

ABSTRACT

Crossing the Color Line

Alisha Hash, M.A.

Mentor: T. Michael Parrish, Ph.D.

Miscegenation, a word not coined until the Civil War, has been an intrinsic part of American History. There is a rich field of scholars discussing the experiences of interracial couples from Colonial America through Reconstruction. Historically, most researchers focus on the earliest laws enacted in the colonies and how these laws were adjusted and applied. However, there has been very little work done on specific states with the exception of a few anomalous regions such as Louisiana. Although the contributions that have been made thus far have been invaluable, there is a hole in the research. There has been very little work done on the state of Texas. Only one author, Charles F. Robinson III, has explored the topic in depth, therefore, his work should be examined thoroughly and critically.

Crossing the Color Line

by

Alisha Hash, B.A.

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Approved by the Department of History

Jeffrey S. Hamilton, Ph.D., Chairperson

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Approved by the Thesis Committee

T. Michael Parrish, Ph.D., Chairperson

Kimberly R. Kellison, Ph.D.

Jerry Z. Park, Ph.D.

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J. Larry Lyon, Ph.D., Dean

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With Love
For Mom and Dad

CHAPTER ONE

Introduction

The history of interracial unions in the United States dates as far back as the earliest colonial settlers. Miscegenation laws, first enacted in the colonies, have long been used as a tool by lawmakers to control and manage race relations. The earliest colonial laws, enacted in Virginia and Maryland, were largely directed at keeping the reproductive power of white women in check. However, the statutes intended to discourage white women from engaging in interracial unions were often not very effective. For instance, there is evidence suggesting that colonists were tolerant towards interracial couplings. Specifically, along the frontier there were several circumstances in which Anglos could and did engage in interracial unions. Soldiers and tradesmen formed both short-term liaisons and committed relationships with Indian women without fear of legal action.

Furthermore, the close living and working relations of white indentured servants with the enslaved black population of the colonies allowed for the development of intimate relationships between members of the different

racers. A variety of legislative measures were implemented throughout the colonies to combat such relationships but more importantly, such measures were designed to define and manage the offspring of interracial unions. Despite increasingly restrictive laws, interracial couples were often tolerated in the early years of the country.

As the colonies became states and the country sought to solidify its national politics, the slave holding South became increasingly concerned about couples crossing the color line. Several notable historians have studied the realities of Southern legislation on interracial couples. For instance, Peter W. Bardaglio examines the effect that interracial liaisons had on members of Southern families and how the so-called "nullity laws" influenced and shaped miscegenation policies. Nullity laws had a profound impact on the legal landscape of the South and left interracial couples vulnerable. However, the justices of Southern courts did not always determine cases involving interracial unions with strict impartiality. Instead, judges were sometimes swayed by the strength of public opposition.

The practical application of miscegenation laws often left courts in a murky quandary. For example, many case decisions were based on whether the plaintiff or defendant could be legally defined as "white." Rather than determine

race based on clearly defined classifications, courts resorted to physical inspections to determine a person's race.

With the upheaval of the Civil War, issues of interracial sex no longer concerned solely the South. The topic of sex across the color line was thrust into national politics with the advent of the American Freedmen's Inquiry Commission. The commission gave black men a voice in the stories of interracial relationships and recorded their opinions of couples that transgressed the color line. Furthermore, as the Civil War gained steam and Southerners slavery slipping away, they began to crack down on interracial infractions.

Though the Civil War brought shifting ideals, it was not until the tumultuous years following the war that the South truly became hostile to the notion of interracial couples. Reconstruction was a contentious and often violent process. Faced with how the eleven seceded states of the Confederacy would be readmitted and regain self-government, the president and Congress engaged in a lengthy power struggle. President Abraham Lincoln favored a lenient plan for readmission that was not popular with certain factions. However, upon Lincoln's untimely death, his successor Andrew Johnson ascended to the presidency.

Johnson also took a lenient approach to the process of Reconstruction, which angered the more radical wing of the Republican party. Ultimately, the Radical Republicans wrested power from Johnson.

As the fight between the president and Congress for power played out on the national stage, similar battles were being waged on a smaller scale across the former Confederate states. Texas was not immune to the turmoil of Reconstruction. In fact, the freedmen of Texas were persecuted throughout the state following their emancipation. Furthermore, politics in Texas were in a constant state of flux as state leaders attempted to meet the requirements for readmission. The readmission process of Texas was further complicated by the continual battle for power between Republicans and Democrats.

The instability of Reconstruction and the policies of various factions led to a continual shifting of legal interpretations as factions rose to power. The topic of miscegenation was one legal issue that was hotly contested in courtrooms across Texas. Unfortunately, few scholars have taken note Texas's treatment of interracial unions. In fact, only one historian, Charles F. Robinson II has delved into the complicated study of Reconstruction miscegenation policies in Texas. Robinson examines the

impact of Reconstruction politics on the laws of Texas and how those laws affected individual cases heard by Texas courts. Because Robinson is the only scholar who has addressed this topic his work is a valuable contribution. However, a critical examination of Robinson's sources reveals that some of his evidence and conclusions may not be entirely accurate.

Overall, the historiography of miscegenation in American is a rich and varied field. Historians working on the topic have contributed greatly to the understanding of racial and gender relations in early America. They have provided the necessary context of the country's ever-changing political climate while also providing fascinating examples of interracial couples. However, interest in interracial unions has not yet reached a peak and there are still holes in the historiography.

CHAPTER TWO

Historiography of Miscegenation in Colonial America

There is often a misconception regarding interracial contact between European settlers and the various ethnic groups with which they coexisted. Conventional wisdom asserts that sexual interactions between white women and black men were forbidden and laws regulating such relationships were strictly enforced. The prevailing myth contends that when such laws were breached angry mobs would exact justice on the perpetrators. Such frontier justice brings to mind scenes of violent retribution and gruesome lynchings. Conversely, white men were free to engage in liaisons with women of other ethnicities without fear of legal or social retribution. As with all misconceptions, this one is grounded in some fact. The idealized and generalized notion of white, male sexual freedom juxtaposed with white, female sexual repression references only a very limited timeframe—the politicized climate of the decades following the American Civil War. This prevalent view of interracial relationships is further enforced by an abundance of scholarship on post-Civil War race relations. However, very little has been written on the topic of

interracial sexual relationships in the century preceding the Civil War and even less has been written on the nature of intermixing during the American colonial period.

In actuality, the settlers of the colonial era were much more ambivalent about crossing the color line than their descendants. The men and women who settled America were more tolerant and allowed for greater freedom when choosing sexual partners. Although there were legal statutes regulating interracial sex and marriage, there was also a societal tolerance of those types of relationships. Both men and women engaged in relationships with other ethnicities but the practice was more prevalent among men as women did face some consequences and stigmatization. More often than not the laws that were enacted were directed at women colonists for economic reasons. However, such laws were not entirely effective and there were countless cases of intermingling.

The circumstances in which colonists lived and worked provided for intimate relationships with the natives, slaves, and indentured workers. While the relationships between colonists and the Native Americans were at times very uncertain or even filled with animosity, there were abundant instances of sexual and emotional interactions between the two groups. Although the English were

generally reluctant to intermingle with the Indian population to the point of sexual relationships, there were certain circumstances that allowed for interracial relations.

In his article "Eroticizing the Middle Ground: Anglo-Indian Sexual Relations along the Eighteenth-Century Frontier," Richard Godbeer asserts that the English were disinclined to engage with the natives for a variety of reasons, both practical and ideological. He hypothesizes that, practically, the English were fearful of Anglo-Native marriages because they might result in native jealousy or provide a way for natives to gain access to colonial settlement.¹ Ideologically, the English were hesitant to intermarry because of religious and moral concerns. For instance, colonial settlers believed in a biblical injunction against marrying non-Christians. Furthermore, the good Christian Englishmen were appalled by what they perceived as loose morals among some Indians who accepted and encouraged premarital sex.² Even though the majority of the English population remained disdainful of Anglo-Indian

¹Richard Godbeer, "Eroticizing the Middle Ground: Anglo-Indian Sexual Relations along the Eighteenth-Century Frontier," in *Sex, Love, Race: Crossing Boundaries in North American History*, ed. Martha Hodes (New York: New York University Press, 1999), 92.

² Ibid.

relationships, there were some that willingly and enthusiastically embraced crossing the color line.

Although Godbeer asserts that his article does not challenge conventional wisdom regarding intermarriage with natives, he does contend that sex across the color line was not unheard of and in fact played an important role in Anglo-Indian relations.³ He provides three specific instances in which Anglo settlers positively intermingled with the native population. First, he states that soldiers were known to keep Indian women as mistresses when stationed at outlying English forts. The atmosphere of a frontier fort provided a fluid and open sexual marketplace that was apparently multiracial and free of racial restrictions. Godbeer quotes one young traveler, Robert Hunter, Jr., a London merchant, who described the relationships between soldiers and Indian women in his travel journal. While visiting Fort Niagara in 1785, Hunter remarked on "the abundance of squaws" and described them as "dressed remarkably well" and "living in the height of luxury."⁴ He further stated that they were "mostly kept

³Ibid.

⁴Robert Hunter Jr., *Quebec to Carolina in 1785-1786, Being the Travel Diary and Observations of Robert Hunter Jr., A Young Merchant of London*, ed. Louis B. Wright and Marion Tinling (San Marino: Huntington Library, 1943), 55.

by the gentlemen who reside there [Fort Niagara]" and that "[e]verybody is indifferent to them, black, white, or Indian."⁵ His vivid description of the sexual freedom pervading the English fort makes it clear that white soldiers freely engaged in sexual relations and domestic relationships with Indian women. Furthermore, the public nature of the relationships reveals that the white men involved in them did not worry about legal retribution or societal disapproval.

Secondly, he gives several examples of tradesmen engaging in both casual sexual encounters and short-term relationships with Indian women. In many Indian tribes it was customary for visitors and guests of the tribe to receive a welcome gift of a bedfellow. Godbeer, who relies heavily on travel journals, cites the writings of William Byrd, a prolific writer and traveler of the time, as evidence of this practice. The first incidence involving the sexual hospitality associated with the natives occurred in 1728 when Byrd participated in an expedition investigating the boundary between Virginia and North Carolina. In his work "The Secret History of the Line," Byrd recalled that the he and other members of the expedition visited a local Indian tribe as overnight guests

⁵Ibid.

but were not offered the traditional hospitality. The lack of hospitality resulted in an obviously irritable Byrd who stated, “[They] offered us no bedfellows, according to the good Indian fashion, which we had reason to take unkindly.”⁶ The expectation of the welcome gesture was obviously a disappointment to the other gentleman as well because Byrd noted that they went “hunting after” Indian ladies later that night.⁷ Clearly, such a practice must have been fairly common and accepted to be so readily expected by the men of the expedition.

In a separate instance, John Lawson, English explorer and naturalist, noted that this ritual of interracial interaction was actually a welcoming gesture that served as a diplomatic function and was essential for maintaining good relations between the English and natives.

Interracial boundaries had to be crossed in order to facilitate and maintain positive inter-group relations.

Richard Godbeer utilizes a story from John Lawson’s work, *A New Voyage to Carolina*, to illustrate the dangers of refusing this gesture. Lawson remarked that one of his

⁶William Byrd, “The Secret History of the Line,” in *Colonial American Travel Narratives*, ed. Wendy Martin, 113-14; Richard Godbeer, “Eroticizing the Middle Ground: Anglo-Indian Sexual Relations along the Eighteenth-Century Frontier,” in *Sex, Love, Race: Crossing Boundaries in North American History*, ed. Martha Hodes (New York: New York University Press, 1999), 97.

⁷Ibid.

travelling companions refused this customary gift, which resulted in the Indian chief's outrage: "His majesty flew into a violent passion, to be thus slighted, telling the Englishmen, they were good for nothing."⁸ Evidently, the natives could become enraged by the perceived lack of manners regardless of motive. As with the soldiers, this group of frontiersmen seemed not to fear legal sanctions or societal disapproval from their sexual escapades. Indeed, they were in danger of compromising Anglo-Indian partnerships if they refused.

The welcome gesture of "trade girls" was an intrinsic part of frontier life and comprised a large portion of the colonies' Anglo-Indian relations. However, such interludes were very brief and often were the result of politics rather than genuine personal feeling. Other interracial relationships were formed by personal bonds and were both personally and professionally advantageous. Some bonds lasted as long as a trader's business kept him with the tribe and others lasted a lifetime.

