

# **The Pocahontas Exception**

The Exemption of American Indian Ancestry from Racial Purity Law

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## **Abstract**

“The Pocahontas Exception” confronts the legal existence and cultural fascination with the eponymous “Indian Grandmother.” Laws existed in many states that prohibited marriage between whites and nonwhites to prevent the “quagmire of mongrelization.” Yet, this racial protectionism, as ingrained in law, blatantly exempted Indian blood from the threat to white racial purity. In Virginia, the Racial Integrity Act of 1924 made exceptions for whites of mixed descent who proudly claimed Native American ancestry from Pocahontas. This paper questions the juridical exceptions made for Native American ancestry in antimiscegenation statutes, and analyzes the concomitant exemptions in contemporary social practice. With increasing numbers of Americans freely and lately claiming Native ancestry, this openness escapes the triumvirate of resistance, shame, and secrecy that regularly accompanies findings of partial African ancestry. I contend that antimiscegenation laws such as the Racial Integrity Act relegate Indians to existence only in a distant past, creating a temporal disjuncture to free Indians from a contemporary discourse of racial politics. I argue that such exemptions assess Indians as abstractions rather than practicalities, which facilitates the miscegenistic exceptionalism as demonstrated in Virginia’s antimiscegenation statute.

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### I. INTRODUCTION

In 1924, Atha Sorrels and Robert Painter applied for a marriage license in the state of Virginia and were denied.<sup>1</sup> The local official refused to issue a license because the two applicants came from different racial groups. Painter identified himself as “white,” while Sorrels hailed from the Irish Creek<sup>2</sup> mixed-race community, and was known to have a grandmother who was classified as “colored.”<sup>3</sup> Their would-be nuptials conflicted with Virginia’s newly enacted Racial Integrity Act, which made it unlawful for any white person “to marry any save a white person.”<sup>4</sup> Creators of this statute aimed to “suppress the shameful intermixture of the races which [had] been going on practically unchecked.”<sup>5</sup> Those who disobeyed the law or falsely reported their race faced up to one year of imprisonment.<sup>6</sup>

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<sup>1</sup> John Powell, *The Breach in the Dike: An Analysis of the Sorrels Case Showing the Danger to Racial Integrity from Inter-marriage of Whites and So-Called Indians* at 7, A.S.C.O.A (Draft version available in The John Powell Collection (#7284) Manuscript Department, University of Virginia Library.)

<sup>2</sup> In Virginia, the Irish Creek group included European, African, and Native strains amongst its members. Mixed groups in rural areas such as the Irish Creek are known as “triracial isolates.” *ENCYCLOPEDIA OF NORTH AMERICAN INDIANS* (Frederick E. Hoxie, eds.) (1996). Also *see generally* JACK D. FORBES, *AFRICANS AND NATIVE AMERICANS: THE LANGUAGE OF RACE AND THE EVOLUTION OF RED-BLACK PEOPLES* (1993).

<sup>3</sup> Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. Davis L. Rev. 421,440 (1987-1988).

<sup>4</sup> An Act To Preserve Racial Integrity, 1924 Va. Acts ch. 371, §5 (Repealed 1975).

<sup>5</sup> Bureau of Vital Statistics, State Board of Health, *EUGENICS IN RELATION TO THE NEW FAMILY AND THE LAW ON RACIAL INTEGRITY* 9 (1934) (hereinafter “The New Family”).

<sup>6</sup> The statute reads: “It shall be a felony for any person willfully or knowingly to make a registration certificate false as to color or race. The willful making of a false registration or birth certificate shall be

But the Integrity Act had a curious loophole. As defendants, Sorrels and Painter argued that “colored” did not necessarily mean “black.” “Colored,”<sup>7</sup> according to local custom, referred to all nonwhite persons, including American Indians. Had her grandmother been part-Indian rather than part-black, Sorrels could have evaded the state’s antimiscegenation statute, which counted as white “persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood.”<sup>8</sup> The court ruled that substantial evidence did not exist to prove that Sorrel’s grandmother was of African descent, and thus declared her to be “white” and legally permitted to marry Painter.<sup>9</sup> “White,” in this juridical context of racial integrity, accommodated the limited spoilage of Indian blood.

Racial ambiguity favored those persons who could legally present themselves as Indian.<sup>10</sup> As early as 1772, a woman known as Sybill brought suit for her freedom on grounds that she was American Indian rather than black.<sup>11</sup> Her grandchildren brought suit on similar grounds that they “always understood they were descended from Indians.”<sup>12</sup> In another case a century later, Rowena McPherson appealed to Virginia’s high court to defend her marriage to George Stewart, a white man. Arguing that they were not “living in illicit intercourse,” McPherson reasoned that she was not a negro because her grandmother was a “brown skin woman...a half-Indian—a fact which is confirmed by the color of her skin.”<sup>13</sup> By declaring partial ancestry as “Indian” instead of

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punished by confinement in the penitentiary for one year.” An Act To Preserve Racial Integrity, *supra* note 4.

<sup>7</sup> Powell, *supra* note 1 at 9.

<sup>8</sup> An Act To Preserve Racial Integrity, 1924 Va. Acts ch. 371, §5 (Repealed 1975).

<sup>9</sup> Powell, *supra* note 1 at 13.

<sup>10</sup> Lombardo, *supra* note 3 at 442.

<sup>11</sup> Gregory v. Baugh, 1831 WL 1924,1 (Ct. App.Va., 1831).

<sup>12</sup> *Id.* at 1.

<sup>13</sup> McPherson v. Commonwealth 1877 WL 6249, 1(Ct. App. Va, 1877)

“black,” “mulatto,” or “negro,” a litigant of mixed race gained attempted to secure the legal rights and privileges of a white person.<sup>14</sup>

Virginia’s statutory conception of “white” codifies what I call miscegenistic exceptionalism, where the intent of white racial purity exempts and protects certain nonwhite ancestries from the threat of taint.<sup>15</sup> Racial groups normally considered nonwhite may receive honorary status as “white,”<sup>16</sup> underscoring the argument of race as a social construct<sup>17</sup> rather than a biological truth.<sup>18</sup> The 1924 Integrity Act defined “white” as “one-sixteenth or less of the blood of the American Indian and hav[ing] no other non-Caucasic blood.”<sup>19</sup> This allowance permitted Indian blood to override the doctrine of hypodescent—its presence alongside European ancestry did not categorically invoke racial hybridity.<sup>20</sup> Despite the eugenic polemics which contended that infusions

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<sup>14</sup>See generally, Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998).

