

The “Most Valuable Sort of Property”: Constructing White Identity in American Law, 1880–1940

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“[W]herever we find the absence of the older kind of political and legal restriction of status, we find a considerable amount of the social restriction, the restriction of social status; and wherever legal and political disabilities are removed or changed suddenly, we find a sudden intensifying of the social distinctions.”

Alain LeRoy Locke¹

“The pure products of America go crazy—”

William Carlos Williams²

I. INTRODUCTION

In the opening pages of Albion Tourgee’s brief for the landmark case of *Plessy v. Ferguson*,³ we find a legal argument that does not seem immediately pertinent to the gist of a case involving separate rail car accommodations for whites and blacks. Tourgee asserted that Louisiana had deprived Homer Plessy of the “most valuable sort of property.”⁴ Indeed, he viewed the railway conductor’s efforts to place the light-skinned Plessy in the “Jim Crow” car established for “people of color” as having deprived Plessy of “the *reputation of being white*,” a reputation that Tourgee equated with a property interest.⁵ Plessy’s ability to pass as white on the streets of New Orleans invested him with a property interest that Tourgee used to accentuate the arbitrariness of race classification.⁶ The conductor’s license to determine Plessy’s race,

1. ALAIN LEROY LOCKE, *The Phenomena and Laws of Race Contacts*, in RACE CONTACTS AND INTERRACIAL RELATIONS 41, 52 (Jeffrey C. Stewart ed., 1992).

2. WILLIAM CARLOS WILLIAMS, *Spring and All*, in COLLECTED POEMS OF WILLIAM CARLOS WILLIAMS, 1909–1939, at 177, 217 (A. Walton Litz & Christopher MacGowan eds., 1986).

3. 163 U.S. 537 (1896).

4. Brief for Plaintiff in Error at 9, *Plessy* (No. 210).

5. *Id.*; see 1890 La. Acts 111 (requiring railway companies to provide equal but separate accommodations for the “white and colored races,” allowing rail conductors to deduce racial identity in assigning each passenger to a racially specific coach or compartment).

6. Homer Plessy’s ability to pass as white on the streets and in the rail cars of New Orleans should not be construed to mean that he was attempting such passage. Historians have noted the impetus for what culminated in *Plessy* as a test case brought by black merchants in New Orleans for the purpose of challenging the segregation statutes. While Plessy’s light skin served to underscore the difficulty in, and capriciousness of, deploying racial categories, his presence in a car reserved for white passengers was deliberately announced prior to boarding to ensure his identification and arrest. *See*

derived from state statute, and his consequent refusal to allow Plessy to enter the first-class passenger car reserved for whites denied Plessy's property right in whiteness without due process of law.⁷ By aligning racial reputation with a property interest, Tourgee's argument breached the formalisms of a late nineteenth-century legal discourse, which sought to separate the political from the social and to distinguish between legally recognized rights and legally created rights.⁸ Espousing racial *reputation* as property enabled Tourgee to bring a social or community standard within the ambit of a political, and therefore judicially cognizable, consideration of rights. Reputation construed as property might then resonate with constitutional significance and receive the constitutional protection extended to more familiar, tangible forms of property.⁹

generally CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION (1987) (discussing *Plessy* as social history); OTTO H. OLSEN, CARPETBAGGER'S CRUSADE: THE LIFE OF ALBION WINEGAR TOURGEE (1965) (discussing the life of the lawyer and advocate of equal rights); OTTO H. OLSEN, THE THIN DISGUISE: TURNING POINT IN NEGRO HISTORY, *PLESSY V. FERGUSON* (1967) (discussing the context of *Plessy* and invoking Justice Harlan's phrase in his *Plessy* dissent observing that the law's promise of equality in segregation was but a "thin disguise" for discrimination).

7. Brief for Plaintiff in Error at 9, *Plessy* (No. 210).

8. The laissez-faire formalisms of the postbellum period sought to separate the design of political rights, a sphere in which the law had a "natural" role, from declarations regarding social relations, a domain in which the law professed no special competence. *See generally* ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895 (1976) (discussing the emergence of laissez-faire constitutionalism in the 1890s as restricting the application of legal claims in the private arena through the elaboration and invention of substantive due process and the predominance of a freedom of contract ideology over the regulative exercise of the police power); EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE (1973) (tracing the emergence of a jurisprudence of social and cultural relativism as a reaction to the reigning legal formalisms that constrained the law's special competence within the political sphere); Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70 (Gerald L. Geison ed., 1983) (discussing the formation, among the nineteenth-century legal elite, of a political realm predicated on ideologically delineated spheres of personal autonomy within which the law was considered competent and the challenge to that view's hegemony in the recognition of broader social and cultural conditions, which informed rights claims); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America*, in 3 RESEARCH IN LAW AND SOCIOLOGY 3, 3-24 (1980) (proposing that the pervasive rationalism of gilded age legal thought manifested itself as laissez-faire constitutionalism and langdellian legal science in the public and private realms, respectively).

9. With regard to the constitutional treatment of property in cultural and political context, see generally JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM

Tourgee's proposition that Plessy's "reputation [in whiteness] is 'property'"¹⁰ revealed the ambiguity inherent in a legal discourse that knit together personality and property as twin foundations of political virtue.¹¹ The Lockean right of self-possession endorsed a vision of

IN THE NINETEENTH-CENTURY UNITED STATES 23–29 (1956) (discussing property and economic development and tracing the divergent application of property rules between "passive" and "dynamic" rights holders); JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 11–12, 100–06 (1990) (discussing the influence of Madisonian views of private property—balancing between democratic values and the privileged status of property owners—as foundational in shaping the structure of the American political system); Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 274 (1991) (proposing multiple property discourses); Thomas C. Grey, *The Disintegration of Property*, in PROPERTY 69, 81 (J. Roland Pennock & John W. Chapman eds., 1980) (tracing the diffusion of property during this period); Margaret J. Radin, *Justice and the Market Domain*, in MARKETS AND JUSTICE: NOMOS XXXI 165, 165, 168–75 (John W. Chapman & J. Roland Pennock eds., 1989) (discussing the sale of body parts and market alienability in relation to property law); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 958–59 (1982) (proposing a personality-based approach to an appreciation of property rights drawing on Hegel); David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 AM. J. LEGAL HIST. 464, 467–80 (1993) (proposing a synthesis of the rhetoric and reality of property that influenced public opinion during the founding); Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 297 (1998) (noting the slippage between property as a concept and enforceable property rights in the law).

10. Brief for Plaintiff in Error at 9, *Plessy* (No. 210).

11. As a term of analysis, whiteness partakes in the notion that the meanings ascribed to racial identity exceed the boundaries of the biological to participate in an arrangement of power relations that privilege the white subject position. The term whiteness draws its explanatory resonance from the complicated manner in which white racial markings draw power through the double gesture of an invisible presence; the privilege accorded white racial identity relies on the fantasy of the unprivileged normative position, in which only nonwhite racial identity appears as marked. So understood, the deployment of "whiteness" as a category of analysis works to locate the meanings of racial identity in social, cultural, economic, legal, linguistic, and political performance and power. Appropriately, the term "whiteness" itself participates in the modernist privileging of vision and appearance when it brings into focus the unmarked nature of white racial identity, the product of a discourse most influential when not in the field of vision. For more about the hegemony of a visual discourse in modernity, see MARTIN JAY, *Downcast Eyes: The Denigration of Vision in Twentieth-Century French Thought* 1–20 (1993). For information regarding cultural, legal, social, and historical considerations of whiteness, see generally MIA BAY, *The White Image in the Black Mind: African-American Ideas About White People, 1830–1925* (2000) (decentering the notion of understanding whiteness); VIRGINIA R. DOMÍNGUEZ, *White by Definition: Social Classification in Creole Louisiana* (1986) (discussing the inflections of racial meaning in the specific context of Louisiana's laws relating to blood percentages); GRACE ELIZABETH HALE, *Making Whiteness: The Culture of Segregation in the South, 1890–1940* (1998) (tracing the cultural markers of whiteness in the nascent consumer economy of the late nineteenth and early twentieth centuries); NOEL IGNATIEV, *How the Irish Became White* (1995) (tracing the cultural and political reconstruction of Irish ethnic identity in the nineteenth-century United States); MATTHEW FRYE JACOBSON, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (1998) (examining the meaning of whiteness in

identity as inalienable property.¹² This vision, in turn, governed the

the multiracial context of European immigration); SAMIRA KAWASH, *DISLOCATING THE COLOR LINE: IDENTITY, HYBRIDITY, AND SINGULARITY IN AFRICAN-AMERICAN NARRATIVE* (1997) (proposing the narrativization of color as a marker of racial identity); LITERATURE AND THE BODY: *ESSAYS ON POPULATIONS AND PERSONS* (Elaine Scarry ed., 1988); IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996) (discussing the legal construction of race in the context of immigration law from the latter half of the nineteenth century to the present); ERIC LOTT, *LOVE AND THEFT: BLACKFACE MINSTRELSY AND THE AMERICAN WORKING CLASS* (1993) (tracing the significant cultural and economic relationship between blackness and whiteness as exemplified in nineteenth-century popular performance of minstrelsy); *PASSING AND THE FICTIONS OF IDENTITY* (Elaine K. Ginsberg ed., 1996) (discussing rhetorical strategies of racial cross representation in nineteenth- and twentieth-century United States literature); DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991) (tracing race and the rhetoric of whiteness in shaping white working class interest in conflict with class solidarity); DAVID R. ROEDIGER, *TOWARDS THE ABOLITION OF WHITENESS: ESSAYS ON RACE, POLITICS, AND WORKING CLASS HISTORY* (1994) (discussing whiteness as a category of analysis in studies of the U.S. working class); ALEXANDER SAXTON, *THE RISE AND FALL OF THE WHITE REPUBLIC: CLASS POLITICS AND MASS CULTURE IN NINETEENTH-CENTURY AMERICA* (1990) (tracing the practice and ideology of racial exclusion among the wage-earning working class as weakening working class opposition to corporate capitalism); ERIC J. SUNDQUIST, *TO WAKE THE NATIONS: RACE IN THE MAKING OF AMERICAN LITERATURE* (1993) (tracing efforts in American fiction to integrate racial differences); Wai-chee Dimock, *Rightful Subjectivity*, 4 *YALE J. CRITICISM* 25 (1990) (tracing the contingent quality of rights in *Plessy*); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 *YALE L.J.* 109 (1998); Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1709 (1993) (discussing the legal attributes assigned to white racial identity); Eric Lott, *White Like Me: Racial Cross-Dressing and the Construction of American Whiteness*, in *CULTURES OF UNITED STATES IMPERIALISM* 474 (Amy Kaplan & Donald E. Pease eds., 1993); Brook Thomas, *Tragedies of Race, Training, Birth, and Communities of Competent Pudd'nheads*, 1 *AM. LITERARY HIST.* 754 (1989). On the issue of culture and racial identity, see generally JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART* 277 (1988) (elaborating on the legal and ethnographic construction of Native American identity); NEIL FOLEY, *THE WHITE SCOURGE: MEXICANS, BLACKS, AND POOR WHITES IN TEXAS COTTON CULTURE* (1997) (discussing whiteness in multiracial context); ROBERT J.C. YOUNG, *COLONIAL DESIRE: HYBRIDITY IN THEORY, CULTURE AND RACE* 90–117, 142–58 (1995) (discussing theories of whiteness, race, and ethnography in the nineteenth-century colonial policies of Britain and the United States).

12. Locke's philosophy of inalienable rights was premised on the notion that all men are in "a state of perfect freedom," and "[a] state also of equality, wherein all the power and jurisdiction is reciprocal." Locke further emphasized "that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions." JOHN LOCKE, *The Second Treatise of Government: An Essay Concerning the True Original, Extent, and End of Civil Government*, in *TWO TREATISES OF GOVERNMENT* ¶ 4, at 116, ¶ 6, at 117 (Mark Goldie ed., 1993). For information about the place of Locke at the formation of the Constitution and the new nation, see DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 118–21 (1966); see also Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American*

discourse of the public realm and inherently accrued in the individual prior to the legal recognition of subjectivity. In a legal regime that had only recently extended the rights of personality to formerly enslaved African-Americans, Tourgee argued that the legal recognition of identity preceded any property claims for the self and that such recognition followed racial lines.¹³ In short, race preceded property in the self. For,

Revolutionary Thought, 30 STAN. L. REV. 843, 860 (1978) (arguing for the centrality of Locke's writing to an understanding of the rhetoric of the revolution); Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 3 (1977) (discussing the centrality of the institution of property to the formation).

While the notion of the self as inalienable property mitigated against such actions as the physical possession of another individual's body, it seems not to have contemplated the advent of the social self, where an aspect or attribute of another person could be assumed. See MARSHALL J. COHEN, CHARLES HORTON COOLEY AND THE SOCIAL SELF IN AMERICAN THOUGHT 174–86 (1982) (discussing the advent and elaboration of theories of the social self into the canon of late-nineteenth-century social science in the thought of Cooley, William James, John Dewey, Josiah Royce, and James Mark Baldwin, each critiquing the dichotomy between the social and the self as foundational and proposing an alternative view in which the personal was an individual idea whose referent was a social object). Indeed, racial identity predicated on reputation skirted alienability because it reconfigured notions of possession. In this instance, no white male forfeited his personal property interest due to Plessy's reputation as a white man. However, Tourgee's argument challenged the notion of the self as a coherent inalienable whole, separate from the social sphere, by suggesting that Plessy could assume or possess an attribute as property, conveyed by his standing in the larger community, without violating the notion of the self as inalienable property. As such, Tourgee's alternative vision rested on the notion that the law protected the viability of multiple selves, one in which legal value should be conferred not on the *object* of property that signified racial identity, such as blood quantum, but on property understood subjectively, as rendered by the community through notions such as reputation. The law, of course, had long recognized reputation as worthy of protection to the degree that it reflected *individual* identity. See MARTIN L. NEWELL, THE LAW OF LIBEL AND SLANDER IN CIVIL AND CRIMINAL CASES AS ADMINISTERED IN THE COURTS OF THE UNITED STATES OF AMERICA 84 (2d ed. 1898) (discussing the historical posture of libel and slander in a defamation treatise).

Tourgee, however, sought to unhinge this specific connection by suggesting that the property value of Plessy's reputation lay in the community's perception, regardless of the degree to which it reflected the "objectivity" of Plessy's racial identity. As such, property was the set of social relations convened around some object, in this case, Plessy's phenotypically white skin color. Tourgee sought legal protection for a community perception regarding Plessy's social self, in line with William James's observation in 1890 that "*a man has as many social selves as there are individuals who recognize him.*" I WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY 294 (1890) (suggesting a paradigm of the modern self predicated on the multiplicity of experience). Such protection would simultaneously validate a self for Plessy that the community already recognized and lend the imprimatur of the law to the notion of multiple social identities.

13. For information regarding the relationship between slavery and property, see DAVIS, *supra* note 12, at 32–39 (discussing the legal representation of the slave as a "thing"); see also *Jarman v. Patterson*, 23 Ky. (7 T.B. Mon.) 644, 644, 646 (1828) (finding that "a slave by our code, is not treated as a person, but . . . a thing, as he stood in the civil code of the Roman Empire"). For information about the intersection of

as Tourgee observed, “The man who rides in a car set apart for the colored race, will inevitably be regarded as a colored man[,] . . . [and] to entail upon him such suspicion . . . is to deprive him of ‘property.’”¹⁴ By linking Plessy’s phenotypically white appearance to reputation and defining reputation for whiteness as a form of property, Tourgee disclosed the racial and cultural dimensions of the connection between property and personality at the law.¹⁵

The *Plessy* decision largely set the terms in which state courts in the American South interrogated racial identity and enforced segregation. This Article examines the manner in which, during the decades following *Plessy*, southern courts labored to instill the legal meaning of whiteness as an object of property inherent in the individual in cases involving racial defamation, miscegenation, and writs of mandamus to

subjectivity and gender in the context of chattel slavery and the logic of property, see ROBYN WIEGMAN, *AMERICAN ANATOMIES: THEORIZING RACE AND GENDER* 62–69 (1995) (proposing that the cultural mechanism that eased the translation of human beings into the propertied abstraction attendant with chattel slavery worked by rendering impossible the opportunity for African American men to claim not simply gender in the abstract but the specificities and privileges of masculine gender that served as the framework for defining citizenship in the public sphere). The de jure demise of the institution of slavery enabled the judiciary a cultural space within which to fashion a legal discourse that assigned property rights to the body of the person without compromising the prevailing notion of the inalienable self.

14. Brief for Plaintiff in Error at 9, *Plessy* (No. 210).

15. *Id.* at 23–24. By acceding to the notion that reputation is property, the Court acknowledged that property value emerged from the social accommodation of some “thing” established in the public, rather than private, sphere. *Plessy v. Ferguson*, 163 U.S. 537, 539 (1896). Yet, for the Court, the truth of this value rested on the already presumed possession of whiteness as a determined racial identity; Plessy could claim a loss for the reputation of being white only if he was already—read innately—white. The loss of reputation, a property that garnered its value through social and cultural circulation in the larger body politic, would only be assigned legal value if the truth of that reputation were possessed, as one would possess a title to land, in which the characteristics of the self flowed from the private self to the larger public body. Thus, for the Court, racial reputation represented a property value, the truth of which issued from the private fact of possessing white blood untainted by racial admixture. By arguing that Plessy could only claim a loss of reputation in whiteness if he was indeed white, the Court sought to keep questions regarding the racial nature of the self within the confines of the private sphere and they did so by anchoring the question of race in the presumed certainty of biology and blood quantum. Driving a wedge between the social and the self, the public and the private, and sentiment and biology, not only enabled the Court to truncate the legal argument that racial identity was a social construction with obvious value, but also marked its effort to remove from discussion the notion that whiteness, like any commodity, might circulate in the market of public opinion, and might be claimed by anyone capable of the necessary social posture, thereby knitting together the social and the self through invention rather than biology.

white-only schools. Deploying the seemingly objective rhetoric of lineage, blood purity, and appearance, these courts sought to contain the meaning of white selfhood. Yet, in tension with this legal rhetoric, whiteness garnered its legal weight through and as community opinion, association, and family narrative. Further exacerbating this tension, the judicial discourse of whiteness relied on, for its validation and certainty, an object-centered notion of property, which was being reconfigured, at the law and in the wider culture, as an associational arrangement. Thus, as courts sought to contain the property of racial identity, the discourse of whiteness both replicated and conditioned a profound shift in the legal meaning of property and personality in modernity.¹⁶

16. Conscious of the possibility of reifying the term “modernity” (as Richard Bernstein has cautioned against), this label is used here to specifically invoke the postenlightenment “turn to interiority,” in which the search for moral personality, in the late nineteenth and early twentieth centuries, became more than an exercise in locating the unitary self as enunciated in the ideals of disengaged reason (positivism) or romantic fulfillment (romanticism), and became instead an aspiration for retrieving experience from the routine, the conventional, and the instrumental. RICHARD J. BERNSTEIN, *THE NEW CONSTELLATION: THE ETHICAL-POLITICAL HORIZONS OF MODERNITY/POSTMODERNITY* 200 (1992).

[I]t is becoming increasingly evident that the terms “modern” and “postmodern” are not only vague, ambiguous and slippery, they have been used in conflicting and even contradictory ways. . . . My own conviction is that we have reached a stage of discussion where these labels (and their cognates) obscure more than they clarify—that it is better to drop these terms from our “vocabularies,” and to try to sort out the relevant issues without reifying these labels.

Id. This moment in modernity, as Charles Taylor explains, resulted in the emergence of a decentered subjectivity, in which the “epiphanic center of gravity [began] to be displaced from the self to the flow of experience, to new forms of unity, to language conceived in a variety of ways—eventually even as a “structure.” CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 143–76, 495–512 (1989) (discussing modernity as marked by an enhanced extension of moral sources for identity, such as rational agency and expressive subjectivity, and discussing modernity not in terms of the loss of foundation, but in terms of the multiplicity of choices and relative instability accompanying the waning of theism). Of additional interest in this modern period is the observation among theorists that such decentering of the self was not contrary to, but complementary of, the “turn to interiority,” in which the desire to grasp the meaning of experience resulted in a recognition of the dissonance between the inadequate generality of expressive concepts (such as property and personality) and the particularity of experience, a recognition that led to the explanatory virtue of allegory over symbol and a resort to the descriptive power of constellations of terms to frame the meaning of things. For a discussion of modernity, see generally RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* (1983) (proposing a dialogic response to the “Cartesian anxiety” of modernism brought about by the absence of an Archimedean point for truth and knowledge, an anxiety that resulted from the difficulty of separating subject and object, thought and thing, within separate ontological registers); ANDREAS HUYSSSEN, *AFTER THE GREAT DIVIDE: MODERNISM, MASS CULTURE, POSTMODERNISM* (1986) (discussing the dichotomies, such as between subject and object, thought and thing, central to the classical account of modernism and tracing the dissolution of these dichotomies under the press of mass culture); DAVID KOLB, *THE CRITIQUE OF PURE MODERNITY: HEGEL, HEIDEGGER AND AFTER* 60–65 (1986) (viewing modern culture and society as a complex interaction without any single exclusive or

II. PLESSY AND PROPERTY

Tourgee's challenge to the accepted meaning and coherence of the link between property and personality suggested a mobile and social understanding of the two terms.¹⁷ Tourgee's assessment served to undermine the presumed inalienability of self-possession by suggesting not only that the community, rather than the individual alone, determined racial identity, but also that the community's consideration deserved legal protection as an informed and valuable interest of the individual.¹⁸ The vision of the proprietary male individual of the nineteenth century,

overpowering identity); JAMES LIVINGSTON, PRAGMATISM AND THE POLITICAL ECONOMY OF CULTURAL REVOLUTION, 1850–1940, at 214–24 (1994) (discussing modern subjectivity as predicated on the cognitive separation between the self and a “reified realm of objects” and contrasting this appreciation with the promise of modern subjectivity proposed in early twentieth-century pragmatic thought, which resisted the attribution of a separate ontological register between thoughts and things); ROSS POSNOCK, THE TRIAL OF CURIOSITY: HENRY JAMES, WILLIAM JAMES, AND THE CHALLENGE OF MODERNITY (1991) (tracing the moral capacity of the modern self as apprehended by pragmatism); Dorothy Ross, *Modernism Reconsidered*, in MODERNIST IMPULSES IN THE HUMAN SCIENCES 1870–1930, at 1 (Dorothy Ross ed., 1994).

