

Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South

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CONTENTS

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|---|-----|
| I. INTRODUCTION | 111 |
| II. THE SHIFTING ESSENCES OF RACE IN THE NINETEENTH-CENTURY SOUTH | 123 |
| A. <i>Racial Knowledge</i> | 124 |
| B. <i>Evidence and Essences</i> | 132 |
| 1. <i>Abby Guy</i> | 133 |
| 2. <i>Race as Physical Marker</i> | 137 |
| 3. <i>Race as Documented Ancestry</i> | 141 |
| 4. <i>Race as Ascriptive Identity: Reputation, Associations, and Reception in Society</i> | 147 |
| 5. <i>The Rise of Race as Science and Performance</i> | 151 |
| III. PERFORMING WHITENESS | 156 |

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| | |
|--|-----|
| A. <i>Performing White Manhood</i> | 158 |
| B. <i>Performing White Womanhood</i> | 166 |
| IV. CONCLUSION..... | 177 |
| A. <i>Postwar Continuities</i> | 177 |
| B. <i>Trials, Law, and Performance</i> | 180 |
| C. <i>Law, Race, and Racism Today</i> | 181 |
| APPENDIX..... | 186 |

I. INTRODUCTION

In April of 1855, Abby Guy sued William Daniel in the Circuit Court for Ashley County, Arkansas, complaining that he held her and her children unfairly in slavery despite the fact that she was white.¹ The trial was held in the small town of Hamburg's brand-new courthouse, no doubt drawing spectators from all over the county to witness the dramatic determination of Guy's racial status.² After Guy won her case, William Daniel appealed it to the state supreme court, and it was tried again in a neighboring county before she finally prevailed in the Arkansas Supreme Court on the eve of the Civil War. At the two trials, jurors watched Guy and her children display themselves for inspection, read documents of sale and a will, and listened to the opinions and descriptions of medical experts and witnesses from several counties. Witnesses testified about Guy's appearance, her reception in society, her conduct, her self-presentation, and her inherited status. In each case, the judge left the question of "race" for the jury to decide, because the jury represented the community consensus.³

Trials like Abby Guy's, at which the central issue became the determination of a person's racial identity, were a regular occurrence in Southern county courts in the nineteenth century. While nineteenth-century white Southerners may have believed in a racial "essence" inhering in one's blood,⁴ there was no agreement about how to discover it. Legal determinations of race could not simply reflect community consensus, because there was no consensus to reflect. Despite the efforts of legislatures to reduce racial identities to a binary system, and of judges to insist that determining race was a matter of common sense, Southern communities

1. Transcript of Trial, Daniel v. Guy, No. 4109 (Ark. Ashley County Cir. Ct. July 1855) (collection of Pulaski County Law Library, Little Rock, Ark., Ark. Supreme Court Records & Briefs), *rev'd in part*, 19 Ark. 121 (1857), *aff'd after remand*, 23 Ark. 50 (1861) [hereinafter Transcript of Trial, Daniel v. Guy].

2. Ashley County was first settled in the 1830s and established as a county in 1848. The courthouse was built in 1854. The April term of 1855 was probably the first term of the circuit court held in the new courthouse. See REFLECTIONS OF ASHLEY COUNTY 73 (Robert A. Carpenter, Sr. & Mary Imogene Noble Carpenter comp., 1988).

3. It is striking how much discretion judges gave juries to decide racial status, given the frequent use during this period of legal presumptions to take control from the jury. While presumptions based on appearance governed slave or free status, they were always held to be rebuttable, and no presumptions governed racial status itself. The major treatises on presumptions and the law of evidence more generally made no mention of racial determination. See, e.g., JOHN D. LAWSON, THE LAW OF PRESUMPTIVE EVIDENCE (1886); JOHN H. MATHEWS, A TREATISE ON THE DOCTRINE OF PRESUMPTION AND PRESUMPTIVE EVIDENCE (1830).

4. For a discussion of the rhetoric of "blood" with regard to race in 19th-century antimiscegenation law, see Eva Saks, *Representing Miscegenation Law*, RARITAN, Fall 1988, at 39.

harbored disagreement, suspicion, and conflict—not only over who was black and who was white, but over how to make such determinations at all.⁵

By examining the kinds of evidence witnesses and litigants brought forth at trial, I hope to suggest that law, broadly defined, played an important role in constituting the cultural meaning of racial identities. In this Article, I argue that, over the course of the antebellum period, law made the “performance” of whiteness increasingly important to the determination of racial status.⁶ Doing the things a white man or woman did became the law’s working definition of what it meant to be white.⁷ This

5. Of course, trial records necessarily reveal much more about the racial ideology of the Southern whites than that of people of color, because whites controlled the courts, composed the juries, and gave most of the testimony. It is beyond the scope of this Article to investigate the ideology of “color” of people of color in the 19th century, although I am pursuing this research elsewhere. My preliminary findings based on other records of ex-slaves and free people of color suggest that they exhibited no more agreement than did the white “community” over racial identities. Werner Sollors touches on many issues regarding “mulattoes” and racial identity in his study of “interracial literature” by black authors. See WERNER SOLLORS, *NEITHER BLACK NOR WHITE YET BOTH: THEMATIC EXPLORATIONS OF INTERRACIAL LITERATURE* (1997).

6. On courts as sites of performance, see generally *CONTESTED STATES: LAW, HEGEMONY AND RESISTANCE* (Mindie Lazarus-Black & Susan F. Hirsch eds., 1994) [hereinafter *CONTESTED STATES*]. I follow Judith Butler in my use of the notion of performativity. See JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX”* 1-23, 167-242 (1993) [hereinafter *BUTLER, BODIES THAT MATTER*]; JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 128-141 (1990). Academic studies of “performance” draw on “two quite different discourses, that of theater on the one hand, of speech-act theory and deconstruction on the other.” Eve Kosofsky Sedgwick, *Queer Performativity: Henry James’s The Art of the Novel*, 1 *GLQ* 1, 2 (1993). In this study, I am concerned both with courtrooms as arenas for the performance of dramatic cultural rituals and, like Butler and Sedgwick, with the ways personal identities are iterated through a series of acts. Cf. generally *BUTLER, BODIES THAT MATTER*, *supra*, at 171 & 275 n.4 (discussing Nella Larsen’s 1929 novel *Passing* and noting the way Bellew, the husband of a woman who passes for white, “produces his whiteness” through “reiteration and exclusion [of blackness]”).

7. I focus on the litigation of *whiteness*—as opposed to *blackness*—because the boundary that mattered most, both before and after the Civil War, was the line between white and “of color,” even when intermediate categories were recognized between white and black. Furthermore, by focusing on the litigation of whiteness, this study seeks to reveal the *content* of white identity at a time when whiteness was anything but “unmarked,” as it sometimes appears to be today. That is, white Southerners were keenly conscious of their identity as white and that identity meant a great deal to them, both consciously and subconsciously.

In recent years, scholars from diverse disciplines have begun to question the unmarked quality of whiteness in contemporary discourse and examine the way “whites tend to think that everyone except them has a race . . .” Naomi R. Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 *MICH. L. REV.* 965, 968 (1997). Historical works on whiteness have focused

attention on a series of formative events and processes: the precedent of British colonial treatment of the Irish; the early, multiracial resistance to indentured servitude and quasilavery, which culminated in the defeat of Bacon’s Rebellion in late seventeenth-century Virginia; the self-identification of “free” workers as white in the antebellum North; and the construction of a “white republic” in the late nineteenth century.

Howard Winant, *Behind Blue Eyes: Whiteness and Contemporary U.S. Racial Politics*, in *OFF WHITE: READINGS ON RACE, POWER AND SOCIETY* 40, 47 (Michelle Fine et al. eds., 1997) (citations omitted). See generally THEODORE W. ALLEN, *THE INVENTION OF THE WHITE RACE* (1997); NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995); DAVID R. ROEDIGER, *THE*

definition of race as performance operated in a law-like fashion, prescribing certain rules of behavior for people of different races. Furthermore, one of the most important ways in which men in particular could perform whiteness was, paradoxically, through the exercise of legal rights. Witnesses at trial frequently proved a man's whiteness by reporting on his performance of acts of citizenship—voting, mustering for the militia, sitting on a jury—that made rightsholding part of the definition of whiteness for men. The trials thus reveal the implications of a racial ideology that decreed that “negro blood” made a person inferior in virtue, competency and behavior—that “blood” made a person act in certain ways. The “laws” of race could be subverted by people who followed all the rules of whiteness but “hid” their intrinsic blackness. Law, which provided the forum for these challenges, made a discourse of race as performance especially salient.⁸

Recognizing that this discourse of performance rose together with “scientific” ways of thinking about race may unsettle the comfortable certainty that race was “that way then, and this way now.” Many contemporary arguments about race on both sides of the political spectrum depend on a view of racism in the past as biological essentialism.⁹ Peggy

WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1991); ALEXANDER SAXTON, *THE RISE AND FALL OF THE WHITE REPUBLIC* (1990). Several important monographs and collections of essays look at the social construction of “whiteness” in literature, society, and culture from a variety of disciplinary perspectives. See *DISPLACING WHITENESS: ESSAYS IN SOCIAL AND CULTURAL CRITICISM* (Ruth Frankenberg ed., 1997) (sociology and cultural studies); RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* (1993) (sociology); TONI MORRISON, *PLAYING IN THE DARK* (1992) (literary criticism); OFF WHITE, *supra* (social psychology and education). Shelley Fisher Fishkin provides an excellent overview of the literature to 1995. See Shelley Fisher Fishkin, *Interrogating “Whiteness,” Complicating “Blackness”: Remapping American Culture*, 47 *AM. Q.* 428 (1995). This work has begun to find its way into the law reviews; abbreviated versions of recent articles appear in *CRITICAL WHITE STUDIES* (Richard Delgado & Jean Stefancic eds., 1997).

8. I use the phrase “discourse of performance” to emphasize that racial performances most often did not take place in court but rather were reported on by witnesses. As Elin Diamond points out, “performance” refers both to a “doing” and a “thing done.” Elin Diamond, *Introduction to PERFORMANCE AND CULTURAL POLITICS* 4-5 (Elin Diamond ed., 1996) [hereinafter *PERFORMANCE AND CULTURAL POLITICS*]. Here, I am primarily concerned with courtroom descriptions and analyses of “things done.” For other discussions of performative identities, see *PERFORMATIVITY AND PERFORMANCE* (Andrew Parker & Eve Kosofsky Sedgwick eds., 1995); and *PERFORMING FEMINISMS: FEMINIST CRITICAL THEORY AND THEATRE* (Sue-Ellen Case ed., 1990).

9. For a critical review of this historiography, see Ann Laura Stoler, *Racial Histories and Their Regimes of Truth*, 11 *POL. POWER & SOC. THEORY* 183 (1997). Stoler writes:

[W]hen scholars distinguish between racisms of past and present, they often imply that racisms once existed in more overt and pristine form. . . . I take this “flattening” not to be arbitrary, but contingent on a basic and historically problematic contrast between a biologized, physiological and somatic racism of the past held up as fundamentally distinct from a more nuanced, culturally coded, and complex racism of the present.

Id. at 185.

Pascoe has identified “modernist” or “color-blind” racial ideology with two views, analytically distinct but sometimes conflated: one in which “race” is culturally constructed, with no biological basis, and one in which race is biologically based but culturally irrelevant. Academic opinion has adhered to the first vision, whereas American courts have tended to accept the second.¹⁰ Both of these views depend on an understanding of a past in which race once meant simply biology, and racism was something “hard,” scientifically based, and natural.

I will say a few words about where this study fits into the cluttered landscape of writing about race. There is an enormous literature on the social construction of race, in a variety of disciplines, and I want neither to reproduce nor to critique that literature here. Historians of race and racial ideology often cite legal rules defining race in terms of fractions of “blood” as evidence of race’s “social construction.”¹¹ The fact that these statutory definitions of race changed over time and varied across place—especially the fact that our contemporary definition of black by a one-drop standard developed only in the last 130 years—has suggested to scholars that what “race” means is historically contingent, dependent on political and social circumstances. There are a number of claims included in the “social construction” argument. First, and probably least controversial, is the claim that whether or not there is some inner, “real” essence to race, whether or not racial designations have a biological or anthropological basis in fact, the *social meaning* of race—which cultural attributes are attached to racial designations, which rights and disabilities accompany racial status, and so on—has changed over time and varied across space. Second, most of the work on the social construction of race seeks to pinpoint a moment at which race was “invented” or when it “originated.”¹² Thus, historical writing in this area has a “chicken-and-egg” quality because it has revolved around a

10. See Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of “Race” in Twentieth-Century America*, 83 J. AM. HIST. 44, 61-69 (1996).

11. See, e.g., F. JAMES DAVIS, WHO IS BLACK? 1-16 (1991); EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 328-39 (1975).

12. Most histories of race and racism, as Ann Stoler points out, emphasize “invention,” “origins,” and the beginning of “race” as a meaningful social category. Stoler, *supra* note 9, at 187-89. No discussion of the history of race in America is complete without a mention of the first twenty “Negars” who set foot in Virginia in 1619, or of the proposition that early Virginia society was not organized along racial lines, but rather that those lines arose from the economic forces that led to the enslavement of Africans and not Europeans. See, e.g., GEORGE FREDRICKSON, *The Social Origins of American Racism*, in THE ARROGANCE OF RACE 189 (1981); WINTHROP JORDAN, WHITE OVER BLACK 44 (1968); MORGAN, *supra* note 11, at 295-337; Oscar Handlin & Mary F. Handlin, *Origins of the Southern Labor System*, 7 WM. & MARY Q. 199 (1950), reprinted in COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT 230 (Stanley N. Katz & John M. Murrin eds., 3d ed. 1983).

debate over which came first: racism or slavery.¹³ Those who emphasize the social construction of race argue that racism, defined basically as meaningful social recognition of racial difference, developed out of the relations of slavery, which arose from primarily economic causes.¹⁴ At its most extreme, some scholars have claimed that race is an “illusion”—that there is no basis in science, culture, or shared history to group human beings by “race.” Under this view, race is pure ideology.¹⁵

The debate over constructivism—not only with respect to race but also in relation to a variety of aspects of human identity—is an important one. For the purposes of this Article, however, I want to assume at least the weaker version of the social construction of race, in order to open certain questions about how that construction might have taken place in the courtroom.¹⁶

One way of understanding the relationship of law and race in the South is to read formal expressions of law, such as statutes and common law rules regarding racial definition, as evidence of changing social beliefs about

13. FREDRICKSON, *supra* note 12, at 193 (calling it a “chicken-and-egg debate”).

14. Did European Americans enslave Africans because they were black and therefore worthy of enslavement, or did they come to see “blackness” as an inferior and degraded status because, for economic and political reasons, African Americans had become the exclusive class of slaves? While this debate has lost some of its steam, partly because of the salutary efforts of historians of the African diaspora to put the United States experience of slavery back into its world context, discussions of the “social construction of race” still draw heavily on the work of those scholars who argued that slavery led to racism. Barbara Fields’s influential polemic, *Slavery, Race, and Ideology in the United States of America*, laid the groundwork for what has become a commonplace. Race, she explained, is an ideology, created to justify relations of oppression and continually recreated today, by “blacks” and “whites.” See Barbara Fields, *Slavery, Race, and Ideology in the United States of America*, NEW LEFT REV., May/June 1990, at 95, 117.

Theodore Allen describes the debate among historians as one between a “psycho-cultural” explanation for racism and a “socio-economic” explanation for racism. Like Barbara Fields, Allen brings a Marxist bent to his socioeconomic history of racism, along with a belief that if racism did fulfill deep-seated psychological needs, it would be ineradicable. Therefore, psychocultural explanations of racism must be defeatist and fatalistic about the possibilities of a world free from racial oppression. See ALLEN, *supra* note 7, at 4-21.

15. See, e.g., KWAME ANTHONY APPIAH, IN MY FATHER’S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE 43-73 (1992). Appiah’s discussion of the consensus among anthropologists, biologists, and geneticists regarding the incoherence of racial categories is less controversial than his claim that equal incoherence follows from the attempt to base “race” on shared culture, politics, or history.

16. Even so, much of what I will suggest about legal determinations of race can be accepted from a position of “realism” or “essentialism” about race. In this respect, there is a great deal of congruence between constructivism debates in the context of race and of sexuality. Janet Halley has shown the wide stretch of “common ground” shared by “weak essentialists” with respect to sexuality and “weak constructivists.” Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 546-68 (1994). That is, in the case of race, even if you believe, as a “weak essentialist” does, that the racial categories of “black” and “white” correspond to some “irreducible and therefore constitutive characteristic[s], regardless of [their] source,” you may still be able to accept my account of the ways in which people in the courtroom gave evidence about those distinctions, which they could not ascertain with any precision. *Id.* at 548.

race. Implicit in this approach is a functionalist view of law: Law changes in response to the needs and “interests” of society, or of the class with power in society.¹⁷ Of course, this view makes the most sense when one focuses on legislation, the legislative branch of government being the most susceptible to the pressures of public opinion and “interest groups.” By contrast, some critical race scholars insist on the importance of law in the process of racial construction.¹⁸ Ian Haney López, one of the few legal scholars to go beyond the study of statutes to look at the case law on racial determination, subtitled his study, “The Legal Construction of Race,” suggesting a powerful role for courts in the creation of racial identity.¹⁹ Legal scholars and historians, however, have paid scant attention to the records of trials in local courts.²⁰

17. Robert Gordon, in a taxonomy of legal history that could apply equally to most general histories of race in the United States, calls this approach “evolutionary functionalism.” Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 59 (1984).

18. See, e.g., Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1 (1991); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437 (1993); Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 STAN. L. REV. 747 (1994) (reviewing APPIAH, *supra* note 15).

Several legal scholars have referred directly to a few of the cases in this study, as cautionary examples of relying on law to construct or deconstruct racial categories. Christine Hickman, in an article about the proposal to add a “multiracial” category to the U.S. Census, discusses several of these cases to demonstrate the absurdity of legal determinations of arbitrary racial boundaries and the dangers of “re-biologizing” race. See Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161 (1997). Hickman, Ian Haney López, and Kenneth Karst, in articles that are primarily theoretical, also give examples of these cases to illustrate the role of law in creating identities. See Haney López, *supra*; Hickman, *supra*; Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 243 (1995).

19. IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996). Haney López makes two specific arguments about “legal construction.” First, he argues that racial definitions set out in court literally shaped physical appearances by excluding certain people as “non-white” and preventing them from intermarrying with the white population. See *id.* at 116-23. Second, he argues that law “legitimizes the existence of races,” *id.* at 124, and “help[s] racial categories to transcend the sociohistorical contexts in which they develop,” *id.* at 126. His study examines a set of federal appellate opinions he calls the “racial prerequisite cases,” in which courts determined the racial status of an immigrant in order to decide whether he could be naturalized as a citizen. From 1790 to 1952, only “white persons” were eligible for naturalized citizenship.

20. Two historians have investigated the individual stories of the subjects of two trials I discuss at length in this Article concurrent with my research. Neither of their case studies are primarily concerned with legal history. See MARTHA HODES, *WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH-CENTURY SOUTH* (1997); Walter Johnson, *Slavery, Whiteness, and the Market: The Strange Case of Alexina Morrison* (1997) (unpublished manuscript, on file with *The Yale Law Journal*). There are only a handful of 19th-century legal histories drawing on large numbers of trial court records. See LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870-1910* (1981); Wayne McIntosh, *150 Years of Litigation and Dispute Settlement: A Court Tale*, 15 L. & SOC’Y REV. 823 (1981); Thomas D. Russell, *South Carolina’s Largest Slave Auctioneering Firm*,

This relative inattention is perplexing, given that ancestry rules were often insufficient to decide actual cases. Juries made the racial determinations in the great majority of cases in the nineteenth century. Indeed, courts consistently held that juries should be allowed to see and hear the widest array of evidence and should have great discretion in finding the “facts” of race. Particularly in the antebellum period, the realms of “law” and “fact” were far from distinct; although the nineteenth-century trend was towards greater power for the judge, vigorous popular efforts to limit judicial power, and strong customary traditions of juries deciding “law” questions, meant that the battle was far from won.²¹ Juries received instructions about the “legal” definition of “negro” and “mulatto” in these trials, but such instructions did not settle the question of racial determination. In some cases, the judge did not specify a definition of “negro” or “white.” Instead, the judge simply charged the jury that if they found the person to be negro, it would lead to one result, and if they found her to be white, it would lead to another. In other cases, the judge instructed the jury about the kinds of evidence they could consider in making their determination but said nothing more about the nature of what they were determining. In still other cases, the jury instructions specified some fraction of African ancestry as the definition of “negro” or “mulatto.”

68 CHI.-KENT L. REV. 1241 (1993); Christopher Waldrep, *The Making of a Border State Society: James McGready, the Great Revival, and the Prosecution of Profanity in Kentucky*, 99 AM. HIST. REV. 767 (1994); Christopher Waldrep, *Substituting Law for the Lash: Emancipation and Legal Formalism in a Mississippi County Court*, 82 J. AM. HIST. 1425 (1996).

21. On the jury as a central instrument of governance with power over law and fact questions, see WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW 20-30* (1975); and Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579 (1993). For example, during the 1830s, most Southern states instituted some form of judicial elections; passed laws limiting judges' instructions only to those requested by the litigants, meaning that some “law” questions might effectively be left to the jury; and, at least during the antebellum period, jurors “were told frequently that they had the right and power to reject the judge’s view of the law.” Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, LAW & CONTEMP. PROBS., Autumn 1980 at 51, 54; see, e.g., Mississippi Limiting Act of 1833, ch. 37, 1839 Miss. Laws § 227 (“That for the better preservation of the sanctity of the right of trial by . . . jury, no judge or justice . . . shall . . . charge said jury on points or principles of law, applicable to the case before them, unless the parties to such issue or issues or the counsel differ in opinion as to the same, or, unless one of the parties to such issue or issues shall ask the charge of said judge or justice . . . which shall be distinctly specified by the persons asking such charge.”). While the common law tradition of jurors as “neighbor-witnesses” participating in the investigation and judging of the trial was fading, and judges increasingly exercised their power to find judgments notwithstanding the verdict (j.n.o.v.), see John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201 (1988), none of the cases under study here ended in a j.n.o.v.; cases appealed to a higher court, if overturned, were remanded for a new jury trial. I discuss juries in cases involving slaves in Ariela Gross, *Pandora’s Box: Slavery, Character, and Southern Culture in the Courtroom, 1800-1860*, at 217-21 (1996) (unpublished Ph.D. dissertation, Stanford University) (on file with the Stanford University Library).

Regardless of the instructions, however, most of the testimony in court traveled far afield from questions of ancestry.²²

This Article will spotlight the trials themselves in order to suggest a more complex interplay between legal and cultural meanings of race. Trial testimony provided glimpses of ordinary people's, as well as lower-level legal actors', legal understandings of racial categories and of their own places in the racial hierarchy. Trials brought to the surface conflicting understandings of identity latent in the culture; people who had lived lives on the "middle ground" of ambiguous status for years now had to fall on one side of the line. Trials required a confrontation between everyday ways of understanding race and definitions that fit into the "official," well-articulated racial ideology that supported the maintenance of slavery and postwar racial hierarchy. That is, legal rules based on "blood" had to be translated into practical action "on the ground," where people were more likely to describe someone's race in terms of how they looked and behaved than in terms of their fractional ancestry. By exploring Abby Guy's story, and others like it, one can learn how witnesses, lawyers, and litigants in the courtroom attempted to make the leap from what was knowable about a person to what was unknowable, or at least only imperfectly ascertainable—from social and physical "facts" about the person to the blood that ran in her veins. This quintessentially legal process—providing

22. Most Southern states had statutory definitions of racial status, which sociologists call hypodescent rules because they were based on fractions of African or "negro" blood or ancestry. Before the Civil War, many states specified one-fourth or one-eighth negro blood as the demarcation line between black and white. But some states, including Arkansas, had no statutory rule and relied on the common law. Whereas this led to a more restrictive rule in Arkansas, as set out in *Daniel v. Guy*, other states, such as South Carolina, developed a much more expansive definition of "negro" that did not depend on precise rules of blood fractions. After the Civil War, many states passed laws enlarging the definition of "negro" to include everyone with any African ancestry—what is known as a "one-drop" rule. See DAVIS, *supra* note 11, at 47-50.

Issues on appeal sometimes bore little resemblance to those at trial. On appeal, for example, litigants often raised issues of form, particularly of the language of color. For example, in *Covey v. State*, 16 Miss. (8 S. & M.) 573 (1847), a defendant tried to have his conviction for theft overturned because the indictment did not set out a description of him as a person of color. The Mississippi High Court of Errors and Appeals rejected this appeal. *Id.* *Dick v. State* involved a mulatto accused of attempted rape. See Transcript of Trial, *Dick v. State*, No. 7379 (Miss. Pontotoc County Cir. Ct.) (collection of Miss. Dep't of Archives & History, Jackson, Miss., Record Group 32), *aff'd*, 30 Miss. 631 (1856). The defendant asked for a charge "that if the jury believed from the evidence, that [defendant Dick] was a mulatto slave, and not a negro man slave, as charged in the indictment, they should acquit him." *Dick*, 30 Miss. at 633 (quoting trial transcript). The trial court refused, and the decision was affirmed by the High Court of Errors and Appeals. As the Attorney General argued, "[i]t is not the color of a slave but his social status which determines him to be a negro slave under our laws. All slaves, whether black brown blue or mulatto or albino are negroes in the meaning of our laws." Transcript of Trial, *Dick v. State*, *supra* (appellate brief). As the South Carolina Court of Appeal explained in *Ex parte Leland*, "The word negroes has a fixed meaning (slaves)." 10 S.C.L. (1 Nott & McC.) 460, 462 (1819); see also *State v. Warrington*, 3 Del. (3 Harr.) 556 (1840) (finding it unnecessary to distinguish between "negro" and "mulatto" on indictment).

evidence of unseen acts or identities to prove that certain persons or things should be placed in one formal category or another—was an important part of nineteenth-century Southern society's ideological fashioning of "race" as a potent force in social life.

Thus, trials of racial determination were important not only to the litigants themselves, whose personal freedom, property holdings, and status as masters and slaves hung in the balance, but also to the neighbors who participated in the trials as witnesses and jurors, as well as to those who learned its lessons through gossip, newspaper accounts, and literary narratives. The courtroom conclusions about how to decide whether someone was black or white, whether this was seen as the *essence* of race or simply as the best available *evidence* of race, reverberated throughout Southern culture because of the importance of the courtroom as a cultural arena.²³ Even a relatively small number of cases could have had a far greater cultural impact than a much larger number of cases today, because cases in the nineteenth century were public events, many of them notorious, and they took place at the central meeting-place of towns and rural areas: the county courthouses.²⁴

23. My view of law's constitutive role in culture draws inspiration from both anthropologists who have studied trials as local cultural rituals and New Historicist literary critics who read trial narratives as cultural artifacts of a particular historical moment. As Guyora Binder and Robert Weisberg argue, in anthropological and New Historicist studies, one can see the way "legal forms and legal processes play a compositional role in modern culture," Guyora Binder & Robert Weisberg, *Cultural Criticism of Law*, 49 STAN. L. REV. 1149, 1150 (1997), by "view[ing] law as an arena for the performance and contestation of representations of self and as an influence on the roles and identities available to groups and individuals in portraying themselves." *Id.* at 1152; see also JAMES CLIFFORD, *Identity in Mashpee*, in THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART 277 (1988) (discussing the Mashpee trial and the construction of Indian identity); CONTESTED STATES, *supra* note 6 (exploring the intersections of legal history and the anthropology of law); VIRGINIA R. DOMÍNGUEZ, *WHITE BY DEFINITION: SOCIAL CLASSIFICATION IN CREOLE LOUISIANA* (1986) (examining the history of racial definition in Louisiana through an ethnography of the "creole" community); CLIFFORD GEERTZ, *LOCAL KNOWLEDGE* 167-236 (1983) (discussing the constitutive role of law in culture); Richard Wightman Fox, *Intimacy on Trial: Cultural Meanings of the Beecher-Tilton Affair*, in THE POWER OF CULTURE: CRITICAL ESSAYS IN AMERICAN HISTORY 103 (Richard Wightman Fox & T.J. Jackson Lears eds., 1993) (analyzing the Beecher-Tilton affair from a cultural anthropology perspective); Stephen Greenblatt, *Towards a Poetics of Culture*, in THE NEW HISTORICISM 1 (H. Aram Veeder ed., 1989) (discussing New Historicist cultural criticism); Amy Robinson, *Forms of Appearance of Value: Homer Plessy and the Politics of Privacy*, in PERFORMANCE AND CULTURAL POLITICS, *supra* note 8, at 239 (analyzing *Plessy v. Ferguson*, 163 U.S. 537 (1896), from the perspective of cultural criticism).