<sup>15</sup> Most other states exempted American Indians all ancestral fractions from the purview of antimiscegenation laws. See *infra* note 40.

<sup>16</sup> In Nazi Germany, people of Japanese ancestry were considered white. See, Scales-Trent *infra* note 153.

<sup>17</sup> A number of scholars have pointed out the miscegenation has no meaning aside from social constructions of race. Keith E. Sealing, *Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation*, 5 Mich. J. Race & L. 559 (2000) (questioning eight different commonly accepted American racial norms); F. JAMES DAVIS, *WHO IS BLACK ?* 18 (The Pennsylvania University Press 1997) (arguing that social constructions of race do not reflect actual racial realities); Anthony Appiah, *In My Father’s House: Africa in the Philosophy of Culture* 45 (1992) (writing that “the truth is there are no races. . . . Talk of ‘race’ is particularly distressing for those of us who take culture seriously”); Gunnar Myrdal, *An American Dilemma* (1944) (noting that social and legal definitions of black may differ from a scientific definition).

<sup>18</sup> At one point in American history, immigrants from Ireland and Southern Europe were not considered as white persons. This sharply contrasts to contemporary racial politics, which generally considers these groups as white. See, NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* 41(1995). See generally Michael Omi, *Racial Identities and the State: The Dilemmas of Classification*, 15 Law & Ineq. 7 (1997); IAN HANEY-LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE*(1996); Howard Winant, *Race and Race Theory*, ANNUAL REVIEW OF SOCIOLOGY (2000).

<sup>19</sup> An Act To Preserve Racial Integrity, 1924 Va. Acts ch. 371 (Repealed 1975).

<sup>20</sup> Membership in Indian tribes is political, rather than racial. In addition to people who identify as Indian, tribes have members who securely see themselves as white, black, or Hispanic. Likewise, many tribes have a majority of members of hybrid ancestry. This distinction accounts for a greater diversity within the population of Indian nations. It places more emphasis on ancestry alone rather than a concentration of blood. In the Cherokee Nation, which has no minimum blood requirement for membership, quantum range from “full blood” to 1/2048. As of 1996, only 21 percent of the 175,326 members had more than one-quarter Cherokee blood. Circe Sturm, *Blood Politics, Racial Classification, and Cherokee National identity: The Trials and Tribulations of the Cherokee Freedmen*, 22 AM. INDIAN Q. 230 (Winter/Spring

of Indian ancestry into the white race would “in a measure lower the creative intelligence of the white man,”<sup>21</sup> the Racial Integrity Act exempted the impeccability of integrity by including Indian blood as a veritable component of white racial identity.

In its accommodation of one-sixteenth Indian blood, Virginia law venerated the “Pocahontas Exception.”<sup>22</sup> Acknowledging the interracial marriage of Pocahontas, the famous “Indian Princess” and the Englishman John Rolfe<sup>23</sup>, the Pocahontas Exception ensured that their descendants could be legally white. Here, a notable irony surfaces: the campaign for racial purity seeks the “right of our children’s children to be white men in a white man’s country”<sup>24</sup> while revering the Pocahontas-Rolfe match as a “peculiarity of descent...subject of just and honorable pride.”<sup>25</sup> For elite Virginians to demand this accommodation demonstrates a malleable and shifting concept of racial purity. In conceptualizing the damning influence and palpable threat of “taint” to a racial identity as white, strains of Indian blood assume a different, more exotic and arguably desirable meaning.<sup>26</sup> At the same time, no adjustments existed to protect black ancestry. This sentiment endures today in social practice, where open declarations of “Cherokee Princess Grandmother” and similar Indian forebears sprinkle the ancestries of contemporary Americans.

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1998).

<sup>21</sup> EARNEST SEVIER COX, *WHITE AMERICA* 9 (1923).

<sup>22</sup> This term, “Pocahontas exception” has been used by a number of legal scholars. See Peter Wallenstein, *Personal Liberty and Private Law: Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s*, 70 *CHI.-KENT. L. REV.* 371, 409 (1994).

<sup>23</sup> Ironically, the event triggering the legal exception itself would have been illegal under the contemporary scheme. Kennedy *infra* note 43.

<sup>24</sup> Powell, *supra* note 1 at 4.

<sup>25</sup> 7 *Op. Atty. Gen.* 746 (1856), quoted in Robert B. Porter, *The Demise of the Omgwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 *HARV. BLACKLETTER L.J.* 107, n. 149(1999).

<sup>26</sup> Brian Dippie declares that “Tell the average American that he is descended from Pocahontas, that his blood may be traced to Confucius, or that his daughter has secretly married one of Madame Blavatsky’s mythical Indian Mahatmas, and the chances are that he will be flattered and gratified.” *THE VANISHING AMERICAN: WHITE ATTITUDES AND U.S. INDIAN POLICY* 250(1982).

This article confronts the origins and outcomes of Virginia’s “Pocahontas Exception.” In particular, scholarship discussing *Loving v. Virginia* regularly mentions the state’s accommodation<sup>27</sup>, but few of these works raise the issue outside of a footnote.<sup>28</sup> Moreover, not enough attention has been paid to the relative absence of antimiscegenation statutes prohibiting marriage between whites and Indians. Likewise, this disparity calls for a critical inquiry of the miscegenistic exceptionalism accorded to American Indians. This exceptionalism is periodic—at different points in American history, Indians have been reviled, extirpated, and even imitated, depending on the region, time, and predicament of the individual or group. This article neither attempts to chronicle the long history of discrimination against American Indians<sup>29</sup>, nor does it hypothesize an explanation for changes in Native American law. What it does do is question the reasoning of state antimiscegenation laws, with a focus on Virginia, that did not consider American Indian ancestry as a threat to white racial purity. This statutory liberality surfaces in contemporary social practice. With increasing numbers of Americans freely and lately claiming Native ancestry, we may ask why such affirmations do not meet the triumvirate of resistance<sup>30</sup>, shame<sup>31</sup>, and secrecy<sup>32</sup> that regularly

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<sup>27</sup> Peter Wallenstein, *Personal Liberty and Private Law: Race, Marriage and the Law of Freedom: Alabama and Virginia 1860’s-1960s*; Richard B. Sherman, “The Last Stand”: *The Fight for Racial Integrity in Virginia in the 1920s*, 54 THE JOURNAL OF SOUTHERN HISTORY 69, 72, (1988).

