Crimes of Passion: The Regulation of Interracial Sex in Washington, 1855-1950

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INTRODUCTION

Race had not mattered to Harvey Creasman and Caroline Paul. The two had lived together as husband and wife for seven years, beginning in 1939.[1] Harvey was black and Caroline was white, but like other couples, they found that they shared things in common and enjoyed each other's company.[2] They met in church in Seattle, Washington.[3] Soon after, they started living together at Harvey's rental unit in the working-class town of Bremerton, across Puget Sound from Seattle, before scraping together enough money to buy a home.[4] They sold Harvey's 1931 Plymouth automobile to make their down payment[5] and put the title in Caroline's name, as Harvey had suffered some discrimination at the hands of a realtor and was too put off to deal with the

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1. Statement of Facts at 18, Creasman v. Boyle, 196 P.2d 835 (Wash. 1948) (No. 30446) (collection of Washington State Archives) (trial testimony of Harvey Creasman on direct examination).

2. *Id.* at 16-17 (noting the race of the parties).

3. *Id.* at 15.

4. *Id.* at 16.

5. *Id.* at 4-5 (trial testimony of L.H. Tasker on direct examination) (noting the details of the sale, including the name listed on the title and the method of down payment); *see also id.* at 17 (trial testimony of Harvey Creasman on direct examination) (stating that he owned a 1931 Plymouth Coupe before Caroline moved in with him).

situation.[6] Friends said the house was more of a "shack," but over the years a combination of frugality and hard work allowed them to fix the place up nicely.[7] Harvey did a lot of the work himself, and Caroline helped take care of it, using Harvey's paychecks from the Naval Yard to purchase furniture and pay the mortgage.[8] Unfortunately for Harvey, however, Caroline's death in 1946 brought more than a loss in companionship, because Caroline's daughter by her previous marriage believed that most everything Harvey and Caroline had built over the years, including the house, belonged to her, not Harvey. And she was right: in an opinion teeming with racial implications, the Washington State Supreme Court ruled that, because Harvey and Caroline had never formalized their marriage, all of the property purchased in Caroline's name belonged to the white daughter rather than the black spouse.[9]

Harvey and Caroline's story, together with others like it, adds a crucial piece to our understanding of the regulation of interracial sex and marriage in this country's past. Prior to *Loving v. Virginia*,[10] virtually every state in the Union outlawed the practice at some point, with much of the South singling out whites and African Americans in their prohibitions, and the West adding other disfavored races to the list. Early scholarship picked up on the valuable insight these laws provided into whites' ideologies, noting how they served the dual purpose of maintaining white racial purity while at the same time protecting white patriarchal privilege through lax enforcement.[11] More recent scholarship

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6. *Id.* at 66 (trial testimony of Madeline Cook on direct examination).

7. *Id.* at 63. One witness stated that the home was a "pretty bad place" when Harvey and Caroline first bought it but that, at the time of trial, it was "a palace." *Id.* at 42 (trial testimony of Sam Aman on direct examination).

8. *See, e.g.*, *id.* at 6-8 (trial testimony of Roy Leonard on direct examination) (noting that, while the furniture company did business almost exclusively with "Mrs. Creasman," the account was actually in Harvey's name); *id.* at 29 (trial testimony of Jesse McDowell on direct examination) (noting that Caroline paid the mortgage). Harvey testified that he went to work in the Navy Yards in 1940 and that Caroline sometimes cashed his checks. *Id.* at 18-21 (trial testimony of Harvey Creasman on direct examination). Harvey also testified that he worked on the house, including building an addition. *Id.* at 22. Others also testified regarding Harvey's improvements. *See, e.g.*, *id.* at 47 (trial testimony of Robert Malone on direct examination).

9. Creasman v. Boyle, 196 P.2d 835, 841-42 (Wash. 1948), *overruled by In re* Marriage of Lindsey, 678 P.2d 328 (Wash. 1984).

10. 388 U.S. 1 (1967) (holding that a state statute prohibiting miscegenation deprived interracial couples of their fundamental right to marry in violation of the Fourteenth Amendment's due process and equal protection clauses).

11. *See, e.g.*, ANGELA Y. DAVIS, WOMEN, RACE & CLASS 172 (Vintage Books 1983) (1981); A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1968-69 (1989); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 105-06 (1983);

has dug deeper, exploring the spaces where interracial fraternization took place and studying those involved to help better understand the significance of race and sex at various times and places.[12] Out of the growing number, a handful have been especially good at looking beyond the rigid lines drawn in the statutes, as these laws were of a type destined to be broken.

Yet, as this impressive list of scholarship grows, the topic of interracial relationships in the State of Washington remains considerably understudied.[13] The explanation is undoubtedly because, with the exception of the years between 1855 and 1868, there were no laws criminalizing interracial marriages. The state thus seems relatively unimportant precisely because it appeared more progressive. But such thinking is simplistic or, worse, dangerous. It mistakenly assumes that the topic was not controversial—it was—and, more importantly, it causes us to miss out on the nuances of race and race relations in the state and region.

This article strives to fill the gap in the literature by exploring the regulation of interracial sex and marriage in the State of Washington from its time as a territory through the first half of the twentieth century. In light of the area's history and settlement patterns, the focus is not limited to blacks and whites, but instead takes into account relationships between whites and other racial groups. The article's main thesis is that, although the criminal bans on the practice were short-lived, Washington elites and powerbrokers used legal mechanisms to discourage and penalize interracial families in much the same

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Karen A. Getman, Note, *Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System*, 7 HARV. WOMEN'S L.J. 115, 115 (1984).

12. *See, e.g.*, PETER W. BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH (1995); LISA LINDQUIST DORR, WHITE WOMEN, RAPE, AND THE POWER OF RACE IN VIRGINIA, 1900-1960 (2004); MARTHA HODES, WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH-CENTURY SOUTH (1997); PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA (2009); JOSHUA D. ROTHMAN, NOTORIOUS IN THE NEIGHBORHOOD: SEX AND FAMILIES ACROSS THE COLOR LINE IN VIRGINIA, 1787-1861 (2003); SEX, LOVE, RACE: CROSSING BOUNDARIES IN NORTH AMERICAN HISTORY (Martha Hodes ed., 1999); DIANNE MILLER SOMMERVILLE, RAPE AND RACE IN THE NINETEENTH-CENTURY SOUTH (2004); THE DEVIL'S LANE: SEX AND RACE IN THE EARLY SOUTH (Catherine Clinton & Michele Gillespie eds., 1997); PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY (2002); Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999); Walter Johnson, *The Slave Trader, the White Slave, and the Politics of Racial Determination in the 1850s*, 87 J. AM. HIST. 13 (2000); Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 J. AM. HIST. 44 (1996).

13. For examples of notable exceptions, see PASCOE, *supra* note 12, at 77-108 (discussing Washington as part of a larger analysis of the West); David Peterson-del Mar, *Intermarriage and Agency: A Chinookan Case Study*, 42 ETHNOHIST. 1 (1995) (exploring the social implications of a relationship between a Chinookan woman and a white man).

way. The result of these efforts may not have been prison time; but, as Harvey Creasman's case demonstrates, lawyers and judges regularly used the law to ensure that wealth and property remained in the hands of whites rather than racial minorities. In doing so, the legal system became an effective deterrent to interracial relationships, perpetuating existing notions of race that privileged whiteness over other racial groups.

Part I of this article introduces the narrative used to explore this thesis. The story involves Swan Anderson, and it begins by recreating the demographics and general environment Swan encountered when he arrived in the Washington Territory in the nineteenth century. This Part also introduces the relationship that Swan developed with Mary, a Native American woman. Part II follows up on this background by situating the passage of the area's antimiscegenation laws within the larger desire of Euro-American settlers to create a white utopia. Part III then examines the repeal of these laws during the Reconstruction era, and contrasts these legal changes with the continuing desire to keep the races separate well into the twentieth century. Part IV refocuses the narrative back to Swan and Mary, exploring in detail the evidence and arguments raised in an inheritance dispute in which Swan and Mary's daughter attempted to prove her parents were husband and wife. Finally, Part V examines the verdict and aftermath of the case, in which decision-makers ruled against the daughter and continued to privilege white ideals and discount the views of people of color. The article concludes by tying together Harvey Creasman's case with this one, and notes that, far from being unique, these stories reflect strongly held assumptions that disadvantaged interracial couples and racial minorities in the state.

I. "SOONER OR LATER THE TIDE OF FEMALE EMIGRATION WILL SET IN"

The precise date Swan Anderson arrived in the Washington Territory is not known. He was certainly here by 1872 and may have been here before that.[14] From the perspective of the newly arriving whites, Washington was considered part of the frontier, although the large number of Native Americans living in the area would have hardly described it that way. The tens of thousands of Indians living in the Pacific Northwest had been here for centuries, developing a culture and a way of life considered foreign and hostile to the expanding interests of the United States. The result in Washington, like in the other spaces where whites and Natives met, was a mix of conflict and cooperation, with Euro-Americans ultimately and often unjustly taking what they wanted.

14. Statement of Facts at 38, *In re* Anderson's Estate (*Anderson I*), 1 P.2d 231 (Wash. 1931) (No. 22892) (collection of Washington State Archives) (trial testimony of John Sigo on cross examination) (stating that his father logged with Swan Anderson in 1872).

Swan lived in what is now Kitsap County, the same county that Harvey Creasman and Caroline Paul would later build a home.[15] He was born in Sweden, but his family immigrated to Minnesota when Swan was evidently a young man.[16] By the time Swan arrived in Washington he was probably in his late twenties, although the extant record makes it impossible to know for certain.[17] Nor do the surviving records indicate precisely what brought him here, but we can safely speculate that he was one of many adventurers who saw opportunity in the ruggedness of the Pacific Northwest.

Like others who settled in this part of the territory, Swan made his living in lumber.[18] The Kitsap Peninsula, where Swan lived, contained an abundance of hemlock, cedar, spruce, and Doug-fir, and early entrepreneurs saw the potential for profits and built sawmills near the deep waters of Puget Sound to meet the growing demand.[19] With oxen pulling the logs to the water's edge and ships ready to set sail, the mills of western Washington shipped lumber to the growing cities in California and to the rest of the world.[20] By 1860, the value of lumber products produced in Washington was over 1 million dollars, and it increased by roughly twenty percent in the next decade.[21]

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15. KITSAP CNTY., WASH. TERRITORY, 1883 KITSAP COUNTY CENSUS 55 (1883), *available at* http://media.digitalarchives.wa.gov/WA.Media/jpeg/C866B81D592765BE47B912BB00A32D2D_1.jpg (listing Swan Anderson as a Kitsap County resident).

16. *Id.* (listing Swan's birthplace as Sweden). Tracing Swan Anderson through the census records has been difficult because there are relatively few clues about his life before he came to Washington. However, a number of his family members lived in Minnesota, including his mother, his cousins, and his brother when his brother died. A "Swan Anderson" from Sweden with the right age, moreover, can be found living in Minnesota in the 1870 federal census. Manuscript Census Returns, Schedule 1.—Inhabitants in Stockholm, Wright Cnty., Minn. 8, *in* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POPULATION SCHEDULES OF THE NINTH CENSUS OF THE UNITED STATES (1870). He cannot be found in earlier censuses.

17. Swan was listed as forty years old in Kitsap County's 1883 census, meaning that he was twenty-eight or twenty-nine if he arrived in 1872 (depending on his birthday and when the census was taken) and younger if he arrived before. KITSAP CNTY., *supra* note 15.