24. These trials took place in circuit courts that met in each Southern county, usually twice a year. Judges and lawyers "rode circuit" from county to county, spending about two weeks in each. Circuit courts heard a wide variety of causes of action, both civil and criminal, often all but the pettiest crimes, the smallest civil claims, and criminal matters involving slave defendants, which could be handled by magistrates and orphans' courts.

The trials were often reported in the newspapers, which was exceptional for civil cases. At times, they received so much publicity that one of the parties requested and was granted a change of venue. This practice was rather uncommon in most litigation because there was no assumption that jurors should not know the litigants or the subject matter of the trial—indeed, the "common

This Article is based on a reading of all of the surviving trial records that I have been able to locate for the sixty-eight cases of racial determination appealed to state supreme courts in the nineteenth-century South.²⁵ More than half of these (thirty-six) took place in the last years of slavery—between 1845 and 1861—and the majority involved men.²⁶ These cases arose from a variety of circumstances. Certain criminal statutes specified that a crime was particular to persons of color or “negroes,” so that one might raise the defense of whiteness to an indictment.²⁷ Nearly all of these cases involved men. In inheritance disputes, one claimant to the estate sometimes claimed that another claimant, or the testator himself, was black and therefore could not inherit or devise property. In other inheritance

knowledge” of a jury of neighbor-witnesses was considered a valuable asset. In one Louisiana case, the trial judge reported that the defendant in a suit for freedom had been the victim of mob action because of his role in the trial. *See* Transcript of Trial, *Morrison v. White*, No. 442, at 63-64 (La. New Orleans Dist. Ct. Sept. 1858) (collection of Earl. K. Long Library, Special Collections & Archives, Univ. of New Orleans, New Orleans, La., Supreme Court Records), *rev'd*, 16 La. Ann. 100 (1861) [hereinafter Transcript of Trial, *Morrison v. White*] (petition for change of venue of James White and grant of petition). For a more detailed discussion of this case, see *infra* Section III.B.

25. I used Helen Catterall’s digest and a variety of other digests, indices, and other sources to compile what I believe to be a comprehensive list of Southern state cases involving racial determination in the 19th century. *See* JAMES HUGO JOHNSTON, *RACE RELATIONS IN VIRGINIA & MISCEGENATION IN THE SOUTH, 1776-1860*, at 191-216 (1970); *JUDICIAL CASES INVOLVING SLAVERY AND THE FREE NEGRO* (Helen Tunnicliff Catterall ed., 1936); Byron C. Martyn, *Racism in the United States: A History of the Anti-Miscegenation Legislation and Litigation* (1979) (unpublished Ph.D. dissertation, University of Southern California) (on file with the University of Southern California Library). The indices of the *Alabama Reports*, *American Digest*, *Louisiana Reports*, and *South Carolina Reports* were also useful resources.

I obtained trial records for 35 cases from archives in Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, and Tennessee. Records of the remaining cases no longer survive in the state archives, although a few may still be in the county courthouses where they originated. Some states’ supreme court reporters, however, summarized the trial testimony in their statements of “facts.” The trial records are handwritten manuscripts running from ten to hundreds of pages. The majority are at least 50 pages, including motions and pleadings, depositions, in some cases briefs on appeal, and records of testimony ranging from brief summaries to apparently verbatim transcriptions. For certain cases, like that of Abby Guy, I also consulted the manuscript census records for the county in which the trial took place and the participants lived, local newspapers, and published sources from the period. Due to the unique and handwritten nature of most of these records and the vagaries of their storage, certain citation information is not consistently available. Pinpoint cites to these sources often cannot be provided since there are generally no page numbers. Furthermore, other information, such as the day and month of decision, is occasionally missing from the record itself.

26. *See infra* Appendix.

27. For examples of racial determination cases involving indictments for carrying firearms, see Transcript of Trial, *State v. Jacobs*, No. 7915 (N.C. Brunswick County Super. Ct. Mar. 1859) (collection of N.C. Dep’t of Archives & History, Raleigh, N.C., Supreme Court Records), *aff’d*, 51 N.C. (6 Jones) 284 (1859); Transcript of Trial, *State v. Chavers*, No. 7249 (N.C. Brunswick County Super. Ct. 1857) (collection of N.C. Dep’t of Archives & History, Raleigh, N.C., Supreme Court Records), *rev’d*, 50 N.C. (5 Jones) 11 (1857) [hereinafter Transcript of Trial, *State v. Chavers*]; and Transcript of Trial, *State v. Dempsey*, No. 4723 (N.C. Bertie County Super. Ct. Mar. 1849) (collection of N.C. Dep’t of Archives & History, Raleigh, N.C., Supreme Court Records), *aff’d*, 32 N.C. (9 Ired.) 384 (1849).

disputes, racial determination often arose in litigating questions of legitimacy: one party might attempt to overcome the presumption of paternity with evidence that the child was mulatto.²⁸ In the only kind of case in which women were disproportionately the subject of racial determination, slaves sued for their freedom by claiming whiteness.²⁹ In suits for slander, a man who held himself out as white sued for lost status or property because another person impugned his whiteness.³⁰ The circumstances of these cases included scuttled weddings, economic disputes between neighboring grocers, and blackballing from clubs or militia units. There were also a few criminal cases in which defendants sought to disqualify witnesses by claiming that they had “colored” blood.³¹ Finally, slaveholders sued steamboats and railroad companies that carried runaway slaves “passing” as white; the transportation companies usually defended by arguing that the slaves were, for all intents and purposes, white.³²

28. For example, in *Florey's Executor v. Florey*, 24 Ala. 241 (1854), the plaintiffs claimed that Gustavus Florey was under an insane delusion that Edward G. was his son. Gustavus was a fair-skinned white man and his wife a fair-skinned white woman, but “Edward G. was of dark skin, and mulatto color, with woolly or kinky hair.” *Id.* at 244. The Alabama Supreme Court invalidated Gustavus Florey’s will, ruling “[t]he physiological fact, that a white man cannot be the father of a mulatto child by a white woman, is, at the present day, as well settled as the opinion of scientific men can settle any question of that nature.” *Id.* at 248; *see also* *Heim v. Bridault*, 37 Miss. 209 (1859) (involving a property dispute between Mrs. Bridault, Hall’s daughter, and Marcelette Marceau, his wife or mistress, who was alleged to be a free woman of color). Interracial marriage or sexual relations were at issue in many cases, both before and after the Civil War, whether indirectly, as in *Florey's Case*, or directly, as in a prosecution for fornication. *See, e.g.*, Transcript of Trial, *Burns v. State*, No. 92 (Ala. Mobile City Ct. Apr. 1872) (collection of Ala. Dep’t of Archives & History, Montgomery, Ala., Supreme Court Records), *rev’d*, 48 Ala. 195 (1872) (involving a magistrate prosecuted for performing an allegedly interracial marriage ceremony); Transcript of Trial, *State v. Melton*, No. 6431 (N.C. Stanley County Super. Ct. Fall 1852) (collection of N.C. Dep’t of Archives & History, Raleigh, N.C., Supreme Court Records), *aff’d*, 44 N.C. (Busb.) 49 (1852) (involving an indictment for fornication after an allegedly interracial marriage was invalidated).

29. *See, e.g.*, *Farrelly v. Louisa*, 34 Ala. 284 (1859); Transcript of Trial, *Miller v. Belmonti*, No. 5623 (La. New Orleans Dist. Ct. June 1845) (collection of Earl K. Long Library, Special Collections & Archives, Univ. of New Orleans, New Orleans, La., Supreme Court Records), *rev’d*, 11 Rob. 339 (La. 1845); *Gaines v. Ann*, 17 Tex. 211 (1856).

30. *See, e.g.*, Transcript of Trial, *Boullemet v. Phillips*, No. 4219 (La. New Orleans Parish Ct. June 1837) (collection of Earl K. Long Library, Special Collections & Archives, Univ. of New Orleans, New Orleans, La., Supreme Court Records), *rev’d*, 2 Rob. 365 (La. 1842); Transcript of Trial, *Cauchoix v. Dupuy*, No. 2125 (La. New Orleans Parish Ct. July 1832) (collection of Earl K. Long Library, Special Collections & Archives, Univ. of New Orleans, La., New Orleans, La., Supreme Court Records), *aff’d*, 3 La. 206 (1831) [hereinafter Transcript of Trial, *Cauchoix v. Dupuy*]; Transcript of Trial, *McDowell v. Bowles*, No. 8169 (N.C. Surry County Super. Ct. 1860) (collection of N.C. Dep’t of Archives & History, Raleigh, N.C., Supreme Court Records), *aff’d*, 53 N.C. (8 Jones) 184 (1860).

31. *See, e.g.*, Transcript of Trial, *State v. Heath*, No. 9 (Ala. Antauga Cir. Ct. June 1859) (collection of Ala. Dep’t of Archives & History, Montgomery, Ala., Supreme Court Records), *rev’d*, 34 Ala. 250 (1859); *State v. Belmont*, 136 S.C.L. (4 Strob.) 445 (1850); *Dean v. Commonwealth*, 45 Va. (4 Gratt.) 541 (1847).

32. *See, e.g.*, *Spalding v. Taylor*, 1 La. Ann. 195 (1846); *Macon & W.R.R. v. Holt*, 8 Ga. 157 (1850); Transcript of Trial, *Williamson v. Norton*, No. 2417 (La. New Orleans Dist. Ct. June

Of course, courtroom battles were not the routine mechanism for knowing a person's racial status in Southern society. For Southerners whose appearance seemed clearly to mark them as "black," the vast majority of whom were enslaved before 1863 or 1864, racial status was overdetermined. The confluence of dark skin, degraded status, reputation, and ancestry rendered the possibility of litigation over racial identity impossible for those African Americans. Yet litigated cases of racial determination are important to the understanding of the creation of racial meanings for a number of reasons. First, there was a substantial and growing number of people of mixed racial ancestry for whom racial presumptions based on appearance could not settle the question of identity.³³ Second, the presence of Indians in the population complicated the equation of dark skin with "negro" identity or slave status. Even dark skin and curly hair did not automatically consign one to the "negro" race if one could trace one's color to "Indian blood." But even more importantly, the possibility of ambiguity created by people of contested racial identity was a source of great anxiety to white Southerners, who expended a great deal of energy trying to foreclose the possibility of white slaves, "passing" blacks, and the interracial sex that lay behind both. If we take their anxiety seriously as a clue to what mattered to white Southerners in their struggle to define racial categories, we cannot simply dismiss the litigated cases as odd or freakish.

1852) (collection of Earl K. Long Library, Special Collections & Archives, Univ. of New Orleans, La., New Orleans, La., Supreme Court Records), *aff'd*, 7 La. Ann. 393 (1852), *rev'd on reh'g*, 7 La. Ann. 394 (1852).

The consequences of these cases varied, as did the outcomes. Twelve out of 14 suits for freedom based on whiteness resulted in victory while, conversely, 14 out of 15 defendants seeking to overturn a criminal conviction based on racial misidentification were turned down by the courts. In all other types of cases, the outcomes were mixed—overall, in 39 cases the subject was found to be a person of color, while in 29 he or she was found to be white. Yet the type of case did not seem to govern the kinds of evidence given at trial. Only the criminal cases, in which summary justice was often handed down, resulted in shorter trials than the rest. All other types of dispute led to lengthy trials at which a variety of evidence was presented. *See infra* Appendix.

33. The evidentiary law of presumptions in common law Southern states established a presumption of freedom for persons of white appearance and of slavery for persons of *black* appearance. In Louisiana and North Carolina, the appearance of a "mulatto" raised no presumption of slavery; in Kentucky, it did. In all states, however, these presumptions were frequently rebutted in court. *See* THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW*, 1619-1860, at 21-29 (1996).

The census stands alone as a source of hard numbers with respect to "mulattoes" in Southern society, and most historians believe that census takers undercounted people of mixed race. According to census data, there were 159,000 free and 247,000 enslaved mulattoes in 1850, constituting 11.2% of the African American population. In 1860, a total of 570,000 mulattoes made up 12.1% of the African American population (by 1860, after crackdowns on manumission, a much greater proportion of mulattoes were enslaved than ten years before). In certain areas, such as New Orleans, where much race-determination litigation originated, the percentages were much higher. *See* POPULATION OF THE UNITED STATES IN 1860, at 598-604 (Wash., D.C., Gov't Printing Office 1864).

Part II of this Article will examine the various bases on which litigants, witnesses, jurors, and judges relied to make their arguments and decisions about a person's racial status. This Part discusses the lack of consensus in the courtroom and the tension between common sense and different kinds of "expertise" as a basis for racial knowledge. It looks at the tremendous profusion and confusion of criteria for whiteness within any given moment or particular case, as well as the rise, over the course of the antebellum period, of two discourses of "race," one of science and another of performance. Part III explores the performative, prescriptive aspects of race: the way that people whose racial status was at issue had to perform white womanhood or white manhood, both within the courtroom and without, and the way that race depended on understandings of identity that were essentially social and legal in nature. Finally, Part IV concludes with a discussion of the contemporary uses of the history of the social and legal construction of race.

II. THE SHIFTING ESSENCES OF RACE IN THE NINETEENTH-CENTURY SOUTH

In trials of racial determination, lawyers and litigants drew upon a variety of criteria and flexible definitions of "race" to explain someone's *essential* blackness or whiteness. As Ann Stoler has written in the European colonial context, racism depended on shifting essences.³⁴ In this Part, I will discuss the competing bases for determinations of race. Section II.A will show that there was no agreement about what constituted the proper authority to determine racial identity. The discourse about race oscillated constantly between a rhetoric of transparency—racial identity as something that cannot help but make itself known—and a rhetoric of veiled and hidden essences. Section II.B will demonstrate that at any historical moment, there were flexible bases for racial definition—and no consensus on any one. Thus, it should be no surprise that individuals with ambiguous ancestry could have such contested racial identities. I will use the story of Abby Guy in both Sections of Part II to illustrate the shifting essences of race.

34. She writes: "[E]ssentialisms are not secured by fixed traits but by substitutable and interchangeable sets of them. Basic to nineteenth-century European discourses on racial essence was an explicit debate about where that immutable essence was located, a disquiet about its vulnerability but rarely a belief in no essence at all." Stoler, *supra* note 9, at 199-200.

A. *Racial Knowledge*

Until 1854, Abby Guy and her four children lived on the Bayou Bartholomew, bordering Louisiana, while William Daniel and his family lived in the hills. Tennessee-born Daniel, having come from Alabama in 1844 with his large family, was one of the earliest settlers in sparsely-populated, rural Ashley County. He was a town father, who served as justice of the peace, postmaster, and the first notary public in the area. In 1850, Daniel owned fifteen slaves and 240 acres of land, one of only four men in the county with more than ten slaves of taxable age.³⁵ In his only brush with the wrong side of the law, Daniel was cited in court in 1849 for giving his slaves too much freedom, “to the annoyance of the neighborhood.”³⁶ Although the citation was dismissed, it may have been the occasion for Daniel’s decision to begin treating Abby Guy and her children as his slaves, a shift in their circumstances that led Guy to bring suit in the circuit court.

Just one year later, Guy and her children were listed in the 1850 census as the only free negroes among the 269 households of Ashley County.³⁷ Railroads would not reach this remote county for decades, so the main form of transportation was by boat on the Marie Saline River. Abby Guy and her children, then, would have been well known to the inhabitants of this small county. Yet they managed to live somewhere between slavery and freedom, black and white, for several years. How could this be so?

We know from the work of social historians that there was a substantial number of free blacks in the South in the 1850s and that they were concentrated in two areas: a band along the Upper South, and a few cities of the Deep South with long histories of free mulatto elites (New Orleans, Louisiana, and Charleston, South Carolina, in particular).³⁸ Yet even in

35. See Census of 1850, Manuscript Population Schedules, Ashley County, Ark. [hereinafter Census of 1850].

36. Y.W. ETHERIDGE, HISTORY OF ASHLEY COUNTY, ARKANSAS 90 (1959) (quoting the court).

37. See Census of 1850, *supra* note 35. Abby Guy lived during 1854 and 1855 with a man referred to at trial only by his last name, Guy, as husband and wife. Guy was probably a white man, but census takers did not find him at home in Ashley County in 1850 or 1860; he may have just been passing through, as many did in a mobile frontier society.

38. Free people of color and mulattoes were distinct, but overlapping, groups. In the Upper South, the proportion of African Americans who were free slowly but steadily grew over the course of the antebellum period, reaching 12.8% on the eve of the Civil War; in the Lower South, the percentage of free people of color dropped from 3.5% in 1820 to 1.5% in 1860. See IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 137 tbl.8 (1974). “Although the majority of free Negroes, like the vast majority of Southern people, resided in the countryside, free Negroes were the most urban caste in the South.” *Id.* at 175. In 1860, more than a third of free people of color lived in cities or towns, compared to only one in 20 slaves. See *id.*

Ashley County, Arkansas, a frontier area with no established free black community, the match between black identity and slave status was not perfect. Perhaps being on the “frontier” worked to Abby Guy’s benefit. People on the move had more opportunity to reshape their identities and reinvent themselves racially; new communities were more likely to allow people to live on the margins of social orders that were still emerging. Furthermore, the number of people of mixed race, both slave and free, had grown over the course of the antebellum period, blurring the color line and increasing the number of people who lived on a “middle ground.”³⁹ These people caused ideological discomfort to Southerners in the 1850s, and legislatures passed laws making it increasingly difficult for slaveholders to

The Upper South had a relatively large population of mulattoes (two-thirds of the total number in the South in 1850), many of whom were free (37%), and, “having sprung from elements of the lower orders, were generally treated by the white elite much as if they were black.” JOEL WILLIAMSON, *NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES* 14 (1980). The Lower South, by contrast, according to Joel Williamson, had fewer mulattoes, divided between a wealthy free mulatto elite concentrated in Charleston and New Orleans (17.3%) and a larger group of enslaved mulattoes (83.7%). The Lower South came closer to a three-tier society because mulattoes made up 76% of the population of free people of color, whereas they were only 35% of the free black population in the Upper South. Williamson attributes this situation to the greater number of Revolutionary-era emancipations of slaves with no blood relation to their masters in the Upper South than in the Lower South. This is partly a distinction between the Old South areas settled in the 18th century, which had a tradition of free mulattoes, and later-settled areas of the Deep South and Southwest, which did not. *See id.* at 26-27.

Gary Mills’s research on free blacks and mulattoes in Alabama suggests more local variation than Williamson’s general study revealed. First, Mills’s findings contradict “[t]he routine assumption that the free Negro class owes its origins in the Lower South to white planter manumission of slave offspring.” Gary B. Mills, *Miscegenation and the Free Negro in Antebellum “Anglo” Alabama: A Reexamination of Southern Race Relations*, 68 J. AM. HIST. 16, 19 (1981). While most free people of color in Alabama were mulattoes, most were born free, apparently as a result of “the natural increase of the small percentage of mulattoes who were freed for one of various reasons.” *Id.* at 20. Mills concluded that significant numbers of white women were giving birth to mulatto children in antebellum Alabama, and that many of these women were married to white men; that the rates of “passing” from black to white were high; and that courts often protected from slavery mulattoes who appeared nearly white, especially if they had been passing for white. In sum, “miscegenation” took place outside the Upper South, New Orleans, and Charleston; and even in a rural Deep Southern locale, toleration among both judges and society was greater than might be expected for sex across racial lines and for people who themselves straddled those lines. For social histories of free people of color, including mulattoes, in the 19th-century South, see ADELE LOGAN ALEXANDER, *AMBIGUOUS LIVES: FREE WOMEN OF COLOR IN RURAL GEORGIA, 1789-1879* (1991); BERLIN, *supra*; TOMMY L. BOGGER, *FREE BLACKS IN NORFOLK, VIRGINIA, 1790-1860: THE DARKER SIDE OF FREEDOM* (1997); DOMÍNGUEZ, *supra* note 23; JOHN HOPE FRANKLIN, *THE FREE NEGRO IN NORTH CAROLINA, 1790-1860* (Russell & Russell 1969) (1943); and JOHNSTON, *supra* note 25.

39. *See* BARBARA JEANNE FIELDS, *SLAVERY AND FREEDOM ON THE MIDDLE GROUND: MARYLAND DURING THE NINETEENTH CENTURY* at xii (1985). It is difficult to gauge either the extent of interracial sex or the prevalence of people of “mixed race” in 19th-century society. Beginning in 1850, census takers noted “B” or “M” on their population schedules to indicate “black” or “mulatto,” but these were hardly precise designations. They do not necessarily reveal ancestry, community status, or self-presentation; they reflect only the census-taker’s opinion. *See* Census of 1850, *supra* note 35.

free their slaves and for freed slaves either to stay in their home state or to live unfettered lives. Although this was not an easy time in which to live on the middle ground, such a ground did exist.⁴⁰

People on the middle ground made it difficult to argue that race was self-evident and commonsensical. Just as federal courts in the early twentieth century fell back on a “common knowledge” test for white citizenship,⁴¹ judges in the nineteenth-century South repeatedly held that the determination of an individual’s race was “a question very proper for a jury,”⁴² because the jury represented the sense of the community; race was something commonsensical—something we *know when we see it*. Witnesses in the courtroom reinforced the notion of race as common sense by invoking the idea that there was an ineffable quality making someone white that any Southerner could discern—and, likewise, that a drop of African blood would make itself known, and a Southerner could sense it “as the alligator . . . knows three days in advance that a storm is brewing.”⁴³ It was not unusual for witnesses to explain that they did not need to know the finer points of physiology or craniology to know “the distinction between the caucasian and african races”—they just *knew*.⁴⁴ Yet at the same time, trials that involved the determination of someone’s race

40. There has been a new focus in recent years in literary and cultural studies on the “middle ground” between black and white, including whites’ dressing up as blacks, blacks’ “passing” for white, and whites’ and blacks’ crossing of the color line in sex and marriage. *See, e.g.,* ERIC LOTT, *LOVE AND THEFT: BLACKFACE MINSTRELSY AND THE AMERICAN WORKING CLASS* (1993); *PASSING AND THE FICTIONS OF IDENTITY* (Elaine K. Ginsberg ed., 1996); SOLLORS, *supra* note 5. These works forcefully assert the cultural centrality of supposedly marginal practices.

41. Haney López shows that federal appellate courts in the late 19th and early 20th centuries mainly used two tests, science and “common knowledge,” to decide whether immigrants should be considered “white persons.” *See* HANEY LÓPEZ, *supra* note 19, at 63-64. By 1923, he argues, “common knowledge” had eclipsed science as the test of choice, because anthropologists and other “experts” on race had begun to move away from the simple, naturalized view of race that the judges preferred. *See id.* at 93-94. Increasingly, if “science” did not corroborate “common knowledge,” courts upheld the latter criterion. *See id.* at 92-100.

Peggy Pascoe’s study of 20th-century miscegenation cases offers valuable insight into the reception of the new anthropology of race in the courts. Pascoe charts a movement in the cases she studies from racialism to culturalism. Racial experts in court made two arguments: (1) “biological race [is] nonsense”; and (2) “race [is] merely biology [which is insignificant].” Pascoe, *supra* note 10, at 55. Judges’ preference for the latter argument, however, made biology significant because law requires racial categorization. Pascoe shows the judges’ frustration with the complexity of new modernist definitions of race, which helps explain why they abandoned some of their faith in “expert” knowledge and turned to “common knowledge” to explain racial identity. *See id.* at 55-69.

42. *State v. Davis*, 18 S.C.L. (2 Bail.) 558, 560 (1831); *see also State v. Cantey*, 20 S.C.L. (2 Hill) 614, 616-17 (1835) (stating, regarding the determination of someone’s racial status, that “this Court will very rarely feel itself authorised to interfere with the verdict of a jury”).

43. Transcript of Trial, *Morrison v. White*, *supra* note 24, at 81 (testimony of P.C. Perret).

44. *See* Transcript of Trial, *Miller v. Belmonti*, No. 5623 (La. New Orleans Dist. Ct. May 1845) (collection of Earl K. Long Library, Special Collections & Archives, Univ. of New Orleans, New Orleans, La., Supreme Court Records), *rev’d*, 11 Rob. 339 (La. 1845) (testimony of C. Pollock) [hereinafter Transcript of Trial, *Miller v. Belmonti*].

demonstrated not consensus around a single, commonsense definition, but disagreement, conflict, and concern for the consequences of being wrong.

Abby Guy embodied racial unknowability in one of its most tantalizing forms: the light-skinned young woman. She and her lawyers played on fears of hidden essences by telling a tale of white slavery. In her complaint, Guy claimed that her mother had been “a poor destitute orphan child in the state of Virginia, without any friend or home and living from place to place,” sold by slave traders into slavery in Alabama, to William Daniel’s father.⁴⁵ Guy explained in her complaint that Daniel’s father had treated her family well, and because their condition was “more favored than that of an ordinary slave,” Guy’s mother and Guy herself “submitted during his life, to that condition.”⁴⁶ Guy claimed that William Daniel’s father had willed her manumission, although this was only an “admission of that previous Right,” but that William Daniel, after his father’s death, “tore them from their home and . . . reduced them . . . to a state of slavery.”⁴⁷

White slavery stories like that of Abby Guy reverberated through both Northern and Southern culture via journalistic and literary accounts. Abolitionists and fugitive slaves writing from the North used cases like Abby Guy’s to illustrate to their Northern readers the ultimate horror of slaveholders’ evil: the possibility of *white slavery*.⁴⁸ As William Craft, a fugitive slave, cautioned his readers in introducing the story of another enslaved woman who sued for freedom on the grounds of whiteness, “[H]e who has the power, and is inhuman enough to trample upon the sacred rights of the weak, cares nothing for race or colour.”⁴⁹ In this way, Craft encouraged his white readers to imagine themselves in the enslaved woman’s shoes. Lawyers for women seeking their freedom on the grounds

45. Transcript of Trial, *Daniel v. Guy*, *supra* note 1, at 2 (petition of Abby Guy).

46. *Id.*

47. *Id.* at 3.

48. David Roediger has traced the uses of the term “white slavery” in the 19th century in the context of the Northern labor movement deploring wage-working conditions through the comparison to unfree labor. He notes that after the Civil War, the term fell out of use except to denote white prostitutes. See ROEDIGER, *supra* note 7, at 65-87. Yet “white slavery” before the Civil War also appeared in the abolitionist literature to refer to this small class of unjustly enslaved light-skinned women, for whom the connotation of prostitution was unmistakable. For a discussion of “white slavery” as it referred to prostitution, see Mara Keire, *The Vice Trust: A Reinterpretation of the White Slavery Scare in the United States, 1907-1917* (Nov. 6, 1997) (unpublished manuscript, on file with *The Yale Law Journal*). For a discussion of the role of depraved sexuality in American abolitionist narratives, see Ronald G. Walters, *The Erotic South: Civilization and Sexuality in American Abolitionism*, 25 AM. Q. 177 (1973). See also SOLLORS, *supra* note 5, at 288-97 (discussing instances of incest and miscegenation in antebellum literature); Nancy Bentley, *White Slaves: The Mulatto Hero in Antebellum Fiction*, 65 AM. LITERATURE 501 (1993) (comparing mulatto men and women as heroes in antebellum novels).

49. WILLIAM CRAFT & ELLEN CRAFT, *RUNNING A THOUSAND MILES FOR FREEDOM OR, THE ESCAPE OF WILLIAM AND ELLEN CRAFT FROM SLAVERY 3* (New York, Arno Press 1969) (1860).

of whiteness encouraged jurors to do exactly the same: They conjured the horror of the wrongful enslavement of pure white womanhood.