Short-term bonds or "temporary marriage" occurred when a trader spent an extended time period living with the natives of a tribe. Once again John Lawson, who traveled

⁸John Lawson, *A New Voyage to Carolina*, ed. Hugh Talmage Lefler (1708; reprint, Chapel Hill: University of North Carolina Press, 1967), 50; See also, Godbeer, "Eroticizing the Middle Ground," 98-99.

through the Carolinas in 1700-1701, provided an example of this kind of relationship. A trader of his acquaintance pointed out the cabin of his "father-in-law" and Lawson explained, "He called him so by reason the old man had given him a young Indian girl, that was his daughter to lie with him, make bread, and to be necessary in what she was capable to assist him in, during his abode among them."⁹ The time frame of this relationship was abundantly clear by the term used to describe it: abode, although not specific, does in fact reference a limited amount of time. Additionally, although temporary in nature, the trader had established a clear kinship network through both his temporary wife and her father.

This type of relationship was exceptionally beneficial for both the trader and his Indian partner. For traders, these matches were useful for gaining acceptance in the local community, forming friendships and partnerships within the tribe, learning the customs and language faster, and if trouble arose, gaining a modicum of protection. The trader garnered practical comforts through temporary stable relationships such as someone to attend to the domestic chores of cooking and cleaning as well as an intimate

⁹Godbeer, 98-99.

companionship.¹⁰ Additionally, both partners received economic benefit from the arrangement. For instance, William Bartram, a Philadelphia naturalist who traveled extensively in the Carolinas, mentioned an Englishman who gained a stock of cattle through his marriage to a Cherokee woman.¹¹ The Indian wife in such matches was also a beneficiary of some economic windfall. Because of their husbands' economic and diplomatic importance to the native community, the wives of traders held considerable status within their tribes. Furthermore, they had access to valuable trade goods through their husbands that they then passed on to their kinship networks.¹² Although such relationships were generally meant to last only the duration of the trader's stay with the tribe, they were accepted, vital relationships that contributed to colonial society and to the mutual advantage of both parties.

Lastly, there are accounts of colonists who integrated into Indian societies through marriage and remained loyal and dedicated to their new kinship networks. These relationships were characterized by a love and devotion and

¹⁰Ibid, 101.

¹¹William Bartram, *The Travels of William Bartram*, ed. Francis Harper (1791; reprint, New Haven: Yale University Press, 1958), 124.

¹²Godbeer, 102.

solemnized by formal ceremonies, both Indian and English. Alexander Cameron, a British agent, married a Cherokee woman and had three children by her. The interracial family lived on Cameron's estate, Lockaber, until the children were sent to be educated in England.¹³ Another Englishman, a land surveyor named Wools, intermixed with the Indians around the Mississippi and married a chief's daughter in a formal Indian ceremony. Upon doing so he received "a tract of land which he soon contrived to convert into a handsome independence."¹⁴ Yet another white colonist, George Galphin, married an Indian sweetheart and produced children. Goodbeer cites an observer who commented that their daughters were "politely enough educated with music etc."¹⁵ Furthermore, both Indian and English authorities formally sanctioned some marriages. For instance, James Adair, a trader, referenced a mixed-race couple in his work, *The History of the American Indians*. He stated that an Englishman married an Indian woman named Dark-Lanthron in a Cherokee ceremony but later

¹³John L. Nichols, "Alexander Cameron, British Agent among the Cherokee, 1764-1781," *South Carolina Historical Magazine* 97 (1996), 100.

¹⁴Godbeer, 104; John Bernard, *Retrospections of America, 1797-1811* (New York: Harper and Brothers, 1887), 182.

¹⁵"Bernard Elliott's Recruiting Journal, 1775," *South Carolina Historical and Genealogical Magazine* 17 (1916), 98-99.

remarried but had Dark-Lanthron baptized at an English settlement in a formal English ceremony.¹⁶ These examples and countless others attest to the fact that Anglo-Indian marriages could be formally sanctioned, long-lasting unions founded on mutual affection. Englishmen could marry their Indian sweethearts, live on English plantations as inter-race couples, raise educated and polite children and most importantly, be recognized by English authorities.

Although Richard Godbeer primarily narrates his research of colonial Anglo-Indian relationships through travel journals, diaries and letters, others rely more heavily on legal sources for their discourse on colonial attitudes regarding erotic and romantic racial relations. Two authors in particular have taken an interest in the legal aspects of colonial interracial laws: Rachel F. Moran and Peter W. Bardaglio.

Rachel Moran's book *Interracial Intimacy: The Regulation of Race and Romance* provides an insightful introduction to the complicated and often volatile topic of interracial sex. While the book is a valuable source for those interested in an overview, it provides very little detailed arguments about any particular topic or time period. Instead, Moran briefly surveys a wide swath of

¹⁶James Adair, *The History of the American Indians* (1775; reprint, New York: Promontory Press, 1973), 133-35.

time beginning with colonial anti-miscegenation laws and progressing through the groundbreaking *Loving v Virginia* case in 1967, and ending with a discussion of modern racial issues. However, *Interracial Intimacies* is noteworthy for tackling the topics of interracial issues facing Asians, Native Americans, and Latinos in addition to African Americans.

Due to the time constraints of the present research (roughly 1700 to 1865), only one chapter of *Interracial Intimacies* is directly applicable to the present study. The second chapter of Moran's work, "Antimiscegenation Laws and Racial Boundaries," provides readers with the groundwork for legal prohibitions on interracial relationships. Moran states it best when she writes, "The South laid a critical foundation for securing the full personhood of whites and entrenching the diminished status of blacks."¹⁷ In other words, the South was the first American section to create inventive new colonial and local laws aimed at restricting sexual access to white women.

The close quarters and lack of available same-race partners for indentured servants and slaves, however, resulted in intermixing between the white servant

¹⁷Rachel Moran, *Interracial Intimacies: The Regulation of Race and Romance* (Chicago: The University of Chicago Press, 2001), 18.

population and the black slave population.¹⁸ Clearly, this blurring of the color line resulted in practical problems as slavery became the primary method of labor in the seventeenth century South. For instance, marriage to whites allowed blacks to gain access to economic privileges and subjugated white women to their African partner under the patriarchal system in place. Such anomalous marriages threatened the emerging social hierarchy.¹⁹

While the intermarriage of indentured and free whites to those of African ancestry was deemed dangerous to the existing status quo, in actuality it was the production of offspring that threatened the racial divisions set in the colonies. Prior to 1662, the Chesapeake colonies of Virginia and Maryland adhered to the English rule that required the child's status to follow that of the father. However, in 1662 Virginian lawmakers overruled this longstanding tradition and implemented the decree that children would thereafter follow the status of the mother.²⁰

It was well understood that such a law would allow for white male indiscretion with Negro women, both free and enslaved, and that any child produced from such a match

¹⁸Ibid, 18-19.

¹⁹Ibid, 19.

²⁰Ibid, 21.

would become the slave of the mother's owner, thus increasing the white man's property. As Moran points out, the scarcity of white women resulted in the majority of interracial sexual relations taking place between white men and black women.²¹ Although this type of interracial affair was the most common, the law created a unique problem when the situation was reversed. When a white woman married or carried on a relationship with a Negro man, the mulatto children of that union were considered free after their mother's status. The rise of this dilemma resulted in the first ever anti-miscegenation laws in the United States.

Interracial Intimacies explores several of the earliest laws of this nature. According to Rachel Moran, in 1661 the Chesapeake colony of Maryland was the first in America to enact an anti-miscegenation statute, and Virginia quickly followed one year later.²² Although these statutes were clearly of the utmost importance Moran does not discuss them past mentioning their existence.

Even though Moran's grasp and discussion of the earliest laws are lacking, she does indeed contribute to other areas of the legal aspects of interracial relationships. For instance, in chapter two, Moran argues

²¹Ibid.

²²Ibid, 19.

that several later laws were enacted in order to define and control the mulatto offspring of interracial couples. Once Moran establishes the change in the status of children with the 1662 law, she then goes on to examine Virginia's law of 1691 which stated that mulattos, even those born to white mothers, could be subjected to slavery until they reached the age of thirty.²³ Moran further explores mulattos' status Virginia's law of 1705. By the end of the seventeenth century one-fifth of children born out of wedlock were mulatto children, and with the population of mulattos increasing rapidly the colony of Virginia implemented a new law that was used to define the term "mulatto." Virginia defined a mulatto as a white person's child who was also "the child of an Indian and the child, grandchild or great grandchild of a negro."²⁴ Additionally, by 1723 any child or adult deemed a mulatto was denied the right to vote, the right to hold office, and the right to bear arms. Furthermore, Moran describes how officials planned to dissuade white slaveholders from emancipating their mulatto offspring: "To discourage manumission of mulatto offspring, masters had to send their freedmen out

²³Ibid, 21.

²⁴ Ibid, 20; See also, Ch. IV, 3 LAWS of VA. 250-252 (Hening 1823) (enacted 1705).

of the colony and authorities were encouraged to eliminate roving bands of 'negroes, mulattoes, and other slaves.'"²⁵ While Moran's discussion of the laws regarding mulattos is clearly beneficial to the discussion of interracial relationships, her most important contribution to the conversation is the inclusion of a case in which a mulatto child of a white landowner fought the justice system of Virginia.

Interracial Intimacies successfully illustrates the status of mulattos with the case of Robert Wright, a mulatto from Campbell County, Virginia. The author begins the story of Wright with an explanation of his heritage. Wright was the product of a union between his prominent, white, landowning, planter father and a black slave woman. The father, estranged from the rest of his family, doted on his son and managed to pass his land and wealth to him. Additionally, the love, support, and guidance of his respected father allowed Robert to gain acceptance in to the white elite of Campbell County. Following his father's death and his inheritance of the family land, Robert married a white woman to whom he remained married for several years and with whom he fathered a child.²⁶

²⁵Moran, 21.

²⁶Ibid, 22.

Unfortunately, Robert's story quickly turned sour and his legal status as a mulatto became detrimental to him when his wife ran off with another man. Upon her abandonment Robert petitioned the Virginia legislature for a divorce so that he could legally marry another white woman. However, despite a marriage license and letters of support from his white neighbors, the Virginia House of Delegates rejected his petition and announced that "Robert Wright could be married to a white woman in his community, [but] he could not be married to her in law."²⁷ In the aftermath of his rejected appeal Robert was ostracized by his white neighbors, lost his standing in the community and saw his designation changed from "white" to "mulatto" on the tax rolls. He died two years later at the age of thirty-eight.²⁸ Moran correctly analyzes this story to illustrate that regardless of power and privileges bestowed privately upon mulatto offspring, they could not permanently subvert legal restrictions or upset the tenuous balance of racial inequality.

Rachel Moran's book *Interracial Intimacies The Regulation of Race and Romance* is a resource for scholars

²⁷Moran, 22; see also, Thomas E. Buckley, S.J., "Unfixing Race: Class, Power, and Identity in an Interracial Family," *Virginia Magazine of History and Biography* 102(3) (July 1994), 364-67.

²⁸Ibid, 22.

and researchers looking for a basic introduction to the topic of interracial relationships and the law in the United States. The author provides a general overview of a wide range of issues over a large expanse of time with a few outstanding illustrations scattered in. One looking for a more in depth treatment of the South's blurring color line in regards to the law would be best advised to turn to Peter W. Bardaglio's essay "'Shamefull Matches': The Regulation of Interracial Sex and Marriage in the South before 1900."

Bardaglio argues that statutory law is an important resource when assessing white anxiety and that such laws both reflected and shaped attitudes of race. Bardaglio further argues that anti-miscegenation laws aimed to keep white women and black men apart but displayed toleration for relations between white males and black women, as long as they did not attempt to formalize the union with marriage. In other words, "Southern elites tended to oppose sexual relations that implied either gender or racial equality."²⁹ He then traces this argument from the seventeenth century and the legalization of slavery, and on

²⁹Peter W. Bardaglio, "'Shamefull Matches': Regulation of Interracial Sex and Marriage," in *Sex, Love, Race: Crossing Boundaries in North American History*, ed. Martha Hodes (New York: New York University Press, 1999), 112-13.

through the Civil War and Reconstruction and the increasing politicized anxiety of cross-color relations.