<sup>28</sup> Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. DAVIS L. REV. 421, fn.60 (1987-1988); Lisa N. Polk, *Montana’s Marriage Amendment: Unconstitutionally Denying a Fundamental Right*, 66 MONT. L. REV. 405(2005); Monte Neil Stewart & William C. Duncan *Marriage and the Betrayal of Perez and Loving*, 2005 BYU L. REV. 555 (2005); Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 YALE L. J. 1473 (2003).

<sup>29</sup> See generally, Robert Williams, Jr. *Like a Loaded Weapon* (2005); Francis Paul Prucha, *The Great Father* (1984); Angie Debo, *infra* note 79.

<sup>30</sup> A number of cases refer to misapplied racial classification as grounds for legal action. In *Collins v. Oklahoma State Hospital* (1916), the court held that “In this state it is libelous per se to write of or concerning a white person that said person is colored.” 76 Okla. 229(1916). Likewise in *Bagwell v. Rice & Hutchins Atlanta Co* (1928), the plaintiff, claiming to be a “white lady of good standing,” recovered damages from the defendant, who called her a “negro,” and seated her “amongst negroes while she was in defendant’s store to make purchase.” 38 Ga. App. 87(1928).

accompanies findings of partial African ancestry. In other words, what is the exceptional legal and social status of the Indian Grandmother that allows her to escape the reach of antimiscegenation law?

This inquiry may be interpreted in a number of ways. First, a skeptic may view this analysis as an imposition of racial boundaries that attempts to pigeonhole American Indian identities<sup>33</sup> into a racial binary restricted to black and white. From this angle, miscegenation discourse features a normative standard that places African-American issues at its center, and others at its margins. Also, the relative absence of antimiscegenation laws affecting American Indians may be viewed as a form of racial reconciliation, and the Pocahontas Exception a progressive example of legally sanctioned amalgamation. Second, questioning this miscegenistic exceptionalism can also underplay the negative and destructive legacy of colonialism. A commentator may contend that five centuries of conquest, death, and theft more realistically portray Indian-white interaction than the legal concessions made for remote strains of Indian blood. Thus, permeable color lines and sought heritages do not overcome a longstanding history fraught with racial tension and community destruction. Lastly, this inquiry may be viewed as a follow-up to the late Vine Deloria, Jr.'s criticism of the "Indian Grandmother Complex,"<sup>34</sup> which questions the motivations of quick and open admissions of remote American Indian ancestry. This final angle most closely represents the goal of this article: Why is there an exception for Pocahontas, or other Indian Princesses? What prevents a similar loophole

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<sup>31</sup> SHIRLEE TAYLOR HAIZLIP, *SWEETER THE JUICE* (1994).

<sup>32</sup> Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145

<sup>33</sup> Sturm, *supra* note 20.

<sup>34</sup> VINE DELORIA, *CUSTER DIED FOR YOUR SINS* at 10 (1969).



for Irish Nell<sup>35</sup>, Venus<sup>36</sup> or Sally Hemings<sup>37</sup>? What enduring legacy of American collective memory categorically resists the embracement of a “Slave Grandmother Complex?”

I confront the miscegenistic exceptionalism of the Indian Princess Grandmother in four parts. First, I examine the concerted efforts of political actors to encourage Indian-white intermixture. Such treatment, located within its historical context, demonstrated an open willingness to absorb the American Indian population into the larger bloodstream. These proposals were singular in their intent, as acceptance of intermixture was not accorded to other racial groups. Second, I consider the statutory origin of *Loving v. Virginia*: The Racial Integrity Act of 1924.<sup>38</sup> This Act illustrates Virginia’s legal deference to the Pocahontas legend, which classified “whites” with Indian blood as racially pure, and allowed such persons to marry people who were entirely white.<sup>39</sup> This practice establishes the concept of miscegenistic exceptionalism. Third, I review the archetypal Indian Princess/Pocahontas legend. Much of this Indian Princess Grandmother (and not Grandfather) myth is based upon colonial romance and appeased

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<sup>35</sup> Irish Nell, an indentured servant in Maryland in the 17<sup>th</sup> century, asked her master, Lord Baltimore, for permission to marry the slave “Negro Charles.” Baltimore warned her that such a marriage would condemn her and her children to a life of slavery. Reportedly, Nell replied that she would rather marry Charles than Lord Baltimore himself. Rachel F. Moran, *Love With a Proper Stranger: What Anti-Miscegenation Laws Can Tell Us About the Meaning of Race, Sex and Marriage*, 32 HOFSTRA L. REV. 1663, 1665 (2004).

<sup>36</sup> Venus, a slave on Bushfield Plantation, owned by George Washington’s nephew, was rumored to give birth to a child fathered by George Washington. HENRY WIENCEK, *AN IMPERFECT GOD: GEORGE WASHINGTON, HIS SLAVES, AND THE CREATION OF AMERICA* (2003). LINDA ALLEN BRYANT, *I CANNOT TELL A LIE: THE TRUE STORY OF GEORGE WASHINGTON’S AFRICAN AMERICAN DESCENDANTS*(2001);

<sup>37</sup>Eugene A. Foster et al, *Jefferson Fathered Slave’s Last Child*, NATURE 396(1998); SALLY HEMINGS & THOMAS JEFFERSON : HISTORY, MEMORY, AND CIVIC CULTURE (Jan Ellen Lewis and Peter S. Onuf eds., 1999).

<sup>38</sup> An Act To Preserve Racial Integrity, 1924 Va. Acts ch. 371 (Repealed 1975).

