Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America

Peggy Pascoe

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." Joe Kirby claimed that while he was "a person of the Caucasian blood," his wife, Mayellen, was "a person of negro blood."[1]

Although Joe Kirby's charges were rooted in a well-established—and tragic—tradition of American miscegenation law, his court case quickly disintegrated into a definitional dispute that bordered on the ridiculous. The first witness in the case 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:

> *Joe's lawyer:* To what race do you belong?
> *Tula Kirby:* Mexican.
> *Joe's lawyer:* Are you white or have you Indian blood?
> *Kirby:* I have no Indian blood.
>
> . . . . . .
>
> *Joe's lawyer:* Do you know the defendant [Mayellen] Kirby?
> *Kirby:* Yes.

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[1] Ariz. Rev. Stat. Ann. sec. 3837 (1913); "Appellant's Abstract of Record," Aug. 8, 1921, pp. 1–2, *Kirby v. Kirby*, docket 1970 (microfilm: file 36.1.134), Arizona Supreme Court Civil Cases (Arizona State Law Library, Phoenix).

Joe's lawyer: To what race does she belong?
Kirby: Negro.

Then the cross-examination began.

Mayellen's lawyer: Who was your father?
Kirby: Jose Romero.
Mayellen's lawyer: Was he a Spaniard?
Kirby: Yes, a Mexican.
Mayellen's lawyer: Was he born in Spain?
Kirby: No, he was born in Sonora.
Mayellen's lawyer: And who was your mother?
Kirby: Also in Sonora.
Mayellen's lawyer: Was she a Spaniard?
Kirby: She was on her father's side.
Mayellen's lawyer: And what on her mother's side?
Kirby: Mexican.
Mayellen's lawyer: What do you mean by Mexican, Indian, a native [?]
Kirby: I don't know what is meant by Mexican.
Mayellen's lawyer: A native of Mexico?
Kirby: Yes, Sonora, all of us.
Mayellen's lawyer: Who was your grandfather on your father's side?
Kirby: He was a Spaniard.
Mayellen's lawyer: Who was he?
Kirby: His name was Ignacio Quevas.
Mayellen's lawyer: Where was he born?
Kirby: That I don't know. He was my grandfather.
Mayellen's lawyer: How do you know he was a [S]paniard then?
Kirby: Because he told me ever since I had knowledge that he was a Spaniard.

Next the questioning turned to Tula's opinion about Mayellen Kirby's racial identity.

Mayellen's lawyer: You said Mrs. [Mayellen] Kirby was a negress. What do you know about Mrs. Kirby's family?
Kirby: 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, and by the time he took the stand, the people 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 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."[3]

[2] "Appellant's Abstract of Record," 12–13, 13–15, 15, *Kirby v. Kirby.*
[3] *Ibid.*, 16–18.

Stopping at the brink of 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. "I know," said the judge, "but that does not signify anything."[4]

From the Decline and Fall of Scientific Racism to an Understanding of Modernist Racial Ideology

The Kirbys' case offers a fine illustration of Evelyn Brooks Higginbotham's observation that, although most Americans are sure they know "race" when they see it, very few can offer a definition of the term. Partly for this reason, the questions of what "race" signifies and what signifies "race" are as important for scholars today as they were for the participants in *Kirby v. Kirby* seventy-five years ago.[5] Historians have a long—and recently a distinguished—record of exploring this question.[6] Beginning in the 1960s, one notable group charted the rise and fall of scientific racism among American intellectuals. Today, their successors, more likely to be schooled in social than intellectual history, trace the social construction of racial ideologies, including the idea of "whiteness," in a steadily expanding range of contexts.[7]

[4] *Ibid.*, 19.

[5] Evelyn Brooks Higginbotham, "African-American Women's History and the Metalanguage of Race," *Signs*, 17 (Winter 1992), 253. See Michael Omi and Howard Winant, *Racial Formation in the United States: From the 1960s to the 1990s* (New York, 1994); David Theo Goldberg, ed., *Anatomy of Racism* (Minneapolis, 1990); Henry Louis Gates Jr., ed., *"Race," Writing, and Difference* (Chicago, 1986); Dominick LaCapra, ed., *The Bounds of Race: Perspectives on Hegemony and Resistance* (Ithaca, 1991); F. James Davis, *Who Is Black? One Nation's Definition* (University Park, 1991); Sandra Harding, ed., *The "Racial" Economy of Science: Toward a Democratic Future* (Bloomington, 1993); Maria P. P. Root, ed., *Racially Mixed People in America* (Newbury Park, 1992); and Ruth Frankenberg, *White Women, Race Matters: The Social Construction of Whiteness* (Minneapolis, 1993).

[6] Among the most provocative recent works are Higginbotham, "African-American Women's History"; Barbara J. Fields, "Ideology and Race in American History," in *Region, Race, and Reconstruction: Essays in Honor of C. Vann Woodward*, ed. J. Morgan Kousser and James M. McPherson (New York, 1982), 143–78; Thomas C. Holt, "Marking: Race, Race-Making, and the Writing of History," *American Historical Review*, 100 (Feb. 1995), 1–20; and David R. Roediger, *Towards the Abolition of Whiteness: Essays on Race, Politics, and Working Class History* (London, 1994).

[7] On scientific racism, see Thomas F. Gossett, *Race: The History of an Idea in America* (Dallas, 1963); George W. Stocking Jr., *Race, Culture, and Evolution: Essays in the History of Anthropology* (1968; Chicago, 1982); 1968; John S. Haller Jr., *Outcasts from Evolution: Scientific Attitudes to Racial Inferiority, 1859–1900* (Urbana, 1971); George M. Fredrickson, *The Black Image in the White Mind: The Debate on Afro-American Character and Destiny, 1817–1914* (New York, 1971); Thomas G. Dyer, *Theodore Roosevelt and the Idea of Race* (Baton Rouge, 1980); Carl N. Degler, *In Search of Human Nature: The Decline and Revival of Darwinism in American Social Thought* (New York, 1991); and Elazar Barkan, *Retreat of Scientific Racism: Changing Concepts of Race in Britain and the United States between the World Wars* (Cambridge, Eng., 1992). On the social construction of racial ideologies, see the works cited in footnote 6, above, and Ronald T. Takaki, *Iron Cages: Race and Culture in Nineteenth-Century America* (New York, 1979); Reginald Horsman, *Race and Manifest Destiny: The Origins of American Racial Anglo-Saxonism* (Cambridge, Mass., 1981); Alexander Saxton, *The Rise and Fall of the White Republic: Class Politics and Mass Culture in Nineteenth-Century America* (London, 1990); David R. Roediger, *The Wages of Whiteness: Race and the Making of the American Working Class* (London, 1991); Audrey Smedley, *Race in North America: Origin and Evolution of a Worldview* (Boulder, 1993); and Tomas Almaguer, *Racial Fault Lines: The Historical Origins of White Supremacy in California* (Berkeley, 1994).

Their work has taught us a great deal about racial thinking in American history. We can trace the growth of racism among antebellum immigrant workers and free-soil northern Republicans; we can measure its breadth in late-nineteenth-century segregation and the immigration policies of the 1920s. We can follow the rise of Anglo-Saxonism from Manifest Destiny through the Spanish-American War and expose the appeals to white supremacy in woman suffrage speeches. We can relate all these developments (and more) to the growth and elaboration of scientific racist attempts to use biological characteristics to scout for racial hierarchies in social life, levels of civilization, even language.

Yet the range and richness of these studies all but end with the 1920s. In contrast to historians of the nineteenth- and early-twentieth-century United States, historians of the nation in the mid- to late-twentieth century seem to focus on racial ideologies only when they are advanced by the far Right (as in the Ku Klux Klan) or by racialized groups themselves (as in the Harlem Renaissance or black nationalist movements). To the extent that there is a framework for surveying mainstream twentieth-century American racial ideologies, it is inherited from the classic histories that tell of the post-1920s decline and fall of scientific racism. Their final pages link the demise of scientific racism to the rise of a vanguard of social scientists led by the cultural anthropologist Franz Boas: when modern social science emerges, racism runs out of intellectual steam. In the absence of any other narrative, this forms the basis for a commonly held but rarely examined intellectual trickle-down theory in which the attack on scientific racism emerges in universities in the 1920s and eventually, if belatedly, spreads to courts in the 1940s and 1950s and to government policy in the 1960s and 1970s.

A close look at such incidents as the *Kirby* case, however, suggests a rather different historical trajectory, one that recognizes that the legal system does more than just reflect social or scientific ideas about race; it also produces and reproduces them.[8] By following a trail marked by four miscegenation cases—the seemingly ordinary *Kirby v. Kirby* (1922) and *Estate of Monks* (1941) and the pathbreaking *Perez v. Lippold* (1948) and *Loving v. Virginia* (1967)—this article will examine the relation between modern social science, miscegenation law, and twentieth-century American racial ideologies, focusing less on the decline of scientific racism and more on the emergence of new racial ideologies.

