Have an Anti-Miscegenation Law" (M.A. thesis, Washington State University, 1998), 27.

23. An Act to Amend Sec. 1810 of the Code, ch. 254, 1887 N.C. Sess. Laws 499; An Act to Change the Name of the Indians in Robeson County, ch. 215, 1911 N.C. Sess. Laws 354; An Act to Restore to the Indians Residing in Robeson and Adjoining Counties Their Rightful and Ancient Name, ch. 123, 1913 N. C. Laws 215.

24. An Act Prohibiting Marriage Between Persons of the Indian Race and Persons of the Colored or Black Race, no. 220, 1920 La. Acts 366. A companion law made "concubinage between a person of the aboriginal Indian race of America, known as the red race, and a person of the colored or black race" a felony (No. 230, 1920 La. Acts 381).

25. An Act to Repeal and Re-enact with Amendment Sec. 365 of Art. 27 of the Code of Pub. Gen. Laws of Md. (1924 ed.), title "Crimes and Punishments," subtitle "Marrying Unlawfully," Prohibiting Marriages Between White Persons and Members of the Malay Race and Between Negroes and Members of the Malay Race, ch. 60, sec. 1, 1935 Md. Laws 101.

26. Okla. Const. art. 23, sec. 11 (repealed 1978).

27. Sarah Deutsch, "Being American in Boley, Oklahoma," in *Beyond Black and White: Race, Ethnicity, and Gender in the U.S. South and Southwest,* ed. Stephanie Cole and Alison M. Parker (College Station: Texas A&M University Press, 2004), 105; An Act Providing for Uniformity of Marriage, ch. 55, sec. 12, 1907–8 Okla. Laws at 556.

28. See, for example, *Blake v. Sessions,* 94 Okla. 59 (1923), *Long v. Brown,* 186 Okla. 407 (1939). For a detailed examination of miscegenation law in Oklahoma, see Peter Wallenstein, "Native Americans Are White, African Americans Are Not: Racial

Identity, Marriage, Inheritance and the Law in Oklahoma, 1907–1967," *Journal of the West* 39, no. 1 (2000): 55–63.

29. Scholars have only recently begun to explore this complex history. See Rachel F. Moran, *Interracial Intimacy: The Regulation of Race and Romance* (Chicago: University of Chicago Press, 2001), 50–53, 56–59; Dara Orenstein, "Void for Vagueness: Mexicans and the Collapse of Miscegenation Law in California," *Pacific Historical Review* 74 (August 2005): 367–407; and Martha Menchaca, "The Anti-Miscegenation History of the American Southwest, 1837–1970: Transforming Racial Ideology into Law," unpublished paper presented to the Transnational Exchanges in the Texas-Mexico Borderlands Conference, April 7–8, 2005, University of Texas, Austin, http://www.utexas.edu/cola/depts/history/news/spring_2005/tx_mexico_conf/noformat/news/spring_2005/tex_mexico_conf/ponencia_menchaca.pdf (accessed September 2, 2006).

30. The qualification "explicitly" is important here. As Leti Volpp has pointed out, this generalization only holds true if Filipinos are categorized as Asian Americans rather than Latinos. And Martha Menchaca argues that the determination to bring Mexican Americans under miscegenation law was the motivation for an amendment to Arizona's miscegenation law in 1913. See Leti Volpp, "American Mestizo: Filipinos and Antimiscegenation Laws in California," *UC Davis Law Review* 33 (1999–2000): 833; Menchaca, "Anti-Miscegenation History."

31. Orenstein, "Void for Vagueness," 376–86; Neil Foley, "Partly Colored or Other White: Mexican Americans and Their Problem with the Color Line," in *Beyond Black and White*, 126–30.

32. W. A. Plecker, "Virginia's Attempt to Adjust the Color Problem," *American Journal of Public Health* 15 (February 1925): 113; Brian William Thomson, "Racism and Racial Classification: A Case Study of the Virginia Racial Integrity Legislation" (Ph.D. dissertation, University of California, Riverside, 1978), 288.

33. Karen Isaakson Leonard, *Making Ethnic Choices: California's Punjabi Mexican Americans* (Philadelphia: Temple University Press, 1992), 10, 63, 68–69; Moran, *Interracial Intimacies*, 57–59.

34. On this point, see esp. Foley, "Partly Colored," 123–41, and Ian F. Haney López, *White by Law: The Legal Construction of Race* (New York: NYU Press, 1996), 61–62.