Bardaglio divides his discussion of colonial laws on miscegenation³⁰ into several distinct subcategories: the earliest statutes, subsequent statutes enacted by the colony of Maryland, subsequent statutes enacted in Virginia, and the treatment of miscegenation in the northern colonies. However, before delving into the complicated legalities of colonial miscegenation, Bardaglio notes that such laws were "a notable exception to the general hesitancy about monitoring the private lives of individual whites."³¹ In fact, Bardaglio hypothesizes that the advent of laws that allowed for such strong state interference were in direct correlation to the colonists' depth of feeling against racial intermixture. Furthermore, he asserts that the patterns of white supremacy and stigmatization of white women involved in interracial relationships persisted throughout later efforts to control miscegenation.³² With the contention that such laws were of

³⁰It is important to note, as Rachel Moran and Peter Bardaglio do, that colonial jurists would not have used the term *miscegenation* as the term was not coined until the Civil War.

³¹Bardaglio, 113.

³²Ibid, 114.

vital importance, Bardaglio turns to a discussion of the laws in question.

Peter Bardaglio agrees with Richard Godbeer's conclusion that, generally, English settlers disapproved of marriages across the color line. However, he makes the caveat that although marriages were frowned upon, sex across the color line was fairly common. Moreover, one particular type of interracial relations caused colony leaders to enact anti-miscegenation laws: white women and black men.³³ As colonial leaders' anxiety over this type of relationship increased they enacted several laws aimed at controlling the sexual behavior of white women in the colonies. For instance, in 1664 Maryland created a law that stated, "Diverse freeborne Englishwomen [who were] forgetful of their free Condition to the disgrace of our Nation doe intermarry with Negro slaves."³⁴ In order to discourage such behavior the law further stated that any women found guilty of the crime would be required to serve her husband's master for the duration of her husband's life. Maryland's lawmakers continued their focus on women's sexual behavior when, in 1681, they modified the

³³Ibid.

³⁴Bardaglio, 114; see also, Jonathan L. Alpert, "The Origin of Slavery in the United States - The Maryland Precedent," *American Journal of Legal History* 14 (1970).

punishment for such behavior by transferring the onus of responsibility from female servants to masters. When writing the newly modified statute lawmakers pronounced that interracial relationships were “always to the Satisfaction of their [white women’s] Lascivious & Lustful desires.”³⁵ The wording of such laws left little doubt among citizens as toward whom they were written and intended to control.

Clearly, Maryland’s earliest statutes were aimed at prohibiting the marriages of white women to black men but this alone did not rectify the problem of white women bearing mulatto children. Therefore, in 1692, lawmakers implemented a statute aimed at copulation rather than marriage. The new law established that any white woman who gave birth to a mulatto bastard child was to spend seven years in servitude. Additionally, if the black father were a free man he too would serve the seven-year sentence as well. Bardaglio mentions that the law applied to white men who fathered children with black women but notes that particular specification was added almost as an afterthought and that laws restricting blacks and mulattos from testifying in court successfully thwarted prosecutions

³⁵Bardaglio, 114.

of white men.³⁶ Clearly, Maryland's laws were primarily directed at controlling sexual unions between white women and black men in order to prevent white women from giving birth to "black" babies and threatening the existing racial hierarchy.

Maryland was a legal innovator when its legislators began to implement laws outlawing interracial unions. But it was not the only state to do so. As Moran mentions in *Interracial Relationships*, Virginia followed suit shortly after Maryland and implemented its own anti-miscegenation laws. Peter Bardaglio details the anti-miscegenation laws of Virginia starting with one of the earliest. In 1662 the Virginia assembly set down a law that employed a different set of punishments for interracial fornication as opposed to fornication between members of the same race. In fact, the fine imposed on illicit interracial relationships was twice that imposed on same-race couples.³⁷ Evidently, Virginia was also concerned with maintaining a divide between the races.

Following the enactment of the law banning fornication, Virginia moved to clearly define the status of mulattos in the colony. Like Moran, Bardaglio also

³⁶Ibid, 114-15.

³⁷Ibid, 115.

discusses the break from traditional English law regarding the status of mulattos. He argues that because the status of the child would, from that point forward, follow the status of the mother, the new law "ensured that the transgressions of white men would lead to an increase in the population of the slave labor force."³⁸ In other words, the law allowed white men to profit from their sexual liaisons across the color line.

Bardaglio further argues that, like Maryland, Virginia's primary goal in the creation of anti-miscegenation statutes was to restrict the sexual behavior of the women in the colony. He cites a 1691 Virginia law that prohibited interracial marriages involving whites of both sexes with perpetrators being banished from the colony. However, the law's stated purpose was to prevent

that abominable mixture and spurious issue which hereafter may encrease [sic] in this dominion, as well as by negroes, mulattoes, and Indians intermarrying with *English or other white women*, as by their unlawfull [sic] accompanying with one another.³⁹

Bardaglio draws the conclusion that although on the surface this law was applicable to both sexes, its only purpose was to criminalize the production of mulatto children born of white women.

³⁸Ibid.

³⁹Ibid.

Bardaglio spends the majority of his discussion on colonial laws detailing what statutes were enacted in the two innovative Chesapeake colonies but he concludes with evidence of laws in other colonies. Pennsylvania and Massachusetts were the only two Northern colonies to put forth legislation outlawing or restricting interracial unions, while all three of the other plantation colonies (in addition to Maryland and Virginia) initiated some form of anti-miscegenation statutes. "The near uniformity of opinion among the legislatures of the plantation colonies," Bardaglio states, "suggests the more pronounced nature of southern opposition to miscegenation."⁴⁰

Bardaglio's article suggests that the South's ever-increasing control of interracial sexual relations among colonists left little room for tolerance of interracial couples. However, as Richard Godbeer suggests in his article "Eroticizing the Middle Ground: Anglo-Indian Sexual Relations along the Eighteenth-Century Frontier," various races did indeed intermingle and at times were even afforded a measure of toleration by white colonists. In her groundbreaking book *White Women, Black Men: Illicit Sex in the 19th-Century South*, Martha Hodes, arguably the authority in the field, details a case in which a colonial

⁴⁰Ibid, 116.

marriage between a white woman and black man was not only legalized but tolerated.⁴¹

Hodes's second chapter, entitled "Marriage: Nell Butler and Charles," is dedicated to the story of a white woman, Nell, and her slave husband, Charles. She chronicles the couple's story through the voices of witnesses that testified when the couple's grandchildren petitioned the court for their freedom based on the fact that they were descended from a white woman. The author also provides several other instances of children or grandchildren who won suits for freedom based on descent from a white woman.

Martha Hodes recounts the facts of Irish Nell and Charles marriage through the testimony of white, well-to-do witnesses that participated in the later freedom suit. As the witnesses recall, Charles and Nell were married in 1681 in the Chesapeake colony of Maryland. At the time of their marriage Nell was an indentured servant bound to Lord Baltimore and Charles was a slave on the plantation of Major William Boarman. However, Nell was eventually sold in to Boarman's service.⁴² As the story goes, on the day of

⁴¹Martha Hodes, *White Women, Black Men: Illicit Sex in the 19th-Century South* (New Haven: Yale University Press, 1997), 20-38.

⁴²Hodes, 20.

Nell's marriage Lord Baltimore confronted her and pleaded with her to consider that the consequences of such a marriage would be to enslave herself and all future children.⁴³ Nell's case fell under a law enacted in Maryland in 1661 which stipulated that a white woman who married a slave would then become the slave of her husband's master for the length of her husband's life. The penalty also extended to future generations as the children of such a couple were to also be enslaved from birth.⁴⁴ However, Lord Baltimore was unable to dissuade Nell from her chosen course and she married Charles in front of several well-to-do white neighbors.

As Martha Hodes points out, the marriage of Nell, a white servant, to Charles, a black slave, did not cause an uproar in their community. In fact, the wedding was officiated by a local Catholic priest and attended by several of the elite, white neighbors. Witnesses that testified at the later freedom trial recalled that Old Madam Witham, Old Mrs. Doyne, Old Ann Short and Old Mrs. Ruthorn all attended the nuptials of this interracial

⁴³Ibid.

⁴⁴*Archives of Maryland, Proceedings of the General Assembly, 1637-1664, 533-534.*; see also, Carter G. Woodson, "The Beginnings of Miscegenation of the Whites and Blacks," in *Interracialism: Black-White Intermarriage in American History, Literature, and Law*, ed. Werner Sollors (Oxford: Oxford University Press, 2000), 45.

couple. Furthermore, witnesses stated that Nell "behaved as a bride," and that it was a fine wedding.⁴⁵ Evidently, Lord Baltimore was the only guest that had reservations about the marriage. The fact that this wedding was attended by the local elite and that those in positions of power not only sanctioned the marriage but extended well wishes indicates that the marriage across the color line did not overly concern Maryland society.

Hodes details several possible explanations for the tolerance displayed by the white elite at the marriage of Nell and Charles. The author claims that the whites of Maryland society could and did tolerate interracial marriage, at least among the lower classes, because they did not greatly differentiate between slaves and indentured servants.⁴⁶ Living and working conditions of African slaves and indentured white workers did not vary greatly and in many instances the two groups toiled side by side in the fields.⁴⁷ Ultimately, such intimacy among the classes of

⁴⁵Hodes, 20; see also, *William Butler and Mary Butler v. Richard Boarman*, Provincial Court Judgments, vol. D.D., no. 17, vol. 61, pt. 1, 1770-71, 233-44, MHR; see also, *William and Mary Butler v. Richard Boarman*, 1 Md. Harris & McHenry 371 (1770).

⁴⁶Hodes, 22.

⁴⁷Ibid.

bound workers resulted in a measure of toleration for crossing the color line.

One further explanation for the acceptance of Nell and Charles' interracial marriage is that white colonists were accustomed to the phenomenon of interracial relationships. Hodes argues that other liaisons across the color line "helps to explain the forbearance of white people."⁴⁸ Of course, she also reasons that such matches could be viewed as the consequence of white forbearance.⁴⁹

Other freedom suits filed in legal courts by descendents of white women married to black men attest to the frequency of interracial marriages in the colonies. In chapter two of her book, *White Women, Black Men: Illicit Sex in the 19th-Century South*, Martha Hodes cites several examples of couples that dared to formalize their unions. For instance, a slave man named Little Robin was legally joined to a white woman named Elizabeth Shorter by a priest in 1681.⁵⁰ Additionally, Louis Mingo and a woman named Rose both proved before the courts that their respective sets of parents included a white mother and a black father.⁵¹ Other

⁴⁸Ibid.

⁴⁹Ibid, 22-23.

⁵⁰Ibid, 23.

⁵¹Ibid.

cases of white women marrying slaves include the case of an Irish woman named Grace who married a slave and produced two children as well as a white woman named Bridget who was sold to a master for marrying a mulatto man named Joseph Guy.⁵² Regardless of whether the high rate of interracial marriages caused white forbearance or was a result of such forbearance one fact is clear: white society in the late seventeenth and early eighteenth centuries tolerated interracial marriages.

Martha Hodes' chapter on Irish Nell and Charles marriage provides scholars with a thoroughly researched and well written case study of an interracial couple that tested the boundaries of their society in the late seventeenth century. Although the case of Charles and his bride is probably the most well-known example of interracial marriage to come out of seventeenth century race and gender studies, Hodes's in depth treatment of the case is an invaluable contribution to the field.

⁵²Ibid.

CHAPTER THREE

Historiography of Miscegenation of the Antebellum and War Years

As Americans emerged from the Revolution, concern was mounting over the increasing population of free blacks and mulattos in the South. What resulted was an expansion of state intervention and a larger quantity of court cases concerned with ironing out judicial issues and complaints.

Several notable historians have tackled the subject of interracial unions, both illicit and matrimonial, in their works. Peter W. Bardaglio's article, "'Shameful Matches': Regulation of Interracial Sex and Marriage" advances a discussion on the nature of infractions across the color line in the antebellum South following his earlier assessment of colonial laws prohibiting such relationships. The author examines not only white females interacting with black males but also the effects of white men's domination and sexual abuse of black females on Southern society. Furthermore, Bardaglio treads where few others have in his brief examination of South Carolina, which presented an anomaly in Southern anti-miscegenation statutes. Bardaglio also goes on to comment on the profound influence of

"nullity laws" on the legal landscape of Southern states. Lastly, Bardaglio argues that public antagonism could and did influence judicial decisions and utilizes a pair of antebellum divorce cases to prove this point.