In exploring these issues, it helps to understand that the range of nineteenth-century racial ideologies was much broader than scientific racism. Accordingly, I have chosen to use the term *racialism* to designate an ideological complex that other historians often describe with the terms "race" or "racist." I intend the term *racialism* to be broad enough to cover a wide range of nineteenth-century ideas, from the biologically marked categories scientific racists employed to the more

[8] On law as a producer of racial ideologies, see Barbara J. Fields, "Slavery, Race, and Ideology in the United States of America," *New Left Review*, 181 (May–June 1990), 7; Eva Saks, "Representing Miscegenation Law," *Raritan*, 8 (Fall 1988), 56–60; and Collette Guillaumin, "Race and Nature: The System of Marks," *Feminist Issues*, 8 (Fall 1988), 25–44.

amorphous ideas George M. Fredrickson has so aptly called "romantic racialism."[9] Used in this way, "racialism" helps counter the tendency of twentieth-century observers to perceive nineteenth-century ideas as biologically "determinist" in some simple sense. To racialists (including scientific racists), the important point was not that biology determined culture (indeed, the split between the two was only dimly perceived), but that race, understood as an indivisible essence that included not only biology but also culture, morality, and intelligence, was a compellingly significant factor in history and society.

My argument is this: During the 1920s, American racialism was challenged by several emerging ideologies, all of which depended on a modern split between biology and culture. Between the 1920s and the 1960s, those competing ideologies were winnowed down to the single, powerfully persuasive belief that the eradication of racism depends on the deliberate nonrecognition of race. I will call that belief *modernist racial ideology* to echo the self-conscious "modernism" of social scientists, writers, artists, and cultural rebels of the early twentieth century. When historians mention this phenomenon, they usually label it "antiracist" or "egalitarian" and describe it as in stark contrast to the "racism" of its predecessors. But in the new legal scholarship called critical race theory, this same ideology, usually referred to as "color blindness," is criticized by those who recognize that it, like other racial ideologies, can be turned to the service of oppression.[10]

Modernist racial ideology has been widely accepted; indeed, it compels nearly as much adherence in the late-twentieth-century United States as racialism did in the late nineteenth century. It is therefore important to see it not as what it claims to be—the nonideological end of racism—but as a racial ideology of its own, whose history shapes many of today's arguments about the meaning of race in American society.

The Legacy of Racialism and the *Kirby* Case

Although it is probably less familiar to historians than, say, school segregation law, miscegenation law is an ideal place to study both the legacy of nineteenth-century racialism and the emergence of modern racial ideologies.[11] Miscegenation laws,

[9] See especially Fredrickson, *Black Image in the White Mind.*

[10] For intriguing attempts to define American modernism, see Daniel J. Singal, ed., *Modernist Culture in America* (Belmont, 1991); and Dorothy Ross, ed., *Modernist Impulses in the Human Sciences, 1870–1930* (Baltimore, 1994). For the view from critical race theory, see Brian K. Fair, "Foreword: Rethinking the Colorblindness Model," *National Black Law Journal,* 13 (Spring 1993), 1–82; Neil Gotanda, "A Critique of 'Our Constitution Is Color-Blind,'" *Stanford Law Review,* 44 (Nov. 1991), 1–68; Gary Peller, "Race Consciousness," *Duke Law Journal* (Sept. 1990), 758–847; and Peter Fitzpatrick, "Racism and the Innocence of Law," in *Anatomy of Racism,* ed. Goldberg, 247–62.

[11] Many scholars avoid using the word *miscegenation,* which dates to the 1860s, means race mixing, and has, to twentieth-century minds, embarrassingly biological connotations; they speak of laws against "interracial" or "cross-cultural" relationships. Contemporaries usually referred to "anti-miscegenation" laws. Neither alternative seems satisfactory, since the first avoids naming the ugliness that was so much a part of the laws and the second implies that "miscegenation" was a distinct racial phenomenon rather than a categorization imposed on certain relationships. I retain the term *miscegenation* when speaking of the laws and court cases that relied on the concept, but not when speaking of people or particular relationships. On the emergence of the term, see Sidney Kaplan, "The Miscegenation Issue in the Election of 1864," *Journal of Negro History,* 24 (July 1949), 274–343.

in force from the 1660s through the 1960s, were among the longest lasting of American racial restrictions. They both reflected and produced significant shifts in American racial thinking. Although the first miscegenation laws had been passed in the colonial period, it was not until after the demise of slavery that they began to function as the ultimate sanction of the American system of white supremacy. They burgeoned along with the rise of segregation and the early-twentieth-century devotion to "white purity." At one time or another, 41 American colonies and states enacted them; they blanketed western as well as southern states.[12]

By the early twentieth century, miscegenation laws were so widespread that they formed a virtual road map to American legal conceptions of race. Laws that had originally prohibited marriages between whites and African Americans (and, very occasionally, American Indians) were extended to cover a much wider range of groups. Eventually, 12 states targeted American Indians, 14 Asian Americans (Chinese, Japanese, and Koreans), and 9 "Malays" (or Filipinos). In Arizona, the *Kirby* case was decided under categories first adopted in a 1901 law that prohibited whites from marrying "negroes, Mongolians or Indians"; in 1931, "Malays" and "Hindus" were added to this list.[13]

Although many historians assume that miscegenation laws enforced American taboos against interracial sex, marriage, more than sex, was the legal focus.[14] Some

[12] Most histories of interracial sex and marriage in America focus on demographic patterns, rather than legal constraints. See, for example, Joel Williamson, *New People: Miscegenation and Mulattoes in the United States* (New York, 1980); Paul R. Spickard, *Mixed Blood: Intermarriage and Ethnic Identity in Twentieth-Century America* (Madison, 1989); and Deborah Lynn Kitchen, "Interracial Marriage in the United States, 1900–1980" (Ph.D. diss., University of Minnesota, 1993). The only historical overview is Byron Curti Martyn, "Racism in the United States: A History of the Anti-Miscegenation Legislation and Litigation" (Ph.D. diss., University of Southern California, 1979). On the colonial period, see A. Leon Higginbotham Jr. and Barbara K. Kopytoff, "Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia," *Georgetown Law Journal*, 77 (Aug. 1989), 1967–2029; George M. Fredrickson, *White Supremacy: A Comparative Study in American and South African History* (New York, 1981), 99–108; and James Hugo Johnston, *Race Relations in Virginia & Miscegenation in the South, 1776–1860* (Amherst, 1970), 165–90. For later periods, see Peter Bardaglio, "Families, Sex, and the Law: The Legal Transformation of the Nineteenth-Century Southern Household" (Ph.D. diss., Stanford University, 1987), 37–106, 345–49; Peter Wallenstein, "Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s–1960s," *Chicago-Kent Law Review*, 70 (no. 2, 1994), 371–437; David H. Fowler, *Northern Attitudes towards Interracial Marriage: Legislation and Public Opinion in the Middle Atlantic and the States of the Old Northwest, 1780–1930* (New York, 1987); Megumi Dick Osumi, "Asians and California's Anti-Miscegenation Laws," in *Asian and Pacific American Experiences: Women's Perspectives*, ed. Nobuya Tsuchida (Minneapolis, 1982), 2–8; and Peggy Pascoe, "Race, Gender, and Intercultural Relations: The Case of Interracial Marriage," *Frontiers*, 12 (no. 1, 1991), 5–18. The count of states is from the most complete list in Fowler, *Northern Attitudes*, 336–439.

[13] Ariz. Rev. Stat. Ann. sec. 3092 (1901); 1931 Ariz. Sess. Laws ch. 17. Arizona, Idaho, Maine, Massachusetts, Nevada, North Carolina, Oregon, Rhode Island, South Carolina, Tennessee, Virginia, and Washington passed laws that mentioned American Indians. Arizona, California, Georgia, Idaho, Mississippi, Missouri, Montana, Nebraska, Nevada, Oregon, South Dakota, Utah, Virginia, and Wyoming passed laws that mentioned Asian Americans. Arizona, California, Georgia, Maryland, Nevada, South Dakota, Utah, Virginia, and Wyoming passed laws that mentioned "Malays." In addition, Oregon law targeted "Kanakas" (native Hawaiians), Virginia "Asiatic Indians," and Georgia both "Asiatic Indians" and "West Indians." See Fowler, *Northern Attitudes*, 336–439; 1924 Va. Acts ch. 371; 1927 Ga. Laws no. 317; 1931 Ariz. Sess. Laws ch. 17; 1933 Cal. Stat. ch. 104; 1935 Md. Laws ch. 60; and 1939 Utah Laws ch. 50.