17. Brief for Plaintiff in Error at 9–12, *Plessy* (No. 210). Tourgee's embrace of the social significance of personality and the social elaboration of property resonated with the observations, during this period, of the amalgamation of self and society. See COHEN, *supra* note 12, at 105–24 (discussing Cooley's contributions to a science of personal psychology predicated on the social); I JAMES, *supra* note 12, at 291 (proposing a confluence of self, society, and ownership in his 1890 observation that “*a man's Self is the sum total of all that he CAN call his*, not only his body and his psychic powers, but his clothes and his house, his wife and children, his ancestors and friends, his reputation and works, his lands and horses, and yacht and bank-account”); STEPHEN KERN, THE CULTURE OF TIME AND SPACE, 1880–1918, at 181–210 (1983) (discussing the concurrent dissolution of conventions that dictated the manner in which an individual should experience his or her own self and the accompanying plasticity of conceptions of space, form, and time). See generally H. STUART HUGHES, CONSCIOUSNESS AND SOCIETY: THE REORIENTATION OF EUROPEAN SOCIAL THOUGHT 1890–1930 (1961) (discussing the breakdown of the dichotomy between subject and object and the rearrangement of social meaning arising from that development).

18. Brief for Plaintiff in Error at 9, 23–24, *Plessy* (No. 210). In his argument, Tourgee asserted that

[p]robably most white persons if given a choice, would prefer death to life in the United States *as colored persons*. Under these conditions, is it possible to conclude that the *reputation of being white* is not property? Indeed, is it not the most valuable sort of property, being the master-key that unlocks the golden door of opportunity?

Id. at 9; see also FRANK LENTRICCHIA, ARIEL AND THE POLICE: MICHEL FOUCAULT, WILLIAM JAMES, WALLACE STEVENS 103–33 (1988) (discussing the property value in the self as a serial attribute responsive to, and formulative of, the constellation of associations within which the self circulates).

the self-possessed master of his character,¹⁹ could not contain Tourgee's idea that enunciated a slippage between the individual self and the social self, between the immutable object of bodily attributes and the valuation of those attributes within the wider community.²⁰ Moreover, this slippage allowed for the possibility of appropriation and assumption with regard to an individual's representation of racial identity.²¹ As

19. The independence of the republican individual from the vicissitudes of political influence and, therefore, the well-spring of moral personality in the polis, hinged on an object-centered conception of property prior to politics and provided the singular means for uncontaminated participation in the political process. Property, external to the self and fixed in time and space—separated from and prior to the vicissitudes of the community—generated the promise of the moral personality in political thought and practice. See II JAMES KENT, COMMENTARIES ON AMERICAN LAW *318–19 (noting that the “right of property, founded on occupancy, is suggested to the human mind, by feeling and reason, prior to the influence of positive institutions”). See generally ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH (1977) (discussing the connection between desire and property); DREW R. MCCOY, THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA 69–75 (1980) (discussing the influence of the Scottish enlightenment on Jefferson and Madison and the effort to balance political virtues of an agrarian society with the economic benefits of commercial manufacturing); J.G.A. POCOCK, *Civil Humanism and Its Role in Anglo-American Thought*, in POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY 80, 91–96 (1971) (discussing the importance of the political thought of Harrington enunciating the value to the moral capacity of the self of the proprietary freehold as an agent for ensuring political and moral independence); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 412–544 (1975) (discussing the ideology of self-determination as a regulative expression of the moral self that negotiated between the thought of Locke and Harrington); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 46–90 (1969) (recounting intellectual events preceding the formation of the Constitution).

20. Tourgee's appreciation of the shifting function and meaning of property presupposed an appreciation of the shifting moral capacity of the modern individual. Attaching the significance of identity and the self to one's racial identity as apprehended by the community served to situate both personality and property within the same ontological register, as marked by the historical time and location of the community rather than as an external object standing outside of time and space. A property form that marked identity through the very comportment of the self revealed the inherent situatedness of the moral personality. See LIVINGSTON, *supra* note 16, at 214–20 (discussing modern subjectivity under corporate capitalism); WARREN I. SUSMAN, CULTURE AS HISTORY: THE TRANSFORMATION OF AMERICAN SOCIETY IN THE TWENTIETH CENTURY 276–84 (1984) (discussing the cultural history of the distinction between character and personality).

21. See JOEL WILLIAMSON, THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION 464–75 (1984). Williamson labels southerners' fear of “hidden blackness, the blackness within seeming whiteness” as the “paranoid style in Southern white culture in the twentieth century.” *Id.* at 465; see also *Jones v. Gill*, 66 P.2d 1033, 1033 (Kan. 1937) (reversing the damage award for the plaintiff and remanding for a new trial a suit involving a mother's claim that rumors of the racial composition of her adopted daughter, that she “was ‘a half-breed child, having a white father and a negro mother,’” which forced the plaintiff to move her family to several different neighborhoods to escape the accusations, were started by the plaintiff's stepmother-in-law); *Berot v. Porte*, 81 So. 323, 324 (La. 1919) (affirming a party's

such, traditional notions of self-possession and inalienability were ill-suited to Tourgee's social understanding of selfhood. For, in arguing that Plessy had a property right in passing for white, Tourgee was pointing to the plasticity of identity and the separate and alienable property value of the social self.²²

Tourgee insisted "the reputation of belonging to the dominant race, in this instance the white race, is *property*."²³ His suggestion not only raised the specter that racial identity was indeed alienable, but, further, that the property interest of identity could be located in the social manifestation of the self, through reputation. To argue for a property value to racial subjectivity, which black claimants might appropriate, and for the determination of that property as external to the subject delineated merely through community sentiment reflected an erosion of a long-held vision of identity as immutable, inherent and internal, a touchstone that signified certainty and coherence.²⁴ Nineteenth-century concerns over assuming the identity of another revolved around the image of confidence men and the like.²⁵ Similarly, construing racial

qualified privilege to make accusations concerning racial identity where there is a social or moral duty, as in this case, involving the defendant's confidential review of the plaintiff's membership application to the Order of Druids). For contemporary accounts bearing witness to this "paranoid style," see RAY STANNARD BAKER, FOLLOWING THE COLOR LINE: AN ACCOUNT OF NEGRO CITIZENSHIP IN THE AMERICAN DEMOCRACY 152–53 (1908) (chronicling black American life and achievement in the forty years following emancipation by focusing on the disabling effects of segregation); J.W. GREGORY, THE MENACE OF COLOUR 31–104 (1925) (arguing against the amalgamation of the races as a form of race suicide); EDGAR GARDNER MURPHY, PROBLEMS OF THE PRESENT SOUTH: A DISCUSSION OF CERTAIN OF THE EDUCATIONAL, INDUSTRIAL AND POLITICAL ISSUES IN THE SOUTHERN STATES 151–202 (1904) (examining southern race relations); Frederick L. Hoffman, *The Problem of Negro-White Intermixture and Intermarriage*, in II SECOND INT'L CONGRESS OF EUGENICS, EUGENICS IN RACE AND STATE 175, 175–88 (1923) (discussing race amalgamation as a threat to civilization).

22. Tourgee also pointed to the value of the citizen self. "The prime essential of all citizenship is *equality* of personal right and the *free* and secure enjoyment of all public privileges. These are the very essence of citizenship in all free governments." Brief for Plaintiff in Error at 14, *Plessy* (No. 210); see also R. JACKSON WILSON, IN QUEST OF COMMUNITY: SOCIAL PHILOSOPHY IN THE UNITED STATES, 1860–1920, at 144–70 (1968) (discussing the relationship between equality and personality).

23. Brief for Plaintiff in Error at 8, *Plessy* (No. 210).

24. See TAYLOR, *supra* note 16, at 400–65 (1989) (discussing the history of the conception of the self as immutable and essential).

25. See KAREN HALTTUNEN, CONFIDENCE MEN AND PAINTED WOMEN: A STUDY OF MIDDLE-CLASS CULTURE IN AMERICA, 1830–1870, at 202–03 (1982) (studying the appropriation of social identity in nineteenth-century middle-class culture). Halttunen argues that the figure of the confidence man, rather than a source of anxiety as it had been with mid-century Victorian concerns over placelessness in an open, urbanizing

identity as a property right presumed, and confirmed, the qualities of the self that inhered in attributes of the body—blood, hair, skin, other physical features—as fungible commodities whose representation might circulate within a cultural economy predicated on the value of whiteness.

Courts sought to police the meaning of this cultural economy by insisting that claiming whiteness, like claiming any property, rested on both the control and ownership of title.²⁶ In the lexicon of the law, such title inhered in pure white blood, without admixture.²⁷ Yet it should have provided little comfort to the courts that the very standard of blackness in the American South—the one-drop rule—merely operated as an invisible mimetic backdrop against which courts and claimants reflected the collected evidentiary proof of racial identity.²⁸ By focusing

society, was now the ticket to success. For instance, the Horatio Alger success formula represents a significant departure from the antebellum success myth that hinged on sincerity in form to convey sincerity of content. The new formula for success, where the trickster has the necessary skills to negotiate the moral wilderness of the city, resided in the art of social manipulation rather than in ascetic self-discipline. *Id.* at 202.

26. Eva Saks, *Representing Miscegenation Law*, 8 RARITAN 39, 40–43 (1988) (discussing the compatibility between blood and title in cases of miscegenation). By insisting on title, the courts participated in and responded to a desire for racial purity incited by anxiety among whites regarding contamination and dissolution. See SAIDIYA V. HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 189–206 (1997) (discussing postbellum legal strategies to alleviate the social uncertainty of racial categories as incited by anxieties of contamination of white racial purity); Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 2–5 (1990) (discussing the role of legal rhetoric and cultural anxiety in the development of conceptions of “white innocence” and “black abstraction”).

27. See *Mullins v. Belcher*, 134 S.W. 1151, 1151 (Ky. 1911) (affirming the trial court’s determination that the plaintiff’s children had one-sixteenth “Negro blood,” which prevented their entrance into the white-only public school). The court observed:

In this connection it is insisted that appellants are as fair as members of the white race, and there is nothing in their personal appearance to indicate the presence of negro blood. In our opinion, however, the question does not depend upon personal appearance. The color of the person may be one means of indicating the class to which he belongs; but the question in its final analysis depends upon whether or not the person has, or has not, an appreciable admixture of negro blood.

Id.

28. Variations of the one-drop rule were incorporated in state statutes in the American South, and even within each state variations of the rule applied depending on whether the activity the state sought to regulate was school attendance, marriage, inheritance, or paternity. See generally MICHAEL BANTON, *THE IDEA OF RACE* (1977); F. JAMES DAVIS, *WHO IS BLACK? ONE NATION’S DEFINITION* (1991) (tracing the development of the one-drop rule); THOMAS F. GOSSETT, *RACE: THE HISTORY OF AN IDEA IN AMERICA* (1963) (tracing determinations of race in the United States); JOHN G. MENCKE, *MULATTOES AND RACE MIXTURE: AMERICAN ATTITUDES AND IMAGES, 1865–1918* (1979) (examining the social stratification developed around race mixture); Gilbert Thomas Stephenson, *Race Distinctions in American Law*, 43 AM. L. REV. 29, 37 (1909) (discussing identity and blood quantum). Franz Fanon has noted the degree to which skin color served as a complicated proxy for the invisibility of blood, where together the

on reputation as a means of representing blood quantum, Tourgee located the dynamics of self-possession and racial identity in community opinion, impression, and sentiment.²⁹ This position reversed the traditional and formal causality between property and community.³⁰ Plessy's appeal relied on an understanding of property and possession as expressed through a set of social relations that conditioned the meaning of an object and presumed that, under the weight of social opinion, Plessy's reputation preceded and formed the property value in his white skin that he then might ratify in the courts. As such, neither property nor personality preceded community, but rather, issued from it.³¹

Contrary to Tourgee's argument, courts sought to draw the lines of identity as a surveyor might determine property lines, by invocation of and reference to title, anchoring their legal reasoning in the rhetoric of an unexamined objectivity regarding race. In this instance, Justice Brown understood ownership of title as expressed by blood quantum.³²

"corporeal schema" of skin color and the yearning to escape into anonymity from that overdetermination of skin marked the "crushing objecthood," the "fact of blackness," in which black subjectivity strained to be viewed as comprised of other than the objectified, external manifestation of color. FRANTZ FANON, *BLACK SKIN: WHITE MASKS* 109–40 (Charles Lam Markmann trans., Grove Press, Inc. 1967) (1952) (discussing a classic study of race relations and subjectivity).

29. Brief for Plaintiff in Error at 9, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (No. 210); see Dimock, *supra* note 11, at 42 (discussing the localization of public sentiment in *Plessy* as an effort to "psychologize" the language of race).

30. See II KENT, *supra* note 19, at *319 (discussing property as prior to the formation of the state); Kennedy, *supra* note 8, at 3–24 (discussing the paradigm of classical legal thought as shaped by an emphasis on separate spheres of power).

31. Brief for Plaintiff in Error at 9–14, *Plessy* (No. 210).

32. Justice Brown's embrace of the objective boundaries of racial identity prefigured the consonant observation by John Chipman Gray in 1909 concerning the parameters of the "true definition of a person":

Jurisprudence . . . need not vex itself about the "abysmal depths of personality." It can assume that a man is a real indivisible entity with body and soul; it need not busy itself with asking whether a man be anything more than a phenomenon, or at best, merely a succession of states of consciousness. It can take him as a reality and work with him, as geometry works with points, lines and planes.

JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 28–29 (Roland Gray ed., 2d ed. 1921) (discussing legal categories of personality). Yet, just as Euclid's explanations of geometry could no longer contain the notion that space is a consequence of the act of measuring, or as Einstein observed in 1920, "[T]here is an infinite number of spaces, which are in motion with respect to each other," so the conception of personality as an indivisible entity could not contain the multiple possibilities of property predicated on legal relations. KERN, *supra* note 17, at 136.

Justice Brown's statement that Plessy had to "be a white man" to claim whiteness is predicated on the assumption that claimants possessed an objective racial identity in line

Writing for the *Plessy* court, Brown invoked this objectivity of racial identity in responding to Tourgee's proposition that Plessy forfeited his property interest in whiteness when placed in a Jim Crow rail car.³³ In agreeing, word for word, with Tourgee that the reputation of being white is a property interest, Brown declared the claim inapplicable, for, he argued, if Plessy

be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so called property. . . . [I]f he *be a colored man* and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.³⁴

According to the Supreme Court, Plessy had to possess whiteness, to hold title impliedly through the object of lineage and blood, in order to claim damage to his reputation. In *Plessy's* legal discourse, property evinced by title and possession preceded personality, a claim opposite of Tourgee's.

Yet, the *Plessy* decision betrays the tension between the representation and reality of racial identity as a form and object of property. Indeed, it contained the very tensions that would continue to buffet questions of property and personality as the law began to treat property as a set of jural relations and personality as an amalgam of legally recognized objects.³⁵ For, after all, what did it mean to "be" a white man, to possess

with the "one-drop rule." See FANON, *supra* note 28, at 109 (discussing the subjectivity of white racial identity and enforced objectivity of the black self); HARTMAN, *supra* note 26, at 200 (discussing the effort in *Plessy* to regulate the social circulation of race and racial categories through the enforcement of objective legal markers such as blood quantum); Saks, *supra* note 26, at 43 (discussing blood quantum in the context of racial identity in miscegenation jurisprudence).

33. Brief for Plaintiff in Error at 9, *Plessy* (No. 210).

34. *Plessy*, 163 U.S. at 549 (emphasis added).

35. Property conceived of as a set of jural relations used the object as merely the starting point of analysis, while the nineteenth-century culture of the yeoman and proprietary freehold treated the object as the apotheosis of property. The tensions in this new regime of property acceded to the subjectivity or constellation of legal concerns held by others. A far-reaching debate among a group of legal writers during the first four decades of the twentieth century amplified the meaning and significance of jural relations on the practice and theory of law, as both an analytical appreciation and realist observation. The proffered calculus served to further challenge, as inadequate, the notion of property as a cohesive legal form; property emerged from this discussion as a subjective psychological legal arrangement regarding some object of attention. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 24 (1913) [hereinafter Hohfeld I] (observing that "[m]uch of the difficulty, as regards legal terminology, arises from the fact that many of our words were originally applicable only to physical things; so that their use in connection with legal relations is, strictly speaking, figurative or fictional" in noting that the "true contrast" between the legal interests held by a fee simple owner of land and an owner of a right of way across that land rests "in the fact that the fee simple owner's aggregate of legal relations is far more extensive than the aggregate of the easement

owner); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710, 746 (1917) [hereinafter Hohfeld II] (presenting an influential set of jural opposites—right or no right, privilege or duty, power or disability, immunity or liability—and jural correlates—right or duty, privilege or no right, power or liability, immunity or disability—meant to clarify the existence of legal value within a series of relationships); see also WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 23–114 (Walter Wheeler Cook ed., 1923) [hereinafter HOHFELD, *LEGAL ESSAYS*]; Charles E. Clark, *Relations, Legal and Otherwise*, 5 ILL. L.Q. 26, 27 (1922) (exploring the significance of jural relations); Arthur L. Corbin, *What Is a Legal Relation?*, 5 ILL. L.Q. 50 (1922) (urging the application of jural relations not as a means of predicting the certainty of the law, but as a condition for a discussion of legal value); Albert Kocourek, *Plurality of Advantage and Disadvantage in Jural Relations*, 19 MICH. L. REV. 47, 49 (1920) (discussing the application and juristic significance of Hohfeld’s conception of jural relations); Max Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1141, 1147 (1938). Radin noted that

the only legal fact . . . is a relation between two such human beings. No relation that has legal relevance exists between a human being and a thing, between a human being and a group of other human beings considered as a group, nor between a human being and an abstract idea.

Id. For contemporary appreciation of these conceptual changes, see GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970*, at 310–23 (1997) (discussing the bundle of rights theory of property); J.M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119, 1123 (1990) (proposing an application of Saussure’s and Peirce’s notions of semiotics to extend an understanding of Hohfeldian jural relations and the consequent impact on the thought of legal realists and fellow travelers of the critical legal studies movement); Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239, 283–301 (1994) (presenting a reevaluation of the bundle of rights theory of property).

The concept of personality exhibited similar tension, in which the original conception of the person as coherent and immutable acceded to an understanding of the individual as relationally different, depending upon the context. During this period the courts extended the designation and protection of legal personality to the corporate form, a move that engendered a wide-ranging discussion of the place of human selfhood in the law. This assignment placed the corporate “individual” within the same ontological universe as the natural individual. See *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394, 409 (1886). See generally GRAY, *supra* note 32, at 20–32 (defending the inviolability of the notion of the cohesive person in jurisprudence and critiquing, as unnecessary, contemporary theories of streams of consciousness detailing the mutability of the self); OTTO GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* (Frederic William Maitland trans., 1958) (arguing, influentially, for conceiving the communal or group form of the modern corporation as a “natural entity” cohering in a like manner to the individual self); John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926) (arguing for a conceptualization of the corporation as a set of relations rather than as a natural entity on par with the individual self); Harold J. Laski, *The Personality of Associations*, 29 HARV. L. REV. 404 (1916) (discussing the ontological cohesion of corporations as separate personalities and comparing that to the legal understanding of associations); Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253 (1911) (discussing the corporation as an entity separate from its constituent members and worthy of naturalized legal personality). This fragmentation of self and property led

that object of whiteness?³⁶ Justice Brown's insistence that Plessy had to "be a white man" in order to claim harm merely deferred the inquiry to a determination of the reasonableness of the reputational claim.³⁷ Containing the tensions between the presocial notion of identity and the relational quality of the self and property, the Court insisted that any claim of racial title in whiteness, of possession of the necessary object of blood quantum, required "reference to the established usages, customs and traditions of the people . . . [and to] 'the *general sentiment of the community*.'"³⁸ Thus, while the courts, following *Plessy*, treated whiteness as an object possessed, they determined the meaning of that object through its representation in the community, the very same means by which courts recognized and constructed reputation.³⁹

III. THE RELATIONAL REGIME OF PROPERTY

As courts during this period sought to fix and protect white racial identity by reference to "title" in the objects, elements, and characteristics of the individual body, a legal and cultural discourse emerged that articulated a reconceptualized consideration of property as composed of jural relations.⁴⁰ Instead of relying on the certainty of the

courts to yearn for an object by which to fix identity and property, and that object was blood quantum.

36. *Plessy*, 163 U.S. at 549.

37. *Id.*

38. *Id.* at 550–51 (quoting *People ex rel. King v. Gallagher*, 93 N.Y. 438, 448 (1883)) (emphasis added).

39. Undermining the Court's efforts was the reality that the legal measure of this racial certainty, and therefore the property value of a reputation in whiteness, lay not in the ineluctable shadows of biology, but in the volatility of social sentiment. Plessy's property interest in "passing" rested on an understanding of property not as an innate value separate from commerce, but as a constellation of perceptions derived from Plessy's circulation in the public and social sphere, a notion consonant with William James's 1891 observation that we are different individuals among different people. I JAMES, *supra* note 12, at 294. In other words, Plessy's property interest was a consequence of, and the condition for, the community belief that he was white. Indeed, as Hohfeld observed in 1917, "[I]nstead of there being a single right with a single correlative duty resting on all the persons against whom the right avails, there are many separate and distinct rights, actual and potential, each one of which has a correlative duty resting upon some one person." Hohfeld II, *supra* note 35, at 742. On property in the social sphere, see generally MICHAEL T. GILMORE, *AMERICAN ROMANTICISM AND THE MARKETPLACE* (1985) (discussing the self and commodification); LENTRICCHIA, *supra* note 18, at 51 (discussing property and the self).