In addition to Peter Bardaglio, other authors writing on the subject of interracial sex have examined the legality of such unions and the practical application of such laws. In their article, "Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia," A. Leon Higginbotham, Jr., and Barbara K. Kopytoff scrutinize the definitions of racial characterizations and how those definitions were applied in both the statutes enacted and the practical applications in cases. The authors give several examples in which those involved in court cases were deemed "white" based on appearance rather than the legal definition of mulatto. It is important to note that most of the cases examined by Higginbotham and Kopytoff involved mulatto offspring rather than the straightforward prosecution of couples under interracial laws. However, such a discussion is important to the overall conversation because it highlights the complexity and prevalence of mulatto legal issues.

Martha Hodes is undeniably a leader in the field of interracial intimacies, and her book is a valuable asset to

any study of interracial sex in the South. Hodes's book covers a large swath of time including colonial America, the antebellum South, the Civil War and Reconstruction. She argues that while the system of racial slavery was intact Southerners could remain relatively tolerant of offenses against interracial laws. However, upon the dawn of the Civil War and the loosening of white superiority, Southerners began to crack down on interracial transgressions. Furthermore, with the upheaval of the war, the topic of interracial relationships made its way into national politics and for the first time was documented on a grander scale through the American Freedman's Inquiry Commission which gave a voice to a silent segment of the population.

While Martha Hodes's primary purpose is to explore the relationships white women had with black men, Peter W. Bardaglio concerns himself with another type of interracial relationships. As Bardaglio aptly points out, relationships and liaisons between white men and black women were far more common and accepted than interracial unions involving white women. Black women were often subjected to sexual exploitation at the hands of their

white masters, and Bardaglio asserts that such exploitation engendered much conflict within families of both races.¹

Sexual coercion and abuse of female slaves resulted in animosity, distress and anxiety for all members of Southern society. First and foremost, the slave women who were exploited and abused experienced not only physical trauma but also the anxiety and anguish associated with sexual abuse. However, slave men greatly suffered as well because they were unable to defend or protect their wives, mothers, daughters and sisters. Furthermore, their husband's infidelity and the production of illegitimate mulatto children caused distress for the wives of Southern slave owners.² Mary Chesnut exemplifies this sentiment with an 1861 diary entry in which she pronounces, "Every lady tells you who is the father of all the mulatto children in everybody's household, but those in her own she seems to think drop from the clouds."³ Clearly, the prevailing system of sexual exploitation disrupted families on both

¹Peter W. Bardaglio, "'Shamefull Matches': Regulation of Interracial Sex and Marriage," in *Sex, Love, Race: Crossing Boundaries in North American History*, ed. Martha Hodes (New York: New York University Press, 1999), 117.

²Ibid.

³Mary Chesnut, *Mary Chesnut's Civil War*, ed. C. Vann Woodward (New Haven: Yale University Press, 1981), 29.

sides of the racial divide and left many feeling victimized.

Slaves and their mistresses, however, were not the only classes of people who exhibited complex emotions concerning sexual contact between the races and the subsequent production of mulatto children. Although there were of course cases in which white men crossed the color line with impunity, it was not unheard of for some to become attached to their slave mistresses and mulatto children.⁴ However, ever-tightening manumission laws strictly limited planters who wanted to free illegitimate families.⁵

As the numbers of mulatto children rose throughout the slave states, legislatures became increasingly concerned with clearly demarcating the "color line." While Southern society generally operated under the "one drop" rule for determining the status of Africans, the law needed a more definitive standard by which to measure. As a result, several Southern states began to pass measures aimed at

⁴See Thomas E. Buckley, "Unfixing Race: Class, Power and Identity in an Interracial Family," *The Virginia Magazine of History and Biography* 102 (1994), 354-356 for an example of a white, slave owning man becoming attached to his slave family and manumitting them. Buckley relays the story of Thomas Wright, a slave owner that became attached to his slave mistress, her previous children and the children he fathered by her. Ultimately, he granted them all freedom and left his estate to his mulatto son, Robert.

⁵Bardaglio, 117.

establishing a legal precedence for determining a person's race. Once again, Virginia was on the forefront of this trend as the legislature passed a law in 1785 that declared any person with an African ancestor in the previous two generations would be legally defined as mulatto.⁶ Virginia, however, was not the only Southern state to implement such laws. Arkansas, Florida and Mississippi followed Virginia's lead and implemented the two-generation rule as the standard by which to determine a person's racial status. Furthermore, Alabama, Georgia, Tennessee, and Texas passed even more prohibitive legislation calling for the determining line to be drawn three generations prior rather than only two.⁷ The increased concern over legally defining race accompanied intensifying attempts to control interracial liaisons, cohabitation and marriage.

Bardaglio asserts that the increasingly stringent anti-miscegenation laws of Southern states were in stark contrast to hands-off nature of most marriage laws in other states. New Southern laws regulating interracial unions imposed a variety of punishments. North Carolina implemented a fine of one hundred dollars for miscegenation infractions and Texas perpetrators faced jail sentences of

⁶Ibid, 118.

⁷Ibid.

up to five years.⁸ It seems as though in addition to punishing the transgressing couple, a clerk or minister could also be punished for performing interracial marriages and although some did perform such marriages, they took steps to protect themselves from prosecution. For instance, Thomas E. Buckley states, "It is not difficult to imagine the minister arriving for the wedding only to discover . . . an interracial couple, performing the ceremony . . . and then covering himself with the law by destroying the certificate."⁹ That states were progressively more willing to impose laws restricting marriage and sexual choices of private citizens reflected a growing public anxiety over the blurring of color lines.

Null and void laws, the most significant contribution by the antebellum South to the progression and advancement of miscegenation laws, resulted from Southern legislatures' growing determination and efforts to more formally establish the racial caste system on which racial slavery was built. Laws voiding marriages between whites and blacks became instrumental in the prosecution of antebellum miscegenation cases for several reasons. First, as the name suggests, laws of this nature voided any attempt made

⁸Ibid.

⁹Thomas E. Buckley, "Unfixing Race," 357.

to formally legalize unions. As Bardaglio aptly asserts, "It meant . . . the result was precisely the same as if no license had been obtained or ceremony performed and the parties had simply indulged in illicit sexual relations."¹⁰ With no legal recourse for the validation of their marriages, interracial couples were then subjected to laws prohibiting adultery and fornication.

Laws voiding the validity of interracial marriages left interracial couples vulnerable in several other aspects. For instance, couples that legally contracted a marriage in another state would find their union challenged if they chose to relocate to a state that banned intermarriage. Furthermore, in addition to criminal sanctions, those whose unions were invalidated by nullity laws were at risk of having their marriages attacked in other types of cases such as estate proceedings.¹¹ In his article, "The Enforcement of Anti-Miscegenation Laws," Randall Kennedy details a situation faced by married interracial couples. He states that because nullity laws invalidated the marriage contract between interracial couples, when one party of the couple died the other was left vulnerable to mercenary family members. A sibling of

¹⁰Bardaglio, 120.

¹¹Ibid.

the deceased could stand to inherit everything by arguing that the bereaved spouse was of a different race.¹²

Additionally, when interracial marriages were deprived of legal protection there were other unintended consequences. Children of such unions were considered illegitimate and could not inherit. Spouses were denied legal protections including alimony, inheritances and death benefits.¹³ Overall, nullity laws were useful tools for Southern legislatures trying to crackdown on interracial unions. However, for those that dared to cross the color line such laws produced vulnerability and anxiety.

While the majority of states in the antebellum South began enforcing miscegenation laws using very narrowly defined definitions of race, South Carolina adamantly declined to implement such laws. Apparently, South Carolina was concerned that "rigid definition[s] of who was what might lead to an overly crude application of the color line."¹⁴ As a result, the South Carolina legislature left it to the courts to determine cases on an individual basis

¹²Randall Kennedy, "The Enforcement of Anti-Miscegenation Laws," In *Interracialism: Black-White Intermarriage in American History, Literature, and Law*, ed. Werner Sollors (Oxford: Oxford University Press, 2000), 146.

¹³Ibid.

¹⁴Bardaglio, 119.

based on a variety of factors including physical appearance and local standing.¹⁵

South Carolina may have been unique among its antebellum neighbors but, as Bardaglio points out, the lack of set legal guidelines often left judges in a predicament when faced with interracial unions. For instance, Bardaglio cites an antebellum property case from 1842 in which the mulatto children of an interracial couple sued for the rights to a tract of property that had been bequeathed to their slave mother by their land-owning father. The children challenged the court by claiming that their mother, an emancipated slave, had been validly married to their father and therefore, they were entitled to inherit the property. The South Carolina judge was forced to agree because the marriage in question was “revolting” but “not contrary to *existing laws*” and that only “*express statutory provisions*” would make interracial marriages illegal.¹⁶ Ultimately, the court decided against the mulatto offspring but did so based on a technicality, as the judges could not dispute the validity of the marriage. In fact, two of the judges that heard the case

¹⁵Ibid.

¹⁶Bardaglio, 120; see also, *Bowers v. Newman*, 2 McMull. 472 (S.C. 1841), 481, 480.

issued an opinion that stated marriage "was good and legal between a white person and a free negro."¹⁷ Evidently, South Carolina's hesitancy to form any narrow, legal definitions of race or to explicitly prohibit interracial unions was an anomaly. However, such ambivalence often caused confusion in the courtroom.

South Carolina courts may have considered such unions to be offensive and repulsive to the average citizen but they remained ambivalent on such laws. However, Bardaglio notes that states could be and were swayed by public opinion. In fact, he cites two cases from 1832 in which a judge from North Carolina, Chief Justice Thomas Ruffin, heard the pleas of two white men petitioning for divorce from their wives. In both cases the men admitted to having relations with their wives prior to the wedding date, but shortly after the marriages the wives gave birth to mulatto children. The injured husbands charged that the women were unfit wives because they had willfully engaged in sexual relations with black men.¹⁸ Ultimately, the judge handed down two very different decisions for the divorcing couples.

¹⁷Bardaglio, 120.

¹⁸Ibid, 120-21.

The first case to come before Chief Justice Ruffin was that of Marville Scroggins. Ruffin denied the divorce and decreed that Scroggins was aware of his wife's premarital indiscretions because Scroggins himself had engaged in relations with her prior to the marriage ceremony. Following that logic, Ruffin upheld the idea that people marry with the understanding that they are taking one another as they are, and because Scroggins knew he was marrying a wanton woman he had subjected himself to humiliation.¹⁹ While Chief Justice Ruffin may have declined to divorce the couple on the grounds of the wife's interracial indiscretion, he did acknowledge his abhorrence to the woman's actions and the general contempt of the public. The judge stated that it was difficult to deny the divorce:

The stigma in our state of society is so indelible, the degradation so absolute, and the abhorrence of the community against the offender, and contempt for the husband so marked and unextinguishable, that the court has not been able, without a struggle, to follow those rules which their dispassionate judgment sanctions.²⁰

Clearly the decision was a difficult one, but ultimately the blind nature of the law won out over the judge and society's revulsion.

¹⁹Ibid, 121.

²⁰Bardaglio, 121; see also, *Scroggins v. Scroggins*, 14 N.C. 535 (1832), 545, 546.

The North Carolina court may have remained impartial for Marville Scroggins' trial but in the latter trial Ruffin was forced to issue the divorce. Although Chief Justice Ruffin was inclined to stand by the precedent set in the Scroggins case, several other justices disagreed and the court was obliged to grant Jesse Barden a divorce on the grounds of nuptial fraud. However, Ruffin made it clear that the decision was "a concession to the deep rooted and virtuous prejudices of the community."²¹ Evidently, public displeasure over the court's decision in the Scroggins case was enough to sway the court in the Barden case.