[14] The most insightful social and legal histories have focused on sexual relations rather than marriage. See, for example, Higginbotham and Kopytoff, "Racial Purity and Interracial Sex"; Karen Getman, "Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System," *Harvard Women's Law Journal*, 7 (Spring 1984), 125–34; Martha Hodes, "Sex across the Color Line: White Women and Black

states did forbid both interracial sex and interracial marriage, but nearly twice as many targeted only marriage. Because marriage carried with it social respectability and economic benefits that were routinely denied to couples engaged in illicit sex, appeals courts adjudicated the legal issue of miscegenation at least as frequently in civil cases about marriage and divorce, inheritance, or child legitimacy as in criminal cases about sexual misconduct.[15]

By the time the *Kirby* case was heard, lawyers and judges approached miscegenation cases with working assumptions built on decades of experience. There had been a flurry of challenges to the laws during Reconstruction, but courts quickly fended off arguments that miscegenation laws violated the Fourteenth Amendment guarantee of "equal protection." Beginning in the late 1870s, judges declared that the laws were constitutional because they covered all racial groups "equally."[16] Judicial justifications reflected the momentum toward racial categorization built

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Men in the Nineteenth-Century American South" (Ph.D. diss., Princeton University, 1991); and Martha Hodes, "The Sexualization of Reconstruction Politics: White Women and Black Men in the South after the Civil War," in *American Sexual Politics: Sex, Gender, and Race since the Civil War*, ed. John C. Fout and Maura Shaw Tantillo (Chicago, 1993), 59–74; Robyn Weigman, "The Anatomy of Lynching," *ibid.*, 223-45; Jacquelyn Dowd Hall, "'The Mind That Burns in Each Body': Women, Rape, and Racial Violence," in *Powers of Desire: The Politics of Sexuality*, ed. Ann Snitow, Christine Stansell, and Sharon Thompson (New York, 1983), 328–49; Kenneth James Lay, "Sexual Racism: A Legacy of Slavery," *National Black Law Journal*, 13 (Spring 1993), 165–83; and Kevin J. Mumford, "From Vice to Vogue: Black/White Sexuality and the 1920s" (Ph.D. diss., Stanford University, 1993). One of the first works to note the predominance of marriage in miscegenation laws was Mary Frances Berry, "Judging Morality: Sexual Behavior and Legal Consequences in the Late Nineteenth-Century South," *Journal of American History*, 78 (Dec. 1991), 838–39. On the historical connections among race, marriage, property, and the state, see Saks, "Representing Miscegenation Law," 39–69; Nancy F. Cott, "Giving Character to Our Whole Civil Polity: Marriage and the Public Order in the Late Nineteenth Century," in *U.S. History as Women's History: New Feminist Essays*, ed. Linda K. Kerber, Alice Kessler-Harris, and Kathryn Kish Sklar (Chapel Hill, 1995), 107–21; Ramon A. Gutierrez, *When Jesus Came, the Corn Mothers Went Away: Marriage, Sexuality, and Power in New Mexico, 1500–1846* (Stanford, 1991); Verena Martinez-Alier, *Marriage, Class, and Colour in Nineteenth-Century Cuba: A Study of Racial Attitudes and Sexual Values in a Slave Society* (Ann Arbor, 1989); Patricia J. Williams, "Fetal Fictions: An Exploration of Property Archetypes in Racial and Gendered Contexts," in *Race in America: The Struggle for Equality*, ed. Herbert Hill and James E. Jones Jr. (Madison, 1993), 425–37; and Virginia R. Dominguez, *White by Definition: Social Classification in Creole Louisiana* (New Brunswick, 1986).

[15] Of the 41 colonies and states that prohibited interracial marriage, 22 also prohibited some form of interracial sex. One additional jurisdiction (New York) prohibited interracial sex but not interracial marriage; it is not clear how long this 1638 statute was in effect. See Fowler, *Northern Attitudes*, 336–439. My database consists of every appeals court case I could identify in which miscegenation law played a role: 227 cases heard between 1850 and 1970, 132 civil and 95 criminal. Although cases that reach appeals courts are by definition atypical, they are significant because the decisions reached in them set policies later followed in more routine cases and because the texts of the decisions hint at how judges conceptualized particular legal problems. I have relied on them because of these interpretive advantages and for two more practical reasons. First, because appeals court decisions are published and indexed, it is possible to compile a comprehensive list of them. Second, because making an appeal requires the preservation of documents that might otherwise be discarded (such as legal briefs and court reporters' trial notes), they permit the historian to go beyond the judge's decision.

[16] Decisions striking down the laws include *Burns v. State*, 48 Ala. 195 (1872); *Bonds v. Foster*, 36 Tex. 68 (1871–1872); *Honey v. Clark*, 37 Tex. 686 (1873); *Hart v. Hoss*, 26 La. Ann. 90 (1874); *State v. Webb*, 4 Cent. L. J. 588 (1877); and *Ex parte Brown*, 5 Cent. L. J. 149 (1877). Decisions upholding the laws include *Scott v. State*, 39 Ga. 321 (1869); *State v. Hairston*, 63 N.C. 451 (1869); *State v. Reinhardt*, 63 N.C. 547 (1869); *In re Hobbs*, 12 F. Cas. 262 (1871) (No. 6550); *Lonas v. State*, 50 Tenn. 287 (1871); *State v. Gibson*, 36 Ind. 389 (1871); *Ford v. State*, 53 Ala. 150 (1875); *Green v. State*, 58 Ala. 190 (1877); *Frasher v. State*, 3 Tex. Ct. App. R. 263 (1877); *Ex Parte Kinney*, 14 F. Cas. 602 (1879) (No. 7825); *Ex parte Francois*, 9 F. Cas. 699 (1879) (No. 5047); *Francois v. State*, 9 Tex. Ct. App. R. 144 (1880); *Pace v. State*, 69 Ala. 231 (1881); *Pace v. Alabama*, 106 U.S. 583 (1882); *State v. Jackson*, 80 Mo. 175 (1883); *State v. Tutty*, 41 F. 753 (1890); *Dodson v. State*, 31 S.W. 977 (1895); *Strauss v. State*, 173 S.W. 663 (1915); *State v. Daniel*, 75 So. 836 (1917); *Succession of Mingo*, 78 So. 565 (1917–18); and *In re Paquet's Estate*, 200 P. 911 (1921).

into the nineteenth-century legal system and buttressed by the racialist conviction that everything from culture, morality, and intelligence to heredity could be understood in terms of race.

From the 1880s until the 1920s, lawyers whose clients had been caught in the snare of miscegenation laws knew better than to challenge the constitutionality of the laws or to dispute the perceived necessity for racial categorization; these were all but guaranteed to be losing arguments. A defender's best bet was to do what Mayellen Kirby's lawyer tried to do: to persuade a judge (or jury) that one particular individual's racial classification was in error. Lawyers who defined their task in these limited terms occasionally succeeded, but even then the deck was stacked against them. Wielded by 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 for their logical consistency. Genealogy, appearance, claims to identity, or that mystical quality, "blood"—any of these would do.[17]

In Arizona, Judge Samuel L. Pattee demonstrated that malleability in deciding the *Kirby* case. Although Mayellen Kirby's lawyer 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 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.[18]

While the judge decided that ancestry determined that Joe Kirby was "Caucasian," he simply assumed that Mayellen Kirby was "Negro." Mayellen Kirby sat silent 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 visible physical characteristics. Neither of the lawyers bothered to argue over Mayellen's racial designation. As Joe's lawyer later explained,

> 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.[19]

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

[17] Individual racial classifications were successfully challenged in *Moore v. State*, 7 Tex. Ct. App. R. 608 (1880); *Jones v. Commonwealth*, 80 Va. 213 (1884); *Jones v. Commonwealth*, 80 Va. 538 (1885); *State v. Treadaway*, 52 So. 500 (1910); *Flores v. State*, 129 S.W. 1111 (1910); *Ferrall v. Ferrall*, 69 S.E. 60 (1910); *Marre v. Marre*, 168 S.W. 636 (1914); *Neuberger v. Gueldner*, 72 So. 220 (1916); and *Reed v. State*, 92 So. 511 (1922).

[18] "Appellant's Abstract of Record," 19, *Kirby v. Kirby*.

[19] "Appellee's Brief," Oct. 3, 1921, p. 6, *ibid.*

miscegenation drama by adding a patriarchal moral to the white supremacist plot. As long as miscegenation laws regulated marriage more than sex, 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.[20]

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. Taking a first step toward the development of modern racial ideologies, they moved beyond their carefully 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. The appeals court judge brushed aside such objections. The argument that the law was unconstitutional, the judge 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.[21]

The Culturalist Challenge to Racialism

By the 1920s, refusals to recognize the rights of African American women had become conventional in American law. So had refusals to recognize obvious inconsistencies in legal racial classification schemes. Minions of racialism, judges, juries, and experts sometimes quarreled over specifics, but they agreed on the overriding importance of making and enforcing racial classifications.

Lawyers in miscegenation cases therefore neither needed nor received much courtroom assistance from experts. In another legal arena, citizenship and naturalization law, the use of experts, nearly all of whom advocated some version of scientific racism, was much more common. Ever since the 1870s, naturalization lawyers had relied on scientific racists to help them decide which racial and ethnic

[20] On the theoretical problems involved in exploring how miscegenation laws were gendered, see Pascoe, "Race, Gender, and Intercultural Relations"; and Peggy Pascoe, "Race, Gender, and the Privileges of Property: On the Significance of Miscegenation Law in United States History," in *New Viewpoints in Women's History: Working Papers from the Schlesinger Library 50th Anniversary Conference, March 4–5, 1994*, ed. Susan Ware (Cambridge, Mass., 1994), 99–122. For an excellent account of the gendering of early miscegenation laws, see Kathleen M. Brown, *Good Wives and Nasty Wenches: Gender, Race, and Power in Colonial Virginia* (Chapel Hill, 1996).