35. Appellant's Abstract of Record, 19, KCF.

36. Appellee's Brief, October 3, 1921, 6, KCF.

37. Appellant's Brief, September 8, 1921, KCF; *Kirby v. Kirby*, 206 P. 405 (1922) at 406. For another account of the Kirby case, see Roger D. Hardaway, "Unlawful Love: A History of Arizona's Miscegenation Law," *Journal of Arizona History* 27 (Winter 1986): 377–90.

38. Franz Boas, "Race," in *Encyclopaedia of the Social Sciences*, ed. Edwin R. A. Seligman (New York: Macmillan, 1930–35), 13:27; Julian S. Huxley and A. C. Haddon, *We Europeans: A Survey of "Racial" Problems* (London: Jonathan Cape, 1935), 107. Emphasis in original.

39. Boas, "Race," 34.

40. Ruth Benedict, *Race: Science and Politics*, new ed. with *The Races of Mankind*, by Ruth Benedict and Gene Weltfish (New York: Viking Press, 1945), 9, 171–72, 98.

41. The background of the case is discussed in the appellate court decision, *Estate of Monks*, 48 Cal. App. 3d.603 (Cal. Dist. Ct. App., 1941) and in extensive local newspaper coverage, including "Monks-Giraudo Marriage Void, Claim in Gunn's Suit on Notes," *San Diego Union*, August 22, 1939, 1A, and "Trial Concluded in Monks Will Case," *San Diego Union*, October 24, 1939, 1B.

42. Reporter's Transcript, 2:660–67, 3:965–98, MCF; "Mrs. Monks Part Negro, Ex-Nurse Testifies in Estate Controversy," *San Diego Union*, September 14, 1939, 10B.

43. Reporter's Transcript, 5:1511–12, 1525, 6:1900; "Mrs. Monks Backed by Anthropologist," *San Diego Union*, September 29, 1939, 10A; "Mrs. Monks White, Asserts Professor," *San Diego Union*, October 5, 1939, 8A.

44. Reporter's Transcript, 7:2543, 2548.

45. Findings of Fact and Conclusions of Law, in Clerk's Transcript, 81, December 2, 1940, *Gunn v. Giraudo*, 4 Civ. 2832, California District Court of Appeal Records, California State Archives, Sacramento; "Mrs. Lee Wins Monks Estate," *San Diego Union*, January 6, 1940, 1A. Both the California Supreme Court and the U.S. Supreme Court refused to hear appeals of the decision (*Estate of Monks*, 48 Cal App. 2d at 612; *Monks v. Lee*, 317 U.S. 590; *Monks v. Lee*, 317 U.S. 711). In 1945, Monks tried again, this time in a probate court in Massachusetts, where she lost her case in a decision (*Lee v. Monks*, 318 Mass. 513) that downplayed the issue of race; the U.S. Supreme Court refused to grant certiorari in this case, too (326 U.S. 696).

46. As Julie Novkov explains in her study of miscegenation law in Alabama, even when judges ruled in favor of defendants, their actions "reflected assumptions about the legitimacy of the regime of white supremacy and enabled legal state actors to sanitize and rationalize it. These cases, in which the occasional defendant escaped a lengthy prison term because of technical problems in the trial, highlight the contradiction of a commitment to procedural fairness in the midst of a broadly unjust system, evoking Hannah Arendt's analysis of the banality of evil." See Julie Novkov, *Racial Union: Racial Union Law, Intimacy, and the White State in Alabama, 1865–1954* (Ann Arbor: University of Michigan Press, 2008), 24.

47. W. A. Plecker, "Shall America Remain White?" typescript, 8, Box 56, Folder 7, JPP.

48. *Wilson v. State*, 20 Ala. App. at 138–39, 140 (Ala. Ct. App., 1924).

49. I have seen only two miscegenation cases in which the sex of the partners was at issue. In the first, *Williams v. State*, 23 Ala. App. 365 (Ala. Ct. App., 1930), lawyers for Jesse D. Williams, a "negro, or a descendant of a negro" who had married a "white" woman, argued that his conviction should be overturned for several reasons, one of which was that the indictment had failed to specify the sex of each partner to the crime. The appellate court summarily rejected this claim, although it overturned the conviction for other reasons. In the 1951 case of *Griffith v. State*, 35 Ala. App. 582 (Ala. Ct. App., 1951), lawyers for Nathan Bell, another "Negro" man married to a "white" woman, used the same argument, to no better effect.

Chapter 5

1. Southern California Historical Records Survey Project, *Inventory of the County Archives of California, No. 20: Los Angeles County Clerk's Office* (Los Angeles: Southern California Historical Records Survey Project, 1943), 85.