In the public discourse on slavery and freedom, however, white Southerners opposing abolitionism used “white slavery” in quite a different sense. In the same issue of the *Arkansas State Gazette and Democrat* that reported the Arkansas Supreme Court’s decision in *Daniel v. Guy*, a story entitled *White Slavery in Connecticut* appeared, which reprinted an advertisement from a 1764 issue of New Haven’s *Connecticut Gazette*: “Just imported from Dublin, in the Brig Darby, a parcel of *Irish servants*, both men and women, *to be sold cheap*, by Israel Boardman at Stamford.”⁵⁰ The Arkansas editors commented,

So it seems that less than 100 years ago, men and women were brought from Ireland, and sold as slaves, in the State of Connecticut. And not 100 years before that time, Indians were sent from Connecticut, Rhode Island, &c., to the West Indies, and sold into slavery. Curious historical facts, these.⁵¹

The editors replied to abolitionists’ accusations by pointing their fingers at “white slavery” in the North: the treatment of Irish indentured servants and Indians in the eighteenth century.

To bring such stories of Northern “slavery” into relief, the editors of the *Arkansas State Gazette and Democrat* routinely printed stories about the kind of women abolitionists called “white slaves,” women like Abby Guy. For example, on May 30, 1851, the paper reported that “Clarissa, a mulatto woman” had won her suit for freedom, which should provide a “practical and conclusive refutation of [Northern editors’] teachings.”⁵² Even one hundred years later, a white Arkansan who romanticized the times before Yankee intervention included Abby Guy’s story in his local history of Ashley County as evidence, not of slavery’s evil but of the law-abiding nature of its practitioners. Y.W. Etheridge, writing in 1959, emphasized the fairness of Abby Guy’s trial, the lengths to which Southerners went to ensure the equitable administration of slavery, and “the horror of placing anyone under the system unless it was shown without a doubt that this under the law must be done.”⁵³ Thus, the possibility of “white slavery” operated as a potent symbol in the political and moral war over slavery, playing into deep cultural anxieties in both North and South.

50. *White Slavery in Connecticut*, ARK. STATE GAZETTE & DEMOCRAT, Sept. 12, 1857, at 2.

51. *Id.*

52. *Suit for Freedom Decided*, ARK. STATE GAZETTE & DEMOCRAT, May 30, 1851, at 1.

53. ETHERIDGE, *supra* note 36, at 93.

White Southerners' fear of people of African descent lurking unknown in their midst provided a courtroom narrative that inverted the "white slavery" story. While racial unknowability might mean the unjust enslavement of white women, it seemed more likely that those of "negro blood" were passing as white, making fools of those who accepted them. As I suggested in an earlier study of civil disputes involving slaves,⁵⁴ whites' fear of being tricked by slaves animated much of the litigation in Southern courts, and the greatest blow to a white man's honor would be to be deceived into bestowing the honors of whiteness on a "negro." A strong strain in the judicial rhetoric mocked as fools those who believed their eyes about someone's race. Thus, Judge Lumpkin of Georgia wrote,

Is it strange that persons should have mistaken the blood of [the persons at issue in the case]? It is done daily in our midst. . . . A man, at the beginning of this war, dropped into a village of one of our counties in Middle Georgia, and becoming rather famous for his pugilism, he was chosen an officer in one of the volunteer companies enlisting for the military service. His *status* was never questioned, until, accosted rather familiarly by his *fellow-servant* . . . an investigation was had, and Sambo was returned to his owner. Which of us has not narrowly escaped petting one of the pretty little mulattoes belonging to our neighbors as one of the family?⁵⁵

Of course, as Judge Lumpkin knew only too well, those "pretty little mulattoes" were most likely "one of the family," but it was a legal fiction to be preserved at all costs that black people were slaves and white people were free. Like the white slave, the passing black threatened white men's sense of themselves and their families, lending urgency to the question of racial knowability.

In *Hudgins v. Wright*,⁵⁶ probably the most influential Southern precedent in setting the presumptions for slave/free status on the basis of race, two judges, in seriatim opinions, offered contrasting visions of the possibility of knowing race when one sees it.⁵⁷ Judge Tucker emphasized the reliability of appearances. He pointed out that even if dark color disappears after a generation or two of intermarriage with whites, "a flat

54. See Ariela Gross, *Pandora's Box: Slave Character on Trial in the Antebellum Deep South*, 7 *YALE J.L. & HUMAN.* 267, 300-14 (1995).

55. *Bryan v. Walton*, 33 Ga. 11, 24 (Supp. 1864) [*Bryan III*].

56. 11 Va. (1 Hen. & M.) 134 (1806).

57. This case also held that native American Indians could not be enslaved and defined the distinctions between Indians and "negroes." *Id.* at 139-40. For insightful discussions of *Hudgins*, see ALAN HYDE, *BODIES OF LAW* 228-31 (1997); and Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 *AM. U. L. REV.* 695, 702-11 (1996).

nose and woolly head of hair . . . disappears the last of all . . .”⁵⁸ Furthermore, the distinction between “the jet black lank hair of the Indian” and the “woolly” hair of the African was so strong that “a man might as easily mistake the glossy, jetty cloathing of an American bear for the wool of a black sheep” as confuse an Indian for an African.⁵⁹ Thus, according to Judge Tucker, it was safe to rely on the presumption that one who appeared black was a slave and one who appeared white or Indian was free. Although Judge Roane reached the same conclusion about the racial status of the person at issue, he was less optimistic about the possibility of racial knowledge. Such distinctions were clear, he pointed out, while the races remained pure; “[w]hen, however, these races become intermingled, it is difficult, if not impossible, to say from inspection only, which race predominates in the offspring . . .”⁶⁰ Because of this indeterminacy, trials of racial determination required testimony as to ancestry, reputation in the community, other socially and legally defined criteria, as well as physiology and medical science.

Tucker and Roane represented two poles in a continuing controversy about the knowability of racial identity in Southern courtrooms. The view that race was a matter of common sense, literally *facially* evident, gave the jurors the power to decide who was black and who was white. But the fear that racial identity could be hidden meant that experts might be required to discover it and that witnesses who gave their opinions would need to don the mantle of expertise. Of course, because expertise could lie in the community, unknowability did not necessarily mean taking control away from the jury or the community at large—but it did mean acknowledging the possibility that they could be fooled.⁶¹

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

59. *Id.* at 139-40.

60. *Id.* at 141.

61. Likewise, the rhetoric of racial common sense did not require jury decisionmaking. Indeed, the stock arguments for racial knowability could allow a judge to make the decision of racial status in the first instance, before trial. For example, a judge could make a finding that the defendant was “of color,” without hearing testimony, in order to deny jurisdiction. Justice John Belton O’Neill of the South Carolina Supreme Court, sitting as trial judge in the prosecution of Mary Hayes for keeping a disorderly house, “was satisfied from inspection that she was a mulatto.” He therefore sent her case to a court of magistrates and freeholders. *State v. Hayes*, 17 S.C.L. (1 Bail.) 275, 275 (1829).

While *State v. Hayes* was pending, Justice Nott sat as a trial judge in a similar case, *State v. Scott*, whose only difference was that the defendant himself sought to overturn his conviction by objecting to the court’s jurisdiction, arguing that he was “a free person of colour, to wit, a mulatto, as would appear upon inspection.” *State v. Scott*, 17 S.C.L. (1 Bail.) 270, 270 (1829). Judge Nott suspended sentence in the case, declining to decide whether Scott was mulatto, until a decision came down in *State v. Hayes*. Scott then moved in arrest of judgment, bringing the case before the court of appeals.

In this case, Justice Johnson, who heard Scott’s appeal, did not think it so obvious that the judge could determine Scott’s race based on his appearance. Johnson echoed the now-familiar judicial fear of deceptive appearances: “[W]e know that nature has clothed her children in all the

In order to ferret out drops of black blood or to certify the purity of white blood, litigants sometimes called on medical doctors as experts.⁶² Yet expertise could be based on grounds other than study in books. Lawyers routinely asked witnesses who were about to testify about someone's racial identity whether they owned slaves themselves. Witnesses sought to certify their testimony as authoritative by asserting their longstanding observation of the "negro" race with their ownership and mastery over enslaved "negros." In this manner, both lawyers and witnesses linked knowledge of racial identity, expertise, and white men's identity as masters. In the person of the slaveholder/racial expert, the rhetoric of racial common sense and expertise merged. As one North Carolina judge explained, it does not

require a distinguished comparative anatomist to detect the admixture of the African or Indian with the pure blood of the white race. Any person of ordinary intelligence, who, for a sufficient length of time will devote his attention to the subject, will be able to discover with almost unerring certainty the adulteration of the Caucasian with the negro or Indian blood.⁶³

variety which can exist between European fairness and the African black; . . . in this country where all the shades are so mixed up and blended together, [color] is not an infallible criterion . . ." *Id.* at 272-73. The presumptions of color are "mere presumptions, [which] must yield to positive proof." *Id.* at 273. Johnson's concerns, however, did not lead him to send the case back to the jury. He affirmed Scott's conviction. So although, in general, the discourse of race as common sense justified a preference for jury decisionmaking, the coincidence of the two was not complete. There was always the possibility that race's self-evidence could make it a simple matter of pretrial disposition—or that the jury needed to decide it precisely because it was *not* self-evident.

There was also a small class of cases in which racial status was determined in a bench trial: criminal cases in which the state or the defendant sought to exclude witnesses because they were of color. When William Dupree shot a man named Smith who had lived on his property, he admitted the shooting but sought to introduce three children as witnesses who would testify that he had acted in self-defense. *See* Transcript of Trial, State v. Dupree, No. 5 (Ala. Mobile City Ct. Jan. 1859) (collection of Ala. Dep't of Archives & History, Montgomery, Ala., Supreme Court Records, Book 229, No. 1-2), *rev'd*, 33 Ala. 380 (1859) [hereinafter Transcript of Trial, State v. Dupree]. The solicitor for the state stated that he had been informed "that these boys . . . were not competent witnesses, being of mixed blood." *Id.*; *see also Dupree*, 33 Ala. at 384. The judge then both inspected the boys and heard testimony regarding their racial status to determine their competency as witnesses. Although the trial judge "ha[d] some doubt whether this question should not be decided by a jury and so express[ed] himself," and the defendant offered to submit the issue to the jury, "the Court upon reflection would not suffer it to be done and excluded the witnesses." Transcript of Trial, State v. Dupree, *supra*; *see also Dupree*, 33 Ala. at 385.

62. I will discuss medical testimony in greater detail *infra* Section II.B.

63. Transcript of Trial, State v. Jacobs, No. 7915 (N.C. Brunswick County Super. Ct. 1859) (collection of N.C. Dep't of Archives & History, Raleigh, N.C., Supreme Court Records), *aff'd*, 51 N.C. 284 (1859).

Judge Battle went on to approve the expert qualification of a slave owner to testify on whether the defendant, indicted as a “free negro” for carrying firearms, was of African descent.⁶⁴

While courts routinely described race as a commonsensical matter of community consensus, a discourse of race as the opposite of commonsensical, and a fear of ending up the fool, lurked in every case. Rather than coherence or consensus, the evidence from the trials suggests quite the reverse. Neither the witnesses who testified in court, nor the judges and jurors who weighed their testimony were certain about the knowability of race or about what qualified one to determine it.

B. *Evidence and Essences*

Jurors had before them both the evidence of their own eyes and many reasons not to trust their own eyes; both common sense and the fear of racial unknowability. To compound the difficulty, no matter who assumed authority to determine race, there was no single discourse of “race” shared by all witnesses or litigants in the courtroom at any time in the nineteenth-century South, and certainly no agreement about what constituted the “essence” of race. As the lawyer for an Alabama free person of color argued in *Thurman v. State*, “A mulatto is to be known, not solely by color, kinky hair, or slight admixture of negro blood, or by a greater admixture of it not amounting to one-half, but by reputation, by his reception into society, and by the exercise of certain privileges.”⁶⁵ While the “scientific” language of the distinction between the “african and caucasian races” filtered into the courtroom, it by no means dominated everyone’s understanding of what it meant to be black or white. Among whites, and among people whose racial identity was in question, there were instead shifting “essences” of whiteness and blackness, hard to grasp and yet, paradoxically, also commonsensical and self-evident to those who proclaimed knowledge of them.

Categorizing these “evidences” and “essences” of race is, to some extent, an artificial exercise. Through the story of Abby Guy, I hope to show how they worked together, on both sides of a legal dispute. I will also, however, briefly outline five ways of talking about race at trial, certain of which increased in frequency and persuasive power over the course of the nineteenth century, but especially between 1800 and 1865. Race as a physical marker, as already noted, was considered unreliable. Nevertheless, physical description remained an important part of these trials, along with

64. *See id.*

65. 18 Ala. 276, 277 (1850).

physical inspection. Witnesses described the appearance of people who were not present in court, painting visual pictures that sometimes markedly contradicted one another. Race as documented ancestry, the sort of evidence one might expect in a statutory regime defining race in terms of ancestry, was important in early cases but was consistently less important in later cases. Race as ascriptive identity, or reputation in society, and race as performance overlapped to some extent, but I believe they are analytically distinct.⁶⁶ Here, reputation refers to acceptance in society, others' beliefs about one's identity, and one's social associations, whereas performance refers to one's acts. Finally, race as a scientific category, interpreted by medical experts or others who used the new language of physiology and ethnology, began to appear in the courtroom in the late 1840s.

1. *Abby Guy*

In the trial of *Guy v. Daniel*, a variety of criteria were discussed on both sides to prove Guy's race. Along with the evidence of inspection and medical experts, the jurors heard from a large number of neighbors of Guy and Daniel. Guy's lay witnesses focused on her social identity, her associations with white people, and her having performed tasks that white people quintessentially performed. Richard Stanley testified that she "visited among white folks, and went to church, parties, etc."⁶⁷ Keightly Saunders, a fifty-seven-year-old farmer who owned four slaves, one a mulatto, in 1850, testified that Guy "visited among the whites as an equal."⁶⁸ Saunders was "locally known as quite a character,"⁶⁹ a drinker and storyteller, free with "curse words which flowed in his conversation like water from a spring."⁷⁰ Nevertheless, he commanded respect in the neighborhood and was a friend of Judge Hawkins, who was considered the leader of the bar in the region.⁷¹ Saunders's testimony for Guy must have carried considerable weight. Jeremiah Oats, a farm laborer with no slaves or land of his own in 1850,⁷² had done work for Guy, and he testified that she

66. Martha Hodes employs the distinction between reputation and self-presentation. See HODES, *supra* note 20, at 103. Although the individuals at issue did not speak for themselves at trial, witnesses reported on the way they held themselves out in society. Most often, however, witnesses did not distinguish between the way people held themselves out and the way they were perceived, or what they "passed for."

67. Transcript of Trial, *Daniel v. Guy*, *supra* note 1, at 20 (bill of exceptions).

68. *Id.* at 23-24.

69. ETHERIDGE, *supra* note 36, at 84.

70. *Id.* at 85.

71. *See id.* at 84-85.

72. He had managed to acquire \$1400 worth of property by 1860. *See* Census of 1850, *supra* note 35; Census of 1860, Manuscript Population Schedules, Ashley County, Ark. [hereinafter Census of 1860].

had been competent to contract and pay her bills herself.⁷³ William M. Drucker, Sheriff of Ashley County, himself a slaveholder, explained that he did not tax Guy because she was a widow, whatever her racial status.⁷⁴

William Daniel emphasized documentary evidence of Abby Guy's slave origins. He produced his father's will, which did not free Guy but devised her to James Condra, Daniel's brother-in-law, as well as Daniel's receipt for Guy from Condra.⁷⁵ Daniel admitted that Guy had been of little value to him as a slave and so he had "permitted her to go when and where she pleased, for several years past,"⁷⁶ but when she left the State of Arkansas for Louisiana, he brought her and her children home and asserted his right of ownership over them.⁷⁷ He argued, in effect, that as a slave, she must be black, because only blacks are slaves. There was another dimension to his argument: He should not have to prove her racial identity because status was enough. If he could prove that she was rightly his slave, she should not be free, whatever her degree of blood, whatever her racial identity. Abby Guy, on the other hand, having no credible evidence of a right to freedom in previous free status, no documentation of "that previous Right,"⁷⁸ had to make her case in her own person. Her right to freedom inhered in her whiteness. Her success at trial rested on her ability to shift the ground of argument to that question.

On behalf of William Daniel, Thomas S. Thompson, a relatively wealthy farmer with six slaves, told the jury that he had known both Guy and her mother Polly as slaves, although they were both "bright mulatto."⁷⁹ Thompson betrayed some confusion over the exact determination of their racial status—Polly "was a yellow woman, darker than white Could not say whether Polly was of African or Indian extraction. I have seen some only of half blood who would provably be as white as Polly was."⁸⁰ But he was much more confident about their slave status. Polly "always held herself as a slave and acted as such. She and Guy always labored and conducted themselves as slaves in the family, with the exception that they took more care of themselves perhaps than others."⁸¹

On cross-examination, Thompson admitted that he was Daniel's brother-in-law and that he "had never studied Physiology nor the

73. See Transcript of Trial, Daniel v. Guy, *supra* note 1, at 23 (bill of exceptions).

74. See *id.* at 21.

75. See *id.* at 32-34 (exhibits A and B).

76. *Id.* at 65-67 (answer of William Daniel).

77. See *id.*

78. *Id.* at 3 (petition of Abby Guy).

79. Daniel v. Guy, 19 Ark. 121, 126 (1857).

80. Transcript of Trial, Daniel v. Guy, *supra* note 1, at 25 (bill of exceptions). In the statement of facts in the state supreme court report, this was summarized as "Had seen half-breeds as white as she was." Daniel, 19 Ark. at 125.

81. Transcript of Trial, Daniel v. Guy, *supra* note 1, at 28 (bill of exceptions)

distinction of races.”⁸² He also admitted that he had seen white persons who worked in the fields become as dark as Guy and her mother, and he had seen white persons with hair as curly as theirs.⁸³ Several other farm laborers testified about Guy and Polly’s slave status, but they acknowledged the difficulty of determining their racial status.⁸⁴ As James Barnett noted, he “had seen persons *recognized as white*, who were as dark as Polly.”⁸⁵

William Daniel’s witnesses made no strong claims about Guy’s racial identity. Indeed, implicit in their acknowledgment that people of ambiguous appearance fell on both sides of the line between white and “negro” was a claim that status should decide race, or at least that race could not decide status; what mattered was how people *recognized* Guy and her mother, which depended on whether they were slaves or free. Abby Guy, on the other hand, made a strong claim to a whiteness that should overwhelm all evidence of slave status or ancestry in slavery. She asked the jury to consider her white because she acted white, because she looked white, and because doctors found her to be white.

After the testimony closed, the lawyers for both Guy and Daniel proposed instructions for Judge Sorrels to give the jury. The judge gave all of the instructions drafted by Abby Guy’s lawyers, which charged the jury to follow a “one-fourth rule” with one wrinkle: Guy and her children could only be proved slaves if they had more than one-fourth “negro blood” *or* if they were descended in the maternal line from a slave who was one-fourth negro or more. Furthermore, “every presumption, consistent with reason, should be indulged in favor of freedom.”⁸⁶ The judge refused to give most of William Daniel’s proposed instructions, including an instruction to ignore “all evidence on Physiology, [which] is irrelevant,”⁸⁷ and several to the effect that evidence that Guy had been held in slavery should be evidence of her status as a slave.⁸⁸

The Ashley County jury gave a verdict for Abby Guy and her children in favor of freedom. The jury list for *Daniel v. Guy* no longer exists, save for the name of the foreman, Ambrose Bull, a forty-nine-year-old farmer who owned six slaves and property worth \$1000 in 1850.⁸⁹ William Daniel won his appeal to the Arkansas Supreme Court, which rejected the one-

82. *Id.* at 27.

83. *See id.* at 28.

84. *See, e.g., id.* at 29-30 (testimony of James Kates); *id.* at 30 (testimony of K.B. Thompson).

85. *Id.* at 29 (testimony of James Barnett) (emphasis added). In 1860, J.D. Barnett was a 47-year-old farmer from Georgia, with \$1200 worth of real property and \$3000 worth of personal property. *See Dwelling 700, Census of 1860, supra* note 72.

86. *Daniel*, 19 Ark. at 129.

87. *Id.*

88. *See id.*

89. *See* Transcript of Trial, *Daniel v. Guy, supra* note 1, at 16; Census of 1850, *supra* note 35.

fourth rule propounded by the trial court in favor of a rule of maternal descent (implicitly, a one-drop-of-blood-rule, as one could be held “negro” with only a tiny fraction of African ancestry so long as it passed through the maternal line).⁹⁰ Daniel succeeded in having the case retried in neighboring Drew County, where he thought he would find a more sympathetic jury. That case also ended in a verdict for Guy.⁹¹

This time, Daniel appealed on the ground that the jury had based their verdict on an improper exhibition of Guy’s feet, for which she had been required to remove her shoes and stockings in court, as well as the more general ground that “there was a total want of evidence to support the verdict.”⁹² The Arkansas Supreme Court, however, thought it quite appropriate to inspect a person’s feet in order to detect “negro blood,” and it refused to disturb the jury verdict.⁹³ Chief Justice English, who had also delivered the opinion establishing the one-drop rule, nevertheless expressed his own skepticism about the jury’s decision, remarking in dictum that “it is possible that the jury found against the preponderance of evidence, through reluctance to sanction the enslaving of persons, who, to all appearance, were of the white race, and, for many years before suit, had acted as free persons and been treated as such.”⁹⁴ So, in 1861, it affirmed the verdict in *Daniel v. Guy*, setting Guy and her children free on the eve of the Civil War.⁹⁵

The trials of *Daniel v. Guy* and their appeals differed widely in the issues that animated dispute. At trial, the racial identity of Abby Guy and her children was disputed on the ground of physical appearance, social acceptance and reputation “as an equal,” and exercise of the rights of free persons. Abby Guy may have won because the jurors were reluctant to remove rights to which she had a “prescriptive” claim by virtue of having exercised them for some years; because the jurors believed from their own observations that she was white, regardless of her ancestry; because the jurors did not want to risk the horror of “white slavery”; or because Abby Guy’s medical experts and other witnesses were more credible, or carried

90. See *Daniel*, 19 Ark. at 131-32.

91. See *Daniel v. Guy*, 23 Ark. 50, 51 (1861).

92. *Id.* at 54.

93. See *id.* at 52, 55. The headnote to the case emphasized that it was, “as often held, [the] province of the jury to pass upon the weight of the evidence.” *Id.* at 51.

94. *Id.* at 54-55.

95. See *id.* This was not the end of the story for Abby Guy and William Daniel. In June 1863, Abby Guy, now Abby Roper, was back in the Ashley County Circuit Court, trying to recover the horses, oxen, and cart Daniel had taken from her when he brought her back from the bayou in 1856. Daniel claimed, first, that Guy could not sue in trover because she was a slave, and second, that the statute of limitations had run out on her suit. The court, in chancery, gave Guy a preliminary injunction against Daniel’s interposition of a plea of the statute of limitations. Daniel took that as a final judgment and appealed it to the Arkansas Supreme Court, where he lost. See *Daniel v. Roper*, 24 Ark. 131 (1863). There is no record of the outcome of Guy’s trover suit.

more weight, than did William Daniel's. But the jury outcome almost certainly did not depend on a determination of a precise fraction of the "African blood" in Abby Guy's veins. The legal issue that moved Chief Justice English to overturn the trial court—whether one-fourth negro blood defined "negro" or whether any fraction passed through the maternal line would suffice—did not decide the actual case left to the juries of Ashley or Drew County.

Guy's lay witnesses made little effort to describe her physically. Most of their testimony focused on her social identity: her passing among whites "as an equal"; her living and working on her own; her ability to form contracts; and so on. On the other hand, the witnesses for William Daniel turned their attention at trial to Guy's ancestry, in particular to her mulatto mother, Polly, her shade of color and curly hair. The jury in *Daniel v. Guy* could view Guy and her children directly and listen to Guy's experts, who talked about what happened to "negro blood" after several generations. Thus, they could choose among several grounds for racial determination: Guy's appearance; her reputation in the community; science; and the discourse that equated whiteness with freedom and the exercise of legal rights. Guy asked the jury to consider her white on the grounds that she was free, because she looked white, and because doctors found her to be white. William Daniel asked the jury to consider her a slave that she had always been a slave and that he could trace "negro blood" in her ancestry. Not only was there no consensus about whether Guy was white, but there was also no consensus about the conjunction between status and race—about whether she should be free if white or whether she must be enslaved if black.

2. *Race as Physical Marker*

If "race" was a question for the jury, then the easiest way for jurors to determine a person's race would be to see for themselves. As the Mississippi Supreme Court ruled in 1876, one's identity as a "colored person" may be "brought to [the jurors'] attention of proof by ocular demonstration," because sometimes "jurors may use their eyes as well as their ears."⁹⁶ Inspection allowed the jury to circumvent the opinions of experts. As the North Carolina court noted in the same year, "[t]he eyes of the members of the jury must be presumed to be as good as those of medical men."⁹⁷ In Abby Guy's case, she and her children "were personally presented in Court," and the judge instructed the jury to "treat

96. *Garvin v. State*, 52 Miss. 207, 209 (1876).

97. *Warlick v. White*, 76 N.C. 175, 179 (1877).

their observation and inspection of plaintiffs' persons as evidence," applying their own "knowledge of the distinction between the negro and the white races" and whatever rules might apply for discerning "negro blood."⁹⁸ Litigants seeking to prove a person's whiteness almost always sought to exhibit her to the jury, in the hope that the presumption raised by light skin would be enough.⁹⁹ In William Daniel's second appeal to the Arkansas Supreme Court, when his counsel objected "with much warmth of expression" to the exhibition of Abby Guy's naked feet to the jury, Chief Justice English rejected his appeal, noting that it did not take an expert to recognize the value of an inspection of the feet to a determination of racial status: "The experience of every intelligent observer of the race . . . will doubtless attest the truth . . . No one, who is familiar with the peculiar formation of the *negro foot*, can doubt, but that an inspection of that member would ordinarily afford some indication of the race . . ." ¹⁰⁰

Yet despite its visual power, exhibition did not take place in every case, and even in those where it did, jurors were given many reasons not to believe their own eyes. Twenty of sixty-eight case records referred

98. Transcript of Trial, Daniel v. Guy, *supra* note 1, at 21.

99. See, for example, *Chancellor v. Milly*, Transcript of Trial, Chancellor v. Milly (Ky. Mason County Cir. Ct. Fall 1838) (collection of Ky. State Archives, Lexington, Ky., Supreme Court Files), *rev'd*, 39 Ky. (9 Dana) 23 (1839), in which Milly's lawyer exhibited her to the jury to prove her whiteness, and she won her freedom from slavery. The appellate court found error in the trial judge's refusal to admit testimony to rebut the presumption of freedom raised by her white looks. See *Milly*, 39 Ky. (9 Dana) at 24.