18. *Id.* (identifying Swan's occupation as a "logger").

19. In 1860, there were four saw mills in Kitsap County, second only to the five saw mills in neighboring Thurston County. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, MANUFACTURES OF THE UNITED STATES IN 1860, at 671-72 tbl.1 (1865), *available at* http://www2.census.gov/prod2/decennial/documents/1860c-15.pdf. In the same year, there was a staggering $755,000 of capital invested in lumber production in Kitsap County, 348 persons working in the field, and $694,000 worth of products produced from lumber. *Id.* at 671. No other county came close in any of these categories. *Id.* at 671-72.

20. ROBERT E. FICKEN & CHARLES P. LEWARNE, WASHINGTON: A CENTENNIAL HISTORY 29-48 (1988) (discussing the "Timber Commonwealth" of western Washington).

21. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, THE STATISTICS OF THE WEALTH AND INDUSTRY OF THE UNITED STATES 612-13 tbl.X (1872), *available at* http://

During his time in the territory, Swan mostly moved around Kitsap County, setting up logging camps and hiring local Indians and other whites to help cut down trees and haul the lumber to the mills. John Sigo recalled that his father logged with Swan at Port Washington in the early 1870s, while others remembered Swan from his days near Port Orchard at a place called Anderson Bay—possibly his namesake—in the mid-1880s.[22] In 1888, the year before his death, Swan briefly moved to nearby Vashon Island where, as before, he lived simply.[23] There, he had a house where he kept his office,[24] and among some of his few positions mentioned in the records was "a logging team—four yoke of cattle and an odd [old?] steer."[25]

The demographics of the area indicate that Swan lived in a sparsely populated area, with fewer inhabitants than other regions. Washington had been a territory since 1853—in that year it was carved out of the Oregon Territory—but parts of it were still relatively remote even in 1889, the year it became a state and the year of Swan's death.[26] In 1860, the first time residents were counted in the federal census, there were 11,594 persons in the entire territory, although that number grossly underestimated the Native population, as it would in subsequent censuses.[27] By 1870, there were 23,955.[28] By 1880, the population had grown to 75,116.[29] And by 1890, there 349,390 people

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www2.census.gov/prod2/decennial/documents/1870c-09.pdf.

22. *See* Statement of Facts, *supra* note 14, at 37-38 (trial testimony of John Sigo on cross examination) (stating that his father logged with Swan); *id.* at 5 (trial testimony of Eric Lee on direct examination) (noting that Swan was logging at the bay in the late 1880s).

23. *See id.* at 11 (trial testimony of Olaf Lee on cross examination) (explaining that Swan lived on Vashon Island in 1889).

24. *Id.* at 41 (trial testimony of Asbaorne Danielson on direct examination).

25. *Id.* at 81 (trial testimony of L.L. Locker on direct examination).

26. For a comprehensive view of the early days of Washington, see EDMOND S. MEANY, HISTORY OF THE STATE OF WASHINGTON (1909). A dated but still useful historiography of the region can be found in Kent D. Richards, *In Search of the Pacific Northwest: The Historiography of Oregon and Washington*, 50 PAC. HIST. REV. 415 (1981). Swan died on September 13, 1889. Petitioner's Transcript on Appeal at 5, *Anderson I*, 1 P.2d 231 (Wash. 1931) (No. 22892) (collection of Washington State Archives) (opinion of the Kitsap County Superior Court regarding the petition for letters of administration).

27. CENSUS OFFICE, U.S. DEP'T OF THE INTERIOR, REPORT ON POPULATION OF THE UNITED STATES AT THE ELEVENTH CENSUS: 1890, at 2 tbl.1 (1895), *available at* http://www2.census.gov/prod2/decennial/documents/1890a_v1-06.pdf. The census takers only counted "civilized Indians" in the census, and in 1860 there were only 426 that met that definition. *Id.* at 401 tbl.14, *available at* http://www2.census.gov/prod2/decennial/documents/1890a_v1-13.pdf. In subsequent decades, the number never reached more than 4500. *Id.*

28. CENSUS OFFICE, *supra* note 27.

29. *Id.*

living in Washington.[30] Despite the significant population growth in the state, however, the numbers in Swan's home of Kitsap County remained small. Between 1860 and 1890, Kitsap went from 544 residents to a mere 4624, while King County, where Seattle is located, grew from 302 to 63,989 during the same period.[31]

Of the early settlers, moreover, the vast majority were men. In 1860, of the 11,594 counted in the census, 8446 (or about seventy-three percent) were male.[32] Ten years later, more women had arrived, but men still represented sixty-three percent of the population.[33] The numbers hardly changed over the next twenty years. In 1880 and 1890 males represented sixty-one and sixty-two percent, respectively, of the total population.[34] In Kitsap County, where Swan lived, the percentage of white men to white women was even higher. In the territorial census of 1883, there were roughly three men for every woman,[35] prompting one early resident to remark, perhaps with only slight exaggeration, that he "[did]n't know of any" white women living there at the time.[36]

Nonetheless, local elites remained hopeful that the sex ratios would balance out. "The New England towns are full to overflowing with intelligent young women, well trained to household duties, with no possible chance of finding husbands at home," beamed the editor of one local paper.[37] "Sooner or later the tide of female emigration will set in."[38] Yet, until it did, the difference in sex ratios led inevitably to Euro-American men seeking companionship with women of other races, most notably Native American women. While it is impossible to derive any precise numbers for these pairings, prosecution rates provide evidence that even if white-Indian relationships were not prevalent,

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30. *Id.*

31. *Id.* at 44 tbl.4.

32. *Id.* at 398 tbl.11, *available at* http://www2.census.gov/prod2/decennial/documents/1890a_v1-13.pdf.

33. There were 14,990 males and 8965 females. *Id.*

34. In 1880, there were 45,973 males and 20,143 females. *Id.* In 1890, there were 217,562 males and 131,828 females. *Id.*

35. Specifically, there were 1635 males and 430 females. KITSAP CNTY., *supra* note 15, at 1-60, *available at* http://www.digitalarchives.wa.gov/Search (Select "Census Records" from the "Record Series" menu, select "Kitsap" from the "County" menu, select "1883 Kitsap County Census" from the "Title" menu, type "1883" in both the "Year From" and "Year To" fields, and click "Search").

36. Statement of Facts, *supra* note 14, at 98 (trial testimony of Thomas Ross on direct examination).

37. *Scarcity of White Women*, PUGET SOUND HERALD, Aug. 26, 1859, at 2, *available at* http://www.sos.wa.gov/history/images/newspapers/SL_dir_steilacoompugesounhera/pdf/SL_dir_steilacoompugesounhera_08261859.pdf#page=2.

38. *Id.*

they were not uncommon either. Of the eighty-five cases of fornication and adultery during the territorial period, thirty-seven, or a full forty-four percent, involved interracial relationships consisting of white men and Indian women.[39] Of course, these numbers represent only those that made it into the public eye. An untold number crossed the color line without interference from local authorities, whether briefly or over a period of years.

Swan Anderson was among the latter. He lived with an Indian woman called Mary for four or five years from the mid-1880s until his death in 1889. "Mary," of course, was not her real name. Her real name was Kashian-Kinso, the daughter of Archat, and she was a member of the Kyuquot people from British Columbia, Canada.[40] Mary's sister was married to Swan's cousin, a man named John Penson, and in 1855 Mary met up with John as she and her father passed through the area on their way to pick hops.[41] John brought Mary to visit her sister near Swan's camp, and Swan and Mary began living together soon after.[42] Many years later, the subject of Swan's relationship with Mary would be in the courts, with one of their daughters—Irene York—arguing that she was their legitimate child. Seeking justice and a share in her uncle's estate, Irene instead found the same thing Harvey Creasman found: a judicial system bent on privileging and upholding the ideologies of whiteness.

II. "WE DO NOT . . . FAVOR[] AMALGAMATION"

Irene was probably destined to lose her case. Long before her parents became intimate, Washingtonians made clear that whites and non-whites belonged in separate spheres, publically lashing out at interracial couples and their families with as much vigor as their Western and Southern counterparts. As the editor of one local paper put it in 1859, "The intermarriage of whites with Indians is fraught with many and serious evils."[43] Offering further insight, he insisted that not only did intermarriage fail to elevate the morals of Indians, but it also led to "an almost instantaneous degeneracy of the white."[44] The trope was a familiar one. Drawing on a supremacist ideology, Southerners had

39. BRAD ASHER, BEYOND THE RESERVATION: INDIANS, SETTLERS, AND THE LAW IN WASHINGTON TERRITORY, 1853-1889, at 66 (1999).

40. Statement of Facts at 9, 13, *In re* Anderson's Estate (*Anderson II*), 17 P.2d 889 (Wash. 1933) (No. 24143) (collection of Washington State Archives) (trial testimony of Celia Obi on direct examination).

41. Affidavit of Celia Obi in Support of Motion for a New Trial at 1, *In re* Estate of Anderson, No. 3600 (Wash. Super. Ct. Kitsap Cnty. Apr. 5, 1930) (collection of Washington State Archives).

42. *Id.*

43. *Scarcity of White Women*, *supra* note 37.

44. *Id.*

been insisting for years that intermarriage between blacks and whites harmed the white individual as much as it did the entire race:

> It is sometimes urged that such marriages should be encouraged, for the purpose of elevating the inferior race. The reply is, that such connections never elevate the inferior race to the position of the superior, but they bring down the superior to that of the inferior. They are productive of evil, and evil only, without any corresponding good.[45]

The Washington editor adopted the same position, regardless of the pairing. "[W]e do not wish to be understood as favoring amalgamation with Africans any more than with Indians," he assured his readers. "We deprecate both."[46]

Others shared his sentiments. Indeed, shortly after becoming a territory, the Washington legislature moved quickly to solidify these racist notions into the statute books. Drawing on the lessons of other states, but also mindful of Washington's particular circumstances, the 1855 legislature made it illegal for whites in Washington to marry either blacks or Indians, including those "possessed of one-fourth or more negro blood, or more than one-half Indian blood."[47] To help ensure compliance, the legislature imposed a stiff fine on those performing the marriage.[48] Nor would those who had married before the ban be exempted; "[A]ll [interracial] marriages heretofore solemnized in this territory," the law read, were declared void.[49]

This law, of course, was not passed in a vacuum, but was instead part of a larger campaign to keep the races separate. At the time of its enactment, the Washington Territory had strong ideological ties to the South, sharing some of its rampant racism. Indeed, the Democratic Party controlled both the governorship and the legislature, and a sizable number of settlers had emigrated from the slaveholding regions of the Upper and Lower South.[50] To be sure, economic conditions and political realities prevented slavery from spreading this far. But the same racial assumptions that underlay the institution invariably found their way into the laws and policies of the Pacific Northwest,

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45. Scott v. State, 39 Ga. 321, 323 (1869).

46. *Id.*

47. Act of Jan. 29, 1855, § 1, 1854-1855 Wash. Sess. Laws 33, 33 ("[A]ll marriages heretofore solemnized in this territory, where one of the parties to such marriage shall be a white person, and the other possessed of one-fourth or more negro blood, or more than one-half Indian blood, are hereby declared void.").

48. *Id.* § 2, 1854-1855 Wash. Sess. Laws at 33 (imposing a fine of between fifty dollars and $500 on anyone who officiated an interracial marriage as defined by the Act).

49. *Id.* § 1, 1854-1855 Wash. Sess. Laws at 33.

