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Article

Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600–1860

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"It ain't no lie, it's a natural fact, / You could have been colored without being so black . . ."

—Sung by deck hands, Auburn, Alabama, 1915–16¹

"They are our enemies; we marry them."

—African Proverb²

INTRODUCTION: THE BRIDE WORE BLACK

In 1819 a Scotsman named James Flint crossed the Atlantic Ocean, made his way from New York to Pittsburgh, sailed down the Ohio, and settled for eighteen months in Jeffersonville, Indiana, just opposite Louisville, Kentucky. His letters

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1. NEWMAN IVEY WHITE, AMERICAN NEGRO FOLK-SONGS 140 (photo. reprint 1965) (1928).

2. DAVID NIRENBERG, COMMUNITIES OF VIOLENCE: PERSECUTION OF MINORITIES IN THE MIDDLE AGES 10 (1996) (quoting MAX GLUCKMAN, CUSTOM AND CONFLICT IN AFRICA 12–13 (1956)).

home described everything from native trees and shrubs to the "taciturnity" of American speech, "adapted to business more than to intellectual enjoyment."³ Soon after arriving in Jeffersonville, Flint recounted the time when a "negro man and a white woman came before the squire of a neighbouring township, for the purpose of being married."⁴ The official refused, citing a prohibition on "all sexual intercourse between white and coloured people, under a penalty for each offence."⁵ Then he thought the better of it. He "suggested, that if the woman could be qualified to swear that there was black blood in her, the law would not apply. The hint was taken," Flint wrote, "and the lancet was immediately applied to the Negro's arm. The loving bride drank the blood, made the necessary oath, and his honour joined their hands, to the great satisfaction of all parties."⁶

Immortalized a century later in *Showboat*, the scene literalizes the "one-drop rule"—the idea that anyone with any African "blood" is legally black. On a first reading, the Indiana wedding seems to confirm that early in the nineteenth century the rule was molding lives.⁷ People knew what it was and recognized it as a governing principle; drinking one drop of her lover's blood made the bride black in the eyes of the law. Yet Flint saw it differently. In his mind, the episode spoke not to the rule's power, but to its permeability. After telling the story, he griped that

[e]quivocations of this sort have been so often noticed in the United States, that they must be looked on as notorious. The practice of naturalizing foreign seamen by the solemn farce of an old woman's first cradling bearded men, and then swearing that she rocked them; and that of procuring pre-emption rights to land in new territories, by sowing only a few grains of corn, and subsequently swearing that a

3. JAMES FLINT, LETTERS FROM AMERICA 263 (Johnson Reprint Corp. 1970) (1822).

4. *Id.* at 170.

5. *Id.*

6. *Id.*

7. It is possible that people had been drinking drops of blood for far longer. In 1930, the *Raleigh Observer* reported a family legend of a "classic case of Revolutionary romance," in which a soldier from Cornwallis's army, wounded in 1781, fell in love with his nurse, a "free mulatto woman." Told that it was illegal to marry her, he was inspired to drink a few drops of her blood after seeing a doctor bleed a patient and then swore that he had "colored blood." See BETH DAY, SEXUAL LIFE BETWEEN BLACKS AND WHITES: THE ROOTS OF RACISM 56 (1974).

crop has been cultivated on the tract claimed, have been so frequent, that it would be invidious to particularize.⁸

To Flint, the one-drop rule was just another naked formalism practically begging for “evasive subterfuges.”⁹ The American insistence on absolute white racial purity is presumed to be the brightest of bright-line rules, synonymous with racism and central to the evolution of racial identity and resistance in the United States.¹⁰ But was it a rule that was made to be broken?

Ideologies of racial purity and pollution are as old as America, and so is interracial mixing. Yet the one-drop rule did not, as many have suggested, make all mixed-race people black. From the beginning, African Americans assimilated into white communities across the South. Often, becoming white did not require the deception normally associated with racial “passing”; whites knew that certain people were different and let them cross the color line anyway. These communities were not islands of racial tolerance. They could be as committed to slavery, segregation, and white supremacy as anywhere else, and so could their newest members—it was one of the things that made them white. The history of the color line is one in which people have lived quite comfortably with contradiction.¹¹

8. FLINT, *supra* note 3, at 170–71.

9. *Id.* at 171 n.*.

10. Compare Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 34 (1991) (“[T]he metaphor of purity is not a logical oddity, but an integral part of the construction of the system of racial subordination embedded in American society. Under color-blind constitutionalism, when race is characterized as objective and apolitical, this history is disguised and discounted.”), with Christine B. Hickman, *The Devil and the One Drop Rule*, 95 MICH. L. REV. 1161, 1166 (1997) (“The Devil fashioned it out of racism, malice, greed, lust, and ignorance, but in so doing he also accomplished good: His rule created the African-American race as we know it today, and while this race has its origins in the peoples of three continents and its members can look very different from one another, over the centuries the Devil’s one drop rule united this race as a people in the fight against slavery, segregation, and racial injustice.”).

11. Cf. Barbara J. Fields, *Ideology and Race in American History*, in REGION, RACE, AND RECONSTRUCTION: ESSAYS IN HONOR OF C. VANN WOODWARD 143, 154 (J. Morgan Kousser & James M. McPherson eds., 1982) (“Since attitudes are not discrete entities and people have no innate compulsion toward logical consistency, it would not be hard to show that the same planters who believed in their slaves’ incapacity also knew—and believed—the contrary. Precisely because ideologies consist of contradictory and inconsistent elements, they can undergo fundamental change simply through the reshuffling of those elements into a different hierarchy.”).

This continual process of “racial migration” upends some of the most basic assumptions about race in the United States.¹² When Southern colonies, and later states, restricted the civil rights and livelihoods of African Americans, such measures did not simply widen the gap between white and black. Rather, these obstacles to life and liberty pushed people across the color line into whiteness. At the same time, courts and communities made it increasingly difficult to reclassify people as black after they had been living as white.¹³ With an exponentially increasing number of people who were vulnerable to reclassification, the stability of Southern communities depended on what was in essence a massive grandfathering of white people with African ancestry. This racial amnesty was accomplished through court decisions that discouraged overzealous policing of the color line;¹⁴ through scientific theories and popular beliefs that African ancestry would always be visible on people’s bodies; and most importantly, through small-town Southern traditions of acceptance, secrecy, and denial.

This Article reconstructs the meaning and purpose of the one-drop rule, setting it within a larger history of racial migration. Most legal scholars casually describe the rule as the

12. The phrase “racial migration” originated in anthropology to describe physical migrations of large human populations. See, e.g., Lois W. Mednick & Martin Orans, *The Sickle-Cell Gene: Migration Versus Selection*, 58 AM. ANTHROPOLOGIST 293, 293 (1956); see also Robert E. Park, *Human Migration and the Marginal Man*, 33 AM. J. SOC. 881, 890 (1928). I reorient the phrase to refer to the social process by which people of African descent became white. Sometimes it involved the physical mobility and relocation associated with racial “passing,” and sometimes it did not. Under my formulation, racial migration is related to the notion of racial naturalization through which black non-citizens “enter the imagined American community as cognizable racial subjects.” Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633, 651 (2005). Racial migration suggests that that subject position can change, albeit without weakening (and perhaps strengthening) conventional understandings of racial roles within the American community. See *id.* at 651–52.

13. This point builds on Adrienne Davis’s important insight that in one of the first cases of racial determination, “blackness is treated narrowly, limited in order to protect white liberty.” Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695, 710 (1996) [hereinafter Davis, *Identity Notes*]; see also Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 YALE L.J. 1473, 1503–04 (2003).

14. See generally Ariela Gross, *Litigating Whiteness*, 108 YALE L.J. 109 *passim* (1998) [hereinafter Gross, *Litigating Whiteness*] (noting the resistance of Southern communities to “binary” or “common sense” notions of race); Sharfstein, *supra* note 13, at 1504 (“[T]he courts . . . discouraged efforts to investigate and uncover individuals’ racial backgrounds.”).

American regime of race without considering its history.¹⁵ Other scholars have attempted to trace the rule's origin to the emergence of the cotton economy in the 1830s,¹⁶ the sectional crisis of the 1850s,¹⁷ or Reconstruction.¹⁸ Still others emphasize that most Southern state legislatures did not formally adopt one-drop racial definitions until the 1910s and 1920s.¹⁹

Like an aging movie star, the rule depends on soft focus to maintain its allure. Amid the vagaries of origin, few suggest anything but that people followed the one-drop rule, as they would any other bright-line rule.²⁰ But the reality of racial mi-

15. See, e.g., Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 964–65 (1995) (“Historically, our multiracial heritage has been concealed by an odd, racist, American institution known as the ‘one-drop rule’ The ‘one-drop rule’ was created to maximize the number of slaves.”); Barbara Bennett Woodhouse, *Dred Scott's Daughters: Nineteenth Century Urban Girls at the Intersection of Race and Patriarchy*, 48 BUFF. L. REV. 669, 674 (2000) (“Frederick Douglass conjectured that the owner of Wye Plantation where he was born may have been his father. By right, that gentleman's child should have been among the lucky few children who lived a life of leisure and learning. Under the one drop rule, however, a child with a drop of African blood was deemed black.”). But see Paul Finkelman, *The Color of the Law*, 87 NW. U. L. REV. 937, 954 n.95 (1993) (reviewing ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992)) (“As of 1910, Tennessee appears to have been the only state to adopt the rule that ‘one drop of blood’ makes someone black. Scholars still write as if this were the rule everywhere, at all times.”); cf. PAUL WALLENSTEIN, *TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY* 142 (2002) (describing how Oklahoma had also adopted its own version of the one-drop rule when it became a state in 1907).

16. See GEORGE M. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817–1914*, at 43–49 (1971) (viewing the 1830s as the time when slavery became essential to the cotton economy in the South and when abolitionist challenges prompted pro-slavery theories to develop “an arsenal of arguments for Negro inferiority which they repeated *ad nauseam*”).

17. See RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 25 (2001); JOEL WILLIAMSON, *NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES* 73–75 (1980) (discussing the South's adherence to the one-drop rule to maintain order within society, despite abolitionism and anti-slavery sentiments from the North and abroad).

18. See Gross, *Litigating Whiteness*, *supra* note 14, at 114 (“[O]ur contemporary definition of black by a one-drop standard developed only in the last 130 years.”); Kenneth E. Payson, *Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People*, 84 CAL. L. REV. 1233, 1247 (1996).

19. See RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 223–24 (2003); Michael A. Elliott, *Telling the Difference: Nineteenth-Century Legal Narratives of Racial Taxonomy*, 24 LAW & SOC. INQUIRY 611, 617 (1999); Finkelman, *supra* note 15, at 954–55.

20. See John A. Scanlon, *Call and Response: The Particular and the Gen-*

gration reveals that the one-drop rule did not keep whites racially pure; rather, it enabled them to believe that they were.

The Article proceeds in two parts. Part I examines the one-drop rule in colonial North America and the early American republic. Theories of innate racial difference transmitted through "blood" existed well before Jamestown, leading influential scholars to interpret almost reflexively early laws defining race and slave status to be synonymous with the one-drop rule. But the rhetoric of purity was always undermined by the realities of European, African, and Native American mixture and of a permeable color line. To the extent that legislators and judges showed confidence in the salience of race, the assumption of an impassable racial divide actually made it easier for some people of African descent to become white.

Southern courts and communities did not strictly define the color line because there was little reason to go beyond slavery's proxy of racial boundaries, and an inflexible racial regime only threatened to interfere with the smooth functioning of a slave society. The one-drop rule's transformation from ideological current to legal bright line and presumed social reality is in essence a story of freedom. Part II examines the thirty years preceding the Civil War. The prospect of freedom for people of African descent hastened the one-drop rule's rise as whites attempted to preserve social hierarchies and property relations in the absence of slavery. While legal scholars identify this period as a time when tightening definitions fixed the status of mixed-race people as black, I contend that rather than establish or enforce a one-drop rule, efforts to tighten the color line pushed many mixed-race people into whiteness, sometimes with the full knowledge of their communities and often in spite of court rulings or publicity. Even as this racial migration continued, however, the rule's growing ideological prevalence in the free North would presage its eventual codification in the South after slavery's demise. During this period of ascendancy, the rule's ostensible opponents played an important part in propagating it. Abolitionists seldom questioned white racial purity, instead relying on the one-drop rule as a symbol of Southern cruelty and of the threats that slavery posed to Northern whites. One might argue that today's legal scholars depend on the rule in much the same way.

eral, 2000 U. ILL. L. REV. 639, 658 ("The 'one drop' rule allowed whites to preserve the mark of whiteness by excluding from that classification all individuals who had less than 100% white heritage.").

The history of racial migration and the one-drop rule requires a revolution in how legal scholars and the courts understand race. Extrapolating from our common experience of race today and relying on traditional sources of legal history such as judicial opinions and trial evidence, recent scholarship has stressed the law's role as "a prime instrument in the construction and reinforcement of racial subordination."²¹ Under this view, courts and legislatures dictated, reproduced, and naturalized a one-drop regime, and communities had little choice but to fall in line. But the legal history of race is incomplete when divorced from the social context of racial migration. However much "law . . . claimed for itself the authoritative license to tell the story of racial meaning in this country,"²² Americans have made their own rules for centuries.²³ The courts were not absolutist about blood purity, regularly turning to other criteria in drawing the color line. Rather than being constitutive of racial experience, formal legal processes functioned to preserve social stability and property relations in a racially porous South that nevertheless was committing itself to the one-drop rule. The law arguably allowed this commitment to racial purity to happen by minimizing the rule's costs for "whites" and shielding them from the widespread insecurity that an aggressive insistence on racial purity would engender. Communities could keep local knowledge of racial migration hidden until it was forgotten.²⁴

21. Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 3 (1994). Ariela Gross's nuanced version of the law's cultural primacy emphasizes how trial narratives reverberated "beyond the courtroom." See, e.g., Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 651 n.44 (2001) [hereinafter Gross, *Beyond Black and White*]; Ariela Gross, *Pandora's Box: Slave Character on Trial in the Antebellum Deep South*, 7 YALE J.L. & HUMAN. 267, 270 (1995) (describing the courtroom as a "cultural arena" in which the law "established racial meanings").

22. Katherine M. Franke, *What Does a White Woman Look Like? Racing and Erasing in Law*, 74 TEX. L. REV. 1231, 1231 (1996).

23. See William E. Forbath et al., *Introduction: Legal Histories from Below*, 1985 WIS. L. REV. 759, 759 (describing how nineteenth-century "industrial workers, women, and artisans . . . did not simply consent or acquiesce to the law as authoritatively given . . . Often, . . . they simply continued to assume and assert, and, where they could, enforce, their own distinctive norms and interpretations of norms—their own law—as the prevailing authority."); Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899, 930 ("[W]hat the law was depended on who was asking").

24. See Martha Hodes, *The Mercurial Nature and Abiding Power of Race*:

The practical consequences of this history lie in the fact that every area of the law that engages with race has a foundation in the one-drop rule. The rule acts as a metric for defining group membership,²⁵ allocating race-based entitlements,²⁶

A Transnational Family Story, 108 AM. HIST. REV. 84, 85 (2003) (“[E]fforts on the part of rulers and subjugated alike work to create, reshape, and reinforce ideologies of race . . . Together, these endeavors work continually to determine, destabilize, and ultimately to sustain racial hierarchies.”); Walter Johnson, *Inconsistency, Contradiction, and Complete Confusion: The Everyday Life of the Law of Slavery*, 22 LAW & SOC. INQUIRY 405, 430 (1997) (reviewing THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW* (1996)) (“Laws and legal decisions are documents that erase the trace of ongoing contests with the languages of precedent, resolution, and progress: as guides to the reality they purport to represent, they are unreliable.”); see, e.g., Gross, *Litigating Whiteness*, *supra* note 14, at 147–51; Sharfstein, *supra* note 13, at 1504.

25. The one-drop rule frequently appears in discussions of census categories and of tribal membership. Letter from Jacob J. Lew, Dir., Office of Mgmt. & Budget, to Heads of Executive Dep’ts & Establishments (Mar. 9, 2000), available at <http://www.whitehouse.gov/omb/bulletins/b00-02.html> (“Responses that combine one minority race and white are allocated to the minority race.”); see also Hickman, *supra* note 10, at 1203–06; Patrick F. Linehan, *Thinking Outside of the Box: The Multiracial Category and Its Implications for Race Identity Development*, 44 HOW. L.J. 43, 43–44 (2000); John A. Powell, *A Minority-Majority Nation: Racing the Population in the Twenty-First Century*, 29 FORDHAM URB. L.J. 1395, 1400–01 (2002); Luther Wright, Jr., Note, *Who’s Black, Who’s White, and Who Cares: Reconceptualizing the United States’s Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 547, 553–54 (1995); cf. Terrion L. Williamson, Note, *The Plight of “Nappy-Headed” Indians: The Role of Tribal Sovereignty in the Systematic Discrimination Against Black Freedmen by the Federal Government and Native American Tribes*, 10 MICH. J. RACE & L. 233, 245–46 (2004) (“By using the one-drop rule, Whites could categorize mixed Black-Indian persons as Black and therefore have fewer ‘real’ Indians with whom to negotiate land deals and treaties. While the one-drop rule has been used as an inclusionary device to define Blacks, Native Americans use a much more exclusionary standard in defining tribal membership. . . . The one-drop rule helps explain the differential treatment Indians with Black blood experience in relation to those Indians who claim to be mixed with White blood.”).

26. See Christopher A. Ford, *Challenges and Dilemmas of Racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action*, 43 UCLA L. REV. 1953, 2002–04 (1996) (discussing the one-drop rule in the affirmative action context); Gerald A. Foster, *American Slavery: The Complete Story*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 401, 413 (2004) (questioning whether an individual is considered black for purposes of receiving reparations based on the one-drop rule or some other measure); Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531, 2543 (2001) (“A second approach in determining the eligibility of those persons entitled to receive reparations for slavery would be simply to apply the ‘one-drop rule,’ a rule of hypodescent that is inherent in the American system of racial classification.”); Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037, 1083–84 (1996); Note, *Bridging the Color Line: The Power of African-American Reparations to Redirect America’s Future*, 115 HARV. L.

awarding child custody,²⁷ determining the existence of discrimination and monitoring the progress of remedial measures,²⁸ and theorizing racial and other group identities.²⁹ If the

REV. 1689, 1698 (2002) (arguing that a resurgence of the one-drop rule to identify people entitled to reparations would be “demeaning and ultimately unnecessary—current educational affirmative action programs have been successful without requiring recipients to ‘prove’ their race”).

27. See Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 81 n.219 (1993); Gayle Pollack, *The Role of Race in Child Custody Decisions Between Natural Parents over Biracial Children*, 23 N.Y.U. REV. L. & SOC. CHANGE 603, 622 (1997) (“The idea that the law reifies racial categories is very powerful—the one-drop rule helped maintain social structures based on race. Mandating that the courts consider race in custody decisions may reinforce socially created racial categories that should be questioned.”); Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 955–56 (1994); Julie C. Lythcott-Haims, Note, *Where Do Mixed Babies Belong? Racial Classification in America and Its Implications for Transracial Adoption*, 29 HARV. C.R.-C.L. L. REV. 531, 532 (1994).

28. Nathaniel Persily, *Color by Numbers: Race, Redistricting, and the 2000 Census*, 85 MINN. L. REV. 899, 929–34 (2001).

29. See, e.g., Haney López, *supra* note 21, at 31 n.120; Hickman, *supra* note 10, at 1188–96; Robert Westley, *First-Time Encounters: “Passing” Revisited and Demystification as a Critical Practice*, 18 YALE L. & POLY REV. 297, 313–14 (2000). The one-drop rule extends far beyond the black-white paradigm. See, e.g., Angel R. Oquendo, *Re-imagining the Latino/a Race*, 12 HARV. BLACKLETTER L.J. 93, 102 (1995) (discussing the impact of the one-drop rule on “Latino/a” characterizations); Ramirez, *supra* note 15, at 964–65.

See also the intense exchange between Jim Chen, on the one side, and Neil Gotanda, Peter Kwan, and Natsu Saito Jenga, on the other, over Robert S. Chang’s *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1993). Jim Chen, *Unloving*, 80 IOWA L. REV. 145, 159 (1994) (“By what crystal ball can Chang so confidently predict that his ‘future children, and their children will always be Asian Americans’? The likeliest reading of his prediction is that he assumes his progeny will have 100% Asian blood. An arguably gentler interpretation of his statement may be that racist white America will always classify as Asian anyone who has the slightest trace of Asian ancestry.”); Neil Gotanda, *Chen the Chosen: Reflections on Unloving*, 81 IOWA L. REV. 1585, 1589–94 (1996) (criticizing Chen’s understanding of “Asian American”); Peter Kwan, *Unconvincing*, 81 IOWA L. REV. 1557, 1557–67 (1996) (finding Chen’s solution for racial fundamentalism “quite disturbing”); Natsu Saito Jenga, *Unconscious: The “Just Say No” Response to Racism*, 81 IOWA L. REV. 1503, 1510–11 (1996) (arguing that Chen presumes that “we must force our children into one exclusive racial category or another”).