[21] "Appellant's Brief," Sept. 8, 1921, *Kirby v. Kirby; Kirby v. Kirby*, 206 P. 405, 406 (1922). On *Kirby*, see Roger Hardaway, "Unlawful Love: A History of Arizona's Miscegenation Law," *Journal of Arizona History*, 27 (Winter 1986), 377–90.

groups met the United States naturalization requirement of being "white" persons. But in a series of cases heard in the first two decades of the twentieth century, this strategy backfired. When judges found themselves drawn into a heated scientific debate on the question of whether "Caucasian" was the same as "white," the United States Supreme Court settled the question by discarding the experts and reverting to what the justices called the opinion of the "common man."[22]

In both naturalization and miscegenation cases, judges relied on the basic agreement between popular and expert (scientific racist) versions of the racialism that permeated turn-of-the-century American society. But even as judges promulgated the common sense of racialism, the ground was shifting beneath their feet. By the 1920s, lawyers in miscegenation cases were beginning to glimpse the courtroom potential of arguments put forth by a pioneering group of self-consciously "modern" social scientists willing to challenge racialism head on.

Led by cultural anthropologist Franz Boas, these emerging experts have long stood as the heroes of histories of the decline of scientific racism (which is often taken to stand for racism as a whole). But for modern social scientists, the attack on racialism was not so much an end in itself as a function of the larger goal of establishing "culture" as a central social science paradigm. Intellectually and institutionally, Boas and his followers staked their claim to academic authority on their conviction that human difference and human history were best explained by culture. Because they interpreted character, morality, and social organization as cultural, rather than racial, phenomena and because they were determined to explore, name, and claim the field of cultural analysis for social scientists, particularly cultural anthropologists, sociologists, and social psychologists, they are perhaps best described as culturalists.[23]

To consolidate their power, culturalists had to challenge the scientific racist paradigms they hoped to displace. Two of the arguments they made were of particular significance for the emergence of modern racial ideologies. The first was the argument that the key notion of racialism—race—made no biological sense.

[22] For examples of reliance on experts, see *In re Ah Yup*, 1 F. Cas. 223 (1878) (No. 104); *In re Kanaka Nian*, 21 P. 993 (1889); *In re Saito*, 62 F. 126 (1894). On these cases, see Ian F. Haney Lopez, *White by Law: The Legal Construction of Race* (New York, forthcoming). For reliance on the "common man," see *U.S. v. Bhagat Singh Thind*, 261 U.S. 204 (1923). On *Thind*, see Sucheta Mazumdar, "Racist Responses to Racism: The Aryan Myth and South Asians in the United States," *South Asia Bulletin*, 9 (no. 1, 1989), 47–55; Joan M. Jensen, *Passage from India: Asian Indian Immigrants in North America* (New Haven, 1988), 247–69; and Roediger, *Towards the Abolition of Whiteness*, 181–84.

[23] The rise of Boasian anthropology has attracted much attention among intellectual historians, most of whom seem to agree with the 1963 comment that "it is possible that Boas did more to combat race prejudice than any other person in history"; see Gossett, *Race*, 418. In addition to the works cited in footnote 7, see I. A. Newby, *Jim Crow's Defense: Anti-Negro Thought in America, 1900–1930* (Baton Rouge, 1965), 21; and John S. Gilkeson Jr., "The Domestication of 'Culture' in Interwar America, 1919–1941," in *The Estate of Social Knowledge*, ed. JoAnne Brown and David K. van Keuren (Baltimore, 1991), 153–74. For more critical appraisals, see Robert Proctor, "Eugenics among the Social Sciences: Hereditarian Thought in Germany and the United States," *ibid.*, 175–208; Hamilton Cravens, *The Triumph of Evolution: The Heredity-Environment Controversy, 1900–1941* (Baltimore, 1988); and Donna Haraway, *Primate Visions: Gender, Race, and Nature in the World of Modern Science* (New York, 1989), 127–203. The classic—and still the best—account of the rise of cultural anthropology is Stocking, *Race, Culture, and Evolution*. See also George W. Stocking Jr., *Victorian Anthropology* (New York, 1987), 284–329.

This argument allowed culturalists to take aim at a very vulnerable target. For most of the nineteenth century, scientific racists had solved disputes about who fit into which racial categories by subdividing the categories. As a result, the number of scientifically recognized races had increased so steadily that by 1911, when the anthropologist Daniel Folkmar compiled the intentionally definitive *Dictionary of Races and Peoples,* he recognized "45 races or peoples among immigrants coming to the United States." Folkmar's was only one of several competing schemes, and culturalists delighted in pointing out the discrepancies between them, showing that scientific racists could not agree on such seemingly simple matters as how many races there were or what criteria—blood, skin color, hair type—best indicated race.[24]

In their most dramatic mode, culturalists went so far as to insist that physical characteristics were completely unreliable indicators of race; in biological terms, they insisted, race must be considered indeterminable. Thus, in an influential encyclopedia article on "race" published in the early thirties, 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." Since Huxley was one of the first culturalists trained as a biologist, his credentials added luster to his opinion. In this and other forms, the culturalist argument that race was biologically indeterminable captured the attention of both contemporaries and later historians.[25]

Historians have paid much less attention to a second and apparently incompatible argument put forth by culturalists. It 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 culturalists considered biology 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."[26]

Following this logic, the contrast between important and wide-reaching culture and unimportant (but biological) race stood as the cornerstone of many culturalist arguments. Thus the cultural anthropologist Ruth Benedict began her influential

[24] U.S. Immigration Commission, *Dictionary of Races or Peoples* (Washington, 1911), 2. For other scientific racist classification schemes, see *Encyclopaedia Britannica,* 11th ed., s.v. "Anthropology"; and *Encyclopedia Americana: A Library of Universal Knowledge* (New York, 1923), s.v. "Ethnography" and "Ethnology."

[25] Franz Boas, "Race," in *Encyclopaedia of the Social Sciences,* ed. Edwin R. A. Seligman (15 vols., New York, 1930–1935), XIII, 27; Julian S. Huxley and A. C. Haddon, *We Europeans: A Survey of "Racial" Problems* (London, 1935), 107.

[26] Boas, "Race," 34. For one of the few instances when a historian has noted this argument, see Smedley, *Race in North America,* 275–82.

1940 book, *Race: Science and Politics,* with an analysis of "what race is *not,*" including language, customs, intelligence, character, and civilization. In a 1943 pamphlet co-authored with Gene Weltfish and addressed to the general public, she explained that real "racial differences" 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." Drawing on these distinctions, Benedict argued that race was a scientific "fact," but that racism, which she defined as "the dogma that the hope of civilization depends upon eliminating some races and keeping others pure," was no more than a "modern superstition."[27]

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. Both arguments effectively contracted the range of racialist thinking, and both helped break conceptual links between race and character, morality, psychology, and language. By showing that one after another of these phenomena depended more on environment and training than on biology, culturalists moved each one out of the realm of race and into the province of culture, widening the modern split between culture and biology. Boas opened his article on race by staking out this position. "The term race is often used loosely to indicate groups of men differing in appearance, language, or culture," he wrote, but in his analysis, it would apply "solely to the biological grouping of human types."[28]

In adopting this position, culturalist intellectuals took 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, they devoted much of their work to dislodging popular racial assumptions. They saw the public as lamentably behind the times and sadly prone to race "prejudice," and they used their academic credentials to insist that racial categories not only did not rest on common sense, but made little sense at all.[29]

The *Monks* Case and the Making of Modern Racial Ideologies

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 persuade 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 was shaped in ways neither they nor the lawyers who recruited them could control.

[27] Ruth Benedict, *Race: Science and Politics* (New York, 1940), 12; Ruth Benedict and Gene Weltfish, *The Races of Mankind* (Washington, 1943), 5; Benedict, *Race,* 12.

[28] Boas, "Race," 25–26.

[29] See, for example, Huxley and Haddon, *We Europeans,* 107, 269–73; Benedict and Weltfish, *Races of Mankind;* Benedict, *Race;* and Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (New York, 1944), 91–115.

Take, for example, the seemingly curious trial of Marie Antoinette Monks of San Diego, California, decided 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 the marriage, which took place in Arizona, Allan Monks declined into insanity. Whether his mental condition resulted from injuries he had suffered in a motorcycle crash or from drugs administered under the undue influence of Marie Antoinette, the court would debate at great length. 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, Marie Antoinette. Ida Lee submitted her version of the will for probate, Marie Antoinette challenged her claim, and Lee fought back. Lee's lawyers contended 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.[30]

Much of the ensuing six-week-long 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 the "kink" in her 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, from the "peculiar pallor" on the back of her neck, from the shape of her face, and from the wave of her hair.[31]

To defend Monks, her lawyers called a friend, a relative, and two expert witnesses of their own, an anthropologist and a biologist. The experts both 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

[30] The Monks trial can be followed in *Estate of Monks*, 4 Civ. 2835, Records of California Court of Appeals, Fourth District (California State Archives, Roseville); and *Gunn v. Giraudo*, 4 Civ. 2832, *ibid.* (Gunn represented another claimant to the estate.) The two cases were tried together. For the 7-volume "Reporter's Transcript," see *Estate of Monks*, 4 Civ. 2835, *ibid.*

[31] "Reporter's Transcript," vol. 2, pp. 660–67, vol. 3, pp. 965–76, 976–98, *Estate of Monks*.