100. Daniel v. Guy, 23 Ark. 50, 51 (1861). In *Warlick v. White*, Transcript of Trial, Warlick v. White, No. 11,775 (N.C. Catawba County Super. Ct. Aug. 1876) (collection of N.C. Dep't of Archives & History, Raleigh, N.C., Supreme Court Records), *rev'd*, 76 N.C. 175 (1877) [hereinafter Transcript of Trial, Warlick v. White], the race of 11-year-old Sarah Carpenter was at issue. The plaintiffs, seeking to prove that she had black blood, "proposed to exhibit Sarah J. Carpenter to the jury and for that purpose to place her upon the witness stand." *Id.* at 4. The defendant (Sarah's mother) objected to the jury's inspection of Sarah, raising concerns about delicacy and decency in 12 men's inspection of a young girl. The trial court "declined to have the child subjected to the inspection of the jury," *id.*, but the appellate court remanded the case for a new trial to allow the inspection to take place, in an opinion addressing the issue of jury inspections for the purpose of racial determination, see *Warlick*, 76 N.C. at 179-80. The court noted the concern that some, including Sarah's mother, had raised—that such an inspection would be "indecent or indelicate." *Id.* at 178. The court distinguished this case from one in which a woman's pregnant condition was displayed to the jury, implying that Sarah's race would be immediately more evident without disrobing before the jury, and thus an unseemly display would not be required. See *id.* And yet, although the details of this inspection do not appear in the record, it is clear that many jury inspections involved just such a disrobing. Indeed, as Walter Johnson has suggested, these disrobings reenacted the inspections of the slave trader's yard. See Johnson, *supra* note 20, at 18. In order to prove whiteness, one often had to perform whiteness through the rituals of the slave market. Thus, Johnson suggests the contradictions inherent in finding these women "white." After all, what good white woman would submit herself to such indelicate inspection? If she were truly, purely white, what good white man would look at her disrobed? Rather, he suggests, these women represented "enslaved whiteness," the tantalizing, hypersexualized, and commodified whiteness of the "fancy girls" sold as concubines—white in beauty but not in social status. "Fancy girls" in the slave market and women suing for their freedom underwent the same "inspections." *Id.*

explicitly to inspections; in only two of these was that the only evidence before the jury, and in only one other case was testimony about appearance the only other evidence.¹⁰¹

Far more ubiquitous in trials of racial determination were witnesses' descriptions of appearance: color, hair, eye color, and features. Often in the courtroom, a certain physical description of the person at issue became a mantra repeated by innumerable witnesses. In *Ulzere v. Poeyfarre*, at least fifteen witnesses described the woman P as "plus blanche que rouge . . . les cheveux noirs et lisses [more white than red . . . black straight hair]."¹⁰² Most physical descriptions centered on a few features considered to be characteristic of racial difference: curly or straight hair; dark or light skin; flat or thin nose; and thick or thin lips.¹⁰³ From these descriptions, witnesses often made the jump to "blood." Jesse Turner testified that

Susan is of very light complexion, has straight hair, is slightly swarthy, and has rather thick lips and coarse features. From her appearance, [Turner] is of the opinion that she has a small amount of African blood in her veins—what amount impossible to say, but [he] thinks not more than an eighth or a sixteenth. Her mouth and features, generally, indicate the African blood¹⁰⁴

Often physical descriptions referred to ancestors of the person in question, mothers and grandmothers who were not in the courtroom, or fathers and grandfathers whose identity was not even assured. *State v. Watters* was a miscegenation case involving a white woman and a man accused by the state of being a mulatto, although he "contended that he was descended from Portuguese, and not from Negro or Indian ancestors."¹⁰⁵ William Watters's witnesses testified, however, that his grandmother was a negro "not as black as some negroes they had seen, and had thin lips."¹⁰⁶ The court rejected testimony by one of the witnesses that the grandmother had told him that the father of her child, Watters's mother, was a white man. The state's witness, by contrast, swore that "he knew the grandfather and grandmother . . . and they were coal black negroes."¹⁰⁷ Similarly,

101. See *infra* Appendix.

102. *Ulzere v. Poeyfare*, No. 468 (La. New Orleans Parish Ct. May 1820) (collection of Earl K. Long Library, Special Collections & Archives, Univ. of New Orleans, New Orleans, La., Supreme Court Records), *rev'd*, 8 Mart. (o.s.) 155 (La. 1820).

103. See, e.g., Transcript of Trial, *State v. Chavers*, *supra* note 27.

104. *Gary v. Stevenson*, 19 Ark. 580, 584-85 (1858).

105. Transcript of Trial, *State v. Watters*, No. 3540 (N.C. Ashe County Super. Ct. Feb. 1842) (collection of N.C. Dep't of Archives & History, Raleigh, N.C., Supreme Court Records), *aff'd*, 25 N.C. (3 Ired.) 455 (1843).

106. *Watters*, 25 N.C. (3 Ired.) at 456.

107. *Id.*

Whitmell Dempsey, who was indicted as a free negro for carrying a firearm, objected to testimony on behalf of the state by a witness who claimed to have heard from someone now dead that Dempsey's great-grandfather was "a coal-black negro," but the court allowed it.¹⁰⁸ Dempsey's witnesses, on the other hand, testified that the mother of Dempsey's great-grandfather was white, that the great-grandfather "was a reddish copper colored man, with curly red hair and blue eyes," and that every succeeding generation of Dempsey men married white women.¹⁰⁹

Litigants recognized the power of physical description when the person was unavailable for inspection. For example, in *State v. Chavers*, the defendant objected that the trial judge had allowed a witness to assert "that the defendant's father was a man of dark colour, and had kinky hair, that he was a shade darker, than the defendant himself, and his hair was about as much kinked." The state argued that "as a negro is almost entirely known by his external marks, for example, his colour, his kinky hair, his thick lips . . . the nearer the defendant approached the appearance of a negro in these marks he was consequently by so much the farther from a white person."¹¹⁰

Yet even when the person at issue was available for inspection, witnesses offered their own physical descriptions of her. They called attention to those features that might have gone unnoticed by the observer, or those that might have fooled the juror. For example, even witnesses appearing on behalf of a litigant trying to prove someone's blackness and slave status might have described the person as white in appearance, while emphasizing the trickery involved in making that person *appear* white. In *Williamson v. Norton*,¹¹¹ in which a man named Robert had passed as a white man on a steamboat but was claimed as a slave by Alexander Norton, Alexander Martin described him as "a shade lighter than a new saddle, with . . . hair dark, but straight."¹¹² Rufus Blanchard would never "have suspected him of having any african blood. I should have thought that he was of Spanish origin. He was a man of clear skin and of dark complexion.

108. See Transcript of Trial, *State v. Dempsey*, No. 4723 (N.C. Bertie County Super. Ct. Mar. 1849) (collection of N.C. Department of Archives & History, Raleigh, N.C., Supreme Court Records), *aff'd*, 31 N.C. (9 Ired.) 384 (1849).

109. *Dempsey*, 31 N.C. (9 Ired.) at 385. The court instructed the jury that even one black great-great-grandfather was enough to make a person black. See *id.*

110. Transcript of Trial, *State v. Chavers*, *supra* note 27.

111. Transcript of Trial, *Williamson v. Norton*, No. 2427 (La. New Orleans Dist. Ct. 1850) (collection of Earl K. Long Library, Special Collections & Archives, Univ. of New Orleans, New Orleans, La., Supreme Court Records), *aff'd in part and rev'd in part*, 7 La. Ann. 393 (1852) [hereinafter Transcript of Trial, *Williamson v. Norton*].

112. *Williamson*, 7 La. Ann. at 394.

His dress was adapted to setting off his complexion to good advantage.”¹¹³ Several witnesses in this case mentioned the way Robert dressed to make himself look whiter.¹¹⁴ In *State v. Jacobs*, a North Carolina criminal case, the state introduced a witness to testify that “the Defendant was of yellow complexion—had kinky hair though his hair on the day of the trial was much straighter than usual.”¹¹⁵ Ultimately, what made race as a physical marker so inadequate as a basis for decision was its contestable, and seemingly mutable, nature. Often witnesses appeared to see the same person quite differently,¹¹⁶ or, as in *Jacobs*, they insisted that the person had made himself look different on prior occasions. In short, like any form of evidence, racial appearances could be manipulated.

3. *Race as Documented Ancestry*

Before the Civil War, determinations of race were necessarily intertwined with questions of status as slave or free. In the first decades of the nineteenth century in particular, race determination cases centered more on the documentation of a person’s inherited status and “pedigree,” and less on other kinds of evidence of racial identity.¹¹⁷ Many of these early cases reached the issue of race not as a question of black or white, but as one of black or Indian. “Red” complexion, unlike “negro” appearance, gave rise to a presumption of freedom.¹¹⁸ Some of the fluidity that characterized these early cases results from the greater permeability of the border between Indian and white,¹¹⁹ the conflation of “race” and “nation”

113. See Transcript of Trial, *Williamson v. Norton*, *supra* note 111, at 56 (deposition of Rufus Blanchard).

114. See *id.* at 48-50, 54-59 (depositions of Rufus Blanchard and Lyman Cole). Lyman Cole noted that Robert “had more the appearance of the gentleman than the plebeian.” *Id.* at 49.

115. Transcript of Trial, *State v. Jacobs*, No. 7915 (N.C. Brunswick County Super. Ct. Mar. 1859) (collection of N.C. Dep’t of Archives & History, Raleigh, N.C., Supreme Court Records), *aff’d*, 51 N.C. (6 Jones) 284 (1859).

116. See *Bryan v. Walton*, 14 Ga. 185 (1853) [*Bryan I.*].

117. See, e.g., *Davis v. Wood*, 14 U.S. (1 Wheat.) 6 (1816) (involving a suit for freedom that turned on the plaintiff’s mother’s descent from an Englishwoman); *Gregory v. Baugh*, 25 Va. (4 Rand.) 611 (1827) (involving a suit for freedom that turned on whether the plaintiff’s mother was descended from an Indian woman who was entitled to her freedom); *Pegram v. Isabell*, 12 Va. (2 Hen. & M.) 193 (1808) (involving a suit for freedom that turned on the plaintiff’s descent from her Indian ancestor in her maternal line).

118. See *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134 (1806).

119. In general, Indian status, like slave status, followed that of the mother. This was in sharp contrast, however, to racial identity as “negro”; it was possible to be considered white with half Indian “blood.” See, e.g., *United States v. Sanders*, 27 F. Cas. 950, 950-51 (C.C.D. Ark. 1847) (No. 16,220) (“[T]he child of a white woman by an Indian father, would . . . be deemed of the white race; the condition of the mother, and not the quantum of Indian blood in the veins, determining the condition of the offspring.”).

in the definition of "Indian,"¹²⁰ and the lesser stigma attached to the Indian "race" by whites.¹²¹ After Indian removal and the Cherokee cases, there were few Indians in the Southeastern United States to pose problems of racial identification, and fewer questions to be resolved about Indian status. The Indians who remained were absorbed either into white society or communities of "people of color."¹²²

120. Membership in one of the Indian "nations" could be gained by intermarriage more easily than an Indian racial identity could. *See, e.g.*, Transcript of Trial, *State v. Melton*, No. 6431 (N.C. Stanley County Super. Ct. Dec. 1852) (collection of N.C. Dep't of Archives & History, Raleigh, N.C., Supreme Court Records), *aff'd*, 44 N.C. (Busb.) 49 (1852) (holding that "Indian" racial identity, for the purposes of a statute prohibiting intermarriage, meant one-eighth Indian ancestry, or Indian "blood . . . to the third degree"); Transcript of Trial, *Tuten's Lessee v. Martin* (collection of Tenn. State Archives, Nashville, Tenn., Supreme Court Records), *rev'd*, 11 Tenn. (3 Yer.) 452 (1832) (noting that because Tuten had married Rachel Coody of the Cherokee nation, lived within the territory of the Cherokees, and followed their practices and habits, he was "the head of an Indian family" for the purposes of land ownership).

121. The lesser stigma attached to the Indian race by whites can be seen in racial determination trials in the ways witnesses discussed someone interchangeably as "Indian" and "white," in contrast to "colored" and "black" or "negro." In *Boullemet v. Phillips*, Transcript of Trial, *Boullemet v. Phillips*, No. 4219 (La. New Orleans Parish Ct. Feb. 1840) (collection of Earl K. Long Library, Special Collections & Archives, Univ. of New Orleans, New Orleans, La., Supreme Court Records), *rev'd*, 2 Rob. 365 (La. 1842) [hereinafter Transcript of Trial, *Boullemet v. Phillips*]. French witnesses who had come to Louisiana from Santo Domingo and from New Orleans testified both that Mr. Boullemet's mother was Indian and that she was white. Jean Fauchet testified on direct examination that the Boullemets "were considered as a respectable family, they were considered as white." *Id.* at 13. On cross examination, he explained that he had heard that Mr. Boullemet's mother "was a descendant of an Indian race . . . that [her] mother . . . was of a dark colour like the Indians (elle était brune comme les Indiens) . . . that he knew many white persons who had the same complexion and who had no African or Indian blood in their veins." *Id.* at 14. Suzanne Mouchon testified that "Mrs. Boullemet was considered as a white person . . . [S]he appeared to be of an Indian race she was of a dark white color (Blanche Brune)." *Id.* at 28-29. Characterizing her as Indian, or having Indian blood, did not prevent them from also seeing her as white. Mrs. Lavigne even noted, in one breath, that "Mr. Boullemet's wife she was considered as white she was an Indian she did not look like a negro or colored person—she visited nobody but was always hunting in the woods." *Id.* at 32. Of course, in Mrs. Lavigne's story, Mrs. Boullemet may have been considered *to be* white but still not have *been* white.

122. In *State v. Belmont*, 35 S.C.L. (4 Strob.) 445, 449 (1850), Amelia Marchant's witnesses claimed that she was Indian and Portuguese. Witnesses for Ambrosio Belmont, who sought to disqualify her from testifying against him in a criminal trial, produced witnesses who claimed she was the daughter of a "colored man." Whereas the trial court charged the jury that Indians were included in the same class as other people of color, the South Carolina Supreme Court distinguished "free Indians in amity with this government," even if the person in question no longer lived with the tribe in a separate national existence but had become a resident of the state and intermarried with whites.

McMillan v. School Committee, Transcript of Trial, *McMillan v. School Comm.*, No. 16,384 (N.C. Robeson County Super. Ct. Fall Term 1889) (collection of N.C. Dep't of History & Archives, Raleigh, N.C., Supreme Court Records), *aff'd*, 12 S.E. 330 (N.C. 1890), reveals the difficulty of drawing legal distinctions between Indians and blacks, even after slavery, given the social history of "colored" communities of Indians and free blacks. The Croatan Indians were by legend considered to be survivors of the last Roanoke colony. Yet Nathan McMillan, suing the School Committee of the "Croatan" District in 1888 to gain his children's entry into school, claimed that "[t]he people or class now called Croatans were reputed to be and were called Mulattoes before the Croatan Act [of the North Carolina legislature] was passed." *Id.* at 19. Before the Civil War, they "were always a separate race to themselves—attended their own

A telling example of an early suit for freedom that raised questions of racial identity was *Phoebe v. Vaughan*.¹²³ Phoebe and her two sons, Davy and Tom, brought suit against Abraham Vaughan of Wilson County, Tennessee, claiming their descent from an American Indian in Dinwiddie County, Virginia. Vaughan was a Revolutionary soldier who settled in Wilson County in the first decade of the nineteenth century.¹²⁴ Phoebe and her sons enlisted the help of John Bonner, a member of the Methodist and Quaker Humane Society, sympathetic to the plight of the enslaved. Bonner was a Virginia-born farmer who had also been a Minuteman during the Revolution.¹²⁵

In many ways, Vaughan was an unlikely defendant in a suit for freedom. Several people testified to having heard Vaughan say that all men of all colors should be free.¹²⁶ Indeed, Vaughan's defense to the claim that he had acknowledged Phoebe's right to freedom was that Vaughan only meant that *all* negroes had the right to be free! This antislavery sentiment, however, extended only to the abstract family of slaves, and not to his own. When Phoebe and her sons took him to court, Vaughan not only fought the suit, but swore before witnesses that he would "have Davy's hide" and "kill him or his arm would rot off."¹²⁷ This suit seemed to Vaughan the worst sort of betrayal by one whom the family had known as "moms" and whom his children had called "mother."¹²⁸ (Vaughan also claimed that when he spoke of Phoebe's right to freedom he had been "in a passion" and had been drinking the day before.)¹²⁹ In April, 1822, he brought Davy and Tom before two magistrates at John Telford's house, in a rage,

churches and some schools of their own and would not associate with the negroes." *Id.* at 26-27 (testimony of J.C.M. Eachin). No one disputed that Nathan's wife was a "Croatan," but Nathan's racial status was contested.

123. Transcript of Trial, *Butcher v. Vaughan*, No. 5626 (Tenn. Sumner County Cir. Ct. Aug. 1823) (collection of Tenn. State Library and Archives, Nashville, Tenn., Sumner County Court Records, Roll A-5083), *rev'd sub nom.* *Vaughan v. Phebe* [sic], 8 Tenn. (Mart. & Yer.) 4 (1827) [hereinafter Transcript of Trial, *Butcher v. Vaughan*].

124. See THOMAS E. PARTLOW, WILSON COUNTY, TENNESSEE, DEED BOOKS C-M, 1793-1829, at 353 (1984) [hereinafter PARTLOW, WILSON COUNTY DEED BOOKS C-M] (deed book E); THOMAS E. PARTLOW, WILSON COUNTY, TENNESSEE, DEED BOOKS N-Z, 1829-1853, at 105 (1984) [hereinafter PARTLOW, WILSON COUNTY DEED BOOKS N-Z] (deed book P); THOMAS E. PARTLOW, WILSON COUNTY, TENNESSEE MISCELLANEOUS RECORDS, 1800-1875, at 95-100, 151, 159 (1982) [hereinafter PARTLOW, WILSON COUNTY MISCELLANEOUS RECORDS].

125. See PARTLOW, WILSON COUNTY DEED BOOKS C-M, *supra* note 124, at 329 (deed book H); PARTLOW, WILSON COUNTY MISCELLANEOUS RECORDS, *supra* note 124, at 147.

126. See Transcript of Trial, *Butcher v. Vaughan*, *supra* note 123 (depositions of Rachel Bowers and James Weir).

127. *Id.* (depositions of Joseph Davenport and Nancy Davenport).

128. *Id.* (deposition of Rachel Bowers).

129. *Id.* (depositions of Rachel Bowers, Nancy Davenport, and James Weir).

accusing them of various crimes.¹³⁰ According to several white witnesses at the house, Davy and Tom were acquitted, but Vaughan, enraged, proceeded to whip them both so severely that most of the other whites left the room in disgust or distress, and Davy lost most of the flesh on his back.¹³¹

Phoebe, with the help of John Bonner and her attorneys, deposed witnesses in Virginia to prove that she was the daughter of an Indian woman named Beck, raised in slavery by Thomas Hardaway. Beck's sister Tabb had won her freedom in Prince George's County, Virginia, by proving that Indians enslaved after 1691 were wrongly held in slavery, and other relatives had won their freedom as well. In order to identify her as the same enslaved woman who now appeared in Tennessee, Phoebe's witnesses testified that she had lost an eye to ringworm. Phoebe also called witnesses from Wilson County who testified that they had heard Abraham Vaughan declare Phoebe's right to freedom in the past. Her star witness was Seth P. Pool, a Wilson County man who claimed acquaintance with Beck in Virginia and corroborated the testimony of the Virginia witnesses. Pool apparently did not bear enough of a grudge against John Bonner, who had assaulted him several years earlier, to affect his testimony on Phoebe's behalf.¹³²

Vaughan, on the other hand, called witnesses who impugned Seth Pool's veracity,¹³³ and who claimed that Phoebe was bought not from

130. John Telford was a native of the region, son of one of the first settlers, and a large landowner. See PARTLOW, WILSON COUNTY MISCELLANEOUS RECORDS, *supra* note 124, at 95-100, 124, 159.

131. See Transcript of Trial, *Butcher v. Vaughan*, *supra* note 123. With Bonner's assistance as "agent," Davy and Tom also sued Vaughan for assault. Although suits for freedom were often formally filed as writs of trespass, using the traditional language of assault and battery, this suit appears to have been genuine.

John Bonner also described in an affidavit to the Sumner County Court Vaughan's further efforts to rid himself of the freedom suit. First, he tried to bribe Bonner with a Lodge membership to convince Phoebe to drop the suit. He then pursued a change of venue from Wilson County to Sumner County for purposes of delay. Bonner also asserted that Vaughan had prohibited Phoebe and her sons from attending depositions in the suit, effectively preventing them from taking place. At that point, the court shifted control over the plaintiffs from Vaughan to Bonner.

132. Bonner had been found guilty in the Wilson County Court in 1815 for assault and battery against Seth P. Pool. See THOMAS E. PARTLOW, THE PEOPLE OF WILSON COUNTY, TENNESSEE, 1800-1899, at 3 (1983). Phoebe's other witnesses included James McDonald, Vaughan's son-in-law, and Booth Warren, a slaveholder who had been indicted for assault and battery just a year before.

133. The 1815 jury that found Bonner guilty of assaulting Pool had fined Bonner only one cent. It may have been that Pool had something of a bad reputation in Wilson County. Matthew Figures, a miller and justice of the peace, one of the oldest and most prosperous landowners in the county, and William Steele, a trustee of the biggest church in town, a second major in the militia, and a major landowner, however, both vouched for Pool's character on Phoebe's behalf. Character witnesses against Pool were Charles Locke, a small landowner, Elizabeth Sanders, and Booth Warren. See FRANK BURNS, WILSON COUNTY 17, 18 (1983); PARTLOW, *supra* note 132, at 25, 89; THOMAS E. PARTLOW, WILSON COUNTY, TENNESSEE, CIRCUIT COURT RECORDS 182 (1988); PARTLOW, WILSON COUNTY DEED BOOKS C-M, *supra* note 124, at 15, 283 (deed books C and

Thomas Hardaway but from a man named Edmund Cooper. Vaughan's witnesses had never heard Phoebe claim her freedom; they had only heard her express the hope that her free husband, Glasgow Hope, might buy her.¹³⁴

Although witnesses for Phoebe mentioned her "copper complexion," suggesting Indian descent, and witnesses for Vaughan talked about her as "tolerably bright and freckled when young," Phoebe's appearance did not become a central issue in the case. No experts testified as to Phoebe's "Indian-ness" or blackness; indeed, there was a peculiar absence of concern about whether Phoebe was in fact of Indian or African origin. Vaughan, despite his professed belief in freedom for all, did not seem overly concerned that an Indian might be held in slavery, if it could be shown, for example, that her ancestors were enslaved when it was still legal to do so. On the whole, the attitude of the defense witnesses seemed to be that if Phoebe was a slave, and had been a slave when brought to Tennessee, then she must be black. Status determined color.

Phoebe's suit was tried before Judge Thomas Stewart in neighboring Sumner County, just north of Wilson County. Most of the jurors and witnesses in Phoebe's case were farmers who owned a handful of slaves. Nevertheless, they gave a verdict for Phoebe's freedom, suggesting that even slaveholders were willing to set someone free.¹³⁵ The question of Phoebe's racial identity was a question both about her status (was Phoebe

G); PARTLOW, WILSON COUNTY DEED BOOKS N-Z, *supra* note 124, at 285 (deed book Q); THOMAS E. PARTLOW, WILSON COUNTY, TENNESSEE, DEEDS, MARRIAGES, AND WILLS, 1800-1902, at 160, 162, 176, 187, 190 (1987) [hereinafter PARTLOW, WILSON COUNTY: DEEDS]; PARTLOW, WILSON COUNTY MISCELLANEOUS RECORDS, *supra* note 124, at 84, 94, 99, 103; Census of 1820, Manuscript Population Schedules, Wilson County, Tenn.

134. See Transcript of Trial, *Butcher v. Vaughan*, *supra* note 123 (depositions of Benjamin Bennett, Judith Bennett, Nancy Hicks, and Rebecca Yeargin).

135. Ten of the jurors in the Sumner County trial appeared in the 1820 census, and of these, five had remained in the county when the census taker returned ten years later. In 1820, all but one of the jurors listed their occupation as "agriculture," and the median number of slaves owned by jurors was four. The one juror who owned more than a handful of slaves, George D. Blackmore, one of the earliest settlers in Sumner County, had twenty-six in 1820, but only ten slaves in 1830. On the other hand, the four other slaveholders appearing in the 1830 census all increased their slaveholding in the ten-year period. Compare Census of 1820, Manuscript Population Schedules, Sumner County, Tenn., with Census of 1830, Manuscript Population Schedules, Sumner County, Tenn.

Although all were farmers, their circumstances varied considerably. Josiah Walton, who was also a stock dealer, was the chairman of the county court for several years and private secretary to Andrew Jackson in 1818. He was born in Sumner County to a large slaveowning family. See GOODSPEED'S GENERAL HISTORY OF TENNESSEE, at 924 (C. & R. Elder Booksellers 1973) (1887). John Parsons, on the other hand, was of meagre enough means that he specified a bequest of \$25 to one of his sons in his will. See SHIRLEY WILSON, SUMNER COUNTY, TENNESSEE BOND BOOK, 1787-1835, at 14 (1994). William Chapman's family had been in Sumner County for at least three generations, whereas Artemus Tufts moved there from Massachusetts by way of Charleston, South Carolina. See CAROL WELLS, SUMNER COUNTY, TENN. COURT MINUTES, 1787-1805 AND 1808-1810, at 107 (1995).

born free?) and her *literal* identity (was she the same Phoebe?) as much as it was a question of her Indian or black race. The question of racial determination was not hotly contested. Although it was an issue in court whether Phoebe was black, Indian, or white, race was recognized as an imperfect referent for status, rather than the focal point of the controversy. The evidence witnesses gave differed from later cases like *Daniel v. Guy*:¹³⁶ Not only were there no expert witnesses to discuss the “science” of race, but there was also little evidence about Phoebe’s social performance of race.

The political climate at the time of Phoebe’s case also was less contentious concerning the slavery question than it became after 1830. John Bonner, the agent of Phoebe and her children, made no secret of his antislavery inclinations. Indeed, he belonged to a religious society devoted in part to helping slavery’s victims. In later cases, those who testified for slaves seeking their freedom, or helped them in any way, had to declare their freedom from abolitionism and insist that only philanthropy motivated them. But in Phoebe’s case, even Vaughan himself had made antislavery statements in the past. The “proslavery argument” that enslaved status was the best of all possible conditions for people of African blood had not yet fully flowered. Nat Turner’s 1831 rebellion had not yet made free blacks seem so dangerous. Furthermore, in the “pioneer” communities of Middle Tennessee, where the events and the trying of this case took place, there was still some room for people of marginal status to live as free men and women.¹³⁷ Despite their increasing reliance on slave labor, the possibility of freeing a slave did not seem to threaten inordinately the slaveholding men who sat on Phoebe’s jury in 1823.

Although appellate courts’ preferred documentary evidence to “reputation” testimony (for which there was a hearsay exception in racial determination cases),¹³⁸ juries found reputation at least as persuasive as documents. For example, in the slander case of *Cauchoux v. Dupuy*, Cauchoux claimed to be pure white, and he produced marriage and baptismal certificates going back to the seventeenth century without a trace

136. For a discussion of *Daniel v. Guy*, see *supra* Subsection II.B.1.

137. For the history of the Middle Tennessee frontier, see generally THOMAS PERKINS ABERNETHY, *FROM FRONTIER TO PLANTATION IN TENNESSEE: A STUDY IN FRONTIER DEMOCRACY* (University of Ala. Press 1967) (1932); STEPHEN V. ASH, *MIDDLE TENNESSEE SOCIETY TRANSFORMED, 1860-1870: WAR AND PEACE IN THE UPPER SOUTH* (1988); and ROBERT TRACY MCKENZIE, *ONE SOUTH OR MANY? PLANTATION BELT AND UPCOUNTRY IN CIVIL WAR-ERA TENNESSEE* (1994).