50. *See* Robert W. Johannsen, *The Secession Crisis and the Frontier: Washington Territory, 1860-1861*, 39 MISS. VALLEY HIST. REV. 415, 416 (1952).

with the criminal bans on interracial relationships being one among many instances.

Early examples help illustrate the pervading sentiment. While Washington was still part of the Oregon Territory, the legislature made clear that it was to be a white man's country, sending the message that black people were not wanted, even if they were free. In 1844, it passed a law banning free people of color from living in the territory and imposing a sentence of twenty to thirty-nine lashes on the bare backs of the offenders, should they fail to leave.[51] The Donation Land Claim Act of 1850, by which settlers could receive several hundred acres of land depending on whether they were married or single, similarly limited land grants to "white" citizens.[52] In the first legislative session of the territory, the legislature also excluded blacks and other racial minorities (except "American half-breed Indians" who had "adopted the habits and customs of civilization") from the right to vote, a key component of the right of citizenship.[53] Capturing the pervading sentiment, the local Seattle paper insisted in 1879 that there was "room for only a limited number of colored people here. Overstep that limit and there comes a clash in which the colored man must suffer."[54] The laws and policies had their intended effect: in 1860 there were only thirty blacks living in the territory, and by 1890 that number had grown to only 1602.[55]

The desire to maintain a white utopia similarly kept the Asian population in check. The Chinese began emigrating to the West in the 1840s during the California gold rush. In the ensuing decades, opportunities in mining, lumber, and the railroads brought them further north. Still, restrictive policies and discriminatory practices meant that their numbers were never very large. The Chinese Exclusion Act of 1882 was not limited to Washington; but it carried the unmistakable message that, like the laws banning free people of color forty years earlier, non-whites were not part of the community Washingtonians hoped to build. In 1880, the number of Chinese in Washington stood at a mere 3260, or less than half a percent of the population, compared to 75,132 in

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51. Act of June 26, 1844, §§ 4, 6 (Or.), *reprinted in* PETER H. BURNETT, RECOLLECTIONS AND OPINIONS OF AN OLD PIONEER 213-14 (N.Y.C., D. Appleton & Co. 1880).

52. Donation Land Claim Act of 1850, ch. 76, §§ 4-5, 9 Stat. 496, 497-98.

53. An Act Relating to Elections and the Mode of Supplying Vacancies, ch. I, § 1, 1854 Wash. Sess. Laws 63, 64.

54. SEATTLE DAILY INTELLIGENCER, May 28, 1879, at 2, *as quoted in* QUINTARD TAYLOR, THE FORGING OF A BLACK COMMUNITY: SEATTLE'S CENTRAL DISTRICT FROM 1870 THROUGH THE CIVIL RIGHTS ERA 22 (1994).

55. CENSUS OFFICE, *supra* note 27, at 400 tbl.13, *available at* http://www2.census.gov/prod2/decennial/documents/1890a_v1-13.pdf.

California.[56] The number of Japanese was even smaller. Despite growing numbers in the West, the census counted one Japanese person in Washington in 1880 and only 360 in 1890.[57]

For those steeped in the ideologies of the time, even this was too many. While anti-Chinese sentiment was by no means limited to Washington, events indicate that it was just as strong there as elsewhere.[58] "The civilization of the Pacific Coast cannot exist half Caucasian and half Mongolian," warned the editor of the *Seattle Post-Intelligencer* in September 1885.[59] "The sooner the people of the United States realize this and take measures to make certain that the Caucasian civilization will prevail, the sooner discontent will be allayed and the outbreaks will cease."[60] The editorial was prescient. The day it appeared, twenty miles southeast of Seattle, a group of whites chased Chinese coal miners from their homes and burned their property.[61]

Six months later, relations reached poisonous levels when a group of anti-Chinese Seattleites did their best to expel the entire Chinese population from the city.[62] On February 7, 1886, a white mob stormed Chinatown, raided the homes of the 350 Chinese living there, and marched every Chinese person they could find to the waterfront where they forced roughly 200 to board a ship destined for San Francisco.[63] Local authorities, led by the King County Sheriff and a team of deputies and militiamen, intervened, but not before blood was shed.[64] In the ensuing commotion, the sheriff escorted "the remaining Chinese back to Chinatown to await the next" vessel.[65] Seven days later, the remaining 154 were placed on two separate ships and sent out of the territory.[66] Just that quick, "virtually the entire Chinese population of Seattle was deported and the city's original Chinatown became history."[67]

The large number of Native Americans already living in the territory posed their own unique problems, yet the same ideological notions that governed the

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56. *Id.* at 401 tbl.14.

57. *Id.*

58. *See, e.g.*, Jules Alexander Karlin, *The Anti-Chinese Outbreak in Tacoma, 1885*, 23 PAC. HIST. REV. 271, 271 (1954).

59. SEATTLE POST-INTELLIGENCER, Sept. 11, 1885, at 2, *as quoted in* TAYLOR, *supra* note 54, at 111.

60. *Id.*

61. TAYLOR, *supra* note 54, at 112.

62. *See id.* (detailing the events of the uprising).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

treatment of blacks and Asians played a predominant role in official actions toward them. After Washington became a territory, the first order of business of Democratic Governor Isaac Stevens was to control and contain the Native population. With Congress's authorization, Stevens concluded several treaties, often grouping together Indians that shared no common leader or common lands onto a single reservation.[68] Part of Stevens's goal was to clear up the conflicts created by the Donation Act, which granted to settlers land occupied by Indians. But just as important, the efforts were designed to ensure "that Indians and whites should inhabit separate territories and have little contact with each other."[69]

Stevens's efforts were destined to fail, however, as many Native Americans were dissatisfied with the terms of the treaties forced on them, resulting in porous boundaries and constant contact between whites and Indians. The response was to push Natives into second-class citizenship, much like the South did to blacks. The legislature, for example, made it a crime in Washington to sell liquor and other intoxicating spirits to Indians.[70] The reason, as in the South, was to control the population. Drunk Indians, like drunk slaves, were viewed as dangerous and hostile to the governing interests. Indians were also not allowed to testify in any civil case in which a white person was a party,[71] and were only allowed to testify in a criminal case if they were the defendant.[72] Such laws drew on notions of white superiority, with settlers viewing the testimony of Indians as untrustworthy based on racialized assumptions of the Native populations.

Thus, race became a central organizing principle in Washington, much as it had become in the rest of the country. In such a world, interracial contacts were seen as a threat of the first order and help explain why the legislature was quick to ban them. Drinking, gambling, lovemaking—these were actions that purveyors of the social order tried so hard to control precisely because they were where racial boundaries could so easily break down. Years later, when Irene York brought her parents' relationship into open court, the criminal bans on interracial marriages may have been lifted, but the ideas behind them were as potent as they were in the early days of the territory.

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68. *See* ASHER, *supra* note 39, at 35-48 (detailing the treaty efforts of Governor Stevens's administration).

69. *Id.* at 36.

70. Act of Jan. 25, 1855, § 1, 1854-1855 Wash. Sess. Laws 30, 30.

71. Act of Apr. 28, 1854, § 293(3), 1854 Wash. Sess. Laws 129, 187.

72. Act of Apr. 28, 1854, § 95, 1854 Wash. Sess. Laws 100, 117.

III. "DISTINCTIONS BASED UPON COLOR"

The subject of Swan's relationship with Mary became a legal issue not in the usual way. There were no criminal prosecutions or constitutional challenges. Instead, in the spring of 1930, while in her early forties, Irene petitioned for letters of administration upon the estate of John Anderson, Swan's brother and Irene's uncle, asserting that she was the sole surviving heir and entitled to the entire estate.[73] The question as stated by the trial court was deceptively simple: "[W]hether the petitioner, Irene York, is the legitimate daughter of Swan Anderson, a brother of said John F. Anderson and who died in Seattle on September 13, 1889."[74] Yet that question proved to be far harder, and much more controversial, than the simplicity of the phrasing suggested. At its core, the legitimacy question was a marriage question; to be legitimate, Irene needed to prove that Swan and Mary were husband and wife.

By the time Irene was born, it was no longer illegal for her parents to be married, as the territorial legislature had erased the criminal bans on interracial marriages some twenty years earlier in 1868.[75] Horace Cayton, the African American publisher and editor of the *Seattle Republican*, suggested the area's tolerance for interracial relationships was a reflection of its enlightened views.[76] Cayton's explanation, however, better reflects his progressive politics than the historical evidence. Indeed, the reason for the repeal had little to do with transformations in white attitudes toward intermarriage, and much more to do with the fundamental reordering of society that came with congressional Reconstruction.

In the Washington Territory, like elsewhere, President Abraham Lincoln's Republican Party had taken control of the machines of government in the 1860s, and with that came a desire to destroy the legal distinctions based on

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73. Petitioner's Transcript on Appeal, *supra* note 26, at 1 (petition for letters of administration).

74. *Id.* at 5 (opinion of the Kitsap County Superior Court regarding the petition for letters of administration).

75. Act of Jan. 23, 1868, § 1, 1867-1868 Wash. Sess. Laws 47, 47-48. Prior to the repeal, the legislature amended the original prohibition twice. The first time was in 1859, when the legislature re-worded the statute from banning marriages "heretofore" solemnized in the territory to those marriages "hereinafter" solemnized. Act of Jan. 21, 1859, § 1, 1858-1859 Wash. Sess. Laws 24, 24. The second time was in 1866, when the legislature changed the law to allow whites to marry so-called "quadroons" while keeping the ban in place for marriages to "mulattoes." Act of Jan. 20, 1866, § 2(3), 1865-1866 Wash. Sess. Laws 80, 81.

76. *Brother in Black*, SEATTLE REPUBLICAN, Dec. 5, 1902, at 1, *available at* http://chroniclingamerica.loc.gov/lccn/sn84025811/1902-12-05/ed-1/seq-1.pdf ("[M]iscegenation between the whites and the blacks of the North, East and West are of frequent occurrence and create no great amount of comment when indulged . . . .").

race.[77] The 1866 Civil Rights Act, passed with Congress's new authority under the Thirteenth Amendment, was a remarkable testament to the new order. Among its many provisions was a guarantee that blacks should have the same right to sue and be sued, to own property, and to make and enforce contracts as whites—rights, of course, that had been denied to them under the slave regime and the Black Codes of 1865 to 1866.[78] Two years later, the states ratified the Fourteenth Amendment, guaranteeing in sweeping terms that the states shall not deprive individuals of their rights to the equal protection of the laws.

On the heels of these transformative events, several state legislatures and courts confronted the question of whether the bans on interracial marriages could survive. Some dismissed the argument out-of-hand, insisting in what would become a familiar line that the bans did not treat the races differently because they applied to whites just the same as they applied to other races.[79] But a few jurisdictions saw through the sham. One notable case took place in Alabama, in the heart of the Deep South. There, in 1872, the Republican-dominated state supreme court held in *Burns v. State* that its antimiscegenation law was an impermissible infringement on the rights of black citizens.[80] "Marriage is a civil contract," it said, and "[t]he same right to make a contract as is enjoyed by white citizens, means the right to make any contract which a white citizen may make."[81] Although the holding granted only a temporary

77. *See* Johannsen, *supra* note 50, at 437 (discussing President Lincoln's appointment of William Wallace to the Washington territorial governorship and the issues surrounding that appointment).