Groups that are not racial in character also use the one-drop rule as they make or resist analogies to race. See Marc A. Fajer, *A Better Analogy: “Jews,” “Homosexuals,” and the Inclusion of Sexual Orientation as a Forbidden Characteristic in Antidiscrimination Laws*, 12 STAN. L. & POLY REV. 37, 41 (“Or is the experience of sexual activity as powerful as African blood was historically understood to be, where one drop could irrevocably classify a person?”); Julie

one-drop rule functioned differently from what its unambiguous terms suggest—if, as I argue, it expressed only a superficial commitment to racial purity, all the while fostering racial migration—then we have to rethink what race means. The magnitude of racial migration is beginning to emerge through the field of population genetics,³⁰ with scientists estimating that millions of Americans who identify as white have African ancestors within recent historic memory.³¹ As people identifying as white begin to claim minority status in college admissions and employment settings,³² African “blood” is losing its ability to define race, determine civil rights violations, and fashion remedies. The already formidable tasks of measuring disparate racial impact or minority vote dilution risk becoming impossible when group boundaries blur.³³

A. Greenberg, *Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience*, 39 SAN DIEGO L. REV. 917, 918–24 (2002); David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives*, 55 OHIO ST. L.J. 491, 503–04 (1994); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 615 (2004); Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 392 n.211 (2000).

30. The irony is not lost that a field that purports to be able to determine a person's racial admixture from a single cheek cell is undermining the one-drop rule. See, e.g., Sandra Soo-Jin Lee et al., *The Meanings of “Race” in the New Genomics: Implications for Health Disparities Research*, 1 YALE J. HEALTH POL'Y L. & ETHICS 33, 47–53 (2001) (explaining and critiquing the technology of admixture estimation).

31. See, e.g., Steve Sailer, *White Prof. Finds He's Not*, UNITED PRESS INT'L, May 8, 2002, <http://www.upi.com/archive/view.php?archive=1&StoryID=15042002-084051-5356r> (describing leading geneticist Mark Shriver's estimate that “more than 50 million whites . . . have at least one black ancestor” as well as his findings about his own African ancestry). Since the 1930s, sociologists have been earnestly trying to estimate the population of African Americans “passing for white.” See Robert P. Stuckert, *African Ancestry of the White American Population*, 58 OHIO J. SCI. 155, 160 (1958) (“Over twenty-eight million white persons are descendants of persons of African origin.”); James Ernest Conyers, *Selected Aspects of the Phenomenon of Negro Passing* 23–27 (1962) (unpublished Ph.D. dissertation, Washington State University) (on file with the Minnesota Law Review) (summarizing and critiquing these studies).

32. See Amy Harmon, *Seeking Ancestry and Privilege in DNA Ties Uncovered by Tests*, N.Y. TIMES, Apr. 12, 2006, at A17 (describing a student who was admitted to college and given a scholarship after checking “Asian” on her college application because DNA test results obtained by her older sister suggested she was “2 percent East Asian and 98 percent European”).

33. See generally Matthew J. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, 74 U. CIN. L. REV. 87 (2006) (discussing the long decline of disparate impact as a measure of discrimination).

Although the history of racial migration and the one-drop rule appears to threaten civil rights policies, ultimately it may strengthen them by forcing definitions of minority status to shift from blood to a shared history of discrimination.³⁴ “African blood” is not unique to blacks. Centuries of racial migration reveal that more than anything, what fixed African Americans as a discrete group was the fact that they were discriminated

34. Proponents of “color-blindness” derive much of their rhetorical ammunition from the characterization of affirmative action and other race-based policies as being blood-based. See, e.g., *Grutter v. Bollinger*, 288 F.3d 732, 792–93 (6th Cir. 2002) (Boggs, J., dissenting) (“The [University of Michigan] Law School gives no explanation of how it defines the groups to be favored. This means that ultimately it must make, on some basis, a decision on who is, and is not, an ‘African-American, Hispanic, or Native American.’ . . . Such judgments, of course, have a long and sordid history. The classic Southern Rule was that any African ancestry, or ‘one drop’ of African blood, made one black. The Nazi Nuremberg laws made the fatal decision turn on the number of Jewish grandparents. ‘Hispanic’ background may, I suppose, depend on which side of a pass in the Pyrenees your great-grandfather came from.”), *aff’d*, 539 U.S. 306 (2003); see also Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POLY REV. 1, 15 (2002) (“[T]he [2000] Census allowed people to indicate more than one race but did not include a ‘multi-racial category In a grimly ironic aspect of the new demographic dispensation, the government adopted something like the one-drop rule that helped enslave so many mulattos and self-identifying whites before Emancipation. (As Malcolm X quipped, ‘That must be mighty powerful blood.’)”; Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1471 n.3 (2004) (showing how supporters of the 2003 California Racial Privacy Initiative amplified its rhetoric by comparing government racial classifications to the one-drop rule).

In various contexts the Supreme Court has affirmed an understanding of race as blood. In *Rice v. Cayetano*, the Court struck down an eligibility requirement in elections for trustees for the Office of Hawaiian Affairs that limited the franchise to “any descendant of the aboriginal peoples inhabiting the Hawaiian Islands . . . in 1778.” 528 U.S. 495, 509 (2000) (citing HAW. REV. STAT. § 10-2 (1993)). Under this limitation people identifying as white, African American, Asian, or any other “race” would all be allowed to vote, as long as they had an ancestral tie to aboriginal Hawaiians. See *id.* Conversely, Polyne- sians presumably of the same “race” as aboriginal Hawaiians would not be able to vote without the direct ancestral tie. See *id.* at 514. The Court ruled, however, that “[t]he ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name” and therefore violated the Fifteenth Amendment. *Id.* at 517, 524. The Court, in essence, turned historical and cultural heritage into racial heritage. See L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 738–39 (2001) (“Oddly, the majority’s effort to root out race has made race more prominent, bordering on a Supreme Court pronouncement of a ‘one drop rule.’”); see also Gotanda, *supra* note 10, at 29–32 (discussing the Supreme Court’s reluctance to abandon entirely immutable racial classifications).

against. In 1940 W.E.B. Du Bois wrote, "I recognize [black] quite easily and with full legal sanction; the black man is a person who must ride 'Jim Crow' in Georgia."³⁵ Many people of African descent could and did avoid racial oppression by becoming white. When we regard the legal category of "African American" through the lens of a shared history of discrimination, the tidy parallel that "color-blind constitutionalism" draws between race-based discrimination and remediation falters.³⁶ While discrimination against African Americans was premised on innate blood-borne inferiority and the preservation of racial purity, measures designed to benefit them are much more inherently remedial than many, including the Supreme Court, have been willing to suppose. Remedial measures acknowledge a specific history, not blood.³⁷

Today we inhabit a legal regime that is the accretion of centuries of myth and amnesia. Unexamined and unchallenged, the one-drop rule remains a fixture of the civil rights landscape. The rule's stark language carries the appearance of unassailable authority. Its sheer inhumanity has made it an easy foil for people committed to uprooting racism, so there has been little reason to examine its history. But assuming the rule's efficacy has only continued to spread the idea of white racial purity without undermining it. Just beyond the one-drop rule's rhetoric is a reality of mixture and migration. It is hidden in plain sight.

35. W.E.B. DU BOIS, *DUSK OF DAWN: AN ESSAY TOWARD AN AUTOBIOGRAPHY OF A RACE CONCEPT* 153 (Transaction Books 1992) (1940); see also Barbara J. Fields, *Whiteness, Racism, and Identity*, 60 INT'L LAB. & WORKING-CLASS HIST. 48, 53-54 (2001) (quoting Du Bois in arguing for a "disentanglement of] the Negro Problem from race" in favor of viewing it purely as "a matter of power"); Richard Thompson Ford, *Unnatural Groups: A Reaction of Owen Fiss's "Groups and the Equal Protection Clause,"* ISSUES IN LEGAL SCHOLARSHIP, 2003, at 1, 3-4, <http://www.bepress.com/ils/iss2/art12/>.

36. *Shaw v. Reno*, 509 U.S. 630, 641 (1993) ("It is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.").

37. It is a history that begins, but by no means ends, with slavery. See, e.g., IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 142-43 (2005) (describing New Deal, G.I. Bill, and Great Society policies that consistently shut out African Americans).

I. IMPURITY AND DANGER: THE ONE-DROP RULE'S EVOLUTION AND EVASION

Before the one-drop rule's widespread codification in the 1910s and 1920s, the color line was formally demarcated through a patchwork of statutes and common law rules dating back to the seventeenth century. These rules were based on physical appearance, genealogy, and the performance or possession of the privileges of whiteness.³⁸ "White" skin carried the presumption of freedom, but slave status was ultimately a question of maternal descent—the child of a slave mother was a slave, regardless of his or her skin color or the amount of European ancestry.³⁹ Laws regulating interracial marriage and the conduct of free people of color defined blackness as a genealogical quantum: Depending on the state, anyone with at least one-quarter, one-eighth, or one-sixteenth "black blood" was legally black.⁴⁰

None of these laws was an explicit one-drop rule, yet it has been widely assumed that the rule was a powerful ideological and social force during slavery. Influential scholars have interpreted early legal definitions of the color line to be proto- or even de facto one-drop rules. For example, Virginia's statutes against interracial sex, enacted in 1662 and 1691, were designed to prevent "abominable mixture" and preserve white racial purity, evolving from a ban on unions between "christians" and "negroes" to a prohibition of sex between "[w]hatsoever English or other white man or woman" and any "negroe, mulatto, or Indian."⁴¹ Also in 1662, Virginia enacted a statute

38. See Jessica A. Clarke, *Adverse Possession of Identity: Radical Theory, Conventional Practice*, 84 OR. L. REV. 563, 585–89 (2005); Davis, *Identity Notes*, *supra* note 13, at 705–06; Gross, *Litigating Whiteness*, *supra* note 14, at 141–56.

39. KATHLEEN M. BROWN, *GOOD WIVES, NASTY WENCHES, AND ANXIOUS PATRIARCHS: GENDER, RACE, AND POWER IN COLONIAL VIRGINIA* 133–35 (1996) (discussing how laws that naturalized slavery by "making it heritable and embedding it in a concept of race. . . . ma[de] the paternity of children born of enslaved women virtually irrelevant in the eyes of the law"); THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1860*, at 43–49 (1996). In Louisiana, there was a presumption of freedom for biracial people. Walter Johnson, *The Slave Trader, the White Slave, and the Politics of Racial Determination in the 1850s*, 87 J. AM. HIST. 13, 15 (2000).

40. See Johnson, *supra* note 39, at 21 ("[O]ther slaveholding statutes . . . attempted to establish presumptions of freedom based upon fractions of 'black blood': halves, fourths, eighths, sixteenths, and so on down to one drop . . .").

41. BROWN, *supra* note 39, at 196–97; see also A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colo-*

categorizing “all children borne in this country” as “bond or free only according to the condition of the mother,”⁴² a rule known by the Latin as *partus sequitur ventrem*. A departure from the English common law tradition linking a child’s status to that of the father,⁴³ the regime of *partus sequitur ventrem* meant that “one is Black if one has a single African antecedent.”⁴⁴ Scholars have generally interpreted the regime as an implicit one-drop rule⁴⁵ “created to maximize the number of slaves”⁴⁶ and guaranteeing that there would be slaves as white as their owners.⁴⁷ Although eighteenth-century statutes in Virginia and

nial and Antebellum Virginia, 77 GEO. L.J. 1967, 1989 (1989) (“As it became obvious to white Virginians that interracial sex posed a threat to white racial purity, they tried to suppress it.”). See generally GARY TAYLOR, *BUYING WHITENESS: RACE, CULTURE, AND IDENTITY FROM COLUMBUS TO HIP-HOP* 97–143 (2005) (discussing the invention of “white” racial identity in Renaissance-era England).

42. 2 WILLIAM WALLER HENING, *THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE STATUTES OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619*, at 170 (New York, R.&W.&G. Bartow 1823).

43. Blackstone described *partus sequitur ventrem* as a rule of livestock ownership. WILLIAM BLACKSTONE, 2 *COMMENTARIES ON THE LAWS OF ENGLAND* 390 (1765); Jason A. Gillmer, *Suing for Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary and Antebellum South*, 82 N.C. L. REV. 535, 560 n.144 (2004); Hickman, *supra* note 10, at 1175. The rule was much less of a departure, however, from the common law of bastardy, the civil law of villenage, and the practices of other societies that enslaved Africans. See, e.g., MORRIS, *supra* note 39, at 45, 52–55; Kristen Collins, Note, *When Fathers’ Rights Are Mothers’ Duties: The Failure of Equal Protection in Miller v. Albright*, 109 YALE L.J. 1669, 1682–85 (2000).

44. Haney López, *supra* note 21, at 4–5.

45. Gross, *Litigating Whiteness*, *supra* note 14, at 136 (describing “a rule of maternal descent” that implicitly functioned as “a one-drop-of-blood-rule, [where] one could be held ‘negro’ with only a tiny fraction of African ancestry so long as it passed through the maternal line”).

46. Ramirez, *supra* note 15, at 965; see also NAOMI ZACK, *RACE AND MIXED RACE* 61 (1993) (suggesting that the “one-drop” rule had its foundation in the slave owner’s property interest in the inheritance of slavery); Michele M. Moody-Adams, *A Commentary on Color Consciousness: The Political Morality of Race*, 109 ETHICS 408, 419 (1999) (“The ‘one drop rule’ . . . function[ed] first to create as many slaves as possible, and eventually to cement the social and economic inequalities of the Jim Crow period.”).

47. A. Leon Higginbotham, Jr., & F. Michael Higginbotham, “*Yearning to Breathe Free*”: *Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1213, 1243 n.163 (1993) (“One paradox of a racist institution’s reliance on a ‘one drop’ rule of African descent was that some individuals, enslaved because they were remotely descended in the maternal line from a black slave woman, had such a high proportion of European ancestry that they looked white.”); Westley, *supra* note 29, at 313 (“[M]any men and women who could ‘pass’ for white were legally held as slaves, often

North Carolina more liberally defined whites as anyone with less than one-fourth, one-eighth, or one-sixteenth "negro blood," they were trumped by the rules of slave status.⁴⁸ Their most salient feature, in the words of a 1797 abolitionist, was that they made "[n]o distinction . . . between negroes and molattoes, whether slaves or freemen."⁴⁹ There were whites, and there was everyone else. Considering these laws, Christine B. Hickman's much-cited article stressed the overpowering fact of the one-drop rule: "For mulattoes and Negroes, all rights were rooted in the past, in remote African ancestry. Ancestry alone determined status, which was fixed. A Negro could not buy out of her assigned race; she could not marry out of it, nor were her children released from its taint."⁵⁰

Although proponents of the idea that the one-drop rule long predated its codification have seldom conducted historical research of any depth,⁵¹ theories of innate, blood-borne racial difference did in fact have serious intellectual currency in the colonies and early Republic.⁵² The prevalence of these theories, however, does not support the conclusion that the one-drop rule

enough, of their own family, simply by virtue of an African-descended ancestor or parent.").

48. Higginbotham & Kopytoff, *supra* note 41, at 1972-73 & n.23; *see also* Gillmer, *supra* note 43, at 610-13.

49. *Minutes of the Proceedings of the Fourth Convention of Delegates from the Abolition Societies Established in Different Parts of the United States, Assembled at Philadelphia, on the Third Day of May, One Thousand Seven Hundred and Ninety-Seven, and Continued, by Adjournments, Until the Ninth Day of the Same Month, Inclusive (1797)*, in EARLY AMERICAN IMPRINTS 57, 57 (Phila., Pa., Zachariah Poulson, Jr. 1797). The Virginia law has been read to confirm the idea expressed by Joel Williamson and cited widely by legal scholars:

In the upper South mulattoes in the mass, having sprung from the elements of the lower orders, were generally treated by the white elite much as if they were black. Among the elite in the upper South, the one-drop rule was the rule in all but the legal sense well before the American Revolution.

WILLIAMSON, *supra* note 17, at 14; *see also* Hickman, *supra* note 10, at 1179.

50. Hickman, *supra* note 10, at 1179.

51. Many accounts have relied on sociologist F. James Davis's work, which was based almost entirely on Joel Williamson's *New People*. *See* F. JAMES DAVIS, WHO IS BLACK?: ONE NATION'S DEFINITION 32 (1991). Williamson's groundbreaking book was by its own terms meant to be a beginning of historical inquiry into the issue, not the authoritative word on the subject. *See* WILLIAMSON, *supra* note 17, at xi ("I have been attempting to write what might be called an 'outline' history of miscegenation and mulattoes in the United States. I use the word 'outline' because, given the state of the art, I feel that such an approximation is as well as I can do.").

52. *See infra* Part I.A.

has always been the American regime of race. It is impossible to understand the rule—its scope, but also its substantive meaning—without attempting to gauge how people were actually living their lives. “Ideas . . . cannot escape the contagion, so to speak, of the material world,”⁵³ historian Barbara Fields has written, and in the early United States, African Americans were continually crossing the color line. Early legislation and judicial decisions expressed confidence in the ability of the law to distinguish black from white, all the while allowing and even encouraging people of African descent to become white. The one-drop rule was something to be believed, but not obeyed.

The three sections that follow consider the rule’s origins alongside the reality of racial migration. First, I outline a series of ideas of innate racial difference that circulated in the American colonies and newly independent United States. Many Americans were thinking about race in terms of drops of blood, yet one-drop ideology remained far removed from lived experience. The second section describes the widespread processes of racial mixing and assimilation in early America, a history that compels reexamination of key assumptions about the power of the one-drop rule and the firmness of the color line. In light of this history, the final section analyzes two seminal cases of racial determination that have been traditionally read as confirming the rise of the one-drop rule: *Hudgins v. Wright*⁵⁴ and *State v. Cantey*.⁵⁵ I argue that these cases affirm a belief that the “black” and “white” could be kept separate and distinct, while simultaneously enabling racial migration to occur. In the process, the courts allowed “white” communities to continue to absorb mixed-race people with minimal interference from the state and without having to articulate anything other than a white racial consciousness.

A. EARLY THEORIES OF INNATE RACIAL DIFFERENCE

In 1792, Benjamin Rush presented a theory to the American Philosophical Society that “the Black Color (as it is called) of the Negroes is derived from the LEPROSY.”⁵⁶ The great American physician and signer of the Declaration of Independ-

53. Fields, *supra* note 11, at 154.

54. 11 Va. (1 Hen. & M.) 134 (1806).

55. 20 S.C.L. (2 Hill) 614 (S.C. Ct. App. 1835).

56. Benjamin Rush, *Observations Intended to Favor a Supposition that the Black Color (As It Is Called) of the Negroes Is Derived from the Leprosy*, 4 TRANSACTIONS AM. PHIL. SOC’Y 289, 289 (1799).

ence declared that the disease had generally ceased to be infectious, but he noted two alarming instances in which white women “not only acquired a dark color, but several of the features of a negro, by marrying and living with a black husband.”⁵⁷ It was no aberration for a signer of the Declaration of Independence to conceive of blackness as a contagion that required “white people” to “keep[] up that prejudice against such connections with them, as would tend to infect posterity with any portion of their disorder.”⁵⁸ The Declaration’s author himself had famously described the “physical and moral” barriers between black and white in *Notes on the State of Virginia*.⁵⁹ “Whether the black of the negro resides in the reticular membrane between the skin and scarf-skin, or in the scarf-skin itself,” Thomas Jefferson wrote, “whether it proceeds from the colour of the blood, the colour of the bile, or from that of some other secretion, the difference is fixed in nature”⁶⁰ To Jefferson, government policy dealing with people of African descent had to prevent them—perhaps first and foremost—from “staining the blood of [the] master.”⁶¹

Ideas of innate racial difference were already old at the time of the Founding. Colonial North America had an advanced vocabulary of racial purity and pollution,⁶² and despite continual claims to the contrary,⁶³ the one-drop rule was hardly unique to the United States.⁶⁴ From the fifteenth century on-

57. *Id.* at 294.

58. *Id.* at 295; see also RONALD TAKAKI, *IRON CAGES: RACE AND CULTURE IN NINETEENTH-CENTURY AMERICA* 16–35 (1990) (describing Rush’s role in creating a white national identity in the early American republic).