Peter W. Bardaglio's article, "'Shamefull Matches': Regulation of Interracial Sex and Marriage in the South before 1900," is an invaluable asset to the study on miscegenation issues in the South. He details several diverse topics that faced antebellum Southerners while relying heavily on his legal sources. First, Bardaglio argues that interracial unions between white men and their female slaves were disruptive to all members of Southern households. Additionally, Bardaglio argues that states implemented increasingly strict racial definitions in conjunction with progressively strict anti-miscegenation

²¹Bardaglio, 121, see also, *Barden v. Barden*, 14 N.C. 535 (1832), 545, 546.

statues as a way to control the growing mulatto population. Ultimately, nullity laws were included in such legislation and used to invalidate any attempt at legalizing interracial unions. Although many, if not most, Southern states resorted to formalized laws restricting or outlawing interracial unions, South Carolina resisted this trend and became an anomaly. Instead of adhering to strict racial definitions, South Carolina relied heavily on the courts to determine cases on an individual basis. Of course, such a laissez faire system often left judges and juries in a quandary when faced with marriages across the color line. Lastly, Bardaglio demonstrates that public opinion could affect the results of court cases. Miscegenation engendered such strong feelings among antebellum Southerners that the legal system was sometimes forced to bend to the will of society. As demonstrated in the Scroggins and Barden cases, instead of maintaining absolute legal objectivity, judges sometimes issued judgments based on societal pressure.

Peter W. Bardaglio is not the only scholar who has attempted to discuss miscegenation in conjunction with the law. In their article, "Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia," A. Leon Higginbotham, Jr., and Barbara K. Kopytoff examine the

legal definitions of race as well as the practical applications of such definitions through court cases. The authors cite several cases in which a person's race was determined by visual inspection and physical appearance rather than actual legal classification. However, it is important to note that unlike Bardaglio, who deals with the South as a whole, Higginbotham and Kopytoff's article focuses on the state of Virginia.

According to the authors, Virginia leaders were less concerned with drawing a definitive line among the races than they were about preventing a darkening of the white race. In other words, the goal was not necessarily to strictly define and categorize the races but instead to keep the white race from taking on physical characteristics of the black population.²² The fact that by 1860 "more than one fifth of them [blacks] have this infusion [mixed race]" was a grave concern to the Southern elite.²³

Virginia, like many other Southern states, employed statutes detailing what percentage of African blood was

²²A. Leon Higginbotham Jr. and Barbara K. Kopytoff, "Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia," in *Interracialism: Black-White Intermarriage in American History, Literature, and Law*, ed. Werner Sollors (Oxford: Oxford University Press, 2000), 97.

²³Carter G. Woodson, "The Beginnings of the Miscegenation of the Whites and Blacks," *The Journal of Negro History* 3 (Oct. 1918): 351.

necessary to classify a person a mulatto. However, in practice it was often difficult to determine ancestry for mulatto children. As Kopytoff and Higginbotham assert in their article, many mulatto children did not have access to records detailing their ancestry: "For most mixed-race children, there were no formal genealogies, no marriage records, no legal marriages."²⁴ Therefore, courts could not determine which generation the African ancestor hailed from and would find it very difficult to determine exactly whether a mulatto person fit the legal definition.

The difficulty in pinpointing a person's genealogy left courts in a legal quandary. Therefore, when a person came in claiming to be white, the person's appearance rather than exact lineages of racial identity determined the case.²⁵ Higginbotham and Kopytoff cite several cases from antebellum Virginia that adequately illustrate this phenomenon. In the first case, a family by the name of Wharton petitioned the Virginia assembly to be released from the consequences of a law aimed at blacks and

²⁴Higginbotham and Kopytoff, 97.

²⁵See William D. Zabel, "Interracial Marriage and the Law." In *Interracialism: Black-White Intermarriage in American History, Literature, and Law*, ed. Werner Sollors (Oxford: Oxford University Press, 2000), 57 for a discussion on the difficulty in determining exact percentages of racial makeup. He argues that statutory definitions of race are impossible to apply as a practical matter.

mulattos. The law required that all persons emancipated since 1806 must leave the commonwealth within twelve months of gaining freedom. The Whartons, petitioning the court in 1833, won their case, and the court declared, "It appears to the general assembly that [the petitioners] are not negroes or mulattoes, but white persons, although remotely descended from a colored woman."²⁶

Although other petitioners' appeals for respite from the law were rejected, the Whartons apparently won their appeal based on physical appearance alone.²⁷ It is important to note, as Higginbotham and Kopytoff do, that although the legislature did indeed have a legal definition of what constituted a mulatto person, and by extension a white person, the Whartons were not judged on this standard. The authors state, "They were not declaring the Whartons white because of their exact proportion of white ancestry, but because they had the appearance of white

²⁶Higginbotham and Kopytoff, 97.

²⁷Historian Joel Williamson reinforces the notion that Southerners determined race based on physical inspection rather than a strict legal definition. Williamson states that strictly speaking a mulatto person was one-half white and one-half black. A "quadroon" person was one-quarter black and an "octoroon" person was one-eighth. However, these definitions (nor those set by set legislatures) were followed. Rather, race was established through physical inspection. Williamson cites the census from 1850 which was the first to count mulattos and "rel[ie]d simply upon the eye of the beholder to recognize a person of mixed ancestry." Joel Williamson, *New People: Miscegenation and Mulattoes in the United States* (New York: The Free Press, 1980), 24.

persons.”²⁸ Clearly then the emphasis was not on exact percentages but rather on preventing the “corruption” of the white race.

The Whartons may have won their case but they did not set the legal precedent of basing legal decisions solely on appearance. That honor was give to the case of *Hudgins v. Wright*. This case, which took place in 1806, set a person’s physical appearance as the standard for burden of proof. The judge presiding over the case, Judge Roane, declared that because people “visibly appearing to be negro” were deemed to be slaves in this country it fell to them to prove that they were in fact free persons. However, because whites and Indians were known to be free persons, the burden of proof lay with the adversary to show that the presumed free person was actually a slave.²⁹ That is to say that when a person came before the court in a contestation over free or enslaved status, the court presumed that people who appeared white were in fact so and it was the challenger’s duty to prove otherwise. Likewise, a person whose physical appearance seemed to be African was saddled with the burden of proving that they were legally white.

²⁸Higginbotham and Kopytoff, 98.

²⁹Ibid, 99.

This legal precedent would prove useful in future cases. In 1811, a slave woman named Nanny Pagee and her children sued the Virginia courts for their freedom. Ultimately, they won their case but the suit was won based on the physical inspection of Pagee rather than any adherence to legal definitions. The Supreme Court of Virginia held "from physical inspection, that 'Nanny Pagee, is a *white* woman . . . was quite sufficient.'"³⁰ Furthermore, the court went on to declare that the defendant was responsible for proving that Pagee was descended from a slave. Because the defendant had not met the burden of proof and Pagee appeared white, she and her children were free.³¹ Once again, the courts were in a quandary when faced with legally defining race. Instead, the judicial process hinged on the highly unscientific practice of determining race based on physical characteristics.

Though Higginbotham and Kopytoff establish that the courts did indeed use a person's physical appearance to decide how a case was tried as well as the outcome, they also point out several flaws with this system. The authors

³⁰Ibid.

³¹Ibid.

use several court cases from the first half of the 19th century to demonstrate noticeable problems with the practice. The first case highlights a discrepancy of genetics while the second case emphasizes the minute difference between a legally mulatto person and a legally white person.

In 1814 a Virginia couple came before the courts because the husband, Richard Jones, claimed that his wife Peggy had engaged in intercourse with a black man and produced a mulatto child. The courts granted a divorce on the provision that a later criminal trial jury ruled the child a mulatto.³² That a court determined the race of the child indicates that the child may have appeared white enough that Richard Jones may have been his father.

What is significant about this case is that Peggy was immediately assumed to have been engaging in an affair rather than anyone suggesting the child's features were a genealogical quirk. It did not occur to white Virginians that Richard, Peggy, or both may have had African ancestry. Clearly, Virginian society did not consider it possible for a white couple to give birth to a child possessing mulatto features.³³ Such a possibility would spell disaster for the

³²Ibid, 110.

³³Ibid, 111.

ad hoc system of determining race according to physical features. For instance, what would happen to a child whose parents were legally white, making the child legally white, but he or she had inherited the racial characteristics of a long-forgotten African ancestor?

The case of *Watkins and wife v. Carlton* heard by the Virginia Court of Appeals in 1840 gives some indication of how genetic quirks played out in the courtroom. The Carlton's case was not a divorce proceeding but rather a lawsuit over the estate of John Carlton. Carlton's three children all laid claim to his estate but he had not updated his will following the birth of his youngest, William. In an attempt to gain a greater share of the inheritance the older two children accused William of being an illegitimate mulatto. During the course of the trial, William's lawyer argued that the great variety of complexions, hair and features among the "unmixed race" left room for doubt and "the presumption should always be in favor of legitimacy."³⁴ In other words, unless legitimacy was impossible, by absence or impotence, the court should always err on the side of caution because physical features can vary.³⁵

³⁴Ibid.

³⁵Ibid.

The most important point brought up by William's lawyer was the fact that genetic differences between a legally mulatto person and a legally white person were insubstantial. Therefore, races could not be reliably established by physical inspection. As the lawyer addressed the court he explained,

It would be very difficult, hardly possible, to distinguish with certainty a mulatto having only one fourth part of negro blood from a white person. The difficulty, the uncertainty, attending the proof of a person being white or mulatto, were strongly exemplified in the present case; it was always [a] matter of opinion, founded on inspection, and it appeared from the depositions in this cause, that while some of the witnesses thought the defendant William a mulatto, others thought him a white person.³⁶

Undoubtedly, the case of William Carlton successfully illustrates the flaws in a common practice among the courts of Virginia. Carlton's lawyer aptly demonstrates that the legal line separating white and mulatto was so fine that there was generally not a noticeable difference.

Therefore, determining race based on physical characteristics was nearly impossible, but if it had to be done, the court should err on the side of caution.

A. Leon Higginbotham Jr. and Barbara K. Kopytoff's article, "Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia," is a useful tool for

³⁶Higginbotham and Kopytoff, 111-12.

miscegenation researchers. While it certainly contributes to the discussion it is not quite as accessible as other secondary works dealing with interracial relationships and the law. However, the authors do provide several interesting topics for discussion. The introduction of cases demonstrating how race was actually determined in Virginia courtrooms reveals the uncertain nature of race in regards to the legal system.³⁷ This is an important contribution to field because it shows that one should not rely solely on legal statutes, as many authors do. Instead, researchers must delve deeper to ascertain how those laws were implemented in reality.

In addition to revealing the inconsistent nature of racial decisions in Virginia courts, Higginbotham and Kopytoff also present several flaws in a system based on physical inspection. The cases of the Joneses and the Carltons illustrate that such a system was highly susceptible to error. The Jones's divorce case highlights the fact that a legally white person could show African features because of a genetic gift from a long forgotten

³⁷For other cases demonstrating the use of physical appearance in court cases deciding race see the cases of Joseph Nunez found in Peter Wallenstein, *Tell the Court I Love My Wife: Race, Marriage and Law - An American History* (New York: Palgrave MacMillian, 2002), 47. Also see the case of Franklin Hugly as found in Martha Hodes, "Color: Slavery, Freedom, and Ancestry," in *White Women, Black Men: Illicit Sex in the Nineteenth-Century South* (New Haven: Yale University Press, 1997), 98-120.

African ancestor or because one or both parents, although legally white, were in fact of mixed race. Conversely, the Carlton siblings' estate feud makes the point that because features are so varied one cannot determine race with accuracy. Essentially both cases emphasize the imperfect nature of the system in antebellum Virginia.

Throughout the historiography of interracial sex in America, most research efforts have focused primarily on colonial laws, the antebellum South, and the escalating violence of Reconstruction. Martha Hodes makes noteworthy contributions in all of these areas but her discussion of interracial relationships during the Civil War is her most valuable addition to the topic. In her book, *White Women, Black Men: Illicit Sex in the 19th-Century South*, Hodes argues that Southerners could and did tolerate sexual indiscretions across the color line up through the Civil War. Other scholars have made the point that Southerners exercised a degree of toleration before the war, but emancipation of slaves and the loss of control resulted in a sexualized, violent climate. However, most historians have bypassed discussing the Civil War altogether. They do not examine the shifting ideology of interracialism through the war or how such a shift occurred. Hodes, however,

dedicates an entire chapter to the transitioning phase of the Civil War.