40. Hohfeld II, *supra* note 35, at 710–47. Additionally, this rearrangement of the corpus of property, ascribing legal weight and substance of an object of attention to jural relations held by parties, echoed the analytical treatment of relations by American pragmatists, like William James, who observed, "[T]he relations that connect experiences must themselves be experienced relations, and any kind of relation experienced must be accounted as 'real' as anything else in the system." William James, *A World of Pure Experience*, 1 J. PHIL. PSYCHOL. & SCI. METHODS 533, 534 (1904)

object to convey legal value, an evolving logic of property insisted that ownership was a situational medley, involving a shifting set of social relationships.⁴¹ In this constellation, legal value emerged from, and varied according to, other persons' legal interests in the object.⁴² In his late nineteenth-century treatise on the law of eminent domain, John Lewis articulated this contingent view of property when he admonished his readers to "look beyond the thing itself, beyond the mere corporeal object, for the true idea of property. . . . The dullest individual among the people knows and understands that his property in anything is a bundle of rights."⁴³ One court conveyed the nature of this change when it observed in 1902:

Property . . . is not, in its modern sense, confined to that which may be touched by the hand, or seen by the eye. What is called tangible property has come to be . . . but the embodiment, physically, of an underlying life—a life that, in its contribution to success, is immeasurably more effective than the mere physical embodiment.⁴⁴

In his study of consciousness and personality, American pragmatist William James put the serial quality of property in psychological terms when, in 1890, he observed that "*a man has as many social selves as there are individuals who recognize him and carry an image of him in their mind.*"⁴⁵

(proposing an appreciation of radical empiricism predicated on experience).

41. Hohfeld I, *supra* note 35, at 23–25 (discussing the false dichotomy between corporeal and incorporeal rights); *see also* WALTER LIPPMANN, DRIFT AND MASTERY: AN ATTEMPT TO DIAGNOSE THE CURRENT UNREST 50–51 (1914) (examining the reorientation of the relationship between property and personality under the press of corporate capitalism).

42. The notion of property as a set of jurial relations served to underscore the social and historic aspects of legal conceptions, for these relations expressed a past narrative of experience while also encompassing the future unfolding of events. During this period, William James described the truth of a thing similarly, noting that "ideas . . . become true just in so far as they help us to get into satisfactory relation with other parts of our experience." WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING, POPULAR LECTURES ON PHILOSOPHY 34 (1907). James conveyed the constituent quality of this relational conception of property when he perceived the truth of an idea as something that happens to the object, rather than something that resides in it, remarking, "It *becomes* true, is *made* true by events. Its verity *is* in fact an event, a process: the process namely of its verifying itself, its *verif-ication*. Its validity is the process of its *valid-ation*." *Id.* at 58, 201.

43. I JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES §§ 63, 64, at 52, 55 (3d ed. 1909) (discussing property as a constituent relationship).

44. Nat'l Tel. News Co. v. W. Union Tel. Co., 119 F. 294, 299 (7th Cir. 1902) (finding that the information on ticker tape is not copyright matter but a commercial product).

45. I JAMES, *supra* note 12, at 294. James acknowledged the proximity of property and personality when he remarked, immediately prior to this observation, "[I]t is clear

Thus, by 1932, Adolph Berle and Gardiner Means might observe that the financial structure of the “quasi-public” corporation had “resulted [in] the dissolution of the old atom of ownership.”⁴⁶ This assertion represented a remarkable testament to the decades-long re-creation and rearticulation of the attributes that formerly cohered in the singular property owner. During this period legal discourse revealed a new apprehension of property as necessarily fragmented and diffuse: Property performed and gained meaning only through a constellation of social relationships, of rights, duties, privileges, powers, and immunities. Consequently, the abilities of property and personality, as conceptual frameworks for legal discourse, to legitimate judicial decisions, provide a basis for claims, and act as a referent for legal resolution yielded, instead, to a contested discourse concerning the meaning and value of property and personality itself, a discourse that treated both concepts as open questions in need of answers.⁴⁷

As the cohesive certainty of property had begun to fragment by matching and exceeding the collected demands of an increasingly corporate and mass culture predicated on wage labor, the preeminence of the moral personality predicated on independence through ownership of land yielded to an understanding of the serial and social self. In response, the cultural practices of the law began to locate the source of individual independence not in landed property but as instantiated in the body of the person. By relying on the rhetoric of blood quantum, with its implied purity of racial identity, courts relocated the object of property into the body in an effort to manifest racial certainty and avoid the contingency of the new property regime.⁴⁸ The tension between an

that between what a man calls *me* and what he simply calls *mine* the line is difficult to draw.” *Id.* at 291; see also I RICHARD T. ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH 132–99 (1914) (suggesting that a property right provides the exclusive control over some thing); Joseph W. Bingham, *Some Suggestions Concerning “Legal Cause” at Common Law*, 9 COLUM. L. REV. 16, 30–36 (1909) (proposing a serially relational conception of negligence based on the scope of duty owed and suggesting that it supplant the object-act notion of probable cause foundational to tort analysis).

46. ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 7–8 (1940) (articulating a distinction between the possession and ownership of property as suggested by the modern corporate form). Much of Berle’s and Means’s observations concerning the dissolution of property echoes economist Thorstein Veblen’s trenchant critique in *The Theory of Business Enterprise*. THORSTEIN VEBLEN, THE THEORY OF BUSINESS ENTERPRISE 120–30 (1935) (discussing the tensions between traditional concepts of individual rights and personality and reconfigurations of those concepts under corporate enterprise).

47. See KERN *supra* note 17, at 50–77 (placing an emphasis on the mutability of notions of time, space, form, and distance in modern mass culture, inclusive of legal doctrine); LIPPMANN, *supra* note 41, at 50–51 (discussing the rearticulation of property and personality).

48. This gesture may be understood as an internalization of the late nineteenth-

object-centered conception of property and the notion of property as serial and social emerged in the judicial discourse of race identification between the ontological certainty of blood quantum and the empiricism of proof through association and community sentiment. Hanging in the balance was the understanding of selfhood, as either prior to the polis and possessing a singular moral personality, or as a condition of the community from which identity emerged.⁴⁹

In grappling with claims of racial misrepresentation, courts of the late nineteenth century sought to locate racial identity in the body in the form of an object of property—an immutable, natural “thing” possessed—to ensure a means for “quieting title” in whiteness.⁵⁰ Working against the

century populist promise of the moral personality written upon the fact of the body. See CHRISTOPHER LASCH, *THE TRUE AND ONLY HEAVEN: PROGRESS AND ITS CRITICS* 204–23 (1991) (arguing that the populism of this period, manifest in several agrarian arenas, held out the promise of a moral personality conditioned upon earlier, cohesive forms of proprietorship, a promise born out of the republican reliance upon the freehold, the external object of desire, as the condition for the formation of the moral personality necessary for independent and uncorruptible civic participation). Where the law recognized a certain form and capacity of the self embodied in the relationship to the appropriation of property as a “thing” that contained a person’s will, the fragmentation of property, its serial quality and the separation of ownership and control, invited an expansion in the possibilities of personhood. The legal attention directed toward blood quantum and community sentiment represented an effort by the courts to suture together what they may have recognized as already fractured: the ownership and control of racial identity. In this context it might be possible to suggest, in the language of the corporate reorganization of property, that Tourgee insisted not on ownership of, but on control over the racial property he recognized as possessed by Plessy *because* of the new apprehension of property as diffuse and fragmentary. See JOHN R. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 155–56 (1924) (applying Hohfeld’s proposition of jural relations to the legal creation of value in commerce); GEORG WILHELM FRIEDRICH HEGEL, *HEGEL’S PHILOSOPHY OF RIGHT* 40–41 (T.M. Knox trans., 1967) (discussing the creation of objects as human activity, the product of continuously articulated desire); ALEXANDRE KOJÈVE, *INTRODUCTION TO THE READING OF HEGEL* 3–70 (James H. Nichols, Jr. trans., Allan Bloom ed., 1969) (arguing for a reading of Hegel that appreciates the development of the modern personality as participating in the creation of objects as the articulation of desire).

49. The reconstruction of property as a set of jural relations implied that the moral personality of the autonomous freeholder had been excluded from cultural and legal sovereignty, or that its rational coherence was at least open to debate. The fixed character of that personality did little to explain or contain new demands on identity.

50. In the judicial treatment of chattel slavery prior to 1865, the courts wrestled with the ontological slippage between property and personality assigned to the body of the bonded slave. Prior to emancipation, courts sought to contain the subjectivity of the slave by limiting the judicial opportunity to recognize personality, marking the slave body as an object rather than as a subject. However, this legally designated property continuously erupted as subjectivity, calling the very legal assignment into question. See *generally* ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL*

backdrop of state laws stipulating blood quantum for establishing the boundaries of racial meaning, courts at both the federal and state level deployed the language of entitlement and the legal convictions of property to represent blood quantum as an immutable characteristic inscribing the racial self.⁵¹ Yet this legal posture only revisited and re-

PROCESS (1975) (examining the judiciary's moral and constitutional responsibility, during the antebellum period, for resisting enforcement of fugitive slave statutes in conflict with state imposed laws); EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (1976) (discussing the law's effect in disrupting the line between person as subject and person as property under the regime of slavery in the American South); Saks, *supra* note 26, at 43 (discussing white identity as property possessed). Under the discursive regime of slavery, in which courts treated the relationship between property and personality as a metaphorical equivalency of object to subject, property retained its cohesive construction, and notions of personality mimicked that cohesion. Severing the legal, metaphorical relationship of person as chattel created the space for a new ontological assignment, in which courts and legislative bodies worked to mark personality through the designation of an object of property within the body. This new apprehension of the relationship between property and personality as a metonymic assignment of part to whole, with blood quantum representing racial identity, effectively resulted in the verification of the right to the moral personality of whiteness through judicial readings of appearance, comportment, association, genealogy, and performance. Together, this constellation provided the means for claiming property in whiteness, a constellation of attributes that resonated with the notion of property conceived of as a bundle of sticks. As such, it may be possible to suggest that the turn away from a unitary conception of property, as enunciated in such notions as the bundle of sticks concept, required the severance of a metaphorical treatment of the body as property found deployed in the law against African Americans until 1865. For a discussion of the explanatory register of the tropes of metaphor and metonymy, see HAYDEN WHITE, *TROPICS OF DISCOURSE: ESSAYS IN CULTURAL CRITICISM* 5–7, 206, 253 (1978) (following Kenneth Burke and proposing a tropological reading of grammar that takes into account differences of meaning between the tropes of metaphor and metonymy, where the latter trope, as represented by the discursive maneuver of enabling a part, such as blood quantum, to represent a whole, the whiteness of a body, also endows the attribute with purposive activity and agency, thereby replacing cause with effect, permitting, for example, the conceptualization that “white” blood creates or causes white identity rather than representing the attribute of “white” blood as the residual effect of the designation of white identity).

51. The legal stipulation of blood quantum for white selfhood provides an interesting twist on Kenneth Burke's observation that a metonymic rhetoric of part and whole was central to the critique of modernization. KENNETH BURKE, *A GRAMMAR OF MOTIVES* 500–17 (1945) (proposing an understanding of linguistic meaning through the grammatical strategies of reading). Burke explained the trope of metonymy as instantiating “some incorporeal or intangible state in terms of the corporeal or tangible.” *Id.* at 506. Reducing whiteness to blood quantum represented just such a telescoping maneuver in legal discourse, as courts treated blood quantum as a material embodiment of an intangible white selfhood. Wai Chee Dimock has characterized the cultural relation between the material part and the immaterial whole expressed in metonymic tropes as “crucial both to the making of entities, the categorization of autonomous units, and to the making of epistemologies, the projection of a cognitive universe.” Wai Chee Dimock, *Class, Gender, and a History of Metonymy*, in *RETHINKING CLASS: LITERARY STUDIES AND SOCIAL FORMATIONS* 57, 59 (Wai Chee Dimock & Michael T. Gilmore eds., 1994) (finding a metonymic discourse in readings of law and literature). To couch this in terms of this discussion, it is through metonymy that the *idea* of the white person equated with the *physical detail* of the white person, making the white body virtually

created the tension found in *Plessy* between property as simultaneously object and subject, as possessed and represented, as both a thing and a set of social relations, expressed through the “general sentiment of the community.”⁵² Efforts to grapple with these questions helped to comprise a legal discourse of the early twentieth century that should not be viewed as merely reaction to the conceptual formalisms of the nineteenth century, nor as quests for the object or method in scientific rationality, but might best be appreciated as crucial attempts to articulate a legal legitimacy consonant with new apprehensions of the self and of property—efforts, in short, to comprehend the moral personality under the aegis of modernity.⁵³

For Justice Brown, whiteness understood as an entitlement through the possession of blood quantum represented an effort to maneuver the long-held association of property and objectivity, in the service of racial certainty, to arrest the indeterminacy of racial identification. Under the Court’s rubric, whiteness was the effect of possessing the objectively

coextensive with white selfhood as an epistemological category. This coextension resulted from a collapse of the immaterial into the material, in which jurists strove to contain whiteness by establishing a legal narrative of reductive equivalency; they recognized white selves because they possessed white blood. This metonymic discourse operated not only to materialize the idea of white selfhood, but also to localize and contain the object of that idea within a narrative of modern individualism. The irony, or in Burke’s phrase, the “internal fatality” of this assignment emerged from the double gesture required of the courts, in which blood quantum, as material phantasm, entailed further representation through evidence of lineage, family narrative, community opinion, appearance, comportment, and association. BURKE, *supra*, at 512. Rather than embodying the idea of whiteness and localizing it in the individual body, the legal narrative of blood quantum burst judicial efforts of containment by registering the proof of white identity as observable social equivalencies. Courts thus authorized whiteness through a series of atomizing and fragmenting exchange relationships in which social markers such as association or appearance stood in for the invisible but “material” blood quantum. Consequently, judicial fidelity to formal notions of legal certainty and a desire to locate that certainty in the objectivity of blood quantum served to fragment rather than contain whiteness, creating the very possibility of and means for misrecognition and passing. For a discussion of the closure of identity, see POSNOCK *supra* note 16, at 105; TAYLOR, *supra* note 16, at 159–76 (discussing a subject’s radical stance of disengagement, of objective distancing, from the self for the purpose of remaking as a quintessentially modern attribute and referring to this stance as the “punctual self”); see also HAYDEN WHITE, *METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH-CENTURY EUROPE* 31–38, 335–360 (1973) (discussing the grammar of metonymy as imparting an agency or causal relationship between parts and wholes).

52. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

53. See TAYLOR, *supra* note 16, at 310–12 (discussing the modern personality); see also KOLB, *supra* note 16, at 3–19, 244–46 (discussing modern identity); LIVINGSTON, *supra* note 16, at 220–24 (discussing the modern personality as thought and thing).

proper blood quantum, thus stanching the possibility that whiteness, as a valuable property form, would derive that value from any source other than the object of blood possessed.⁵⁴ Yet, as state legislatures and courts associated whiteness with the objectivity of blood quantum, the laws delimiting racial identity did not so much arrest or prohibit transgressions across the color line as they created and reproduced the conditions for redefining race as the very possibility of passing.⁵⁵

IV. REPUTATION AND THE SOCIAL SELF

Courts addressing a private injury to reputation might do so under the legal doctrine of defamation.⁵⁶ Late nineteenth-century commentators on the law of libel and slander in the United States differed over whether the gist of a defamatory action turned on an injury to reputation or on the assertion of a pecuniary loss.⁵⁷ Rather than a mere legal nicety, the basis of this distinction signaled alternative views of identity that defamation law sought to protect.⁵⁸ While both views relied on an understanding of reputation as a social or community expression of selfhood, regulating that reputation by measuring it as a pecuniary loss determined the value of identity primarily in relation to a cash nexus.⁵⁹ Thus, the social

54. *Plessy*, 163 U.S. at 549.

55. As the requisite blood quantum served as the metonymic device by which courts “found” racial property in the person, the invisibility of blood as a racial signifier required another gesture of representation for the effective apprehension of legal categories of race. That second gesture required the presentation of the self within a community. Consequently, legal efforts to ensure the certainty of the racial self through the biological objectivity of blood actually created the cultural conditions for racial self-fashioning. See Peggy Pascoe, *Race, Gender and the Privileges of Property: On the Significance of Miscegenation Law in the U.S. West*, in *OVER THE EDGE: REMAPPING THE AMERICAN WEST* 215 (Valerie J. Matsumoto & Blake Allmendinger eds., 1999) (discussing miscegenation law and probate).

56. Historically, defamation addressed three elements: the form of the publication (whether verbal or written), the character of the matter, and the motives for dissemination. Van Vechten Veeder, *The History and Theory of the Law of Defamation I*, 3 COLUM. L. REV. 546, 571 (1903) [hereinafter Veeder I]; Van Vechten Veeder, *The History and Theory of the Law of Defamation II*, 4 COLUM. L. REV. 33, 35 (1904) [hereinafter Veeder II] (tracing the growth and development of defamation law in England and the United States); see also NEWELL, *supra* note 12, at 68–84 (discussing the law of defamation).

57. See NEWELL, *supra* note 12, at 966–71 (discussing libel and slander of reputation); W. BLAKE ODGERS, *A DIGEST OF THE LAW OF LIBEL AND SLANDER* 18–20 (3d ed. 1896) (discussing defamation law principally in England); JOHN TOWNSHEND, *A TREATISE ON THE WRONGS CALLED SLANDER AND LIBEL* 37–50 (4th ed. 1890) (asserting that pecuniary loss must be shown to entitle a petitioner to a remedy). See generally THOMAS STARKIE, *A TREATISE ON THE LAW OF SLANDER, LIBEL, SCANDALUM MAGNATUM, AND FALSE RUMORS* (1832) (treating cases in both England and the United States).

58. See NEWELL, *supra* note 12, at 195–97, 849–72 (discussing special damages relating to business loss and the loss of honor).

59. This often amounted to a discussion of whether a showing of special damages was required, where a known pecuniary loss did not necessitate such a showing. *Id.* at 849–72.

expression of the self largely carried legal weight to the degree the market might augment that expression by registering the loss of business opportunity, clients, or professional position.⁶⁰

Alternatively, exercising defamation law to protect an injury to reputation absent evidence of pecuniary loss relied on a wider, if not entirely different, economy of community sentiment.⁶¹ In this economy, turn-of-the-century jurors assigned value to reputation by brandishing the yardstick of community norms to measure any loss to the value of the social expression of the self by reference to honor, prejudice, belief, and expectation.⁶² Knit together, these intangible reference points for community sentiment provided reputational claims with the tangible, legal weight of a worldly object. This transformation was not lost on one commentator who, in 1903, observed that “[o]ne’s good name is therefore as truly the product of one’s efforts as any physical possession; indeed, it alone gives to material possessions their value as sources of happiness.”⁶³ Thus, reputation was no less a part of the production process, no less proprietary and no less tangible because it operated within the cultural economy of community sentiment.⁶⁴ Reputation, as a

60. *Id.* at 168–98 (discussing defamation in offices, profession, and trades); *see also* Axton Fisher Tobacco Co. v. Evening Post Co., 183 S.W. 269, 274 (Ky. 1916) (discussing a corporation as equivalent to a merchant or tradesman in the type of harm it might claim when initiating a libel suit); HARRY D. NIMS, *THE LAW OF UNFAIR BUSINESS COMPETITION* 389–420 (1909) (discussing libel and slander of the corporation). While Nims focuses on defamation of trade, it is important to note that with the advent, during this period, of a mass market advertising that sought to align identity with commercial product, trade libel began to look like character libel, enabling a broadening of the concept of reputational injury in commerce. *See generally* JACKSON LEARS, *FABLES OF ABUNDANCE: A CULTURAL HISTORY OF ADVERTISING IN AMERICA* (1994) (discussing the shift in advertising from the promotion of the product to the selling of an identity that necessitated the product).

61. *See* GEORGE A. LOFTON, *CHARACTER SKETCHES* 76–77 (1890) (noting that “few ever override popular odium and disfavor” created by the “sting” of slander); NEWELL, *supra* note 12, at 966–71 (discussing defamation as protecting the place of personal reputation in the community); Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 701 (1986) (discussing the social linkages crucial to an appreciation of the application of defamation law).

62. *See* *Morris v. State*, 160 S.W. 387, 388 (Ark. 1913) (finding that the defendant’s comment that the plaintiff’s mother was a black woman effectively removed the community’s respect in remanding for a new trial); *O’Connor v. Dallas Cotton Exch.*, 153 S.W.2d 266, 268 (Tex. App. 1941) (finding that the plaintiff could recover from a building owner for the “pain and humiliation” of riding a freight elevator with African Americans).

63. Veeder II, *supra* note 56, at 34 (recognizing reputation as infusing objects with the subjectivity of the self).

64. *See* NEWELL, *supra* note 12, at 77–84 (discussing harm to reputation).

proprietary expression of the social self, yielded new ways of regulating and expressing the self, consonant with the new expressions of property that were accommodating and shaping the requirements of a nascent corporate and consumer economy.⁶⁵

In the law of defamation, judges sought to administer a set of rules regarding expression—whether written, spoken, imputed through gesture or representation—considered harmful to the reputation of an individual and to justify the remedial attention of the law.⁶⁶ American common law developed categories of defamation that enabled judges to recognize remarks as per se harmful to one’s standing in the community.⁶⁷ Judges found words per se harmful where the law presumed, without express proof, that the nature of the words themselves, on their faces, must have injured the plaintiff’s reputation.⁶⁸ The common law treated the written word, when published or disseminated in some printed form, as libelous when the petitioner proved “special damages” of a pecuniary loss to receive compensation for injury to reputation.⁶⁹ On the other hand, injury to reputation through spoken words or gestures amounted to slander, which the courts recognized as per se harmful to the extent the defamation represented a categorically unacceptable utterance, such as imputing the commission of a crime, attributing contamination with a contagious disease, or disparaging a person in office, profession, or trade.⁷⁰ While commentators differed over the efficacy of the common-law distinction between the written and spoken word, most generally

65. The proliferation of new property forms, such as business goodwill and trademarks in a person’s name and face, along with the application of property to actions such as the labor injunction yielded, and could only have emerged from, a fragmented or serial notion of property. See COMMONS, *supra* note 48, at 1–45 (discussing business goodwill); JANE M. GAINES, *CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW* 1–41 (1991) (discussing the multiplication of legal instruments and approaches for addressing the personality attributes of the body that accompanied the rise in mass and corporate culture); Grey, *supra* note 9, at 69–73 (discussing the myriad forms of property).