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 because this argument replaced certainty with uncertainty, it did not play very well in the *Monks* courtroom. Seeking to find the definitiveness they needed to offset the experts who had already testified, the lawyers for Monks paraded their own 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.[32]

The experts' dilemma reveals the limitations of the argument for racial indeterminacy in the courtroom. Faced with a conflict between culturalist experts, 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 frustratingly vague and uncooperative (in other words, 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); he passed over the biologist (whose testimony, he thought, could go either way); and he dismissed the two anthropologists, whose testimonies, he said, more or less canceled each other out. The only expert the judge was willing to rely on was the surgeon, because the surgeon "seemed . . . to hold a very unique and peculiar position as an expert on the question involved from his work in life."[33]

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 and from inheriting his estate. The racial categorization served to invalidate the marriage in two overlapping ways. First, as a "negro," Marie Antoinette could not marry a white under Arizona miscegenation law; and second, by telling her husband-to-be that she was "French," Marie Antoinette 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.[34]

[32] *Ibid.*, vol. 5, pp. 1501–49, vol. 6, pp. 1889–1923.

[33] *Ibid.*, vol. 7, pp. 2543, 2548.

[34] "Findings of Fact and Conclusions of Law," in "Clerk's Transcript," Dec. 2, 1940, *Gunn v. Giraudo*, 4 Civ. 2832, p. 81. One intriguing aspect of the *Monks* case is that the seeming exactness was unnecessary. The status of the marriage hinged on the Arizona miscegenation law, which would have denied validity to the marriage whether the proportion of "blood" in question was "one-eighth" or "one drop."

As the *Monks* case suggests, we should be careful not to overestimate the influence culturalists had on the legal system. And, while in courtrooms culturalist experts were trying—and failing—to convince judges that biological racial questions were unanswerable, outside the courts their contention that biological racial answers were insignificant was faring little better. During the first three decades of the twentieth century, scientists on the "racial" side of the split between race and culture reconstituted themselves into a rough alliance of their own. Mirroring the modern dividing line between biology and culture, its ranks swelled with those who claimed special expertise on biological questions. There were biologists and physicians; leftover racialists such as physical anthropologists, increasingly shorn of their claims to expertise in every arena *except* that of physical characteristics; and, finally, the newly emerging eugenicists.[35]

Eugenicists provided the glue that held this coalition together. Narrowing the sweep of nineteenth-century racialist thought to focus on biology, these modern biological experts then expanded their range by offering physical characteristics, heredity, and reproductive imperatives as variations on the biological theme. They were particularly drawn to arenas in which all these biological motifs came into play; accordingly, they placed special emphasis on reforming marriage laws. Perhaps the best-known American eugenicist, Charles B. Davenport of the Eugenics Record Office, financed by the Carnegie Institution, outlined their position in a 1913 pamphlet, *State Laws Limiting Marriage Selection Examined in the Light of Eugenics,* which proposed strengthening state control over the marriages of the physically and racially unfit. Davenport's plan was no mere pipe dream. According to the historian Michael Grossberg, by the 1930s, 41 states used eugenic categories to restrict the marriage of "lunatics," "imbeciles," "idiots," and the "feebleminded"; 26 states restricted the marriages of those infected with syphilis and gonorrhea; and 27 states passed sterilization laws. By midcentury, blood tests had become a standard legal prerequisite for marriage.[36]

Historians have rather quickly passed over the racial aspects of American eugenics, seeing its proponents as advocates of outmoded ideas soon to be beached by the culturalist sea change. Yet until at least World War II, eugenicists reproduced a modern racism that was biological in a particularly virulent sense. For them, unlike their racialist predecessors (who tended to regard biology as an indicator of a much more expansive racial phenomenon), biology really was the essence of race. And unlike nineteenth-century scientific racists (whose belief in discrete racial dividing lines was rarely shaken by evidence of racial intermixture), twentieth-century

[35] For descriptions of those interested in biological aspects of race, see Stocking, *Race, Culture, and Evolution,* 271–307; I. A. Newby, *Challenge to the Court: Social Scientists and the Defense of Segregation, 1954–1966* (Baton Rouge, 1969); and Cravens, *Triumph of Evolution,* 15–55. On eugenics, see Proctor, "Eugenics among the Social Sciences," 175–208; Daniel J. Kevles, *In the Name of Eugenics: Genetics and the Uses of Human Heredity* (New York, 1985); Mark H. Haller, *Eugenics: Hereditarian Attitudes in American Thought* (New Brunswick, 1963); and William H. Tucker, *The Science and Politics of Racial Research* (Urbana, 1994), 54–137.

[36] Charles B. Davenport, *Eugenics Record Office Bulletin No. 9: State Laws Limiting Marriage Selection Examined in the Light of Eugenics* (Cold Spring Harbor, 1913); Michael Grossberg, "Guarding the Altar: Physiological Restrictions and the Rise of State Intervention in Matrimony," *American Journal of Legal History,* 26 (July 1982), 221–24.

eugenicists and culturalists alike seemed obsessed with the subject of mixed-race individuals.[37]

In their determination to protect "white purity," eugenicists believed that even the tightest definitions of race by blood proportion were too loose. Setting their sights on Virginia, in 1924 they secured passage of the most draconian miscegenation law in American history. The act, entitled "an Act to preserve racial integrity," replaced the legal provision that a person must have one-sixteenth of "negro blood" to fall within the state's definition of "colored" with a provision that:

> It shall hereafter be 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. For the purpose of this act, the term "white person" shall apply only to the person who has no trace whatsoever 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.

Another section of the Virginia law (which provided for the issuance of supposedly voluntary racial registration certificates for Virginia citizens) spelled out the "races" the legislature had in mind. The list, which specified "Caucasian, Negro, Mongolian, American Indian, Asiatic Indian, Malay, or any mixture thereof, or any other non-Caucasic strains," showed the lengths to which lawmakers would go to pin down racial categories. Within the decade, the Virginia law was copied by Georgia and echoed in Alabama. Thereafter, while supporters worked without much success to extend such laws to other states, defenders of miscegenation statutes added eugenic arguments to their rhetorical arsenal.[38]

Having been pinned to the modern biological wall and labeled as "mixed race," Marie Antoinette Monks would seem to have been in the perfect position to challenge the constitutionality of the widely drawn Arizona miscegenation law. She took her case to the California Court of Appeals, Fourth District, where she made an argument that echoed that of Mayellen Kirby two decades earlier. Reminding the court of the wording of the Arizona statute, her lawyers pointed out that "on the set of facts found by the trial judge, [Marie Antoinette Monks] is concededly of Caucasian blood as well as negro blood, and therefore a descendant of a Caucasian." Spelling it out, they explained:

> As such, she is prohibited from marrying a negro or any descendant of a negro, a Mongolian or an Indian, a Malay or a Hindu, or any of the descendants of

[37] See, for example, C[harles] B[enedict] Davenport and Morris Steggerda, *Race Crossing in Jamaica* (1929; Westport, 1970); Edward Byron Reuter, *Race Mixture: Studies in Intermarriage and Miscegenation* (New York, 1931); and Emory S. Bogardus, "What Race Are Filipinos?," *Sociology and Social Research*, 16 (1931–1932), 274–79.

[38] 1924 Va. Acts ch. 371; 1927 Ga. Laws no. 317; 1927 Ala. Acts no. 626. The 1924 Virginia act replaced 1910 Va. Acts ch. 357, which classified as "colored" persons with 1/16 or more "negro blood." The retention of an allowance for American Indian "blood" in persons classed as white was forced on the bill's sponsors by Virginia aristocrats who traced their ancestry to Pocahontas and John Rolfe. See Paul A. Lombardo, "Miscegenation, Eugenics, and Racism: Historical Footnotes to *Loving v. Virginia*," *U.C. Davis Law Review*, 21 (Winter 1988), 431–52; and Richard B. Sherman, "'The Last Stand': The Fight for Racial Integrity in Virginia in the 1920s," *Journal of Southern History*, 54 (Feb. 1988), 69–92.

> any of them. Likewise . . . as a descendant of a negro she is prohibited from marrying a Caucasian or descendant of a Caucasian, which of course would include any person who had any degree of Caucasian blood in them.