<sup>39</sup>“ For the purpose of this act, the term "white person" shall apply only to the person who has no trace whatsoever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons.” An Act To Preserve Racial Integrity, 1924 Va. Acts ch. 371 (Repealed 1975).

guilt. Lastly, I argue that such laws relegate Indians to existence only in a distant past, creating a temporal disjuncture to free Indians from a contemporary discourse of racial politics. I argue that such exemptions assess Indians as abstractions rather than practicalities, or as fictive temporalities characterized by romantic ideals. These practices bifurcate treatments of Indian blood, either essentializing a pre-modern and ahistorical culture, or trivializing this ancestry as inconsequential ethnicity. I conclude by arguing that exceptionalism accorded to Native ancestry in antimiscegenation law carries over into contemporary social practice.

## II. ADVOCATING INDIAN-WHITE INTERMIXTURE

In seven states<sup>40</sup>, laws existed that prohibited Indian-white intermarriage<sup>41</sup>: Arizona, Louisiana, Massachusetts, North Carolina, Oregon, South Carolina, and Virginia.<sup>42</sup> A 1691 Virginia antimiscegenation law (subject to change after the 1924 Integrity Act) aimed to prevent “abominable mixture and spurious issue,” prohibited marriages between whites and “negroes,” “mulattoes,” and Indians.<sup>43</sup> This law endured

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<sup>40</sup> This number sharply contrasts with the thirty-eight states that banned black-white intermarriage. While numbers alone do not conclusively prove that state governments found Indians less threatening than blacks in regards to marriage, they demonstrate a collective avoidance to proscribe the legitimacy of Indian-white sexual activity. ROBERT J. SICKELS, *RACE, MARRIAGE, AND THE LAW* 64 (1972).

<sup>41</sup> This paper concentrates on Virginia antimiscegenation law. For an in-depth discussion of the laws of other states, see Karen M. Woods, “Law Making: A “Wicked and Mischievous Connection”: The Origins of Indian-White Miscegenation Law,” *infra* note 49.

<sup>42</sup> Kennedy, *infra* note 43, at 483. *See also*, Phyl Newbeck, *VIRGINIA HASN’T ALWAYS BEEN FOR LOVERS, INTERRACIAL MARRIAGE BANS AND THE CASE OF RICHARD AND MILDRED LOVING* (2004) 227-231.

<sup>43</sup> Laws regarding Indian-White intermarriage and classification of “white” in Virginia changed over time. Most notably, legal classifications of race reflected differential approaches to Indian-white and Black-white intermixtures. A 1705 statute banning mulattoes, Blacks, Indians, and criminals from holding public office. However, the state defined mulatto as “the child of an Indian, or the child, grandchild, or great grandchild of a Negro.” This would have made a person with ¼ Indian ancestry legally white under the statute. Eighty years later, this definition changed again. A 1785 law titled, “An Act declaring what persons shall be deemed mulattoes” made no mention of Indian ancestry. Higginbotham, *infra* note 57 at 1977-78. *See also*, RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 483 (2003).

until 1753, when the state exempted Indians from the intermarriage law.<sup>44</sup> North Carolina specifically placed marital limitations on Cherokees from Robeson County.<sup>45</sup> States were not uniform in prohibiting such marriages, leaving some states with substantial indigenous populations (South Dakota, Wyoming, Utah) to focus instead on the threat that Asians posed to white racial integrity.<sup>46</sup> Oklahoma posed a cruder delineation of a racial binary by classifying all persons as either “of African ancestry” or “not of African ancestry.”<sup>47</sup> Fullblood Indians, “Mongolians,” “Malays,” and Hindus were each lumped into the category of “white.”<sup>48</sup> Effectively, these classification differentials made American Indians legally white for purposes of marriage, because statutory language did not enumerate Indians as party to miscegenation.

The curious absence of Indian-white intermarriage bans (except for the states listed above) did not necessarily engender open acceptance of Indians by whites, but it does demonstrate the sharp contrast in treatment of Blacks and Indians. In states where Indians faced no marriage restrictions, legal allowances often contradicted social practice. Such antipathy surfaced in Connecticut in 1825, when the Rev. Cornelius B. Everest condemned the “wicked and mischievous connection” of his sister in law Harriet Gold

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<sup>44</sup> Woods, *infra* note 49 at 56.

<sup>45</sup> Newbeck, *infra* note 46.

<sup>46</sup> Phyl Newbeck, *Virginia Hasn't Always Been for Lovers: Interracial Marriage Bans and the Case of Richard and Mildred Loving* 227 (2004) Appendix C : Arizona: Mongolians, Malaysians, Hindus, Indians. California: Mongolians, Malaysians. Georgia: African, West Indian, Malayan, Japanese, Chinese, Asiatic Indian. Maryland: Malaysians. Massachusetts: Indians. Mississippi: Mongolians. Montana: Chinese, Japanese. Nebraska: Chinese. Nevada: Ethiopian(black), Malay (brown), Mongolian(yellow). North Carolina: Indian, Cherokees from Robeson County. Oregon: Chinese, Kanakan, Indian. South Carolina: Indians. South Dakota: Korean, Malayan, Mongolian. Utah: Malaysians. Wyoming: Malaysians, Mongolians.

<sup>47</sup> 43 Okl. St. Ann. § 12, (Repealed 1969). “Colored” defined anyone of African descent in any degree. “White” included all other persons. *See, eg.*, Peter Wallenstein, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY 143, Fig. 11 (2002).

<sup>48</sup> *Id.* at 143.

and the Cherokee journalist Elias Boudinot.<sup>49</sup> In popular culture, parodies of the folk song “Little Red Wing” sung of the lewd counterpart of the beautiful Indian princess who “lays on her back in a cowboy shack, and lets cowboys poke her in the crack” resulting in offspring looking like a “brat in a cowboy hat with his asshole between his eyes.”<sup>50</sup> In Virginia, the state legislature had banned Indians, blacks, and criminals from holding office.<sup>51</sup> This same law also defined mulatto as “the child of an Indian, or the child, grandchild, or great grandchild of a Negro.”<sup>52</sup> These different stages of “washing the taint,” as Higginbotham and Kopytof point out, demonstrate how “Europeans tended to see Indians as higher on the scale of creation than Negroes, though still lower than themselves.”<sup>53</sup> Perhaps this sentiment tempered the potentially controversial statements that proposed to accept and assimilate Indian, rather than African, blood into the white majority.