66. See NEWELL, *supra* note 12, at 33–84 (discussing the elements of libel and slander).

67. See *id.* at 849–56 (discussing the categories in which a showing of special damages is considered largely unnecessary: libel action, imputing an indictable offense, contagious disease, or disparaging the person in profession, trade, or office of public trust, want of chastity, adultery, or fornication).

68. See *id.* at 849 (discussing per se harm).

69. *Id.* at 43. Newell observed:

Any written words are defamatory which impute to the plaintiff that he has been guilty of any crime, fraud, dishonesty, immorality, vice or dishonorable conduct, or has been accused or suspected of any such misconduct; or which suggest that the plaintiff is suffering from any infectious disorder; or which have a tendency to injure him in his office, profession, calling or trade. And so, too, are all words which hold the plaintiff up to contempt, hatred, scorn or ridicule, and which, by thus engendering an evil opinion of him in the minds of right-thinking men, tend to deprive him of friendly intercourse and society.

Id.

70. See *id.* at 84 (discussing categories of per se harm).

regarded a published and printed defamation as more injurious to personal and professional reputation in its threat of permanency and dissemination than the presumed ephemera of speech.⁷¹

Legal treatises on libel and slander published during the closing decades of the nineteenth century enumerated these categories.⁷² Because the harm to reputation that an utterance might cause depended on whom it was directed toward and the specific accusation in the community, courts faced a litany of considerations.⁷³ For instance, judges had to consider whether the words were directed at a public official, clergyman, lawyer, doctor, journalist, or general trader; they had to discover which particular criminal offense might be imputed, from cheating, counterfeiting, gaming, and kidnapping to robbery, subornation, or watering milk; when a specific moral impropriety was averred, courts had to ascertain whether it involved rape, incest, sodomy, soliciting, adultery, fornication, or prostitution.⁷⁴ Thus, courts might not consider it slanderous per se to refer to a lawyer as a crank or as insane, but they did consider it actionable to impute that a lawyer abandoned clients.⁷⁵

Nevertheless, for courts to regard spoken words not falling within one of the enumerated categories as defamatory required a showing of “special damages”: material evidence shown at a trial establishing the financial injury visited upon the person’s reputation.⁷⁶ As one treatise

71. Veeder I, *supra* note 56, at 571–73 (distinguishing between libel and slander in terms of the relative permanence, as an object in print, of libel); *see also* NEWELL, *supra* note 12, at 43 (finding the harm of libel in its enduring quality, as opposed to the evanescent nature of slander). *But see* LOFTON, *supra* note 61, at 76 (insisting that slander’s evanescent quality made it more difficult to contain and therefore more dangerous). Characterizing slander as “infinitely worse than theft or murder or arson,” Lofton laments, “Such is the eager love of scandal, so innumerable, doubtful, and irresponsible are its sources among the masses, that it is almost next to impossible to win a suit for damages or to criminally prosecute the slanderer.” *Id.* at 76–77. Disrupting the effective categorical differences between libel and slander, between the subjective utterance and the objective publication, as courts did in cases of racial misrecognition, ironically mimicked the eroding distinction between the very categories of subject and object, the distinct integrity of which the courts relied upon to justify the certainty of racial identity.

72. *See* NEWELL, *supra* note 12, at 93–201 (discussing the enumerated categories of harm).

73. *See id.* at 270–358, 388–561 (discussing the construction of the averred harmful language).

74. ODGERS, *supra* note 57, at 18–22 (discussing both American and British examples of special damages in a widely circulated and often cited treatise).

75. *See* NEWELL, *supra* note 12, at 184–86 (discussing degrees of defamation in relationship to possible pecuniary consequences).

76. *See id.* at 849–72 (discussing slander).

writer explained in 1881, “[W]ords which are merely uncivil, words of idle abuse, are clearly no ground for an action, unless it can be shown that in fact some appreciable damage to the plaintiff has followed from their use.”⁷⁷ However, bringing another’s name into disrepute not only implicated a property dimension to reputation, but also involved intangible considerations of honor and dignity, crucial markers of one’s place in a community.⁷⁸ Southern courts constructed a separate category in defamation involving racial misrecognition, a category in which courts sought to etch the color line so indelibly as to create instant harm and ready remedy for misapprehending another’s racial identity.⁷⁹ Involving as it did issues of property, honor, and identity, southern courts almost universally treated racial misrepresentation as a *per se* harm whether sounding in libel or slander.⁸⁰

The legal construction of a right in reputation also articulated and inscribed notions of community and locality. When judges recognized a specific person’s reputation as a property interest vulnerable to harm, they did so by reference to an imaginary community to which the person belonged, one that recognized the claimant’s reputation as worthy of legal protection.⁸¹ One’s reputation always existed within a community, and the legal decisions recognizing harm or ignoring injury in defamation constructed and reinforced an imaginary community in which that reputation might garner evidentiary weight.⁸² That the law might, for instance, recognize as harmful a statement impugning a

77. ODGERS, *supra* note 57, at 18 (discussing the need to show special damages).

78. See Veeder II, *supra* note 56, at 33–42 (discussing reputation and community standing).

79. See *infra* notes 117–85 and accompanying text.

80. See, e.g., *Bowen v. Indep. Publ’g Co.*, 96 S.E.2d 564, 566 (S.C. 1957) (finding recovery necessary when a white woman sued a paper for publishing the news that her son had been transferred to a government hospital and naming her as the mother in the paper’s section on “Negro news” beneath the picture of a “colored soldier”). As petitioners and courts made common cause to establish the ineluctable line of racial identity, judicial decisions served to reinscribe social divisions seemingly beyond the competence of the courts to address, while also baldly acknowledging a broad absence of harm. As the court opined in *Bowen*:

Although to publish in a newspaper of a white woman that she is a Negro imputes no mental, moral or physical fault for which she may justly be held accountable to public opinion, yet in view of the social habits and customs deep-rooted in this State, such publication is calculated to affect her standing in society and to injure her in the estimation of her friends and acquaintances.

Id.

81. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 1–4 (rev. ed. 1991) (examining the cultural and political linkages that have generated national community as an aspirational and regulative ideal); WILSON, *supra* note 22, at 45–70 (discussing interpretive communities).

82. See Post, *supra* note 61, at 700–10 (discussing the constitutive role of the community in forming reputation).

trader's honesty relied on the court's implied construction of a community of traders in which the principles of cohesion rested on a culture of fair dealing, personal integrity, and face-to-face transactions.⁸³ Equivalently, during this period, courts in many states recognized a defamatory imputation that a woman had given birth to an illegitimate child as actionable *per se*.⁸⁴ The courts predicated their willingness to find such *per se* harm on the expectations of a constructed community in which a woman's chastity stood as the hallmark of her reputation.⁸⁵

Similarly, legal exclusions, or nonrecognition of harm, also served to articulate the meaning of the community.⁸⁶ As a result, legal recognition of reputation always implicated and created a larger social whole that courts determined and divided through community considerations of status, race, and gender. As one legal commentator remarked in 1903, in reflecting on the law's obligation to remedy defamatory harm:

[T]he right to reputation . . . has regard . . . to that repute which is slowly built up by integrity, honorable conduct, and right living. . . . [I]t is reputation, not character, which the law aims to protect. Character is what a person really is; reputation is what he seems to be. One is composed of the sum of the principles and motives—be they known or unknown—which govern his conduct. The other is the result of observation of his conduct—the character imputed to him by others. It is, therefore, reputation alone that is vulnerable⁸⁷

Reputation resulted from the extension and elaboration of social recognition; it was not a possession of individuals but a relation between

83. See NEWELL, *supra* note 12, at 195–97, 707–10 (discussing commercial reputation).

84. See *Bowden v. Bailes*, 8 S.E. 342, 345 (N.C. 1888) (stating that “any words, written or spoken, of a woman, which may amount to a charge of incontinency, shall be actionable,” whether or not spoken “wantonly” or “maliciously”) (citing N.C. Code § 3763); *Roe v. Chitwood*, 36 Ark. 210, 212 (1880) (confirming that accusing a married woman of being no better than a “base whore” is a charge of adultery sufficient without an allegation of special damages from the claimant); *Jones v. Gill*, 66 P.2d 1033, 1034–35 (Kan. 1937) (reversing the damage award for the plaintiff and remanding for a new trial a suit involving a mother's claim that rumors of the racial composition of her adopted daughter—that she was “a half-breed child,” which forced plaintiff to move her family to several different neighborhoods to escape the accusations—were started by the plaintiff's stepmother-in-law); NEWELL, *supra* note 12, at 151–66 (discussing adultery and fornication).

85. *Nicholson v. Merritt*, 59 S.W. 25, 26 (Ky. 1900) (stating that, “Has one of Griff Nicholson's girls had a young one? I heard it,” is a charge of fornication and therefore actionable *per se*).

86. See *infra* notes 108–15, 187–93 and accompanying text.

87. *Veeder II*, *supra* note 56, at 33 (proposing the nineteenth-century conceit concerning identity in distinguishing between character as innate and coherent and reputation as social construction).

persons.⁸⁸ The relative weight courts assigned to any given reputation rested on the judiciary's willingness to recognize an individual as belonging to the community implied and constructed by the courts.⁸⁹

V. REPUTATION AS PROPERTY

While the legal right of reputation always implicated the community, courts recognized that individuals claiming defamatory harm sought to fortify and redefine property value in the social self. The judicial treatment of defamation indicates that during this period claims to the right of reputation sought to protect at least two types of interest: honor and property in the self.

Seeking to make the distinction clear, Roscoe Pound remarked in 1915:

On the one hand [defamation] may be an injury to personality affecting the feelings, the sensibilities, the honor of the person defamed. On the other hand it may be an injury to substance, since credit plays so large a part in society that the confidence of one's fellows may be a valuable asset.⁹⁰

Reputation, then, resonated with two fairly disparate, but inseparable meanings—honor and “substance.” Even Pound admitted that, while he considered the interest involved when a person is humiliated as one of honor rather than of “substance,” he nevertheless recognized that a claim in such an instance amounted to no more than one of property in the name.⁹¹

Honor relied on a system of stratification and status that conveyed

88. Of course, in the eyes of the *Plessy* Court and other jurists who attempted to contain the possibility of race as a free-floating signifier, reputation exhibited a community's expression of the nascent and immutable *character* of an individual. See SUSMAN, *supra* note 20, at 276–84 (distinguishing between character and personality and discussing the development of the latter notion of identity as a condition and consequence of the modern self, especially under the terms of mass culture).

89. See *infra* notes 103–19 and accompanying text.

90. Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 641 (1915) (noting that defamation “may be an injury to personality . . . [or] an injury to substance, since credit plays so large a part in society that the confidence of one's fellows may be a valuable asset”). Pound takes his cue on reputation as property from Bower's code of actionable defamation:

In so far . . . as individual honor, dignity, character, and reputation are recognized by the law as proper subjects of its protection and as being such that any injury thereto entitles the aggrieved party to the same forms of legal redress as the invasion of property strictly so called, it is permissible to consider these rights as assets

Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 446 (1915) [hereinafter Pound, *Interests of Personality*] (quoting GEORGE SPENCER BOWER, A CODE OF THE LAW OF ACTIONABLE DEFAMATION 240, 241 (1908)). “Individual interests may be classified as (a) interests of personality,—the individual physical and spiritual existence; (b) domestic interests,—‘the expanded individual life;’ and (c) interests of substance,—the individual economic life.” *Id.* at 349 (footnote omitted).

91. Pound, *Interests of Personality*, *supra* note 90, at 347.

social value.⁹² Construing reputation as honor, therefore, implied that identity was importantly linked to social status and, according to one observer, “presupposes an image of society in which ascribed social roles are pervasive and well established, and in which such roles provide the point of reference both for the ascription of social status and for the normative standards of personal conduct.”⁹³ Thus, harm to reputation occurred when words threatened to remove an individual from the community, causing that person to be “shunned or avoided,” “to bring him into contempt among honorable persons,” to have the tendency “to put him without the pale of social intercourse,” or to “expose him to the public hatred, contempt, and ridicule.”⁹⁴

92. MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 185–90 (H.H. Gerth & C. Wright Mills eds. and trans., 1968) (discussing honor and social subordination).

93. Post, *supra* note 61, at 701 (footnote omitted). For discussions on the intersection of defamation and community standing, see generally ROBERT BELLAH ET AL., HABITS OF THE HEART 100–10 (1985) (examining the tensions in American culture between utilitarian individualism and community relatedness in the development of the self); HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT (1966) (examining group libel as a First Amendment concern in the context of civil rights actions); NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 178–234 (1986) (discussing historical trends in public law of libel in northern courts); Alfred H. Kelly, *Constitutional Liberty and the Law of Libel: A Historian's View*, 74 AM. HIST. REV. 429 (1968); Andrew J. King, *The Law of Slander in Early Antebellum America*, 35 AM. J. LEGAL HIST. 1 (1991) (discussing the origins of slander); David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 750–80 (1942) (drawing connections between group libel claims and group entity theories); David Riesman, *Democracy and Defamation: Fair Game and Fair Comment I*, 42 COLUM. L. REV. 1085 (1942) (surveying group libel techniques); David Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 COLUM. L. REV. 1282 (1942) (same); Donald Roper, *James Kent and the Emergence of New York's Libel Law*, 17 AM. J. LEGAL HIST. 223, 225 (1973) (discussing libel law as a constraint on nineteenth-century press freedoms); Joseph Tanenhaus, *Group Libel*, 35 CORNELL L.Q. 261 (1950) (examining and critiquing group defamation).

94. See *Morris v. Evans*, 95 S.E. 385, 386 (Ga. Ct. App. 1918) (“shunned or avoided”); *Mankins v. State*, 57 S.W. 950, 951 (Tex. Crim. App. 1900) (“contempt among honorable persons”); *Fitzpatrick v. Age-Herald Pub. Co.*, 63 So. 980, 982 (Ala. 1913) (“without the pale of social intercourse”); *Ottero v. Ewing*, 110 So. 648, 651 (La. 1926) (“public hatred, contempt, and ridicule”).

Arkansas libel law, under section 1856 of Kirby's Digest, read as follows:

It shall be deemed slander to falsely use, utter or publish words which, in their common acceptance, shall amount to charge any person with having been guilty of any other crime or misdemeanor not mentioned in this act, or to charge any person with having been guilty of any dishonest business or official conduct or transaction, the effect of which charge would be to injure the credit or business standing, or to bring into disrepute the good name or character of such person so slandered, and such words so spoken shall be actionable, and the person so falsely publishing, speaking or uttering the same shall be deemed

While this form of social severance certainly implicated reputation understood as honor or “personality” in Pound’s terminology, it just as certainly provided for an understanding of reputation as property. The courts recognized that society did not merely ascribe reputation, but that one’s “good name,” like goodwill, might be the result of personal exertion.⁹⁵ Viewing reputation as property presumed a set of marketplace linkages between people, in which good character might be understood as a form of capital resulting from the labors of self-creation.

Thus, by 1895, Albion Tourgee’s insistence that reputation was property seemed already familiar. As a burgeoning marketplace participated in the proliferation of property forms in corporations, goodwill, and labor injunctions, and as reliance on reputation increased with the relative anonymity accompanying urban growth, immigration, and geographic mobility, courts came to agree with Tourgee’s assessment that one’s reputation might provide the “golden door of opportunity” and must therefore be guarded as a valuable asset.⁹⁶ One prominent treatise writer at the time went so far as to argue that reputation is only property and not personality, reasoning that “pecuniary loss to the plaintiff is the gist of the action for slander or libel” and that where the law protects reputation “it does so indirectly, by means of a fiction—an assumption of pecuniary loss. . . . [T]he action . . . is always for the pecuniary injury, and not for the injury to the

guilty of slander, and punished accordingly.

Morris v. Evans, 160 S.W. 387, 388 (Ark. 1913); *see also* OKLA. STAT. ANN. tit. 12, § 1441 (West 1980).

Libel is a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation, or any malicious publication as aforesaid, designed to blacken or vilify the memory of one who is dead, and tending to scandalize his surviving relatives or friends.

Id.

95. *See Wolfe v. Ga. Ry. & Elec. Co.*, 58 S.E. 899, 901–02 (Ga. Ct. App. 1907) (overruling the defendant’s demurrer and allowing the plaintiff’s suit to proceed by finding that the railway conductor’s efforts to seat the plaintiff in the rear section of the railcar “impute[d] the odium of illegitimacy”); *Michaelson v. Turk*, 90 S.E. 395, 398–401 (W. Va. 1916) (discussing the connection between honor, reputation, and property in one’s good name in the context of common-law defamation and statutory slander).

96. Brief for the Plaintiff at 9, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (No. 210); *see also Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893) (rate case); *Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418 (1890) (rate case); WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 85–88 (1991) (tracing the development of the labor injunction as a property right protected by the Supreme Court from the late nineteenth through the early twentieth century); LIPPMANN, *supra* note 41, at 50–51 (discussing the fragmentation in the concept of property with the rise of the trust); SUSMAN, *supra* note 20, at 276–84 (discussing the shifting reliance on reputation).

reputation.”⁹⁷ The judicial treatment of reputation as property implied that just as property assumed many forms, so might reputation; the malleability of property suggested the plasticity and possibility of personality expressed through reputation. The legal equation of reputation and property during this period signaled the increasing commodification of personal identity while presenting the conditions, as Tourgee suggested, for protecting reputation that placed one’s standing in a social milieu infused with race, gender, and class distinctions.⁹⁸

VI. WHITENESS AS A REPUTATIONAL CLAIM

Northern courts more often recognized and required a pecuniary loss to legitimate damages for any harm to a person’s reputation.⁹⁹ Courts in southern states,¹⁰⁰ on the other hand, exhibited both a broader sense of which words might cause defamatory harm and a narrower sense of

97. TOWNSHEND, *supra* note 57, at 45–47 (discussing nineteenth-century defamation treatise); *see also* BOWER, *supra* note 90, at 275 (“For purposes of the civil law of defamation, reputation is regarded as a species of property.”). *See generally* Gilbert Thomas Stephenson, *Race Distinctions in American Law*, 43 AM. L. REV. 29 (1909) (discussing reputation and standing in relationship to racial identity).

98. For a discussion of the cultural resistance to the commodification of identity, *see* T.J. JACKSON LEARS, *NO PLACE OF GRACE: ANTIMODERNISM AND THE TRANSFORMATION OF AMERICAN CULTURE, 1880–1920*, at 14–45 (1981) (discussing the antimodernist effort to contain the dissipating effect of mass culture on modern subjectivity and the consequent rise of therapeutic culture); *see also* WILLIAM LEACH, *LAND OF DESIRE: MERCHANTS, POWER, AND THE RISE OF A NEW AMERICAN CULTURE* 3–30 (1993) (placing desire at the center of the development of modern subjectivity in tracing the transforming effects of mass culture); LIVINGSTON, *supra* note 16, at 220 (critiquing the antimodernist narrative of the fragmentation of modern subjectivity as a declensionist tale of tragedy, which ignores possibilities for democratic participation contained in the promise of a constructed self). The republican ideal of individual independence and moral personality located in the proprietary freehold acceded to new cultural constructions of identity consonant with an emerging economy predicated on wage labor. Jurists replicated and reinforced these changes when they located the moral personality of citizenship—the object of whiteness—in the body, thus facilitating the move from a proprietary to a wage economy.

99. BOWER, *supra* note 90, at 279 (discussing the judicial interest in the financial impact of defamation); TOWNSHEND, *supra* note 57, at 50 (discussing pecuniary loss as a criteria for defamation cases).

100. The appellate cases involving defamatory harm when a reputed white person claimed racial misrecognition arose in the following states: South Carolina, Mississippi, Georgia, Oklahoma, Texas, Alabama, Virginia, West Virginia, Tennessee, Kentucky, Arkansas, Kansas, Louisiana, and North Carolina. Of the defamation cases brought under the same charge in the North (in Illinois, Ohio, and New York) during this period, none succeeded. *See, e.g., Kenworthy v. Brown*, 92 N.Y.S. 34, 35 (Gen. Term 1904) (holding that words charging a woman with being a “half-negress” were not slanderous per se as imputing lack of chastity).

whose reputation received evidentiary weight. As former bonded Africans gained de jure political equivalency, southern judges and state legislatures fashioned new categories of per se defamatory harm,¹⁰¹ categories that generated and reinscribed whiteness as status and property while simultaneously excluding any legal claim of reputation for blacks.¹⁰² While southern courts, like their northern counterparts, located harm to reputation in loss to property, they also assessed injury to honor and dignity.¹⁰³ Indeed, southern courts wove the dual concern for personality and property together, forming a legal idiom in which reputation appeared as an honor that could be protected as a property interest in the self. In the southern legal cosmos, in short, the law of defamation protected white identity as property; thus, honor and property flexed the same legal muscle to define the meaning of white subjectivity.

In this regard the law was not merely consonant with southern culture; courts actually created the value in white honor and white subjectivity by etching racial boundaries around the right of reputation in whiteness.¹⁰⁴ By finding defamatory harm when a white person was

101. The location of moral personality as an object within the body, as whiteness, rather than externally, as a proprietary freehold, required the demise of the de jure status of slavery with its accompanying metaphorical equivalency of person with property.

102. See Stephenson, *supra* note 97, at 46–52 (discussing per se defamatory harm). Certainly, many cases of racial misrecognition did not involve judicial proceedings. Ray Stannard Baker recounts one such instance, occurring in Albany, Georgia in 1907 and reported in the Atlanta *Georgian*, as follows:

Peter Zeigler, a Negro, was last night escorted out of town by a crowd of white men. Zeigler had been here for a month and palmed himself off as a white man. He has been boarding with one of the best white families in the city and has been associating with some of Albany's best people. A visiting lady recognised him as being a Negro who formerly lived in her city, and her assertion was investigated and found to be correct. Last night he was carried to Forester's Station, a few miles north of here, and ordered to board an outgoing train.