138. See *Davis v. Wood*, 14 U.S. (1 Wheat.) 6 (1816) (holding that hearsay and general reputation are admissible to prove pedigree but not status); *Pegram v. Isbell*, 12 Va. (2 Hen. & M.) 193 (1808) (holding that prior litigation deciding the status of a woman is not conclusive evidence of the status of the woman’s offspring).

of evidence of color.¹³⁹ Although he won the case, the jury awarded him only \$250 in damages, when he had requested \$6000.¹⁴⁰ Likewise, documentary evidence frequently gave way to “scientific” evidence, even in cases where a person’s slave status seemed quite certain. For example, in *Gaines v. Ann*,¹⁴¹ a Texas jury found whiteness despite heavy documentary and testamentary evidence that Ann, her mother, and her grandmother were slaves. The jury made this finding based on “evidence of her being pure white blood” given by two doctors who “had examined her and could not detect any of the indicia of the existence of African blood in her.”¹⁴² In spite of this jury finding, however, an appellate court reversed.¹⁴³

4. *Race as Ascriptive Identity: Reputation, Associations, and Reception in Society*

What nineteenth-century judges and lawyers commonly called “reputation evidence” drew on a variety of kinds of evidence or criteria for racial determination. Here, I shall use the term “reputation evidence” to refer to testimony about a person’s acceptance in the community, including the person’s associations with blacks or whites and the racial status his neighbors assigned to him—what he “passed for.” I shall consider separately testimony about self-presentation and about what I shall call “performance,” but these categories necessarily overlap. One’s social activities and one’s associations are not always distinct; one’s acceptance by others and self-presentation depend on one another. Furthermore, part of acceptance in the community involved rumors about ancestry. In testifying about a person’s reputation, witnesses revealed the complicated connections between community memory of a family’s racial identity and their sense of an individual’s racial identity. The translation into practice of rules based on “blood” required an inquiry into each family member’s status, balanced against the present status of the person in question. And in practice,

139. Transcript of Trial, *Cauchoux v. Dupuy*, *supra* note 30; *see also* Transcript of Trial, *Lange v. Richoux*, No. 2491 (La. New Orleans Dist. Ct. May 1833) (collection of Earl K. Long Library, Special Collections & Archives, Univ. of New Orleans, New Orleans, La., Supreme Court Records), *aff’d*, 6 La. 560 (1833) (involving the elaborate genealogy of a family of free people of color).

140. *See Cauchoux*, 3 La. at 207. This case was unusual. In the vast majority of cases, record evidence was on the side of the party asserting someone’s blackness or slave status. Whiteness was an argument in itself, expected to stand outside and beyond documentary evidence. Documentation of status as a slave or free person of color was the best available evidence of African ancestry, and it was the source most commonly resorted to by those trying to prove a person’s blackness.

141. 17 Tex. 211 (1856).

142. *Id.* at 215.

143. *See id.*

testimony about a family's social identity and reputation served to combat documentary evidence of slave, free negro, or Indian status.

A good example of the use of reputation testimony is the case of *Boullemet v. Phillips*,¹⁴⁴ a Louisiana slander case. Slander, of course, is all about rumor, so much of the testimony was bound to center on rumors and reputation. The lawsuit arose when a Mr. Murphy refused to serve in the Louisiana militia with Stephen Boullemet, "saying he was a colored man," and Boullemet's friends traced the rumor to Alexander Phillips.¹⁴⁵

In two trials held in quick succession in the spring of 1840, witnesses for Stephen Boullemet insisted that he had lived his life as a white man, that he had been accepted into white society, and that his mother was reputed to be, if not white, then Indian, but certainly not "colored." Francis Oboyd testified that Boullemet was "received in good circles of society—He was received as a white man."¹⁴⁶ William Emerson testified that Boullemet was "always considered a white boy at school . . . [and] was a kind of favorite at school."¹⁴⁷ Thomas Spear testified that Boullemet's children played with his children, although he had heard the rumor that Boullemet's mother was a colored woman.¹⁴⁸ Several witnesses from Santo Domingo confirmed that the Boullemets had been a respectable white family on that island, and that "if a white person was to unite to a coloured woman he was immediately considered as degraded."¹⁴⁹ The Santo Domingo witnesses testified that Boullemet and his mother were "descendants of Indians (descendants de Sauvages)."¹⁵⁰ Mrs. Lavigne had seen Boullemet's father, on the other hand, "at Lafayette Balls and at Mr. Mackay's balls . . . Mr. Boullemet visited Mrs. Brennan, Mrs. Benvist, Mr. Baptiste, Mrs. Legalle, Mrs. Chaption, Mrs. Mouchon . . ."¹⁵¹

By contrast, witnesses for the defendant described Boullemet's mother as the mulatto housekeeper of his father, the "*menagère*" who kept his grog

144. Transcript of Trial, *Boullemet v. Phillips*, *supra* note 121. Some of the circumstances under which questions of racial determination arose underscore both the financial benefit that accompanied white status in the 19th-century South, which Cheryl Harris has eloquently described, *see* Harris, *supra* note 18, at 1715-45, and the honor attached to whiteness.

145. Transcript of Trial, *Boullemet v. Phillips*, *supra* note 121 at 9 (testimony of Francis Oboyd).

146. *Id.*

147. *Id.* at 36 (testimony of William Emerson).

148. *See id.* at 11 (testimony of Thomas Spear).

149. *Id.* at 12 (testimony of Jean Chaillot); *see also id.* at 24 (testimony of Jean Chaillot); *id.* at 14, 26 (testimony of Jean Fauchet).

150. *Id.* at 24 (testimony of Jean Chaillot). On cross-examination, he explained that he "knew that the mother of Mr. Boullemet was a descendent from Indians because she told him so. She told him so without being asked." *Id.* at 25; *see also id.* at 14, 28, 29, 32 (testimony of Mrs. Louis Engelhim, Jean Fauchet, Mrs. Lavigne, and Suzanne Mouchon). At the second trial, Jean Fauchet testified that he could not "state if they were Indians but heard that they descended from zinguiques (Bohemions)." *Id.* at 69 (testimony of Jean Fauchet).

151. *Id.* at 31 (testimony of Mrs. Lavigne).

shop.¹⁵² Norbert Vaudry, for example, explained on cross-examination that while Boulemet's father was indeed "a very respectable man," his mother "never associated with white ladies."¹⁵³ Accordingly, Vaudry "always took her for a coloured woman."¹⁵⁴ Another witness from Santo Domingo claimed that "the mother of the woman who calls herself Mrs. Boulemet she had no more the appearance of an Indian than witness himself has that of a broom stick (l'air d'un Indian comme mien d'un manisse à balet)."¹⁵⁵ Furthermore, "her complexion was more that of a grenadier than that of a woman . . . [T]he children might have been considered as interesting children but not as white children."¹⁵⁶ At the second trial, the defendant's Santo Domingo witnesses emphasized that they had never known of Indians in the West Indies,¹⁵⁷ that Mrs. Boulemet, who was called Fillette, was known "as coloured," although several of the witnesses did not know whether she was "descended from an Indian or negro race."¹⁵⁸ As Thomas Bausy said, "the fact is he never gave it a thought."¹⁵⁹ Mr. Barnett testified that many boarders left Boulemet's father's boarding house after he married Fillette.¹⁶⁰ Several defense witnesses tried to explain the racial practices of Santo Domingo in the years leading up to the slave revolt, in which mulattoes were accepted on an equal footing in certain realms—in the military and in public office, but not in private white society and certainly not in marriage.¹⁶¹ Boulemet called several rebuttal witnesses (and recalled some who had testified before) to deny that Fillette and his mother were the same person. The housekeeper, whom they claimed was known as Mrs. Julie, was about forty when Mrs. Boulemet arrived at the age of eighteen.¹⁶²

152. *Id.* at 18 (testimony of Norbert Vaudry).

153. *Id.* at 19-20.

154. *Id.*

155. *Id.* at 41 (testimony of Joseph P. Baude-[illegible]).

156. *Id.* at 42-43.

157. *See id.* at 41, 45 (testimony of Joseph P. Baude-[illegible] and Norbert Vaudry).

158. *Id.* at 48 (testimony of P.D. Henry); *see also id.* at 49, 50 (testimony of Barthelemy Bacas and Thomas Bausy).

159. *Id.* at 50 (testimony of Thomas Bausy).

160. *See id.* at 52 (testimony of Mr. Barnett).

161. *See id.* at 62-63, 75-76 (testimony of Franois Carlon and deposition of Madame Verine Laplante).

162. *See id.* at 68-69 (testimony of Mrs. Preaux). The first jury in this case could not reach a verdict. The second jury gave a verdict for Stephen Boulemet, showing that they believed he was a white person. The trial judge indicated that he disagreed with their reading of the facts of the case but felt that he could not disturb the verdict. The Louisiana Supreme Court, however, finding the verdict "contrary to the evidence," overturned it and remanded the case for a new trial. *Boulemet v. Phillips*, 2 Rob. 365, 366-67 (La. 1842).

Similarly, in *Cauchoux v. Dupuy*, Transcript of Trial, *Cauchoux v. Dupuy*, *supra* note 30, the plaintiff sued for slander because his impending marriage had been scuttled by the rumor that his aunt was a woman of color in New York. Witnesses on both sides reported that they had known Mr. Cauchoux and his family in Havana and had known his aunt, Madame Allien, in New York,

Late nineteenth-century cases similarly relied on reputation evidence. In *Hare v. Board of Education*, James Hare's children were kept out of the public school in Gates County on the ground that they were negroes.¹⁶³ The Board of Education called J.H. Ellis to testify that James Hare's mother (admitted to be "a pure-blood white woman") was living with Charles Jones, "a yellow man," when James was born.¹⁶⁴ When asked, "From your knowledge of the plaintiff, from your observation of him and his associations, do you say he is a white man or a negro?"¹⁶⁵ Ellis answered, "I say he is a colored man. He associated with colored people until they would not have him."¹⁶⁶ Similarly, Morgan averred, "From my knowledge of him I say he is a colored man. He has associated with the colored race."¹⁶⁷ A "colored man," William Eason, also testified for the Board that Hare had associated with people of color: "[Hare] was at our church at the mourners' bench for a week. He courted my wife; she is a colored woman."¹⁶⁸ On the other hand, Hare made the case that his father was not Charles Jones, who was "about three-fourths white," but Elbert Matthews, who was "a white man, dark-coloured."¹⁶⁹

The neighbors of both Stephen Boulemet and James Hare judged their racial status by the company they kept. Acceptance in the white community

but they gave completely conflicting views of their racial status. *See id.* Some witnesses said that they had never even heard it rumored in Havana that the Cauchoix had colored blood; others claimed to have known them as colored people. *See id.* Similarly, one witness said that Madame Allien "was invited by a great many ladies of the City of New York," and another noted that "there was current report there in Circulation that [Madame Allien] was a colored woman." *Id.*

163. Transcript of Trial, *Hare v. Board of Educ.*, No. 17,552 (N.C. Gates County Super. Ct. June 1893) (collection of N.C. Dep't of Archives & History, Raleigh, N.C., Supreme Court Records), *aff'd*, 18 S.E. 55 (N.C. 1893).

164. *Id.* at 14.

165. *Id.* at 15.

166. *Id.*

167. *Id.*

168. *Id.* at 16.

169. *Id.* at 17. The court instructed that marriage was prohibited between whites and people with up to the "third degree" of African ancestry (a black ancestor within three generations). *Id.* at 18. Thus, if Hare's father was Charles Jones, then Hare would have been considered to have one-eighth "negro blood," enough to make him "negro."

For an example of a late 19th-century slander case, see *Spotorno v. Fourichon*, Transcript of Trial, *Spotorno v. Fourichon*, No. 18,349 (La. New Orleans Civ. Dist. Ct. 1888) (collection of Earl K. Long Library, Special Collections & Archives, Univ. of New Orleans, New Orleans, La., Supreme Court Records), *aff'd*, 4 S. 71 (La. 1888), which involved the black-balling of a grocer at the St. Maurice Benevolent Society. Fourichon was a grocer who kept a store at the corner opposite Spotorno's and had often used the rumor of Spotorno's color in business competition. For example, he told a black customer that "his negro friend across the street keeps a grocery" and asked a white customer why he did not "buy from a white man instead of buying from a negro." The plaintiff, Spotorno, testified that his children played with all the other children in the neighborhood, except on one occasion when "I told my child go tell Mr. Senac that his children are calling you a nigger. I want it stopped, I want it to stop or I will stop it, I will go and see him and stop it." The lawyer prompted Spotorno, "Well, what did Mr. Senac do?" and he answered, "Mr. Senac gave a good lamming to his child, that was the end of it." *Id.*

could signify white identity, and certain kinds of associations with “colored” people almost certainly meant blackness. In court, witnesses remembered whether the person at issue had inhabited churches, schools, and other spaces that were designated white or black.

5. *The Rise of Race as Science and Performance*

Trials in the early nineteenth century, like *Phoebe v. Vaughan*, often revolved around documentary evidence, status, and ancestry. During the 1850s, however, as the question of race became more central and more hotly contested, courts began to consider “scientific” knowledge of a person’s “blood” as well as the ways she revealed her blood through her acts. The mid-nineteenth century saw the development of a scientific discourse of race that located the essence of racial difference in physiological characteristics such as the size of the cranium and the shape of the foot, and attempted to link physiological, moral, and intellectual difference.

This Section will show the domestication and popularization of “racial science” by lawyers, doctors, and laypeople at trials. It will also suggest some reasons for the heightened focus on racial identity in the courtroom in the decades preceding the Civil War. The following Part will focus on the performance of whiteness, arguing that racial science, despite its rising importance as a way of understanding “race,” shared the stage with a discourse of race as social performance.

Numerous developments between 1830 and 1850 help explain the rise in litigation over racial determination in the pre-Civil War years. The final decades before the Civil War were increasingly difficult times to live on the “middle ground” between slavery and freedom, black and white. First, the threat posed to slavery by abolitionism and slave revolts beginning in the 1830s led proslavery Southerners to develop a new explicit defense of slavery in racial terms: The “necessary evil” became the “positive good.” The proslavery argument rested on the racial inferiority and fitness for slavery of African Americans. The development of this ideology made the status of free black people, an increasingly anomalous liminal group, more and more precarious. If black people fulfilled their highest purpose in slavery, and freedom was an attribute of whiteness, then how could there be free black people? The 1840s and 1850s saw a tightening of manumission laws, making it increasingly difficult to free a slave voluntarily, and a corresponding rise in the restrictions on free blacks’ freedom of movement

and other civil rights.¹⁷⁰ This trend culminated in the self-enslavement laws of the 1850s, which gave free blacks a choice between leaving the state or choosing a master and enslaving themselves.¹⁷¹ (Needless to say, the latter option had no takers.)¹⁷²

People who crossed racial boundaries—"mulattoes"—like free blacks, threatened efforts to make slave status more congruent with blackness and freedom more congruent with whiteness. Although most states had bans on interracial marriage and fornication before the Civil War, Alabama had no barrier to interracial marriage until 1852,¹⁷³ and Mississippi's statute provided only that ministers and officials were authorized to celebrate marriages between free whites.¹⁷⁴ In prewar Tennessee, interracial marriage was punishable by a fine; by 1870, it was a felony for which one could be imprisoned for five years.¹⁷⁵ White Southern perceptions that the mulatto population was growing, as well as the increasing domestic slave trade from the Upper South to the Lower South, and rising geographic mobility in Southern society, were making it harder to determine who was white or black, and who was a slave.¹⁷⁶ These developments fed white Southerners' anxieties about the possibilities of knowing and determining racial identities.

The growing urgency surrounding racial identity and the higher stakes attendant on drawing racial boundaries manifested themselves in an upswing in litigation after 1850.¹⁷⁷ In the cases themselves, the effort to align slavery and racial status more closely made it considerably more

170. On the developments of the 1840s and 1850s, see BERLIN, *supra* note 38, at 343-80; and MORRIS, *supra* note 33, at 371-423.

171. See, e.g., An Act to Remove the Free Negroes and Mulattoes from this State, 1859 Ark. Acts 175.

172. According to Ira Berlin, "In 1860, only 144 mostly elderly free Negroes remained in [Arkansas]." BERLIN, *supra* note 38, at 374; see also MORRIS, *supra* note 33, at 30-36.

173. See Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s*, 70 CHI.-KENT L. REV. 371, 373 (1994).

174. See 1838 Miss. Digest of Laws Ch. 75, § 1, at 560.

175. See 1857-1858 TENN. CODE §§ 2437, 2445-2447, at 481-82; 1870 Tenn. Laws, ch. 39. For discussions of bans on interracial sex and marriage, see PETER W. BARDAGLIO, *RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH* 48-64 (1995); and JOHNSTON, *supra* note 25, at 165-216.

176. On the slave trade, see MICHAEL TADMAN, *SPECULATORS AND SLAVES: MASTERS, TRADERS, AND SLAVES IN THE OLD SOUTH* (1989). On social and geographic mobility, see JAMES OAKES, *THE RULING RACE: A HISTORY OF AMERICAN SLAVEHOLDERS* 69-95 (1982); RICHARD C. WADE, *SLAVERY IN THE CITIES: THE SOUTH 1820-1860*, at 243-81 (1964); and Johnson, *supra* note 20, at 6-7. During the 1850s, according to the federal census, mulatto slavery rose by 66.9%, to 10.4% of the total slave population. See BUREAU OF THE CENSUS, *NEGRO POPULATION IN THE UNITED STATES, 1790-1915*, at 220-21 (1918).

177. There was a rise in appellate cases of racial determination from seven per decade before 1850 to 24 per decade between 1850 and the first year of the Civil War. See *infra* Appendix.

difficult for a litigant to convince a jury or a judge that she was white.¹⁷⁸ But most striking in the cases of racial determination was the new fervor with which the trials were conducted. The 1850s saw the clamor around race rise to a fever pitch. The trials of racial determination not only garnered local attention because of the often salacious subject matter, but they also became the objects of national political discourse because they fed into abolitionist claims about white slavery and “tragic octoroons.” Suits for freedom were politicized in the newspapers and in retellings by abolitionists and fugitive slaves. Litigants became more invested in the search for the true essence of race, but despite the rhetoric suggesting that common sense could help distinguish between whites and blacks, that essence was elusive. Increasingly, documentation of status gave way to two arguments for whiteness or blackness: science and performance. In the postbellum years, the stakes in these courtroom battles changed somewhat, but the shape of the conflict retained important continuities with disputes of the 1850s.

The first of these developments, the introduction of a “scientific” discourse about race into the courtroom, traces its roots to the well-documented rise of “racial science” among phrenologists and medical doctors during this period. Although there is some debate about when scientific racism came to dominate American racial ideology, most historians date its beginnings to the mid-nineteenth century.¹⁷⁹ By drawing the contrast between nineteenth-century biological essentialism and early twentieth-century anthropological theories, which saw racial differences as the product of social and cultural construction, these historical accounts make “science” appear to have been the monolithic language of race in the nineteenth century.¹⁸⁰ The evidence from courtroom battles over racial determination, however, suggests that, at least before the Civil War, racial science was not the predominant way of understanding racial identity.

Only nine cases appear to have relied on expert scientific testimony about racial differences.¹⁸¹ The discourse of racial science, of course, was not limited to medical experts. In reviewing the cases, it is often hard to

178. Before 1850, 58% of the 68 trials in which race was an issue ended in a finding of whiteness; after 1850, only 25% of trials ended in a finding of whiteness. *See infra* Appendix.

179. *See, e.g.*, GEORGE M. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914*, at 74 (1971) (dating scientific racism to the emergence of the “American school of ethnology” in the 1840s and 1850s). For the history of scientific racism, see generally REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM* (1981); and Bruce R. Dain, *A Hideous Monster of the Mind: American Race Theory, 1787-1859* (1996) (unpublished Ph.D. dissertation, Princeton University) (on file with the Princeton University Library).

180. For a summary of this literature, see Pascoe, *supra* note 10, at 46.

181. Eight of these took place after 1848. *See infra* Appendix.

distinguish the testimony of a medical expert from that of a layperson, because the “racial science expert” was typically a local doctor whose testimony highlighted the same aspects of physical appearance that other witnesses did. For example, Abby Guy’s lawyer called two local doctors to inform the jury about the “distinguishing marks between the negro and the white race.”¹⁸² Dr. Isaac Newton, an elderly physician who owned substantial land holdings as well as a young mulatto woman slave with two children, qualified as an expert because he “had read Physiology.”¹⁸³ Dr. Newton testified that curly hair and flat noses “remain observable for several descents [from the negro],” implying that Abby Guy, who lacked these features, must have been far removed from “the negro.”¹⁸⁴ Dr. M.C. Comer, who owned thirty slaves of his own,¹⁸⁵ corroborated Dr. Newton’s testimony.¹⁸⁶

Medical experts, however, were more likely than lay people to be seen as capable of hypothesizing about the trajectory of “negro blood” in one’s family tree. For example, three doctors testified on behalf of Thomas Gary, a slave suing for his freedom.¹⁸⁷ Dr. Brown “could discover no trace of the negro blood in his eyes, nose, mouth or jaws.”¹⁸⁸ While Dr. Brown was unwilling to conclude firmly that Gary had not a drop of negro blood, he explained that he “[s]hould suppose it would take at least twenty generations from the black blood to be as white as complainant.”¹⁸⁹ Dr. Wilcox could “discover no evidence of negro blood in him” by examination, having known Gary seven or eight years;¹⁹⁰ and Dr. Dibbrell had examined Gary and guessed that he had approximately one-sixteenth negro blood, although he cautioned that there was “no definite rule.”¹⁹¹ The only signs of negro blood were “upper lip rather thicker than in the white race” and “temperament sanguine.”¹⁹²

In *Sullivan v. Hugly*,¹⁹³ Justice Lyon of the Georgia Supreme Court articulated an explanation for why medical testimony should count more than lay testimony. In that case, the plaintiff in an inheritance dispute questioned the paternity of Amos Hugly, claiming that he should lose the

182. See *Daniel v. Guy*, 19 Ark. 121, 136 (1857). The Arkansas Supreme Court commented that this was appropriate, “[i]f they were skilled in the natural history of the races of men.” *Id.*

183. Transcript of Trial, *Daniel v. Guy*, *supra* note 1, at 31 (bill of exceptions).

184. *Id.*

185. See Census of 1850, *supra* note 35.

186. See Transcript of Trial, *Daniel v. Guy*, *supra* note 1, at 32 (bill of exceptions).

187. See *Gary v. Stevenson*, 19 Ark. 580, 583-84 (1858).

188. *Id.* at 583.

189. *Id.*

190. *Id.*

191. *Id.* at 584.

192. *Id.*

193. 32 Ga. 316, 322-23 (1861).

right to inherit from his father, because he was really the child of his mother's adulterous affair with a black man.¹⁹⁴ Dr. Dudley Hammond testified that "this child differed from the pure white race in several particulars . . . [Dr. Hammond] was indelibly impressed with those [developments] pertaining to the negro variety . . . skin dark . . . eyes large and prominent, nose short, and hair black, the facial angle deficient."¹⁹⁵ Justice Lyon noted that

[n]either of these [other] witnesses are experts, or profess any skill in physiology, genealogy or ethnology. . . . The testimony of Dr. Hammond is to the same purport, but is much stronger and more important, from the fact, that he is a scientific and learned gentleman on the subject of the races, and examined the child at different times "closely, for the purpose of ascertaining whether it was a white child or a mulatto."¹⁹⁶

Nevertheless, the Court noted that none of these opinions were "infallible." Dr. Hammond's testimony "should have been corroborated by that of others skilled like himself . . ."¹⁹⁷ Furthermore, Justice Lyon continued, in matters of racial determination, higher courts should not second-guess juries, and this jury had seen fit to decide that Amos Hugly was white, or at any rate, to give his mother's husband the benefit of the presumption of paternity.¹⁹⁸

Conversely, lay witnesses were encouraged by lawyers to put their testimony in "scientific" terms. In Abby Guy's case, her lawyers asked several of Daniel's witnesses whether they had studied "Physiology or the difference in distinctions of races."¹⁹⁹ Although the trial judge in this case allowed the witnesses to testify even if they made no claim of expertise,²⁰⁰ in others, laypersons were excluded from testifying about racial descent.²⁰¹

194. *See id.* at 317; *see also* HODES, *supra* note 20, at 108-16 (discussing *Sullivan*).

195. *Sullivan*, 32 Ga. at 319.

196. *Id.* at 322-23.

197. *Id.* at 323.

198. *See id.* at 324.

199. Transcript of Trial, *Daniel v. Guy*, *supra* note 1, at 27 (cross-examination of Thomas S. Thompson).

200. *See id.*

201. *See, e.g.*, Transcript of Trial, *Hopkins v. Bowers*, No. 16,598 (N.C. Orange County Super. Ct. Mar. 1890) (collection of N.C. Dep't of Archives & History, Raleigh, N.C., Supreme Court Records), *rev'd on other grounds*, 12 S.E. 984 (N.C. 1891). In this property dispute, one of the plaintiffs, John Hopkins, testifying to Ann Bowers's mixed blood, was asked by the plaintiff's counsel, "what degree of african descent, in his opinion, was Ann." *Id.* at 21 (testimony of John Hopkins). After the defendant objected, the judge asked Hopkins "if he had ever given any attention to, or had any experiences in the admixture of races." *Id.* When Hopkins said he had not, "[h]is Honor adjudged him not to be an expert in this matter and excluded the question." *Id.* at 21-22.

Witnesses, then, had an incentive to don the mantle of science when they gave physical descriptions. Despite these incentives, racial science dominated the cases far less than one might expect, and it was almost entirely absent before the 1850s.

III. PERFORMING WHITENESS

The most striking aspect of “race” in the nineteenth-century racial determination trials was not so much the biologization emphasized by earlier writers, but its performative and legal aspects. Proving one’s whiteness meant performing white womanhood or manhood, whether doing so before the court, or through courtroom narratives about past conduct and behavior.²⁰² While the essence of white identity might have been white “blood,” because blood could not be transparently known, the evidence that mattered most was evidence about the way people acted out their true nature.

Cultural historians of North and South in the United States have noted the divergence between the two regions in understandings about character and conduct. While New Englanders recognized a strong division between external appearances and one’s inner, “true” self, so that reputation could serve only as *evidence* of character, for nineteenth century Southerners, outward manifestations *were* what counted as character.²⁰³ Thus, the performance of virtue and honor was the thing itself in nineteenth-century Southern society; and the more strongly virtue and honor were identified with whiteness, the more it became a requirement to perform virtue and honor to prove one’s whiteness. During the peak period of racial determination litigation, in the 1850s and 1860s, discussions of an individual’s exercise of the social, political, and legal rights and privileges

202. Many trials of racial determination appear to have involved people of some African or Indian ancestry claiming whiteness for its advantages—freedom, property rights, public school attendance. On the other hand, in some cases, the person at issue was a child, or someone who had no direct interest in the suit herself (for example, a witness disqualified in a criminal case). In those instances, the subject of the inquiry may not have been consciously presenting herself as white. Even in those cases, however, witnesses who reported on the person’s racial performance sometimes made reference to the way a person held herself out, distinguishing self-presentation from reception by others.

203. See KENNETH S. GREENBERG, *HONOR & SLAVERY* 16 (1996); BERTRAM WYATT-BROWN, *YANKEE SAINTS AND SOUTHERN SINNERS* 185-94 (1985); Gross, *supra* note 54, at 269. Historians identify this as a crucial difference between an honor-based and a guilt-based society. See, e.g., Bertram Wyatt-Brown, *The Mask of Obedience: Male Slave Psychology in the Old South*, 93 AM. HIST. REV. 1228, 1233 (1988). Charles Sydnor, in one of the earliest articles to discuss Southern law and culture, explains the caning of William Sumner in similar terms. See Charles S. Sydnor, *The Southerner and the Laws*, 6 J.S. HIST. 3 (1940). For an illuminating discussion of the legal and political ramifications of 19th-century Northerners’ “look within,” see Jacob Katz Cogan, Note, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 YALE L.J. 473 (1997).

of a white person dominated courtroom testimony, sometimes serving as a counterweight to “scientific” evidence, sometimes in conjunction with it.

During the 1850s and 1860s, perhaps the greatest contradiction in white culture was the strange combination of the ideal of honor with white *herrenvolk* democracy. On the one hand, Southern gentlemen were expected to adhere to a “Code of Conduct” that prescribed very different ways of interacting with social inferiors, peers, and superiors. On the other hand, Southern politics depended on a belief that all white men were equals, that only blacks constituted the “mudsill” class. Thus, as George Fredrickson has argued, honor in the South was democratized; there were elements of honor in which all white men could partake, especially through acts of citizenship.²⁰⁴

“Honor” meant very different things for men and for women in Southern society. Most obviously, a white woman’s honor lay in the purity of her sexuality, in stark contrast to the degraded sexuality of a black “Jezebel.” A white man’s honor resided in the public sphere—in his statesmanlike behavior towards superiors and inferiors, his adherence to the gentlemen’s code of conduct, his mastery of slaves, and his exercise of citizenship. For a man, performing whiteness meant the performance of rights and privileges. For a woman, performing whiteness meant acting out purity and moral virtue. Although women, even white women, could not perform the same civic and political roles that men did, their purity and moral virtue did have legal significance, for these were the same qualities—and the same performances—required of them in the legal arena in many other situations (cases of divorce, rape, and even inheritance). Performing pure white womanhood was the feminine equivalent of male acts of citizenship through the exercise of civic duties.