59. THOMAS JEFFERSON, *Notes on the State of Virginia*, in *WRITINGS* 125, 264 (Merrill D. Peterson ed., 1984).

60. *Id.*

61. *Id.* at 270.

62. See generally WINTHROP JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812* (1968) (providing the classic account of incipient American understandings of racial difference).

63. See, e.g., DAVIS, *supra* note 51, at 13; John O. Calmore, *Dismantling the Master’s House: Random Notes of an Integration Warrior*, 81 *MINN. L. REV.* 1441, 1449 (1997) (referring to the “unique American racial code, known as the one-drop rule”); Ford, *supra* note 26, at 2002 n.208 (“In the Americas, [the one-drop rule] appears to have been peculiar to regions settled by Britons.”); Hickman, *supra* note 10, at 1172 (describing “[t]he unique American definition of ‘Black’”).

64. The rule is not a freak result of the American experiment, somehow outside of history. Cf. Fields, *supra* note 11, at 143 (“The notion of race . . . continues to tempt many people into the mistaken belief that American experience constitutes the great exception in world history, the great deviation

ward, Spain and Portugal enacted laws of *limpieza de sangre* (purity of blood) that “distinguished between original Christians and *conversos*, those people who ostensibly had converted from Islam or Judaism or whose ancestors had converted,”⁶⁵ establishing that “any stain on an impure lineage was ineffaceable and perpetual.”⁶⁶ These laws bear obvious similarity to the American one-drop rule.⁶⁷ The Spanish and Portuguese brought *limpieza de sangre* rules to the New World,⁶⁸ adding West African and Native American ancestry to the list of proscribed “bloods.”⁶⁹ Although Latin American societies are often described as milder and more flexible than the United States in

from patterns that seem to hold for everybody else. Elsewhere, classes may have struggled over power and privilege, over oppression and exploitation, over competing senses of justice and right; but in the United States, these were secondary to the great, overarching theme of race.”)

65. Marc Shell, *Marranos (Pigs), or from Coexistence to Toleration*, 17 CRITICAL INQUIRY 306, 309 (1991).

66. *Id.* at 314 (citations omitted).

67. “The principle upon which the Inquisition acted was, that Judaism was like the scrofula—once in the system, there was no getting it out of it,” wrote a British essayist in 1811:

[I]t mattered not how deeply the breed was crost,—whether a man were a half-new Christian, or a quarteron, or a half-quarteron, (for the degrees were as nicely discriminated as the shades of colour in the Spanish colonies,) the Hebrew leaven was in the blood. And so well had they succeeded in impressing this prejudice upon the vulgar, that it was believed Judaism could be sucked in the milk of a Jewish nurse.

The History of the Inquisitions; Including the Secret Transactions of Those Horrific Tribunals, 6 Q. REV. 313, 346 (1811); see also Shell, *supra* note 65, at 312.

68. See VERENA MARTINEZ-ALIER, MARRIAGE, CLASS AND COLOUR IN NINETEENTH-CENTURY CUBA: A STUDY OF RACIAL ATTITUDES AND SEXUAL VALUES IN A SLAVE SOCIETY 15 (1974); Maria Elena Martinez, *The Black Blood of New Spain: Limpieza de Sangre, Racial Violence, and Gendered Power in Early Colonial Mexico*, 61 WM. & MARY Q. 479 (2004).

69. See MARTINEZ-ALIER, *supra* note 68, at 15; Jeffrey M. Shumway, “*The Purity of My Blood Cannot Put Food on My Table*”: Changing Attitudes Towards Interracial Marriage in Nineteenth-Century Buenos Aires, 58 AMERICAS 201, 201–02, 205 (2001) (discussing how middle- and upper-class families in colonial Buenos Aires valued “purity of blood” and exercised the right to block marriages of their children with “unequal partners”). *But see* Shumway, *supra* at 211–12 (noting that in the decades after independence in 1810, Buenos Aires’ African population went from thirty percent to less than two percent of the population and that scholars theorized that low birth weights, intermarriage, and the end of the slave trade contributed to the decline); Monte Reel, *In Buenos Aires, Researchers Exhume Long-Unclaimed African Roots*, WASH. POST, May 5, 2005, at A14 (noting that recent DNA testing suggests that Buenos Aires’ population shift occurred because many black Argentinians intermarried and assimilated into the white majority).

its understandings of race,⁷⁰ *limpieza de sangre* rules determined access to education and jobs and affected whether people could legally marry in colonial Brazil, Cuba, Peru, Puerto Rico, Venezuela, and elsewhere.⁷¹

The English were well aware of Iberian rules—or at least pretensions—of purity.⁷² As the English began to encounter Africa and consider the question of racial difference, their experience often was mediated through the Spanish and Portuguese,⁷³ who initially controlled the Atlantic slave trade and whose early written accounts of Africa provided crucial sources for seventeenth-century proto-race scientists such as Thomas Browne and Robert Boyle.⁷⁴ English settlers in North America and the Caribbean had direct contact with societies that regulated race in terms of drops of blood. In addition to the Spanish and Portuguese, French colonizers of Canada and the Carib-

70. DAVIS, *supra* note 51, at 99–105.

71. See, e.g., JAY KINSBRUNER, NOT OF PURE BLOOD: THE FREE PEOPLE OF COLOR AND RACIAL PREJUDICE IN NINETEENTH-CENTURY PUERTO RICO 19, 36–40 (1996) (describing *limpieza de sangre* rules and the belief, in the words of a priest in 1782, that “there was ‘nothing more ignominious than being a black or descended from them’”); HERBERT S. KLEIN, SLAVERY IN THE AMERICAS: A COMPARATIVE STUDY OF VIRGINIA AND CUBA 206 (1967); MARTINEZ-ALIER, *supra* note 68, at 15; Estelle T. Lau, *Can Money Whiten? Exploring Race Practice in Colonial Venezuela and Its Implications for Contemporary Race Discourse*, 3 MICH. J. RACE & L. 417, 424 (1998); Martinez, *supra* note 68, at 496–97; A.J.R. Russell-Wood, *Prestige, Power, and Piety in Colonial Brazil: The Third Orders of Salvador*, 69 HISP. AM. HIST. REV. 61, 67–68, 72, 88 (1989).

72. According to the Oxford English Dictionary, the phrase “blue blood” derives from the Spanish *sangre azul*, “attributed to some of the oldest and proudest families of Castile, who claimed never to have been contaminated by Moorish, Jewish, or other foreign admixture; the expression probably originated in the blueness of the veins of people of fair complexion as compared with those of dark skin.” OXFORD ENGLISH DICTIONARY 303 (2d ed. 1989); see also Shell, *supra* note 65, at 312 n.18. The English repeatedly tweaked their Iberian foes as being racially impure. See TAYLOR, *supra* note 41, at 134, 136, 414 n.40.

73. See JORDAN, *supra* note 62, at 56–63; EDMUND MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 154 (Francis Parkman Prize ed. 2005); Jennifer L. Morgan, “Some Could Suckle Over Their Shoulder”: Male Travelers, Female Bodies, and the Gendering of Racial Ideology, 1500–1770, 54 WM. & MARY Q. 167, 169 (1997).

74. See ROBERT BOYLE, EXPERIMENTS AND CONSIDERATIONS TOUCHING COLOURS 165 (London, Henry Herringman 1664) (describing the Portuguese experience in Angola and the “African Kingdom of Longo”); THOMAS BROWNE, PSEUDODOXIA EPIDEMICA: OR, ENQUIRIES INTO VERY MANY RECEIVED TENENTS AND COMMONLY PRESUMED TRUTHS 324 (London, Tho. Harper 1646) (drawing from published reports about the “Moores in Brasilia” and the “Negroes . . . of the Spanish plantations”).

bean also lived in “jealous anxiety . . . to repel any suspicion of being contaminated by a single drop of African blood.”⁷⁵ Soon after the United States won independence, the new nation incorporated whole populations that had lived under blood purity regimes, from the people of the Louisiana Territory to French planters fleeing the Haitian Revolution.⁷⁶

Leaving aside the question of Spanish, Portuguese, or French influence, from the beginning ideas circulated among the English of a blood-borne blackness that anticipated one-drop notions of race.⁷⁷ In 1578, George Best, an explorer look-

75. M. GREGOIRE, *ESSAY ON THE NOBILITY OF THE SKIN* 17 (Charlotte Nooth trans., Paris, Setier 1826); see also JEAN-PHILIPPE GARRAN DE COLON, *AN INQUIRY INTO THE CAUSES OF THE INSURRECTION OF THE NEGROES IN THE ISLAND OF ST. DOMINGO* 20 (Phila., Pa., Joseph Crukshank 1792) (“[T]he White [Creole] would with less horror hear his enemies accuse him of a crime, than assert that a drop of African blood circulates in his veins. Such a reproach is considered as the most outrageous insult.”); Guillaume Aubert, “*The Blood of France*”: *Race and Purity of Blood in the French Atlantic World*, 61 *WM. & MARY Q.* 439 (2004). In his *Description Topographique, Physique, Civile, Politique et Historique de la Partie Française de l’Isle Saint-Dominique*, Moreau de Saint-Méry elaborately charted racial mixture, describing 1/64 “black blood” as “steadily approaching the White . . . without ever merging with him absolutely,” and further “assert[ing] that in Santo Domingo there are mixed-bloods who have only 1/512 of African blood.” WERNER SOLLORS, *NEITHER BLACK NOR WHITE YET BOTH: THEMATIC EXPLORATIONS OF INTERRACIAL LITERATURE* 120–21 (1997) (citation omitted); see also JOHN JEREMIE, *FOUR ESSAYS ON COLONIAL SLAVERY* 31 (London, Samuel Bagster 1831) (“However fair their complexions, however legitimate their descent, however exemplary their conduct, a single drop of African blood was a pollution of the whole stock.”). Just before the Haitian Revolution, Francis Alexander Stanislaus described the poisonously purist attitudes among the French:

“He has relations on the coast!” Such, Sir, is the expression by which they manifest their contempt, on the slightest suspicion that a single drop of African blood has found its way into the veins of a white. And such is the force of prejudice, that it requires an effort of reason and courage to enable you to contract with such an unfortunate being, that kind of familiarity, which a state of equality pre-supposes and demands.

FRANCIS ALEXANDER STANISLAUS, *A VOYAGE TO SAINT DOMINGO IN THE YEARS 1788, 1789, AND 1790*, at 42 (J. Wright trans., London, T. Cadell 1817).

76. See generally Jennifer Spear, “*Clean of Blood, Without Stain or Mixture*”: *Blood, Race, and Sexuality in Spanish Louisiana*, in *A CENTER OF WONDERS: THE BODY IN EARLY AMERICA* 95, 95–108 (Janet Moore Lindman & Michele Lise Tarter eds., 2001) (discussing *limpieza de sangre* cases in Spanish Louisiana).

77. To be sure, a great variety of theories purported to explain racial difference throughout the seventeenth and eighteenth centuries, from purely environmental accounts to varying interpretations of Scripture. See, e.g., FREDRICKSON, *supra* note 16, at 60–61; JORDAN, *supra* note 62, at 11–15, 17–20, 35–36; TAYLOR, *supra* note 41, at 11–15. Whether and how these theories competed for and attained adherents is a story dependent on contingency and

ing for the Northwest Passage, ruminated on what “shoulde cause the Ethiopians great blacknesse.”⁷⁸ Rejecting environmental accounts of racial variation,⁷⁹ Best attributed African skin color to “infection of bloud, & not the distemperature of the clymate.”⁸⁰ Blackness was a condition that likely began with the biblical curse of Ham⁸¹ and was unaffected by interracial marriage.⁸² For centuries afterwards, similar theories of racial difference circulated.⁸³ Blackness was more than skin deep, literally manifesting itself in the blood, bile, semen, and mucus.⁸⁴

local circumstances. Cf. NIRENBERG, *supra* note 2, at 6 (“I am not arguing that negative discourses about Jews, Muslims, women, or lepers did not exist, but that any inherited discourse about minorities acquired force only when people chose to find it meaningful and useful, and was itself reshaped by these choices. Briefly, discourse and agency gain meaning only in relation to each other.”).

78. GEORGE BEST, *A TRUE DISCOURSE OF THE LATE VOYAGES OF DISCOUVERIE* 30 (London, Henry Bynnyman 1578); see also JORDAN, *supra* note 62, at 15, 17, 40–43 (discussing Best without mentioning Best’s specific use of the word “blood”).

79. See BEST, *supra* note 78, at 30–32; JORDAN, *supra* note 62, at 11–12 (noting early climatic accounts of racial difference from ancient Greeks). For American environmental accounts, JORDAN, *supra*, at 513–16.

80. BEST, *supra* note 78, at 32. Best wrote that “this blacknesse procéedeth of some naturall infection of the first inhabitants of that Countrey, and so all the whole progenie of them descended, are still poluted with the same blot of infection.” *Id.* at 30; see also WILLIAM STANTON, *THE LEOPARD’S SPOTS: SCIENTIFIC ATTITUDES TOWARD RACE IN AMERICA, 1815–59*, at 3–9 (1960).

81. Noah’s curse on his son Ham in *Genesis* 9:25 (King James) (“Cursed be Canaan; a servant of servants shall he be unto his brethren.”) was cited to explain and justify African skin color and enslaved status. See, e.g., FREDRICKSON, *supra* note 16, at 60–61; JORDAN, *supra* note 62, at 17–20, 35–36; Benjamin Braude, *The Sons of Noah and the Construction of Ethnic and Geographical Identities in the Medieval and Early Modern Periods*, 54 *WM. & MARY Q.* 103, 103–04 (1997).

82. See BEST, *supra* note 78, at 29 (“I my selfe have séene an Ethiopian as blacke as a cole broughte into Englande, who taking a faire Englishe woman to Wife, begatte a Sonne in all respectes as blacke as the Father was, although England were his native Countrey, & an English woman his Mother.”).

83. See JORDAN, *supra* note 62, at 20 (describing how the idea persisted “in the face of centuries of incessant refutation”).

84. See *id.* at 15–16. The English “Dr. of Physick” Thomas Browne explained in 1646 that “the tincture of the skin as a spermaticall part traduced from father unto son.” BROWNE, *supra* note 74, at 329. English scientist Robert Boyle echoed this notion eighteen years later opining that “the Principal Cause . . . of the Blackness of *Negroes* is some Peculiar and Seminal Impression . . . Propagated to Posterity.” BOYLE, *supra* note 74, at 160–61, 162. Semen was commonly understood to be derivative of blood. JORDAN, *supra* note 62, at 166. Browne did, however, suggest that the blackening agent in semen could be “omit[ted]” after “divers generations” of “commixture.”

"Tis plain their Colour and Wool are Innate,"⁸⁵ wrote a confident Oxonian in 1695. "The Textures of their Skins, and Blood, differ from those of *Whites*."⁸⁶ According to a Virginia doctor in 1743, the work of Marcello Malpighi, an Italian anatomist who had examined cross-sections of skin under a microscope in 1665, formed the "general received Opinion . . . that the Cause of the Colour of Negroes is a Juice or Fluid of a black Colour."⁸⁷ No wonder, then, that census records, wills and letters "show with disturbing clarity," as Alden Vaughan has written, "that the black men and women brought to Virginia . . . held from the outset a singularly debased status in the eyes of white Virginians."⁸⁸

B. RACIAL MIGRATION AND EARLY EVASIONS OF THE ONE-DROP RULE

Although many people may have believed that one drop of blood made a person black, the existence of ideologies of purity does not compel the conclusion that "mulatto[es] [were] absorbed into the Black race."⁸⁹ In 1757, the Reverend Peter Fontaine wrote his brother in Wales to complain that the Virginia countryside "swarms with mulatto bastards."⁹⁰ A minister in the Westover Parish of Charles City County, Virginia, half-

BROWNE, *supra* note 74, at 329.

85. L.P., TWO ESSAYS SENT IN A LETTER FROM OXFORD TO A NOBLEMAN IN LONDON 27 (London, R. Baldwin 1695).

86. *Id.*

87. John Mitchell, *An Essay upon the Causes of the Different Colours of People in Different Climates*, 43 PHIL. TRANSACTIONS 102, 114 (1744-45); see also TAYLOR, *supra* note 41, at 274. For his part, Mitchell refuted Malpighi:

I must own I was surprised at first to see them differ from the Opinions of some learned Men; especially in Matter of Fact, which they rather allege than prove, relating to the fluid *Mucus* of the *Cuticula*, or *Corpus reticulare*; for which Reason I repeated my Experiments on living Subjects several times, but could never see any Tokens of that black Juice.

Mitchell, *supra*, at 102 n.*.

Mitchell's work affirmed that "there is not so great, unnatural, and unaccountable a Difference between Negroes and white People, on account of their Colours," *id.* at 131, but his use of living subjects makes one wonder how Mitchell's belief in natural equality manifested itself in his daily life and work.

88. Alden T. Vaughan, *Blacks in Virginia: Evidence from the First Decade*, in ROOTS OF AMERICAN RACISM: ESSAYS ON THE COLONIAL EXPERIENCE 128, 129 (1995) (describing how Africans were plainly regarded as chattel).

89. Hickman, *supra* note 10, at 1173.

90. JAMES FONTAINE, MEMOIRS OF A HUGUENOT FAMILY 350 (Ann Maury trans., Genealogical Publ'g Co., Inc. 1973) (1853).

way between Richmond and Williamsburg, Fontaine denounced interracial sex as “unjustifiable in the sight of God and man,” a “heinous practice[]” that “smutted our blood.”⁹¹ The Reverend fervently believed in the absolutism of racial difference.⁹² But what troubled him most was not the mere presence of mixed-race people; rather, it was that they, “if but three generations removed from the black father or mother, may, by the indulgence of the laws of the country, intermarry with the white people, and actually do every day so marry.”⁹³ The mixed families and offspring that truly upset Fontaine were not living as black. “[T]his abominable practice . . . hath polluted the blood of many *amongst us*,” Fontaine lamented.⁹⁴ White Virginians were not entirely white.

In fact, many of the colonial era’s interracial children wound up white. Contrary to the common account of *partus sequitur ventrem*, laws of maternal descent were not the same as the one-drop rule.⁹⁵ Rather, *partus sequitur ventrem* functioned almost as two opposite one-drop rules:⁹⁶ One drop of direct maternal slave “blood” might make one a slave regardless of overwhelming European ancestry, but a drop of maternal free “blood” meant freedom, no matter the proportion of African ancestry.⁹⁷ Numerous histories have followed the fortunes of indi-

91. *Id.*

92. Fontaine was not absolutist in all things. As chaplain in William Byrd of Westover’s expedition drawing the dividing line between Virginia and North Carolina in 1733, Fontaine could be pragmatic and was capable of understanding that not every dogma would have its day. See WILLIAM BYRD, WESTOVER MANUSCRIPTS 80 (Petersburg, Va., Edmund & Julian C. Ruffin 1841) (“In a dearth of provisions our chaplain pronounced it lawful to make bold with the sabbath, and send a party out a-hunting.”).

93. FONTAINE, *supra* note 90, at 350 (discussing the problem in a letter dated March 30, 1757).

94. *Id.* (emphasis added).

95. See MORRIS, *supra* note 39, at 43.

96. Cf. Sharfstein, *supra* note 13, at 1502 (describing as a “reverse one-drop rule” a 1910 North Carolina decision interpreting the state’s one-eighth rule to require that a great-grandparent be a “negro of pure African blood” in order for someone to be legally black (citing *Ferrall v. Ferrall*, 69 S.E. 60 (N.C. 1910))).

97. See MORRIS, *supra* note 39, at 43–49 (1996) (“Although [*partus sequitur ventrem*] meant that some people were doomed to be slaves, it also meant that others would be free.”). The true legacy of *partus sequitur ventrem* is not the one-drop rule, but rather the culture of rape and denial that permeated the American South and what Adrienne D. Davis has called “the sexual economy of slavery.” Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 246 (1999). Classifying mulattoes as blacks allowed white men to pretend that they were unrelated to slave chil-

vidual families who were freed from slavery early in the seventeenth century,⁹⁸ and thanks to Paul Heinegg's compilation of public records pertaining to free people of color in Delaware, Maryland, Virginia, and the Carolinas, a more comprehensive picture is emerging. The vast majority of free families of color in seventeenth- and eighteenth-century Virginia and Maryland descended from European servant women. Over two hundred had children with Africans, and many had long-term, multi-child relationships.⁹⁹ Even where there were very few Africans, people formed interracial families. In Prince George's County, Maryland, from 1696 to 1699, the editors of a compilation of court records wrote, "[b]ut for a few fleeting references to mulatto bastards born to white servant women there would be no indication that the institution of negro slavery existed in the province."¹⁰⁰ In far-flung places across the South, white women would persist in having relationships with African and African American men long after indentured servitude ended.¹⁰¹ In antebellum Alabama, about twenty percent of free mixed-race people had white mothers.¹⁰²

Thousands of mixed-race people were born into freedom. Although the "divers[e] freeborne English women" having children with African slaves prompted Virginia and Maryland to enact laws "for deterring such freeborne women from such

dren. Hickman, *supra* note 10, at 1175–76; Higginbotham & Kopytoff, *supra* note 41, at 2005–06. Similarly deep-seated capacity for denial would persist as people of African ancestry assimilated into white communities.