78. For examples of Black Codes, see Act of Feb. 16, 1866, No. 100, 1865-1866 Ala. Acts 111; Act of Dec. 15, 1865, No. 112, 1865-1866 Ala. Acts 119; Act of Feb. 6, 1867, No. 35, 1867 Ark. Acts 98; Act of Jan. 15, 1866, ch. 1466, 1865 Fla. Laws 23; Act of Jan. 12, 1866, ch. 1467, 1865 Fla. Laws 28; Act of Jan. 12, 1866, ch. 1468, 1865 Fla. Laws 30; Act of Jan. 11, 1866, ch. 1469, 1865 Fla. Laws 31; Act of Mar. 12, 1866, No. 240, 1865-1866 Ga. Laws 234; Act of Mar. 9, 1866, No. 252, 1865-1866 Ga. Laws 240; Act of Mar. 9, 1866, No. 253, 1865-1866 Ga. Laws 240; Act of Mar. 7, 1866, No. 254, 1865-1866 Ga. Laws 241; Act of Nov. 29, 1865, ch. 23, 1865 Miss. Laws 165; Act of Nov. 25, 1865, ch. 4, 1865 Miss. Laws 82; Act of Nov. 24, 1865, ch. 6, 1865 Miss. Laws 90; Act of Dec. 19, 1865, No. 4731, 1864-1865 S.C. Acts 271; Act of Dec. 21, 1865, No. 4733, 1864-1865 S.C. Acts 291.

79. *See, e.g.*, State v. Hairston, 63 N.C. 451, 452 (1869) (rejecting a challenge to the intermarriage ban, stating that the law creates "no discrimination in favor of one race against the other, but applies equally to both"). The argument that the bans did not violate equal protection because they penalized both whites and blacks was used by the state attorney general before the U.S. Supreme Court in *Loving v. Virginia*, 388 U.S. 1, 8 (1967). The Court rejected it, recognizing that the argument was a cover for the white supremacist ideology that provided the true rationale for the law. *Id.*

80. Burns v. State, 48 Ala. 195, 197 (1872).

81. *Id.*

reprieve,[82] the case nonetheless was significant for what it said about the Republican mindset. The Reconstruction Amendments[83] and the Civil Rights Act of 1866[84] were designed to remove legal disabilities based on race; hence, blacks and other citizens had the same right to contract, to appear in court, to buy and sell property, and to marry as whites.

Other jurisdictions, including several in the South, reached the same conclusion. The Louisiana Supreme Court first confronted the issue in 1874, two years after the Alabama decision.[85] In an inheritance dispute following the death of E.C. Hart, Cornelia Hart, a woman of color and the long-time partner of E.C. Hart, convinced the court that she was his lawful wife.[86] The Civil Rights Act, the court reasoned, "invested [Cornelia] with the capacity to enter into the contract of marriage with E.C. Hart, a white man, and to legitimate her children by him born before said marriage, just as if she had been a white woman."[87] The Texas Supreme Court turned to its own Reconstruction-era constitution to reach the same result.[88] The new provision made lawful all marriages between persons living together as husband and wife that, because of "the law of bondage, were precluded from the rights of matrimony."[89] The court interpreted this provision to mean that John Clark, a white man, and Sobrina, his former slave, were husband and wife based on testimony that they treated each other as such for thirty-odd years.[90] Mississippi's highest court later concluded the same.[91] "With the adoption of the present constitution," it

82. The court reversed itself five years later, after confederate sympathizers had regained control of the court and statehouse. *See* Green v. State, 58 Ala. 190, 192 (1877) (holding that there "is no discrimination made in favor of the white person" because the ban "no more tolerates [marriage] in one of the parties than the other").

83. U.S. CONST. amends. XIII-XV.

84. Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

85. Hart v. Hoss, 26 La. Ann. 90, 93-94, 97 (1874).

86. *Id.* at 93-94.

87. *Id.* at 97.

88. Honey v. Clark, 37 Tex. 686, 687 (1872).

89. TEX. CONST. of 1869, art. XII, § 27.

90. *Honey*, 37 Tex. at 687. The court overturned the case in 1874, after the former confederates regained control of Texas politics. *See* Clements v. Crawford, 42 Tex. 601, 604 (1874). The *Clements* decision was subsequently reaffirmed in several courts in the ensuing decade. *See* Oldham v. McIver, 49 Tex. 556 (1878); Francois v. State, 9 Tex. Ct. App. 144 (1880); Frasher v. State, 3 Tex. Ct. App. 263 (1877); *see also Ex parte* Francois, 9 F. Cas. 699 (C.C.W.D. Tex. 1879) (No. 5047). The court in *Frasher* summed up the prevailing sentiment this way: "the people of Texas are now, and have ever been, opposed to the intermixture of these races." *Frasher*, 3 Tex. Ct. App. at 278.

91. Dickerson v. Brown, 49 Miss. 357, 374 (1873).

said, referencing a provision identical to the Texas constitution, "former impediments to marriage between whites and blacks ceased."[92]

Thus, put in context, Washington's decision to repeal its ban on interracial marriages was less about social equality than it was about legal equality. Today, after the landmark decision in *Brown v. Board of Education*,[93] the two are often inseparable. But nineteenth-century thought had little difficulty distinguishing between them. "The object of the [Fourteenth A]mendment was undoubtedly to enforce the absolute equality of the two races before the law," the U.S. Supreme Court famously said in *Plessy v. Ferguson*, "but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either."[94] Indeed, in Washington, like in the rest of the country, blacks, Asians, and Indians continued to suffer discrimination at the hands of whites long after the Reconstruction experiment, despite their equal standing in the courts. In this environment, interracial marriages remained as much in disfavor in the years following Reconstruction as they were before. "[M]iscegenation, or mix-niggeration," was how one local paper sarcastically described the practice in 1869, the year after the repeal, no doubt reflecting a view held by many.[95]

Washington attitudes toward intermarriage can be further evidenced in the fury and sensation caused by the black boxer and heavyweight champion Jack Johnson's marriage to Etta Duryea, the first of his three white wives, in 1911. Johnson was the very embodiment of the Nat Turner image ingrained in the white conscious.[96] His strength and power in the ring was seen not as a characteristic to be admired or celebrated, but something to be feared. Like Turner, who led a slave rebellion in the Virginia countryside eighty years earlier, Johnson posed a threat to white society, besting the former white heavyweight champion James Jeffries in a metaphor for life. Crossing the color line and marrying a white woman only heightened these anxieties, giving proof to the myth that black men posed a sexual danger as well. The editor of

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92. *Id.*

93. Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that state-imposed racial segregation in "separate but equal" public educational facilities violated the Fourteenth Amendment's Equal Protection Clause).

94. Plessy v. Ferguson, 163 U.S. 537, 544 (1896), *abrogated by Brown*, 347 U.S. 483.

95. *Miscegenation*, WALLA WALLA STATESMAN, May 7, 1869, at 2, *available at* http://www.sos.wa.gov/history/images/newspapers/SL_dir_wallawallastat/pdf/SL_dir_wallawallastat_05071869.pdf#page=2.

96. GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND 51-70 (Wesleyan Univ. Press 1987) (1971).

the *Seattle Times* could hardly contain himself: "[T]he people of this part of the world," he thundered, "are distinctly opposed to miscegenation."[97]

Calls for a ban on the practice of miscegenation became a regular occurrence during this time. "Washington needs this law and needs it badly," insisted the *Seattle Star*.[98] Heeding these words, the Washington legislature tried repeatedly to reinstate the criminal prohibitions on interracial marriages through a series of bills first introduced in January 1911. In that year alone, three separate bills were introduced in the House, with the engrossed bill—House Bill 141—sent to the Senate where it apparently died in committee.[99] In the next session, after declaring the matter "an emergency," the Senate introduced its own version, upping the crime from a gross misdemeanor to a felony meriting up to five years in prison.[100] After the Senate failed to pass this bill, the House followed up with another bill in 1917 and again in 1921, amending a general marriage bill to include a prohibition on whites marrying non-whites.[101] The House passed the 1921 bill and sent it over to the Senate, but it failed to muster a majority.[102]

Following a brief hiatus, the topic once again became an important matter in the halls of the state capitol in the 1930s. This time the triggering event was reportedly not a national issue, but a local one.[103] In 1935, a Filipino man and a white woman applied for a marriage license in King County.[104] The county auditor, Earl Milliken, first refused to issue the license, and only did so when the prosecuting attorney, Warren Magnusson, informed him that no Washington law prohibited the marriage.[105] Members of the local parent-teacher and women's club organizations learned about the decision and were outraged.[106] At their prompting, Milliken and Magnusson urged their representative, Dorien Todd, to introduce a far-reaching bill that not only

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97. *"And His White Wife,"* SEATTLE DAILY TIMES, Mar. 15, 1909, at 6.

98. *These Marriages Should Be Stopped*, SEATTLE STAR, Sept. 17, 1909, at 1, *available at* http://chroniclingamerica.loc.gov/lccn/sn87093407/1909-09-17/ed-1/seq-1.pdf.

99. H.R. 141, 1911 Leg., 12th Reg. Sess. (Wash. 1911). The other two bills introduced in 1911 were H.R. 50, 1911 Leg., 12th Reg. Sess. (Wash. 1911), and H.R. 349, 1911 Leg., 12th Reg. Sess. (Wash. 1911).

100. S. 17, 1913 Leg., 13th Reg. Sess. (Wash. 1913).

101. H.R. 40, 1921 Leg., 17th Reg. Sess. (Wash. 1921); H.R. 87, 1917 Leg., 15th Reg. Sess. (Wash. 1917).

102. S. JOURNAL, 1921 Leg., 17th Reg. Sess. 453 (Wash. 1921).

103. *See Committee Plans Fight on Intermarriage Bill*, NW. ENTERPRISE (Seattle), Feb. 7, 1935, at 4, *available at* http://depts.washington.edu/civilr/images/antimisceg/NEW%202-7-35.jpg.

104. *Id.*

105. *Id.*

106. *Id.*

banned interracial marriages but, in a nod to the extremism of the Southern legislatures, painstakingly defined who belonged to the "white," "negro," "Mongolian," and "Oceanic" races.[107] Despite a positive endorsement from the House Committee on Public Morals, the bill once again failed to become law.[108]

Two years later, in the next legislative session, Senator Earl Maxwell picked up the cause.[109] Like Representative Todd, Senator Maxwell also said a local event prompted his actions, yet his justification played off the same deep-seated racial fears that prompted earlier efforts. What brought the matter to his attention, he said, was a "14-year-old Seattle girl marrying a 38-year-old negro . . . ."[110] As with Jack Johnson, the message was clear: black men were dangerous, and white women—particularly someone as young and innocent as this one—needed the State's protection.

This bill would eventually fail, as would the other two bills introduced by Senator Maxwell in the subsequent sessions of 1939 and 1941.[111] Men like Lieutenant Governor Victor Meyers, a champion of the liberal wing of the Democratic Party, helped muster the votes to defeat them.[112] But credit also rests with racial progressives and civil rights activists.[113] Horace Cayton, the African American editor of the *Seattle Republican*, was an early and strong voice of opposition. He regularly attacked whites pushing for anti-miscegenation laws as hypocritical, insisting in 1909 that "[i]f the white man desires to prevent race miscegenation let he himself put up the fence and then observe it."[114] The black community also organized against the 1935 bill,

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107. *Id.*; *see* H.R. 301, 1935 Leg., 24th Reg. Sess. § 1 (Wash. 1935).