In the first half of Hodes's book, she details several notable cases involving interracial couples. The drama of these cases generally remained in the neighborhood and the transgressing black male's voice was not heard, or was heard minimally, throughout court proceedings. However, Hodes argues that with the upheaval of the Civil War allowed black men to gain more of a voice and for their cases to become a topic of national politics.³⁸

Throughout her book, Hodes uses a variety of sources including letters, laws and court cases. She primarily uses documents from the American Freedmen's Inquiry Commission to support her arguments of increased black male vocalization throughout the Civil War. The American Freedmen's Inquiry Commission (AFIC) was composed of white antislavery men, and they would ultimately propose the creation of the Freedmen's Bureau to "foster incorporation of emancipated slaves into American society."³⁹ However, Hodes makes certain to note that even though the AFIC documented interracial relationships and even categorized

³⁸Martha Hodes, "Color: Slavery, Freedom, and Ancestry," in *White Women, Black Men: Illicit Sex in the Nineteenth-Century South* (New Haven: Yale University Press, 1997), 125.

³⁹Ibid, 127.

such unions under "I" for "Illicit Intercourse between white women & black men not uncommon" and then again under "Intercourse between white women and colored men common-Instances on," the AFIC later suppressed all such stories.⁴⁰ Unfortunately, even though the AFIC supported and made black vocalization possible on the issue of interracial sex, such liberty did not last long.

Although the AFIC later suppressed the records, it did document the thoughts, feelings and issues facing black men under slavery. Several themes emerged from the testimony given before the wartime commission. First, there was a legacy of defiance and disapproval among intimate groups of black men and their communities. Among the stories recounted for the commission, was a tale told by Patrick H. Minor. Minor was a black man who had worked on the Mississippi River, and he reported that other black men who worked along the river would share information on white women that desired to sleep with men of the opposite race.⁴¹ A white man, James Redpath, who asserted that he had often heard black men laughing and discussing cases of white women producing mulatto children corroborated this

⁴⁰Ibid, 127-28.

⁴¹Ibid, 128-29.

information.⁴² If such behavior was indeed true, and one has no reason to believe it is not, it is evident that black men did disdain the social and legal junctions against interracial sex.

Furthermore, testimony also revealed that black communities sometimes disapproved of interracial couples as well. In the course of the interviews, one town's white mayor reported an instance in which a black man had fled the area with a white girl. Another black man commented on the circumstances saying, "I always looked upon him as a respectable man. I didn't think he would fall so low as to marry a white girl."⁴³ However, the mayor's story was not the only evidence offered to suggest contempt on the part of the black community. A white teacher by the name of Sinclair submitted further proof of unease among African American communities. Mr. Sinclair related that there was "quite a noise . . . about the marriage of a black man to a white woman, about four years ago, and the blacks seemed as much displeased as the whites."⁴⁴ Such stories demonstrate that, for the first time, black voices were allowed to enter the historical record.

⁴²Ibid, 129.

⁴³Ibid.

⁴⁴Ibid, 129-30.

Although the AFIC brought the topic of interracial relationships into the realm of national politics⁴⁵ instead of continuously relegating it to local and communal affairs and gave voice to a previously unheard from segment of the population, it provided no way to measure whether such relationships were more or less common during the upheaval of the American Civil War. Hodes asserts that it is impossible to know for certain if unions across the color line increased or decreased but that one can only determine that they did not cease.⁴⁶ There were numerous cases demonstrating that interracial relationships did indeed continue throughout the Civil War. The outcomes of such cases indicate a shifting and complex landscape.

Several Civil War court cases reinforce Hodes's argument that Southerners could and did tolerate sexual escapades across the color line. For example, in 1862 a white man named Jesse Black went to trial in North Carolina for abusing his wife, Tamsey, because it had been discovered that she was having an affair with a black man.

⁴⁵The topic of interracial relationships was also thrust on to the national scene during Abraham Lincoln's reelection campaign of 1864. Democrats attempted to alarm voters and turn them against the Republican Party by insinuating that Lincoln and his party supported interracial marriage. It was also during this time that the term *miscegenation* was coined, replacing *amalgamation*. See Wallenstein, *Tell the Court*, 51 for further discussion.

⁴⁶Hodes, 139.

Jesse was eventually acquitted on the grounds that he had the right "to use force to make Tamsey 'behave herself'" because a husband was "responsible for the acts of his wife."⁴⁷ However, what is significant about this case is that it was Jesse, a white man, on trial and not the black man involved in the affair. In another instance of Southern toleration, a white woman named Martha Smith was charged in Alabama in 1865 with adultery when she and her former slave, Joe, were caught in bed together.⁴⁸ Like the case of Jesse and Tamsey Black, this incident is noteworthy because it was the white woman, not her slave, who was on trial for an interracial transgression.

From such cases it is evident that slaves were not immediately tried and found guilty for sexual infractions involving whites during the Civil War.⁴⁹ However, it is

⁴⁷Hodes, 139-140; see also, *State v. Jesse Black*, Ashe County, SSCMR #8716, NCDAH.

⁴⁸Hodes, 140.

⁴⁹There were also instances in which persons crossing the color line were tried for violating the law but after they had served their punishment they were allowed to cohabit in peace. See the case of Alfred Hooper, a black man from North Carolina who was tried for violating the state's anti-miscegenation law in 1842. Although convicted, Hooper simply paid the penalty and then continued living with his white "wife." The Hooper's case demonstrates that even though Southerners began to crack down on black men with white women, there was not necessarily an upsurge of violence towards such unions. Couples could and did live in relative peace in the years leading to war. Found in Peter Wallenstein, *Tell the Court I Love My Wife: Race, Marriage, and Law - An American History*, (New York: Palgrave MacMillian, 2002), 45-46.

less clear why Southerners were so forbearing toward slaves when faced with infractions of this nature. Hodes offers a case that partially explains such behavior. She cites the case of Sam, a slave boy in piedmont North Carolina, who in 1864 was charged with the rape of a four-year old white girl. The evidence against Sam was overwhelming but Hodes asserts that "concern for the master's property took precedence over any alarm at the alleged crime." Sam was found innocent and returned to his master.⁵⁰ Evidently, under the system of racial slavery, whites believed that property rights trumped criminal activity, and such views continued throughout the war.

White Southerners undoubtedly had many reasons for their lenient attitudes towards interracial indiscretions under the institution of slavery. The Civil War produced shifting ideals, and as the familiar safety net of slavery began to slip away, Southern elites began to crack down on interracial transgressions. For instance, Hodes cites the case of a slave in Richmond, Virginia, who in early 1865 was sentenced to "two doses of thirty-nine lashes for 'associating and cohabitating with his mistress, Delia Mack, a white woman.'"⁵¹ This time the slave, not the white

⁵⁰Hodes, 141.

⁵¹Ibid, 140.

woman, received the punishment for the liaison.⁵² Even Northerners took notice of increasing unease over interracial escapades. For example, one Northern soldier commented in his diary in 1862 that there had been "some excitement" over a white factory girl who had run off with a man described as either Negro or mulatto. The couple was later found and the man was tied to a tree before being turned over to a man who had hired him. The woman also received punishment as she was "left against her will at the house of a stranger."⁵³ Once again, a black man was punished for crossing the color barrier.

Martha Hodes makes an invaluable contribution to the field of interracial studies with her work on the Civil War. Her focus on the American Freedmen's Inquiry Commission offers an important insight into the experiences of blacks, both free and enslaved, under racial slavery. The AFIC gave a voice to a segment of the population that had previously been unheard and that expressed a wide variety of emotions, including defiance of societal norms and disapproval when norms were broken.

⁵²For another example of the South's crackdown on interracial sex see the antebellum case of an unnamed black man who was hanged in New Orleans for an illicit union with his master's daughter. Although she took responsibility for the crime the man in question was executed. Found in Carter G. Woodson, "The Beginnings of the Miscegenation of the Whites and Blacks," 350.

⁵³Hodes, 140.

Furthermore, Hodes's work on the complex and shifting nature of racial relations during the Civil War is a immense contribution. Few other scholars have written on the complexities of changing ideologies throughout the American Civil War.

CHAPTER FOUR

Reconstruction and Texas: A Hole in the Historiography

The American Civil War was arguably the bloodiest, most contentious era of America's history. However, General Robert E. Lee's surrender at Appomattox in April 1865 did not signify a cessation of conflict in the United States. If anything the conflict simply transformed. Reconstruction was a time of intense partisan battles over the readmission of Confederate states into the Union and struggles over how to guarantee the rights of newly freed slaves. The upheaval of the conflict continued through Presidential Reconstruction and then on into later Radical Republican policies as the country's leaders sought to answer the questions of reunion and control of the South.

With national and state leadership waging intense and complicated legal battles, individual legal questions were often incredibly complicated and lengthy. For instance, miscegenation laws in Texas were ever changing and shifted with the tides of power. While historians have written extensively on anti-miscegenation in other Southern states during Reconstruction, very few scholars have written on the reality of interracial couples living in Texas

following the Civil War. However, one particular historian, Charles F. Robinson II, has taken an interest in the state of Texas and written at length on the topic. Therefore, Robinson's work deserves a closer look and should be critically examined.

Charles F. Robinson II, earned a Ph.D. from the University of Houston and has taught at Houston Community College and currently serves on the faculty at the University of Arkansas-Fayetteville. He has written extensively on the subject of interracial relationships in the South including publishing two books on the topic: *Dangerous Liaisons: Sex and Love in the Segregated South* and *Engaging Missouri: An Epic Drama of Love, Honor and Redemption across the Color Line*. Furthermore, Robinson has published an article titled "Legislated Love in the Lone Star State" detailing anti-miscegenation in Texas following the Civil War.

Robinson's article on interracial unions in Texas is of the most interest as it is the only scholarship attempting to fill a void in the historiographical record. However, his book, *Dangerous Liaisons*, briefly addresses the issue as well. Because Robinson's works represent the most intensive foray into the field of miscegenation policies in Reconstruction Texas, they deserve an in depth

inspection of the arguments and sources used to arrive at conclusions.

Robinson's contributions to the field of anti-miscegenation in Texas have been important and he does a wonderful job of discussing the history of miscegenation laws in Texas. He details the history of such laws from the earliest days of the Republic.¹ For instance, he quotes a law that was enacted on June 5, 1837, and stated that it was not lawful for "any person of European blood or their descendants, to intermarry with Africans or the descendants of Africans" and violation of this law meant "such marriage shall be null and void, and the parties on conviction shall be deemed guilty of a high misdemeanor."² Undoubtedly, the inclusion of this law is incredibly important for any discussion of miscegenation in Texas as it marks the beginning of such legislation in Texas.

Robinson continues contextualizing the anti-miscegenation debate with the discussion of several revisions to the statutes. In 1858, Texas revised its

¹Charles F. Robinson II, "Legislated Love in the Lone Star State: Texas and Miscegenation," *The Southwestern Historical Association* 108 (2004), 67.

²H. P. N. Gammel, *The Laws of Texas, 1822-1897* volume 1, section 9 (Austin: Gammel Book Co., 1898), 1294-1295. Robinson cites "H. P. N. Gammel, *The Laws of Texas, 1822-1897* (Austin: Gammel Book Co., 1989), 233-234. However, his citation is misleading, as *The Laws of Texas* are a multi-volume set with several sections within each volume. The pages numbers Robinson cites direct to individual sections within the volume rather than the pagination of the volume as a whole.

penal code and adjusted the miscegenation law. The new modification presented a specific penalty of infractions: two to five years in prison. Furthermore, the new changes also provided for a legal definition of "black." The new law stated that legally black persons were defined as "all persons of mixed blood, descended from negro ancestry to the third generation inclusive."³ Robinson hypothesizes that this strengthening of the miscegenation code was a direct result of the growing sectional crisis facing the country and efforts by Southerners to fortify their interracial laws in an attempt to prevent the undermining of slavery.⁴

"Legislated Love in the Lone Star State" offers context to the topic, but the greatest contribution Robinson makes is the discovery and discussion of Reconstruction era interracial legal cases. One such case, *Bonds v. Foster*⁵ represents how interracial unions were handled under Republican rule. The case was to determine whether Leah, a manumitted slave woman, and her minor

³Robinson, "Legislated Love," 67-68; see also H. P. N. Gammel, *The Laws of Texas, 1822-1897* vol. 4 (Austin: Gammel Book Co., 1898), 1036-37.

⁴Robinson, "Legislated Love," 68.

⁵For further discussion on *Bond v. Foster* see Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (Oxford: Oxford University Press, 2009), 17-46.

children were the legal heirs to Leah's husband, A. H. Foster, a white man. Upon Foster's death the executor of his will, B. G. Bonds declared the estate insolvent and sold the property to pay debts. Leah sued claiming that she was a widow and her children minors, and therefore the homestead was exempt. The court was left to decide if Leah was in fact Foster's legal widow and as such entitled to the homestead. Ultimately, the court ruled that although the couple could not have been legally married in Texas, their behavior while living in the state of Ohio indicated legal marriage. Furthermore, Foster's will left no doubt that he considered Leah his legal wife.⁶ It is important that Robinson includes the Foster case because it indicates a shift towards legal acceptance of interracial unions.