98. See, e.g., T.H. BREEN & STEPHEN INNES, *MYNE OWNE GROUND: RACE AND FREEDOM ON VIRGINIA'S EASTERN SHORE, 1640–1676*, at 68–109 (2005); J. DOUGLAS DEAL, *RACE AND CLASS IN COLONIAL VIRGINIA: INDIANS, ENGLISHMEN, AND AFRICANS ON THE EASTERN SHORE DURING THE SEVENTEENTH CENTURY* 207–403 (1993); JOHN H. RUSSELL, *THE FREE NEGRO IN VIRGINIA, 1619–1865*, at 24–38 (Dover Publ'ns, 1969) (1913).

99. PAUL HEINEGG, *FREE AFRICAN AMERICANS OF VIRGINIA, NORTH CAROLINA AND SOUTH CAROLINA* 1, 3 (5th ed. 2006). Only nineteen of the hundreds of Virginia and North Carolina families tracked by Heinegg descended from white men. *Id.* at 5.

100. Joseph A. Smith & Phillip A. Growl, *Introduction to COURT RECORDS OF PRINCE GEORGE'S COUNTY, MARYLAND, 1696–1699*, at xii (Joseph A. Smith & Phillip A. Growl eds., 1964).

101. See MARTHA HODES, *WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE 19TH-CENTURY SOUTH* 38 (1997) ("By the close of the seventeenth century, the transition from servitude to slavery was complete [L]ocal whites could still tolerate now-illicit liaisons between white women and black men.")

102. Gary B. Mills, *Miscegenation and the Free Negro in Antebellum "Anglo" Alabama: A Reexamination of Southern Race Relations*, 68 J. AM. HIST. 16, 22 (1981).

shameful Matches,” mandating periods of servitude for them and their children,¹⁰³ free communities of color started to take shape. Greatly outnumbered by both the slave and the white populations, they “straddled one of hell’s elusive boundaries.”¹⁰⁴ They went into and out of debt, fell prey to economic downturns, had difficulty amassing property across generations, and remained vulnerable to enslavement.¹⁰⁵ And an ever-increasing litany of restrictions on the right to own property, travel, bear arms, and more squeezed their existence like a vise.¹⁰⁶ Nevertheless, families evolved into large clans, many of which split into darker and lighter branches, depending on whom people married and/or had children with.

Legal restrictions narrowed the worlds of free people of color, but also set them in motion, driving them to find places where they could own land and experience something approaching liberty. In the mid-eighteenth century, hundreds of free people of color began to migrate out of Virginia, north into Maryland and Delaware and south into the Carolinas.¹⁰⁷ In the Carolina wilderness, they bought land among communities of white farmers and forged business and family ties. Heinegg documents branches of four families—Bunch, Chavis, Gibson, and Gowen—that “became resolutely white after several generations” in North and South Carolina.¹⁰⁸ Fifty miles inland

103. See 1 GENERAL ASSEMBLY OF MD., PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY JANUARY 1637/8–SEPTEMBER 1664, at 553–54, available at <http://www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000001/html/am1--533.html>.

104. IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH*, at xiv (New Press 1992) (1974) [hereinafter BERLIN, *SLAVES WITHOUT MASTERS*]. Free people of color comprised two percent of the free Maryland population in 1755. *Id.* at 3–4.

105. See BERLIN, *SLAVES WITHOUT MASTERS*, *supra* note 104, at 217–49. William Byrd of Westover described the precarious existence of one family on the North Carolina-Virginia border in his *History of the Dividing Line*:

There we came upon a family of mulattoes that called themselves free, though by the shyness of the master of the house, who took care to keep least in sight, their freedom seemed a little doubtful. It is certain many slaves shelter themselves in this obscure part of the world, nor will any of their righteous neighbours discover them. On the contrary, they find their account in settling such fugitives on some out-of-the-way corner of their land, to raise stocks for a mean and inconsiderable share, well knowing their condition makes it necessary for them to submit to any terms.

BYRD, *supra* note 92, at 17.

106. See BERLIN, *SLAVES WITHOUT MASTERS*, *supra* note 104, at 317–40.

107. HEINEGG, *supra* note 99, at 3–9, 17–21.

108. *Id.*; see also JORDAN, *supra* note 62, at 171–73.

from Charleston, plantation owner Joseph Pendarvis freed his seven children upon his death in 1735 and willed them his land.¹⁰⁹ The Pendarvis heirs married whites, and their children were white.¹¹⁰ Along the South Carolina-Georgia border in Edgefield, the scion of a pre-Revolutionary white family had two sons with a free woman of color, and their descendants “were assimilated into the white world.”¹¹¹ It took no great leap for Charleston merchant and Revolutionary leader Henry Laurens to write in 1783 that “[r]easoning from the colour carries no conviction. By perseverance the black may be blanched and the ‘stamp of Providence’ effectually effaced.”¹¹²

At the same time that restrictions on property ownership and other civil rights were pushing people over the color line, laws drawing the color line closed the curtain behind them and allowed them to stay white. Although one-fourth, one-eighth and one-sixteenth rules undoubtedly fostered the belief that mixed-race people were completely black, it was well within the realm of eighteenth-century comprehension to know that these laws were not one-drop rules. Reverend Peter Fontaine parsed the statutory text, knew how it was put into practice, and was less than pleased.¹¹³ So did his friend and neighbor, William Byrd of Westover, who blithely asserted in his *History of the Dividing Line* that “a Moor may be washed white in three generations.”¹¹⁴

Byrd’s use of the passive voice is telling. Although free people of color were among the first African migrants to whiteness, the history of crossing the color line is not congruent with individual agency and consent, implicating not only the legal restrictions and poverty under which free African Americans lived, but also the full horror of slavery. In his *Commonplace Book*, Byrd restated and elaborated his contention in what seemed to him a comical story:

109. LARRY KOGER, *BLACK SLAVEOWNERS: FREE BLACK SLAVE MASTERS IN SOUTH CAROLINA, 1790–1860*, at 13–14 (1985).

110. *Id.*

111. ORVILLE VERNON BURTON, *IN MY FATHER’S HOUSE ARE MANY MANSIONS: FAMILY AND COMMUNITY IN EDGEFIELD, SOUTH CAROLINA* 400 n.65 (1985).

112. JORDAN, *supra* note 62, at 173 (quoting Letter from Henry Laurens to William Drayton (Feb. 15, 1783) in *THE LIFE OF HENRY LAURENS; WITH A SKETCH OF THE LIFE OF LIEUTENANT-COLONEL JOHN LAURENS* 454 (New York, N.Y. & London, 1915)).

113. FONTAINE, *supra* note 90, at 350.

114. BYRD, *supra* note 92, at 3.

A wicked West Indian boasted that he had washt the Black . . . White, and being askt by what art, he did it, he replyd, that in his youth he had an Intrigue with an Ethiopian Princess, by whome he had a Daughter that was a Mulatto. Her he lay with, believeing no man had so good a right to gather the Fruit as he who planted it. By this he had another Daughter of the Portuguese complection and When she came to be 13 years old he again begot Issue Female upon her Body, that was perfectly white; and very honourably descended.¹¹⁵

Eighty years later, Byrd's image of whiteness as a product of slavery, incest, and rape was echoed by Thomas Jefferson, writing the lawyer Francis Gray in 1815: "You asked me in conversation, what constituted a mulatto by our law? And I believe I told you four crossings with the whites. I looked afterwards into our law, and found . . . that one-fourth of Negro blood, mixed with any portion of white, constitutes the mulatto."¹¹⁶ Jefferson initially abstracted his discussion into an Enlightenment-era flurry of algebraic equations, likening the laws of blood proportion to "a mathematical problem of the same class with those on the mixtures of different liquors or different metals."¹¹⁷ Soon, though, he switched to language eerily reminiscent of Byrd's, analogizing to "a Merino ram being crossed, first with a country ewe, second with his daughter, third with his granddaughter, and fourth with his great-granddaughter, the last issue [being] deemed pure Merino, having in fact but 1/16 of the country blood."¹¹⁸ Jefferson then took a short step from "country blood" to the number of "crosses with the pure white" that "clear[s] the issue of the negro blood."¹¹⁹ Although one whose "blood" has been "cleared" is not automatically free under "the principle of the civil law, *partus sequitur ventrem*," Jefferson wrote, "if [he] be emancipated, he becomes a free *white* man, and a citizen of the United States to all in-

115. William Byrd, *The Commonplace Book*, in THE COMMONPLACE BOOK OF WILLIAM BYRD II OF WESTOVER § 173, at 139–40 (Kevin Berland et al. eds., 2001). Showing how hard it is for scholars to rethink the one-drop rule, the editors' commentary assumes the one-drop rule was in effect in Byrd's lifetime and reads Byrd's anecdote as reinforcing the rule: "A child with any admixture of African blood continues to be classified as African, thus confirming the futility of the attempt to erase racial ancestry, implicit in the aphorism itself." *Id.* at 235–36.

116. Letter from Thomas Jefferson to Francis C. Gray (Mar. 4, 1815), in XIV THE WRITINGS OF THOMAS JEFFERSON 268, 268 (Andrew A. Lipscomb & Albert E. Bergh eds., 1904).

117. *Id.*

118. *Id.* at 270.

119. *Id.*

tents and purposes.”¹²⁰ Jefferson did not bemoan the idea that people of African descent can “become[] . . . *white*.” It was simply a fact, one that Jefferson knew intimately.

With no fanfare, Jefferson’s letter departs from *Notes on the State of Virginia*’s concern with blood purity. The slave owning architect of American democracy had long negotiated contradiction.¹²¹ Perhaps acquainting himself with the letter of the law changed his views, and perhaps real life intervened. In the thirty years since the publication of *Notes*, Jefferson had fathered as many as four children with his slave and wife’s half-sister, Sally Hemings—children who all met the legal threshold for whiteness.¹²² Shortly after the correspondence with Francis Gray, Jefferson’s son Beverly and a daughter Harriet left Monticello. According to an 1873 interview with the youngest son, Madison Hemings, “Beverly . . . went to Washington as a white man. He married a white woman in Maryland, and their only child, a daughter, was not known by the white folks to have any colored blood coursing in her veins.”¹²³ Harriet, in turn, “married a white man in good standing in Washington City She thought it to her interest, on going to Washington, to assume the role of a white woman, and by her dress and conduct as such I am not aware that her identity as Harriet Hemings of Monticello has ever been discovered.”¹²⁴

120. *Id.* For an elegant and uncompromising reading of Jefferson’s letter, see SOLLORS, *supra* note 75, at 115 (“The text embodies the dialectic of Enlightenment, though in its attempt at systematizing interracial locations it expresses not so much the curiosity of the scientist or his or her service in the description of knowledge as the perhaps unconscious desire to make the findings compatible with the existence of an ultimate racial boundary that would support the notion of racial difference.”).

121. See generally ANNETTE GORDON-REED, THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY (1997) (examining evidence both for and against Jefferson’s thirty-eight-year-old liaison with slave woman Sally Hemings); see also Fields, *supra* note 11, at 147 (“People are quicker than social scientists sometimes believe to learn by experience, and much slower than social scientists usually assume to systematize what they have learned into logically consistent patterns. They are thus able to ‘know’ simultaneously what experience has taught and what tradition has instilled into them, even when the two are in opposition.”).

122. JOSHUA D. ROTHMAN, NOTORIOUS IN THE NEIGHBORHOOD: SEX AND FAMILIES ACROSS THE COLOR LINE IN VIRGINIA, 1787–1861, at 46–48 (2003).

123. *Life Among the Lowly, Number I*, PIKE COUNTY (OH.) REPUBLICAN, Mar. 13, 1873 (interview with Madison Hemings), available at <http://www.pbs.org/wgbh/pages/frontline/shows/jefferson/cron/1873march.html>.

124. *Id.*; see also ROTHMAN, *supra* note 122, at 40–44 (describing Beverly and Harriet’s integration into the white community).

C. RETHINKING THE LAW OF RACE: *HUDGINS* AND *CANTEY*,
RECONSIDERED

The realities of racial mixing demand a rethinking of the law of race. To show what a new legal history of race would look like in the context of racial migration, I next examine two seminal early nineteenth century cases: *Hudgins v. Wright*¹²⁵ and *State v. Cantey*.¹²⁶ In *Hudgins*, Virginia's High Court of Chancery considered a suit for freedom brought by three slave women on the ground that their maternal ancestry was Native American, not African.¹²⁷ It is, in Ariela Gross's words, "probably the most influential Southern precedent in setting the presumptions for slave/free status on the basis of race."¹²⁸ Ian Haney López's acclaimed article, *The Social Construction of Race*, begins with a discussion of *Hudgins*, describing the case as a hallmark of an "empirical definition of race. *Hudgins* tells us one is Black if one has a single African antecedent, or if one has a 'flat nose' or a 'woolly head of hair.'"¹²⁹ The decision, combining "the laws of our country, as connected with *natural history*,"¹³⁰ seems to lead inexorably to the words of South Carolina jurist William Harper, writing thirty years later in *State v. Cantey*: "a slave cannot be a white man."¹³¹ Robert Westley's elegant essay on racial passing interpreted the sentence to be the highest expression of the one-drop implications of maternal descent laws, which were codified across the South in the nineteenth century:¹³² "Judge Harper's coup de grace . . . set[] up purity of blood, of character, of liberty, and of personhood as natural barriers to the demise of race distinction through mixing. . . . The Harper doctrine made whiteness natural, something that resided internally in purity of blood and character."¹³³ In the sections that follow, I argue that the courts did not "ma[k]e whiteness natural." Instead, they expressed at best a hollow confidence in the integrity of racial boundaries, and in

125. 11 Va. (1 Hen. & M.) 134 (1806).

126. 20 S.C.L. (2 Hill) 614 (S.C. Ct. App. 1835).

127. 11 Va. (1. Hen. & M.) at 134.

128. Gross, *Litigating Whiteness*, *supra* note 14, at 129.

129. Haney López, *supra* note 21, at 4–5.

130. *Hudgins*, 11 Va. (1. Hen. & M.) at 137.

131. 20 S.C.L. (2 Hill) at 616.

132. Gillmer, *supra* note 43, at 560 n.144.

133. Westley, *supra* note 29, at 314; *see also* WILLIAMSON, *supra* note 17, at 71 ("Harper was not willing to define freedom by color, but he was willing, out of hand and without explanation, to declare slavery and whiteness incompatible.").

so doing gave communities considerable discretion to evade biological notions of race.

1. *Hudgins v. Wright*

In *Hudgins*, three women—mother, daughter, and granddaughter—stood before Virginia’s High Court of Chancery, seeking relief at the moment when their owner was about to “send them out of the State.”¹³⁴ In two opinions, by Judge Tucker and Judge Roane, *Hudgins* first held that the burden of proving or disproving free descent would be based on appearance—white and/or Native American appearance created a presumption of freedom, while African appearance created a presumption of slavery.¹³⁵ Second, once the burden was established, the court required substantive proof of free or slave status through testimony regarding maternal ancestry.¹³⁶ As to the burden of proof, Judge Tucker emphasized the “flat nose and woolly head of hair” that “nature has stamp” as persistent, multi-generational markers of African ancestry.¹³⁷ Judge Roane, by contrast, stressed the importance of genealogical testimony because it was impossible to determine “from inspection only, which race predominates” when “these races become intermingled.”¹³⁸

Three of the most important readings of *Hudgins* focus on the tension between physical appearance and maternal ancestry. Ian Haney López has interpreted the two prongs of

134. 11 Va. (1 Hen. & M.) at 134. The massive forced migration of slaves from the original Southern states into the Deep South was just beginning. IRA BERLIN, *GENERATIONS OF CAPTIVITY: A HISTORY OF AFRICAN-AMERICAN SLAVES* 161 (2003) [hereinafter BERLIN, *GENERATIONS OF CAPTIVITY*]. Some slaves found themselves being sold south because they were too light-skinned. In 1865, George Nichols, a twenty-eight-year-old from Mt. Desert, Maine, was marching through South Carolina in Sherman’s army when he asked a passerby if he knew who owned a mansion that stood in the distance. The man looked at Nichols with a “dull gray eye” and answered that “Master” did. The Yankee officer recorded the exchange in his diary. “You don’t mean to say that you are a slave?” he said. “You show no more indication of negro blood than any of the soldiers walking about here.” “No one takes me for a negro,” the man responded. “I was born and raised in my own father’s house in Baltimore . . . I don’t know why he sold me, except that I was getting to resemble him too much!” GEORGE WARD NICHOLS, *THE STORY OF THE GREAT MARCH: FROM THE DIARY OF A STAFF OFFICER 185–86* (New York, N.Y., Harper & Bros. 1865).

135. *Hudgins*, 11 Va. (1 Hen. & M.) at 139, 141.

136. *Id.* at 140, 142.

137. *Id.* at 139.

138. *Id.* at 141.

Hudgins as together manifesting something close to the one-drop rule—a belief in the physical truth of race, made permanent by the existence of one remote African ancestor.¹³⁹ Ariela Gross has described the decision’s two prongs as “poles in a continuing controversy about the knowability of racial identity in Southern courtrooms,” pitting race as a “matter of common sense, literally facially evident,” versus “the fear that racial identity could be hidden.”¹⁴⁰ Adrienne Davis has read the decision as a hedge, with the appearance-based burden of proof protecting white liberty against mistaken enslavement, and the genealogical evidence protecting white property against mistaken emancipation.¹⁴¹

In the context of racial migration, the case takes on an entirely different valence. Even as Judge Tucker’s language regarding physical appearance, cited throughout the nineteenth century, evinced a belief in the permanence of race, it also punched holes in the color line. Such ramifications were evident from the first recorded words out of the mouth of the plaintiff-appellee’s lawyer: “This is not a common case of mere *blacks* suing for their freedom; but of persons perfectly *white*.”¹⁴² The litigants were living proof that dark could become light. Although they claimed Native American ancestry, they appeared indistinguishable from the lawyers and judges—even opposing counsel referred to “[t]he circumstance of the appellees’ being *white*.”¹⁴³ The defendant-appellant’s lawyer nevertheless argued that maternal descent should trump physical appearance.¹⁴⁴ But Judge Tucker’s burden-shifting calculus did not take into account slave status, barely considering the evidence that the three generations of litigants in *Hudgins*—and at least two additional generations of ancestors recounted by witnesses—had been born to enslaved mothers. Instead of functioning as a one-drop rule, *partus sequitur ventrem* was simply pushed to the side.¹⁴⁵ Judge Tucker’s complete confidence in the physical markers of African descent allowed him to look at

139. Haney López, *supra* note 21, at 3.

140. Gross, *Litigating Whiteness*, *supra* note 14, at 130.

141. Davis, *Identity Notes*, *supra* note 13, at 706.

142. *Hudgins*, 11 Va. (1 Hen. & M.) at 135.

143. *Id.* at 136. The Chancellor at trial took note of the subtle gradations of the litigants’ skin tone from the older to younger generations. *Id.* at 134. Their lawyer’s phrase “mere *blacks*” foreshadowed an additional whitening factor beyond appearance: the act of racial prejudice.

144. *Id.* at 135.

145. *Id.* at 137.

the litigants, knowing that they had dark-skinned slave ancestors, and pronounce them “*absolutely free*.”¹⁴⁶ Ultimately, it was this type of confidence that would keep courts and communities later in the nineteenth century from having to question or police racial purity. They could just assume it. The disconnect between Tucker’s language affirming the permanence of race and the reality in front of him enabled the color line to be strengthened at precisely the moment it was being undermined.