Zeigler has a fair education and polished manners, and his colour was such that he could easily pass for a white man where he was not known.

BAKER, *supra* note 21, at 152 (recounting southern treatment of African Americans in the reconstruction and gilded age South). Zeigler went to extraordinary lengths to prove himself a white person before the community tribunal. As the Albany *Herald* later noted, Zeigler returned with “a party composed of relatives and influential friends from his native state of South Carolina” to demonstrate to the satisfaction of the town that he was, in reality, a white man. *Id.*

103. See *Cook v. Patterson Drug Co.*, 39 S.E.2d 304, 307 (Va. 1946) (recognizing a valid claim in slander where the petitioner sought compensation for the damage to his reputation as a white person that occurred when he was served a pepsi-cola in a paper cup reserved for African-American patrons rather than a coca-cola in a glass reserved for white patrons).

104. Certain legal writers, variously labeled “realists,” recognized the ability of the law to create value through the sheer act of boundary tending. See HOHFELD, *LEGAL ESSAYS*, *supra* note 35, at 14; Robert L. Hale, *Rate Making and the Revision of the*

mistaken for a black person, the southern courts simultaneously created a valuable property interest in white identity and embedded that interest within a racial hierarchy of honor.¹⁰⁵ As Bertram Wyatt-Brown reminds us, “[L]ocal opinion . . . was the dominant force in Southern public life, . . . [and] honor alone was absolute and indivisible.”¹⁰⁶ The *Plessy* Court’s directive, to heed “the general sentiment of the community” in determining honor and reputation, allowed southern courts to give legal form and substance to identity based on custom, prejudice, and desire; general sentiment provided the evidentiary weight for reputed whiteness to appear before the court as a property interest.¹⁰⁷ Through the logic of the legal syllogism, the judicial inscription of substance to white identity achieved its own justification; as courts upheld an ideology of race in the community, this ideology ossified into legal precedent that circumscribed and enhanced the meaning of white subjectivity.

The judicial construction of reputation as racially specific property continually stripped black subjectivity of its evidentiary weight, with southern courts refusing to recognize an injury to black reputation. For instance, B.C. Franklin, a black attorney practicing in Tulsa, Oklahoma as late as 1938, objected to a local newspaper story that portrayed him as using illiterate grammar and referring to his clients as “pore [sic] colored nigger boys.”¹⁰⁸ Citing the state libel statute in his suit against the newspaper’s publisher, Franklin contended that the story damaged his reputation in the black community, his sole base of clients, by ascribing to him the use of the word “nigger,” a term “detestable to the members

Property Concept, 22 COLUM. L. REV. 209, 214 (1922) [hereinafter Hale, *Rate Making*] (discussing the legal construction of value in rate cases and noting that “ownership is an indirect method whereby the government coerces some to yield an income to owners”); Robert L. Hale, *The Supreme Court’s Ambiguous Use of “Value” in Rate Cases*, 18 COLUM. L. REV. 208, 212 (1918) (discussing the judicial determination of property value). See generally JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 8, 11–46 (1924) (discussing the legal creation of exchange value).

105. See *Michaelson v. Turk*, 90 S.E. 395, 398–401 (W. Va. 1916) (discussing the connection between honor, reputation, and property in one’s good name in the context of common-law defamation and statutory slander).

106. BERTRAM WYATT-BROWN, SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH 364 (1982) (examining the foundational importance of locality to southern politics and culture). See generally EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH (1984) (discussing honor).

107. *Plessy v. Ferguson*, 163 U.S. 537, 549, 551 (1896); see also Dimock, *supra* note 11, at 33, 44 (discussing rights as a form of property in the context of *Plessy*’s contingent universe).

108. *Franklin v. World Publ’g Co.*, 83 P.2d 401, 402 (Okla. 1938).

of the Negro race”¹⁰⁹ and one that would surely hold “him up to scorn, hatred, ridicule and contempt” in his community.¹¹⁰ In spite of the obvious harm, the Oklahoma Supreme Court denied any injury to Franklin’s reputation, noting, “In order to be libelous, [the publication] must tend to lower him in the opinion of men whose standard of opinion the court can properly recognize or tend to induce them to entertain an ill opinion of him.”¹¹¹ In declaring the newspaper article legally benign, the court reasoned:

The word “nigger” . . . has been brought forward from the days of negro slavery and is today frequently used by both the white man and the negro in a friendly way without reflection or ill feeling[,] . . . and we are *unable to see* how the use of the word as generally used when referring to the negro, casts any insult or reflection whatsoever.¹¹²

Drawing upon the presumed opinions of the judicially imagined white community enabled the court to dissipate the specific effect of the language on Franklin’s reputation and to deny the legal weight of his reputation by inverting the elements of the law of libel.¹¹³ As one Virginia court acknowledged, contrary to *Franklin*, concerning the elements of a libel directed at a white man, “The gravamen of the action is the insult to the feelings of the offended party, not the intention of the party using the words. . . . ‘The publication of a libel . . . gives a right of recovery, irrespective of the intent of the defendant who published it’”¹¹⁴ The judges in *Franklin* disregarded this orthodox view, indicating their unwillingness to entertain the notion of an injury to a reputation they would not recognize, emanating from a community they did not consider. As such, they were truly “unable to see” reputation as either honor or property, not predicated on whiteness.¹¹⁵ The court, consequently, subsumed Franklin’s injury into the weightless legal category of black reputation, recalling, in paraphrase, Justice Brown’s

109. *Id.* at 403; *see also* OKLA. STAT. ANN. tit. 12, § 1441 (West 1980) (codifying state libel law).

110. *Franklin*, 83 P.2d at 403.

111. *Id.* at 404 (quoting *Phoenix Printing Co. v. Robertson*, 195 P. 487 (Okla. 1921)).

112. *Id.* at 403 (emphasis added). By point of comparison, the court observed that “[t]he Chinaman is frequently referred to as a ‘Chink.’ The northern man is often referred to as ‘Yankee’ and the southern man as ‘Rebel.’ The people of Oklahoma are referred to as ‘Sooners.’” *Id.* *Franklin*’s suit appears to be the only recorded appellate case between 1888 and 1957 brought by a black plaintiff claiming an injury to reputation arising from an explicit racial defamation. *Cf.* *Lee v. New Orleans Great N. R.R. Co.*, 51 So. 182, 183 (La. 1910) (discussing the term “Negro” or “nigger” as a term of reproach).

113. Just as the courts created value in whiteness through the very gesture of entertaining suits of race misrecognition, the reality of white community opinion received its form and substance through the very act of reliance made by the court in *Franklin*.

114. *Cook v. Patterson Drug Co.*, 39 S.E.2d 304, 307 (Va. 1946) (quoting *Holmes v. Jones*, 41 N.E. 409, 411 (N.Y. 1895)).

115. *Franklin*, 83 P.2d at 403.

dismissive comment in *Plessy* that separate coaches appear as badges of inferiority only because blacks had chosen that construction.¹¹⁶

Through a fashioning of defamation law that validated the “peculiar social conditions prevailing,”¹¹⁷ southern courts shaped and then guarded the sense of community and the value, honor, and meaning of white subjectivity. The majority rule in every southern state made it libelous per se to erroneously publish that a white person was black.¹¹⁸ As one Kentucky court commented in 1916, implicating northern states:

116. See Justice Brown’s observation in *Plessy*:

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

117. *Jones v. R.L. Polk & Co.*, 67 So. 577, 577 (Ala. 1915) (finding an actionable claim of libel where an asterisk next to the plaintiff’s name in the Selma City directory made the false representation that the plaintiff was a black city resident).

118. Stephenson, *supra* note 97, at 47–48 (discussing the southern courts’ disposition of defamation cases involving race). Stephenson notes that the first judicial effort to determine such race misrecognition actionable per se was the 1791 South Carolina case of *Eden v. Legare*, 1 S.C.L. (1 Bay) 171 (1791), where the court considered whether words identifying a white citizen as a black man disparaged the claimant in his trade, business, or profession and, moreover, subjected the claimant to civil disabilities. While the *Eden* court considered the verbal opprobrium actionable per se, later courts considering the question did not uniformly regard such an utterance as so inflammatory as to require strict liability. According to Stephenson, not until the period after the Civil War, and attendant upon the development of Jim Crow legislation, were the courts willing to enforce the per se rule without conflict. *Id.* at 48. Southern courts crafted per se libel standards in cases of race misrecognition not only as a means for underscoring the proprietary value of whiteness, but also to cleave linguistically what state action sought to separate physically under the guise of Jim Crow policies, both de jure and de facto. As one southern court observed in 1907, the distinction between the races

had its origin in the creation of the races, and is firmly established as a part of the social and domestic order and economy of the country, and the man or set of men of either race who attempts to ignore or obliterate these distinctions and differences undertakes an impossible task. This racial distinction, and the resulting classification, is recognized [sic] by Legislatures, authorized by courts, sanctioned by custom, and approved by an enlightened public opinion. It is not confined to any community, state or nation, but is found wherever the two races abound in sufficient numbers to make noticeable the impassable chasm that separates them. In the home, the school, the church, the public place—in truth, everywhere—it exists.

Chiles v. Chesapeake & Ohio Ry. Co., 101 S.W. 386, 388 (Ky. 1907) (finding no constitutional infirmity in allowing a common carrier to segregate passengers on the basis of race, so long as the accommodations were equal between the races).

Perhaps there are some parts of the United States in which a publication of this nature would not tend to disgrace or degrade the white man of whom it was published or render him odious and contemptible in the estimation of his friends and acquaintances. But in this state we are sure there could not be two opinions on this subject.¹¹⁹

Additionally, southern courts considered words spoken as slanderous per se if they transgressed the color line by calling into doubt a party's racial identity. In a 1913 case involving the accusation that Mrs. James Holt's "father was a thief, and her mother a Negro, and she was a half-breed,"¹²⁰ the Arkansas Supreme Court found little difficulty in concluding that defendant Bill Morris uttered per se slander, opining:

[I]t cannot be disputed that charging a white man with being a negro is calculated to bring into disrepute his good name or character. No one could make such a charge, knowing it to be false, without understanding that its effect would be injurious to the character of the person so slandered.¹²¹

The only exceptions to the judicial equivalency of libel and slander in cases of racial misrecognition were in the states of Kentucky and North Carolina, where the courts did not recognize a verbal charge as slander per se, but required allegation and proof of special damages to maintain an action.¹²²

119. *Axton Fisher Tobacco Co. v. Evening Post Co.*, 183 S.W. 269, 276 (Ky. 1916) (finding defamation of race misrecognition in a corporate context).

120. *Morris v. State*, 160 S.W. 387, 387 (Ark. 1913).

121. *Morris*, 160 S.W. at 388 (finding that per se slander was available for the defendant's comments but reversing and remanding for a new trial where the plaintiff's attorney failed to charge the exact language used, setting out only his conclusions regarding the meaning and effect of the words).

122. *Deese v. Collins*, 133 S.E. 92, 92 (N.C. 1926) (finding that an action for slander requires the plaintiff to allege and prove special damages). *Deese* relied upon the North Carolina Supreme Court's decision in *McDowell v. Bowles*, 53 N.C. (8 Jones) 184 (1860), determining that referring to someone as a "free negro" did not amount to slander per se, but required the claimant to proffer an assertion of special damages. The Kentucky Supreme Court did not find slander per se in the remark to a white man that he was "a damn negro, and his mother was a mulatto." *Williams v. Riddle*, 140 S.W. 661, 664 (Ky. 1911). George Riddle's remark had, according to Williams's plea, affected his association with "a young lady, who was of one of the best families of the neighborhood[. . .] permanently depriv[ing him] of the association, respect, and company of said young lady, and of all other young ladies of the best families in said neighborhood." *Id.* Relying on *McDowell*, the court narrowly rendered the special damages upon which Williams might recover, noting that the claimed injury "must be a loss of a pecuniary character, or the loss of some substantial or material advantage. . . . [E]vidence of the loss of consortium vicinorum, or evidence that plaintiff's relatives slighted and shunned him, is not sufficient to show special damages." *Id.* These courts may have been more willing to resist finding per se harm for comments uttered in the heat of an argument.

More importantly, courts proved less willing to find harm predicated on exaggerated insults that, through their very utterance, relied upon and reinforced race hierarchy than if the slander represented a challenge to the judicially maintained cultural fabric of race separation. See *Watkins v. Augusta Chronicle Publ'g Co.*, 174 S.E. 199, 200 (Ga. Ct. App. 1934) (finding evidence of libel inadequate because no special damages were pled

The southern judicial insistence on finding an injury per se, regardless of whether the error was spoken or written, extinguished the long-standing legal distinction between libel and slander, laying bare a judicial activism intent on maintaining the value of white reputation. An appellate court in Texas in 1912 went so far as to find a local newspaper libelous for reporting that an unidentified “negress” had been robbed while, two days later, naming the victim in an article that did not mention her race.¹²³ In confirming the lower court judgment of \$500 in damages, the appellate court asserted a broad reading of libel, finding that it was “sufficient if those who know the plaintiff can discern that she was the person meant.”¹²⁴

Not only did southern courts refashion the existing legal differences between libel and slander, but an equal number also regarded gesture and innuendo as per se injuries to white reputation.¹²⁵ For instance, in

and the plaintiff’s character was not called into question, where a local paper reported two days prior to an election that the plaintiff, a candidate for the office of sheriff, had received the endorsement of a “group of negroes representing 1,100 registered voters,” while also running an article in the next column on a “meeting to be held at the courthouse to build an invincible voting machine for the sustenance of white supremacy in this community”); *Berot v. Porte*, 81 So. 323, 323 (La. 1919) (discussing an instance in which a party may have a qualified privilege to make verbal accusations concerning racial identity where there is a social or moral duty, as in this case involving the defendant’s review of the plaintiff’s membership application to the Order of Druids); *MacIntyre v. Fruchter*, 148 N.Y.S. 786, 786–87 (Gen. Term 1914) (finding no slander per se where the objectionable comment, “You are only fit for niggers to associate with, and only worked with niggers in the South,” did not involve a claim of special damages showing an intent to injure the plaintiff in any trade).

123. *Express Publ’g Co. v. Orsborn*, 151 S.W. 574, 574–75 (Tex. Civ. App. 1912) (affirming the libel judgment for a plaintiff identified in a news article not by her name but as a “negress”).

124. *Id.* at 575. Courts considered racial misrecognition so egregious that, between 1888 and 1957, only two court decisions vacated a libel conviction without remanding the case for a new trial. In *Jones v. R.L. Polk & Co.*, 67 So. 577, 577 (Ala. 1915), the publisher of the city directory for Selma, Alabama mistakenly placed an asterisk next to the name of one Mary Jones, consequently identifying her as a black resident of the city. While pointing to the fact that the publisher had quickly amended the directory in reasoning its dismissal, the Alabama Supreme Court found it significant that Jones had failed to join the printing company, the party presumably responsible for the error, in the suit. *See also Little Rock Ry. & Elec. Co. v. Putsche*, 104 S.W. 554 (Ark. 1907) (reversing the trial court’s award of damages for mental anguish to Ida Putsche in her suit against a street car company whose conductor referred to her as a “negress” and demanded that she sit in the back of the car, an entreaty which she ignored without further incident).

125. A finding of per se defamatory harm in gesture and innuendo was the exception to the rule that required claimants to establish special damages through a showing of pecuniary injury. *See NEWELL, supra* note 12, at 54 (describing the treatment of legal

1910 the Supreme Court of Louisiana found the conductor of a Shreveport streetcar liable in defamation for gesturing the elderly and deaf Mrs. Emma May toward the back of the car.¹²⁶ Awarding Mrs. May \$250, the court reasoned:

The question, "Don't you belong over there?" when the person asking it points to seats in a car set apart for negroes and designated by a sign, is sufficient to wound the feelings of the white person to whom it is addressed, and, for that wound, the defendant is bound to render an account.¹²⁷

In another instance, a Texas court in 1941 found mere innuendo sufficient for a defamation claim in which an elevator operator requested that May O'Connor leave the lift and use an elevator at the rear of the Dallas cotton exchange.¹²⁸ At the time of the incident, the plaintiff claimed she was "ignorant of the fact" that the elevator existed only for use by black passengers and freight.¹²⁹ Nevertheless, in reversing the lower court's decision to deny O'Connor's claim, Justice Looney agreed that the innuendo did "designate and classify her as a Negro, . . . shaming and disgracing her before . . . white persons . . . and causing her to be branded and considered as a negro by the negroes in the elevator she was directed to use."¹³⁰ The legal weight afforded such innuendo testifies to the uncertainty and volatility of the color line.¹³¹ That, in the

criteria involving unspoken defamation).

126. *May v. Shreveport Traction Co.*, 53 So. 671, 675 (La. 1910) (finding a railway company liable for race misrecognition in accommodating passengers).

127. *Id.*

128. *O'Connor v. Dallas Cotton Exch.*, 153 S.W.2d 266, 267-68 (Tex. Civ. App. 1941) (reversing and remanding the trial court's dismissal of the plaintiff's claim of race misrecognition concerning an elevator ride).

129. *Id.* at 267.

130. *Id.* Interestingly, in this case the court treated the opinions of black patrons riding the freight elevator with Mrs. O'Connor as possessing significant legal weight. Rather than signifying a shift in evidentiary standards, this recognition reflected and reinforced a condition in which courts refused to recognize any property interest in the reputation of black identity, a condition enunciated by the Oklahoma Supreme Court in *Franklin v. World Publishing Co.*, 83 P.2d 401 (Okla. 1938). *O'Connor's* accommodation indicated that the courts might recognize the materiality of a black witness's opinion only when that testimony reinforced the absence of a property interest in black reputation, as here, by enunciating the embarrassment and shame that May O'Connor experienced at being misrecognized. In these instances, the courts provided legal voice and weight to the testimony of black witnesses only for self-indictment. See also *Bagwell v. Rice & Hutchins Atlanta Co.*, 143 S.E. 125, 126 (Ga. Ct. App. 1928) (finding that the statute of limitations barred the petitioner's claim for "slandering [her] good name" when she was instructed by a salesperson to "get over with the negroes where you belong" while waiting to try on shoes in the defendant's shoe store).

131. Indeed, the volatility of whiteness imparted such legal weight to everyday conversation that it extended its reach even to racial comments made by a child's playmate. See *Mopsikov v. Cook*, 95 S.E. 426, 427 (Va. 1918) (extinguishing the trial court's award of \$2000 and remanding for a new trial to show that the nine-year-old daughter's comment to Jacob Mopsikov's daughter that she was a "nigger doll"

eyes of the court, racial identity might be so established in one elevator ride as to “brand” the passenger indicates the indelible protocol of a system of formal and informal Jim Crow rules in which color mattered less than context and reputation determined racial subjectivity.¹³²

Holding a person accountable not only for a published error, but equally for utterance, innuendo, and gesture that impugned another’s white reputation enabled the courts to mark the boundaries of race and subjectivity.¹³³ The southern judiciary actively reinscribed, in the terms of the *Plessy* Court, the “general sentiment of the [white] community”—its practice of racial hierarchy and domination—when they narrated in legal opinions their reasoning for presuming harm in a case of racial misrecognition.¹³⁴ Within these opinions that re-created racial distinctions by valorizing white reputation lay legal homilies to the natural detachment of the judiciary from interference with the *social* status of the races.¹³⁵ The courts covered their own constructed tracks

originated with the child’s father, defendant Benjamin Cook).

132. As the question of whether falsely charging “a white person with being a negro” amounted to slander came before the court as a case of first impression, *O’Connor* relied upon *Spotorno v. Fourichon*, 4 So. 71 (La. 1888), for the cultural and legal proposition that “in view of the social habits, customs, traditions and prejudices prevalent in this state, in regard to the status of whites and blacks, we think such a charge would be slanderous.” *O’Connor*, 153 S.W.2d at 268. The quandary for the court lay in establishing a legal claim from pure innuendo. As the court observed:

[I]t was not alleged that, the operator of the elevator called plaintiff’s wife a negro, or classified her as such; the allegation being that the operator simply directed plaintiff’s wife to leave the elevator first entered and use another at the rear of the building, the reason for the change was not stated, nor did plaintiff’s wife, at the time, know the reason, which was made to appear by an innuendo, explanatory of the conduct of the operator, but not explanatory of the language used, which was unambiguous and without any implication that plaintiff’s wife was a negro.

Id. at 268. The court resolved its uncertainty by concluding that *O’Connor* was an invitee to whom the Dallas Cotton Exchange owed a “high degree of care,” and the elevator conductor’s innuendo had breached that duty. *Id.*

133. See TOWNSHEND, *supra* note 57, at § 338, at 572.

Where language is ambiguous and is as susceptible of a harmless as of an injurious meaning, it is the function of an innuendo to point out *the meaning* which the plaintiff claims to be the true meaning, and the meaning upon which he relies to sustain his action. This applies whether the ambiguity be patent or latent, and whether or not there are any facts alleged as inducement.

Id. (internal reference and footnotes omitted); see also NEWELL, *supra* note 12, at 754 (addressing the legal criteria for defamation).

134. See Dimock, *supra* note 11, at 43 (proposing that the Court’s opinion in *Plessy* deployed the evidentiary weight of subjective community feelings in such a way as to enable later courts to valorize the sentiments of white subjectivity).

135. See Kennedy, *supra* note 8, at 3–13 (arguing that the prevailing legal

through the contention they were merely observing the social landscape. As one Georgia court observed in handing down a slander decision in 1907, “Under our benign institutions ‘every man is the architect of his own fortune.’ Every citizen, white and black, may gain, in every field of endeavor, the recognition his associates may award. . . . But the courts can take notice of the architecture without intermeddling with the building of the structure.”¹³⁶ The courts refused to recognize that, in taking judicial “notice of the architecture,” they were conserving as well as entitling the structure. Indeed, merely acknowledging a per se right of recovery imputed intrinsic value to whiteness predicated on difference.¹³⁷ By invoking custom, sentiment, habit, tradition, and prejudice as judicial rationale for finding harm, valorizing white honor, and emptying the legal content of black identity, courts strove to create and affirm stark racial distinctions in reputation and subjectivity.