108. H.R. JOURNAL, 1935 Leg., 24th Reg. Sess. 166, 333, 336, 1041 (Wash. 1935); *see* Stefanie Johnson, *Blocking Racial Intermarriage Laws in 1935 and 1937: Seattle's First Civil Rights Coalition*, SEATTLE C.R. & LAB. HIST. PROJECT (2005), http://depts.washington.edu/civilr/antimiscegenation.htm.

109. S. 342, 1937 Leg., 25th Reg. Sess. (Wash. 1937).

110. *Mixed-Marriage Ban Is Proposed in Legislature*, SEATTLE DAILY TIMES, Feb. 20, 1937, *available at* http://content.wsulibs.wsu.edu/u?/clipping_II,31010; *Seattle Case Prompts Bill to Stop Mixed Marriages*, SPOKANE CHRON., Feb. 20, 1937, *available at* http://content.wsulibs.wsu.edu/u?/clipping_II,30966.

111. *See* S. 12, 1941 Leg., 27th Reg. Sess. (Wash. 1941); S. 293, 1939 Leg., 26th Reg. Sess. (Wash. 1939).

112. Michael Hood, Essay No. 8392, *Meyers, Victor A. (1897-1991)*, HISTORYLINK.ORG (Dec. 4, 2007), http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file_id=8392.

113. *See* Johnson, *supra* note 108.

114. *White Women Marrying Chinese*, SEATTLE REPUBLICAN, July 2, 1909, at 1, *available at* http://chroniclingamerica.loc.gov/lccn/sn84025811/1909-07-02/ed-1/seq-1.pdf; *see also American Race Discrimination*, SEATTLE REPUBLICAN, July 12, 1907, at 2, *available at* http://chroniclingamerica.loc.gov/lccn/sn84025811/1907-07-12/ed-1/seq-2.pdf;

forming the Colored Citizens' Committee in Opposition to the Anti-Intermarriage Bill.[115] Churches and other organizations, including the NAACP, also spoke out against the efforts.[116] An editorial published in the *Northwest Enterprise*, Seattle's African American newspaper, perhaps summed it up best when it lambasted the 1937 law: "With love as old as the world, and marriage, love's goal, a sacred institution upon which the nation is propagated, any law which denies legitimacy to childhood is demoralizing to the people of the State, and any law which is discriminatory in character, is dastardly and derogatory to true American principals [sic]."[117]

It was messages like these that provided the necessary encouragements for couples of different races to remain together. Like elsewhere, getting a handle on the number who crossed the color line in Washington is a difficult task. George Bush, an early African American pioneer, had a white wife.[118] They were a highly successful family, appearing in the 1860 census records together with five children and an estate worth over $8000.[119] Ten years later, George and Elizabeth Oulst from King County appear in the census,[120] together with Commons and Mary Nix from Pierce County,[121] each one an interracial couple consisting of a white person and a person of African descent.

Extermination or Miscegenation, SEATTLE REPUBLICAN, Dec. 30, 1904, at 5, *available at* http://chroniclingamerica.loc.gov/lccn/sn84025811/1904-12-30/ed-1/seq-5.pdf; *Ghent Against Humphries Bill*, SEATTLE REPUBLICAN, July 30, 1909, at 1, *available at* http://chroniclingamerica.loc.gov/lccn/sn84025811/1909-07-30/ed-1/seq-1.pdf; [*John E. Humphries*] *Has Miscegenation Nightmare*, SEATTLE REPUBLICAN, July 9, 1909, at 1, *available at* http://chroniclingamerica.loc.gov/lccn/sn84025811/1909-07-09/ed-1/seq-1.pdf; *Negro Rapist in the South*, SEATTLE REPUBLICAN, June 18, 1907, at 4, *available at* http://chroniclingamerica.loc.gov/lccn/sn84025811/1909-06-18/ed-1/seq-4.pdf; *What of the Future of the American Negro?*, SEATTLE REPUBLICAN, Feb. 11, 1910, at 1, *available at* http://chroniclingamerica.loc.gov/lccn/sn84025811/1910-02-11/ed-1/seq-1.pdf.

115. Johnson, *supra* note 108.

116. *Id.*

117. *The Miscegenation Marriage Bill*, NW. ENTERPRISE (Seattle), Feb. 26, 1937, at 1, *available at* http://depts.washington.edu/civilr/images/antimisceg/NWE%202-26-37b.jpg.

118. George Bush is mentioned in a number of histories, among them, W. Sherman Savage, *The Negro in the History of the Pacific Northwest*, 13 J. NEGRO HIST. 255, 258-59 (1928).

119. Manuscript Census Returns, Schedule 1.—Free Inhabitants, Thurston Cnty., Wash. Territory 29, *in* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POPULATION SCHEDULES OF THE EIGHTH CENSUS OF THE UNITED STATES (1860).

120. Manuscript Census Returns, Schedule 1.—Inhabitants in Lake Wash., King Cnty., Wash. Territory 33, *in* BUREAU OF THE CENSUS, *supra* note 16.

121. Manuscript Census Returns, Schedule 1.—Inhabitants in Puyallup, Pierce Cnty., Wash. Territory 26, *in* BUREAU OF THE CENSUS, *supra* note 16.

The other states surrounding Washington, including California, Idaho, Montana, Nevada, Oregon, and Wyoming, all maintained their bans into the mid-twentieth-century, prompting interracial couples to travel to Washington to formalize their marriage. The most sensational of these occurred in 1909 when Helen Emery, the daughter of an Episcopal archdeacon, and Gunjiro Aoki, a Japanese student of "noble" lineage, attempted to marry in San Francisco.[122] California's ban, combined with public outcry, prompted the couple, along with Helen's mother, to head north to Washington. But the couple's travails had garnered enough media attention that, by the time they reached the state, local elites had made their positions clear. Acknowledging "there [was] no legal impediment to such a marriage," Vancouver's city attorney nonetheless dared the couple to try to marry in his jurisdiction, threatening to "do all [he could] to prevent such a union."[123] Others railed against the idea, using the case to expound on the evils of intermarriage, this time focusing on the children:

> [T]he experience of several hundred years has taught us that no good comes of the half caste child. It is strange, but none the less a fact, that offspring of miscegenated couples, for the most part, inherit all the bad qualities of their parents and none of the good. It may be that this is explainable on the theory that none but the worst of each race intermarry, but whatever the cause may be, the effect is certain.[124]

Still, the lack of a ban meant that Helen and Gunjiro could legally marry, and they did so in March of that year, despite the reprobations.[125]

Nor were they alone. Other interracial couples sought to formalize their relationships in the law, staking out room on the middle ground between the races. Among them were Shun Takahashi, a Japanese man, and Vivian, a white woman. Facing a ban in their native Montana, Shun and Vivian followed the tradition of Helen and Gunjiro and travelled to Spokane, Washington to get married in 1915.[126] In Spokane, around this same time, other interracial couples such as James Baker (black) and Lizzie (white), C.O. Townsend ("colored") and Alice (white), and Fred Young (white) and Nellie ("negro") filed for licenses and were married.[127] Perhaps more than the sensational cases,

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122. For more details on the story, see PASCOE, *supra* note 12, at 87-91.

123. *Id.* at 89 (internal quotation marks omitted).

124. *These Marriages Should Be Stopped*, *supra* note 98.

125. PASCOE, *supra* note 12, at 90.

126. *In re* Takahashi's Estate, 129 P.2d 217, 219 (Mont. 1942).

127. Bureau of Vital Statistics, Wash. State Bd. of Health, License No. A.4610, Certificate of Marriage (July 1, 1907) (collection of Washington State Archives) (marriage license of James and Lizzie); Spokane Cnty. Auditor, Spokane Cnty., Wash., License No. A.12260, Certificate of Marriage (Aug. 8, 1911) (collection of Washington State Archives)

these marriages of ordinary individuals provide us with the best insight into the way things were. Official policymakers and influential whites may have lashed out at interracial marriages because they posed stark threats to the racial order. But outside and in between these rigid lines, regular people found that they shared things in common, teaching us that life on the ground was much more fluid than contemporary observers ever allowed.

IV. "THEY LIVE[D] TOGETHER AS HUSBAND AND WIFE"

This was precisely what Irene needed to prove. She had to show that her parents' relationship, like the ones cited above, was not one of sexual convenience, but a stable relationship that exists between husband and wife. Irene was represented by Ray Greenwood who, over the course of the trial, built a persuasive case. Greenwood had been a lawyer since 1916.[128] Following World War I, he became the prosecuting attorney for Kitsap County, a position he held for six years.[129] Thereafter, he returned to private practice in Bremerton, litigating a number of successful cases.[130] By all accounts, Greenwood was an excellent attorney, enjoying "the reputation of being a lawyer of great learning and ability."[131] Domestic troubles and a drinking habit would eventually get the better of him, and he would be ingloriously disbarred in 1941 (only to be reinstated several years later).[132] But those matters had yet to take place, and as Irene's attorney his skill and devotion to the cause were unmatched.

Because the events at issue took place many years prior—Irene's father, Swan, died when she was three or four—the case depended in significant part on the memory of a handful of witnesses who were familiar with the couple forty years earlier. Of the dozen or more called by Greenwood, the collective message of all was that Swan and Mary "live[d] together as husband and wife."[133] "She was called Mrs. Swan Anderson . . . and Swan was called her

(marriage license of C.O. and Alice); Spokane Cnty. Auditor, Spokane Cnty., Wash., License No. A.10515, Certificate of Marriage (Sept. 20, 1910) (collection of Washington State Archives) (marriage license of Fred and Nellie).

128. *In re* Greenwood (*Greenwood II*), 157 P.2d 591, 591 (Wash. 1945).

129. *Id.*

130. *Id.*

131. *In re* Greenwood (*Greenwood I*), 111 P.2d 791, 791 (Wash. 1941).

132. *Id.* Four years later, after giving up alcohol and leading an "exemplary" life, the Washington State Supreme Court reinstated Greenwood to the practice of law. *Greenwood II*, 157 P.2d at 594.