Nor did Judge Roane’s uncertainty about the permanence of blackness and emphasis on testimony about ancestry do much to seal a porous color line. Such testimony—about long dead generations—was bound to be, as it was in *Hudgins*, “very imperfectly stated.”¹⁴⁷ In his opinion Judge Roane complained about incomplete evidence and biased witnesses. In essence, the record before the judges supplemented the litigants’ physical appearance with unreliable memories of their ancestors’ physical appearance: “If *Hannah’s* grandmother (the mother of *Nan*) were a *negro*, it is impossible that *Hannah* should have had that entire appearance of an Indian which is proved by the witnesses.”¹⁴⁸ At most, the genealogical testimony gives an illusion of objective control over racial boundaries beyond physical appearance. Yet while one effect of this testimony was the rise of evidence of racial “performance” and reputation,¹⁴⁹ there was a more significant social consequence: though supposedly objective, genealogical evidence was, in fact, equivocal, subjective, and entirely manipulable by individuals within local communities. As a result, courts’ reliance on such tests allowed communities to preserve the status quo and choose on their own terms to absorb or not to absorb people of ambiguous origin.

One final comment is necessary about the case’s equation of slavery with blackness, with freedom adhering to European and Native American ancestry. Adrienne Davis has described *Hudgins* as squeezing three races into a biracial black/white paradigm and isolating blacks from Native Americans.¹⁵⁰ In-

146. *Id.* at 141 (emphasis in original).

147. *Id.* at 134.

148. *Hudgins*, 11 Va. (1 Hen. & M.) at 142.

149. Gross, *Litigating Whiteness*, *supra* note 14, at 156. In *Hudgins*, one sees the kernel of performative evidence in testimony that a great-grandmother and her brother both asserted their freedom: “*Hannah* herself made an almost *continual claim* as to her right of freedom, insomuch that she was threatened to be whipped by her master for mentioning the subject.” 11 Va. (1 Hen. & M.) at 142.

150. Davis, *Identity Notes*, *supra* note 13, at 704.

deed, the first judicial opinion to apply a one-drop rule and equate African ancestry with slavery as a dispositive matter, and not for the purposes of burden-shifting, emerged from a case distinguishing blacks from Indians.¹⁵¹ Not only was African ancestry a sign of slave descent, but it also supported an inference that people with a mixture of African and Native American ancestry descended from slave Indians and had lost their tribal identities.¹⁵² The diverging status of African Americans and Native Americans created a legacy—that remains hotly contested to this day—of slaveholding and racial discrimination within Indian tribes and periodic purges from tribal rolls of people with African ancestry.¹⁵³

151. *Ex parte Ferret*, 8 S.C.L. (1 Mill) 194 (S.C. Ct. App. 1817). In Charleston in 1817, a Haitian refugee named Ferdinand Ferret refused to pay a city tax on free persons of color, “whether a descendant of an Indian or otherwise,” because he was a descendant of a “free woman of the East Indies” and a Frenchman. *Id.* The Constitutional Court of Appeals interpreted the statute only to include the descendants of “slave Indians”:

[I]t cannot . . . be extended to the descendants of an East Indian and a white man, nor indeed to the descendants of any other free Indian not impregnated with the blood of a negro. In a word, the ordinance can mean no other persons than such as are the descendants of slaves, whether negroes or Indians.

Id. Later in the nineteenth century, most cases of black/Indian identity did not turn on blood quantum. See Gross, *Beyond Black and White*, *supra* note 21, at 680 (“Because Indian identity was inherited from ones mother and did not depend on a fraction of ‘blood,’ cases involving claims of Indian-ness focused less on discerning ‘blood’ through either spurious medical science or the evidence of performance than did cases involving only black versus white identity. Instead, black/Indian identity cases centered on questions of status and citizenship in Indian nations, using different modes of fact-finding.”).

152. See, e.g., *State v. Belmont*, 35 S.C.L. (4 Strob.) 445, 456 (S.C. Ct. App. 1847) (Frost, J., dissenting) (“From this view of the condition of [enslaved] Indians, it appears that it was no better than that of Africans. They were, in the same manner, made captives and enslaved; and bought and sold; *as slaves were subjected to the same treatment, and intermarried with the African race*; were manumitted for similar merit; and when separated from their tribes, and domesticated in the colony, were punishable for offences by a single justice. There was no such difference in their condition, character, or treatment, as would justify the inference of any discrimination between the races, in the legislation affecting them.” (emphasis added)).

153. See Williamson, *supra* note 25, at 237–46 (describing history of slaveholding within Indian tribes). On March 8, 2006, the Cherokee Nation’s Judicial Appeals Tribunal issued a split decision striking down a 1992 “blood quantum” requirement that excluded people who were categorized as “freedmen” in Dawes Commission tribal membership rolls compiled in the 1890s. See S.E. Ruckman, *Tribal Chief Opposes Ruling: The Cherokee Leader Wants Councilors to Help Overturn a Freedmen Citizenship Decision*, TULSA WORLD, Mar. 15, 2006, at A1; Claudio Saunt, *Jim Crow and the Indians*, SALON, Feb. 21, 2006, http://www.salon.com/news/feature/2006/02/21/chokekee/index_np

At the same time, however, in separating blacks and Indians, decisions like *Hudgins* also had the unintended effect of linking them. Native American identity came to represent a bridge to freedom and to whiteness, with the result that many people of African descent deliberately *became* Indians. In the colonial era, as free families of color split into darker and lighter branches and began leaving Virginia, many wound up in communities that were neither black nor white.¹⁵⁴ Some intermarried with Native Americans and assimilated into remnant eastern tribes.¹⁵⁵ More often, during the nineteenth and twentieth centuries these groups—whether or not they had Native American family connections—adopted Indian or other liminal identities such as “Portuguese” or “Turk” when needed for survival or preemptively to distinguish themselves from African Americans.¹⁵⁶ In Person County, North Carolina, for ex-

.html.

154. These groups extend from New Jersey and Delaware into Maryland and Virginia, across the Southeast and Appalachia and into the Deep South. See Calvin Beale, *An Overview of the Phenomenon of Mixed-Racial Isolates in the United States*, in *A TASTE OF THE COUNTRY: A COLLECTION OF CALVIN BEALE'S WRITINGS* 32, 34 (Peter A. Morrison ed., 1990); Horace Mann Bond, *Two Racial Islands in Alabama*, 36 *AM. J. SOC.* 552, 554–56 (1931).

155. HEINEGG, *supra* note 99, at 21–29.

156. *Id.*; see also BERLIN, *SLAVES WITHOUT MASTERS*, *supra* note 104, at 164 (“[A] few successful South Carolina free Negroes wriggled out of the free Negro caste by claiming Indian ancestry. . . . Of course, some of these elite free Negroes . . . may well have had both Indian and black ancestors, but the fact that they were allowed to take refuge in their Indian status suggests that money could bleach, especially in parts of the Lower South.”); JAMES CLIFFORD, *Identity in Mashpee*, in *THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE AND ART* 277, 342 (1988) (“The Mashpee trial [in U.S. District Court in Massachusetts in 1976] seemed to reveal a people who were sometimes separate and ‘Indian,’ sometimes assimilated and ‘American.’ Their history was a series of cultural and political transactions, not all-or-nothing conversions or resistances. Indians in Mashpee lived and acted *between* cultures in a series of ad hoc engagements.”). Claims of Indian and Portuguese ancestry were common in cases of racial determination. See, for example, *State v. Belmont*, 35 S.C.L. (4 Strob.) 445, 445 (S.C. Ct. App. 1847), in which a woman claimed to have “free Indian” grandparents and a Portuguese father. Of the father, one witness said that he “never saw him associating with white persons, nor heard he was a Portuguese. He had no foreign accent.” 35 S.C.L. at 446. Another witness said that the woman’s father “was a Portuguese. If he had been a mulatto, they would not have permitted [the woman’s mother] to marry him.” *Id.* at 446; see also *Locklayer v. Locklayer*, 35 So. 1008, 1008 (Ala. 1904) (“being part Indian, part Portuguese, and part Caucasian”); *Farrelly v. Maria Louisa*, 34 Ala. 284, 286 (1859) (having “the characteristic features of an Indian Mexican or Mexican Indian”); *Ferrall v. Ferrall*, 69 S.E. 60, 60 (N.C. 1910) (“Indian or Portuguese”); *Gilliand v. Bd. of Educ.*, 54 S.E. 413, 415 (N.C. 1906) (Portuguese); *McPherson v. Common-*

ample, one group known as “old issue negroes” in 1887 became “Mongolian” in 1901, “Cuban” in 1908, and finally “Indian” in 1912, to maintain a school apart from the descendants of slaves.¹⁵⁷ Many of these “triracial isolate” groups dispersed and assimilated into white communities in the twentieth century, moving to cities and reinventing themselves like other newcomers.¹⁵⁸ Despite cases such as *Hudgins*, claims of Indian ancestry are widespread today among African Americans, though uncorroborated by recent genetic admixture studies.¹⁵⁹ An impossibly large number of people who identify as whites also claim Native American ties, perhaps suggesting a different ancestry entirely.¹⁶⁰

2. *State v. Cantey*

Hudgins did far less to establish the one-drop rule than would appear at first glance, and later antebellum cases of racial determination continued to contain a reality of racial migration within rhetoric affirming the certainty of racial difference. *State v. Cantey*, the 1835 South Carolina decision that crescendos to the declaration that “a slave cannot be a white man,”¹⁶¹ is a case in point. Although such language seems an unambiguous affirmation of the one-drop rule, the rest of the case suggests otherwise. At issue in *Cantey* was a criminal defendant’s challenge of two prosecution witnesses under a statute that prohibited testimony against whites by people of color.¹⁶² The witnesses were admittedly “descendant[s] in the third degree of a half breed who had a white wife . . . so that

wealth, 69 Va. (28 Gratt.) 939, 939 (1877) (“half-Indian”); Daniel Sharfstein, *Passing Fancy*, LEGAL AFF., Sept.–Oct. 2003, at 65, 65; Sharfstein, *supra* note 13, at 1498.

157. HEINEGG, *supra* note 99, at 26–27.

158. BREWTON BERRY, ALMOST WHITE 20 (1963).

159. See, e.g., Esteban J. Parra et al., *Estimating African American Admixture Proportions by Use of Population-Specific Alleles*, 63 AM. J. HUM. GENETICS 1839, 1848 (1998) (detecting “just 4 individuals with an Amerindian haplogroup, among [more than] 1,000 African Americans”).

160. Russell Thornton describes the phenomenon of millions of Americans claiming to have “Cherokee grandmothers.” RUSSELL THORNTON, THE CHEROKEES: A POPULATION HISTORY 172–74 (1990). Many Americans “without an actual Cherokee grandmother claim one. There are also explanations for this. Such ‘lineage’ might be from another, non-Cherokee tribe or it might be totally non-Indian.” *Id.* at 173.

161. *State v. Cantey*, 20 S.C.L. (2 Hill) 614, 616 (S.C. Ct. App. 1835).

162. *Id.* at 614.

[they] had one-sixteenth part of African blood.”¹⁶³ Before the witnesses were sworn in, the trial judge instructed the jury to decide their race as “a person of color” if:

[T]here be a clear visible admixture evidenced by the color of the skin, the hair, or features, the person is to be regarded as of the degraded class; but if these distinctive characteristics be wanting, and the person has been received and treated as white, although there may be proof of some admixture derived from a remote ancestor, yet such person is to be accounted white, and entitled to privileges as such.¹⁶⁴

The jury found that the witnesses were white, allowed them to testify and then convicted the defendant.¹⁶⁵ On a motion for a new trial, the defendant continued to challenge the witnesses’ race. The South Carolina Court of Appeals affirmed the jury’s conclusion and denied the motion, noting that “[i]f we should say that such an one is to be regarded as a person of colour, on account of *any* mixture of negro blood, however slight or remote, we should be making . . . a very cruel and mischievous law.”¹⁶⁶ The court’s refusal to set any blood quantum as the marker of whiteness has led Ariela Gross to describe *Cantey* as “the clearest possible statement that racial identity was a socially and legally defined status.”¹⁶⁷

Beyond the notion of “social construction,” however, by declaring that “a slave cannot be a white man,”¹⁶⁸ the court affirmed the regime of *partus sequitur ventrem*, but not the one-drop rule. Rather, the court was signaling that it was more important to keep a slave society stable than guard the color line. *Cantey* frankly acknowledged that people with African ancestry were becoming and could become white. The judges only had to open the newspaper to know that the ranks of the newly white included slaves.¹⁶⁹ The court could be flexible on the issue be-

163. *Id.*

164. *Id.* at 615.

165. *Id.*

166. *Id.*

167. Gross, *Litigating Whiteness*, *supra* note 14, at 164. As Gross observed, the court valued manly performance as a marker of whiteness in its speculation that “it may be well and proper, that a man of worth, honesty, industry and respectability, should have the rank of a white man, while a vagabond of the same degree of blood should be confined to the inferior caste.” *Id.* (quoting *Cantey*, 20 S.C.L. at 616).

168. *Cantey*, 20 S.C.L. at 616.

169. From Richmond to Mobile to New Orleans, runaway notices described fugitives who were “so WHITE as very easily to pass for a free WHITE MAN.” WILLIAM JAY, A VIEW OF THE ACTION OF THE FEDERAL GOVERNMENT IN BEHALF OF SLAVERY 83–87 (Bergman Publishers 1969) (1839) (compiling 1830s-era newspaper advertisements for light-skinned runaway slaves). Slaves—

fore it because it believed that the number of people crossing the line was comparatively small and that slavery would usually keep whites and blacks separate. "It is perhaps not necessary to advert particularly to some of the arguments which were urged," Judge Harper appended almost as an afterthought:

It seemed to be argued as if there were no necessary connexion between the degree of negro blood and its appearance in the person; that an individual of unmixed European descent, may approach to the negro features and complexion, and one having a large proportion of negro blood may be free from these distinctive marks. But in general this is not so. I doubt whether a person of unmixed European blood, though he might be darker than many a colored person, would ever be mistaken for one. And it can hardly happen that a person having more than an eighth of negro blood will not betray it in his person.¹⁷⁰

Although today's readers are accustomed to politically progressive arguments about the arbitrariness of race,¹⁷¹ more likely the lawyer to whom Harper referred was urging something like the one-drop rule—the harder it was to tell white from black, the more necessary it would be to devise an uncompromising criterion beyond visual appearance to maintain white supremacy.¹⁷² Harper could reject the argument—and the *Cantey* court could forgo the one-drop rule—because he was convinced that blood would generally manifest itself in an easily discernable (and legally dispositive) manner.¹⁷³ An insis-

particularly men—could be too light to have a market value, as a deputy sheriff in Prince William County, Virginia, learned to his chagrin when he unsuccessfully tried to sell a teenager who was taken into custody after claiming to be a free person of color. ROTHMAN, *supra* note 122, at 217–18 (describing the attempted sales of William Hyden). At auction in 1835, the same year that *Cantey* was decided, slave traders decided that the teen's "colour was too light and that he could by reason thereof too easily escape from slavery and pass himself for a free man." *Id.* at 217. Hyden soon disappeared from custody. *Id.* at 218; *cf. id.* (describing the market for "fancy girls"); Johnson, *supra* note 39, at 16–20 (same). Stephan Talty, in his 2003 book *Mulatto America*, mentions an 1821 Kentucky auction in which townspeople refused to bid on a woman and her children who were "as white as any of our citizens." STEPHAN TALTY, *MULATTO AMERICA* 7 (2003). Local newspapers described the lack of bidding in terms of sentimental identification with the family, although the prospect of escape conceivably provided a colder basis for the town's magnanimity. *Id.*

170. *Cantey*, 20 S.C.L. at 616.

171. See Sharfstein, *supra* note 13, at 1482 (discussing race as a social construction).

172. *Cf. id.* at 1504–06 (describing the "social constructivism" of Jim Crow racial hardliners).

173. Eighty-five years later, after generations of African Americans had become white, a similar confidence in the permanence of race was crucial to making the one-drop rule the official policy of the Census Bureau. See Hick-

tence on absolute racial purity would accomplish little besides disrupting and distracting a functioning slave society. Preserving the social order and political economy depended less on making formal rules to protect white purity than on keeping the fact of racial migration quiet. "I think it to be regretted that the question was made in the present case," wrote Judge Harper, "and hope that the same question will not be again made under the same circumstances. It is doing unnecessary violence to the feelings of persons, who in this instance are admitted to be of much worth and respectability."¹⁷⁴

Rather than establish the one-drop rule, early cases in which courts had to determine whether people were black or white reflected a world in which people regularly migrated across the color line, and a culture that both permitted such crossings and denied they were taking place. The courts allowed racial migration to happen and to be buried. Southern communities were given the room to be unselfconsciously white and, in the face of looming sectional conflict, unselfconsciously committed to slavery and white supremacy. Part II will explore the one-drop rule's rise in the decades before the Civil War. The rule's history is primarily one of freedom, not slavery. While slavery was presumed to separate whites and blacks, the prospect of emancipation required a new basis for preserving status boundaries. North and South, people started thinking of white racial purity as an axiomatic first principle of American society; legislatures began debating proposals to tighten statutory racial definitions; and courts heard more and more arguments invoking the one-drop rule. The rule became a fixture of the abolitionist rhetorical arsenal, extending its reach nationally. All the while, the migration across the color line continued.

II. THE DARK SIDE OF FREEDOM: THE RISE OF THE ONE-DROP RULE, 1830–1865

The one-drop rule incubated in a space between experience and ideology, liberty and bondage. If William Harper's jurisprudence fostered a permeable color line, he had a national reputation for being decidedly less compromising, lecturing extensively in favor of slavery.¹⁷⁵ In *State v. Cantey*, Harper saw

man, *supra* note 10, at 1187.

174. *Cantey*, 20 S.C.L. at 617.

175. See William Harper, *Harper's Memoir on Slavery, in THE PRO-SLAVERY ARGUMENT, AS MAINTAINED BY THE MOST DISTINGUISHED WRITERS OF THE SOUTHERN STATES* 1, 1–5 (Negro Univ. Press 1968) (arguing that slav-

with his own eyes that “persons . . . of much worth and respectability” had “admixture[s] of negro blood.”¹⁷⁶ Outside of court, however, he insisted that “the negro race” “[is] inferior to our own in mind and character,” and required constant vigilance to prevent “deterioration from such intermixture. What would be thought of the moral conduct of the parent who should voluntarily transmit disease, or fatuity, or deformity to his offspring?”¹⁷⁷

Historians have long described the three decades leading up to the Civil War as a time of spiraling crisis and polarizing rhetoric, a crucible that forged racism as we know it today.¹⁷⁸ The one-drop rule started appearing more often in a range of discussions about slavery and racial difference.¹⁷⁹ The nation’s most distinguished scientists proclaimed that Africans were innately inferior, perhaps an entirely different species, and that people of mixed race were “effeminate progeny,” unhealthy and

ery is necessary to the rise of civilization). Harper was also the author of South Carolina’s 1832 nullification ordinance. CHAUNCEY SAMUEL BOUCHER, *THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA* 214 (1968).

176. *Cantey*, 20 S.C.L. at 616–17.

177. Harper, *supra* note 175, at 1, 92. Harper questioned whether whites’ “refus[al] to blend the races by marriage” was “not prejudice, but truth, and nature, and right reason, and just moral feeling . . . [T]hroughout the whole of nature, like attracts like, and that which is unlike repels.” *Id.* at 91.

178. See BERLIN, *SLAVES WITHOUT MASTERS*, *supra* note 104, at 343 (“The onrushing sectional conflict pushed the free Negro caste to the edge of extinction. The threat of free Negro subversion, always present in the white mind, loomed ever larger as the South prepared for war.”); FREDRICKSON, *supra* note 16, at xvii (describing a coalescence in antebellum America of “a rationalized pseudoscientific theory positing the innate and permanent inferiority of non-whites”); WILLIAMSON, *supra* note 17, at 73–74 (describing the 1850s as a time when an anxiety-ridden South united around the certainty of strict racial categories).