#### A. *Support from the Founding Fathers*

Advocacy of Indian-white intermarriage received considerable support from noted Founding Fathers. The encouragement of red-white amalgamation began slowly after the Virginia legislature’s 1753 omission of Indian-white marriage from state antimiscegenation laws.<sup>54</sup> Thomas Jefferson, a “Great Father” of the Indian, welcomed this mixture in his treatise *Notes on the State of Virginia* (1781): “Are not the fine

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<sup>49</sup> Karen M. Woods, *Law Making: A “Wicked And Mischievous Connection”: The Origins Of Indian-White Miscegenation Law*, 23 LEGAL STUD. F. 37 (1999).

<sup>50</sup> Rayna Green, *The Pocahontas Perplex: The Image of Indian Women in American Culture*, in UNEQUAL SISTER: A MULTICULTURAL READER IN U.S. WOMEN’S HISTORY 19 (Ellen Carol Dubois and Vicki L. Ruiz ed., 1990).

<sup>51</sup> Higginbotham, *infra* note 57 at 1977.

<sup>52</sup> *Id.* at 1977.

<sup>53</sup> *Id.* at 1977.

<sup>54</sup> Woods, *supra* note 49 at 56.

mixtures of red and white, the expressions of every passion by greater or less suffusions in color in the one, preferable to that eternal monotony, which reigns in the countenances, that immovable veil of black which covers the emotions of the other race?”<sup>55</sup> Jefferson saw this specific crossing of red and white as the genesis of a unique national identity. “We shall all be Americans,” he wrote in a separate letter in 1808, “you will mix with us by marriage, your blood will run in our veins, and will spread over this great island.”<sup>56</sup> Through this encouragement, he condoned the practice of racial intermixture, despite its criminality for black-white mixes.<sup>57</sup> This endorsement had its limits, however. Jefferson’s encouragement attempted to hasten the ultimate disappearance of the Indian—his noble and paternalistic goal of incorporation in no way intended to retain or celebrate Indian culture.<sup>58</sup> Most notably, Jefferson did not publicly encourage or endorse<sup>59</sup> the open incorporation of African<sup>60</sup> ancestry in this American bloodline.<sup>61</sup>

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<sup>55</sup> Thomas Jefferson, *Notes on the State of Virginia*, in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 238 (A. Koch & W. Peden, eds. 1993)

<sup>56</sup> Thomas Jefferson, *Letter to Captain Hendrick, the Delawares, Mohiccons, and Munries (Dec. 21, 1808)*, in *THE COMPLETE JEFFERSON* 503 (Saul K. Padover ed., 1943), *quoted in* Woods, *supra* note 49 at 55.

<sup>57</sup> “Virginia was also one of the first colonies to formulate a legal definition of race and to enact prohibitions against interracial marriage and interracial sex.” (See Act XII, 2 LAWS OF VA. 170, 170 (Hening 1823) (enacted 1662) (fine for interracial sex twice that for fornication); Act XVI, 3 LAWS OF VA. 86, 86-87 (Hening 1823) (enacted 1691) (interracial marriage punished by banishment from Virginia within three months). Barbara K. Kopytoff & A. Leon Higginbotham, Jr., *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 *Geo L. J.* 1967 (1989).

<sup>58</sup> See generally, Dippie, *supra* note 26.

<sup>59</sup> Scholars have generally concluded that Jefferson had a lifelong relationship with his slave, Sally Hemings. See Annette Gordon-Reed, *THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY* (1997); Jan Ellen Lewis and Peter Onuf, eds., *Sally Hemings and Thomas Jefferson: History, Memory, and Civic Culture* (1999). See also, INTERIM REPORT OF THE MEMBERSHIP ADVISORY COMMITTEE OF THE MONTICELLO ASSOCIATION, SEC. III (May 2000), at <http://www.monticello-assoc.org/Interim%20Report.pdf>. (last checked Dec. 8, 2005) *But c.f.*, SCHOLARS COMMISSION ON THE JEFFERSON-HEMINGS MATTER, REPORT (2001); VIRGINUS DABNEY, *JEFFERSON SCANDALS: A REBUTTAL; MERRILL PETERSON, THE JEFFERSON IMAGE IN THE AMERICAN MIND* 187 (1960).

<sup>60</sup> “Add to these, flowing hair, a more elegant symmetry of form, their own judgment in favour of the whites, declared by their preference of them, as uniformly as is the preference of the Oran-ootan for the black woman over those of his own species.” *Supra* note 55 at 138.

<sup>61</sup> “Deep rooted prejudices entertained by the whites; ten thousand recollections, by the blacks, of the injuries they have sustained; new provocations; the real distinctions which nature has made; and many other circumstances will divide us into parties, and produce convulsions which will probably never end but in the extermination of one or the other race.” Peden *Supra* note 55 at 138.

Clandestine intermixtures of black and white, however, persisted without such encouragement.<sup>62</sup>

Other Virginia statesmen echoed Jefferson's sentiments, with similar political ends. In 1784, Patrick Henry offered legislation "for the encouragement of marriages with the Indians," providing financial rewards and free education for the mixedblood offspring.<sup>63</sup> The Henry bill placed mixedbloods on the same footing as white citizens, making them "entitled, in all respects, to the same rights and privileges, under the laws of this commonwealth, as if they had proceeded from intermarriages among free white inhabitants thereof."<sup>64</sup> Henry succeeded in pushing the bill through the Virginia legislature, but it soon failed after he became governor. Another statesman publicly encouraged intermixture despite its criminality before the 1753 amendment. In 1705, Robert Beverley, author of *The History and Present State of Virginia* asserted that

Intermarriage had been indeed the Method proposed very often by the Indians in the Beginning, urging it frequently as a certain Rule, that the English were not their Friends, if they refused it. And I can't but think it wou'd have been happy for that Country, had they embraced that proposal.<sup>65</sup>

Edmund Atkins, Superintendent for Indian Affairs for the Southern colonies, echoed

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<sup>62</sup> See Kevin Noble Maillard, "The Tain't of Taint: Memory and The Denial of Mixed Race in the U.S." Ph.D Diss, University of Michigan 2004, fn. 120. See also, BERTRAM WYATT BROWN, SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH 307 (1982) ("Miscegenation between a white male and black female posed almost no ethical problems for the antebellum Southern community, so long as the rules, which were fairly easy to follow, were discretely observed."); CHARLES F. ROBINSON, DANGEROUS LIAISONS: SEX AND LOVE IN THE SEGREGATED SOUTH 13-14 (2003) (discussing the "veil of informality" practiced by discreet interracial couples); ROBERT J. SICKELS, RACE MARRIAGE AND THE LAW 17-19 (1972) (suggesting the ethical consistency of white men's protection of white gyneolatriy and support of black sexual exploitation). See generally, RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY AND ADOPTION (2003); JOSHUA ROTHMAN, NOTORIOUS IN THE NEIGHBORHOOD: SEX AND FAMILIES ACROSS THE COLOR LINE IN VIRGINIA, 1787-1861 (2003); ELISE LEMIRE, "MISCEGENATION": MAKING RACE IN AMERICA (2002); GARY NASH, FORBIDDEN LOVE: THE SECRET HISTORY OF MIXED RACE AMERICA (1999); JOEL WILLIAMSON, NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES (1995); EUGENE GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1976).