133. Statement of Facts, *supra* note 14, at 13 (trial testimony of Kate Ross on direct examination).

husband," explained Eric Lee, who had worked for Swan since 1886.[134] "That is all I know. Swan called her his wife and Mrs. Anderson called him her husband."[135] Olaf Lee, Eric's brother, similarly testified that Swan's reputation was that of "a married man."[136] Kate Ross agreed, adding that Swan and Mary "lived together in a little cabin" near hers.[137] Francis Sackman, another neighbor, said that Mary was known as "Mrs. Anderson" and that she referred to Swan as "her husband."[138] Ike Sackman, Francis's husband, likewise said that Swan and Mary "lived as man and wife."[139] According to John Sigo, who worked for Swan from 1886 until his death, Swan and Mary lived together continually during that time and Swan never lived with anyone else.[140]

A number of witnesses also remembered Irene when she was a little girl, and provided further proof that the relationship between Swan and Mary was as a family rather than as some passing moment. Alec Kettle remembered seeing Swan holding Irene in his arms when he met Swan and Mary in Seattle. Alec asked Mary, in Chinookan dialect: "'This your husband?' She say, 'Yes'. I say, 'This your girl?' She say, 'Yes'."[141] Eric Lee was also asked to describe how Swan treated his daughter. "Very lovely," he said.[142] "He thought the world of her. Whenever he came out of the woods and came to the camp he always picked her up and carried her around."[143] Pressed for details on what Swan called Irene, he said "He always referred to her as 'my child'—'my girl' he called her."[144] Eric's brother Olaf agreed, saying that Swan "thought a great deal of her."[145]

Modern observers looking back have a tendency to portray relationships between white men and women of racial minorities in a negative light. Like in the Old South, themes of rape and power imbalances emerge as dominant narratives in the Washington Territory, with sex with Native women becoming a commodity that was purchased on the market and discarded after a time. Reports of white men offering Indian elders goods in exchange for a woman are common, with others seeking gratification from prostitutes or taking it from

134. *Id.* at 6 (trial testimony of Eric Lee on direct examination).
135. *Id.*
136. *Id.* at 10 (trial testimony of Olaf Lee on direct examination).
137. *Id.* at 13 (trial testimony of Kate Ross on direct examination).
138. *Id.* at 15, 16 (trial testimony of Francis Sackman on direct examination).
139. *Id.* at 30 (trial testimony of Ike Sackman on direct examination).
140. *Id.* at 36 (trial testimony of John Sigo on direct examination).
141. *Id.* at 33 (trial testimony of Alec Kettle on direct examination).
142. *Id.* at 6 (trial testimony of Eric Lee on direct examination).
143. *Id.*
144. *Id.*
145. *Id.* at 11 (trial testimony of Olaf Lee on direct examination).

the young or vulnerable. But, like with interracial contacts under slavery, care must be taken to allow counter-narratives to emerge.[146] David Peterson-del Mar's close study of Celiast Smith, a Chinookan woman born at the Columbia River's mouth in the early nineteenth century, demonstrates that Indian women exercised agency in intermarriage.[147] For many women, including Celiast, white men stood "as potential allies or at least as useful tools in gaining status, wealth, and authority . . . ."[148]

Judging by the evidence, Celiast was not alone. Records left behind reveal that meaningful relationships between white men and Indian women were not uncommon. Like Swan and Mary's case, a number of these relationships found their way into the courts, a place that provides unique insight into everyday life. In estate contests and other disputes, we hear from regular people about their impressions of their neighbors and their relatives, unfiltered by the knowledge that their views will later be picked apart for public consumption. For instance, the daughter of Indian Chief Kettle Labatum described how Harry Weatherall

> came to see her father, and told her father that he wanted to marry Sallie [an Indian woman]. Her father asked Mr. Weatherall, "Will you live with her until you die or until she dies?" and Mr. Weatherall says, "Yes." Then he married them right there, made them shake hands, and Mr. Weatherall swore he would live with her as long as both lived.[149]

In another case, John Wilbur reportedly entered into a binding marriage ceremony with Kitty according to the customs of the Swinamish tribe.[150] The two lived together for nine years and had two children.[151]

Nor do these cases seem extraordinary. A sampling of census returns from Swan and Mary's home in Kitsap County reveals several instances of white men and Indian women listed together as husband and wife.[152] Further proof

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146. *See* Peggy Pascoe, *Race, Gender, and Intercultural Relations: The Case of Interracial Marriage*, 12 FRONTIERS: J. WOMEN'S STUD., no. 1, 1991, at 5 (suggesting that interracial marriages provide fertile ground for exploring the agency of the oppressed).

147. Peterson-del Mar, *supra* note 13, at 1.

148. *Id.* at 7.

149. Weatherall v. Weatherall (*Weatherall I*), 105 P. 822, 823 (Wash. 1909).

150. Wilbur's Estate v. Bingham, 35 P. 407, 407 (Wash. 1894).

151. *Id.*; *see also* Follansbee v. Wilbur, 44 P. 262, 263 (Wash. 1896) (referencing, in a subsequent case, the couple's two children).

152. *See* KITSAP CNTY., *supra* note 15, at 5, *available at* http://media.digitalarchives.wa.gov/WA.Media/jpeg/85FB93EA0EEC37449C90220A8DD0C134_1.jpg (T.O. and Kali Gard); *id.* at 8, *available at* http://media.digitalarchives.wa.gov/WA.Media/jpeg/4DABAC663CB9510E9276A4C34DBC1308_1.jpg (George and Mary Allip); *id.* at 14, *available at* http://media.digitalarchives.wa.gov/WA.Media/jpeg/DB23455528711877ECF3C90C3AC524D5_1.jpg (W.C. and Sarah Fletcher); *id.* (Asa and Emma Fowler); *id.* at 55, *available at*

can be found in nearby Thurston County, where other whites and Indians filed marriage returns in the county courthouse in Olympia, the state capital. Among them were Leus Balch and Hassie Kardis, Harvey Wells and Jennie Smith, and Thomas Nelson Brown and Laura May Provoe.[153] Each of these provides strong evidence that, despite power imbalances, individuals of differing races could and did care for each other.

But the defense was of a different mind. Represented by Marion Garland, an attorney of local prominence, Swan's white cousins from Minnesota challenged Irene's ability to inherit her uncle's estate as the daughter of Swan.[154] They denied that Irene was next of kin or, for that matter, kin at all, and thus they asked that Alice Holman, a more distant relative from Bremerton, be appointed administratrix.[155]

Garland's litigation strategy was broad-based. He first sought to discredit Irene's witnesses by drawing on racialized assumptions about Native Americans. Harkening back to the days when Indians were not allowed to testify against whites, Garland pressed the witnesses about their racial background in a cheap effort to cast their testimony in doubt: "You're an Indian?," he asked Kate Ross after she testified that Swan and Mary lived together as husband and wife.[156] This was one of only two questions Garland would even ask Ms. Ross—the other was her age—in a striking illustration of the effect he thought it would have on the court.[157] Garland apparently believed that her answer—"Quarter Indian"—did little to repair the damage done, with the question planting the seeds of doubt in the observer's mind.[158]

Indeed, Garland's strategy of discrediting witnesses based on their racial makeup became a leitmotif of the trial. Of Francis Sackman, Garland pressed

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http://media.digitalarchives.wa.gov/WA.Media/jpeg/B138C85D69CEC340D39A751BB29020EA_1.jpg (James and Isabel Mitchell); *id.* at 56, *available at* http://media.digitalarchives.wa.gov/WA.Media/jpeg/B13B3662D720FAF50FD6E785ABF800D1_1.jpg (James and Lady Howard).

153. Marriage Return No. 1979, Thurston Cnty., Wash. (July 3, 1903) (collection of Washington State Archives) (marriage return for Thomas and Laura); Marriage Return No. 1456, Thurston Cnty., Wash. (June 20, n.d.) (collection of Washington State Archives) (marriage return for Harvey and Jennie); Marriage Return No. 1436, Thurston Cnty., Wash. (Mar. 24, 1898) (collection of Washington State Archives) (marriage return for Leus and Hassie).

154. Petitioner's Transcript on Appeal, *supra* note 26, at 3 (objections to the petition for letters of administration).

155. *Id.*

156. Statement of Facts, *supra* note 14, at 13 (trial testimony of Kate Ross on cross examination).

157. *Id.*

158. *Id.*

him for details: "You're an Indian?" "Part Indian." "How much?" "Half Indian."[159] He did the same to other witnesses. "You're part Indian?," he asked Joe Sigo, in a smug end to his cross.[160] Irene's attorney, Ray Greenwood, soon became concerned that the details he was drawing out from the plaintiff's witnesses would be lost by the direct strikes on their racial background, and thus, in a classic illustration of drawing out the "bad facts" before Garland could, he sought to defuse them by asking the witnesses on direct. "Mr. Mitchell," he queried of a witness who would subsequently testify about Swan's reputation as a married man, "you're a halfblood Indian?"[161] The back-and-forth continued with subsequent witnesses, with Garland seeking to highlight the race of each of Irene's witnesses and Greenwood trying to downplay it. After Garland closed his cross examination of Ike Sackman with his typical flourish, "You're an Indian?,"[162] Greenwood was on his feet to repair the damage. "Half Indian?," he asked, getting the expected confirmation, no doubt hoping that the white half would outweigh the Native half in the mind of the court.[163]

Garland's efforts to play on race did not stop with the witnesses. He also drew on racialized assumptions about the sexual proclivities of Native American women to cast doubt on the marriage. The view was a common one. Like in the Old South, where whites created elaborate myths about the lasciviousness of black women, white Washingtonians imagined that Native American women were ruled by base passions. In the case involving Harry Weatherall discussed above, the Washington State Supreme Court had no doubt that Weatherall "had certain intimate relations" with Sallie, the woman claiming to be his wife.[164] But it seized on testimony suggesting that Sallie had been "with two other white men in the same community prior to her acquaintance" with Weatherall to reject her claim.[165] Her reputed thirty-year relationship with the man meant little when measured against what she did before she met him.[166] "[C]ohabitation is not of itself very strong evidence of

159. *Id.* at 17 (trial testimony of Francis Sackman on cross examination).

160. *Id.* at 40 (trial testimony of John Sigo on cross examination).

161. *Id.* at 22 (trial testimony of John Mitchell on direct examination).

162. *Id.* at 31 (trial testimony of Ike Sackman on cross examination).

163. *Id.*

164. Weatherall v. Weatherall (*Weatherall II*), 115 P. 1078, 1079 (Wash. 1911).

165. *Id.*

166. *See Weatherall I*, 105 P. 822, 823 (Wash. 1909) (noting the claim that the marriage took place in 1879 and lasted until Weatherall's death, which apparently occurred in 1909).

marriage," the court said, "when, as here, it is made to appear that the woman is lewd and free with her favors."[167]

Garland had no qualms drawing attention to these images. Cross-examining Francis Sackman, he played off the notion of Indian women dispensing sexual favors to white men when he asked about Indian women being in the camps, knowing that his points were made even if Sackman did not give him the answers he wanted.

> Q When did he bring this supposed Mrs. Anderson there?
> A After he was logging a time.
> . . . .
> Q Were there any other white men there?
> A [There were a] lot of white men working for him.
> Q Did they have Indian wives?
> A No, sir.
> Q Were there any other Indian women around there?
> A No, she was the only one around there.
> Q Other Indian women came to the camp?
> A No, sir.[168]

With his own witnesses, Garland's questions were more direct. "State if it was a custom at that time among the Indian women to live first with one man and then another?"[169] Indeed, in one of his more blatant appeals, Garland asked Ada Poul, a white woman from Minnesota (and one of his own witnesses), about what she had heard of the relationship between Swan and Mary, going so far as to commodify Mary by refusing to give her a name: "[D]o you know the reputation of the Indian woman that was living with Swan, as to . . . her morals?"[170] The answer, following an objection and a brief sidebar, was telling: "He said she was chasing with other men."[171]

One of the more tragic aspects of the case was used to further cement the idea that Mary, like non-white women in general, did not respect the marriage bond because she did not display the characteristics of a good mother. Following Swan's death, Swan's brother Andy came up from California to help administer the estate.[172] After burying his brother, Andy then took Irene from

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167. *Weatherall II*, 115 P. at 1079.

168. Statement of Facts, *supra* note 14, at 17 (trial testimony of Francis Sackman on cross examination).

169. *Id.* at 103 (trial testimony of Thomas Ross on direct examination).

170. *Id.* at 78 (trial testimony of Ada F. Poul on re-direct examination).

171. *Id.*

172. *Id.* at 128 (exhibit no. 5).

her mother and brought her to an orphanage in Seattle, where he had her admitted when she was just three or four years old.[173] The defense held the view that this proved that Mary cared little for the institution of marriage or the family, as she accepted fifty dollars in exchange for a promise never to visit her daughter again.[174] Considerations about Mary's familiarity with her legal rights and her ability to assert them, let alone her ability to communicate effectively in English, were disregarded in much the same way that slaveholders convinced themselves after selling a child or separating a couple that slave women did not love their children or their husbands. "Fidelity to the marriage relation," Thomas R.R. Cobb said, in his influential treatise on the laws of slavery, "they do not understand and do not expect . . . ."[175] The court in Irene's case phrased it differently, but the effect was the same: "Illiteracy, no matter how great it may be, can never, to my mind, overcome the maternal instinct."[176] Further proof that Mary abandoned her claim to Swan's estate before the U.S. Attorney for twenty dollars only solidified the image[177]: Mary was neither a wife nor a mother.