Courts viewed these defamatory charges of race misrecognition as serious harms, for they implied transgression of racial boundaries, jeopardizing the constructed differences in subjectivity and race that generated the very meaning of white reputation. As one Louisiana court remarked in 1888, “under the social habits, custom, and prejudices prevailing . . . it cannot be disputed that charging a white man with being a negro is calculated to inflict injury and damage. We are concerned with these social conditions *simply as facts*. They exist and, for that reason, we deal with them.”¹³⁸ The male claimant in this early case of

orthodoxy during this period emphasized a rational ordering of the law that separated the public from the private and consigned the regulation of society to an elected rather than an appointed governmental body).

136. *Wolfe v. Ga. Ry. & Elec. Co.*, 58 S.E. 899, 901 (Ga. Ct. App. 1907) (finding a right of recovery in slander for the petitioner and his sister when the city rail car conductor placed them in the rear of the car). Consonant with the cultural and political inclination of the period, interference in the judicially conceived separate spheres of social and economic endeavor exceeded constitutional mandate and judicial competence. For Judge Russell, the author of the *Wolfe* opinion, courts could do no more than take judicial notice of the “habits of the people” in observing the social and political inequality between the white and black citizens of the state. *Id.* Russell naturalized this inequality, placing it prior to the formation of the republican form of government and therefore beyond the legitimate grasp of the judiciary, observing:

It is a matter of common knowledge that, viewed from a social standpoint, the negro race is in mind and morals inferior to the Caucasian. The record of each from the dawn of historic time denies equality. . . . The distinction and inequality is recognized in Holy Writ. . . . We take judicial notice of an intrinsic difference between the two races. . . . Notice of this difference does not imply legal discrimination against either, and for that reason cannot, in any sense, impugn or oppose the fourteenth and fifteenth amendments to the Constitution of the United States or the Constitution of our own state.

Id.

137. *Id.* at 902; see Hale, *Rate Making*, *supra* note 104, at 213 (examining the creation of value through judicial decisionmaking).

138. *Spotorno v. Fourichon*, 4 So. 71, 72 (La. 1888) (emphasis added) (upholding a

racial slander could claim an injury to honor and property because the court instilled value in his reputation as a white man through legal recognition.¹³⁹ The prevailing judicial ideology enabled courts to rely on the “general sentiment of the community” as a “fact” that they might place in evidence for the proposition that racial misrecognition resulted in a harm from which a claimant might recover.¹⁴⁰ Yet reputational value in whiteness arose through legal approbation. The judicial act of imagining both “community” and “sentiment” validated and ossified as legal fiat the mutable cultural impulses that yearned for racial separation and hierarchy.¹⁴¹

By reading social habits as facts, courts cloaked their acts of creation as merely another exercise in taking judicial notice.¹⁴² Nevertheless, courts engaged in a myriad of discursive maneuvers to locate the value of whiteness as property externally and prior to the advent of their own legal rulings. Namely, courts located differences in racial identity

finding of per se slander for the false assertion that the plaintiff was black and confirming the judgment for \$500 in damages); *see also* Flood v. News & Courier Co., 50 S.E. 637, 639 (S.C. 1905). The court found libel per se in identifying a white man as a black man in print, observing that

it must be apparent that to impute the condition of the negro to a white man would affect his (the white man’s) social status, and, in case any one publish a white man to be a negro, it would not only be galling to his pride, but would tend to interfere seriously with the social relation of the white man with his fellow white men; and, to protect the white man from such a publication, it is necessary to bring such a charge to an issue quickly.

Id.

139. *Spotorno*, 4 So. at 71.

140. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

141. *See* LAWRENCE GOODWYN, *DEMOCRATIC PROMISE: THE POPULIST MOMENT IN AMERICA* xii-xiv (1976) (discussing the ideology of the coherent self as foundational to populism); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 3–12 (3d rev. ed. 1974) (tracing the malleable social and political culture of the reconstruction South prior to the rise of Jim Crow policies that quickened segregationist impulses). Indeed, as Peggy Pascoe observes, prior to the hardening of state miscegenation laws, judges elected to uphold these particular marriages in the 1870s. Pascoe, *supra* note 55, at 220; *see also* Lee v. New Orleans Great N. R.R. Co., 51 So. 182, 184 (La. 1910) (concluding that, while the parties were married legally in 1889, prior to the passage of state miscegenation laws, their children did not belong to the “white race”). *See generally* Burns v. State, 48 Ala. 195 (1872); Hart v. Hoss, 26 La. Ann. 90 (1874); *Ex parte Brown*, 5 CENT. L.J. 149 (Tex. 1877) (describing the unreported U.S. District Court of Texas case of *Ex parte Brown*); State v. Webb, 4 CENT. L.J. 588 (1877) (describing the unreported District Court of the First Judicial District of Texas case of *State v. Webb*); Honey v. Clark, 37 Tex. 686 (1873).

142. *Wolfe v. Ga. Ry. & Elec. Co.*, 58 S.E. 899, 901 (Ga. Ct. App. 1907); *Spotorno*, 4 So. at 71.

inherent in nature, divine pattern, Holy Writ, and social and cultural practice.¹⁴³ By recognizing and reinscribing—indeed, in the most profound sense, by *naming*—the sentiment and location of the white community as social fact with evidentiary weight, courts substantiated miscegenation laws, Jim Crow coaches, school segregation, and racially restrictive covenants in mortgages, not to mention everyday patterns of enforced segregation and deference.¹⁴⁴ In turning to these decisions for precedent of the value of a white reputation, courts also fashioned the legal parameters that valorized community sentiment and substantiated a legal discourse that defined subjectivity at the law as predicated on racial reputation.

The courts reserved their most pointed responses for defamatory remarks of racial misrecognition that also transgressed gender boundaries. Southern community sentiment invested the figure of the white woman with a purity and piety resonating with Victorian era values.¹⁴⁵ Southern judges framed this sentiment when they delivered fiery opinions and large fines to hapless defendants who had erroneously paired white women and black men. In one such instance, the Axton Fisher Tobacco Company brought a libel suit against the *Louisville Evening Post* for a story it ran on the company in 1913, in which the newspaper mentioned that “a negro foreman was placed as boss over white girls.”¹⁴⁶ The court turned to a litany of cases involving segregation

143. *Wolfe*, 58 S.E. at 901; *Spotorno*, 4 So. at 72.

144. With regard to racially restrictive covenants as a valuable property right creating an easement in favor of the owner of one parcel of land with the restricted district which cannot be taken under the power of eminent domain without just compensation, see generally *Sipes v. McGhee*, 25 N.W.2d 638 (Mich. 1947), *rev'd sub nom. Shelley v. Kraemer*, 334 U.S. 1 (1948) (accepting the plaintiff's observations as to the defendant's racial makeup despite testimony on the difficulty of assigning racial identity and finding a property interest in racially restrictive easements); *Porter v. Johnson*, 115 S.W.2d 529 (Mo. Ct. App. 1938) (treating a racially restrictive covenant as a property right enforceable against black homeowners in a residential subdivision).

145. WILLIAMSON, *supra* note 21, at 196 (discussing the anxiety among southern white men over the perceived vulnerability of white women to black men); see also Thomas Nelson Page, *The Lynching of Negroes—Its Cause and Its Prevention*, 178 N. AM. REV. 33, 39 (1904) (discussing the cause of lynching in the American South as an effort by white men “to put an end to the ravishing of their women”).

146. *Axton Fisher Tobacco Co. v. Evening Post Co.*, 183 S.W. 268, 276 (Ky. 1916). In several editions of the *Louisville Evening Post*, the paper discussed the working conditions at the Axton factory, manufacturers of smoking and twist tobacco under the labels “Old Hill Side” and “Booster Twist.” In the October 4, 1913 edition of the paper, the story read in part:

In [Axton's] factory he puts negro foremen over white men. It is another example of his double dealing with laboring men. He don't dare deny it.

A negro named Brown was foreman on the third and fourth floors of Axton's factory and that he had many white men under him. This is the same Wm. H. Brown, colored, whose name appears in the city directory, page 230, as foreman of the Axton Tobacco Factory.

in common carriers, schools, and residences as evidence of the race “difference[s] recognized by all” based on inheritance, tradition, training, education, and custom.”¹⁴⁷ However, in finding the Post article libelous per se,¹⁴⁸ the court emphasized that the “sentiment reflected” in race legislation and supporting judicial opinion “does not find the ends or the perfection of its purpose in mere race separation alone[.] . . . [but] in the general feeling everywhere prevailing that the negro . . . is not and cannot be a fit associate for white girls.”¹⁴⁹ In this instance, race misrecognition of an individual was not the issue, but rather the imputation of racial and sexual commingling, with its implication of

Id. at 271. In the October 18, 1913 edition of the paper, the story read:

Negro foreman was placed as boss over white girls in Axton factory. The negro foreman Will Brown was then placed in charge of machines where the girls were employed and as a boss over them. The girls then quit work and refused to work under a negro foreman. They reported the whole trouble to Local Union No. 16. . . .

. . . .
Mr. Hardy and the Grievance Committee investigated and found that the charges of the girls against Mr. Axton’s factory were true and so reported back to the union. Axton would not remedy the matter, and upon Mr. Hardy’s recommendation the union, after a number of fruitless conferences with Mr. Axton, withdrew the use of the union label from the Axton factory and placed him and his factory upon the unfair list. This action was ratified by the International Union of Tobacco Workers.

Id. at 272 (alterations provided by court omitted). While the newspaper story concerned transgressing racial and class hierarchies, the court and the union took special care to act on the issue when they paired a black man with white women, threatening quickened cultural norms that feared black men in authority as a threat to the purity of white women and as a challenge to the virility of white men. For a contemporary account, see Page, *supra* note 145, at 45, wherein Page discusses the need to end lynching while also noting that social equality to “the young negro . . . signifies but one thing: the opportunity to enjoy, equally with white men, the privilege of cohabiting with white women. This the whites of the South understand . . .” *Id.*

147. *Axton Fisher Tobacco Co.*, 183 S.W. at 276.

148. The Kentucky Supreme Court contended that, as a business entity, Axton could argue libel per se, “as a corporation, like an individual, may have a good reputation and enjoy the good will of its customers and the public, and this good reputation and good will are as valuable to it as good will would be to an individual or partnership.” *Id.* at 274. Indeed, the court rendered broadly the scope of harm for which a corporation might seek compensation. The lower court found that Axton had not suffered harm from the publication because the printed remarks did not constitute a libel per se of its products, business methods, or creditworthiness. On appeal, the Kentucky Supreme Court found that a publication which commented only upon a corporation’s cultural practices might inflict harm “if the publication reasonably and naturally has the effect of bringing the business of the corporation into public contempt, and of making it odious in the estimation of those with whom it has business dealings or connections.” *Id.* at 275.

149. *Id.* at 276–77.

taint, of thwarting segregation, and with its innuendo of sexual desire leading to a blurring of the color line.¹⁵⁰

One of the principles in *Plessy*, highlighted in Tourgee's brief, established that the seemingly manifest criteria for separate facilities—distinctions based upon color—proved difficult to discern.¹⁵¹ Indeed, as one Kentucky judge admitted, when Louella Thurman brought a suit for slander against the local railway for being told by the conductor to sit in a Jim Crow car: "What race a person belongs to cannot always be determined infallibly from appearances . . ." ¹⁵² Likewise, in a slander suit originating in Danville, Virginia, a soda fountain clerk at the local drug store served Harvey Cook a pepsi-cola in a paper cup rather than the requested coca-cola in a glass.¹⁵³ When Cook objected, he was told, "We don't serve negroes coca-colas, and we don't let them drink out of glasses."¹⁵⁴ According to the court, "Cook reached up and pulled his hair, and asked if it looked like a negro's hair. The [clerk] said 'Yes. I have seen whiter negroes than you are,' and picked up a milk bottle, and asked Cook what he was going to do about it."¹⁵⁵

Consonant with this uncertainty over the racial interpretation of appearance, putatively white plaintiffs had to present evidence of their own white lineage. For instance, George Spencer brought one such case

150. In *Muller v. Oregon*, 208 U.S. 412, 421–22 (1908), the U.S. Supreme Court found that women should have to work no more than ten hours in any one day because standing for too long would impair the "influence of vigorous health upon the future well-being of the race," noting that the "the performance of maternal functions is . . . an object of public interest and care in order to preserve the strength and vigor of the race." That white women remained pure and healthy for the good of the race and the nation was not an issue reserved for the southern states alone, as it was a central theme of the judiciary concerned with progressive labor legislation, and through such concern the courts consequently aligned the interests of race, nation, and masculinity. For information regarding innuendo, see NEWELL, *supra* note 12, at 754.

151. See *Plessy v. Ferguson*, 163 U.S. 537, 548–52 (1896); Brief for the Plaintiff at 8–14, *Plessy* (No. 210).

152. *S. Ry. Co. v. Thurman*, 90 S.W. 240, 241 (Ky. 1906). The conductor's insistence that Thurman leave the ladies' coach and sit in the colored coach precipitated this suit for libel. At trial, Thurman recovered a judgment for \$4000, which, in a rare instance, the appellate court reversed and remanded for a new trial in light of its conclusion that the jury had not been instructed that if a carrier exercises ordinary care and is not "insulting" to the passenger, it is not liable for damages. *Id.* Thurman could still recover on the evidence that the brakeman had insulted her when he remarked that he recognized her as "a whore off of Dewees street," bearing witness to the cultural slippage between an accusation of racial transgression and an accounting of criminal activity. *Id.* at 240.

153. *Cook v. Patterson Drug Co.*, 39 S.E.2d 304, 306 (Va. 1946).

154. *Id.*

155. *Id.* Compare *Weaver v. State*, 116 So. 893, 895 (Ala. Ct. App. 1928) (approving as sufficient for purposes of racial identification testimony that the defendant's grandfather had "kinky hair," noting, "This is one of the determining characteristics of the negro"), with *BAKER*, *supra* note 21, at 152 (narrating the expulsion of a man from a Georgia town because of the community's impression that he was black).

against his Virginia neighbor, George Looney, in 1914 after Looney had spread the word that the Spencer family sought to pass as members of the white race.¹⁵⁶ In the fallout from Looney's accusation, the local school board expelled the oldest son, Melvin Spencer, from the white grade school.¹⁵⁷ In the course of his defamation suit, Spencer traced his family history, provided a "number of reputable citizens" as witnesses acquainted with his father and grandfather to testify to their "standing and reputation as white men,"¹⁵⁸ and supplied photographs of his grandfather and aunt for the purpose of showing they were white.¹⁵⁹ Of

156. *Spencer v. Looney*, 82 S.E. 745, 746 (Va. 1914). Of the Spencer family, Looney commented that "[t]hey are nothing but God damned negroes, and I can prove that they are God damned negroes." *Id.* (alterations provided by court omitted). This suit involved both slander and libel, as Looney pursued affidavits purportedly from people in Kentucky to support his accusations and to force the white public school to bar George Spencer's son from attending. Interestingly, and in light of this discussion concerning the volatility of racial subjectivity, the court makes special mention of the peculiar history between these two men:

[P]laintiff in error and his father having in recent years worked for defendant in error and stayed at his home, where they were treated as white people, eating at his table and sleeping in his beds. About two years prior to the trouble out of which this suit arises Jack Spencer, a brother of plaintiff in error, was accused of killing one Henderson Looney, a brother of defendant in error, and after that time, as it appears, the latter began to raise objections to plaintiff in error's boy, Melvin, attending the white public free schools of Buchanan county

Id. Indicative of the combustibility of the assignment of racial subjectivity, it appears, as in *Looney*, that accusations regarding passing might serve as a ready tool for exacting revenge. See also *Stultz v. Cousins*, 242 F. 794, 797 (6th Cir. 1917) (finding that deliberate race misrecognition was used for labor advantage in employment); *Watkins v. Augusta Chronicle Publ'g Co.*, 174 S.E. 199, 200–01 (Ga. Ct. App. 1934) (finding no deliberate effort to sabotage the plaintiff's candidacy and no cause for libel because no special damages were pled and the plaintiff's character was not called into question, where the local paper reported two days prior to the election that the plaintiff, a candidate for the office of sheriff, had received the endorsement of a "group of negroes representing 1,100 registered voters" while also running an article in the next column on a "meeting to be held at the courthouse to build an invincible voting machine for the sustenance of white supremacy in this community"); *Jones v. Gill*, 66 P.2d 1033, 1035 (Kan. 1937) (finding hearsay evidence inadequate to establish slander in the plaintiff's claim that her stepmother-in-law had started rumors that the plaintiff's adopted daughter had "Negro blood"); *Berot v. Porte*, 81 So. 323, 324 (La. 1919) (finding that the defendant had not attempted to scuttle the plaintiff's membership in the Order of Druids by commenting that "there was a streak in the family, and that a full investigation should be made" regarding the plaintiff's racial identity).

157. *Spencer*, 82 S.E. at 746.

158. *Id.* at 748.

159. *Id.* at 749. The trial court would not permit the photographs to be shown to the jury, as the court was of the opinion that "they were taken from other photographs." *Id.*

the witnesses, the court noted: “[W]ith one exception all agree that the Spencers were regarded as white people, and that the senior Spencer and his family attended the white schools and churches.”¹⁶⁰ For his defense Looney brought in “experts” to testify to some quantum of “Negro blood” due to the family’s facial features.¹⁶¹ Finding merit in Spencer’s claim, the appellate court vacated the lower court’s determination that Looney’s accusations were not libelous because true and remanded the case for a new trial.¹⁶²

The concern courts displayed over the invisibility of race—that there might be someone in the community not quite white¹⁶³—lessened if, in the course of the trial, they sensed that the party accusing another of racial transgression harbored malice or sought ill-gain. In 1913, for instance, the members of a firemen’s brotherhood in Erwin, Tennessee wrote to the master mechanic that one of the brotherhood’s chosen, Isaac Cousins, was not a “full-blooded white.”¹⁶⁴ This complaint resulted in Cousins’s dismissal from the brotherhood, with the remaining members, those leveling the charge, moving up to fill his position.¹⁶⁵ Cousins subsequently brought a libel suit against the thirty-six members of the brotherhood based on the offending letter sent on behalf of the brotherhood to the master mechanic of the railway.¹⁶⁶ Sensing avarice on the part of the defendants, the trial court allowed, and the appellate court upheld, the submission into evidence by Cousins of a “crayon portrait of [his] great-uncle and his white wife, made before the controversy arose and testified to by [Cousins], who knew him, to be a true picture of the uncle.”¹⁶⁷ In affirming the jury award of \$3400, the appellate court reasoned, “That it was a crayon representation, and not a photograph, went only to its weight, not to its admissibility, as tending to

160. *Id.*

161. *Id.* at 748. The appellate court found Looney’s witnesses less than credible, noting that they revealed no special competence in determining whether George Spencer’s son Melvin’s “lips, nose [and] yellow skin” indicated more than one-sixteenth “negro blood.” *Id.* at 750.

162. *Id.*

163. *See Jones v. Gill*, 66 P.2d 1033, 1034–35 (Kan. 1937) (reversing the damage award for the plaintiff and remanding for a new trial a suit involving a mother’s claim that rumors of the racial composition of her adopted daughter—that she had “Negro blood” which forced the plaintiff to move her family to several different neighborhoods to escape the accusations—were started by the plaintiff’s stepmother-in-law); *Berot v. Porte*, 81 So. 323, 323 (La. 1919) (affirming a party’s qualified privilege to make accusations concerning racial identity where there is a social or moral duty, as in this case involving the defendant’s confidential review of the plaintiff’s membership application to the Order of Druids).

164. *Stultz v. Cousins*, 242 F. 794, 796 (6th Cir. 1917).

165. *Id.*

166. *Id.*

167. *Id.* at 797.

show that the great-uncle was a white man.”¹⁶⁸ Race confirmation turned on a constellation of ingredients and, while it does not appear from the record of the appellate court whether Cousins presented witnesses ready to vouch for his character as a white man, the jury’s acceptance of a crayon portrait as evidence of the plaintiff’s whiteness in assessing injury without a showing of special damages attests to a judicial willingness to expand the elements of proof available for countering the action of a seemingly avaricious defendant.

Where Homer Plessy’s problematic slippage between white color and black race raised concerns over the means by which to ascertain distinctions seemingly invisible to the senses, courts in defamation hearings addressed this disquiet by translating the language of “character” into the legal grammar of race.¹⁶⁹ Because skin color alone might prove insufficient verification of a plaintiff’s whiteness, courts looked to character as a way of reading race.¹⁷⁰ Whiteness as a property claim that might be damaged by libel rested on the individual’s comportment with, and in, the community. As such, whiteness was a legal claim proffered to validate a social condition, marked by family, friends, neighbors, and acquaintances, the church and school attended, place of residence, how time was passed, and, most certainly, with whom. As the Supreme Court of South Carolina noted, reputation was a social and not a political claim and, while “[t]he colored race, in our courts of justice, stand on the same plane as the white race. . . . Our social conditions, however, are very different. . . . These relations and associations the law does not undertake to make or regulate for us.”¹⁷¹ Thus, presumably courts drew meaning to inform and shape the legal standards of race relations from the seemingly prelegal sphere of the community, by reference to the genuinely authentic indication of blood quantum. In actuality, the representative rhetoric of the court in *Flood*

168. *Id.*

169. By imputing relational rather than biological reasons in determining race, courts proved themselves consonant with the contemporaneous efforts by American pragmatists to establish identity and consciousness as both thought and thing, mind and body, action and entity. Judicial attempts to consider both association and blood quantum as referents for racial identity suggest a nascent effort to bridge the “Cartesian divide” between action and entity. Of course, this represented a nascent promise unfulfilled, as courts frequently regarded even the slightest evidence of a claimant’s association with members of the black community as indicating biology alone.

170. See SUSMAN, *supra* note 20, at 276–80 (discussing character and personality in the culture of the early twentieth century).