This Part will use several case studies—a series of Georgia trials involving the racial status of the Nunez men and two Louisiana suits for freedom brought by enslaved women—to examine the performance of white manhood and white womanhood in racial determination trials of the 1850s and 1860s.

204. See FREDRICKSON, *Aristocracy and Democracy*, in *THE ARROGANCE OF RACE*, *supra* note 12, at 134, 138-41. Fredrickson attributes this insight to Wilbur J. Cash. See W.J. CASH, *THE MIND OF THE SOUTH* (1941). On honor, see generally GREENBERG, *supra* note 203; BERTRAM WYATT-BROWN, *HONOR AND VIOLENCE IN THE OLD SOUTH* (1986); and BERTRAM WYATT-BROWN, *THE HOUSE OF PERCY: HONOR, MELANCHOLY, AND IMAGINATION IN A SOUTHERN FAMILY* (1994). On *herrenvolk* democracy, see FREDRICKSON, *supra* note 179, at 61-71; J. WILLIAM HARRIS, *PLAIN FOLK AND GENTRY IN A SLAVE SOCIETY: WHITE LIBERTY AND BLACK SLAVERY IN AUGUSTA’S HINTERLANDS* 5-6, 94-119 (1985); OAKES, *supra* note 176, at 138-47; and J. MILLS THORNTON III, *POLITICS AND POWER IN A SLAVE SOCIETY: ALABAMA, 1800-1860*, at 442-59 (1978).

A. *Performing White Manhood*

The case of *Bryan v. Walton*, usually cited in the legal literature for its holding that free blacks could not be citizens, traveled up and down the court system to the Georgia Supreme Court three times in the 1850s and early 1860s, mostly focusing on the question of whether the men of the Nunez family were black or white.²⁰⁵ Joseph Nunez, the son of Lucy, a white woman, died without descendants, having sold six slaves to Seaborn Bryan, a white man. Hughes Walton was the white administrator of Joseph Nunez's estate, and he sued Seaborn Bryan to recover the slaves, on the theory that Nunez was a person of color prohibited by law from conveying slaves. The first trial did not turn on racial identity; the jury found for Walton, based on instructions that assumed Joseph Nunez's identity as a person of color and made no mention of how the jury should determine that "fact."²⁰⁶ The Georgia Supreme Court remanded the case for a new trial, because of problems with the introductions of the wills as evidence.²⁰⁷

At the second trial, however, Bryan sought testimony to support the claim that Joseph Nunez was in fact white. Witnesses on both sides agreed that Lucy was white, so attention focused on Joseph's father, James. The witnesses for Bryan argued that James was white; some claimed that his dark color came from Indian blood,²⁰⁸ others testified that James was of Portuguese descent.²⁰⁹ As in the earlier cases, no one suggested that James's Indian blood removed him from the white race. Most agreed with Mary Rogers's physical description: "a straight long nose, thin lips, straight and very black hair, rather a narrow, long face and of a red complexion; he was

205. See Transcript of Trial, *Bryan v. Walton*, No. A-1154 (Ga. Houston County Super. Ct. April 1853) (collection of Ga. Dep't of Archives & History, Atlanta, Ga., Supreme Court, Case F., Box 17), *rev'd*, 14 Ga. 185 (1853) [hereinafter Transcript of Trial, *Bryan I*]; Transcript of Trial, *Bryan v. Watson* [sic], No. A-1836 (Ga. Houston County Super. Ct. Apr. 1856) (collection of Ga. Dep't of Archives & History, Atlanta, Ga., Supreme Court, Case F, Box 21), *rev'd*, 20 Ga. 480 (1856) [hereinafter Transcript of Trial, *Bryan II*]; Transcript of Trial, *Bryan v. Walton*, No. A-3737, (Ga. Houston County Super. Ct. April 1859) (collection of Ga. Dep't of Archives & History, Atlanta, Ga., Supreme Court, Case F, Box 46), *aff'd*, 33 Ga. 11 (Supp. 1864) [hereinafter Transcript of Trial, *Bryan III*]. See generally HODES, *supra* note 20, at 98-108 (discussing the Nunez case as an example of racial ambiguity and the apparent community acceptance, before the Civil War, of a possibly interracial marriage).

This case is a good example of performance as a "thing done," since witnesses were reporting on the past performances of one no longer living. For a discussion of performance as a "doing" and a "thing done," see Diamond, *supra* note 8, at 1.

206. See Transcript of Trial, *Bryan I*, *supra* note 205, at 21a-25 (containing the defendant's requested instructions and the judge's charge to the jury).

207. See *Bryan v. Walton*, 14 Ga. 185, 194-95 (1853) [*Bryan I*]. In this opinion, Judge Lumpkin made his more famous pronouncements about free blacks' rightslessness, including the statement that "[t]he prejudice, if it can be called so, of caste, is unconquerable." *Id.* at 202.

208. See *Bryan v. Walton*, 20 Ga. 480, 491-92 (1856) [*Bryan II*] (testimony of Mary Rogers); *id.* at 494 (testimony of Harriett Kilpatrick). Most of the testimony of this trial was reprinted in *id.*

209. See *id.* at 491 (testimony of Joseph Bush).

not a large man, walked trim and nice.”²¹⁰ Rogers also reported that Jim Nunez

was always treated and regarded in the neighborhood as not a negro, or having any negro blood in his veins, but as *a respectable Indian and white blooded man*; kept as good company as any body in the neighborhood. Witness thinks that Jim was always among respectable white people in the neighborhood in their dances, parties, &c. and was received by them as on a footing with whites. Witness does not remember of a free negro ever having been received and treated in that way by the neighborhood.²¹¹

Harriett Kilpatrick had stayed in the house of Joseph’s mother, and on cross-examination she reiterated that “neither Jim or Joe Nunez were regarded as free negroes, nor did either regard himself as such or act as such.”²¹² Mary Rogers agreed that Joseph associated with free negroes; however, she thought “it was because Joe had a negro for his wife.”²¹³ Stephen Newman and Mary Harrel testified not only that Jim Nunez, Joseph’s father, looked more Indian than negro, but that “his action and movements were as genteel as any man witnesses have known; there was no clumsiness about him. Witnesses well remember Jim Nunez’s dancing, which was very graceful; many persons tried to catch his step, and nearly all admired its style.”²¹⁴ Mary Harrel testified that Jim Nunez

never kept low, trifling or rakish company; he associated with respectable whites in the neighborhood; was often at their balls and parties, assemblies and little gatherings, where no free negro was allowed to associate with the whites, and dined with the whites just the same as any gentleman would have done.²¹⁵

In sum, Bryan presented the case that Jim Nunez was Indian or Portuguese, either of which counted as white, that he presented himself as white and was accepted as white by both whites and free blacks, that he acted white—genteel and light of foot—and that he married a white woman. Joseph, it seemed, acted less white—married a black woman and associated with free blacks—but he too looked white and presented himself as white. There was only one hole in his argument. No one presented any

210. *Id.* at 492.

211. *Id.* (emphasis added).

212. *Id.* at 494.

213. *Id.* at 492.

214. *Id.* at 496. This evidence of good dancing style, incidentally, went to prove Jim’s *whiteness*, contrary to modern stereotypes.

215. *Id.*

evidence of either Nunez exercising political or legal rights. Indeed, Harriett Kilpatrick testified that as far as she knew, “neither Jim or Joe Nunez ever voted or exercised any of the rights of citizenship.”²¹⁶

In rebuttal, several witnesses from Burke County testified that James Nunez was a mulatto. Charles Cosnahan claimed that the Nunezes “passed in the neighborhood as free colored persons” although he allowed that he did “not know what their blood was.”²¹⁷ Cosnahan gave as evidence of their race their appearance, their self-presentation, and his belief that neither Jim nor Joseph “voted or performed military duty; [he thought] they exercised no other rights than those of free negroes.”²¹⁸ Joseph Cosnahan agreed that the Nunezes were mulattoes. He first mentioned their appearance: “[T]hey had hair which curled, does not recollect their features, but their general appearance indicated them as mulattoes.”²¹⁹ Then Cosnahan discussed their social and civic performances, explaining that he “never knew of their exercising the usual rights of white citizens; they considered themselves as mulattoes; James Nunez was an educated man and mixed sometimes with white men; they were regarded in the neighborhood as mulattoes; the white citizens associated with them and regarded them as mulattoes”²²⁰ Several other witnesses corroborated this version of Joseph and James’s racial identity.²²¹

At the third trial, several witnesses gave much the same testimony, and more witnesses were called.²²² William C. Bates, for Bryan, testified that

James Nunez was of the complexion of a dark Spaniard or Indian; not so dark as I have seen them—he had black straight hair, wore it platted and tied at the ends with ribbands and hung down on his shoulders—his features were more of the Portuguese or Spaniard than any other, unless Indian; his race or blood was either Spanish, Indian or Portuguese, or a mixture of the three races; he was a man that was treated by his neighbors as a gentleman, recognized as a gentleman, and enjoyed the privileges of a gentleman and a free citizen; he was recognized as a free white man, and not as a negro or one that had negro blood in him.²²³

216. *Id.* at 494; *see also* HODES, *supra* note 20, at 100-03 (discussing the contradictory testimony in the first Nunez trial).

217. *Bryan II*, 20 Ga. at 498.

218. *Id.*

219. *Id.*

220. *Id.*

221. *See, e.g., id.* at 500 (testimony of Charles Ward); *id.* at 501 (testimony of Thomas Cosnahan).

222. *See* Transcript of Trial, *Bryan III*, *supra* note 205, at 13-31 (exhibit B).

223. *Id.* at 17.

On cross-examination, Bates explained that he “was too young, when I knew James Nunez, to answer whether he voted, mustered, or served on juries”²²⁴

Only one witness gave testimony that James Nunez had exercised the rights of a white man. The deposition of a South Carolinian, Matthew Alexander, was read into testimony to provide evidence of James Nunez’s racial status in South Carolina, before he moved to Georgia:

James Nunez . . . was a fine looking man—genteel appearance—fine dancer—quite a gentleman in manners and appearance. The color of his skin was that of a Spaniard or Indian; his hair was long, straight and dark or black; he was reported to have been of Indian descent; he was a free white man, or so recognized; he was treated by all the neighborhood as a free white man; he mingled and associated with the white population; he was never treated as a negro, or a man that had negro blood in him, and he enjoyed all the privileges of a free man; he was sometimes called Dr. Nunez—don’t know that he was a Doctor . . . James Nunez voted, mustered, and did jury duty, and exercised the usual privileges and duties of free white citizens.²²⁵

For Walton, three new witnesses testified to Joseph Nunez’s negro blood. One thought he “combined the White, Indian, and Negro race, with a preponderance of Negro blood”; the second thought he was “of the White and Negro race . . . composed equally of each”; and the third that he was “mostly of the Negro blood.” But all three asserted that Joseph “was not received and treated as a white man, and he did not associate with free white citizens, and was not allowed to eat at the tables with free white citizens, neither did he sleep on the beds with them” and “he did not seek to do so”²²⁶

At the end of the third trial, there was testimony on both sides of every aspect of Joseph Nunez’s white identity: appearance, self-presentation, reputation and acceptance among blacks and whites, exercise of the

224. *Id.* at 18.

225. *Id.* at 18-19.

226. *Id.* at 19-21 (testimony of Dr. Green B. Powell, Fielding Stephens, and James T. McNowell). On cross-examination, these witnesses had to swear to their own whiteness, asserting that they and their parents are as white as most white people, and especially as white as the interrogator, and that they are not advocating a free negro cause. Witnesses say that their hair is not kinky or curly, or straight, and one of them has little or no hair on his head, and rushes like Elijah of old, when he shall have shuffled off this mortal coil to go up thou old bald head. They all swear that they are white men and gentlemen. We have no negro veins, you old rake, and advise you to amend yourself. We have known white men to live with negro wives.

Id. at 21.

privileges and rights of whiteness, white conduct, white character, and white ancestry.²²⁷ While no one could agree whether James and Joseph had straight or curly hair, almost everyone agreed that they had not exercised the privileges and rights of whiteness. The jury gave a verdict for Hughes Walton, indicating that they believed the Nunezes to be people of color.

Judge Lumpkin, for the Supreme Court of Georgia, sought to set the matter to rest at the final disposition of the case in 1864. Lumpkin disparaged all the testimony in favor of Nunez's whiteness as that of dupes, fooled by appearances. He considered all of the evidence both of appearance and of performance—all of which together constituted the "common sense" of the community—to be unreliable.²²⁸ Judge Lumpkin found his hard evidence in old-fashioned legal documentation of ancestry: the will of Moses Nunez, James's father, leaving his possessions to his wife, "Mulatto Rose."²²⁹ Lumpkin characterized Moses Nunez as "a Portuguese . . . from a left hand marriage with a mulatto; . . . from this connection sprang James Nunez . . . [who] emigrated to a then distant part of the country, that he acquired some notoriety at dances for the grace and agility with which 'he tripped the light fantastic toe;' that James Nunez intermarried with a very pretty white woman," and that was "the origin and blood of this mongrel family."²³⁰ Judge Lumpkin's rhetoric of fraud and deceit suggests that he recognized the subversive possibilities of a discourse of racial performance.

In *Bryan v. Walton*, the witnesses could not agree about whether Joseph or James Nunez looked white or whether they were accepted as white by the community. They did not agree whether the essence of the Nunezes' racial identity was captured by the way they looked, the way they danced, or the way they performed the essential acts of citizenship. But they did implicitly agree upon one thing: All of these emanations of racial identity were performative. Race was not only something Joseph and James *were*, it was something they *did*. To be white was to act white: to associate with

227. In a wonderful study of interracial sex in the 19th-century South, Martha Hodes discusses the Nunez case at length. She concludes from the complete lack of community consensus about the racial identity of the Nunezes that, "[u]nlike the categories of slave and free . . . color and race must have been less urgent to white neighbors." HODES, *supra* note 20, at 103. She argues that before the Civil War, matters of interracial sex and of racial line-drawing were less important than they later became. *See id.* I am less persuaded, however, that disagreement and conflict necessarily signify contentment with a lack of consensus.

228. *Bryan III*, 33 Ga. at 25-27.

229. *See id.* at 24. It is quite likely that Moses Nunez was Jewish. According to the leading historian of American Jewry, Dr. Samuel Nunez was a Portuguese Jew who arrived in Georgia in 1733 by way of England. "[H]is sons ate and slept with Indians, blacks, and Christians" and became fur merchants. 1 JACOB RADER MARCUS, UNITED STATES JEWRY, 1776-1985, at 34, 44, 108 (1989). By the 19th century, the "Nunezes of Georgia" were a well-known Jewish family. It is striking that the question of religion was never raised at trial.

230. *Bryan III*, 33 Ga. at 23.

whites, to dance gracefully, to vote. Blood may have been the signified, but the signifiers were social acts. More than that, the signifiers of race were not only social and political but also prescriptive and legal. What did it mean to be a white man? It meant to be a citizen, a civic being, someone who could do certain kinds of things.

This way of describing white identity functioned as a *legal* definition in two ways. First, people described others as white or black in terms of their competencies and disabilities. Thus, “race” operated in a law-like fashion, prescribing certain rules of behavior for people of different races. The “laws” of race could, then, be undermined by people who followed all the rules of whiteness and hid their intrinsic blackness. Second, for men in particular, the kinds of competencies that were mentioned repeatedly were those that involved civic participation and rights-holding: voting, mustering in the militia, jury service. Witnesses routinely gave this sort of evidence to prove whiteness, and it seemed to be determinative in at least some cases.

This appears to a modern observer to be a reversal of the proper order of fact-finding, a kind of circular argumentation: In order to exercise rights, one must be white; in order to be white, one must exercise rights. It is possible that witnesses and jurors thought of this as merely one more form of “reputation” evidence—someone had already certified that this person is white—or that they were demonstrating deference to earlier administrative decisions. But judicial rhetoric and the operation of courtroom narrative suggest that such an explanation is partial, at best. Part of the reason witnesses repeatedly gave evidence of race in terms of legal rights and disabilities is because the law undergirded so much of what people understood racial identity to mean in the nineteenth-century South. Embedded in their very way of speaking or conceiving various relations and identities—identities formed in and through relations to others—was law.²³¹

At trial, witnesses translated legal rules based on ancestry and “blood” into wide-ranging descriptions of individuals’ appearances, reputation, and in particular, a variety of forms of racial performance: dancing, attending parties, associating with white people or black people on a social level, sitting on a jury, voting, and testifying in court. By deferring to juries,

231. Robert Gordon discusses law’s constitutive role in culture this way:

[I]n practice, it is just about impossible to describe any set of “basic” social practices without describing the legal relations among the people involved—legal relations that don’t simply condition how the people relate to each other but to an important extent define the constitutive terms of the relationship, relations such as lord and peasant, master and slave, employer and employee, ratepayer and utility, and taxpayer and municipality. . . . Slavery is a legal relationship: It is precisely the slave’s bundle of jural rights (or rather lack of them) and duties vis-à-vis others (he can’t leave, he can’t inherit, he has restricted rights of ownership, he can’t insist on his family being together as a unit, etc.) that *makes* him a slave.

Gordon, *supra* note 17, at 103.

judges allowed performance evidence to become as or more important to the definition of “race” as fractions of “blood” were in the statutory law. But judges gave greater weight to particular kinds of racial performance. At the appellate level, when courts referred to performances of whiteness, it was civic performances that they found determinative.

The clearest judicial statement of the overriding importance of white manhood as a performance of legal prerogatives came from South Carolina, the state that had no hypodescent rule before the Civil War. In an 1835 case, the South Carolina Court of Appeals found to be white several witnesses whose “maternal grand father . . . although of a dark complexion, had been recognized as a white man, received into society, and exercised political privileges as such.”²³² The people in question were now “respectable . . . one of them is a militia officer, and their caste has never been questioned until now.”²³³ Judge Harper held that for a person of ambiguous appearance, evidence of reception in society and exercise of legal and political rights could overcome evidence of negro ancestry.²³⁴ Judge Harper added that “it may be well and proper, that a man of worth, honesty, industry and respectability, should have the rank of a white man, while a vagabond of the same degree of blood should be confined to the inferior caste. . . . It is hardly necessary to say that a slave cannot be a white man.”²³⁵

A slave cannot be a white man. Certainly it was the cardinal rule on which black slavery was based, that a white man could not be a slave. But “a slave cannot be a white man” suggested that not only did status depend on racial identity, but status was part of the essence of racial identity. Being degraded signified black “blood,” and, conversely, behaving honestly, industriously, and respectably, exercising political privileges, and mustering in the militia qualified one for whiteness *even if* one’s “degree of blood” alone might consign one to “the inferior caste.” Here was the clearest possible statement that racial identity was a socially and legally defined status.²³⁶ Of course, it is a statement from a court in South Carolina, the state with the most “aristocratic,” caste-based social structure in the Deep South, and one unburdened with “blood”-based statutory rules of racial definition in this period.²³⁷

232. *State v. Cantey*, 20 S.C.L. (2 Hill) 614, 614 (1835).

233. *Id.* at 614-15.

234. *Id.* at 615.

235. *Id.* at 616.

236. *Accord White v. Tax Collector*, 37 S.C.L. (3 Rich.) 136, 139 (1846) (“[T]he question [of racial determination] . . . must partake more of a political than a legal character.”).

237. For other cases from South Carolina, see, for example, *White v. Tax Collector*, a case about payment of the capitation tax on free negroes, in which the tax collector made the case that “[t]heir father is a man of some property, but was never admitted to any of the privileges of a

Yet it is possible to find similar statements in judicial opinions from all over the South, regardless of the operative statutory definition of “negro.” The Mississippi High Court of Errors and Appeals, in finding Augustine Krebs to be mulatto, considered it determinative that he “married a slave, that he did not claim or exercise the right to vote at elections, to act as a juror in court, or to testify against white men in court . . . though several witnesses testify that he was considered to be a white man”²³⁸ In *Dean v. Commonwealth*,²³⁹ the Virginia Supreme Court, in considering whether trial witnesses were mulattoes, found it important that “[t]heir grandfather, David Ross, who was spoken of as a respectable man, though probably a mulatto, was a soldier in the revolution and died in the service.”²⁴⁰ In all of these cases, courts singled out evidence of the exercise of rights and privileges as particularly strong markers of white manhood.

One important dimension of these opinions is particularly clear in Judge Harper’s opinion: the *prescriptive* right to whiteness. Here, I am using “prescriptive” in its strictest legal sense, that one might acquire a right to property after a *prescribed* number of years by virtue of having used the property and treated it as one’s own for those years without challenge. Judge Harper suggested that it would be unwise—indeed, he wrote, “very cruel and mischievous”—to disturb the racial identity of one “whose caste has never been questioned until now.”²⁴¹ He went on to make the connection between this gentleman’s prescriptive right to be white and other rights in property: “Shall time and prescription, which secure and consecrate all other rights, have no effect in fixing the civil condition of an

white man,” whereas the plaintiffs gave evidence that Elijah Bass had been a witness in the Court of Common Pleas at Camden with free white persons as parties. *Id.* at 137-38; *see also* Transcript of Trial, *Johnson v. Boon* (Walterborough Cir. Ct. Spring 1842) (collection of S.C. Dep’t of Archives & History, Columbia, S.C., Court of Appeals Loose Opinions, 1843, Box 7), *aff’d*, 29 S.C.L. (1 Spears) 268, 269 (1842) (stating that the persons at issue “had been raised as white, and had been so received in society, and had exercised all the privileges of white people, such as mustering and voting”); *Johnson v. Basquere* (Colleton Ct. C.P. Nov. 1842) (collection of S.C. Dep’t of Archives & History, Columbia, S.C., Court of Appeals Loose Opinions, 1843, Box 7), *aff’d*, 29 S.C.L. (1 Spears) 329, 329-30 (1843) (“The narrator was in court, and had the appearance of a white man. He had been a member of a volunteer company, and had voted at the general election for members of the Legislature. There was no question but what his lineage on his father’s side, was that of white, and rather respectable people.”).

238. *Raby v. Batiste*, 27 Miss. 731, 732 (1854).

239. 42 Va. (4 Gratt.) 541 (1847).

240. *Id.* at 541; *see also* *White v. Clements*, 39 Ga. 232 (1869) (holding that evidence that the plaintiff’s name was marked “colored” in voter registration list was not enough to determine his racial status).

241. *State v. Cantey*, 20 S.C.L. (2 Hill) 614, 615 (1835). *But see* *White*, 37 S.C.L. (3 Rich.) at 141 (holding that there was “no prescriptive right to civil and political franchises” just because no one in the family has ever previously paid the (free negro) capitation tax; and also holding that a jury can determine racial status based on color and features, evidence about social intercourse, respectability, and marriage to a white person).

individual?”²⁴² Reading this, we might draw the conclusion that the prescriptive aspect of whiteness was simply judicial reluctance to disturb the conclusions of the community. Yet, as we have seen, communities were by no means decided about liminal individuals’ racial status. Furthermore, people in the community themselves spoke of the prescriptive aspects of whiteness in both senses of the word: the way in which identity was formed by the accretion of acceptances and associations by and with other white people, over a *prescribed* period of time; and the way in which identity was formed through performance, by doing the *prescribed* things white people do.

“Prescriptive” whiteness, then, had an additional layer of meaning: White identity for men was determined by political, legal, and social “facts.” As trials attempted to mediate between legal and community definitions of “whiteness,” to allocate property rights at the same time as they gave recognition to the white community’s own self-definition, they revealed the conflicted and contested status of racial identity. The law did not merely reflect community consensus, because community understandings were contested; at the same time, legal definitions by no means settled racial meanings. The ideology of whiteness was created and recreated through a prism of legal as well as social understandings—whether a man had exercised or claimed the legal and political rights of a white man by sitting on a jury, voting, testifying in court, holding property, or forming contracts; whether he held himself out as white and was accepted as white; whether he acted like a gentleman and “passed” in “good society”; whether he was an honorable man.

B. *Performing White Womanhood*

The most dramatic suits involving racial determination were suits for freedom, most of them brought by women, and nearly all of these brought successfully.²⁴³ These women could not claim that they had exercised the rights of white men. Rather, they dazzled their neighbors and jurors with feminine evidence of whiteness: beauty and goodness. In the two cases discussed herein, the documentation was on the side of black ancestry, or at least slave status. Yet the women won their cases by successfully invoking the trope of white womanhood—indeed, by performing it in court. They won their cases through campaigns of white womanhood; they fought their

242. *Cantey*, 20 S.C.L. (2 Hill) at 616.

243. Of sixteen manumission suits, twelve were by women, of which eleven were won by the plaintiffs and the last ended in hung juries. See Transcript of Trial, *Morrison v. White*, *supra* note 24, at 33-36, 47-49. Of the four suits by men, two were won and two were lost. See *infra* Appendix.

cases in the public eye and in the popular press. In a time when newspapers studiously avoided the subject of miscegenation and almost never commented on a civil case, it is striking that these cases appeared in the newspapers at all.

In 1845, Sally Miller sued Louis Belmonti for her freedom.²⁴⁴ Sally Miller claimed to be a German Redemptorist who had been separated from her family off the boat from Holland and then sold or bound to service in Attakapas Parish to John F. Miller. Miller had then sold her to Louis Belmonti at a public auction in New Orleans. Louis Belmonti's witnesses testified that Sally Miller possessed an ineffable quality that showed her colored blood. One explained that "persons who live in countries where there are many colored persons acquire an instinctive means of judging that cannot be well explained" and that "he judges she was of mixed blood."²⁴⁵ Sally Miller introduced a number of German witnesses who claimed that she was their long-lost cousin or neighbor and that she had birthmarks on her thighs that they remembered from her girlhood.²⁴⁶ But the chief argument Sally's attorney made in favor of her whiteness was a moral argument:

Of all the poor and half starved people who came over to this country in the Bark Johanna, in 1818, and who now survive, I tell the Court there is not one, except this unfortunate Plff, who is not in better than middling circumstances—all of them are well off, many of them really affluent. And she, the perseverance, the uniform good conduct, the quiet and constant industry, which are found in those she claims as relatives, have always been found in her, and however polluted and degraded her person may have been, these traits have yet left her worthy of the relatives who ask her at your hands—and these traits prove her white nature²⁴⁷

This argument, of course, was about reception into society—associations with other whites—but also about the qualities of character that defined whiteness. Whiteness meant virtue and honor—good conduct, industry, and so forth. Sally Miller's virtues revealed themselves through her conduct, her performance. As her attorney explained, "both morally and physically, she shows before the Court that there is nothing of the African about her."²⁴⁸ He

244. See Transcript of Trial, *Miller v. Belmonti*, *supra* note 44.

245. *Id.* (testimony of C. Pollock).

246. See *id.* (testimony of Mde. Henon, Daniel Muller, Mrs. Schultze-Heimer, and Mrs. Shubert).

247. *Id.* (notes by plaintiff's counsel on the rule for a new trial, in support of said rule). In his motion for a new trial, plaintiff's counsel "repeat[ed] . . . in as nearly the same words as possible, what [he] did say on this point at the trial." *Id.*

248. *Id.*

hastened to explain that he was not making an argument for public opinion to decide a legal question. He was not saying that Sally Miller was white because a majority of people believed her to be white or because she associated with whites.²⁴⁹ He mentioned public opinion only “*to shew her moral power, and weight, and influence. An influence, which I contend no one but a white woman could possibly raise up and control—an influence as inconsistent with the nature of an African, as it would be with the nature of a Yahoo.*”²⁵⁰ In short, only a white woman could exercise the moral power to convince others of her virtue through her performance.