But perhaps the strongest line of defense, and in many ways most striking, was not to sully Mary but to tarnish Swan. From the beginning, the strategy was to paint Swan as a "squaw man," a derisive term that conjured up images of a man who sought the passing pleasures of Indian women rather than the stability and respect of a white family. It began with Garland's first witness. "Did you know the custom that existed at that time as to white men living with Indian women?," he asked of Chris Wist who owned a hotel in Seattle.[178] Greenwood objected, as he would typically do when Garland asked the same question of subsequent witnesses. But Garland pressed on, revealing his hand to the court. "I offer to prove by this witness what the general practice was in those days . . . that Indian women were imported and the loggers lived first with one Indian woman and then another."[179] Swan, moreover, was no exception. "[Do] you know whether or not Swan Anderson was known as a 'squaw man'?," he inquired of Joseph Pitt.[180] Evidently, Garland felt the strategy was worth whatever collateral damage the testimony might cause. With witness

173. *Id.* at 3 (trial testimony of Elsie L. Bailey on direct examination).

174. *Id.* at 127 (exhibit no. 5).

175. THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA § 36, at 40-41 (Univ. of Ga. Press 1999) (1858).

176. Statement of Facts, *supra* note 14, at 166 (opinion of the Kitsap County Superior Court denying the motion for a new trial).

177. *Id.* at 127 (exhibit no. 5).

178. *Id.* at 58 (trial testimony of Chris Wist on direct examination).

179. *Id.* at 60 (trial testimony of Charles J. Severson on direct examination).

180. *Id.* at 62 (trial testimony of Joseph Pitt on direct examination).

after witness, he hammered away at the point that Swan slept with Indian women without care, and had little interest in establishing any significant ties. His reputation was that of a "bachelor," they all insisted, who enjoyed the company of sultry women.

In fact, Garland even went so far as to suggest that Swan may have died in the arms of an Indian prostitute. J.J. Smith, a longtime acquaintance of Swan's, testified that he was in Seattle the day Swan died. Garland sensed an opening. After a few preliminary questions, he got to the point. "Was he associating with Indian women in Seattle at the time [of his death]?"[181] Greenwood leapt to his feet with an objection, on the grounds that the testimony offered "no proof of anything."[182] But Garland was steadfast. "I want to prove at the time of his death he was associating with Indian women in Seattle in a lewd and immoral manner, which tends to prove he was not a married man."[183] After a back-and-forth with the judge, Garland explained his position further. "If this man lived with one Indian woman and then another, cohabited with one and then another, and had illicit relations with one and then another, it creates a doubt and has some probative value."[184] The court agreed and admitted the testimony.

Having created the opening, Garland pushed J.J. Smith to provide details. "Did you know a woman by the name of 'Kitty'—'Kitty Kennae[?]," he asked.[185] Getting the expected response, Garland sought to establish that Swan knew her too, asking if Swan might have even considered her "a friend."[186] Garland then dispensed with the niceties and went straight to the point. "Do you know whether he had illicit relations with her?"[187] Smith professed not to know, prompting Garland to prove through circumstantial evidence what he failed to get in direct testimony. "This 'Kitty Kennae,'" he asked, following a question about whether Smith knew if Swan died at Kitty's house, "what was her business?"[188] Greenwood objected, as he had done during other parts of Smith's testimony, but the court thought it a proper line of inquiry. "Isn't it a fact that she was an Indian prostitute?"[189] The one word answer said it all, with

181. *Id.* at 69 (trial testimony of J.J. Smith on re-direct examination).
182. *Id.*
183. *Id.*
184. *Id.* at 69-70.
185. *Id.* at 70.
186. *Id.*
187. *Id.*
188. *Id.* at 71.
189. *Id.*

Garland successfully focusing the court's attention on where Swan *might have* spent his last days: "Yes."[190]

Swan's cousins also joined in on the characterization, deliberately casting their relative as a man of little morals. Florence Gengler, a second cousin who was considerably younger than Swan, recalled that Swan's brother Andy had mentioned at the dinner table an "illegitimate girl" and an "Indian woman" that had lived with Swan.[191] Despite never having met him, Ms. Gengler had a confident response when asked to "[s]tate whether or not [Swan] lived with other women besides that one." "Yes; he did," she replied, although she felt little need to expand or identify anyone.[192] Ms. Gengler's sister, Alice Holman, further diminished the relationship by insisting Mary was Swan's help—the "housekeeper"—and "that he lived with [her] without being married to her and that this housekeeper had a daughter who was an illegitimate child . . . ."[193] Garland also introduced a letter from Swan's mother, who had passed by the time of the trial, but who had written to Andy after Swan's death. "He has a child but no wife," she wrote, firmly establishing that no one in Swan's family recognized the marriage.[194] Indeed, Swan's mother, perhaps unsurprisingly, was worried about the family's reputation, insisting that Andy "not let anyone know about this girl in Minnesota."[195]

Irene's attorney, Ray Greenwood, thus had to spend as much time establishing a marriage as he did rehabilitating Swan and Mary's character. Joseph Pitt, one of Garland's witnesses, admitted that Swan was not a "mixer" like other loggers.[196] The group apparently had a rough and tumble reputation. "You know, as a general thing, most of the loggers were what you call drinking men, mixers—have a good time," he delicately put it.[197] They would go down to nearby places like Pleasant Beach and Blakely and "have a good time."[198] But Greenwood pressed Pitt for details and Pitt admitted that Swan was different; he was a "quiet, retiring sort of man" who "[k]ept his own counsel."[199] When the others went out and got drunk, he stayed home.[200]

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190. *Id.*
191. *Id.* at 109-10 (trial testimony of Florence Gengler on direct examination).
192. *Id.* at 110.
193. *Id.* at 122 (trial testimony of Alice Holman on cross examination).
194. *Id.* at 135.
195. *Id.*
196. *Id.* at 63-64 (trial testimony of Joseph Pitt on re-direct examination).
197. *Id.* at 64.
198. *Id.*
199. *Id.* (trial testimony of Joseph Pitt on re-cross examination).
200. *Id.*

In rebuttal, Greenwood also called Sam Wilson, a sixty-eight-year-old chief from the Suquamish Reservation in northern Kitsap County. Chief Wilson described in detail the marriage ceremonies that took place in his community between white men and Indian women in decades past. The contrast between Chief Wilson's testimony and that of the white witnesses was stark. Garland himself had earlier justified a particular line of questioning of Thomas Ross by explaining to the court "that it was the custom at that time for white men to pay the relatives of Indian women a small amount of money and to live with the Indian women until they saw fit to leave . . . ."[201] Ross later had a chance to elaborate and wasted little time in denigrating Native culture. "The Indians looked upon the [female] children as chattel and made them [white men] pay for them with blankets or money . . . ."[202]

But Chief Wilson painted a very different picture, reflecting a perspective of whites having little understanding of the Indian way of life. For those men who were interested in Indian women, he explained, the process began when the man approached the woman's parents and the tribal elders and asked for permission to marry.[203] In doing so, the man provided the mother and father with a gift of a "hundred dollars or more . . . ."[204] If they granted him permission, the chief performed the ceremony, complete with questions about love and commitment, and then the elders distributed "all that money to all the people there—give so much a-piece [sic]—to witness that marriage . . . ."[205] After the ceremony, the parents would host an elaborate dinner, and their daughter would then go to live with her husband in his camp.[206] Greenwood asked Chief Wilson to elaborate on the money transaction, seen by so many whites as evidence that the process was not legitimate and that the Indians sold their daughters to the highest bidder. It was to "witness that marriage," Chief Wilson said. "That is what the Indians do to witness the marriage, so the people will know that so-and-so are married; so the big Chiefs will know that she is married."[207]

Chief Wilson also made clear that the image of the sexually depraved Native woman had no basis in his reality. Greenwood asked him if the marriage ceremony had to be performed, or whether the Chief would "let them have the daughter without doing that."[208] "No," he replied, "they would not

201. *Id.* at 90 (trial testimony of Thomas Ross on re-direct examination).
202. *Id.* at 102 (trial testimony of Thomas Ross on direct examination).
203. *Id.* at 151-52 (trial testimony of Sam Wilson on direct examination).
204. *Id.* at 152.
205. *Id.* at 152, 153.
206. *Id.* at 152.
207. *Id.* at 153.
208. *Id.*

unless they do that."[209] He then added without prompting, "Especially Chief Seattle in Kitsap County; he would not allow Indian women to marry whitemen without doing that."[210]

The respondent's attorney, Marion Garland, nonetheless tried to shake Chief Wilson into acknowledging his theory of the case—that Swan kept a woman for a brief period and then discarded her when he was through. "Some of them lived with them without getting married, didn't they?," he asked as his first question on cross.[211] But Chief Wilson did not falter. "I don't know them people but all these people who lived here, I know they married," he responded.[212] The court also got into the questioning, unwilling to drop its image of the illicit encounters between white men and Native women.

> Court: Mr. Wilson, do you know whether any Indian women lived with any white loggers in those days without marrying—just lived a while and went off and lived with somebody else?
> A No; the law is they will marry.
> Court: Let me ask this. Do you know whether any Indian women would live with first one logger and then another without marrying one of them?
> A No, No . . . .[213]

In a last ditch effort, Garland tried to press Chief Wilson into admitting that this was only the practice in the local tribes, and would not apply to Mary who was from Canada. But Chief Wilson's answer put to rest any doubt on the matter: "That [the marriage ceremony] was the Indian way."[214]

V. "SWAN ANDERSON AND THIS INDIAN WOMAN WERE NEVER MARRIED"

The evidence ultimately was not enough, at least to the white decision-maker. At the close of the trial, which took two full days to present, the court ruled against Irene and declared that her parents had never been married.[215] In so holding, it pointed out that there was "no direct evidence of any marriage, or contract of marriage, between the parties, either according to our own law or according to any Indian custom."[216] As for the testimony, the court refused to

209. *Id.*
210. *Id.* at 153-54.
211. *Id.* at 155 (trial testimony of Sam Wilson on cross examination).
212. *Id.*
213. *Id.* at 156.
214. *Id.* at 155.
215. Petitioner's Transcript on Appeal, *supra* note 26, at 5-7 (opinion of the Kitsap County Superior Court regarding the petition for letters of administration).
216. *Id.* at 6.

resolve it in favor of Irene. "There were many witnesses who testified regarding Swan's cohabitation with this particular woman," it said, but there were also "some who testified as to his promiscuous habitation with other women of the same race."[217] Nor was the court persuaded by Greenwood's argument—long the rule in Washington and elsewhere—that doubts should be resolved in favor of a marriage.[218] "[T]he petitioner has not," the court ruled, "supported her claim of relationship or right to appointment as adminixtratrix [sic] of the estate."[219]

Soon after, however, additional evidence emerged which Greenwood argued merited a new trial. It was the discovery of a younger sister named Celia that Irene never knew she had. Celia's testimony—brought to light after Irene's husband and her attorney found Celia married and living on a reservation[220]—was important because she could provide detailed information about what happened after their father Swan died. Before, the defense had used what little information there was to racialize Mary into a bad mother who gave up her child for fifty dollars.[221] But the new evidence suggested something vastly different. Andy, it turns out, had taken not just Irene but also Celia to the orphanage after his brother's death.[222] Far from being silent or complicit, as suggested in the first trial, Mary was extremely distraught—she "begged and entreated" him to not take her girls away.[223] But Andy was determined, using the privilege and authority that came with his white skin. Fearing that she was about to lose both, in a replay of countless stories with similar endings from the slave South, Mary consented to give up one if she could keep the other.[224] Andy then gave her Celia and had Irene—or Ida, as she was called upon admittance—placed in the home, with the director extracting the promise that Mary never try to see "or bother" her daughter again.[225]

With nothing but fleeting memories of her mother, Irene remained in the orphanage for a dozen years, until 1901.[226] During that time, Andy met with

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217. *Id.*

218. Statement of Facts, *supra* note 14, at 91 (argument of counsel).

219. Petitioner's Transcript on Appeal, *supra* note 26, at 7 (opinion of the Kitsap County Superior Court regarding the petition for letters of administration).