Because this meant that she was "absolutely prohibited from contracting valid marriages in Arizona," her lawyers argued that the Arizona law was an unconstitutional constraint on her liberty.[39]

The court, however, dismissed this argument as "interesting but in our opinion not tenable." In a choice that speaks volumes about the depth of attachment to racial categories, the court narrowed the force of the argument by asserting that "the constitutional problem would be squarely presented" only if one mixed-race person were seeking to marry another mixed-race person, then used this constructed hypothetical to dodge the issue:

> While it is true that there was evidence that appellant [Marie Antoinette Monks] is a descendant of the Caucasian race, as well as of the Negro race, the other contracting party [Allan Monks] was of unmixed blood and therefore the hypothetical situation involving an attempted alliance between two persons of mixed blood is no more present in the instant case than in the Kirby case. . . . The situations conjured up by respondent are not here involved. . . . Under the facts presented the appellant does not have the benefit of assailing the validity of the statute.

This decision was taken as authoritative. Both the United States Supreme Court and the Supreme Judicial Court of Massachusetts (in which Monks had also filed suit) refused to reopen the issue.[40]

Perhaps the most interesting thing about the Monks case is that there is no reason to believe that the public found it either remarkable or objectionable. Local reporters who covered the trial in 1939 played up the themes of forgery, drugs, and insanity; their summaries of the racial categories of the Arizona law and the opinions of the expert witnesses were largely matter-of-fact.[41]

In this seeming acceptability to the public lies a clue to the development of modern racial ideologies. Even as judges narrowed their conception of race, transforming an all-encompassing phenomenon into a simple fact to be determined, they remained bound by the provisions of miscegenation law to determine who fit in which racial categories. For this purpose, the second culturalist argument, that race was merely biology, had far more to offer than the first, that race was biologically indeterminable. The conception of race as merely biological seemed consonant with the racial categories built into the laws, seemed supportable by

[39] "Appellant's Opening Brief," *Gunn v. Giraudo*, 12–13. This brief appears to have been prepared for the California Supreme Court but used in the California Court of Appeals, Fourth District. On February 14, 1942, the California Supreme Court refused to review the Court of Appeals decision. See *Estate of Monks*, 48 C.A. 2d 603, 621 (1941).

[40] *Estate of Monks*, 48 C.A. 2d 603, 612–15 (1941); *Monks v. Lee*, 317 U.S. 590 (*appeal dismissed*, 1942), 711 (*reh'g denied*, 1942); *Lee v. Monks*, 62 N.E. 2d 657 (1945); *Lee v. Monks*, 326 U.S. 696 (*cert. denied*, 1946).

[41] On the case, see *San Diego Union*, July 21, 1939–Jan. 6, 1940. On the testimony of expert witnesses on race, see *ibid.*, Sept. 21, 1939, p. 4A; *ibid.*, Sept. 29, 1939, p. 10A; and *ibid.*, Oct. 5, 1939, p. 8A.

clear and unequivocal expert testimony, and fit comfortably within popular notions of race.

The Distillation of Modernist Racial Ideology: From *Perez* to *Loving*

In the *Monks* case we can see several modern racial ideologies—ranging from the argument that race was biological nonsense to the reply that race was essentially biological to the possibility that race was merely biology—all grounded in the split between culture and biology. To distill these variants into a unified modernist racial ideology, another element had to be added to the mix, the remarkable (in American law, nearly unprecedented) proposal that the legal system abandon its traditional responsibility for determining and defining racial categories. In miscegenation law, this possibility emerged in a case that also, and not coincidentally, featured the culturalist argument for biological racial indeterminacy.

The case was *Perez v. Lippold.* It involved a young Los Angeles couple, Andrea Perez and Sylvester Davis, who sought a marriage license. Turned down by the Los Angeles County clerk, they challenged the constitutionality of the California miscegenation law directly to the California Supreme Court, which heard their case in October 1947.[42]

It was not immediately apparent that the *Perez* case would play a role in the development of modernist racial ideology. Perhaps because both sides agreed that Perez was "a white female" and Davis "a Negro male," the lawyer who defended the couple, Daniel Marshall, did not initially see the case as turning on race categorization. In 1947, Marshall had few civil rights decisions to build on, so he tried an end-run strategy: he based his challenge to miscegenation laws on the argument that because both Perez and Davis were Catholics and the Catholic Church did not prohibit interracial marriage, California miscegenation law was an arbitrary and unreasonable restraint on their freedom of religion.

The freedom-of-religion argument made some strategic sense, since several courts had held that states had to meet a high standard to justify restrictions on religious expression. Accordingly, Marshall laid out the religion argument in a lengthy petition to the California Supreme Court. In response, the state offered an even lengthier defense of miscegenation laws. The state's lawyers had at their fingertips a long list of precedents upholding such laws, including the *Kirby* and *Monks* cases. They added eugenic arguments about racial biology, including evidence of declining birth rates among "hybrids" and statistics that showed high mortality, short life expectancies, and particular diseases among African Americans. They polished off their case with the comments of a seemingly sympathetic Roman Catholic priest.[43]

[42] *Perez v. Lippold,* L.A. 20305, Supreme Court Case Files (California State Archives). The case was also known as *Perez v. Moroney* and *Perez v. Sharp* (the names reflect changes of personnel in the Los Angeles County clerk's office). I have used the title given in the *Pacific Law Reporter,* the most easily available version of the final decision: *Perez v. Lippold,* 198 P. 2d 17 (1948).

[43] "Petition for Writ of Mandamus, Memorandum of Points and Authorities and Proof of Service," Aug. 8, 1947, *Perez v. Lippold;* "Points and Authorities in Opposition to Issuance of Alternative Writ of Mandate,"

Here the matter stood until the California Supreme Court heard oral arguments in the case. At that session, the court listened in silence to Marshall's opening sally that miscegenation laws were based on prejudice and to his argument that they violated constitutional guarantees of freedom of religion. But as soon as the state's lawyer began to challenge the religious freedom argument, one of the court's associate justices, Roger Traynor, impatiently interrupted the proceedings. "What," he asked, "about equal protection of the law?"

> *Mr. Justice Traynor:* . . . it might help to explain the statute, what it means. What is a negro?
>
> *Mr. Stanley:* We have not the benefit of any judicial interpretation. The statute states that a negro [Stanley evidently meant to say, as the law did, "a white"] cannot marry a negro, which can be construed to mean a full-blooded negro, since the statute also says mulatto, Mongolian, or Malay.
>
> *Mr. Justice Traynor:* What is a mulatto? One-sixteenth blood?
>
> *Mr. Stanley:* Certainly certain states have seen fit to state what a mulatto is.
>
> *Mr. Justice Traynor:* If there is 1/8 blood, can they marry? If you can marry with 1/8, why not with 1/16, 1/32, 1/64? And then don't you get in the ridiculous position where a negro cannot marry anybody? If he is white, he cannot marry black, or if he is black, he cannot marry white.
>
> *Mr. Stanley:* I agree that it would be better for the Legislature to lay down an exact amount of blood, but I do not think that the statute should be declared unconstitutional as indefinite on this ground.
>
> *Mr. Justice Traynor:* That is something anthropologists have not been able to furnish, although they say generally that there is no such thing as race.
>
> *Mr. Stanley:* I would not say that anthropologists have said that generally, except such statements for sensational purposes.
>
> *Mr. Justice Traynor:* Would you say that Professor Wooten of Harvard was a sensationalist? The crucial question is how can a county clerk determine who are negroes and who are whites.[44]

Although he addressed his questions to the lawyers for the state, Justice Traynor had given Marshall a gift no lawyer had ever before received in a miscegenation case: judicial willingness to believe in the biological indeterminacy of race. It was no accident that this argument came from Roger Traynor. A former professor at Boalt Hall, the law school of the University of California, Berkeley, Traynor had been appointed to the court for his academic expertise rather than his legal experience; unlike his more pragmatic colleagues, he kept up with developments in modern social science.[45]

Marshall responded to the opening Traynor had provided by making sure that his next brief included the culturalist argument that race was biological nonsense. In it, he asserted that experts had determined that "race, as popularly understood,

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Aug. 13, 1947, *ibid.*; "Return by Way of Demurrer," Oct. 6, 1947, *ibid.*; "Return by Way of Answer," Oct. 6, 1947, *ibid.*; "Respondent's Brief in Opposition to Writ of Mandate," Oct. 6, 1947, *ibid.*

[44] "[Oral Argument] On Behalf of Respondent," Oct. 6, 1947, pp. 3–4, *ibid.*

[45] Stanley Mosk, "A Retrospective," *California Law Review*, 71 (July 1983), 1045; Peter Anderson, "A Remembrance," *ibid.*, 1066–71.

is a myth"; he played on the gap between expert opinion and laws based on irrational "prejudice" rooted in "myth, folk belief, and superstition"; and he dismissed his opponents' reliance on the "grotesque reasoning of eugenicists" by comparing their statements to excerpts from Adolf Hitler's *Mein Kampf*.[46]

Marshall won his case. The 1948 decision in the *Perez* case was remarkable for many reasons. It marked the first time since Reconstruction that a state court had declared a state miscegenation law unconstitutional. It went far beyond existing appeals cases in that the California Supreme Court had taken the very step the judges in the *Kirby* and *Monks* cases had avoided—going beyond the issue of the race of an individual to consider the issue of racial classification in general. Even more remarkable, the court did so in a case in which neither side had challenged the racial classification of the parties. But despite these accomplishments, the *Perez* case was no victory for the culturalist argument about the biological indeterminacy of race. Only the outcome of the case—that California's miscegenation law was unconstitutional—was clear. The rationale for this outcome was a matter of considerable dispute.