The attorney went on to suggest the reliability of discovering racial identity through its performance. Whereas, as Judge Lumpkin and countless others had warned, blackness could be hidden behind white physical features, moral qualities would shine through. Thus, the lawyer sought, successfully, to link white Southerners’ confidence in the intangible but unmistakable qualities of white womanhood to identifiable acts of self-presentation and behavior performed by Sally Miller:

I contend that the moral traits of the Quartronne, the moral features of the African are far more difficult to be erased, and are far more easily traced, than are the distinctions and differences of physical conformation. The Quartronne is idle, reckless and extravagant, this woman is industrious, careful and prudent—the Quartronne is fond of dress, of finery and display—this woman is neat in her person, simple in her array, and with no ornament upon her, not even a ring on her fingers.²⁵¹

Sally Miller’s whiteness, in other words, could be read in her goodness, her moral features. Black blood might hide itself under the mask of blue eyes and flaxen hair, but a true white Southerner would be able to detect that ineffable essence of blackness—and, likewise, true pure whiteness would always reveal itself. Not only did the jury believe Sally Miller, but the Louisiana Supreme Court affirmed her freedom. Judge Bullard was impressed not only with Sally Miller’s “complexion,”²⁵² but also with the fact that Sally “did not seek this controversy, and was apparently contented with her condition.”²⁵³

249. *See id.*

250. *Id.* (emphasis added).

251. *Id.*

252. *Miller v. Belmonti*, 11 Rob. 339, 341 (La. 1845).

253. *Id.* at 342. He was presumably referring to the fact that her suit was aided by various others, including her purported German relatives. This also suggests that Judge Bullard was impressed by the “moral influence” argument.

This case received a great deal of publicity; the newspapers referred to it as “the celebrated Miller case” or simply “Sally Miller’s case,” as though everyone in the city of New Orleans would know whom they meant.²⁵⁴ Most of the coverage was sympathetic to Sally Miller. The *Daily Picayune*, for example, reported before the trial that Sally *alleged* to have “suffered the hardships and privations imposed only on the African race,”²⁵⁵ but by the trial the newspaper was recounting her allegations as fact.²⁵⁶ The *Picayune* described Sally as “a woman of some 33 years of age or thereabouts; has a dark olive complexion, and when young must have been pretty good looking.”²⁵⁷

In response to the negative publicity, John Miller wrote to the *New Orleans Picayune* to plead his side of the matter on May 31, 1844;²⁵⁸ his letter was reprinted in the *New Orleans Bee* the following day.²⁵⁹ He argued that the Sally Miller who was lost to her family in 1817 or 1818 in Attakapas was a different person from the slave he sold to Louis Belmonti; she was a mulatto slave named Bridget brought from Mobile.²⁶⁰ But he also argued his own bona fides:

I can say that I have never in my life had a German—man, woman or child—bound to me, either as redemptioner or apprentice. For the last thirty-six years I have been well known as a resident of New Orleans. I think the position I have ever occupied is such that no person who has ever known me can believe that I could be capable, knowingly, of attempting to convert a white apprentice into a slave for life.²⁶¹

Miller obviously felt that his own honor was at stake in this case, put into question by an enslaved woman claiming the honor of white womanhood.²⁶²

Sally Miller’s story also became grist for fugitive slave narratives purveyed to Northern audiences by abolitionists. The trial narrative offered a dramatic real-life example of what was to become a stock character in

254. See *District Court*, DAILY PICAYUNE (New Orleans, La.), Apr. 9, 1844, at 2 [hereinafter *District Court I*]; *District Court*, DAILY PICAYUNE (New Orleans, La.), May 25, 1844, at 2 [hereinafter *District Court II*].

255. *District Court I*, *supra* note 254, at 2.

256. See *District Court II*, *supra* note 254, at 2.

257. *Id.*

258. See John Miller, *To the Public*, DAILY PICAYUNE (New Orleans, La.), May 31, 1844, at 1.

259. See John Miller, *To the Public*, NEW ORLEANS BEE, June 1, 1844, at 1.

260. See Miller, *supra* note 258, at 1.

261. *Id.*

262. Miller explained that he needed to defend himself because “numerous publications in the papers have repeated the rather romantic pretensions of the plaintiff in a manner to give rise to injurious imputations upon my character.” *Id.*

abolitionist literature: the “tragic octoroon.”²⁶³ The abolitionist former slave William Wells Brown, in his novel, *Clotel or the President’s Daughter*, based on the Sally Hemings story, devoted a chapter to the story of “Salomé Miller,” entitled *A Free Woman Reduced to Slavery*.²⁶⁴ The chapter ends with the admonition to the reader to look in the New Orleans newspapers if he does not believe the truth of Salomé’s struggle to be free.²⁶⁵ William and Ellen Craft, an enslaved husband and wife who published a narrative of their own escape to freedom, used Sally Miller’s

263. Literary critics suggest several explanations for the appeal of the tragic octoroon story, in which a very light-skinned young woman grows up free or nearly free, often in the household of her white father, and then, because of some tragic event such as her owner/father’s bankruptcy, is sold into true slavery. This plot was, first, an “attempt to appeal to a common humanity” with white readers, “a bit of reverse racism anchored in the idea that a nearly white person enslaved was more pitiable than a pure African similarly situated.” JAMES KINNEY, *AMALGAMATION!: RACE, SEX, AND RHETORIC IN THE NINETEENTH-CENTURY AMERICAN NOVEL* 63 (1985). But the tragic octoroon story also appealed to Northern readers because it fed their sense of moral superiority to Southern slaveholders by directly attacking the depravity of the individual slaveholder. Further, the audience of middle-class women dependent on their husbands or fathers empathized with the “sudden, horrible reversal of the tragic octoroon’s fortunes,” which represented a real threat to them. *Id.* at 65; *see also, e.g.*, H. LORD HOSMER, *ADELA, THE OCTOROON* (New York, Follett, Foster & Co. 1860); JOSEPH HOLT INGRAHAM, *THE QUADROONE; OR, ST. MICHAEL’S DAY* (New York, Harper & Brothers 1841). Werner Sollors also calls attention to the fact that black authors used the quadroon or octoroon character as often as did whites, sometimes for black audiences, in order to call “race” into question. *See* SOLLORS, *supra* note 5, at 234-45.

264. WILLIAM WELLS BROWN, *CLOTEL OR THE PRESIDENT’S DAUGHTER: A NARRATIVE OF SLAVE LIFE IN THE UNITED STATES 87-90* (M.E. Sharpe 1996) (1853). Brown introduced Salomé Miller as a hired servant in the Morton family home where his slave heroine, Althesa, lived. Salomé “was perfectly white; so much so, that Mrs. Morton had expressed her apprehensions to her husband, when the woman first came, that she was not born a slave.” *Id.* at 87. Salomé was also very unhappy, and wept at her work. *See id.* When Mrs. Morton expressed sympathy, Salomé revealed that she was born in Germany, that she worked as a nurse in New Orleans when she first arrived, that she had become separated from her mother, and that her father had died. *See id.* at 88. One day, while visiting with the family for whom she worked at a town on the banks of the Mississippi,

they went out for a ride, and they had not been gone more than half an hour, when two men came into the room and told me that they had bought me, and that I was their slave. I was bound and taken to prison, and that night put on a steamboat and taken up the Yazoo river, and set to work on a farm. I was forced to take up with a Negro, and by him had three children.

Id. at 88.

In response, Althesa whispered, “Unhappy woman, . . . why did you not tell me this before?” *Id.* Salomé explained that she was afraid because she “was once severely flogged for telling a stranger that I was not born a slave.” *Id.* When Mr. Morton inquired about Salomé’s status with her present owner, the response confirmed her story but also, tragically, led her owner to remove Salomé from Mr. Morton’s house. *See id.* at 89. Three months later, Salomé was cleaning the door steps of her new hirer’s house when a German woman who had crossed the Atlantic on the same ship with her happened to pass by and recognize her. *See id.* “The poor woman was raised from the ground by Mrs. Marshall, and placed upon the door step that she had a moment before been cleaning. ‘I will do my utmost to rescue you from the horrid life of a slave,’ exclaimed the lady . . .” Sure enough, after a “long and tedious trial,” Salomé Miller became free. *Id.* at 90.

265. *See id.* at 90.

story as the framing story of their narrative, with which they begin their tale.²⁶⁶ They used the story to play upon the sympathies and fears of white Northerners about “white slavery,” but also to emphasize that slavery was not so much about racial distinctions as about power relations; or, rather, that there was nothing natural and distinct about racial categories—that they emanated from the relations of power rather than vice-versa. Craft explained, “It may be remembered that slavery in America is not at all confined to persons of any particular complexion; there are a very large number of slaves as white as any one,” but given the inadmissibility of a slave’s testimony against that of a free white person, whites unjustly held in slavery had little chance of regaining their freedom.²⁶⁷

Historians have credited slave resistance with helping to bring about the Civil War, emphasizing the role of runaway slaves who escaped to the North, triggering sectional conflicts over the Fugitive Slave Act.²⁶⁸ Most runaway slaves were men.²⁶⁹ But the enslaved women, like Sally Miller, who brought suits for freedom based on whiteness, not only used the tools of the legal system to challenge their slave masters, but they fashioned the stories that opponents of slavery used to reach a broad audience for their crusade. The politicization of “white slavery” narratives suggests the subversive possibilities of claims of whiteness.²⁷⁰

Another dramatic case, *Morrison v. White*, illustrates the ways in which white womanhood had become Southern society’s “most precious fetish of

266. See CRAFT & CRAFT, *supra* note 47, at 3-6.

267. *Id.* at 2. William Craft noted that his wife Ellen was nearly white, but that this had caused nothing but trouble for her under slavery, triggering the resentment of her mistress, who was her father’s widow. Craft introduced Sally Miller’s story to prove “that he who has the power, and is inhuman enough to trample upon the sacred rights of the weak, cares nothing for race or colour . . .” *Id.* at 3. Craft gave even more details of the arrival of Daniel Miller and his daughters Dorothea and Salomé, their travel to Attakapas parish to work on the plantation of John F. Miller, and the disappearance of the girls after their father’s death. Craft quoted the *Law Reporter*’s account of the gathering of German emigrants of 1818 to establish Salomé’s identity, including the midwife who had assisted at her birth. According to Craft, “There was no trace of African descent in any feature of Salomé Muller [sic]. She had long, straight, black hair, hazel eyes, thin lips, and a Roman nose. The complexion of her face and neck was as dark as that of the darkest brunette.” *Id.* at 5. Although so many years under the hot Louisiana sun had darkened her exposed skin, “[t]hose parts of her person which had been shielded from the sun were comparatively white.” *Id.* at 5-6. This and other stories of free children sold into slavery provided the Crafts with evidence of the moral depravity to which the institution of slavery had reduced white men.

268. See, e.g., OAKES, *supra* note 176, at 171-74. Most Civil War historians now emphasize the role of abolitionists in escalating the sectional conflict to the point of war. See, e.g., 1 WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS AT BAY 1776-1854*, at 289-352 (1990); DAVID M. POTTER, *THE IMPENDING CRISIS 1848-1861*, at 18-50 (1976).

269. See EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 648 (1974).

270. Of course, like all efforts to turn the weapons of the oppressor against himself, the politicization of “white slavery” was a double-edged sword; it did not ultimately repudiate the racial hierarchy that made whiteness supreme.

white supremacy.”²⁷¹ Alexina Morrison had been held as a slave in Matagorda County, Texas, by Moses Morrison. In 1850, Morrison gave seven-year-old Alexina to his nephew, B.F. Giles, in Little Rock. It was not clear whether the transaction was a loan or a gift; Alexina was to learn domestic arts such as sewing and cooking at Giles’s house. Giles testified that he had not wanted to take her because she was too white, and indeed, Giles’s father had refused her as a gift. Giles then sold her to a slave trader in 1854, who brought her to the New Orleans slave market, and sold her to the defendant in the case, James White, a slave trader who had just sold his pen in New Orleans and bought land in Jefferson Parish.²⁷² All of these transactions save the first were documented by a paper trail.

Alexina Morrison, now known as Jane, was unhappy in White’s household, and ran away in the late summer or early fall of 1857. She surrendered herself to the Jefferson Parish jail for protection. The jailer, William Dennison, took pity on Morrison and accepted her story that she was white and had been kidnapped into slavery in Arkansas. He took her home from jail, and by all accounts, introduced her into white society. According to John White, who found this quite outrageous, inhabitants of Jefferson Parish had “introduced her into society of respectable persons in this parish as Miss Morrisson [sic] and in that character have dressed her up, and taken her to public and private balls.”²⁷³

At the first trial, in 1858, witnesses on behalf of Alexina Morrison testified to her whiteness, agreeing with her attorneys that she had a “light sallow complexion, blue eyes and flaxen hair.”²⁷⁴ G.H. Lyons, who “[was] informed by Physicians, that one of the Marks of Black blood were some dark marks on the back bone,” examined Morrison down to the waist and “saw no such marks.” Lyons hastened to add that he was “opposed to amalgamation.”²⁷⁵

271. Johnson, *supra* note 20, at 10.

272. See Transcript of Trial, *Morrison v. White*, *supra* note 24, at 33-36, 47-49 (depositions of B.F. Giles and Moses Morrison); Johnson, *supra* note 20, at 1.

273. Transcript of Trial, *Morrison v. White*, *supra* note 24, at 63.

274. *Id.* at 14 (interrogatories to Benjamin F. Danby, Christopher C. Danby, Josiah Gildes, Andre Hutt, and John T. Trigg).

275. *Id.* at 24. As Walter Johnson has pointed out, Morrison had to pay for her freedom by performing the rituals of the slave market, stripping before white men who would consider it indecent to inspect a respectable white girl in the same way. Alexina Morrison, rather, was white in the same way that “fancy girls” sold at New Orleans quadroon balls were white, a whiteness that could be purchased. Johnson also suggests, however, the irony that slaveholders had to rely on “[t]he saving abstraction ‘black blood’ . . . to distinguish nearly white women from really white ones, to distinguish what was essentially performance from what was the performance of essence.” Johnson, *supra* note 20, at 6. An excellent performance “could breach the categories designed to contain and commodify hybridity, [and] a slave could step over the color line and onto the other side.” *Id.* That was just what Alexina Morrison tried to do.

The defendants' lawyers repeatedly challenged the racial expertise of Alexina Morrison's witnesses, asking whether they knew "the peculiar features of the african race, even when removed to the fourth or fifth degree," what basis they had for "the comparison of the caucasian and african races," and whether they owned slaves.²⁷⁶ While Morrison's lawyer tried to convince the jurors to trust their own eyes, White's case depended on proving that "race" was something about which one could not rely on appearances, something that required expertise—even the sort of expertise one could acquire through slave-ownership—to discern.

Thus, even White's lay witnesses used the language of "science" to declare Alexina Morrison colored. A planter who owned many slaves "judge[d] that [Morrison] ha[d] African blood . . . from the shape of her cheek Bones and the conformation of the lower part of her mouth."²⁷⁷ B. Preston saw African blood in "[s]omething between the eyes and cheeks [and] also something in the lips, the peculiarity of the eyes and a darke shade of the teeth which are characteristic with quadroons."²⁷⁸ White also introduced witnesses who could testify to the status of Alexina's ancestors, the most traditional kind of defense to a suit of freedom. Moses Morrison, Alexina's original owner, while acknowledging her "yellow flaxen hair and light blue eyes," confirmed that Alexina's mother "was and is a slave."²⁷⁹ Whereas Alexina based her case on performance, White based his on "science" and the documentary record.

The first trial ended with a hung jury. At this point, James White petitioned the court for a change of venue, complaining that "there is such a degree of prejudice in the public mind of the parish" in favor of Alexina Morrison's suit that he could not get a fair trial.²⁸⁰ In fact, "a few days before the last trial," James White claimed, he went to Carrollton and "was surrounded and threatened by a lawless mob . . . [that] threatened personal violence to [him] because he dared to assert his property in his own slave, whom said mob declared to be a white person."²⁸¹ White won his change of venue, convincing the judge that Morrison had won over the public of Carrollton.

276. G.H. Lyon, for example, had to be asked twice. On reexamination, he explained that he "[d]id not understand the question first put to him, as whether he knew the difference between the Caucasian and African Race, says now that he knows the difference." Transcript of Trial, *Morrison v. White*, *supra* note 24, at 24-25; *see also id.* at 25 (testimony of J.B. Clauson); *id.* at 26-27 (testimony of S.N. Cannon); *id.* at 28-29 (testimony of J.H. Breaux).

277. *Id.* at 28 (testimony of J.H. Breaux).

278. *Id.* at 29 (testimony of B. Preston).

279. *Id.* at 34-35 (deposition of Moses Morrison).

280. *Id.* at 62 (petition for change of venue by James White).

281. *Id.* at 63.

At the second trial, Alexina Morrison brought even more witnesses to testify on her behalf. Some of them made the same argument in favor of whiteness that had been made in Sally Miller's case: There was a certain ineffable quality that made someone white. P.C. Perret, in answer to a question by the Court, explained that he "[h]as often seen quatroun girls in his place much [whiter] than the plaintiff which he knew to be of African descent; and as for this girl from natural [instinct] he would say she was white, why he feels this to be so he cannot explain."²⁸² On cross-examination, he reiterated that he was

not able to state why he says that he believes the girl to be white, but it is because a creole of this place, being among colored persons of so many different shades of color from snowy white to jet black and the constant intermingling of races the creole can always detect in a person whether that person is of African origin . . . it is the same instinct in some measure as the alligator . . . who knows three days in advance that a storm is brewing.²⁸³

It was not, he emphasized, the color of skin that led him to his conclusion.²⁸⁴ William Dennison, Alexina Morrison's jailer and then host in Carrollton, testified that when she first threw herself upon his mercy her hair had been dyed dark and curled to make her appear more black.²⁸⁵

This time, Alexina Morrison's lawyer made sure that her witnesses could prove their expertise in racial matters. Several doctors testified on Morrison's behalf that her hair was "of the moderate oval characteristic of the caucasian or white race."²⁸⁶ A merchant seaman testified that he had thoroughly examined Morrison and found her to have several "characteristics of the whites" including a "double cartillage" and a "hollow foot."²⁸⁷ This merchant testified that he had studied as a surgeon and made a detailed comparison of black and white sailors in Massachusetts in 1840 or 1841.²⁸⁸ Yet given the uncertainty of history and science, White sought to clinch his case with "social practice and sexual performance."²⁸⁹ Questioning S.N. Cannon, one of Morrison's jailers, White's attorneys tried to raise the specter of the colored sexual temptress, the quadroon fancy girl, repeatedly asking him whether he was the father of Alexina Morrison's

282. *Id.* at 80 (testimony of P.C. Perret).

283. *Id.* at 81.

284. *See id.* at 82.

285. *See id.* at 84 (testimony of William Dennison).

286. *Id.* at 89-90 (testimony of Dr. Brickell); *see also id.* at 92-96 (testimony of Dr. Riddell).

287. *Id.* at 88 (testimony of Seaman Hopkins).

288. *See id.* at 87. He explained that he had undertaken this study "before [Massachusetts] legislated itself out of the Union." *Id.*

289. Johnson, *supra* note 20, at 12.

child. Under cross-examination, he testified that Morrison had been out of jail for nineteen months out of the five years he was her jailer, and that she had a child while in jail.²⁹⁰ “By alluding to her public exposure at a ball and her extramarital sexuality, [White’s lawyers] drew on the overdetermining racialized sexuality of the quadroon mistress to locate Alexina Morrison’s origins—her sexuality, they implied, was proof enough of her invisible but essential blackness.”²⁹¹

The second jury found in Morrison’s favor, and White appealed. Of the twelve men who gave a verdict for Morrison’s freedom, only five appeared in the censuses of Jefferson or Orleans Parish for 1850 or 1860. Of these, all were nonslaveholders, yet “shareholders in a society based on racial caste.”²⁹² As Johnson suggests, they may have been less persuaded by White’s appeal to racial solidarity against a slave attempting to cross the color line than by “the version of racial reassurance offered by Alexina Morrison: one could be treated as a slave but still be white.”²⁹³

The Louisiana Supreme Court believed White’s case. In particular, the Court accepted the argument that one could not trust one’s eyes to determine a person’s racial identity, explaining that Morrison’s “fair complexion, blue eyes, and flaxen hair . . . must yield to proof of a servile origin.”²⁹⁴ The case was remanded for a new trial, in 1862, which ended in another hung jury, this time with the votes tallied at ten in Morrison’s favor, and two against her.²⁹⁵ White filed another appeal in early February, but the Supreme Court adjourned on February 24, 1862 and did not reopen that spring, as four of the five justices fled New Orleans in the wake of the Union Army. We do not know what happened to Morrison or White, but one can only guess that Morrison found her freedom one way or another, in 1862 or 1863.

What is striking about this case, besides the arresting image of a blue-eyed blonde slave commanding a mob of white citizens to drive a respectable slaveholder out of town, is the strength of two discourses of racial identification. Despite the legal rule making ancestry the determinative factor, the lawyers and witnesses for both sides did not rest on the records of Morrison’s ancestral status. At the first trial, White emphasized science and Morrison emphasized performance; by the second, both sides improvised with both kinds of arguments. That the supreme court, in Louisiana as in Georgia, preferred documentary evidence of status

290. See Transcript of Trial, *Morrison v. White*, *supra* note 24, at 156-58 (testimony of S.N. Cannon).

291. Johnson, *supra* note 20, at 13.

292. *Id.* at 15.

293. *Id.* at 16.

294. *Morrison v. White*, 16 La. Ann. 100, 102 (1861).

295. See Transcript of Trial, *Morrison v. White*, *supra* note 24, at 170.

should not be surprising. But the supreme court could only send the case back to a jury, and juries were not equally impressed with documentary evidence.

Of course, Louisiana was not like the rest of the South. Louisiana, as several of these witnesses commented, sanctioned much “intermingling.” Louisiana recognized gradations of caste and color and tolerated an established elite community of free people of color. It should not be surprising that it was easiest to prove one’s whiteness in Louisiana or that these matters were litigated more often in Louisiana than anywhere else in the United States. But what made it possible for Sally Miller and Alexina Morrison to sway white juries was surely no different in Louisiana than elsewhere: They appealed to a vision of white womanhood as beauty, purity, and physical and moral goodness that was increasingly the rhetorical center of Southern laws regarding race relations from segregation of public accommodations to the criminal law.²⁹⁶

Race was performative in trials involving men and in trials involving women. Sally Miller and Alexina Morrison performed white womanhood by showing their beauty and whiteness in court, by performing the rituals of the “fancy girl” market, and by demonstrating purity and moral goodness to their neighbors. White womanhood was ideally characterized by a state of legal disability, of requiring protection by honorable gentlemen. In nineteenth-century legal settings, women of ambiguous racial identity were able to call upon the protection of the state if they could convince the court that they fit this ideal of white womanhood. James and Joseph Nunez failed to perform white manhood by failing to exercise legal and political rights. Now, of course, the witnesses who described these performances and the jurors who both watched them enacted and heard them described undoubtedly believed that they were sifting *evidence* of these individuals’ *essential* natures. The practical effect of offering, and valuing, this kind of evidence was to make white identity equal to a set of moral and civic virtues that could only be performed by white people.

296. For an example of such a case far from New Orleans, see *Miller v. Denman*, Transcript of Trial, *Miller v. Denman* (Jan. 1835) (collection of Tenn. State Archives, Nashville, Tenn., Supreme Court Records), *rev'd*, 16 Tenn. 232 (1835). James Denman sued Isaac Miller for enticing his slave Harriett away from their home in Georgia to Sevier County, Tennessee, where she lived free for two years under the name Irene Sanders. When Denman came to reclaim “Harriett,” the neighbors tried to stop him and demanded proof of her slave status. Although Miller was inclined to let Denman take her away, because she admitted that she was a slave, Richard Shields, John Cattell, and John Evans were not willing to let her go, arguing that the girl might have been bound when a child to the plaintiff and raised as a negro and did not know any better—and that Shields added the girl had lived at his house so long and conducted herself so well he did not think it would be right to let her be taken off in that way

Id. at 13 (testimony of John Cattell).

IV. CONCLUSION

A. *Postwar Continuities*

After the freeing of the slaves, the color line did not lose its salience in the South. Indeed, many historians of the nineteenth-century South portray a postbellum world in which the racial divide rose in significance: The color line replaced the boundary between free and slave, race replaced slave status, and a regime of whiteness replaced the regime of slavery as the weapon of oppression.²⁹⁷ Martha Hodes's study of interracial sex suggests that whereas before the Civil War there had been some space for relationships between black men and white women, now there was an intense commitment on the part of whites to racial "purity."²⁹⁸ Joel Williamson argues that what had been, in some parts of the South, particularly Louisiana and South Carolina, a three-tiered society ("whites," "mulattoes," and "negroes") now had only two tiers: black and white.²⁹⁹ After the Civil War, legislatures hurried to pass antimiscegenation laws.³⁰⁰

297. See, e.g., HODES, *supra* note 20, at 146; Johnson, *supra* note 20, at 20-21.

298. See HODES, *supra* note 20, at 6, 198.

299. See WILLIAMSON, *supra* note 38, at 61-109. Williamson suggests that this resulted both from the decisions of the mulatto elite to align themselves politically and culturally with the freedpeople and from white efforts to force mulattoes into the "negro" class. He writes: "There began a melding of mulatto and black worlds, not only in politics but in the whole broad array of human endeavor." *Id.* at 78. Most observers agreed that interracial sex declined dramatically after the Civil War. See *id.* at 88-89.

There is a voluminous literature on how much "room" there was for alternative social arrangements during Reconstruction, when segregation, racial violence, and disfranchisement were less widespread than they would become in the later 19th century. It is safe to say, however, that the trend in social and political life in the 1870s was already toward the exclusion and separation of people with African ancestry, although this campaign did not succeed entirely until the last decade of the century, accompanied by an epidemic of violence and lynching aimed at black people and whites who allied themselves with them. On the violence of the 1890s, see JACQUELYN DOWD HALL, *REVOLT AGAINST CHIVALRY: JESSIE DANIEL AMES AND THE WOMEN'S CAMPAIGN AGAINST LYNCHING* (1993); and JOEL WILLIAMSON, *THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION* (1984). On the rise of segregation after Reconstruction, see generally HAROLD D. WOODMAN, *NEW SOUTH—NEW LAW: THE LEGAL FOUNDATIONS OF CREDIT AND LABOR RELATIONS IN THE POSTBELLUM AGRICULTURAL SOUTH* (1995); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d rev. ed. 1974); and Barbara Y. Welke, *When All the Women Were White, and All the Blacks Were Men: Gender, Class, Race, and the Road to Plessy, 1855-1914*, 13 L. & HIST. REV. 261 (1995).

300. For example, Alabama, which had no explicit law against interracial marriage before the Civil War, passed a law in 1866 punishing interracial marriage, adultery, or fornication by two to seven years imprisonment or hard labor. See REV. CODE ALA. §§ 3602-3603, at 690 (1867). The Alabama Supreme Court found this statute unconstitutional in 1872 but overruled itself quickly in 1877. Compare *Burns v. State*, 48 Ala. 195 (1872), with *Green v. State*, 58 Ala. 190 (1877). For a summary of legal developments in Southern states, see BARDAGLIO, *supra* note 175, at 179-89.

Indeed, the word "miscegenation" was coined as an anti-Republican epithet in 1864. As Robert J. Sickels notes:

"Miscegenation," from the Latin *miscere* (mix) and *genus* (race) was coined by the authors of an anonymous pamphlet, *Miscegenation: The Theory of the Blending of the*

Whereas most states before the Civil War had defined “negro” according to fractions of “blood”—usually one-eighth or one-fourth—many moved to one-drop-of-blood rules. This heightened concern for purity of blood accompanied the fetishization of white womanhood and the flowering of the myth of the black rapist that led to the lynching deaths of so many black men in the late nineteenth century.

After emancipation, courtrooms continued to be the fora for determining people’s racial status. Voting restrictions, segregated school systems, and laws prohibiting interracial marriage and fornication guaranteed that courts would still be adjudicating people’s racial status well into the twentieth century. Thus, it is somewhat surprising that racial determination litigation peaked between 1850 and 1865, rather than during the post-Civil War years. One might expect, given the intensification of this litigation in the years immediately prior to the Civil War, that this trend would have continued in the courts after the war.³⁰¹ It may have been precisely because the statutory boundaries of whiteness were growing so narrow that it became increasingly difficult to raise a credible claim in court if there was any disagreement at all about one’s racial status. Any “taint” of color was enough to consign one to blackness.