171. *Flood v. News & Courier Co.*, 50 S.E. 637, 639 (S.C. 1905).

served to cloak the discursive mechanisms by which the law suffused those very relations with meaning. The judicial rhetoric of “social conditions” unsullied by legal restraint belied the very form and substance that comprised social relations of domination in the South: law, custom, and violence regulated the membership of these communities. By validating whether or not the members “belonged”—and thus, whether a statement was false—courts increasingly relied on character, comportment, and, above all, association.¹⁷² For instance, in deciding a defamation suit involving separate accommodations on a streetcar, the Louisiana Supreme Court found that a conductor would not run afoul of the law in directing a person to the Jim Crow section if the person looked black or “consorted” with blacks.¹⁷³ In that case the conductor pointed Mrs. Emma May to the back of the car because “he had seen, or thought he had seen, [her], on a previous occasion, riding in the negro end of the car.”¹⁷⁴ One Louisiana clergyman’s “marked moral character, great prestige[,] . . . austere probity[,] . . . [and] well-known lineage” enabled him to secure damages against the local *Times-Democrat* newspaper in 1901 for mistakenly referring to him in print as a “negro,” which, according to the court, “was enough to arouse the most profound indignation of the most patient man.”¹⁷⁵ In another

172. Of course, a few courts would not maintain damage awards for reputational injury without some evidence of physical harm. See *Little Rock Ry. & Elec. Co. v. Putsche*, 104 S.W. 554, 554 (Ark. 1907) (reversing the trial court’s award of damages for mental anguish to Ida Putsche in her suit against a street car company whose conductor referred to her as a “negress” and demanded that she sit in the back of the car, an entreaty which she ignored without further incident). The *Putsche* opinion relied upon the clear legal demarcation between damages for mental and physical injury enunciated in *St. Louis, I.M. & S. Railway Co. v. Taylor*, 104 S.W. 551 (Ark. 1907), where the court concluded:

We prefer to adhere to the rule, as a sound one, that mental suffering alone, unaccompanied with physical injury or any other element of recoverable damages, cannot be made the subject of an independent action for damages, even where the act or violation of duty complained of was willfully committed; and that such suffering does not of itself constitute a cause of action, but is merely “an aggravation of damages when it naturally ensues from the act complained of.”

Id. at 553. The court’s unwillingness in the instant case to find reputational harm where the conductor failed to effectively remove from Ida Putsche her sense of entitlement and belonging to her presumed racial community further suggests that the cases in which courts awarded damages reflected the judicial conviction that claimants had lost control over the ownership of their racial identity—that the sense of belonging was fragile and volatile.

173. *May v. Shreveport Traction Co.*, 53 So. 671, 673 (La. 1910).

174. *Id.*

175. *Upton v. Times-Democrat Publ’g Co.*, 28 So. 970, 971, 972 (La. 1900) (finding libel per se in a newspaper story published on the temperance activities of Revered Thomas J. Upton, in which the telegraphically dispatched story containing the phrase “cultured gentleman” was printed as “colored gentleman”).

instance, the Supreme Court of Mississippi confirmed an award of \$5000 to a white woman, mistakenly referred to in the local paper as a “Negro,” after the court noted that the plaintiff was “a young married woman” with two small boys and a “woman of good repute in her home county.”¹⁷⁶

Similarly, the reputed whiteness of Nathan Wolfe and his sister came under scrutiny when a streetcar conductor placed them in the rear of the car reserved for black passengers.¹⁷⁷ When Wolfe pressed the conductor for an explanation, the following colloquy took place:

The conductor replied: “Because white people seat from the front, and negroes from the rear, of the car.”

Petitioner asked: “What has that to do with me?” And the conductor responded: “Haven’t I seen you in colored company?”

Petitioner’s sister then addressed the conductor as follows: “Do we look like colored people?”¹⁷⁸

The court found the conductor’s intimation that the plaintiff “was a white man degraded . . . by having associated with negroes,” as tantamount to defamation of character.¹⁷⁹ As courts translated the seeming ontology of race into the epistemology of character and association, race identification seemed tenuous and white reputation proved increasingly volatile.¹⁸⁰

Consequently, most defamation opinions betrayed a yearning for a visible difference with which to fix race. The indelbleness of such a mark usually emerged in proportion to the degree of judicial insistence in mapping an unbridgeable social chasm between black and white communities. For instance, in 1907, one Georgia judge relied with confidence on the palpability of “race purity” to sustain racial boundaries when “difference[s] in color” failed to ensure separation:

176. *Natchez Times Publ’g Co. v. Dunigan*, 72 So. 2d 681, 683, 685 (Miss. 1954) (finding libel per se in a newspaper’s account of an automobile collision in which the plaintiff was driving and was described as a “Negro woman traveling in the company of two Negro men” and further upholding the damage recovery).

177. *Wolfe v. Ga. Ry. & Elec. Co.*, 58 S.E. 899, 899 (Ga. Ct. App. 1907).

178. *Id.*

179. *Id.* at 903.

180. Indeed, in his efforts to substantiate the *Wolfe* decision, Judge Russell tried to return to the ontology of race by engaging in a lengthy disquisition on the “intrinsic difference” between the races, avoiding any acknowledgment that the case before him was predicated on the very absence of such ontological certainty, resting instead on the cultural subjectivity of race by association. *Id.* at 901–02.

The amalgamation of the races is not only unnatural, but it is also productive of deplorable results. Our daily observation shows us that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength to the full blood of either race.¹⁸¹

Courts sought a language by which to mimetically translate presumed ontological differences of race—differences that emerged as social, political, and cultural inequality—onto a visual palette from which judges might then draw in locating racial identity without resorting to relational evidence that would undermine the very ontology they sought to unveil and reinforce. To this end, judges relied on skin color, characteristics of hair, facial features, and, as did Judge Russell in *Wolfe*, the health and virility of the person in question.¹⁸²

For Judge Russell, as for others, to “call a white man a negro” did not simply damage the white citizen’s reputation and property in the self, it raised the stigma of sexual transgression.¹⁸³ These courts viewed racial misrecognition as “imput[ing] the odium of illegitimacy”¹⁸⁴ implicating the person as neither black nor white but suggesting the result of an illicit union that transgressed the very racial boundaries the courts sought to maintain. In reality, courts assumed this posture, entertaining defamation actions for racial misrecognition precisely because “daily observation” could not suffice in maintaining segregation.¹⁸⁵ Each decision upholding the value of white reputation tacitly admitted the existence of uncertainty, interpretation, and cultural confusion.¹⁸⁶ Furthermore, each case was as much an implicit acknowledgment of the possibility of racial transgression as it was a reassertion and re-creation of racial difference in reputation, subjectivity, and property in the self.

Southern courts, however, did not always recognize a white person’s claim of injury to reputation, and the circumstances surrounding these few denials provide a measure of the threshold below which courts imagined a reputation for whiteness exhibited little legal merit. In one such case the plaintiff, Joseph Collins, sought to recover damages to his reputation when the Oklahoma State Sanitarium placed his daughter, committed for reason of insanity, in a ward “set apart for negro patients, and entered upon its record opposite her name the word ‘colored,’ and thereby held her out to the world as a woman having negro blood.”¹⁸⁷

181. *Id.* at 902–03 (quoting *Scott v. State*, 39 Ga. 321, 323 (1869)) (alterations in original).

182. *Id.* at 903.

183. *Id.* at 901.

184. *Id.* at 902.

185. *Id.* at 902–03.

186. See Pascoe, *supra* note 55, at 220.

187. *Collins v. Okla. State Hosp.*, 184 P. 946, 946 (Okla. 1916).

The Oklahoma Supreme Court denied Collins's claim by relying on a narrow reading of libel and refusing to consider the hospital records as a publication.¹⁸⁸ In another Oklahoma libel case, the wife of a convicted rum-runner sought action against the local paper in 1928 for referring to her husband as a "negro" in a story about his release from prison.¹⁸⁹ The court strictly construed the state libel statute to conclude that, as the article failed to mention the wife by name, it did not reflect on her and she had sustained no injury to her reputation.¹⁹⁰ In a similar case decided by the Georgia Court of Appeals in 1934, the parents of Thomas Farmer sued the *Atlanta Journal* for defamation when the paper reported the death of their son as the "death of a negro convict."¹⁹¹ Farmer had died from sunstroke while engaged in a prison labor project on a local public road.¹⁹² The court again construed libel narrowly to find that, because the newspaper had mentioned the names of neither parent, the publication did not intend, and readers could not reasonably presume, that Thomas Farmer was "in any way related to the plaintiffs."¹⁹³

Southern courts treated defamatory injury claimed from racial misrecognition quite capaciously and, as one commentator observed, "So far as written defamation is concerned, the right to reputation, like the right to personal security, may be said to be an absolute right, to be respected at peril."¹⁹⁴ In this light, the truncated manner in which judges dismissed libel cases brought by, or about, committed or incarcerated persons suggests that the legal construction of reputation in whiteness had several pressure points from within an imagined white community. Thus, whites who had fallen from social grace might no longer claim the evidentiary weight necessary to claim legal protection for the reputation in their racial identity.¹⁹⁵ Regardless of "blood quantum," these claimants

188. Compare *id.* at 947–49, with *Stultz v. Cousins*, 242 F. 794, 798 (6th Cir. 1917) (discussing internal union records regarding the plaintiff's racial identity as publications for the purpose of libel).

189. *Hargrove v. Okla. Press Publ'g Co.*, 265 P. 635, 635–36 (Okla. 1928).

190. Compare *id.* at 637, with *Express Publ'g Co. v. Orsborn*, 151 S.W. 574, 574–75 (Tex. Civ. App. 1912) (affirming the libel judgment for the plaintiff, who was identified in a news article not by her name but as a "negress").

191. *Atlanta Journal Co. v. Farmer*, 172 S.E. 647, 648 (Ga. Ct. App. 1934).

192. *Id.*

193. *Id.*

194. *Veeder II*, *supra* note 56, at 34 (implying the justification of physical violence in defense of personal reputation).

195. Compare this treatment with the court's similar conclusions concerning black attorney Benjamin Franklin's petition for libel. See *supra* notes 108–15 and accompanying text.

failed to possess a reputation for whiteness the courts would recognize; they had, in this sense, lost their membership in the white community and with it the all-important right to claim property, dignity, or honor in the self.

VII. FAMILY PROPERTY: WHITENESS IN MARRIAGE

Miscegenation statutes passed by state legislatures of the Jim Crow South between 1870 and 1890 regulated the status of the marriage contract by defining racial identity and prohibiting interracial unions, annulling marriages, and subjecting the parties to possible criminal prosecution.¹⁹⁶ One of the central legal effects of annulling the marriage contract was to remove any burden of alimony and dower and to extinguish any devises of property in probate.¹⁹⁷ As Chief Justice Brown of the Georgia Supreme Court opined in 1869:

I do not hesitate to say that it was dictated by wise statesmanship, and has a broad and solid foundation in enlightened policy, sustained by sound reason and common sense. The amalgamation of the races is not only unnatural, but it is always productive of deplorable results. . . . [S]uch connections never elevate the inferior race to the position of the superior, but they bring down the superior to that of the inferior. They are productive of evil, and evil only, without any corresponding good.¹⁹⁸

196. See, for example, Missouri's antimiscegenation legislation, MO. REV. STAT. § 4727 (1909), which determined that, within the confines of this statute, a black person was any person having one-eighth part or more of "negro blood." North Carolina prohibited the marriage between a white person and any "person of mixed blood to the third generation." *State v. Melton*, 44 N.C. (Busb.) 49, 51 (1852) (finding no infraction where the person evinced an admixture of Indian blood); see also *Linton v. State*, 7 So. 261, 262 (Ala. 1890) (holding that, because "mulatto" is subsumed in the definition of "Negro," the defendant violated Alabama's antimiscegenation law by cohabiting with a mulatto man).

197. Legal challenges to the validity of a marriage often surfaced in probate court, where petitioners sought to constrain the devising of estates to surviving spouses and heirs. See *Locklayer v. Locklayer*, 35 So. 1008, 1009 (Ala. 1904) (determining that the deceased's spouse, who was considered a white woman, could not receive her husband's personal property, as he was regarded as a black man and the marriage was void as a matter of law under state statute); *Ferrall v. Ferrall*, 69 S.E. 60, 62 (N.C. 1910) (reversing a decision to void a marriage as a violation of the miscegenation statute, observing that the husband's efforts at avoidance were predicated on a desire to not pay alimony and dower); *Hopkins v. Bowers*, 16 S.E. 1, 1-2 (N.C. 1892) (holding that the children of a deceased father could not inherit land challenged by father's sister because they issued from his marriage to a reputedly black woman based on evidence that she "associated with colored people"). Additionally, Ray Stannard Baker recounts the 1907 case of Mrs. Elsie Massey of Tipton County, Tennessee, who was accused of being "a Negro, the daughter of a cotton planter named 'Ed' Barrow, and a quadroon slave." BAKER, *supra* note 21, at 152-53. Only after a jury declared her "of pure Caucasian blood" might she and her children inherit \$250,000 in property. *Id.* at 153; see also Pascoe, *supra* note 55, at 220-21 (discussing civil miscegenation cases in the postbellum period as frequently depriving widows in interracial marriages of any testamentary rights predicated on the view that any interracial relationship involved criminally illicit sexual ties).

198. *State v. Tutty*, 41 F. 753, 756-57 (C.C.S.D. Ga. 1890) (quoting *Scott v. State*,

The cultural concern over “amalgamation” provided the backdrop for judicial efforts to tend the boundaries of racial property lines to ensure the value of whiteness and determine the sources of racial meaning.¹⁹⁹

In 1911, Louis Marre, a white man of Italian ancestry born in St. Louis, Missouri, sought to annul his three-year marriage to Agnes Nash Marre.²⁰⁰ The trial court rendered a favorable decision for Louis based, in large part, on his assertion and the testimony of fellow witnesses that Agnes had enough “negro blood,” to render their marriage void under the Missouri antimiscegenation statute.²⁰¹ The *Marre* case provides a glimpse into the legal importance of community impressions of racial identity and marriage—impressions arrived at through force of habit and the skin color of acquaintances of the most remote sort.²⁰² The testimony of two witnesses convinced the trial court that Agnes Marre was black, thus leading to the dissolution of the marriage.²⁰³ One witness, a clerk in a store where Agnes was employed indicated that Agnes had worked in a department that was “in the habit of employing colored girls.”²⁰⁴ While the witness also admitted that the store had no rules to this effect, the mere possibility of interracial hiring and working conditions disposed the trial court to annul the marriage as a violation of the state miscegenation statute.²⁰⁵ The second witness, a grocer who had business dealings with Agnes, testified that she had once asked him to move a trunk from her house to the home of a black family.²⁰⁶ Further

39 Ga. 321, 323 (1869) (unindicated alterations in original).

199. By attending to the concern for amalgamation, the courts not only were trying to protect whiteness, but also were retaining the meaning of whiteness within the terms of the old property regime, for amalgamation would rearrange the constellation of individuals whose relations determined the meaning of any given property right. In the discourse of the new property regime, amalgamation led to a redefinition of whiteness because the jural relations imparting meaning and value to that term or object would be realigned.

200. *Marre v. Marre*, 168 S.W. 636, 637, 639 (Mo. Ct. App. 1914). The appellate court also considered and rejected the petitioner’s claim that the marriage was void on grounds of duress. Louis Marre provided testimony that his wife’s brother had threatened to kill him if he did not marry her, averring that on the day of the wedding he was locked in the pregnant defendant’s bedroom by her mother until he agreed, in particular, to be wed by a Roman Catholic priest. *Id.* at 637–38.

201. *Id.* at 639–40; *see also* MO. REV. STAT. § 4727 (1909).

202. *Marre*, 168 S.W. at 639–40.

203. *Id.*

204. *Id.* at 639.

205. *Id.*

206. *Id.* at 640. Interestingly, such conclusions were couched in terms of Agnes’s family’s economic condition, the court noting that the family rented a building on the

testimony indicated that members of Louis's family had "seen negroes go to the house of defendant's mother; had seen a sister, on one occasion, walking on the street with a Negro woman, and that they considered defendant's family negroes."²⁰⁷

Overturning the trial court's decision, the Missouri Court of Appeals found "not a particle of tangible evidence" proving that Agnes Marre had more than the allowable one-eighth of "negro blood" coursing through her veins.²⁰⁸ In reaching its conclusion the court rendered visible the law's position that blood signified race by relying on the narrative of genealogy and dismissing as scurrilous gossip the witness testimony so convincing to the trial court.²⁰⁹ Filling out the family tree, the court noted the testimony of Agnes's mother, who located the family roots in Kentucky and Mexico.²¹⁰ Agnes's mother adopted a discourse of the body in testifying that "there was no negro blood in the family, in the veins of herself, her husband or her children."²¹¹ Judge Reynolds focused on the family's genealogical attributes, noting that Agnes's sisters had all married white men and that "their associates are with white people."²¹²

Complicating the defendant's case was the opprobrium of "shame" accompanying Louis's racial assertions. Indeed, the family was so anxious to avoid publicity regarding the charges that the court had to *compel* Agnes's own sisters to come forward on her behalf with proof that they had indeed married white men.²¹³ The court's necessity to compel evidence of family marriage indicated not only the degree of infamy involved in proffering the question of racial identity but also the crucial ways in which that identity proved tenuous. Mere rumor might undo the opportunity to participate in the privileges of whiteness. For while the *Marre* court exhibited a rhetorical gesture toward the necessity of genealogical evidence to prove blood lineage in line with statutory constraints, it rendered its opinion based on evidence of association.²¹⁴

back lot of the plaintiff's property while also discussing Agnes's brother's progression through a series of mental institutions.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*; see also *Wilson v. State*, 101 So. 417, 421 (Ala. Ct. App. 1924) (finding no need to "trace the antecedents of a defendant in order to establish the race of an accused," while also permitting a witness to testify "if he knows such to be the fact, . . . that a person is a negro, or is a white person, or that he is a man, or that she is a woman . . . [because] in this jurisdiction certainly every person possessed of any degree of intelligence knows a negro").

211. *Marre*, 168 S.W. at 640.

212. *Id.*

213. *Id.*

214. *Id.*

Indeed, while the court insisted “color is in itself no proof of blood,”²¹⁵ associational evidence might prove conclusive. Thus, consonant with the metonymic characteristic of the relied-upon object of whiteness—blood quantum—the courts established title to racial identity not as a certain and visible possession, but as invisible until rendered by law.²¹⁶ The law’s cultural work consisted of providing the discursive conduit for rendering the invisible blood a visible signifier of a legal right, while simultaneously anchoring the invisible in the legitimacy of property discourse.

Some miscegenation decisions sought to use state statutes delineating blood ratios in fixing the meaning of race as a way of avoiding any reliance on the “common parlance of the people” to determine racial identity.²¹⁷ In the 1910 case of *Ferrall v. Ferrall*, the North Carolina Supreme Court confronted the state miscegenation law adopted in 1883 and transferred into the North Carolina State Constitution: “That all marriages between a white person and a . . . person of negro descent to the third generation inclusive are hereby forever prohibited.”²¹⁸ In writing the opinion for the court, Justice Hoke determined that, under the specificity of the statute, it was not enough that the ancestor in question be regarded as a black person in the eyes of the community, but that “the ancestor of the third generation whose blood should determine the issue must have been of pure negro blood.”²¹⁹ While this merely moved the inquiry of racial identity to another generation, it effectively silenced the plaintiff in this case, who averred that the community regarded his wife’s great-grandfather as possessing a “strain of negro blood” while failing to prove that the ancestor had no “white blood in him.”²²⁰ Indeed, the plaintiff sought to press an interpretation of the state statute that relied not on blood quantum, but on the ancestor’s “status as a negro ascertained and fixed by the recognition and general consensus of the community where his lot is cast.”²²¹ The court rejected the plaintiff’s

215. *Id.*

216. *See* Saks, *supra* note 26, at 40–47 (discussing the signifier of blood quantum in the context of miscegenation jurisprudence).

217. The notion of the “common parlance of the people,” was interchangeable with the *Plessy* Court’s search for the “general sentiment of the community.” *Compare* *Ferrall v. Ferrall*, 69 S.E. 60, 61 (N.C. 1910), with *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

218. *Ferrall*, 69 S.E. at 62 (discussing article 14, section 8 of the state constitution).

219. *Id.* at 61.

220. *Id.* at 60–61.

221. *Id.* at 61–62.

efforts to “[set] up a varying and uncertain standard” while avoiding any mention of the parallel standard discussed in *Plessy*.²²²

The *Ferrall* decision provides a view of the efforts to enunciate “blood purity” separate from the “general consensus of the community” as a judicial standard in determining the propriety of racial identity.²²³ By requiring blood purity in the ancestor of the third generation to ascertain the claimant’s racial identity, the *Ferrall* court insisted on a proprietary reading of race as possession of title.²²⁴ Yet this reading simultaneously enlarged the scope of those persons able to claim whiteness, rendering the definition even more ambiguous. The court reversed the usual order of proof in race misrecognition cases by framing the determination of whiteness under the state’s miscegenation statute in terms of a “strain” of blood. Thus, unless a plaintiff could demonstrate that a defendant’s ancestor, three generations prior, contained no trace of “white blood,” a petitioner could not prove that the defendant was not necessarily white.²²⁵ The court’s requirement of blood purity to register the *absence* of whiteness contrasted with decisions in other states by reversing the type of blood quantum required. Where courts in other states found that whiteness could not obtain in petitioners with one drop of “black” blood, the *Ferrall* court concluded that *any* strain of “white” blood in the petitioner’s ancestor, three generations removed, created the *possibility* of whiteness.

In legal discourse, blood lineage served as title to the property of racial identity. Yet, in a metonymic double gesture, blood itself required representation. As such, blood quantum as the object of whiteness that enabled the legal expression of title to property in racial identity required associational evidence to register legal credibility. Consequently, the proof required to demonstrate a legally cognizable violation of state miscegenation laws replicated the tensions, evident in *Plessy*, between an object putatively inhering in the body and the relational posture of an individual’s subjectivity. As courts sought to fix racial identity through the insistent rhetoric of a titular conception of property, reliance on that rhetoric proved difficult in both theory and practice. The evidentiary demands for demonstrating racial identity—self-professed statements, genealogy, witness testimony, community associations—all resonated within an associational discourse to signal possession.