Four justices condemned the law and three supported it; altogether, they issued four separate opinions. A four-justice majority agreed that the law should be declared unconstitutional but disagreed about why. Two justices, led by Traynor, issued a lengthy opinion that pointed out the irrationality of racial categories, citing as authorities a virtual who's who of culturalist social scientists, from Boas, Huxley, and Haddon to Gunnar Myrdal. A third justice issued a concurring opinion that pointedly ignored the rationality or irrationality of race classifications to criticize miscegenation laws on equality grounds, contending that laws based on "race, color, or creed" were—and always had been—contrary to the Declaration of Independence, the Constitution, and the Fourteenth Amendment; as this justice saw it, the Constitution was color-blind. A fourth justice, who reported that he wanted his decision to "rest upon a broader ground than that the challenged statutes are discriminatory and irrational," based his decision solely on the religious freedom issue that had been the basis of Marshall's original argument.[47]

In contrast, a three-justice minority argued that the law should be upheld. They cited legal precedent, offered biological arguments about racial categories, and mentioned a handful of social policy considerations. Although the decision went against them, their agreement with each other ironically formed the closest thing to a majority in the case. In sum, although the *Perez* decision foreshadowed the day when American courts would abandon their defense of racial categories, its variety of judicial rationales tells us more about the range of modern racial ideologies than it does about the power of any one of them.[48]

Between the *Perez* case in 1948 and the next milestone miscegenation case, *Loving v. Virginia*, decided in 1967, judges would search for a common denominator among this contentious variety, trying to find a position of principled decisive-

[46] "Petitioners' Reply Brief," Nov. 8, 1947, pp. 4, 44, 23–24, *Perez v. Lippold*.
[47] *Perez v. Lippold*, 198 P. 2d at 17–35, esp. 29, 34.
[48] *Ibid.*, 35–47.

ness persuasive enough to mold both public and expert opinion. One way to do this was to back away from the culturalist argument that race made no biological sense, adopting the other culturalist argument that race was biological fact and thus shifting the debate to the question of how much biological race should matter in determining social and legal policy.

In such a debate, white supremacists tried to extend the reach of biological race as far as possible. Thus one scientist bolstered his devotion to white supremacy by calling Boas "that appalling disaster to American social anthropology whose influence in the end has divorced the social studies of man from their scientific base in physical biology."[49] Following the lead of eugenicists, he and his sympathizers tried to place every social and legal superstructure on a biological racial base.

In contrast, their egalitarian opponents set limits. In their minds, biological race (or "skin color," as they often called it), was significant only because its visibility made it easy for racists to identify those they subjected to racial oppression. As Myrdal, the best-known of the mid-twentieth-century culturalist social scientists, noted in 1944 in his monumental work, *An American Dilemma:*

> In spite of all heterogeneity, the average white man's unmistakable observation is that *most Negroes in America have dark skin and woolly hair,* and he is, of course, right. . . . [the African American's] African ancestry and physical characteristics are fixed to his person much more ineffaceably than the yellow star is fixed to the Jew during the Nazi regime in Germany.[50]

To Myrdal's generation of egalitarians, the translation of visible physical characteristics into social hierarchies formed the tragic foundation of American racism.

The egalitarians won this debate, and their victory paved the way for the emergence of a modernist racial ideology persuasive enough to command the kind of widespread adherence once commanded by late-nineteenth-century racialism. Such a position was formulated by the United States Supreme Court in 1967 in *Loving v. Virginia,* the most important miscegenation case ever heard and the only one now widely remembered.

The *Loving* case involved what was, even for miscegenation law, an extreme example. Richard Perry Loving and Mildred Delores Jeter were residents of the small town of Central Point, Virginia, and family friends who had dated each other since he was seventeen and she was eleven. When they learned that their plans to marry were illegal in Virginia, they traveled to Washington, D.C., which did not have a miscegenation law, for the ceremony, returning in June 1958 with a marriage license, which they framed and placed proudly on their wall. In July 1958, they were awakened in the middle of the night by the county sheriff and two deputies, who had walked through their unlocked front door and right into their bedroom to arrest them for violating Virginia's miscegenation law. Under

[49] For the characterization of Franz Boas, by Robert Gayres, editor of the Scottish journal *Mankind Quarterly,* see Newby, *Challenge to the Court,* 323. On *Mankind Quarterly* and on mid-twentieth-century white supremacist scientists, see Tucker, *Science and Politics of Racial Research.*

[50] Myrdal, *American Dilemma,* 116–17.

that law, an amalgam of criminal provisions enacted in 1878 and Virginia's 1924 "Act to preserve racial integrity," the Lovings, who were identified in court records as a "white" man and a "colored" woman, pleaded guilty and were promptly convicted and sentenced to a year in jail. The judge suspended their sentence on the condition that "both accused leave . . . the state of Virginia at once and do not return together or at the same time to said county and state for a period of twenty-five years."[51]

In 1963, the Lovings, then the parents of three children, grew tired of living with relatives in Washington, D.C., and decided to appeal this judgment. Their first attempts ended in defeat. In 1965, the judge who heard their original case not only refused to reconsider his decision but raised the rhetorical stakes by opining:

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

But by the time their argument had been processed by the Supreme Court of Appeals of Virginia (which invalidated the original sentence but upheld the miscegenation law), the case had attracted enough attention that the United States Supreme Court, which had previously avoided taking miscegenation cases, agreed to hear an appeal.[52]

On the side of the Lovings stood not only their own attorneys, but also the National Association for the Advancement of Colored People (NAACP), the NAACP Legal Defense and Education Fund, the Japanese American Citizens League (JACL), and a coalition of Catholic bishops. The briefs they submitted offered the whole arsenal of arguments developed in previous miscegenation cases. The bishops offered the religious freedom argument that had been the original basis of the *Perez* case. The NAACP and the JACL stood on the opinions of culturalist experts, whose numbers now reached beyond social scientists well into the ranks of biologists. Offering both versions of the culturalist line on race, NAACP lawyers argued on

[51] *Loving v. Commonwealth*, 147 S.E. 2d 78, 79 (1966). For the *Loving* briefs and oral arguments, see Philip B. Kurland and Gerhard Casper, eds., *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*, vol. LXIV (Arlington, 1975), 687–1007. Edited cassette tapes of the oral argument are included with Peter Irons and Stephanie Guitton, ed., *May It Please the Court: The Most Significant Oral Arguments Made before the Supreme Court since 1955* (New York, 1993). For scholarly assessments, see Wallenstein, "Race, Marriage, and the Law of Freedom"; Walter Wadlington, "The Loving Case: Virginia's Antimiscegenation Statute in Historical Perspective," in *Race Relations and the Law in American History: Major Historical Interpretations*, ed. Kermit L. Hall (New York, 1987), 600–634; and Robert J. Sickels, *Race, Marriage, and the Law* (Albuquerque, 1972).

[52] *Loving v. Virginia*, 388 U.S. 1, 3 (1967); Wallenstein, "Race, Marriage, and the Law of Freedom," 423–25, esp. 424; *New York Times*, June 12, 1992, p. B7. By the mid-1960s some legal scholars had questioned the constitutionality of miscegenation laws, including C. D. Shokes, "The Serbonian Bog of Miscegenation," *Rocky Mountain Law Review*, 21 (1948–1949), 425–33; Wayne A. Melton, "Constitutionality of State Anti-Miscegenation Statutes," *Southwestern Law Journal*, 5 (1951), 451–61; Andrew D. Weinberger, "A Reappraisal of the Constitutionality of Miscegenation Statutes," *Cornell Law Quarterly*, 42 (Winter 1957), 208–22; Jerold D. Cummins and John L. Kane Jr., "Miscegenation, the Constitution, and Science," *Dicta*, 38 (Jan.–Feb. 1961), 24–54; William D. Zabel, "Interracial Marriage and the Law," *Atlantic Monthly*, 216 (Oct. 1965), 75–79; and Cyrus E. Phillips IV, "Miscegenation: The Courts and the Constitution," *William and Mary Law Review*, 8 (Fall 1966), 133–42.

one page, "The idea of 'pure' racial groups, either past or present, has long been abandoned by modern biological and social sciences," and on another, "Race, in its scientific dimension, refers only to the biogenetic and physical attributes manifest by a specified population. It does not, under any circumstances, refer to culture (learned behavior), language, nationality, or religion." The Lovings' lawyers emphasized two central points: Miscegenation laws violated both the constitutional guarantee of equal protection under the laws and the constitutional protection of the fundamental right to marry.[53]