One might conclude, then, that it was in the post-Civil War period that racial science triumphed and became the single argument for explaining “race.” Because I have found relatively few cases from this period, I am cautious about reaching any conclusions at this point about the post-Civil

Race, published in 1864, in reality an attempt by Democrats David Croly and George Wakeman to attribute favorable views on racial mixing to the Republicans and thereby aid the Democratic candidate for president.

ROBERT J. SICKELS, RACE, MARRIAGE, AND THE LAW 151 n.2 (1972).

301. Here it is important to use caution in drawing conclusions from the numbers of cases that reached their state’s highest court. It is possible that people were litigating race steadily in trial courts but that for some reason, the rate of appeals accelerated in the 1840s and 1850s and dropped after the Civil War. For the antebellum period, I feel fairly comfortable concluding that the cases in state supreme courts roughly reflect the cases in county trial courts, based on my research in civil cases involving slaves. See Gross, *supra* note 21, at 17-25. In that study, I compared trials in five Deep Southern states that were appealed to the states’ highest courts with a large sample of unappealed trials in Adams County, Mississippi, drawn from a survey of all causes of action brought in the Adams Circuit Court between 1798 and 1861. I found that the cases from my five-state sample and those from my Adams County sample differed in few important ways. Litigation rates in Adams County rose over the antebellum period, and cases involving slaves rose as a percentage of all litigation. This rise was mirrored in the rise of appeals to the five state supreme courts. During the antebellum period, state supreme courts took all appeals brought to their attention. See *id.*

I cannot exclude the possibility that after the Civil War more cases were litigated in county trial courts than were heard on appeal in state supreme courts, so that the drop-off after the Civil War seen in my sample of trials does not demonstrate a lower frequency of litigation. It is worth noting, however, that there were no particularly widespread changes in the rules of appellate procedure in the immediate aftermath of the Civil War. Only in the 20th century did most states add intermediate courts of appeal and limit the number of appeals heard by their highest courts. See ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 106-320 (1941).

War years. Yet there are remarkable continuities in the cases that continued to go to trial: They demonstrate the same oscillation between common sense understanding and the essential unknowability of race, the same reliance on expert knowledge and the social performance of racial identity. At the very least, there is no evidence that science pushed out performance as a dominant racial discourse at trial.

For example, in an 1890 North Carolina land dispute, a nephew of Nash Booth sued Nash's wife, Ann Bowers, and her children, alleging that Ann was "of negro blood," which would render her marriage invalid and her children illegitimate.³⁰² At trial, H.R. Lloyd testified that although Nash and Ann had "lived together and cohabited as man and wife for ten to twelve years," he believed "from their appearance . . . [that Ann and her daughter] were mixed blooded."³⁰³ Although Lloyd testified that he thought Ann was "a colored person," the Court did not allow him to give his opinion about her "degree of african descent," because he was not qualified as an expert.³⁰⁴ Several other witnesses testified that Nash Booth "was a white man, though dark skinned" but that Ann appeared to be of mixed blood.³⁰⁵ The plaintiffs then exhibited Ann and her children to the jury "and called attention to their skin, their hair &c. &c."³⁰⁶ They also called attention to her six-month-old child, "begotten and born since the death of Nash Booth," and the infant's relative whiteness.³⁰⁷

In an even more dramatic case from North Carolina, *Warlick v. White*, an ex-slave testified to having slept with his former master's wife while his master was fighting in the Confederate Army, making their daughter an illegitimate mulatto who could not inherit.³⁰⁸ The jury weighed testimony about the relationship of the ex-slave and his alleged mistress, now a widow, and, at the behest of the challengers to the child's legitimacy,

302. Ann Bowers, in her answer to the suit, claimed title to the land both as Nash Booth's widow and also as the heir of Lydia Bowers. According to Ann, her mother Lydia had deeded her house and land to Nash Booth on her deathbed. Ann had been ready to challenge Nash's title by charging that he had exercised undue influence on Lydia, but he "prevailed upon her not to bring suit," saying that "if she would marry him it would secure the land to both." Transcript of Trial, *Hopkins v. Bowers*, *supra* note 201, at 20-21. So Nash Booth married his lover Lydia's daughter in order to retain control of her land. *See id.*

303. *Id.* at 20-21 (testimony of H.R. Lloyd).

304. *Id.* at 21-22.

305. *Id.* at 22.

306. *Id.* at 22-23.

307. *Id.* Ann called no witnesses on her own behalf. She herself testified, as did one of her daughters, about her marriage to Nash and his paternity of their children, and she exhibited her six-month-old baby again to the jury. *See id.* at 24. Ann's counsel was awarded the right to open and conclude the trial. *Id.* at 25. The jury rendered a verdict for Ann and her children, but the plaintiffs won their appeal on the ground that exhibiting Ann and her children for inspection by the jury did not make them witnesses for the plaintiffs; therefore, the defendant had no right to call them to testify. *See Hopkins v. Bowers*, 12 S.E. 984 (N.C. 1891).

308. *See* Transcript of Trial, *Warlick v. White*, *supra* note 100.

inspected the child. The child was then “subjected to medical examination” by experts from both sides, but the experts “differed in their opinion as to whether the child was mixed blooded or not.”³⁰⁹ The jury did not accept the “scientific” argument that she had mixed blood, but instead appears to have given a verdict for the widow, Naomi White, based on the reputation testimony of the witnesses, as well as their own observation of the child. Naomi White successfully appealed to the ideal of pure white womanhood to argue that she could not possibly have allowed herself to be sullied by a connection with a black man. In the very continuities linking racial determination cases from 1806 to 1890, the mobility of race reveals itself as part of its essence.

B. *Trials, Law, and Performance*

In a society in which racial identity governed one’s ability to own the fruits of one’s labor, to control one’s own family life and bodily integrity, and, even after slavery’s end, to partake freely of civic, political, and social life, decisions about individuals’ racial status were freighted with significance. Liminal individuals, those who “passed” for white or raised claims of whiteness in court, consciously or unconsciously challenged a system ideologically based on the “impassable gulf” between black and white. The disputes adjudicating their racial status tapped into white Southerners’ deep anxieties about the stability and security of white identity—on the one hand, the fear of white slavery, that even racial purity might not be shield enough from bondage; and on the other hand, the fear of the passing black, that white appearance could mask a negro impostor.

Trials of racial determination, then, provide a unique window onto a potentially disruptive moment in the construction of the proslavery and white supremacist edifice of Southern law and culture. Trials are more revealing than appellate opinions not only because they allow us to explore the *content* of the “common knowledge” appellate courts were using to define whiteness, but also because they were instances that forced the confrontation of the official discourse of law (in this case, “blood” fractions, “ancestry,” and a bright-line division between black and white) with everyday understandings of racial identity. Communities contained within themselves a great deal of discord about individual racial identities; only adjudication forced resolution. It was only in the legal setting of the courtroom that people had to articulate their understandings about racial identity. At trial, ordinary witnesses introduced a discourse of race as a set

309. *Id.* at 4.

of associations and performances that competed with the discourse of race as ancestry, as science, and as physical marker.

This story could be read as the triumph of custom over law, in which social practices of defining race through performance overwhelmed formal rules of ancestry and “blood.” That is certainly a part of the picture. Yet such a view depends on an overly narrow definition of “law.” The litigation of racial determination cases also demonstrates that law as it is actually experienced is created by a variety of lawmakers: not only by judges and legislators, but by the litigants, witnesses, and jurors in the courtroom. In the very performance of the trial, these actors helped to make the law of race: They described their neighbors’ racial performances and made them determinative of racial status. And they did so in a place that was at the cultural center of Southern society, at least before the Civil War: the courthouse. The stories told there echoed throughout the culture to large audiences of spectators and appeared in the pages of newspapers, novels, and fugitive slave narratives.

If law “constructed” race in the antebellum South, it did so not through a top-down system of coercive rules handed down from high courts and legislatures, nor only through the hegemonic creation of an official ideology, but also in a more subtle way. Not only did law provide the context and language that defined what it meant to be a slave, but also what it meant to be black or white as well. Indeed, in important respects, it was one’s “bundle of jural rights”³¹⁰ that made one white. Even after emancipation, when whiteness was no longer defined by unenslaveability, courtroom decisions about individuals’ racial status continued to be based on their performances of the behaviors associated with the status of white men and women.

C. *Law, Race, and Racism Today*

The insight that law has played a crucial role in producing the racial categories used to enforce racial hierarchy may engender a sense of helplessness about the hegemonic function of law. On the other hand, recognizing the existence of different lawmakers reveals more room for the “contestability” of racial definition under the law than is suggested by some contemporary accounts of the law’s role in racial construction.³¹¹ Because “race” was a question for the jury, trials of racial determination

310. Gordon, *supra* note 17, at 103 (“[I]t is precisely the slave’s bundle of jural rights (or rather lack of them) and duties vis-à-vis others . . . that makes him a slave.”)

311. See Susan F. Hirsch & Mindie Lazarus-Black, *Introduction: Performance and Paradox: Exploring Law’s Role in Hegemony and Resistance*, in *CONTESTED STATES*, *supra* note 6, at 1, 2-13 (arguing that scholars should recognize both the “contestability” and “hegemony” of law).

were fora for heated contests over individuals' identities. During a period when lawyers and judges were self-consciously involved in making law into a science, trials remained unruly arenas for juries to exercise wide discretion. Furthermore, the discourse of race as performance allowed some individuals who inhabited the constantly shifting "middle ground" of race to challenge their own place in the hierarchy through claims of whiteness.

By this, I do not mean to suggest that the nineteenth-century South was a free-wheeling world in which people could "try on" racial identities as they pleased with plenty of room for experimentation. Nor do I wish to minimize the tremendous consequences attendant on these racial determinations, which the law made *once and for all*. And raising a whiteness claim was a double-edged sword. The discourse of performance confirmed to a wide audience the ideological connections between degradation and blackness on the one hand and among morality, virtue, civic ability, and whiteness on the other. As Eve Kosofsky Sedgwick has pointed out, recent academic writing about performativity tends to become stuck on the question of whether certain performances, like "passing," did or did not reinforce the status quo. "The bottom line," she writes, "is generally the same: kinda subversive, kinda hegemonic."³¹² Yet legal studies from within the legal academy have been surprisingly ready to concede law's hegemony without acknowledging that a variety of actors—litigants, jurors, witnesses, lawyers, and the community at large—played a role in creating the law. The unpredictability of courtroom battles over "race" allowed Phoebe, Abby Guy, Sally Miller, Alexina Morrison, and their lawyers to fashion performances—and narratives about performance—that they used to win their freedom and that abolitionists used as weapons in the battle to bring freedom to all Southern slaves.

The legal discourse of prescriptive whiteness challenges the notion that the social or legal "construction of race" was solely about the invention of a pseudo-scientific basis for essential racial difference.³¹³ This point may have unsettling implications for contemporary political and legal discourse. Despite tremendous normative differences, contemporary narratives about race emerging from debates about affirmative action and other policy questions share certain common historical assumptions about racism and "race" in the past.³¹⁴ Both the colorblind constitutionalism of the Rehnquist

312. Sedgwick, *supra* note 6, at 15; see also Amy Robinson, *Forms of Appearance of Value: Homer Plessy and the Politics of Privacy*, in *PERFORMANCE AND CULTURAL POLITICS*, *supra* note 8, at 239 (seeking to transcend the subversion-hegemony dichotomy).

313. See Stoler, *supra* note 9, at 196.

314. The literature on the social construction of race stands in uncomfortable counterpoise to the ideology of "colorblindness." Barbara Fields and K. Anthony Appiah come closest to using the history of racial "construction" as an argument for abolishing "race," and by implication, racial remedies, in the present day. Barbara Fields ends her tendentious article, *Slavery, Race and*

Court and various “conservative” commentators, and the race-conscious ideology of supporters of race-based remediation premise their views on understandings of how “race” and racism today differ from “race” and racism in the past, usually the nineteenth-century past.³¹⁵ Likewise, the anthropologist Ann Stoler has shown that much contemporary “antiracist” scholarship on race depends on the assumption that “race” was once “as constant as a southern star.”³¹⁶ By contrasting the present with a past in

Ideology in the United States of America, by admonishing contemporary readers not to “recreate” race by teaching their children that people with brown skin are in fact “black.” See Fields, *supra* note 14, at 118. As David Roediger notes, Fields does not escape the Marxist tendency to make race “disappear into the ‘reality’ of class.” ROEDIGER, *supra* note 7, at 8. Appiah calls for replacing the “illusion” of race with “culture” instead, arguing that even strategic uses of essentialism, deploying racial pride to unify oppressed classes, backfire because their historicism folds back into an essentially biological understanding of race. That is, black people cannot simply be people with a “shared history,” because you need biology or morphology to define the group who “share” the history. See APPIAH, *supra* note 15, at 28-46.

A number of writers, among them critical race theorists studying the role of law, have tried to salvage the social constructionist position on race from these conclusions, sometimes using Fields’s and Appiah’s work as a starting point to resurrect race as a useful and “real” category. Jayne Lee, for example, makes a subtle effort to recapture some ground for “race” by recognizing its usefulness as a strategic identity category for progressive political projects. See Lee, *supra* note 18, at 770-80. For a more typical argument, see Hickman, *supra* note 18, at 1240 (arguing that “[h]istory created this race and gave it its significance” but now “there is race”).

315. For a discussion of the historical narratives embedded in the colorblind ideology of the Rehnquist Court and the Reagan-Bush Justice Department, see Robert W. Gordon, *Undoing Historical Injustice*, in JUSTICE AND INJUSTICE IN LAW AND LEGAL THEORY 35, 51-52 (Austin Sarat & Thomas R. Kearns eds., 1996). Many of the lawyers and conservative writers associated with the Reagan Administration devoted a great deal of their attention to this history. See, e.g., CLINT BOLICK, THE AFFIRMATIVE ACTION FRAUD: CAN WE RESTORE THE AMERICAN CIVIL RIGHTS VISION? (1996); CLINT BOLICK, CHANGING COURSE: CIVIL RIGHTS AT THE CROSSROADS (1988); CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT (1991). A more celebrated “conservative” historical account is that of DINESH D’SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY (1995), which devotes the first 244 pages to chronicling the history of slavery, Jim Crow, and the civil rights movement. For critical reviews of D’Souza, see, for example, DAVID THEO GOLDBERG, RACIAL SUBJECTS: WRITING ON RACE IN AMERICA 189-226 (1997); Paul Finkelman, *The Rise of the New Racism*, 15 YALE L. & POL’Y REV. 245 (1996); and George M. Fredrickson, *Demonizing the American Dilemma*, N.Y. REV. BOOKS, Oct. 19, 1995, at 10. In these histories, racial classification figures as the evil of past systems of racial subordination, and racism—defined as the official recognition of race in the law—is consigned to the deep past of the 19th century.

On the academic Left, there is also a tendency to contrast the racism of the past with the racism of today. As Michael Omi and Howard Winant write: “[T]he racism of today is no longer a virtual monolith, as was the racism of yore. Today, racial hegemony is ‘messy.’” MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S, at 75 (2d ed. 1994).

316. Stoler, *supra* note 9, at 196 (footnote omitted). Unlike Stoler, I am less struck by the progressive uses of constructivist arguments about race than by their conservative uses. Of course, constructivism can be used on both sides of the political debate—Janet Halley has made this point well in the context of sexual orientation, see Halley, *supra* note 16, at 517—but the history of defining race in the law has often been employed recently to suggest the continuing futility, absurdity, and/or injustice of racial classification for any purpose. Thus, progressive scholars have seen it as a problem for their histories of the construction of whiteness to keep their readers from reaching the conclusion that they seek the abolition of all racial categorization in the present day.

which there was “hard,” essentialist, scientific racism, it becomes easier for society to distance itself from that past, and, as a result, important truths about racial meanings in modern times and the role of law in creating racial meanings remain unnoticed.

As George Fredrickson explains, “[S]cience-based concepts of race may lose credibility as the result of new discoveries and shifting paradigms, but concepts of race based on the cultural differences associated with descent groups may have greater durability.”³¹⁷ On the contemporary scene, Fredrickson compares Charles Murray and Richard Herrnstein’s “old-fashioned biological determinism”³¹⁸ to Dinesh D’Souza’s “cultural determinism which does much the same work.”³¹⁹ In *The End of Racism*, D’Souza argues that it is appropriate in a society that does not “see” race, in which all racial classifications are eliminated, for members of certain racial groups to end up at the bottom of the social, political, and economic hierarchy in much higher numbers than members of other groups, based on their inferior “cultural,” moral, and civic attributes. Thus, D’Souza suggests that “culture” may justly provide a basis for social discrimination that, on average, produces racial inequality.³²⁰ As Fredrickson notes, “[t]his ‘new racism’ is not really unprecedented. . . . It recalls the rationale for black enslavement and subordination that preceded the growth of scientific racist doctrines.”³²¹

The history of racial determination litigation, however, suggests that nineteenth-century racism, even racial essentialism, was marked not only by the rise of scientific discourse but by the rise of a discourse of race as social and civic performance. If racial categories were defined *not only* by “blood” but by and through the performance of moral and civic virtues, then racism in the nineteenth century was not so very distant from the racial

There is now a substantial and growing body of literature that seeks to avoid this dilemma by calling for the “abolition of whiteness” rather than the abolition of “race.” See, e.g., DAVID ROEDIGER, *TOWARDS THE ABOLITION OF WHITENESS* (1994). A new journal called *Race Traitor*, edited by Noel Ignatiev and John Garvey, is devoted to this goal. This literature emphasizes the important insight that classification was not itself the evil in past systems of racial subordination. Indeed, classification was simply one way of accomplishing subordination. Changing or undoing those classifications will not undo racial hierarchy. Robert Gordon points in the more promising direction of structural approaches to “undoing historical injustices,” see Gordon, *supra* note 315, at 66-75, which focus less on the “sins” of the past and more on strategies to remake society. So, for example, affirmative action should be seen not as “reparations” but as one piece of “the architecture of a racially integrated future.” Kathleen M. Sullivan, *Sins of Discrimination: Last Term’s Affirmative Action Cases*, 100 HARV. L. REV. 78, 80 (1986).

317. GEORGE FREDRICKSON, *Understanding Racism: Reflections of a Comparative Historian*, in *THE COMPARATIVE IMAGINATION: ON THE HISTORY OF RACISM, NATIONALISM, AND SOCIAL MOVEMENTS* 77, 79 (1997).

318. *Id.* at 81.

319. *Id.*

320. See D’SOUZA, *supra* note 315, at 525-56.

321. FREDRICKSON, *supra* note 317, at 81.

ideology of today. Indeed, the idea that moral and civic performances can and should determine one's place in the social hierarchy, and that they may be related to one's racial identity, is similar in important ways to D'Souza's view.

To recognize the contestability of law is only to see how much work still lies ahead. For if "race" in the past was more mobile and more contested than previously thought, yet still remained the basis for the thoroughgoing social, legal, and political subordination of African Americans, it should not surprise us that current efforts to "destabilize" race, to break down or refuse to recognize racial categories, have failed to topple the existing racial hierarchy. In important ways, our society is not as distant from our past as we imagine and hope.

APPENDIX

| CASE | SEX | TYPE ¹ | DATE | RESULT ² | | TYPES OF EVIDENCE INTRODUCED ³ | | | | | | | |
|----------|-----|-------------------|------|---------------------|-----|---|-----|-----|-----|-----|------|-----|-----|
| | | | | TRIAL | APP | LKS | ANC | RTS | INS | SCI | PERF | REP | DOC |
| ALABAMA | | | | | | | | | | | | | |
| Marshall | M | CRI | 1845 | C | R | Y | | Y | | | Y | Y | Y |
| Hansford | M | MAR | 1846 | W | A | Y | Y | | Y | | | | |
| Thurman | M | CRI | 1850 | C | R | Y | Y | | | | | | |
| Felix | M | CRI | 1851 | C | R | Y | Y | | | | Y | Y | |
| Becton | M | CRI | 1853 | C | R | Y | | Y | | | Y | Y | |
| Floreys | M | INH | 1854 | C | A | Y | Y | | | Y | | | |
| Tucker | M | CRI | 1854 | C | R | Y | | Y | | | | Y | |
| Dupree | M | CRI | 1859 | C | R | Y | Y | | | | Y | Y | |
| Farrelly | F | MAN | 1859 | W | R | Y | Y | Y | | | Y | Y | |
| Heath | M | WIT | 1859 | C | R | Y | Y | | | | | Y | |
| ARKANSAS | | | | | | | | | | | | | |
| Gary | M | MAN | 1848 | C | A | Y | Y | | | Y | | | |
| Pleasant | M | CRI | 1853 | C | A | Y | | | Y | | | | |
| Daniel | F | MAN | 1857 | W | A | Y | Y | Y | | Y | Y | Y | Y |
| Daniel | F | MAN | 1861 | W | A | Y | | | Y | Y | Y | Y | |
| GEORGIA | | | | | | | | | | | | | |
| Macon | M | RR | 1850 | C | A | Y | | | | | | | |
| Yancy | M | CRI | 1851 | C | A | Y | Y | | | | | | |
| Bryan | M | INH | 1856 | C | A | Y | Y | Y | | | Y | Y | Y |
| Sullivan | M | INH | 1861 | W | A | Y | Y | | | Y | Y | Y | |
| Swestern | M | RR | 1867 | C | A | Y | | | | | Y | | |
| White | M | CT | 1869 | C | A | Y | | Y | | Y | Y | Y | Y |

1. These abbreviations represent the following categories: BAS (bastardy); CRI (criminal); CT (in wrong court); INH (inheritance); MAN (manumission); MAR (interracial marriage or fornication); NA (not available); RR (carrying off of runaway slave by railroad or steamboat); SCH (school); SLA (slander); TAX (taxation of person of color) and WIT (witness disqualification).

2. These abbreviations represent the following categories: A (affirmed); R (reversed or remanded (not necessarily overturning finding on color)); C (of color); and W (white).

3. These abbreviations represent the following categories: ANC (discussion of ancestry); DOC (documents); INS (physical inspection in court); LKS (physical descriptions); PERF (social performance); REP (reputation and ascriptive identity); RTS (rights exercised); and SCI (scientific evidence).

| CASE | SEX | TYPE | DATE | OUTCOME | | TYPES OF EVIDENCE INTRODUCED | | | | | | | | |
|----------------|-----|------|------|---------|-----|------------------------------|-----|-----|-----|-----|------|-----|-----|---|
| | | | | TRIAL | APP | LKS | ANC | RTS | INS | SCI | PERF | REP | DOC | |
| KENTUCKY | | | | | | | | | | | | | | |
| Milly | F | MAN | 1839 | W | R | Y | Y | | | Y | | | | |
| Gatliff | F | MAN | 1848 | W | R | Y | | | | Y | | | | |
| LOUISIANA | | | | | | | | | | | | | | |
| Ulzere | M | MAN | 1820 | W | R | Y | Y | | | | | Y | Y | |
| Cauchoix | M | SLA | 1831 | W | A | | Y | | | | | | Y | Y |
| Lange | M | INH | 1833 | W | A | | Y | | | | | | Y | Y |
| Boullemet | M | SLA | 1837 | W | R | Y | Y | Y | | | | Y | Y | Y |
| Spalding | M | RR | 1844 | W | R | Y | | | | | | | | |
| Sally M | F | MAN | 1845 | C | R | Y | Y | | | | | Y | Y | |
| Williamson | M | RR | 1850 | W | A | Y | | | | | | Y | Y | |
| Morrison | F | MAN | 1861 | W | R | Y | Y | | | Y | Y | Y | Y | Y |
| Blasini | F | INH | 1878 | W | A | Y | | | | | | Y | Y | |
| Spotorno | M | SLA | 1888 | C | A | | Y | | | | | | Y | |
| MARYLAND | | | | | | | | | | | | | | |
| Mary | F | MAN | 1814 | W | R | Y | Y | | | | | | | Y |
| MISSISSIPPI | | | | | | | | | | | | | | |
| Talbott | M | CT | 1848 | C | A | Y | | | | | | | Y | |
| Raby | M | INH | 1854 | C | A | Y | Y | Y | | | | Y | Y | |
| Heim | F | INH | 1859 | C | A | Y | Y | | | Y | | Y | Y | |
| Garvin | M | CRI | 1876 | C | A | | | | | Y | | | | |
| NORTH CAROLINA | | | | | | | | | | | | | | |
| Scott | M | MAN | 1828 | W | A | Y | | | | | | | | |
| Watters | M | MAR | 1843 | C | A | Y | Y | | | | | | Y | Y |
| Miller | M | CRI | 1847 | C | A | Y | Y | | | | | | | |
| Dempsey | M | CRI | 1849 | C | A | Y | Y | | | | | | Y | Y |
| Chavers | M | CRI | 1857 | C | R | Y | Y | | | Y | | | | |
| Jacobs | M | CRI | 1859 | C | A | Y | Y | | | Y | | | Y | |
| Patrick | M | CRI | 1859 | C | A | Y | Y | Y | | | | | Y | |
| Warlick | M | INH | 1877 | W | R | Y | Y | | | Y | Y | Y | Y | |
| Mcmillan | M | SCH | 1890 | C | A | Y | Y | | | | | Y | Y | |
| Hopkins | M | INH | 1891 | C | R | | | | | Y | Y | | | |
| Hare | M | SCH | 1896 | C | A | | Y | | | Y | | Y | Y | |

| CASE | SEX | TYPE | DATE | OUTCOME | | TYPES OF EVIDENCE INTRODUCED | | | | | | | |
|----------------|-----|------|------|---------|-----|------------------------------|-----|-----|-----|-----|------|-----|-----|
| | | | | TRIAL | APP | LKS | ANC | RTS | INS | SCI | PERF | REP | DOC |
| SOUTH CAROLINA | | | | | | | | | | | | | |
| Wood | F | NA | 1816 | W | A | | Y | | | | | Y | |
| Hardcastle | F | INH | 1826 | W | A | Y | Y | | | | | Y | |
| Hayes | F | CRI | 1829 | C | A | Y | Y | | Y | | | | |
| Scott | M | CRI | 1829 | W | A | Y | Y | | Y | | | | |
| Davis | F | BAS | 1831 | W | R | Y | Y | Y | Y | | Y | Y | |
| Cantey | M | WIT | 1835 | W | A | Y | Y | Y | Y | Y | Y | Y | |
| Basquere | M | CRI | 1843 | W | A | Y | | Y | Y | | Y | Y | |
| Boon | M | TAX | 1843 | W | A | Y | Y | Y | Y | | Y | Y | |
| McCollum | M | NA | 1845 | C | R | Y | Y | Y | | | Y | Y | |
| Nelson | M | RR | 1845 | C | A | Y | Y | | | | | Y | |
| White | M | TAX | 1846 | C | A | Y | Y | Y | Y | | Y | Y | |
| Belmont | F | WIT | 1848 | C | R | Y | Y | Y | | | Y | Y | |
| TENNESSEE | | | | | | | | | | | | | |
| Vaughan | F | MAN | 1827 | W | R | Y | Y | | | | | Y | Y |
| Tutens | M | INH | 1832 | C | R | Y | | | | | Y | Y | |
| Miller | F | MAN | 1835 | W | R | Y | Y | | | | Y | Y | |
| TEXAS | | | | | | | | | | | | | |
| Gaines | F | MAN | 1856 | W | R | Y | Y | | | Y | | | |
| VIRGINIA | | | | | | | | | | | | | |
| Hudgins | F | MAN | 1806 | W | A | Y | Y | | Y | | | | Y |
| Gregory | M | MAN | 1808 | C | R | Y | Y | Y | | | Y | Y | |
| Pegram | F | MAN | 1808 | W | R | Y | Y | | | | | Y | Y |
| Hook | F | MAN | 1811 | W | A | Y | | | Y | | | | |
| Dean | M | WIT | 1847 | C | A | Y | Y | | | | | | Y |