Bonds v. Foster, one of the first interracial cases tried under Republican rule in Texas, clearly demonstrated a loosening of the anti-miscegenation laws. However, it was a later trial, *Honey v. Clark* that took a definitive stand on the subject and seriously weakened Texas anti-miscegenation law. The case detailed a relationship between John C. Clark, a white planter, and his slave, Sobrina. Clark fathered three children with his slave and in 1871 those children sued the state (represented by state

⁶*Bonds v. Foster*, 36 Tex. 68 (1870).

Treasurer, G. W. Honey) for Clark's property.⁷ The victory in this case by the children of Clark demonstrated a definite relaxation of miscegenation law under the Radical Republican regime.

The state argued that Article 12, Section 27 of the state Constitution of 1869 did not apply to interracial couples. The article stated,

All persons who, at any time heretofore, lived together as husband and wife, and both of whom, by the law of bondage, were precluded from the rites of matrimony, and continued to live together until the death of one of the parties, shall be considered as having been legally married; and the issue of such cohabitation shall be deemed legitimate.⁸

However, the court argued that the statute applied only to the relationships of former slaves, not interracial unions. Fortunately for the Clark children, the Texas Supreme Court disagreed with the state's view of the law and instead ruled:

The section under consideration was intended to legalize the marriage of certain persons, and legitimate their offspring; and the inquiry arises, who are such persons and such offspring? We answer . . . John C. Clark and Sobrina were precisely such persons.⁹

⁷Ibid.

⁸Ibid.

⁹Ibid.

The result of such a ruling was that the Texas Supreme Court used the state Constitution to openly legitimize interracial unions and the children of such unions.

Even though the law was relaxed under Republican rule, Robinson points out, correctly, that such leniency was only temporary. Robinson shows, through court cases, that political upheaval and the transition to Redemption in the state had a significant impact on the interpretation of miscegenation laws in Texas. Although the Republicans liberally interpreted the law, thus legitimizing interracial unions, the state returned to a more narrow definition under the Democratic administration of Governor Richard Coke. Coke "pledged to return traditional government to Texas" and did so by replacing Republican oriented state Supreme Court justices with Conservative Democrats.¹⁰ The shift in political alignment meant a reaffirmation of earlier miscegenation policies.

Charles F. Robinson II rightly suggests the case of *Clements v. Crawford* as evidence of Texas's reaffirming its earlier anti-miscegenation laws. In 1870 E. E. Crawford loaned George Clements two thousand dollars and Clements offered a tract of land in Galveston as collateral.

¹⁰Robinson, "Legislated Love," 73.

However, Clements failed to repay the loan after several years so Crawford initiated court proceedings in an effort to obtain the title of the property. Clements argued that Crawford could not legally take the land because Clements and his common-law mulatto wife, Mary, and their children had established the land as a homestead. Crawford objected to this reasoning with the argument that because Mary was a mulatto Clements could not have been legally married to her.¹¹ The ruling handed down was to decide the fate of the property but the justice's decision also reinterpreted the Article 12, Section 27 of the Constitution of 1869.

In his defense, Clements cited the earlier case of *Honey v. Clark* but the new Democrat-controlled court overruled the earlier decision and ruled against Clements. The court ruled that the portion of the Constitution under dispute "refer[ed] only to those persons who were both precluded, not from intermarriage with each other merely, but from marriage with any one else."¹² In other words, the law was meant to validate the marriages of former slaves because they had been previously precluded from the sacrament of marriage. Furthermore, the court went on to state "a free white man, precluded by no law from marriage,

¹¹Ibid.

¹²*Clements v. Crawford*, 42 Tex, 601 (1875).

who was living with a woman either white or black, in violation of the law, at the time of the adoption of the Constitution, was not thereby made a married man.”¹³ Clearly, the Democratic-controlled court’s decision was aimed at proclaiming the illegitimacy of interracial relationships.

Also of note is Robinson’s examination of the unrest in the state following the April 1879 change in the miscegenation statute. The newly amended statute provided that in addition to whites, blacks should also be punished for violations of the miscegenation law.¹⁴ He goes on to discuss Texas’s miscegenation policies following Reconstruction including the Progressive Era ordinances of several major Texas cities that were hostile towards interracial unions.¹⁵

The readmission of Southern states was a contentious issue for Reconstruction leaders. President Abraham Lincoln began pushing his ten percent plan in December of 1863. Under Lincoln’s plan, readmission would be granted “whenever a number of voters equal to ten percent of the state’s vote in the 1860 presidential election took the

¹³Ibid.

¹⁴Robinson, “Legislated Love,” 76.

¹⁵Ibid, 78-81.

oath of allegiance.”¹⁶ However, disdain for the president’s plan ultimately led Congress to formulate a plan of its own and in July 1864 Congress introduced the more stringent Wade-Davis bill. The alternative plan proposed that Southern states only be granted readmission after the majority of the state’s white males pledged an oath to the Federal Constitution. Furthermore, the bill stipulated that voting rights would only be given to those who could swear the Ironclad Oath.¹⁷ Clearly, how to readmit Southern states was a controversial issue as the war was ongoing, and it would remain so throughout Reconstruction.

The wartime struggles between Congress and Lincoln foreshadowed the contentious nature of postwar Presidential Reconstruction and Radical Reconstruction. Upon Lincoln’s assassination in April 1865, President Andrew Johnson inherited the presidency. Unfortunately for Johnson, a former Southern Democrat, he stepped in to an exceptionally complex situation upon his rise to the White House.

Historian Eric Foner asserts that President Andrew Johnson believed that states did not have the right to leave the Union. Consequently, because states could not

¹⁶Armstead L. Robinson, “The Politics of Reconstruction,” *The Wilson Quarterly* 2 (Spring 1978): 110-11.

¹⁷Eric, Foner, *Reconstruction: America’s Unfinished Revolution 1863-1877* (New York: Harper & Row Publishers, 1988), 61.

legally secede they had not given up their rights to self-government. He considered a few prominent ex-Confederates to be traitors in need of punishment, not a state as a whole.¹⁸ Undoubtedly, the radical faction of the Republican Party would not accept such a position.

President Johnson's convictions ultimately led him to take a conciliatory stance towards Southern states, hasten their return to the union, and veto key Republican legislation. As Johnson took over the reins of the shattered nation he issued a proclamation aimed at restoring the property rights, with the exception of slaves, to former Confederates so long as they pledged loyalty to the Union and supported emancipation.¹⁹ By offering clemency to former rebels, Johnson was effectively granting them the right to reenter state politics in the elections of 1865. Once former secessionists were able to return to political life they could and did obtain high state and congressional offices.²⁰ With their newly obtained political offices the men of the South were ready to return to national politics.

¹⁸Ibid, 179.

¹⁹Ibid, 183.

²⁰Robinson, "The Politics of Reconstruction," 115.

Late in 1866, elections were held to elect members to the Fortieth United States Congress. Facing growing hostility President Johnson set off on a September speaking tour, but his speeches were negatively received and distorted in the press. Therefore, many of Johnson's supporters began to turn against him and gravitate towards more radical factions of the party.²¹ Despite Johnson's "swing around the circle" speaking tour to garner support, his Republican opponents won a two-thirds majority of congressional seats in a landslide.²²

The resounding victory of Johnson's opponents allowed Congress to capitalize on the triumph by setting radical policies in place. Between March of 1867 and July of 1868 Congress pushed through several Reconstruction Acts aimed at limiting the rights of the secessionist states. The Reconstruction Acts mandated several important points. First, the eleven Confederate states, with the exception of Tennessee, were to be divided into military districts. Secondly, Congress decreed that states must create and approve by a majority vote new constitutions that allowed for universal manhood suffrage. Lastly, former Confederate

²¹Lawrence H. Gibson, "The Statesmanship of President Johnson: A Study of the Presidential Reconstruction Policy," *The Mississippi Valley Historical Review* 2 (1915): 380.

²²Robinson, "The Politics of Reconstruction," 118.

states were required to ratify the Fourteenth Amendment giving blacks citizenship before Congress would recognize them.²³ Obviously, such policies would cause resentment and bitterness on the part of the conquered Southern states.

With the national political climate in such a state of upheaval one can assume that individual states were also experiencing political turmoil. As the bloody years of the American Civil War drew to a close, Northern leaders were eager to assess the situation of their conquered foes. In many Southern states large swaths of land had been occupied, so reliable information was somewhat accessible. However, the state of Texas was an anomaly in that it had never been successfully invaded and occupied. Therefore, Northerners were even more anxious for answers to their pressing questions.²⁴ In order to accurately assess the state of affairs in Texas, Union officers were sent to the state in late 1865.²⁵ Their reports indicated that the residents of Texas were not willing to accept defeat and the implementation of Reconstruction policies.

²³Foner, 276.

²⁴Greg Cantrell, "Racial Violence and Politics in Reconstruction Texas, 1867-1868," *The Southwestern Historical Quarterly* 93 (1990): 333.

²⁵Ibid.

Union observers witnessed instances of violence and retribution against freedmen. Inspector General William E. Strong noted that freedmen in Texas were "frequently beaten unmercifully, and shot down like wild beasts, without any provocation, followed with hounds and maltreated in every way."²⁶ Furthermore, there was a dramatic increase in interracial violence for that period: from thirty-eight homicides in 1865 to one hundred and thirty-three for the first half 1868 alone.²⁷ Clearly, Texans were reluctant to accept their former slaves as free and equal.

Clearly Reconstruction was a time of social upheaval in the state, and that turmoil was also evident in the political climate of the embattled Southern state. Presidential Reconstruction in Texas began with the Provisional Governorship of Andrew J. Hamilton. His duty, as decreed by the president, was to call a convention "in order to nullify the act of secession, to abolish slavery, and to repudiate the state's Confederate debt."²⁸ However, when elections for the convention were held in January of

²⁶Ibid, 334.

²⁷Ibid.

²⁸Carl H. Moneyhon, "Reconstruction," *Handbook of Texas Online* (<http://www.tshaonline.org/handbook/online/articles/mzr01>), accessed June 26, 2011. Published by the Texas State Historical Association.

1866 many conservative, former secessionists were elected.²⁹ Hamilton warned the assembly that nothing short of full commitment would appease the United States Congress and that hasty action could significantly delay Texas's re-entry to the Union.³⁰ Convention members showed little interest in committing to anything other than the bare minimum requirements set forth by the president.

When the convention met in February 1866 the delegates addressed the key issues of readmission. First, they tackled the issue of the validity of secession.³¹ Members debated whether the right of secession had never existed or if it existed until the end of the war and only then became invalid. Ultimately the convention chose to declare the issue null and void without reference to a date.³² Additionally, delegates granted that the Thirteenth Amendment had abolished slavery and decreed that their oath

²⁹Ibid.

³⁰Claude Elliott, "Constitution Convention of 1866," *Handbook of Texas Online* (<http://www.tshaonline.org/handbook/online/articles/mjc03>), accessed June 26, 2011. Published by the Texas State Historical Association.

³¹This debate was known as the *ab inito* question. Radical Republicans argued that secession was null and void from the beginning (*ab inito*). Therefore, all laws implemented since secession were invalid. The Moderate Republican faction disagreed and instead took the view that although secession was invalid all laws that were not in direct violation of the Constitution should remain valid.

³²Elliot, *Handbook of Texas Online*, "Constitution Convention of 1866."

of allegiance would suffice in the place of formal ratification.³³ The convention was also responsible for determining the rights of freedmen and black suffrage. They granted freedmen the rights of person and property, to sue and be sued, and to enter contracts but the convention did not approve black suffrage or allow freedmen to hold political office. Lastly, the convention members voted to repudiate all war debt.³⁴ These key points reflected the bare minimum standards for Texas's readmission.

Following the convention, voters were asked to elect state officials. Conservative James W. Throckmorton defeated Elisha M. Pease, a former unionist. During the campaign, Pease was accused of sympathizing with the Radicals and their agenda of black suffrage, so Throckmorton won in a landslide.³⁵ However, under Throckmorton's governorship, the Eleventh Legislature elected two prominent secessionists to the United States Senate, refused to ratify the Thirteenth and Fourteenth amendments and enacted "black codes" aimed at restricting the rights of freedmen. However, Throckmorton's career as

³³Ibid.