<sup>63</sup> WILLIAM WIRT, THE LIFE AND CHARACTER OF PATRICK HENRY 258-259( [188-?]).

<sup>64</sup> *Id.* at 259.

<sup>65</sup> ROBERT BEVERLEY, THE HISTORY AND PRESENT STATE OF VIRGINIA 38 (Louis Wright ed., 1947).

these sentiments in a report on Indian affairs in 1755, where he advocated marriages between soldiers on the frontier and Indian women.<sup>66</sup> Presumably, Atkins embraced the inevitability of amalgamation, and legitimation of these liaisons appealed to a moral and religious concern. More likely, however, he also viewed these combinations as political maneuvering on a local level, “by which means our Interest among the Indians will be strengthened.”<sup>67</sup>

*B. Assimilation Schemes and the Dawes Allotment Act*

Such ends-oriented approaches to intermixture reveal an underlying belief in assimilation as an effective solution to the “Indian problem.” White reformers such as Theodora Jenness (1879), viewed “the harmonious blending of the two races” as “the great solution of the Indian question as regards the five civilized tribes.”<sup>68</sup> Reformers did not view miscegenation as an equal blending of two cultures, but rather as a deliverance of indigenous peoples from what they viewed as irreparable savagery.<sup>69</sup> In addition to intermarriage, reformers advocated private property ownership as an alternative assimilationist tactic. Land allotment schemes such as the Dawes Act of 1888<sup>70</sup> instituted not only the allotment of land in severalty, but also, as argued by Carl Schurz, an “immense step in the direction of the ‘white man’s way.’”<sup>71</sup> The Dawes Act aimed to

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<sup>66</sup> PERDUE, “MIXED BLOOD” INDIANS: RACIAL CONSTRUCTION IN THE EARLY SOUTH 73 (2003)

<sup>67</sup> *Id.* at 73.

<sup>68</sup> Theodora R. Jenness, “The Indian Territory,” ATLANTIC MONTHLY, XLIII (Apr. 1879) p. 449, *quoted in* Dippie, *supra* note 26 at 248.

<sup>69</sup> Perdue, *Supra* note 66 at 74.

<sup>70</sup> 25 USCS § 331(repealed 2000).

<sup>71</sup> Carl Schurz, *Present Aspects of the Indian Problem* in FRANCIS PAUL PRUCHA, AMERICANIZING THE AMERICAN INDIAN at 21 (1973).

disperse Indians amongst “civilized”<sup>72</sup> American citizens, and this displacement would hasten the erosion and disappearance of tribal cohesion.<sup>73</sup> Francis Paul Prucha comments, “There was no longer to be a group ‘out there,’ some different sort of people who lived across a line. The otherness was to be destroyed and a homogenous mass was to be formed, of which the Indians would be an indistinguishable part.”<sup>74</sup> Private property, then, sought to instill a white Protestant ethic throughout the Indian population. Marriage, however, aimed to perpetuate this ethos and its possessions for successive generations.

These marriages, often involving Indian women rather than white women, reflected the political and economic motivations of individual white men and groups of advocates. Reformers viewed the legally sanctioned union of matrimony as a highly honorable method of assimilation. Secretary of War William H. Crawford argued in 1816 that, “When every effort to introduce among them ideas of separate property, as well in things real as personal, shall fail, let intermarriages between them and the whites be encouraged by the Government.”<sup>75</sup> Intermarriage was an easy road to assimilation<sup>76</sup>, and a time-tested method for securing property for those white men who married local Indian women.<sup>77</sup> At the time of the Allotment Acts, the Taylor-Trotwood Magazine

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<sup>72</sup> Rebecca Tsosie, *Land, Culture and Community: Reflections on Native Sovereignty and Property in America*, 34 INLR 1291, 1295 (2001) (noting the paternalistic benevolence of the allotment acts).

<sup>73</sup> William Bradford, “*With a Very Great Blame on Our Hearts*”: *Reparations, Reconciliation and an American Indian Plea for Peace with Justice*, 27 AMINDLR 1, 38 (2002) (describing allotment as a devastating governmental scheme that “abolished Indian reservations as autonomous and integral sociopolitical entities.”)

<sup>74</sup> FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 3 (1984).

<sup>75</sup> William H. Crawford, *American State Papers: Indian Affairs*, , excerpted in DOCUMENTS OF UNITED STATES INDIAN POLICY 2:26-28( Francis Paul Prucha ed., 2000).

<sup>76</sup> Perdue, *supra* Note 66 at 72.

<sup>77</sup> Far less often, white women married Indian men, and these transculturations were represented in popular literature as the captivity narrative. These works, according to Rebecca Faery, insist on the desirability of whiteness by making it the source and sign of both the captive women’s being cherished by their Indian



(1908) published an article, “The Newest American State” that extolled the virtues of Oklahoma, joking that the Indian woman was “a thing of beauty and a joy for ever, and she and each of her sisters has a great big farm.”<sup>78</sup> Many American Indian communities, particularly the Five Civilized Tribes<sup>79</sup>, had substantial interracial elements that gave truth to this statement.<sup>80</sup> Particularly in Indian territory (now Oklahoma), whites and their offspring existed as more than small factions. In the Cherokee Nation, whites had intermingled with Indian women to such an extent that of 28,000 Cherokees enrolled, 21,000 of them were of mixed blood.<sup>81</sup> These pairings allowed frontiersmen to formalize alliances in unfamiliar territory—a practice which tautologically led to the formalization of their property interests.