179. On New Year’s Day in 1832, for example, the French consul in New Orleans told Alexis de Tocqueville that “women as white as the most beautiful European women . . . belong[ed] to the proscribed race, because tradition makes it known that there is African blood in their veins.” *JOURNEY TO AMERICA* 100 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1971) (1959). At least one scholar has taken the French consul’s words as proof that “the one drop rule applied” in the antebellum South. See Bernie D. Jones, “*Righteous Fathers*,” “*Vulnerable Old Men*,” and “*Degraded Creatures*”: *Southern Justices on Miscegenation in the Antebellum Will Contest*, 40 *TULSA L. REV.* 699, 742 (2005). Thirty years later, a short story in *Harper’s Weekly* casually chronicled the one-drop rule’s ascent: “It’s too terrible for belief!” exclaimed Mary Evans. “Why, Clara tells me that one drop of black blood could destroy her very nature. I know her love and goodness, and I won’t believe it.” “It’s the opinion generally entertained, North as well as South,” replied Abel.” *Out of the House of Bondage*, *HARPER’S WEEKLY*, May 10, 1862, at 298, 298.

infertile.¹⁸⁰ As they debated measures to expel or enslave free blacks, Southern state legislatures repeatedly enacted laws to “limit free Negro mobility, punish their crimes more severely, tax them heavily, extract their labor, and generally equate them with slaves.”¹⁸¹ In 1853, Virginia—for two centuries, the trailblazer in racial definition—debated a proposal to amend its seventy-year-old “one-quarter” rule¹⁸² “to declare all persons to be negroes who may be known or proven to have negro blood in them.”¹⁸³ Journalists in Richmond and Charlottesville agreed that the measure was needed to keep “[t]he blood of the Caucasian . . . pure and undefiled.”¹⁸⁴ Soon after, the Louisiana Senate entertained a bill for the “prevention of marriages where one of the parties has a taint of African blood.”¹⁸⁵ The courts seemed to be following suit, “defin[ing] the boundaries between black and white much more tightly than before.”¹⁸⁶ In 1857, the Arkansas Supreme Court construed the term “*mulatto*” to mean “persons belonging to the *negro race*, who are of an intermixture of white and negro blood, without regard to grades.”¹⁸⁷ On the eve of war, the one-drop rule had a palpable presence in communities, legislatures, and courts across the South.

180. STANTON, *supra* note 80, at 66–68, 189–91 (describing theories of Josiah Nott and Louis Agassiz in the 1840s and early 1860s, respectively).

181. BERLIN, SLAVES WITHOUT MASTERS, *supra* note 104, at 349. For a catalogue of “measures prejudicial to the free people of color”—albeit one used to advocate for the dubious enterprise of African colonization—see John H.B. Latrobe, *African Colonization—Its Principles and Aims*, in AFRICAN REPOSITORY 230 (Balt., Md., John D. Toy 1859).

182. ROTHMAN, *supra* note 122, at 209.

183. *Id.* at 209, 229.

184. BERLIN, SLAVES WITHOUT MASTERS, *supra* note 104, at 365–66 (quoting RICHMOND ENQUIRER, Jan. 3, 1854, Dec. 31, 1853).

185. *Louisiana Legislature*, DAILY PICAYUNE, Feb. 20, 1857, at 7 (“[S]uch marriages were not unfrequent in New Orleans—that the evil was on the increase, and the most unhappy consequences often resulted from such alliances.”).

186. Gillmer, *supra* note 43, at 613.

187. *Daniel v. Guy*, 19 Ark. 121, 134 (1857). Thomas D. Morris described *Daniel v. Guy* as the first case to establish the one-drop rule. MORRIS, *supra* note 39, at 27, 29; see also Gillmer, *supra* note 43, at 617 (noting that the case was the first to raise the question of nearly white slaves); Johnson, *supra* note 39, at 21 (describing the one-drop rule as “the standard only in Arkansas during the antebellum period”). The language in *Daniel* may not have truly established a one-drop rule, however, instead simply correlating legal status with social status—i.e., if a person already “belong[s] to the *negro race*,” then there is no need to calculate a blood quantum.” *Daniel*, 19 Ark. at 121 (emphasis added).

Yet this narrative of the rule's ascent—and the corollary that it became “increasingly difficult for those living in that vague and unsettled area between slavery and freedom, black and white, to cross over to the white side”¹⁸⁸—is incomplete. Restrictive legislation and escalating rhetoric did not make race suddenly appear where it had once been invisible and unenforceable; rather, people teetering on the color line were given additional motive to cross it. Opportunities for self-invention remained, particularly but not exclusively for free people of color, and the courts did little to squelch them. In the sections that follow, this Article examines racial migration in the antebellum period and then traces the propagation of the one-drop rule in the North. Part II.A explores the constant migration in the antebellum South. While geographic mobility provided ample opportunity to cross the color line, many families stayed right where they had always lived. In one South Carolina community, multiple members of a large mixed-race family repeatedly sought legal recognition as whites. The same court heard their cases, with a range of outcomes. Part II.B turns to one of the one-drop rule's central tensions: that it was articulated more often in the context of freedom than of slavery. If the prospect of freedom sharpened the Southern defense of slavery, the reality of freedom in the North pushed many to justify continued racial inequality in terms of the one-drop rule. The experience of Ohio, where the one-drop rule was expressly asserted in a series of civil rights cases in the 1840s, is particularly illustrative. Part II.C describes the cruel irony of how abolitionists made a practice of invoking the rule strategically, yet uncritically, in order to force the issue of slavery onto Northerners' personal and political agendas. It was a strategy that helped kill slavery, but in the process arguably strengthened the one-drop rule.

A. ANTEBELLUM RACIAL MIGRATION

Years after Thomas Jefferson's two oldest slave children escaped to the Washington, D.C. area, a third child, Eston Hemings, was set free upon the President's death in 1826. With his wife and children, Hemings moved to Ohio and eventually to Wisconsin, where he established himself as white. As the frontier expanded west, so did opportunities for refashioning and assimilation. The settlement of the Deep South, Appala-

188. Gillmer, *supra* note 43, at 613.

chia, and the Midwest in the late eighteenth and early nineteenth centuries is generally thought of as a mass migration of poor whites¹⁸⁹ and as a “second Middle Passage” of enslaved Africans, larger than the trans-Atlantic trade.¹⁹⁰ Others, however, journeyed along the same roads, rivers and mountain passes. The opening of western frontiers coincided with measures that put free people of color in motion, such as the 1806 Virginia statute requiring emancipated slaves to leave the state.

By accident and by design, geographical mobility often translated into racial mobility. Joshua Peavy left the farming life in North Carolina around 1820 and made his way south and west, wife and children in tow, preaching the Gospel.¹⁹¹ Born a free person of color, Peavy was born again as Methodist and “French” by the time he reached Alabama. Ordained a minister, Peavy was known for “the alacrity with which he met heretics, and the zeal with which he engaged in driving away erroneous doctrines”¹⁹²—and for his “very dark complexion.”¹⁹³

While scholars of race have asserted that “[t]here may be light-skinned Blacks, but there are no dark-skinned Whites,”¹⁹⁴ the experiences of Peavy and many others do not bear this out.¹⁹⁵ Eston Hemings was said to have resembled nothing so much as a bronze statue of the third President.¹⁹⁶ Describing antebellum Virginia, historian Joshua Rothman has written that “[w]hites knew who racially ambiguous persons in their communities were, although they did not necessar[il]ly agree

189. See, e.g., Mills, *supra* note 102, at 24–25 (describing Alabama’s 1860 white population as sixty-nine percent Georgia “crackers” and South Carolina “Sand Hillers”).

190. See BERLIN, GENERATIONS OF CAPTIVITY, *supra* note 134, at 161, 163–209.

191. HEINEGG, *supra* note 99, at 914–15.

192. ANSON WEST, A HISTORY OF METHODISM IN ALABAMA 208 (1893).

193. *Id.* at 207.

194. Haney López, *supra* note 21, at 47 n.181.

195. See, e.g., State v. Cantey, 20 S.C.L. (2 Hill) 614, 614 (S.C. Ct. App. 1835) (“The maternal grand father of the witnesses, although of dark complexion, had been recognized as a white man, received into society, and exercised political privileges as such.”); see also Mills, *supra* note 102, at 30 (describing the Davis family in Montgomery County, Alabama); Sharfstein, *supra* note 13, at 1496–97 (recounting that a family that moved to a small Kentucky town shortly before 1850 had a reputation for being “a little bit negro”).

196. *A Sprig of Jefferson Was Eston Hemings*, SCIOTO GAZETTE (Chillicothe, Ohio), Aug. 1, 1902, available at <http://www.pbs.org/wgbh/pages/frontline/shows/jefferson/cron/1902sprig.html>.

what such persons were.”¹⁹⁷ Perhaps the gap between black and white was narrower than we think—dark complexions were ordinary and expected where the seasonal tanning of faces was a fact of agrarian life.¹⁹⁸ Alternatively, in many places in the South, crossing the color line did not require fooling people.¹⁹⁹

All over the South, legal cases and legislative petitions provide steady documentation of white communities where mixed-race people lived and assimilated.²⁰⁰ Such materials reveal an assimilation process that was never entirely easy. In 1833, for example, fifty-one white residents of Stafford County, Virginia, halfway between Richmond and Washington, D.C., petitioned the legislature to allow a newly freed family called the Whartons—William, Lemuel, Barney, Nancy, and Lewis—to remain in the state, as white people. The petition characterized the Whartons as “*free white persons*,” citing their appearance, marriage to whites, and service in helping catch run-aways—and “that ‘their partialities are decidedly for the

197. ROTHMAN, *supra* note 122, at 216.

198. See CHARLES CRAWFORD, OBSERVATIONS UPON NEGRO-SLAVERY 13 (Phila., Pa., Eleazer Oswald 1790) (“[I]t is the nature of the sun first to embrown, and then to blacken the skin. I myself knew a gentleman in the West-Indies, who from his engagements for a considerable part of his life used to be almost daily exposed to the sun, which made him so brown that he was proverbially called Mulatto Frank. . . . And he, I very well knew, was descended from English parents, who had not the least Negro blood in them.”); SAMUEL STANHOPE SMITH, ESSAY ON THE CAUSES OF THE VARIETY OF COMPLEXION AND FIGURE IN THE HUMAN SPECIES 42–44 (Winthrop D. Jordan ed., Harvard Univ. Press 1965) (1787) (noting that Europeans were darkening under the American sun); CONEVERY BOLTON VALENCIUS, THE HEALTH OF THE COUNTRY: HOW AMERICAN SETTLERS UNDERSTOOD THEMSELVES AND THEIR LAND 230, 244 (2002) (describing anxiety over tanning skin among settlers in the Mississippi Valley); Hodes, *supra* note 24, at 99 (“The two most common terms for white [Civil War] recruits were ‘dark’ and ‘light,’ invoked about equally, but other white men were sandy, florid, ruddy, muddy, medium, sallow, pale, swarthy, fair, and fresh.”).

199. See Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145, 1145–47 (2001) (describing how large numbers of light-skinned negroes effectively cross the color line each year).

200. See, e.g., BERLIN, SLAVES WITHOUT MASTERS, *supra* note 104, at 161–62 (describing how “mixed bloods” passed into the ranks of the white via Virginia’s legal system); HODES, *supra* note 101, at 96–98 (describing how mixed race children presented southern courts with a variety of complex and confusing problems); Gross, *Litigating Whiteness*, *supra* note 14, at 122 (discussing racial identity litigation in Civil War era southern society); Sharfstein, *supra* note 13, at 1504 (“[T]he realities of everyday life . . . showed . . . that many white Southerners had African ancestry and that white communities could function peacefully without that knowledge.”).

whites.”²⁰¹ The legislature allowed them to stay in the state because it “appear[ed] to the general assembly” that the Whartons were “not negroes or mulattoes, but white persons, although remotely descended from a coloured woman.”²⁰² Although the petition has been cited as an instance of state and community consensus that a family was white because of their appearance and performance,²⁰³ the 1840 census lists William, Barney and Lewis Wharton not as whites, but as the heads of “free colored” families. William and Lewis owned seven slaves between them; Lemuel, listed as white, owned a single slave.²⁰⁴ After 1840, the Whartons seemed to disperse, intermittently appearing in later censuses as white people.²⁰⁵ Whether the 1840 census taker knew who they were or how they were regarded, whether he simply eyeballed them, or whether he believed in the one-drop rule, the Whartons were not unambiguously white seven years after the legislature had essentially declared them so.

While the Wharton petitioners’ assimilation narrative appeared to be seamless on the surface, most cases were marked by contentious public debate over specific instances of racial migration. Although historians have read into these cases a general lack of community consensus over where the color line should be drawn,²⁰⁶ it is to be expected that witnesses on oppos-

201. ROTHMAN, *supra* note 122, at 212–13, 300 n.17 (quoting Petition of Sundry Inhabitants of the County of Stafford Praying That Wm. Horton and Others *Free White Persons* Who Have Acquired Title to Their Freedom Since 1806 May Be Permitted to Remain in This Commonwealth, Stafford County, No. 10243 (Jan. 14, 1833)).

202. Higginbotham & Kopytoff, *supra* note 41, at 1984 (quoting Ch. 243, 1832 Va. Acts 198, 198).

203. ROTHMAN, *supra* note 122, at 213–14; Higginbotham & Kopytoff, *supra* note 41, at 1985.

204. U.S. CENSUS BUREAU, 1840 FEDERAL CENSUS, STAFFORD COUNTY, VIRGINIA 185–87 (1840).

205. In 1850, the only Wharton listed in Stafford County is “William Whorton,” a fifty-seven-year-old white sailor in Stafford County. U.S. CENSUS BUREAU, 1850 FEDERAL CENSUS, STAFFORD COUNTY, VIRGINIA 16 (1850). In 1870, Barney Whorton is a seventy-seven-year-old white carpenter, and a white farm laborer named James Wharton has two small children named Lemuel and William, suggesting that they are related to the subjects of the 1833 legislative petition. U.S. CENSUS BUREAU, 1870 FEDERAL CENSUS, STAFFORD COUNTY, VIRGINIA 22, 48 (1870).

206. See HODES, *supra* note 101, at 98 (“Although the law insisted on formal categories of race, white neighbors were willing not only to determine racial status on an ad hoc basis but also to disagree among themselves on such matters.”); ROTHMAN, *supra* note 122, at 216; Gross, *Litigating Whiteness*, *supra* note 14, at 126–27, 162 n.227 (“[T]rials that involved the determination of

ing sides of a case would disagree; otherwise, there would not be a case in the first place. Lack of consensus is overrepresented in court records—the financial, liberty, and other interests at stake undoubtedly skewed testimony on each side.²⁰⁷ While few traces were left behind of communities that did not litigate questions of racial status, antebellum trials of racial determination were a subset of a larger phenomenon. The relative frequency of these “cases of embarrassment and difficulty,” as one court called them, seems less a function of widespread local disagreement about racial definitions than of “[t]he constant tendency of this [free colored] class to assimilate to the white, and the desire of elevation.”²⁰⁸

1. Black, White, and Tann

The constancy of racial migration, undeterred by “embarrassment and difficulty,” comes to life in a series of cases litigated from 1832 to 1843 involving one extended family, in one place. Collectively, these cases show that once a family decided to cross the color line, very little could stop them. They did not have to adjust to the cruel dictates of society; often, society adjusted to them.

On the Fourth of July, 1832, William Tann, an overseer on a rice plantation in the Colleton District west of Charleston, shot a slave named Moses with a musket full of buckshot.²⁰⁹ Tann fled to Georgia but was captured and returned to South Carolina.²¹⁰ According to the *Charleston Courier*, “The fairness of his complexion was thought to be and passed for a WHITE

someone’s race demonstrated not consensus around a single, commonsense definition, but disagreement, conflict, and concern for the consequences of being wrong.”).

207. Cf. Gross, *Beyond Black and White*, *supra* note 21, at 650–51 (“[T]rial stories not only drew on familiar cultural narratives and were presented because of their cultural resonance, but . . . the legal forum often shaped these stories, winnowed out certain elements and emphasized others . . .”).

208. *Bass v. Tax Collector of Kershaw Dist.*, 37 S.C.L. (3 Rich.) 136, 139 (S.C. Ct. App. 1846).

209. WILLIAM JAY, *INQUIRY INTO THE CHARACTER AND TENDENCY OF THE AMERICAN COLONIZATION AND AMERICAN ANTI-SLAVERY SOCIETIES* 22 (New York, N.Y., Negro Univ. Press 1969) (1838).

210. HEINEGG, *supra* note 99, at 1138 (“William, fled from South Carolina to Georgia about 1835 after Simon Verdier posted his bond on charges he had killed a ‘Negro’ on John’s Island in Colleton District. Upon the court’s determination of his race as ‘colored,’ Verdier captured him, and he was tried and executed.”).

MAN.”²¹¹ But before he could be tried for murder, a preliminary trial was held on his race, with a verdict that Tann was black.²¹² As a result, he was taken from the Walterboro court of sessions into the custody of a magistrate and freeholders, who under state law had jurisdiction over free people of color.²¹³ Denied a jury trial, he was sentenced to death and hanged in April 1835.²¹⁴

It was an abrupt end for a man whose family had been journeying to whiteness for two centuries. Tann likely descended from John Kecatan, or “Jack the Negro,” a slave in mid-seventeenth-century Virginia who contracted for his freedom in exchange for eleven years of “careful[] and honest[] . . . labour.”²¹⁵ When his owner tried to back out of the bargain, Kecatan sued and prevailed in court, despite testimony that his master “had never a serv’t maid but the sd Jack the Negro lay with her or got her w’th child.”²¹⁶ Jack the Negro’s descendants grew lighter with every generation, moving through Virginia and the Carolinas, and seeking white racial status as soon as they could.²¹⁷ William Tann did not just look white. He was an overseer who killed a slave from a neighboring plantation.²¹⁸ It is no exaggeration to characterize him as aggressively white. But upon being arrested for murder,²¹⁹ Tann’s appearance and

211. JAY, *supra* note 209, at 22.

212. *See id.*

213. *Id.*

214. *Id.*

215. HEINEGG, *supra* note 99, at 1133. It is possible that Kecatan was able to contract himself out of lifetime servitude because he was part Native American. Kecoughtan is the name of the “only native group inhabiting the eastern tip of the Virginia peninsula at the time of the Jamestown settlement.” Maurice A. Mook, *The Ethnological Significance of Tindall’s Map of Virginia, 1608*, 23 WM. & MARY Q. 371, 384–88 (2d ser. 1943). While initially describing the Kecoughtan as hospitable, the English attacked them in 1610. The site of the main Kecoughtan village is near downtown Hampton, Virginia. *Id.*

216. HEINEGG, *supra* note 99, at 1133.

217. *Id.*

218. *Id.* at 1138.

219. The case not only confronted the court with the border between black and white, but also between person and property. Murder charges for killing slaves were motivated by the victims’ property value though such charges unintentionally served to acknowledge their humanity as well. *Cf.* EUGENE GENOVESE, ROLL JORDAN ROLL 28–30 (1974) (“The South had discovered, as had every previous slave society, that it could not deny the slave’s humanity, however many preposterous legal fictions it invented.”).

performance made little difference. He was black and condemned—end of story.

Tann's personal narrative was over, but his family's migration was not. Neither courtroom drama nor widespread publicity stopped other Tanns from trying to become white, all in the Colleton District. Barely a year after the execution was reported in the *Courier*, Isaac Winningham and his wife Rachel petitioned the elderly Charleston judge Elihu Hall Bay for relief from a tax on free people of color. They had an ancestor, Elizabeth Tan, probably distantly related to William Tann, who was "a colored woman with thick skin and long hair," had come from North Carolina, and "claimed to be an Egyptian."²²⁰ Judge Bay granted a writ of prohibition on the ground that Winningham and his wife "were exempt from such a tax, as the descendants of Egyptians."²²¹

In 1843, three more cases involving probable descendants of John Kecatan were brought in the same Walterboro court that had ruled against William Tann eight years earlier. In one case, Thomas Miller sought an exemption from the "poll tax imposed on free persons of color, of African origin and taint."²²² Johnson cited Judge Bay's 1836 decision in the Winningshams' favor, which had named Miller as an equally Egyptian descendant of Elizabeth Tann. Called into court, Miller "shew[ed]" the "appearance . . . of a mulatto" and dropped his case just before opposing counsel started to call witnesses.²²³ In a second case, William Johnson was a criminal defendant about to be tried as a free person of color, as Tann was, by a magistrate and freeholders. Johnson challenged their jurisdiction on the ground that he was white. Elizabeth Tann was his great-grandmother.

220. See HEINEGG, *supra* note 99, at 1140 (tracing colonial-era records of Elizabeth Tan(n)s in Southampton County, Virginia, and Franklin and Northampton Counties, North Carolina).

221. *Johnson v. Basquere*, 28 S.C.L. (1 Speers) 329, 330 (S.C. Ct. App. 1843) (describing the 1836 case). The designation of "Egyptian" ancestry was not the same as white. In the 1840 Federal Census, an Isaac Winningham was listed as the head of a free family of color in Colleton District, South Carolina, where William Tann committed his murder and was executed. See HEINEGG, *supra* note 99, at 1138. Interestingly, Winningham's neighbor, George Driggers, was listed as white, although he, too, descended from a free family of color with roots in seventeenth-century Virginia. See BREEN & INNES, *supra* note 98, at 75–76 (describing the life of Emmanuel Driggus, a free man of color in the 1650s, and his efforts to free his family); DEAL, *supra* note 98, at 279–304 (tracing the lives of Driggus and his descendants).