³⁴Ibid.

³⁵Moneyhon, Handbook of Texas Online, "Reconstruction."

governor quickly came to an end with the implementation of Congressional Reconstruction.

Radical Republicans passed the Reconstruction Acts, which deemed all existing governments provisional and split the former Confederate states into five military districts with Texas and Louisiana comprising the Fifth Military District. The districts were under the control of the army, and General Charles Griffin was the commander in charge of Texas. General Griffin was continually at odds with Governor Throckmorton and ultimately had Throckmorton removed from power for being "an impediment to Reconstruction" because of "failure to qualify for office under the military bill . . . and his refusal to cooperate in the punishment of those who had committed outrages against loyal men, white and black."³⁶ The ousting of Throckmorton marked the beginning of Republican rule in Texas.

Texas was once again compelled to hold a convention and this time delegates were elected by voters of all races. The convention was charged with the creation of a new state constitution and the ratification of the Fourteenth Amendment. Although the Republicans dominated the convention, it brought to light serious divisions

³⁶Ibid.

within the party. It was at this point that the party split into a moderate faction led by Andrew J. Hamilton and Elisha M. Pease and a Radical faction under the leadership of Edmund J. Davis. The Radicals favored full civil rights for freedmen and tighter restrictions for Confederates, but the moderate wing controlled the convention and took a more liberal stance towards former Confederates.³⁷ The second convention marked the split of the Republican Party into opposing factions and the rift would dominate Texas politics for some time.

In the next state elections, those determining the governor, the two opposing divisions ran on separate tickets. The moderate faction chose Andrew J. Hamilton to represent their views while the Radicals declared Edmund J. Davis as their champion. Ultimately, with an endorsement from President Ulysses S. Grant, Davis won the contest. Following the election, the Twelfth Legislature convened in Austin, adopted the Fourteenth and Fifteenth amendments, and chose United States senators to represent the state. President Grant readmitted Texas into the Union and ended Congressional Reconstruction in the state when he signed

³⁷Ibid.

the act decreeing readmission on March 30, 1870.³⁸ With readmission, Texas was free to begin rebuilding and addressing the problems of the newly re-created state. The issue of miscegenation was perceived by Texans as a problem to be addressed.

In his article, "Legislated Love in the Lone Star State: Texas and Miscegenation," historian Charles F. Robinson II, makes the argument that white Texans during Reconstruction were not necessarily vehemently opposed to interracial sex but instead resisted the notion that interracial relationships could be formalized through marriage.³⁹ Illicit relations did not alarm Texans to the same extent as marriages because sex did not threaten the social hierarchy but marriage publicly suggested that blacks and whites were social equals.⁴⁰ To support this position Robinson cites the case of Katie and Calvin Bell.

According to Robinson, Katie and Calvin Bell were the participants of several legal actions and ultimately were tried under Texas's anti-miscegenation laws. The couple

³⁸Ibid.

³⁹This is a common theme in miscegenation scholarship. For a discussion on Southerner's fears of interracial marriages and the laws enacted to combat such matches see Peter Wallenstein, *Tell the Court I Love My Wife: Race, Marriage, and Law - An American History* (New York: Palgrave Macmillian, 2002), 136-38.

⁴⁰Robinson, "Legislated Love", 67.

began facing legal action in early 1893 when they were defendants in a civil case brought against them by private parties. Very little is known about the case, but Robinson asserts that the court records indicate that Katie Bell publicly testified that she was a white woman and was married to Calvin Bell, a black man.⁴¹ Becoming the focus of legal action ultimately resulted in increased attention on the couple and future litigation.

By the end of 1893 Galveston County officials had arrested Calvin and Katie for violating the state's laws forbidding interracial marriage. Calvin was granted his freedom on the grounds that he did not know Katie was a white woman, but Katie was ultimately convicted. Although she argued that she was indeed a woman of color, not white, the court disagreed and convicted her to two years in prison. Robinson argues that the court convicted Katie based on her earlier testimony in the civil case in which she admitted to being a white woman and the fact that Katie's former husband was a Confederate soldier (presumably white). Katie Bell served the majority of her sentence but was released early for good behavior.⁴²

⁴¹Ibid, 65.

⁴²Ibid, 66.

Robinson certainly presents a convincing argument supported by a fascinating case study of an interracial couple. However, the sources used to defend Robinson's point of view need to be closely examined. For instance, when Robinson begins the story of Katie and Calvin he cites a civil case in which Katie is purported to have admitted that she was a white woman married to a black man. Robinson claims to have found this information on a microfilm of the District Court Minutes from Galveston County.⁴³ Yet when one reviews the microfilm from the Galveston District Court, no such admissions exist.

The court minutes are available on microfilm at the Sam Houston State Regional Library and Research Center in Liberty, Texas. The Bells's case is marked throughout the film as case 16.005, but none of the references to their civil case indicate what was said in Katie Bell's testimony.⁴⁴ For instance, one reference to the case dated January 25, 1893 states,

This day came the parties by attorneys, and thereupon came on to be the general _____ (unintelligible) of defendants to plaintiff's petition, which being duly considered by the court is overruled, to which ruling of the court the defendant except, and the said defendants have leave to amend their original answer

⁴³*Bell v. Bell*, District Court Minutes, Galveston County (1893), microfilm (Galveston County District Court, Galveston, Texas).

⁴⁴*Ibid.*

filed Dec. 9, 1892, and thereupon plaintiffs dismiss herein as to Mary Ann Bell one of the defendants at plaintiff's cost incurred in making her a party and thereupon plaintiff has leave to file amended original petition in lieu of original petition filed July 23, 1892.⁴⁵

The following day the court addressed the Bells's case again. On January 26, 1893 the court declared,

On this day came on to be heard the above entitled and numbered cause, and thereupon came the parties by their respective attorneys, and announced ready for trial, and no jury being demanded and the matter in controversy as well of fact as of law being submitted to the court and the pleadings evidence and argument of council having been heard and full understood and the court being fully advised in the _____ (unintelligible). It is considered, adjudged and decreed by the court that the said plaintiffs Hetty Bell and George Bell take nothing by this suit and that the said defendants Calvin Bell, Kate Bell, and Mary Ann Bell go hence without day and have and recover of and from the said plaintiffs, all costs in the behalf incurred for which execution may issue, and that execution issue for use of Officers of Court against each party respectively for the costs by them in this behalf respectively incurred.⁴⁶

Clearly, the entries included in the Galveston County District Court Minutes from 1893 do not make any mention of Katie Bell, or anyone else, claiming Katie was of white ethnicity or married to Calvin, a black man. Although the documents contain several other entries referencing the case, they too simply detail legal procedures or decisions.

⁴⁵Ibid.

⁴⁶Ibid.

While the civil court district minutes do not reference Katie Bell's race, there is one particular document that does indicate Katie testified to being white in the civil case.⁴⁷ In March of 1894 Katie Bell appealed her conviction with the Court of Criminal Appeals of Texas. The court referred to Katie's testimony in the civil trial two separate times. First, under "Evidence" the court indicated that the defendant's testimony in another case was admissible. The court declared, "On a trial of a white woman for intermarrying with a negro, *Held*, that her testimony in a civil case in which she was a defendant, that she was a white woman, was admissible in evidence against her."⁴⁸ Secondly, the court declared in its opinion that there was "no error in permitting the State to prove that in a civil case . . . she testified that she was a white person."⁴⁹ Therefore, although Galveston District Court minutes did not contain a record of Katie's testimony, there is evidence that such testimony took place.

⁴⁷It seems that the only record of Katie's testimony in the civil case is found in her appeal to the Court of Criminal Appeals of Texas but an earlier census record indicates Katie as a white woman. The 1880 census of Galveston County lists Calvin Bell as a black man with the occupation of laborer. Under Calvin's name is listed "Kitty," his wife, whose occupation is homemaker and their three daughters and two sons, all marked as mulattos.

⁴⁸*Bell v. State*, 33 Tex. Crim. 163; 25.S.W. 769, (1894).

⁴⁹*Ibid.*

The records of the civil and criminal trials of Katie Bell begs the question as to why Charles F. Robinson II would cite the Galveston County District Court minutes in his article when the information is clearly not contained in those documents. First, it is possible that Robinson mistakenly cited the wrong document and did not recognize the error. Secondly, the inconsistency could have resulted from the current research. Perhaps there is a microfilm of Galveston County District Court minutes from 1893 that has been overlooked. It is entirely possible that the current research simply did not unearth the source that Robinson was referring to. However, if that was the case one must wonder why the citation was so misleading as to direct one to the wrong microfilm. Lastly, because the information can be found in the later appeals case, one might hypothesize that Robinson used that document to make inferences and simply cited the court minutes rather than actually examining the microfilm. Regardless of why the inconsistency occurred, one thing is certain: Robinson's article, "Legislated Love in the Lone Star State," contains serious citation errors and cannot be used as the sole authority on the topic.

In the end, Robinson's work on interracial unions in Texas is an invaluable addition to the historiography on

the topic. The field of miscegenation study is a relatively new arena for historians and few have studied the issue in depth. Of those that have undertaken the task of studying interracial relations, most have focused on the South as a monolithic whole and the few that have narrowed research to a specific state tend to focus on representative Southern states such as Virginia. Robinson is the only historian that has actively examined the state of Texas; therefore, his work deserves recognition and examination.

CHAPTER FIVE

Conclusion

The history of sex, relationships and marriages between whites and blacks in the South from the colonies through Reconstruction is a compelling story. Through the lives of interracial couples and the laws enacted to control them historians can examine some of the country's most turbulent moments. However, the stories and experiences of those involved in interracial unions are not always easily accessible and sometimes the material found is only one to two sentences. It is often necessary to piece together various parts of the puzzle using a variety of sources including but not limited to court records, legal codes and diaries or journals. Records are difficult to come by because cases of interracial transgression did not enter the record under one uniform method. Rather, legal cases could come before the court as an adultery case, a bastardy trial, a divorce proceeding, a dispute over an inheritance or any other legal question.

Historians of interracial sex have shown that white Southerners could and did respond to interracial unions with a measure of toleration up through the eve of the

Civil War. However, the general consensus is that black freedom caused a crisis among the Southern elite and resulted in the persecution of blacks for crossing the color line. Although whites displayed relative forbearance, they were by no means completely accepting of interracial transgressions. Rather legal toleration was extended for a variety of reasons.

First, Southerners felt relatively secure under the institution of racial slavery so they were less inclined to respond with alarm at an isolated instance of cross-racial liaisons. Secondly, slave owners had a vested interest in protecting their "property." Therefore, courts were likely to weigh the property owner's rights heavily when handing down verdicts. Lastly, cases were likely to only come before the court once mulatto children had been produced. The presence of children could precipitate a local crisis because Southern laws were written in such a way that white women could produce free "colored" children.

The country's descent into the turmoil of war allowed for increasingly stringent reactions to interracial couples. The upsurge in animosity as the war drew to a close was a direct result of the newly free black population. The Southern elite could no longer control the black population through the institution of racial slavery

so they sought to limit Freedmen through legal channels such as anti-miscegenation laws.

The study of interracial unions in the United States is of the utmost importance because it can and does illuminate the ever-important intersections of race and gender. Through the study of sex and love across racial boundaries scholars can decipher how racial categories were constructed during some of the country's most trying times. Furthermore, through the study of racial constructs, historians can trace the history of gender and sexuality. The convergence of these two historical developments in the topic of interracial intimacies is a great contribution to historical study.

Although the changing law of race and marriage in the South has been thoroughly studied as a whole, very few scholars have chosen to explore individual state's reactions to interracial liaisons or how miscegenation laws operated to shape individual lives, experiences and opportunities in various states. The South is not one monolithic whole so treating it as such is not always in the best interest of the research. Of course, there are continuities across the South but in order to achieve a complete picture of interracial studies scholars need to begin to focus on more narrow geographical limits.

One area in which scholars should focus more closely on is the state of Texas. Texas is different from other Southern states in that it is a unique blend of the South and the West. The landscape, economy, and political ideals of Texas vary greatly depending on location. Therefore, one can reasonably assume that the topic of interracial sex and love would engender a wide range of responses across the state. It is precisely this variety that commands greater interest and research in the area.

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