It must be noted here that this school of incorporation sharply contrasts with the systematic efforts by the federal government to eradicate the human obstruction of Native Americans from the steamroller of American progress. Of course, the seemingly benevolent policies of assimilation coexisted alongside the segregationist policies of

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husbands and white culture’s grief over their loss.” REBECCA BLEVINS FAERY, *CARTOGRAPHIES OF DESIRE: CAPTIVITY RACE, & SEX IN THE SHAPING OF AN AMERICAN NATION* 172 (1999).

<sup>78</sup> Quoting Baxter Taylor, “The Newest American State,” *Taylor-Trotwood Magazine* VI (Feb. 1908) 500, in Dippie, *supra* note 26 at 248.

<sup>79</sup> The Five Tribes include the Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles. These tribes quickly adopted aspects of European culture, and intermarriage was common. See, Angie Debo, *AND STILL THE WATERS RUN* (1940); Grant Foreman, *THE FIVE CIVILIZED TRIBES* (1934).

<sup>80</sup> See *supra* note 20 and *infra* note 123 for discussions on blood. Such enumeration portended a growing obsession with race and blood fractionation that previously did not exist. Further example of this can be seen in the procedure necessary to prove that one is a member of the Cherokee nation. “To obtain a CDIB, you must formally apply for one and provide acceptable legal documents which connect you to an ancestor, who is listed with a roll number and a blood degree from the *FINAL ROLLS OF CITIZENS AND FREEDMEN OF THE FIVE CIVILIZED TRIBES*, Cherokee Nation, (commonly called the Dawes Commission of Final Rolls). These rolls were compiled between the years of 1899-1906. Quantum of Indian Blood is computed from the nearest paternal and/or maternal direct ancestor(s) of Indian blood listed on the Final Rolls.” Available online at

<http://www.cherokee.org/home.aspx?section=services&service=Registration&ID=kP49UzWPgBA>

(last visited September 24, 2005).

<sup>81</sup> This number does not include intermarried persons: white men married to Cherokee women who were counted as Cherokee citizens during enrollment. In *U.S. v. Rogers*, the court ruled that such men were “non-Indians” for the purpose of criminal jurisdiction. See, *U.S. v. Rogers*, 45 U.S. 567 (1846) For See also, BRIAN DIPPPIE, *THE VANISHING AMERICAN: WHITE ATTITUDES AND U.S. INDIAN POLICY* 249(1982).

removal—a dynamic vacillation of ideologies that Francis Paul Prucha has described as “a movement between two extremes.”<sup>82</sup> Advocates of removal justified their policies by identifying the negative consequences of Indian-white proximity. Andrew Jackson, the presidential architect and arbiter of Indian removal, wrote to James Gadsen in 1829:

You may rest assured that I shall adhere to the just and humane policy towards the Indians which I have commenced. In this spirit I have recommended them to quit their possession on this side of the Mississippi, and go to a country to the west where there is every probability that they will always be free from the mercenary influence of White men, and undisturbed by the local authority of the states.<sup>83</sup>

Such humanitarian concern stretched to both policies, which sweetened the resolute and unabashed hunger for land.<sup>84</sup> Both policies predated the idea of a pluralistic society<sup>85</sup>--Indians would either become land-owning, English-speaking Christians, or isolated, ahistorical beings transported beyond the realm of white society.

Twentieth century approaches to the Indian problem sharply differed from the assimilationist policies of the 1800s. In this earlier period, reformers aimed to disperse Indians amongst white populations, pitting their previous savagery and heathenness against the supremacy of American values. Believing that Indians had potential to become civilized people<sup>86</sup>, “Friends of the Indian”<sup>87</sup> executed assimilation programs that had destructive effects on previously intact Native communities. The final goal was complete integration into mainstream society, at the expense of the loss of Indian culture.

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<sup>82</sup> Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* (1984) 179.

<sup>83</sup> Prucha, *Id.*, at 199.

<sup>84</sup> *Id.* at 283-4.

<sup>85</sup> Prucha, *Id.*

<sup>86</sup> Some “Friends of the Indian” firmly believed that racial difference entirely depended on environment. These groups firmly believed that Indian men could be “positively influenced to move toward ‘civilization.’” Margaret D. Jacobs, *The Eastmans and the Luhans: Interracial Marriage Between White Women and Native American Men, 1875-1935*, *FRONTIERS - A JOURNAL OF WOMEN'S STUDIES*, Sept 2002 at 29.

<sup>87</sup> Prucha *supra* note 74 at 609.

In comparison, twentieth century racial policies sought a complete purge of nonwhite elements from mainstream society. Paternalistic benevolence was replaced by segregationist discontent. Support of intermarriage and amalgamation, as was previously exhibited by Thomas Jefferson and Patrick Henry<sup>88</sup>, would have ensured a political death for its advocates.

### III. EUGENICS AND THE RACIAL INTEGRITY ACT OF 1924

The nineteenth century dialectic of assimilation and abhorrence of American Indians paralleled the growth of dubious scholarship on racial outcomes at the turn of the century. While not constant, federal Indian policy had shifted from removalist tactics of the mid-1800's to the incorporationist protheletizations of the late nineteenth century. Most notable in this ideological change from Lamarckian<sup>89</sup> thought was the emergence of scientific racism, which promoted the inherent inferiority of nonwhites.<sup>90</sup> At the forefront of this political scholarship was Francis Galton<sup>91</sup>, an Englishman and half-cousin of Charles Darwin, who coined the term "eugenics" in 1883 as the "science of improvement of the human germ plasm through better breeding."<sup>92</sup> Eugenacists vociferously argued that the white race, as a superior group, remained strong only when

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<sup>88</sup> *Supra* Peden note 55 and Wirt note 63.

<sup>89</sup> Jean-Baptiste Lamarck was a French naturalist (1744-1829) who believed that environmental changes incited organic changes. In other words, traits acquired during one's lifetime can be passed on to their offspring. *See*, Hasian *infra* note 92 at 18.

<sup>90</sup> Richard B. Sherman THE JOURNAL OF SOUTHERN HISTORY, Feb. 1988 at 71.