222. *Basquere*, 28 S.C.L. at 330.

223. *Id.*

At trial, the evidence showed that she had married a white man.²²⁴ Their daughter, Johnson's maternal grandmother, married a "colored man" but was alleged to have had an affair with an Irish schoolmaster. Johnson "had the appearance of a white man," had voted in various elections and was a member of a militia company, and although his witnesses testified that "he was received in society, and regarded as a free white man," opposing witnesses were adamant that Elizabeth Tan "was a mulatto."²²⁵ As the jury stood ready to announce its verdict, Johnson, like Miller, moved to discontinue proceedings and dropped his lawsuit.²²⁶ While the decisions of the two Tan descendants to concede their cases spoke to the ultimate insecurity of their racial status, the descendants nevertheless had made an initial decision to litigate aggressively. This decision strongly suggests that they saw themselves as white. Neither their sense of how the community viewed them nor the notoriety of prior litigation deterred their attempts to cross the color line.

A third case, involving an additional set of Tann cousins, made it to a jury verdict. Like Winningham and Miller, Thomas, John, and Henry Johnson sued to avoid paying a tax on "free mulattoes."²²⁷ The three brothers were the grandchildren of Lydia Tan, whose father was a "colored man. . . [They] could not have had more than one-eighth of negro blood in their veins, possibly not more than one-sixteenth."²²⁸ According to the trial judge, the Johnsons' sister resembled "a quadroon," while Thomas and John Johnson were pronounced "very passable white men."²²⁹ The third brother, Henry, a "darker man than either of them," declined to come to court.²³⁰ He may have been especially dark at the time—like William Tann, he was an overseer on a rice plantation, and the crop was being planted. While the three brothers had all participated in white civic life, neighbors frequently challenged them. They had served in the Colleton County militia for a time, only to be kicked out of it because of their race. Thomas voted for Sheriff, but his ballot was taken out of the box and "his name scratched . . . off the

224. *Id.*

225. *Id.* at 329.

226. *Id.*

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

228. *Id.* at 269.

229. *Id.*

230. *Id.* at 268.

list.”²³¹ As one witness testified, “They associated with white persons, but never without question.”²³² After the trial judge instructed the jury that “when white men had been acknowledged as white men, and allowed all their privileges, it was bad policy to degrade them to the condition of free negroes,” the jury “*very properly* found the relators to be free white men.”²³³ The Court of Appeals affirmed the verdict as “unquestionably right.”²³⁴ The ambiguous racial ancestry of the Tans/Tanns was well known in the Colleton District, yet members of the family kept trying to establish themselves as white and sometimes succeeded. Perhaps their efforts meant that Southerners could be undecided about who was black and who was white.²³⁵ Perhaps they showed how some communities—even after the racialist defense of slavery had begun in earnest—were capable of being unfazed by a few drops of blood here or there.²³⁶ What is certain is that many families of ambiguous ancestry were also unfazed by drops of blood. Neither local knowledge nor courtroom testimony—let alone abstract political discourse or statutory definitions of race—stopped people from crossing the color line.

2. Racial Migration in a Mobile Society

Families were able to cross the color line where they had lived for generations largely because there were few public records to fix their racial status. This general lack of documentation caused the North Carolina Supreme Court to lament in 1849 that “in our country, so little attention is paid to the registry of births and deaths and pedigree generally, as to make it extremely difficult, and in some cases impossible, to prove the blood of a person even for four generations.”²³⁷ In this vacuum of authoritative data, reputational and performative evidence became crucial to racial classification.

231. *Id.* at 269.

232. *Id.*

233. *Id.* at 270.

234. *Id.* at 271.

235. See HODES, *supra* note 101, at 102–03 (describing racial indecisiveness in the context of the racial ancestry of Nunez men); Gross, *Litigating Whiteness*, *supra* note 14, at 132 (“Neither the witnesses who testified in court, nor the judges and jurors who weighed their testimony were certain about the knowability of race or about what qualified one to determine it.”).

236. See HODES, *supra* note 101, at 108.

237. *State v. Dempsey*, 31 N.C. (9 Ired.) 384, 386 (1849).

Not even this evidence was available in frontiers and cities, which were rapidly being populated by newcomers from all over the country. For example, however much residents of St. Louis, Missouri adhered to strict racial etiquette, the color line would never be as mighty as the Mississippi River. By 1860, more than a third of St. Louis's free blacks had moved there from outside Missouri;²³⁸ other free people of color moving to town established themselves as white. "The free colored people of St. Louis . . . are separated from the white race . . . by a line so dim indeed that . . . the most critical observer cannot detect it," wrote a local "colored aristocrat" in 1858.²³⁹ "We, who know the history of all the old families of St. Louis, might readily point to the scions of some of our 'first families,' and trace their genealogy back to the swarthy tribes of Congo or Guinea."²⁴⁰ The ambiguity characteristic of the nation's western outposts found blunt expression in an 1863 poem by B. Clark, Sr., a "colored man" who had survived a Detroit race riot that was allegedly sparked by an incident of racial confusion: "He's what is call'd white, though I must confess / So mixed are the folks now, we oft have to guess, / Their hair is so curl'd and their skins are so brown, / If they're white in the country, they're niggers in town."²⁴¹

Free people of color were not the only ones who faded into new lives and identities far away from home. Fugitive slaves passed for white on their journeys north, as Southern newspapers and slave narratives alike attested.²⁴² Such ruses were not necessarily temporary; sometimes, the surest way to avoid slave catchers was to blend into the white community. Militant abolitionist Thomas Wentworth Higginson described spending a long Massachusetts winter in the early 1850s caring for three

238. BERLIN, SLAVES WITHOUT MASTERS, *supra* note 104, at 174.

239. CYPRIAN CLAMORGAN, COLORED ARISTOCRACY OF ST. LOUIS 45–46 (Julie Winch ed., Univ. of Mo. Press 1999) (1858).

240. *Id.* at 45–46. "In time, though, some of the 'aristocrats' of St. Louis, including Clamorgan himself, would cross the racial divide, either temporarily when the need arose, or permanently." Julie Winch, *Introduction to CLAMORGAN*, *supra* note 239, at 1, 10.

241. B. Clark, Sr., *The Riot, in A THRILLING NARRATIVE FROM THE LIPS OF THE SUFFERERS OF THE LATE DETROIT RIOT, MARCH 6, 1863, WITH THE HAIR BREADTH ESCAPES OF MEN, WOMEN AND CHILDREN, AND DESTRUCTION OF COLORED MEN'S PROPERTY, NOT LESS THAN \$15,000*, at 1, 23 (1863), available at <http://docsouth.unc.edu/neh/detroit/detroit.html>.

242. WILLIAM CRAFT, *RUNNING A THOUSAND MILES FOR FREEDOM; OR, THE ESCAPE OF WILLIAM AND ELLEN CRAFT FROM SLAVERY* 4–8 (Miami, Fla., Mnemosyne Publ'g Co. 1969) (1860).

runaways—"a pretty young woman, apparently white, with two perfectly white children. . . . She finally married a tradesman near Boston, who knew her story, and she disappeared in the mass of white population, where we were content to leave her untraced."²⁴³ Less furtively, slave owners regularly sent their mixed-race children out of harm's way. "[E]very time it come for them yellow gals to work in the field, they got sent North," Alabaman Martha Jackson recalled to folklorist Ruby Pickens Tartt decades after emancipation. "I reckon 'cause he never wanted see his own blood get beat up, and that Jim Barton was a cruel overseer, sure's you're born. Twas a heap of them yellow gals got sent North from around here, sure was."²⁴⁴ From a position of relative privilege, these children sometimes found their way to whiteness.²⁴⁵

As the nation headed toward civil war, paranoia about "invisible blackness" expressed itself in demagogic political writings and speeches, court rulings that attempted to police the color line more vigilantly, and legislative proposals to tighten racial boundaries to one-drop rules.²⁴⁶ Yet the clamor about purity yielded few changes in policy, in part because there remained some vestigial understanding that the private dynamics of the color line made enforcing strict rules unpalatable. The proposed one-drop statutes in Virginia and Louisiana were tabled in committee, amid concern that it put too many whites at risk of being reclassified. "I doubt not," wrote one Virginian to a pro-one-drop newspaper, "if many who are reputed to be white, and are in fact so, do not in a very short time find themselves instead of being elevated, reduced . . . to the level of a free negro."²⁴⁷ Even as racial migration culminated, in essence, in a denial that it had ever taken place, people were able to intuit not only what was happening, but also that one-drop rules ac-

243. THOMAS WENTWORTH HIGGINSON, *CHEERFUL YESTERDAYS* 146–47 (William Loren Katz ed., Arno Press 1968) (1898).

244. *Martha Jackson: Yellow Gals Got Sent North*, in *TOTING THE LEAD ROW: RUBY PICKENS TARTT, ALABAMA FOLKLORIST* 143, 143–45 (Virginia Pounds Brown & Laurella Owens eds., 1981).

245. See, e.g., *Reads Like Fiction: Life of a Chicago Woman Who Was Given a Cruel Blow*, *CHI. TRIB.*, May 6, 1894, at 28 (describing a woman's revelation that she had African ancestry after having been sent to Chicago as a child to be raised white).

246. WILLIAMSON, *supra* note 17, at 98; see also Gross, *Litigating Whiteness*, *supra* note 14, at 129–30.

247. ROTHMAN, *supra* note 122, at 230 (quoting *RICH. ENQUIRER*, Feb. 24, 1854).

celerated the process. “[T]he distinctive features of the African soon disappear, and then those of the corrupted blood cease to be designated as colored,” wrote a Washington correspondent of the *New York Times* in 1860:

The odium which attaches to the taint of African blood is so great that families shake it off as soon as possible by a change of residence, and probably of name. In this way hundreds of free colored people graduate yearly, and pass themselves off as pure Anglo-Saxons. So extensively is this system carried on, that the impression has gained ground that the mulatto race is incapable of propagating itself; whereas, its ambition has prompted it to bleach out, and cease to carry the mark of Ham upon its brow.²⁴⁸

Before the one-drop rule could become law, public revelations of racial migration had either to lose their legitimacy or somehow reinforce the call for ever-vigilant policing of the color line.

B. FREEDOM AND LOATHING: THE ONE-DROP RULE IN THE NORTH

Virginia and Louisiana were not the only states to propose one-drop statutes at mid-century. One measure defining black racial status as “possessing any negro blood” actually made it to a floor vote, failing by a mere two-person margin. The language was introduced in a northern state, Indiana, in an 1863 bill to exclude blacks from the public schools.²⁴⁹ One of the more jarring juxtapositions of the rule’s early history in the United States is that it usually arose in the context of emancipation, not slavery.²⁵⁰ This section considers how the one-drop rule took root in the North, paying particular attention to the experience of Ohio, a border state where by the start of the Civil War the rule had emerged unambiguously. The hardening of the one-drop rule in conditions of freedom anticipated its widespread codification after the Civil War. But the rule’s ascendancy did not make it any more enforceable than it had ever been.

248. *Relations of Slavery*, N.Y. TIMES, Aug. 28, 1860, at 5. Days before the bombardment of Fort Sumter, the same correspondent declared that “there are slaves in Virginia as white, and often whiter than their masters. But there are no white ‘free negroes,’ . . . for the reason . . . that they cease to be regarded in law, or in fact as free negroes, and take rank with the whites—for the most part doubtless with the ‘poor whites,’ but occasionally also with the ‘first families.’” *Our Washington Correspondence*, N.Y. TIMES, Apr. 9, 1861, at 1.

249. JOURNAL OF THE INDIANA STATE SENATE, 43D SESS. 308–09 (1863); see also *From Indianapolis*, CHI. TRIB., Feb. 14, 1863, at 1.

250. See FREDRICKSON, *supra* note 16, at 1–42.

While slavery was implicitly assumed to preserve white purity, freedom was understood to imply inevitable racial “amalgamation.”²⁵¹ Preserving power hierarchies in the absence of slavery inspired a fully articulated discourse of separation. When Thomas Jefferson fretted in 1781 that slaves would “stain[] the blood of [their] master,” he was describing how slaves “might mix” with the master class “when made free.”²⁵² For his part, Jefferson proposed that liberated bondpeople be “removed beyond the reach of mixture.”²⁵³ Five years after Jefferson published *Notes on the State of Virginia*, a South Carolina Congressman read the book aloud on the floor of the House of Representatives, arguing that

the blacks, when liberated, ought not to remain here to stain the blood of the whites by a mixture of the races If the blacks did not intermarry with the whites, they would remain black to the end of time; for it was not contended that liberating them would whitewash them; if they would intermarry with the whites, then the white race would be extinct, and the American people would be all of the mulatto breed.²⁵⁴

The mere prospect of emancipation in the decades between the Revolution and the Civil War immeasurably aided the rise of the one-drop rule. The colonization movement of the 1810s to 1860s, which advocated sending free blacks to Africa, was premised in large part on absolute racial difference and African inferiority.²⁵⁵ The fact of freedom for thousands of people of African descent made the question of racial difference central in everyday life. The vast majority of cases that required courts to define the color line involved free people. While questions of *slave* status could turn on formalisms—such as the status of one’s mother—that status masked the issue of racial difference;²⁵⁶ questions of *tax* status hinged squarely on what made someone white and what made someone black.²⁵⁷

251. The widespread assumption that freedom would lead to intermarriage gives the lie to the post-Reconstruction dissociation of social and political equality. From the 1780s to the 1860s, political and social equality were of one piece, fueling the Southern defense of slavery.

252. JEFFERSON, *supra* note 59, at 270.

253. *Id.*

254. See JORDAN, *supra* note 62, at 544–45 (quoting South Carolina Congressman William Loughton Smith).

255. FREDRICKSON, *supra* note 16, at 17 (quoting Henry Clay).

256. Higginbotham & Kopytoff, *supra* note 41, at 1972–73 & n.23; see also Gillmer, *supra* note 43, at 615–18 (arguing that increased attention to maternal descent in the 1850s reflected a heightened sense of racial difference).

257. ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY *passim*

In the antebellum North, freedom and the one-drop rule existed in contrapuntal harmony. Throughout the first half of the nineteenth century, border states such as Illinois, Indiana, Iowa, and Ohio enacted a range of anti-black measures that escalated from restricting immigration to segregating education to criminalizing miscegenation.²⁵⁸ Ohio's experience is particularly illuminating. Settled by Southerners and Northerners in equal numbers, the state banned slavery in its 1802 Constitution, but restricted voting to "white male inhabitants."²⁵⁹ Within four years after achieving statehood in 1803, legislators enacted a series of "Black Laws" that restricted "black and mulatto persons" from settling in Ohio, serving in the state militia, and testifying against whites.²⁶⁰ People of color then numbered in the low hundreds, although their population was growing exponentially, particularly in the southern part of the state.²⁶¹ By 1830, the Census recorded nearly 10,000 blacks in Ohio.²⁶² The state was becoming a relative haven for the newly free, but also a hothouse of racial prejudice.²⁶³ In 1829, almost all of Cincinnati's black population decamped for Canada after the city government sought large sums of money from them and whites destroyed black homes and businesses in three days and nights of deadly rioting.²⁶⁴ Other communities across southern Ohio

(2006).

258. BERLIN, *SLAVES WITHOUT MASTERS*, *supra* note 104, at 167; DAVID A. GERBER, *BLACK OHIO AND THE COLOR LINE, 1860–1915*, at 3–24 (1976) (discussing antebellum race relations and black life in Ohio before 1860); STEPHEN MIDDLETON, *THE BLACK LAWS IN THE OLD NORTHWEST: A DOCUMENTARY HISTORY* 15–18, 34, 199–203, 207–11, 251–52, 291–92, 323–25 (1993) (providing the actual text of such laws from Ohio, Indiana, and Illinois); FRANK U. QUILLIN, *THE COLOR LINE IN OHIO: A HISTORY OF RACE PREJUDICE IN A TYPICAL NORTHERN STATE passim* (1913); Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-Brown North*, 44 *UCLA L. REV.* 677, 692–93 (1997); Davison M. Douglas, *The Struggle for School Desegregation in Cincinnati*, 71 *U. CIN. L. REV.* 979, 981–95 (2003); Jonathan L. Entin, *An Ohio Dilemma: Race, Equal Protection, and the Unfulfilled Promise of a State Bill of Rights*, 51 *CLEV. ST. L. REV.* 395, 398–407 (2004); Paul Finkelman, *The Strange Career of Race Discrimination in Antebellum Ohio*, 55 *CASE W. RES. L. REV.* 373, 406–08 (2004).

259. OHIO CONST. art. 1, § 2, art. 8, § 2 (1802).

260. QUILLIN, *supra* note 258, at 21–22.

261. *Id.* at 25.

262. *Id.*

263. See, e.g., GERBER, *supra* note 258, at 18–20; QUILLIN, *supra* note 258, at 26.

264. QUILLIN, *supra* note 258, at 32.

also acted to expel people of color.²⁶⁵ An 1829 law shut blacks out of public schools,²⁶⁶ and in 1831, the legislature forbade them from jury service, with legislators declaring that “their very touch is contamination.”²⁶⁷

That same year, the Ohio Supreme Court began hearing a series of cases on “the degree of duskiness which renders a person” legally black.²⁶⁸ For the next three decades, the court repeatedly affirmed that as a matter of law, “a man, of a race nearer white than a mulatto . . . should partake in the privileges of whites.”²⁶⁹ This one-half rule was coupled with a steadfastly narrow construction of the Black Laws²⁷⁰ and criticism of the “shabby meanness” of those who would enforce them strictly.²⁷¹ Although the court’s rulings did not overturn the Black Laws and kept the majority of Ohioans of color outside of the bounds of citizenship, scholars have described this jurisprudence as “surprisingly progressive,”²⁷² a judicial counterpart to twenty years of legislative efforts to repeal the Black Laws that finally succeeded in 1849.²⁷³ The 1840s was supposedly a time when “Ohio moved into the northern mainstream, if not quite the vanguard, of racial equality.”²⁷⁴

To the extent that Ohio achieved a position in the “mainstream of racial equality,” however, it was through a process of constant struggle against increasingly absolutist justifications of white supremacy by local government officials. Even though in 1831 the state supreme court had construed the term “white man” in the Ohio Constitution to mean anyone with less than one-half African ancestry, free people of color were forced to litigate the issue repeatedly over the next three decades. Only three years after the original precedent, the court had to decide a case involving a southern Ohio school district’s refusal to enroll “the children of a *white mother*, and a *father* three-quarters

265. LEON LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860*, at 72–73 (1961); ROTHMAN, *supra* note 122, at 216.

266. MIDDLETON, *supra* note 258, at 34–40; QUILLIN, *supra* note 258, at 23.

267. QUILLIN, *supra* note 258 at 23, 31 (quoting OHIO ST. J., Feb. 1, 1832 (remarks of Rep. Worthington)).

268. *Gray v. Ohio*, 4 Ohio 353, 354 (1831).

269. *Id.*

270. *Id.* (“[W]e are unwilling to extend the disabilities of the statute further than its letter requires.”).

271. *Williams v. Dir. of Sch. Dist. No. 6*, 1 Wright 578, 580 (Ohio 1834).

272. *See, e.g., Entin, supra* note 258, at 396.

273. QUILLIN, *supra* note 258, at 56.

274. Finkelman, *supra* note 258, at 374.

white,” on the ground that “the school fund is raised for *white children only*.”²⁷⁵ Within another ten years, the court heard two more cases of local election officials preventing people of color from voting²⁷⁶ as well as another case involving exclusion from schools.²⁷⁷

Each time, the court regarded Ohio’s one-half rule to be “clearly settled,”²⁷⁸ ruling in favor of the plaintiffs. Yet the resistance continued, quickly evolving into the first unambiguous assertions of the one-drop rule in American law. Lawyers argued that “[t]he term white, as applied to persons, has . . . been . . . applied as expressive of the pure white race.”²⁷⁹ Juries agreed,²⁸⁰ especially after trial judges instructed that the Black Laws applied “if the plaintiff had in him any negro blood whatever.”²⁸¹ Significantly, one justice appointed in 1842 urged his colleagues to redraw the color line:

A mixture of black and white is not *white* [A] preponderance of the one or the other color will not make the mixture a pure white, or a pure black It is not the shade of color, but the purity of the blood, which determines the stock or race to which the individual belongs.²⁸²

Despite the 1849 repeal of some of the more onerous provisions of the Black Laws, segregated education as well as rules against suffrage and jury and militia service remained on the books. Repealed provisions included immigration restrictions and the prohibition of black testimony against whites.²⁸³ Election officials continued to reject ballots from mixed-race people, especially when Democrats were trying to suppress the Whig (and later Republican) vote,²⁸⁴ prompting more lawsuits by disenfranchised people of color. In 1855, the Cincinnati City Council entertained a resolution “to exclude every man from voting who had a drop of Negro blood in his veins,” according to a con-

275. *Williams*, 1 Wright at 579.