220. Affidavit of Herman York at 1-3, *In re* Estate of Anderson, No. 3600 (Wash. Super. Ct. Kitsap Cnty. Apr. 10, 1930) (collection of Washington State Archives).

221. *See supra* notes 172-177 and accompanying text.

222. Affidavit of Celia Obi in Support of Motion for a New Trial, *supra* note 41, at 2.

223. *Id.*

224. *Id.*

225. *Id.*

226. Statement of Facts, *supra* note 14, at 48 (trial testimony of Herman York on direct examination).

Celia and her mother on different occasions. According to Celia, Andy insisted that he was the girls' guardians, and promised that he would provide for Celia and Irene.[227] Evidence indicates that he followed through on this promise with Irene, leaving her half his property in his will,[228] but he never gave Celia anything that she could remember.[229] In addition, while Irene was in the orphanage, Celia said that Mary attempted on several occasions to visit her daughter but was turned away every time.[230] Later, after Irene went to live with the Yorks and eventually married one of the sons, Andy met again with Mary, with Celia present. What Andy told her was emblematic of how he had treated her over the years and was consistent with the racial assumptions of the day. In a striking display, he told her that Irene, her oldest daughter, was dead when in fact she was alive and well and living nearby.[231]

Still, despite the proffer of this new evidence, the trial court was unconvinced. It simply could not imagine a mother giving up her child, and thus the only explanation was that Mary, like slave women in the slaveholder's mind, did not embrace the institution of family or marriage. The court said that Celia's story, in a quiet nod to the view that Indians could not be trusted, was so fantastical that the court "could not accept it as being true,"[232] despite the close companionship between Celia and her mother throughout her life. The judgment stood: "Swan Anderson and this Indian woman were never married."[233]

Greenwood subsequently took the case to the Washington State Supreme Court. There, the court acknowledged that, had the facts been limited to what was introduced in the first trial, it would have left the judgment undisturbed.[234] But Celia's affidavit made it possible that Irene's claims had merit. Importantly, and perhaps surprisingly, the court acknowledged that the trial court may have misunderstood Mary's motive for giving up Irene:

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227. Affidavit of Celia Obi in Support of Motion for a New Trial, *supra* note 41, at 3.

228. Transcript on Appeal of Irene York at 1, *Anderson I*, 1 P.2d 231 (Wash. 1931) (No. 22892) (collection of Washington State Archives) (last will and testament of Andy P. Anderson).

229. Statement of Facts, *supra* note 40, at 10 (trial testimony of Celia Obi on direct examination).

230. Affidavit of Celia Obi in Support of Motion for a New Trial, *supra* note 41, at 3.

231. *Id.*

232. Statement of Facts, *supra* note 14, at 166 (opinion of the Kitsap County Superior Court denying the motion for a new trial).

233. Petitioner's Transcript on Appeal, *supra* note 26, at 10 (judgment of the Kitsap County Superior Court).

234. *Anderson I*, 1 P.2d 231, 233 (Wash. 1931).

> The woman was an Indian, far away from her own people. She was indigent and helpless, with two infants to care for besides herself. By allowing the older one to be taken into the children's home she was not sacrificing it, but assuring herself that it would be well cared for and protected, leaving her the better able to maintain the younger child and herself.[235]

It also offered a simple explanation for Mary giving up the claim on the estate: that it was "worthless so far as any right of inheritance was concerned."[236] It therefore reversed and remanded.

In the second trial, however, Irene fared no better. Celia affirmed the details in her affidavit, testifying about the pain her mother experienced in losing her husband and giving up her child.[237] Celia also followed up on a statement, first made in her affidavit for a new trial, that her mother had told her that she and her father had been married by a Catholic priest.[238] The defense seized on this claim more than any other, seeking to demonstrate that that there was no official record of any marriage.[239] The strategy was effective. The trial court rejected once again Irene's claim of legitimacy, highlighting the absence of a record of a formal marriage to conclude that there must not have been one.[240]

Greenwood appealed the case one more time, but a curious development must have forewarned him that his efforts would not be successful. Between the time of the second judgment and the second appeal, the trial court judge—William Steinert—had been appointed to the state's highest bench.[241] Retreating behind a wall of formalism, Washington's supreme court affirmed the decision of its new colleague, agreeing that the absence of any documentary

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235. *Id.*

236. *Id.*

237. Statement of Facts, *supra* note 40, at 8 (trial testimony of Celia Obi on direct examination).

238. Affidavit of Celia Obi in Support of Motion for a New Trial, *supra* note 41, at 1-2 ("Swan Anderson asked the mother of affiant to marry him and that they were married by a priest (whose name affiant can pronounce but not spell) in the presence of John Penson and his wife, the sister of affiant's mother, who witnessed the ceremony."); *see* Statement of Facts, *supra* note 40, at 7 (trial testimony of Celia Obi on direct examination) ("[T]hey got married by a priest that travels around; they call him Chirouse . . . .").

239. *See* Statement of Facts, *supra* note 40, at 56-80 (trial testimony of Theodore Ryan on direct examination) (detailing his efforts, as Chancellor of the Catholic Diocese of Seattle, to locate a marriage record among the papers left behind by Father E.C. Chirouse).

240. Memorandum Decision at 3-4, *In re* Estate of Anderson, No. 3600 (Wash. Super. Ct. Kitsap Cnty. Mar. 7, 1932) (collection of Washington State Archives).

241. CHARLES H. SHELDON, THE WASHINGTON HIGH BENCH: A BIOGRAPHICAL HISTORY OF THE STATE SUPREME COURT, 1889-1991, at 322-25 (1992).

evidence of a marriage "refutes the fact of any ceremonial marriage."[242] Hence, under the laws of Washington, this meant that Swan and Mary were never husband and wife. Like Harvey Creasman, Irene was left with nothing, and the distant white heirs took all.

CONCLUSION

Sadly, the result in these cases was the rule not the exception. In an early case with strikingly similar facts to Irene's, Charles Kelley sought to establish that he was the legitimate heir of Michael Kelley, a white man from Kitsap County who died in 1870.[243] Charles's mother was Julia, a Native American woman, and Charles was tasked with proving that Michael and Julia were husband and wife.[244] The evidence suggested that Michael and Julia were married according to the custom outlined by Chief Wilson, Irene's witness, and lived together for five years.[245] But the court in 1893 was no more predisposed to recognize marriages between whites and Indians than it was forty years later. Derisively dismissing the money offered during the ceremony—"Michael Kelley obtained this woman by paying two or three dollars in silver to her sisters"—the court ruled that "[a]ll of the testimony in relation to these parties agreeing to live together" should never have been considered.[246] "Such arrangements," it held, "could hardly amount to marriages under any law."[247]

Other cases reached similar results, with immediate family members—most often wives and children—from mixed marriages passed over by the courts, ensuring that property remained in the hands of the ever-important and ubiquitously-present white stakeholders.[248] Perhaps more discouraging than the results, however, was the method by which courts assured racial dominance, drawing on notions that privileged whiteness over other racial groups. For example, the court labeled Susan Enos an "adventuress" for laying claim to her white husband's estate, a designation that surely would never have

242. *Anderson II*, 17 P.2d 889, 889 (Wash. 1933).

243. Kelley v. Kitsap County, 32 P. 554, 554-55 (Wash. 1893).

244. *Id.* at 555.

245. The marriage took place in 1865 and Michael died in 1870. *Id.* at 554-55.

246. *Id.* at 555.

247. *Id.*

248. *See* Watson v. Watson, 161 P. 375, 376-77 (Wash. 1916) (affirming the conclusion that an Indian woman was not the white decedent's wife and had no rights to his estate, despite the fact that the two lived together for thirty-three years); Miller v. Simmons, 121 P. 462, 462 (Wash. 1912) (ruling that the probate proceedings were proper and that the title to real property would pass to a corporation rather than to the surviving children of a white man and an Indian woman); Metcalfe v. Sackman, 120 P. 84, 85 (Wash. 1912) (keeping property in the hands of a white son rather than the decedent's Indian family).

been used to describe a white woman who lived with a man for nine years and had three children by him.[249] Or consider the dispute over John Wilbur's estate—possibly the only case where the court actually found that a marriage ceremony between a white man and a Native American woman had taken place.[250] Still, it conveniently found that the ceremony, done according to Indian custom, occurred in 1867 while the criminal bans against interracial marriage were in effect.[251] This allowed the court to conclude that the marriage was never valid.[252] A subsequent effort to fix the date in 1868, coupled with evidence that the couple lived together for nine years, did nothing to nudge the court into recognizing the marriage.[253] "They lived together, and had children born to them, and that was all," it concluded with an air of mockery.[254] Like Irene York, John's wife and two children—all classed as Indians—took nothing, while his second wife, a white woman, inherited everything.

Notably, the implications from these cases have snaked their way into more recent times. Indeed, following the decision in Harvey Creasman's case, the court found itself in a troubling position. It was one thing to evict Harvey, a black man, from his home and deprive him of the many possessions purchased with his paychecks but in his wife's name. It was quite another to turn away white persons who, after many years of living in "meretricious" relationships, unwittingly found themselves in Harvey's position. Rather than deprive them of the property acquired during the relationship, the court spent the next four decades carving out carefully crafted exceptions to the "*Creasman* Presumption" to allow these white spouses and children to inherit what Harvey and Irene never did.[255]

In 1984, the court finally closed out this sad chapter in its history. In that year, the court overruled the *Creasman* decision, holding that courts should examine each "meretricious" relationship and disburse property as the court finds "just and equitable."[256] While this decision should appropriately be remembered as a positive step in the right direction, it is important to remember that for Irene York, Harvey Creasman, and countless others who courageously crossed the color line, the damage had already been done.

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249. Enos v. Hamblen (*In re* Enos' Estate), 140 P. 675, 675, 677 (Wash. 1914).

250. Wilbur's Estate v. Bingham, 35 P. 407, 407 (Wash. 1894).

251. *Id.* at 407-08.

252. *Id.* at 409.

253. Follansbee v. Wilbur, 44 P. 262, 263 (Wash. 1896).

254. *Wilbur's Estate*, 35 P. at 407.

255. *See In re* Marriage of Lindsey, 678 P.2d 328, 330 (Wash. 1984) (outlining the exceptions of "tracing source of funds," "implied/partnership/joint venture," "resulting/constructive trust," "contract theory," and "cotenancy").

256. *Id.* at 331.