222. *Id.* at 62; *see Plessy*, 163 U.S. at 549.

223. *Ferrall*, 69 S.E. at 61–62.

224. *Id.* at 63.

225. *See id.*

VIII. THE WHITENESS OF CHILDREN: MANDAMUS
AND SCHOOL SEGREGATION

While states in the American South sought to regulate marriage through a statutory delineation of racial identity comprised of percentages, they required an absolute prohibition of racial intermixing in schools.²²⁶ For instance, North Carolina's miscegenation statute prohibited the marriage of blacks to whites only if the amount of "Negro blood" was greater than one-eighth, or within the third generation, but the state regulation of public schools sought a sweeping separation of the races.²²⁷ The legislature provided

that all white children shall be taught in the public schools provided for the white race and all colored shall be taught in schools provided for the colored race, but no child with negro blood in its veins, however remote the strain, shall attend a school for the white race.²²⁸

The Supreme Court of North Carolina addressed the incompatibility between the state's provisions on school segregation²²⁹ and miscegenation²³⁰ in *Johnson v. Board of Education*.²³¹ Writing for the court, Judge Walker determined that, while the state's miscegenation provision validated the

marriage between plaintiff and the mother of his children, it does only that much, and legitimates the offspring of the union, but by no subtle alchemy known to the laboratory of logic can it be claimed to have extracted the negro element from the blood in the veins of such offspring and made it pure.²³²

226. In the name of protecting the racial integrity of the children, one court endorsed removing a woman's children from a former marriage when she later wed a man with "negro blood in his veins." *Moon v. Children's Home Soc'y*, 72 S.E. 707, 708 (Va. 1911). In *Moon*, the Virginia Circuit Court of Albemarle County gave custody of Lucy Moon's children to the Children's Home Society of Virginia because their mother had married a person with colored blood, who was only recognized as a colored man, and that the associations of these children, who were of pure blood and gentle ancestors would be with persons of mixed blood, and that they would be deterred from association with gentle people of white blood.

Id.

227. *Ferrall*, 69 S.E. at 61.

228. *Id.* at 62 (quoting N.C. PUB. L. ch. 435, § 22 (1903)); see *Hare v. Bd. of Educ.*, 18 S.E. 55, 55-56 (N.C. 1893) (upholding a jury verdict denying admission to a white-only school to the plaintiff's children, who could not prove that they themselves were four generations removed from a "full-blooded Negro").

229. See N.C. CONST. of 1876, art. IX, § 2 ("[T]he children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of or to the prejudice of either race.").

230. *Id.* at art. XIV, § 8.

231. 82 S.E. 832 (N.C. 1914).

232. *Id.* at 833.

Judge Walker's attention to blood purity underscores the prevalent fears of race amalgamation in the American South and further confirms Gilbert Stephenson's 1908 observation that "[m]iscegenation has never been allowed to be a bridge upon which one might cross from the Negro race to the Caucasian, though it has been allowed as a thoroughfare from the Caucasian to the Negro."²³³ Yet, Judge Walker's extended concern with the social *arena* of blood purity reflected more than an acquiescence to legislative line drawing, it indicated the anxieties over education and children in the possible contamination and dissolution of title to whiteness.²³⁴

Confronted by school board decisions to expel their children from white-only schools due to concerns over racial identity, parents utilized a writ of mandamus to proffer a reputational claim for their children's whiteness and quash the actions of school trustees. Regarded as extraordinary, a writ of mandamus was a legal form by which a court might compel an administrative body, in this case a school board and its officers, to perform a mandatory duty to ensure the petitioner's exercise of a clear legal right. Petitioners sought these writs from the courts both as a way of compelling the white-only schools to allow their children's attendance and to validate the family's whiteness. Most courts viewed the application for mandamus as an opportunity to review the evidence concerning a child's racial identity, compelling reinstatement where the school board's decision failed to pass legal muster.

As parents confronted school board removal decisions by arguing that their children were white, southern state courts sought to define race in the vernacular. Thus, in the parlance of the court, the word "white" meant any "member of the white or Caucasian race, and the word 'colored' mean[t], not only negroes, but persons who [were] of the mixed blood."²³⁵ After addressing the meaning of the term "colored children" with a brief reference to Webster's dictionary, one Kentucky court determined that "[a] person who has any perceptible admixture of African blood is generally called a colored person. In affixing the epithet 'colored,' we do not ordinarily stop to estimate the precise shade."²³⁶ Adopting the vernacular or "common understanding" of the terms, particularly the notion that the term "colored" embraced "any

233. Stephenson, *supra* note 97, at 43.

234. See *Axton Fisher Tobacco Co. v. Evening Post Co.*, 183 S.W. 269, 276 (Ky. 1916) (discussing the ease of distinguishing between black and white persons on the basis of education); *BAKER*, *supra* note 21, at 152 (discussing the "fair education and polished manners" of a man the community thought to be passing for white).

235. *Moreau v. Grandich*, 75 So. 434, 435 (Miss. 1917).

236. *Mullins v. Belcher*, 134 S.W. 1151, 1151 (Ky. 1911) (quoting *Enos Van Camp v. Bd. of Educ.*, 9 Ohio St. 406, 407, 412 (1859)).

appreciable mixture of negro blood,” enabled courts to avoid the meaning of race deployed in state marriage statutes and constitutional amendments.²³⁷

The judicial interest in guaranteeing the unassailability of whiteness goes some distance toward explaining the legislative inconsistencies between miscegenation statutes and school segregation. For instance, the Mississippi Supreme Court’s observation in 1917 dismissing the state miscegenation statute as “not necessarily mak[ing] children having less than one-eighth negro blood members of the white race” placed the value of whiteness in the public and social services provided for the white community—especially education.²³⁸ The court’s enforcement of the narrow one-drop rule reflected an anxiety that education might serve as a conduit through which families might alienate the property of whiteness and arrogate to themselves a seemingly uncertain racial identity.²³⁹

Indeed, as one court acknowledged in reaching a decision in a school mandamus case, admission to the “privileges” of whiteness “will very much depend on character and conduct; and 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.”²⁴⁰ The requirement of absolute blood purity in mandamus cases thus “confined to the inferior caste” those children whose racial identity the community questioned.²⁴¹ Withholding equivalent educational opportunity lessened the possibility that these children might eventually garner the “character and conduct” necessary to be acknowledged as white.²⁴² In this sense, the condition of absolute blood purity in regulating school segregation amounted to a tacit acknowledgment that, regardless of blood quantum, an individual

237. *See id.* (noting that Webster’s definition of “colored people” is consonant with “the common understanding” of the term); *Lee v. New Orleans Great N. R.R. Co.*, 51 So. 182, 183 (La. 1910) (discussing the shifting meaning of the term “colored” as initially applied to any resident of the state not considered black or white, but which, in the postbellum period, was applied by the courts to mean only black persons); *see also* GA. CODE ANN. § 1708 (1873) (stating simply that “[t]he marriage relation between white persons and persons of African descent is forever prohibited, and such marriages shall be null and void”). As the court observed in *State v. Tutty*, 41 F. 753, 756 (C.C.S.D. Ga. 1890), the legislature adopted this policy “with the purpose to preserve, as far as the laws may accomplish that result, the purity and distinctness of the races inhabiting the state.”

238. *Moreau*, 75 So. at 435.

239. *Id.*

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

241. *Id.*

242. *Id.*; *see* BAKER, *supra* note 21, at 151.

might acquire whiteness through comportment, that whiteness existed not as a thing but as an action, not as an object but as a behavior, not inherent in the self but generated through the community.

Sylvia Gilliland knew well the racial meaning of even the most perfunctory action in the community when, in 1905, she brought a mandamus action against the board of education of Buncombe County and the school committee of Avery's Creek Township of North Carolina to force the school to reinstate her children in the county's white public schools.²⁴³ In removing the Gilliland children from the school, the board testified to their belief that the great-grandfather, Jeffrey Graham, a man of "Portuguese descent," possessed a "mixture of negro blood."²⁴⁴ At trial, the Gillilands provided pivotal testimony from William Whitesides, a neighbor of Jeffrey Graham in the early 1860s, to the effect that Graham had voted, or that at least "[t]here was nothing said against his voting."²⁴⁵ On appeal, the North Carolina Supreme Court found little merit in the school board's objection to this testimony, weighing it as evidence of Graham's "pure white blood."²⁴⁶ The court found "the fact that the ancestor was permitted to vote openly and without any objection is most pertinent" in determining racial heritage.²⁴⁷ The court emphasized that evidence of racial identity need not encompass merely the oral expression of a community, as "questions of race ancestry, general or common reputation" should also be afforded legal weight.²⁴⁸ By "general or common reputation" the court meant to embrace the unspoken understanding of a locale, "the manner in which a man is received and treated by his neighbors and the community generally."²⁴⁹

Of course, determining the boundaries of a "general or common reputation" often proved illusive and volatile. One claimant, J.R. Medlin, discovered this when he sought a writ of mandamus against the Wake County school board of North Carolina for removing his children from

243. Gilliland v. Bd. of Educ., 54 S.E. 413, 414 (N.C. 1906).

244. *Id.* at 414, 415.

245. *Id.* at 414.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* Other jurisdictions regarded opinion evidence of race as admissible. As the Supreme Court of Oklahoma observed at length in 1912:

It is manifest that one who has known a friend for many years should be permitted to say that he is a white man or a negro man without stopping to say that his hair is straight or curly; that his face is white or black; that his eyes are blue or black; that he knew his father and mother, and that their characteristics were those of the white or black race; that he knew his brothers and sisters; and that their characteristics are those of the black or white race. While to a certain extent it is the expression of an opinion, it is also the statement of a fact.

Cole v. Dist. Bd. of Sch. Dist. Number 29, 123 P. 426, 427 (Okla. 1912).

the white-only school.²⁵⁰ Through the jury trial and appellate proceedings, the school board insisted that, because the community generally regarded the children's maternal grandmother, Nan Powers, to be "of mixed blood," they could not attend the white-only school.²⁵¹ Reviewing the trial record, however, the state supreme court noted the conflicting community narratives regarding the Medlin's racial identity.²⁵² One witness, Elma Maynard, testified to the general reputation that Nan Powers was of "mixed blood."²⁵³ Yet this same witness remarked, "It is generally reputed that two or three men started the rumor that Medlin's children were mixed blooded."²⁵⁴ Relying on this evidence, a divided court found the Medlin children had "purely white blood" because "there was a widely spread report which was not believed because it was of *general repute* that it was a trumped-up charge."²⁵⁵ However, whether one narrative trumped another did little to diminish the evidentiary weight of the community's "common" voice, as the judicial inquiry remained wedded to the legal discourse of "general reputation" in determining whiteness.

Southern states constitutionalized school segregation by race, weaving it into, as one state supreme court insisted, the "organic law" of the people.²⁵⁶ The Oklahoma State Constitution declared the existence of only two races in the state, "persons of African descent" and whites, assigning all nonblack persons to the white race.²⁵⁷ South Carolina's constitution declared, "Separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race."²⁵⁸

250. Medlin v. County Bd. of Educ., 83 S.E. 483, 483–84 (N.C. 1914).

251. *Id.* at 484.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 484 (emphasis added).

256. Ferrall v. Ferrall, 69 S.E. 60, 62 (N.C. 1910); see Johnson v. Bd. of Educ., 82 S.E. 832, 833 (N.C. 1914) (applying the separate schools provision of the North Carolina Constitution). Article IX, section 2 of the North Carolina Constitution of 1905 reads in pertinent part: "[T]he children of the white race and the children of the colored race shall be taught in separate public schools . . ." N.C. CONST. of 1876, art. IX, § 2.

257. OKLA. CONST. of 1907, art. XXIII, § 11; see also Cole v. Dist. Bd. of Sch. Dist. Number 29, 123 P. 426, 426–27 (Okla. 1912) (affirming the constitutional declaration that the state had only two races, black and nonblack, in the state and finding error in the trial court's exclusion of testimony that the plaintiff's children attended white-only schools in Kentucky).

258. S.C. CONST. of 1868, art. III, § 33.

Southern state constitutions even provided de jure, if not de facto, equal financing.²⁵⁹ The Kentucky State Constitution, for instance, determined that “[i]n distributing the school fund no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained.”²⁶⁰

Yet, while the state constitutions determined the legal ground for separate facilities based on race, the courts and school boards engaged as tribunals for delimiting and declaring whiteness when questions of racial identity arose concerning attendance. State courts afforded local school board trustees wide latitude in dismissing students from white-only schools on the basis of racial “impurity.”²⁶¹ Moreover, state school segregation statutes allowed the exclusion of children without formal investigations or proceeding, with one court noting, “It is immaterial how the board obtained its information if they possessed knowledge or information which warranted their action as reasonable men.”²⁶² In removing students discerned as not “clear-blooded” in the eyes of the community, trustees exercised their legislatively granted authority to act in the “best interest of the school.”²⁶³

Under the auspices of this legislative authority, the trustees of the Dalcho public schools in South Carolina removed the children of John Kirby because they had “always heard that he was not clear-blooded.”²⁶⁴ The trial court heard sworn testimony from thirteen members of the community averring that, as far as they knew, John Kirby was not white.

259. N.C. CONST. art. IX, § 2 (noting that through taxation the state will provide a uniform system of public schools, separated by race); *Johnson*, 82 S.E. at 833 (reversing a grant of writ of mandamus to the plaintiffs, whose children sought entrance to white public schools, noting the state constitution’s direction that “[t]he children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor or to the prejudice of either race”).

260. KY. CONST. of 1890, § 187.

261. *Eubank v. Boughton*, 36 S.E. 529, 530 (Va. 1900).

262. *State ex rel. Black v. Bd. of Dirs. of Sch. Dist. Number 16*, 242 S.W. 545, 546 (Ark. 1922); *see also* ARK. CODE ANN. §§ 8915, 8916 (Michie 1921) (providing for the segregation of black and white children in separate schools and remaining silent on the issue of whether the directors of a school are required to have a formal investigation or proceeding in determining racial identity for the purposes of exclusion).

263. *See* S.C. CIV. CODE § 1761 (1912) (stating that trustees had the power “[t]o suspend or dismiss pupils when the best interest of the schools make it necessary”); *see also* *Tucker v. Blease*, 81 S.E. 668, 670, 675 (S.C. 1914) (following the maxim “[t]he greatest good to the largest number” in concluding that, due to the community parents’ opposition to allowing their children’s attendance at school alongside the plaintiff’s children, “it would seem to be far better that the children in question should be segregated than that the large majority of the children attending that school should be denied educational advantages”); *Johnson*, 82 S.E. at 833 (excluding the plaintiff’s children from the white-only school because, while the father possessed a “pure strain of blood,” the mother did not).

264. *Tucker*, 81 S.E. at 669.

These witnesses further insisted that returning his children to the school would result in “a wholesale resigning of the trustees and a tearing up of the school.”²⁶⁵ One witness, the son of the author of a history of Marion County, produced a family tree into evidence and observed, “the per cent. of the colored blood in the Kirby children is one thirty-second.”²⁶⁶ In reviewing this testimony, the South Carolina Supreme Court declared that under blood mixture criteria both the state statute and constitution considered the Kirby children white.²⁶⁷ Indeed, prior to this suit, the community had also regarded John Kirby as white, for in his lifetime Kirby attended white schools, belonged to the white First Baptist Church at Dillon, voted and conducted business with white men, and married a white woman.²⁶⁸ At his death, Kirby was buried in the white cemetery of the First Baptist Church.²⁶⁹

Yet, in yearning to ensure the unquestioned racial purity of the school and guard against diminishing the future value of whiteness, the animus of community sentiment reframed and conditioned the indices of blood and association relied upon by the court. By arguing for the removal of the Kirby children “in the best interest of the school,” the trustees arrogated to themselves the authority to determine racial identity through a differentiating lens of community sentiment that established, rather than relied upon, the meaning of family lineage and local associations.²⁷⁰ Under this litmus test, past character and conduct determined racial identity less than did the immediacy of local community sentiment. Thus, a community that treated John Kirby as a white man both in life and in death might also, under the press of public opinion, relegate his children to a “school for mulattos” in the name of racial purity.²⁷¹ Under this standard, the courts’ legal efforts to regulate the value of whiteness through the putatively objective determinates of blood or heritage paradoxically redounded to the most local and uncertain of social bodies—the whim of community sentiment.²⁷²

265. *Id.* at 670.

266. *Id.* at 671.

267. *Id.*; see S.C. CONST. of 1895, art. III, § 33 (“The marriage of a white person with a negro or mulatto, or person who shall have one-eighth or more negro blood, shall be unlawful and void.”); see also S.C. CIV. CODE § 1780 (1912).

268. *Tucker*, 81 S.E. at 670.

269. *Id.* at 671–72.

270. *Id.*

271. This particular community provided three different schools for children; these were designated as black, white, and mulatto. *Id.* at 672.

272. As one state supreme court justice observed regarding race determination in a

The case of the Kirby children indicated one of the cultural mechanisms deployed for alienating the property of whiteness. In admitting that the law of South Carolina entitled the children to be “classed as white,” the court nevertheless found the board of trustees’ refusal to reinstate them in the white school as “neither capricious nor arbitrary.”²⁷³ Deploying the law to require the children’s readmission would, the court insisted, “conflict with the general sentiment of the community” and embroil the judiciary in an arena presumably beyond its competence—regulating the social conditions of race.²⁷⁴ Nevertheless, by refusing to *apply* South Carolina’s legal definition of race, the court revealed the inseparability of the legal meaning of race from its social condition, the very situation the court hoped to avoid by relying on the objectivity of blood quantum.²⁷⁵

Moreover, the court’s position revealed the concern over the issue of alienability in the new regime of property constructed as a constellation of social relationships with regard to some object. While the court focused on whether the blood quantum of the Kirby children enabled them to be classified as white, the application of the meaning of this object rested in the hands of the community that, by denying the children a place in the white school, alienated the family’s property in whiteness.²⁷⁶ The court’s determination of whiteness gained meaning, weight, and value through a constellation of social relationships; the nexus of this constellation rested in a local community marked by a culture of racial hierarchy. Such local authority could serve only to exacerbate the anxiety over the tenuousness of racial identity, an anxiety born from the realization that whiteness exhibited the qualities of

school mandamus case, “Reputation and tradition are the methods of proof by which pedigree and kindred matters are established.” *Medlin v. County Bd. of Educ.*, 83 S.E. 483, 486 (N.C. 1914).

273. *Tucker*, 81 S.E. at 675.

274. *Id.* at 674 (quoting *People ex rel. King v. Gallagher*, 93 N.Y. 438, 448 (1883)). The judicial stance that social questions were best left to the legislature (or some other political body) was not uncommon during this period fueled, as it was, by a cultural and political ideology that regarded the role of the court as the preeminent body for explaining the law rather than as a tribunal for determining social conditions. The nature of this compartmentalization disregarded the production of legal meaning, in which the judiciary actively engaged in legal interpretations that shaped the cultural construction of identity and property, the very concepts underpinning the legal evaluation of race. Yet, the legal culture that fostered such line-drawing rested on an ideology of objectivity that deployed the image of a judiciary insulated from the vicissitudes of politics and pressures of social inequality. The culture of legal objectivity fostered a discourse of professional separation as essential for justice, fairness, and the rule of law and as comporting with the tenets of a limited judiciary in a democracy in which the laws were enacted by an elected body, but interpreted by an appointed tribunal.

275. *Id.* at 675.

276. *See supra* note 12 (discussing the alienability of the social self).

property that might be alienated by the community itself.²⁷⁷ Courts fueled this tension by relying on a discourse of community sentiment that removed whiteness as an intrinsic marker of identity. In this way, the new regime of property fostered anxiety over individual character and the meaning of identity, but it also opened a space for self-identification and racial redefinition. If court and community could deny whiteness, if it were alienable in law, it might also be assumed. This understandably accentuated the volatility of racial personality, while also locating the certainty of racial identity outside of the self.

IX. CONCLUSION

Opinions by southern jurists, entertaining reputational claims for racial identity, whether through defamation, miscegenation, or mandamus, indicated the evanescent characteristics of whiteness as court and claimant prospected the cultural landscape in pursuit of racial certainty. These opinions also suggested the racial composition of property in the self, as the personality interests comprising reputation in whiteness gathered substance and legal weight from the cultivated sentiments of a judicially constructed white community, while those reputations considered beyond the “kin” of whiteness languished at the law. Consequently, only white reputation appeared as a property interest in which honor and dignity provided the currency for a legally cognizable harm. In the grammatical universe of the law, property in the self inferred reputation, while the legal validation of that social self presumed whiteness.

Southern jurists’ fidelity toward legal certainty and their own yearning to constrain the meaning and circulation of whiteness yielded a discourse of biological fact in which the coherent objectivity of blood accompanied the legal rhetoric of entitlement, possession, and ownership. Yet, just as the “old atom of property” had burst in the arena of corporate capital, dividing ownership from control, judicial focus on the ownership of racial identity refracted through the cultural lens of reputational claims; racial subjectivity redounded to the control of the social self. As courts sought to maintain the property value of whiteness in the body politic through a discourse of intrinsic character, the community determined the meaning of whiteness through extrinsic evaluations of personality. As a reputational and discursive relationship,

277. See BAKER, *supra* note 21, at 152.

racial identity located meaning and direction in a constellation of cultural moments, including social and economic comportment, association, family narrative, and community opinions regarding appearance.

Mediating the tensions between an established, object-centered view of property and an emerging vision of property as convened by, and through, social relations proved illusive for southern jurists wedded to the conception of an innate racial identity. Standing alone, the signifying power of blood quantum failed to express the material embodiment of white selfhood. Yet, by seeking to establish the certainty of an innate white identity in the presumed objectivity of blood quantum, these jurists provided the conduit through which the entitlement of whiteness emerged as the impertinent possession of an imagined community. Thus, rather than localizing the idea of whiteness as embodied in the individual, the legal narrative of blood quantum burst judicial efforts at containment by registering the proof of white identity through the logical entailment of a relational conception of property, or in the language of *Plessy*, the “general sentiment of the community.” The ensuing volatility and fragmentation of racial identity created the very possibility of, and means for, misrecognition and passing.