276. *Thacker v. Hawk*, 11 Ohio 376 (1842); *Jeffries v. Ankeny*, 11 Ohio 372 (1842).

277. *Lane v. Baker*, 12 Ohio 237 (1843).

278. *Jeffries*, 11 Ohio at 375.

279. *Lane*, 12 Ohio at 240–41.

280. *Jeffries*, 11 Ohio at 373.

281. *Thacker*, 11 Ohio at 377.

282. *Id.* at 380 (Read, J., dissenting).

283. *QUILLIN*, *supra* note 258, at 37 (“While [the 1849 act] is generally spoken of and thought of as the act *repealing* the Black Laws, it is really an act *modifying* them.”).

284. *GERBER*, *supra* note 258, at 8–9.

tributor to *Frederick Douglass' Paper*.²⁸⁵ The journalist sardonically noted the resolution's obvious constitutional failings. "Aint we progressing in Ohio? Aint these signs of improvement?"²⁸⁶ Four years later, the legislature attempted to override the Supreme Court's elections precedents with a statute disqualifying anyone with a "distinct and visible admixture of African blood."²⁸⁷ Although the "distinct and visible admixture" standard was not quite a one-drop rule, the statute's stated purpose was to "preserve the purity of elections."²⁸⁸ The court promptly rejected the standard because "it can not be claimed . . . by any intelligent statesman or lawyer, that it is within the scope of legislative power to give to the courts an authoritative construction of a provision of the constitution of the state."²⁸⁹ The call for racial purity had been compelling enough—politically and perhaps personally—for legislators to ignore the statute's fatal flaws.

Racial ideologies hardened around the one-drop rule, even as black communities in Ohio became politically organized and a cohort of emerging leaders worked with Free Soilers and white abolitionists to change the law and popular attitudes.²⁹⁰ Forty-eight years after the state's first constitution was drafted, the document was rewritten after the Constitutional Convention of 1850–51. Though the Convention heard petitions to improve civil rights, they fell on deaf ears; delegates went out of their way to object to petitions written by blacks.²⁹¹ The southern Ohio contingent labeled as trespassers the tens of thousands of people of color who lived in their communities, presenting numerous proposals to restrict immigration and send blacks to Africa so that "this should be a State for the white man and the white man only."²⁹² By a wide margin, the Convention refused to allow blacks to vote, join the militia, or

285. Cincinnatus, *Our Election in Ohio*, FREDRICK DOUGLASS' PAPER, Oct. 26, 1855, available at <http://www.accessible.com/accessible/text/freedom/00000774/00077482.htm>.

286. *Id.*

287. 1859 Ohio Laws 120, in MIDDLETON, *supra* note 258, at 12.

288. *Id.*

289. *Anderson v. Milliken*, 9 Ohio St. 568, 579 (1859).

290. See GERBER, *supra* note 258, at 22–23.

291. QUILLIN, *supra* note 258, at 61.

292. *Id.* at 63–65 (quoting remarks of Mr. Loudon of Brown County in I REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850–51, at 28 (1851)).

go to school with whites.²⁹³ “What accounts for this treatment of the negro?” said a frustrated reformist delegate:

It is the color of his skin. Can you define that color precisely? . . . No, certainly not. For by “color” in these discussions we do not mean color at all. . . . What is it then? Why, you must get his genealogy from the time of the deluge and, if you can discover one single cross with the descendants of *Ham*—he must stand condemned as a person of “color,” for the principle is, that the mixture never runs out. Ten or ten thousand times diluted by mixtures with the *Caucasian* race, and it is still the same.²⁹⁴

In Ohio, blood was eclipsing skin color as the authoritative measure of race. The one-drop rule was taking root in the North long before it became the law of the South.

C. ABOLISHING SLAVERY, PROPAGATING THE ONE-DROP RULE

Historians have long pondered “the simultaneous appearance of antislavery sentiment and racialist ideology.”²⁹⁵ Some attribute the “grim coincidence”²⁹⁶ to abolitionist challenges that prompted pro-slavery forces to “develop[] an arsenal of arguments for Negro inferiority which they repeated *ad nauseam*.”²⁹⁷ Others trace a common Foucauldian genealogy for pro- and anti-slavery forces “in the unfolding of bourgeois social relations, and the ethos of rationality and science in which these social relations were ideologically reflected.”²⁹⁸ Pro- and anti-slavery discourse relating to blood purity suggests a third dimension: the one-drop rule fueled the anti-slavery cause. Slavery apologists were not the only ones engaging in racialist rhetoric *ad nauseam*. In the decades leading up to the Civil War, abolitionists repeatedly characterized “[t]he curse of slavery” as “pursu[ing] the descendants of slaves to the latest generation.”²⁹⁹ Anti-slavery forces invoked the one-drop rule to show the cruelty of colonization and then deployed it in the context of Southern restrictions on free blacks and then of slavery

293. *Id.* at 86.

294. *Id.* at 87 (quoting II REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850–51, at 600 (1851)).

295. Fields, *supra* note 11, at 152.

296. *Id.*

297. FREDRICKSON, *supra* note 16, at 49.

298. Fields, *supra* note 11, at 152.

299. P.B., A GENERAL HISTORY OF NEGRO SLAVERY 125 (Cambridge, Eng., W. & W. Hatfield 1826). The author continued, “So long as the slightest tinge of African blood can be discovered to flow in their veins . . . the sentence of civil disability and degradation continues in force.” *Id.*

itself. Accepting the rule as a given, abolitionists argued that Northern whites were vulnerable to enslavement, broadening the reach of anti-slavery sentiment, but at the cost of shielding the rule from any sustained scrutiny.

The first widespread repetition of the rule among abolitionists occurred in response not to slavery apologists, but to colonization proponents. In 1828, the Colonization Society of Connecticut circulated an Address proclaiming that “[i]n every part of the United States there is a broad and impassible line of demarcation between every man who has one drop of African blood in his veins and every other class in the community [...] . . . a degradation inevitable and incurable.”³⁰⁰ Rather than refute this claim, William Lloyd Garrison reprinted it, relying on the cruelty of its sentiment to incite a furious opposite response. After quoting the passage at length in *Thoughts on African Colonization*, Garrison simply followed it with the *cri de coeur*: “[A]re we pagans, are we savages, are we devils?”³⁰¹ Two satiric pieces in abolitionist publications lampooned the Colonization Society’s language in 1834 and 1835,³⁰² one of which characterized the 1828 passage as a stock answer in a colonizationist “catechism.” But it was in the abolitionist rhetorical pantheon that the one-drop rule became firmly entrenched. Representing the height of barbarism and inhumanity, the rule was its own best counter-argument. Abolitionists only had to say it to make their point.

The rule was soon invoked in a slightly different context, to protest the restriction of the civil rights of free people of color. When Southern states started cracking down on free blacks after the 1831 Nat Turner rebellion, their statutes did not encode

300. *An Address to the Public, by the Managers of the Colonization Society of Connecticut*, AFR. REPOSITORY & COLONIAL J., June 1828, at 116, 118.

301. WILLIAM LLOYD GARRISON, THOUGHTS ON AFRICAN COLONIZATION 136, 142 (photo. reprint 1968) (1832). The strategy of reprinting outrageous pro-slavery remarks was a hallmark of abolitionist advocacy. In the case of Harper’s defense of slavery, for example, abolitionists did not point out the fundamental inconsistency in Harper’s work. Just reprinting choice passages of the “Memoir” caused them to “glow with indignation against slavery.” *Southern Defence of Slavery*, N.Y. EVANGELIST, Oct. 6, 1838, at 159. “Is there a man so brutal?” asked one New England newspaper in 1838. “Iron yokes, fetters and thumb-screws, may be had gratis by calling on Hon. Chancellor Harper.” CHRISTIAN REFLECTOR, Dec. 21, 1838, at 2.

302. See *Catechism for Children, Extracted from the Confession of Faith of the Colonization Society*, GENIUS OF UNIVERSAL EMANCIPATION, July 1834, at 112, 112–13; *The One Drop of African Blood*, ANTI-SLAVERY REC. 150, 150–51 (1835).

the one-drop rule. But Garrison's *Liberator* described such legislation as erasing "the last fragment of the *appearance* of liberty . . . from all who have a drop of African blood in their veins."³⁰³ Cataloguing these statutes in a book, Judge William Jay, son of Chief Justice John Jay and one of the founders of the New York Anti-Slavery Society, again invoked the rule: "In some of the States, if a free man of color is accused of crime, he is denied the benefit of those forms of trial which the Common Law has established for the protection of innocence. . . . But who is a *colored* man? We answer, the *fairest* man in Carolina, if it can be proved that a drop of negro blood flowed in the veins of his mother."³⁰⁴ Around the same time, C.L. Remond, a "young 'Colored American'" from Newport, Rhode Island, was giving speeches at home and abroad, lamenting that "[i]f a man . . . has one drop of African blood in his veins, it not only dooms him to be an outlaw, but exposes him to seizure as a slave."³⁰⁵ The strategic equation of everyone who was socially recognized as black with anyone who had "one drop of African blood in his veins" helped abolitionists articulate the inhumanity of Southern statutes and the unreasonable extremes demanded by the slave power.

Abolitionists invoked the one-drop rule most often not in castigating the South for turning free blacks into slaves, but rather in showing that the South could enslave free whites. In 1834, *The Liberator* described a Missouri trial in which a ten-year-old boy sued for his freedom. Two doctors examined him and testified that "very little, if any trace of negro blood could be discovered by any of the external appearances," but it "was proven . . . that his progenitors on his mother's side had been, and still were, slaves; consequently he was found to be a slave."³⁰⁶ After describing the boy's fair skin, "hair soft, straight, fine and white," and "eyes blue, but rather disposed to

303. *A Bill*, *LIBERATOR*, Feb. 18, 1832, at 26.

304. JAY, *supra* note 209, at 21–22; see also WILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE* 274–85 (photo. reprint 1968) (1853) (echoing Jay's observation).

305. *Extract from a Speech*, *COLORED AM.*, Jul. 10, 1841, available at <http://www.accessible.com/text/freedom/00000169/00016915.htm>; see also *Rhode Island State Anti-Slavery Society*, *COLORED AM.*, Nov. 25, 1837, available at <http://www.accessible.com/text/freedom/00000030/00003058.htm> ("Wherever you meet the individual in whose veins one drop of African blood mingles, in America, it is sufficient to mark him as an object of degradation, of scorn, of contempt, of abuse.").

306. *A Hard Case*, *LIBERATOR*, Oct. 18, 1834, at 167.

the hazelnut color," *The Liberator* raged, "A hard case, forsooth!" Rather than appeal solely to white readers' sentiment, the article warned that the one-drop rule put them directly at risk:

The truth is, we are all in danger of being kidnapped—the color of the skin is no protection from servitude in this *land of liberty*. . . . It is lucky for DANIEL WEBSTER, that he is too well known to be kidnapped with impunity; otherwise, in traveling through the southern States, he would be liable to be seized and cast into prison, and compelled to prove his freedom!³⁰⁷

The one-drop rule forced white Northerners to think about slavery and pushed them towards abolition, as fugitive slave laws carried the rule directly to Northern doorsteps.³⁰⁸ Early on, abolitionists recognized the rule's potential for expanding their base of support. In 1839, an anti-slavery newspaper commented on why the "industrious and thrifty farmers, mechanics, and white population in the free states, who stand aloof from the anti-slavery enterprise, do not see that the principles by which slavery is sustained and defended, take as deep a hold upon their interests as upon those of the colored people in slavery."³⁰⁹ As a consequence of the one-drop rule, the newspaper predicted that "the sons and daughters of white freemen at the North will be kidnapped and sold into Southern slavery. Mark that. How can it be otherwise. Color is becoming every day less and less a test by which to determine the fact of human chattelship."³¹⁰ In the 1840s and 1850s, Northern preachers such as Henry Ward Beecher turned one-drop rhetoric into theatrical events, "auctioning" light-skinned runaways to their congregations to raise money to purchase their freedom.³¹¹ The auctions caused weeping pandemonium, what Beecher called "a panic of sympathy."³¹² Writers such as Lydia Maria Child and Dion Boucicault turned the one-drop rule into art, making "tragic mulatto" characters a fixture of American literature for more

307. *Id.*

308. It also reinforced sentimental understandings of white liberty that were prevalent North and South. See, e.g., DAVID ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* 65–87 (1991) (describing the power of "white slavery" as an image in the North); Johnson, *supra* note 39, at 31–33 (cataloguing pro-slavery writing that invoked the image of the Northern white wage slave).

309. *White Slaves*, *PHILANTHROPIST*, Nov. 12, 1839, at 3.

310. *Id.* Stephan Talty documents several instances of whites kidnapped into slavery. TALTY, *supra* note 169, at 9–19.

311. TALTY, *supra* note 169, at 3–6.

312. *Id.* at 3–8.

than a century.³¹³ As fugitive slave laws became stricter, anti-slavery sentiment rippled more widely. “Thousands and thousands are in hopeless bondage in this land of liberty, along whose veins scarcely one drop of African blood is flowing,” wrote Charles Adams in 1850.³¹⁴ “And what shall hinder any man, however fair and free—if, perchance, some bloody hands may find him at a distance from acquaintanceship—which shall hinder him from being plunged, by the same mere oath, into the gulf of slavery?”³¹⁵

In deploying the one-drop rule, the abolitionists tried to create “humanizing nightmares,” shocking Northerners into political and personal epiphany.³¹⁶ Yet the everyday legacy was more ambiguous than it would seem. Northerners were “disposed to be incredulous, when they hear of *white* slaves at the South,” wrote William Jay in 1839.³¹⁷ If anti-slavery rhetoric forced people to imagine that they could themselves be enslaved, it did not shatter the color line. In January 1856, an abolitionist speaker gave a lecture in Chicago. He was preaching to a friendly audience that hated the Fugitive Slave Act of 1850, “spurn[ing] most industriously and vocif[er]ously the idea of being slave-catchers, or human blood hounds.” Yet the speaker was met with stony silence when he invoked the one-drop rule:

[T]he soul-stirring appeals of the speaker, in favor of the slave who might perchance have one drop of African blood—the white haired, blue eyed damsel, as near to them by complexion, as themselves, failed to elicit one breath of approbation, and the fatal administration that there might barely be a possibility of detection—put the fire quite out. . . . [T]he suggestion that such might be the fate, was actually the fate of our daughters, was lost on that fine assembly, and the ominous silence indicated more nearly the disgust felt at the temerity of the speaker, than silent indignation at the wrongs of a white slave.³¹⁸

“To my mind,” wrote a reporter covering the event for a black Canadian newspaper, “the white citizens . . . are . . . too American to recognize [colored people] as part in a common

313. SOLLORS, *supra* note 75, at 361–94 (indexing the “chronology of interracial literature”).

314. Charles Adams, *The Fugitive Slave Law*, ZION’S HERALD & WESLEYAN J. (Boston, Mass.), Nov. 6, 1850, at 1.

315. *Id.*

316. TALTY, *supra* note 169, at 13.

317. JAY, *supra* note 169, at 83.

318. *Id.*

brotherhood.”³¹⁹ Northern whites could believe that slavery made them vulnerable without surrendering an abiding belief that blacks were innately different.

Accepting the one-drop rule as fact allowed abolitionists to threaten Northerners with enslavement. By contrast, intimations that the rule was riddled with exceptions made a point about race, not slavery. Such talk was more personal than political. The fact that many white Southerners had African ancestry was not incompatible with slavery; some of the same people owned slaves. When John Quincy Adams proposed that the House of Representatives “inquir[e] into the pedigrees of the members, and eject[] such as had any African blood in their composition[,] [t]he House, by a large majority refused to receive [the petition] on the ground of its being disrespectful.” “Petitions on this nature,” sniffed one newspaper, “now excite little attention.”³²⁰ With the aid of the one-drop rule, abolitionists were able to realize their vision of a North united against slavery. But in slavery’s defeat, the one-drop rule became all the stronger.

CONCLUSION: BLOODLETTING

Within sixty years of the Civil War, the one-drop rule was synonymous with Jim Crow and codified in statutes across the South.³²¹ As the antebellum period anticipated, the rule triumphed as a reaction to emancipation and the possibility of racial equality. Where the South Carolina Supreme Court in 1835 rejected the one-drop rule as “a very cruel and mischievous law,”³²² the same court in 1914 allowed a local board of education to pull three brothers named Kirby out of a white school even though they were legally white under a one-eighth rule enacted in 1895.³²³ The unanimous opinion in the case, *Tucker v. Blease*, opted nonetheless for a one-drop rule because “there is a social element, arising from racial instinct, to be taken into consideration between those with and those without negro blood.”³²⁴

319. M.A. Shadd, *Correspondence*, PROVINCIAL FREEMAN (Chatham, Conn.), Feb. 2, 1856, at 350 (on file with the Minnesota Law Review).

320. Viator, *From Our Correspondent at Washington*, CHRISTIAN REG. & BOSTON OBSERVER, Jan. 19, 1839, at 11.

321. PAULI MURRAY, STATES' LAWS ON RACE AND COLOR *passim* (1950).

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

323. *Tucker v. Blease*, 81 S.E. 668, 673 (S.C. 1914).

324. *Id.*; see also Peter Wallenstein, *Reconstruction, Segregation, and Mis-*

Despite appearances to the contrary, the one-drop rule's triumph was never unqualified. Very few of the untold thousands of whites with African ancestry were reclassified during Jim Crow. In most cases, knowledge of racial crossing in earlier generations had been lost, whether by design or through the passage of time. Additionally, courts often made it difficult to prove accusations of blackness while liberally allowing damages for accusations deemed false.³²⁵ But even when juries and judges took the step of changing people's classifications from white to black, that step in no way cemented their identities. It certainly did not in the *Tucker* case. Just three years after the court's ruling—which affirmed an administrative proceeding in which witnesses repeatedly described them as “colored” and “not . . . clear-blooded”³²⁶—one of the Kirby boys and an older brother registered for the World War I draft in their hometown of Dillon, South Carolina, along the state's northern border. The brothers presented themselves and were classified by a local draft board as “Caucasian” and “White.”³²⁷

The evolution from antebellum rhetoric about blood purity to formal legal rules in the Jim Crow Era did not make the one-drop rule any more enforceable than it ever was before. It is little surprise that the uncompromising ideologies, everyday inhumanity, and relentless violence of segregation created a high tide of racial passing to accompany the flood of people from rural areas to cities and from South to North and West. “Suffice it to say,” wrote a Boston journalist in 1925, “that there are hundreds of ‘Portuguese’ who were once just plain Jack Johnsons and Mary Browns. . . . There are scores of ‘Armenians’ and ‘Greeks’ and a few ‘Italians’ who came to this great center of culture and liberty from Shoe Button, Mississippi; Hop Toad, Georgia; and Corn Pone, Arkansas.”³²⁸

The one-drop rule has been always with us, and it has never been with us. As its history emerges into sharp focus, legal scholars must rethink the connection between rule and

cegenation: Interracial Marriage and the Law in the Lower South, 1865–1900, 6 AM. NINETEENTH CENTURY HIST. 57, 68–69 (2005).

325. See Sharfstein, *supra* note 13, at 1504.

326. *Tucker*, 81 S.E. at 669–70.

327. Registration Cards for Edward D. Kirby (June 5, 1917) and Herbert Andrew Kirby (Sept. 17, 1918) (on file with author).

328. Eugene F. Gordon, *Massachusetts: Land of the Free and Home of the Brave Colored Man*, MESSANGER, June 1925, reprinted in THESE “COLORED” UNITED STATES: AFRICAN AMERICAN ESSAYS FROM THE 1920S, at 145, 151 (Tom Lutz & Susanna Ashton eds., 1996).

lived experience, and the correlation between blackness and "blood." An over emphasis on the mechanics of *partus sequitur ventrem* or the judge-made and legislative rules of race obscures the reality that people were continually jumping the color line. Contrary to the assumption that the one-drop rule was obeyed, the rule in fact pushed people into whiteness and shielded them once they arrived there, masking a centuries-long history of racial migration. Assuming the fact of the one-drop rule for the sake of argument is a sure fire way to arouse disgust with the illogic and cruelty of racism in the United States, much as it did for abolitionists over slavery. But the failure to see the rule as something much less than fact keeps it alive. The one-drop rule created a line so bright that it was blinding. The time has come to open our eyes.