In response, the lawyers for the state of Virginia tried hard to find some ground on which to stand. Their string of court precedents upholding miscegenation laws had been broken by the *Perez* decision. Their argument that Congress never intended the Fourteenth Amendment to apply to interracial marriage was offset by the Supreme Court's stated position that congressional intentions were inconclusive. In an attempt to distance the state from the "white purity" aspects of Virginia's 1924 law, Virginia's lawyers argued that since the Lovings admitted that they were a "white" person and a "colored" person and had been tried under a section of the law that mentioned only those categories, the elaborate definition of "white" offered in other sections of Virginia law was irrelevant.[54]

On only one point did the lawyers for both parties and the Court seem to agree: None of them wanted to let expert opinion determine the outcome. The lawyers for Virginia knew only too well that during the twentieth century, the scientific foundations of the eugenic biological argument in favor of miscegenation laws had crumbled, so they tried to warn the Court away by predicting that experts would mire the Court in "a veritable Serbonian bog of conflicting scientific opinion." Yet the Lovings' lawyers, who seemed to have the experts on their side, agreed that "the Court should not go into the morass of sociological evidence that is available on both sides of the question." "We strongly urge," they told the justices, "that it is not necessary." And the Court, still reeling from widespread criticism that its decision in the famous 1954 case *Brown v. Board of Education* was illegitimate "sociological jurisprudence," was not about to offer its opponents any more of such ammunition.[55]

The decision the Court issued was, in fact, carefully shorn of all reference to expert opinion; it spoke in language that both reflected and contributed to a new popular common sense on the issue of race. Recycling earlier pronouncements that "distinctions between citizens solely because of their ancestry" were "odious to a free people whose institutions are founded upon the doctrine of equality" and that the Court "cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense," the justices reached a new and broader conclusion. Claiming (quite inaccurately) that "We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race," the Court concluded that

[53] Kurland and Casper, eds., *Landmark Briefs*, 741–88, 847–950, 960–72, esp. 898–99, 901.
[54] *Ibid.*, 789–845, 976–1003.
[55] *Ibid.*, 834, 1007.

the racial classifications embedded in Virginia miscegenation laws were "so directly subversive of the principle of equality at the heart of the Fourteenth Amendment" that they were "unsupportable." Proclaiming that it violated both the equal protection and the due process clauses of the Fourteenth Amendment, the Court declared the Virginia miscegenation law unconstitutional.[56]

Legacies of Modernist Racial Ideology

The decision in the *Loving* case shows the distance twentieth-century American courts had traveled. The accumulated effect of several decades of culturalist attacks on racialism certainly shaped their thinking. The justices were no longer willing to accept the notion that race was the all-encompassing phenomenon nineteenth-century racialist thinkers had assumed it to be; they accepted the divisions between culture and biology and culture and race established by modern social scientists. But neither were they willing to declare popular identification of race with physical characteristics (like "the color of a person's skin") a figment of the imagination. In their minds, the scope of the term "race" had shrunk to a point where biology was all that was left; "race" referred to visible physical characteristics significant only because racists used them to erect spurious racial hierarchies. The Virginia miscegenation law was a case in point; the Court recognized and condemned it as a statute clearly "designed to maintain White Supremacy."[57]

Given the dependence of miscegenation laws on legal categories of race, the Court concluded that ending white supremacy required abandoning the categories. In de-emphasizing racial categories, they joined mainstream mid-twentieth-century social scientists, who argued that because culture, rather than race, shaped meaningful human difference, race was nothing more than a subdivision of the broader phenomenon of ethnicity. In a society newly determined to be "color-blind," granting public recognition to racial categories seemed to be synonymous with racism itself.[58]

And so the Supreme Court promulgated a modernist racial ideology that maintained that the best way to eradicate racism was the deliberate nonrecognition of race. Its effects reached well beyond miscegenation law. Elements of modernist racial ideology marked many of the major mid-twentieth-century Supreme Court decisions, including *Brown v. Board of Education.* Its effects on state law codes were equally substantial; during the 1960s and 1970s, most American states re-

[56] *Loving v. Virginia,* 388 U.S. at 12.

[57] *Ibid.*, 11.

[58] The notion that American courts should be "color-blind" is usually traced to Supreme Court Justice John Harlan. Dissenting from the Court's endorsement of the principle of "separate but equal" in *Plessy v. Ferguson,* Harlan insisted that "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson,* 163 U.S. 537, 559 (1896). But only after *Brown v. Board of Education,* widely interpreted as a belated endorsement of Harlan's position, did courts begin to adopt color blindness as a goal. *Brown v. Board of Education,* 347 U.S. 483 (1954). On the history of the color-blindness ideal, see Andrew Kull, *The Color-Blind Constitution* (Cambridge, Mass., 1992). On developments in social science, see Omi and Winant, *Racial Formation in the United States,* 14–23.

pealed statutes that had defined "race" (usually by blood proportion) and set out to erase racial terminology from their laws.[59]

Perhaps the best indication of the pervasiveness of modernist racial ideology is how quickly late-twentieth-century conservatives learned to shape their arguments to fit its contours. Attaching themselves to the modernist narrowing of the definition of race to biology and biology alone, conservative thinkers began to contend that, unless their ideas rested solely and explicitly on a belief in biological inferiority, they should not be considered racist. They began to advance "cultural" arguments of their very own, insisting that their proposals were based on factors such as social analysis, business practicality, or merit—on anything, in other words, except biological race. In their hands, modernist racial ideology supports an Alice-in-Wonderland interpretation of racism in which even those who argue for racially oppressive policies can adamantly deny being racists.

This conservative turnabout is perhaps the most striking, but not the only, indication of the contradictions inherent in modernist racial ideology. Others run the gamut from administrative law to popular culture. So while the United States Supreme Court tries to hold to its twentieth-century legacy of limiting, when it cannot eradicate, racial categories, United States government policies remain deeply dependent on them. In the absence of statutory definitions of race, racial categories are now set by the United States Office of Management and Budget, which in 1977 issued a "Statistical Directive" that divided Americans into five major groups—American Indian or Alaskan Native, Asian or Pacific Islander, Black, White, and Hispanic. The statistics derived from these categories help determine everything from census counts to eligibility for inclusion in affirmative action programs to the drawing of voting districts.[60] Meanwhile, in one popular culture flashpoint after another—from the Anita Hill/Clarence Thomas hearings to the *O. J. Simpson* case, mainstream commentators insist that "race" should not be a consideration even as they explore detail after detail that reveals its social pervasiveness.[61]

These gaps between the (very narrow) modernist conception of race and the (very wide) range of racial identities and racial oppressions bedevil today's egalitarians. In the political arena, some radicals have begun to argue that the legal system's deliberate nonrecognition of race erodes the ability to recognize and name racism and to argue for such policies as affirmative action, which rely on racial categories

[59] *Brown v. Board of Education*, 347 U.S. 483 (1954). The Court declared distinctions based "solely on ancestry" "odious" even while upholding curfews imposed on Japanese Americans during World War II; see *Hirabayashi v. United States*, 320 U.S. 81 (1943). It declared race a "suspect" legal category while upholding the internment of Japanese Americans; see *Korematsu v. United States*, 323 U.S. 214 (1944). By 1983, no American state had a formal race-definition statute still on its books. See Chris Ballentine, "'Who Is a Negro?' Revisited: Determining Individual Racial Status for Purposes of Affirmative Action," *University of Florida Law Review*, 35 (Fall 1983), 692. The repeal of state race-definition statutes often accompanied repeal of miscegenation laws. See, for example, 1953 Mont. Laws ch. 4; 1959 Or. Laws ch. 531; 1965 Ind. Acts ch. 15; 1969 Fla. Laws 69–195; and 1979 Ga. Laws no. 543.

[60] The fifth of these categories, "Hispanic," is sometimes described as "ethnic," rather than "racial." For very different views of the current debates, see Lawrence Wright, "One Drop of Blood," *New Yorker*, July 25, 1994, pp. 46–55; and Michael Lind, *The Next American Nation: The New Nationalism and the Fourth American Revolution* (New York, 1995), 97–137.

[61] *People v. O. J. Simpson*, Case no. BA 097211, California Superior Court, L.A. County (1994).

to overturn rather than to enforce oppression. Meanwhile, in the universities, a growing chorus of scholars is revitalizing the argument for the biological indeterminacy of race and using that argument to explore the myriad of ways in which socially constructed notions of race remain powerfully salient. Both groups hope to do better than their culturalist predecessors at eradicating racism.[62]

Attaining that goal may depend on how well we understand the tortured history of mid-twentieth-century American ideologies of race.

[62] See, for example, Kimberle Williams Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," *Harvard Law Review,* 101 (May 1988), 1331–87; Dana Y. Takagi, *The Retreat from Race: Asian-American Admissions and Racial Politics* (New Brunswick, 1992), 181–94; and Girardeau A. Spann, *Race against the Court: The Supreme Court and Minorities in Contemporary America* (New York, 1993), 119–49. See footnote 5, above. On recent work in the humanities, see Tessie Liu, "Race," in *A Companion to American Thought,* ed. Richard Wightman Fox and James T. Kloppenberg (Cambridge, Mass., 1995), 564–67. On legal studies, see Richard Delgado and Jean Stefancic, "Critical Race Theory: An Annotated Bibliography," *Virginia Law Review,* 79 (March 1993), 461–516.