<sup>91</sup> The term "eugenics" is derived from the Greek *eu* = good and *genus* = race. *See*, Derryn E. Moten, Racial Integrity or 'Race Suicide': Virginia's Eugenic Movement, W. E. B. Du Bois, and the Work of Walter A. Plecker, NEGRO HISTORY BULLETIN, April-Sept, 1999.

<sup>92</sup> *Quoted in* Ann Gibson Winfield, Eugenics and Education – Implications of Ideology, Memory, and History for Education in the United States. Unpublished Ph.D. diss, 1994) 93-4.  
Marouf Arif Hasian, Jr., THE RHETORIC OF EUGENICS IN ANGLO-AMERICAN THOUGHT 1 (1996).

pure. Racially inferior groups such as blacks, Indians, and Asians<sup>93</sup> carried destructive taints in their blood, which proponents viewed as a serious threat to the integrity of the white race. These scholars, aiming to create a panic amongst whites, gained authority by rooting racial prejudice in scientific “fact.”

#### A. *The Growth of the Eugenics Movement*

The popularity of eugenics in the United States grew alongside the governmental expansion of allotment, which lasted until 1934.<sup>94</sup> At the same time that reformers purported interest in transforming savage Indians to civilized Christians, Madison Grant’s immensely popular book *The Passing of the Great Race* (1916)<sup>95</sup> preached for the unyielding separation of the races.<sup>96</sup> In fact, he predicted a racial apocalypse. His writings, among others, initiated a campaign of fear that led readers to believe that “inferior” beings, namely the insane, mentally defective, foreign, or nonwhite populations, imperiled the genetic sanctity of superior peoples.<sup>97</sup> Grant warned:

Whether we like to admit it or not, the result of the mixture of two races, in the long run, gives us a race reverting to the more ancient, generalized, and lower type. The cross between a white man and an Indian is an Indian; the cross between a white man and a Negro is a Negro; the cross between a white man and

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<sup>93</sup> While the “science” of eugenics is commonly paired with racial prejudice, its origins lie in xenophobia. Southern and eastern European immigrants, according to eugenicists, threatened the development of an Anglo-Saxon America. *Id.* at 49-50. *See also*, Reginald Horsman, *Race and Manifest Destiny* in *CRITICAL WHITE STUDIES* 140, 143 (explaining the collective belief that America is an Anglo-Saxon country, but distinctly American, and drawn from “the very best stocks of western and northern Europe.”)

<sup>94</sup> The Dawes Act was enacted February 8, 1887, amended in 1891 and 1906 by the Burke Act. This was followed by the Curtis Act (1908) which abolished the tribal jurisdiction of Indian land. Termination of allotment came through the Indian Reorganization Act in 1934. *See generally*, Francis Paul Prucha, *DOCUMENTS OF UNITED STATES INDIAN POLICY* (2000).

<sup>95</sup> Madison Grant, *THE PASSING OF THE GREAT RACE* 18 (1970). *Hereinafter* Grant.

<sup>96</sup> Grant’s book reached such popularity that F. Scott Fitzgerald referenced it in *The Great Gatsby*. Using a combination of Madison Grant and fellow eugenicist Eugene Stoddard, Fitzgerald conjured the character “this man Goddard” who predicted that if we don’t look out the white race will be — will be utterly submerged.” F. SCOTT FITZGERALD, *THE GREAT GATSBY* (1925).

<sup>97</sup> Sherman *Supra* note 90 at 71.

a Hindu is a Hindu; and the cross between any of three European races and a Jew is a Jew.<sup>98</sup>

Presented as academic truth to the general public, the eugencial arguments of *Passing* combined science and ideology<sup>99</sup>, forming a rhetorical structure that “enjoyed a considerable vogue.”<sup>100</sup> Although Grant focused on European populations, his statements created considerable alarm (and provided a battalion of quotations) in American and European racial policy. Arguing that racial intermixture “gives us a race reverting to the more ancient, generalized and lower type,”<sup>101</sup> Grant’s pseudoscience<sup>102</sup> eventually became destructive public policy.

The eugenics movement hit a racist goldmine in Nazi ideology, placing “social failures”<sup>103</sup> as the primary targets for political ire, as well as scapegoats for the ills of society.<sup>104</sup> Adolf Hitler expressed his awe of *Passing*, praising it as “my Bible.”<sup>105</sup> “A people that fails to preserve the purity of its racial blood,” he wrote in *Mein Kampf*, “thereby destroys the unity of the soul of the nation in all its manifestations.”<sup>106</sup> This portentous statement, written in 1925, echoes Grant’s derision of “undesireable,”<sup>107</sup>

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<sup>98</sup> *Id.* at 53.

<sup>99</sup> Hasian, *supra* note 92 at 22

<sup>100</sup> Sherman *supra* Note 90 at 72.

<sup>101</sup> Grant *supra* note 95 at 53.

<sup>102</sup> Robert J. Cynkar correctly notes the curious dichotomy between ideology and science. In pointing out the dearth of trained geneticists amongst eugenists, Cynker points out that a mere ten percent of members of the Advisory Council of the American Eugenics Society could call themselves as such. He writes, “Eugenics quickly became a social crusade based on crude and outdated principles of genetics, animated by a sense of moral purpose.” Robert J. Cynkar *Buck v. Bell: "Felt Necessities" v. Fundamental Values ?* 81 CLMLR 1418, 1426 (1981)

<sup>103</sup> Grant, *supra* note 95 at 53.

<sup>104</sup> Earnest Cox’s *White America* (1923) articulates a syllogism of racial purity and national fortitude:

1. The white race has founded all civilizations.
2. The white race remaining white has not lost civilization.
3. The white race become hybrid has not retained civilization.

ERNEST SEVIER COX, *WHITE AMERICA* 23 (1923).

<sup>105</sup> “His 1916 book *The Passing of the Great Race* won praise from Hitler as “his Bible.”” Paul Lombardo, “*The American Breed*”: *Nazi Eugenics and the Origins of the Pioneer Fund*, 65 ALBLR 743, 759 (2002).

<sup>106</sup> Hitler, *MEIN KAMPF* James Murphy trans (1942), 192.

<sup>107</sup> Grant, *supra* note 95 at 51.

“worthless race types”<sup>108</sup> who clogged a social system that would benefit from a “rigid system of selection through the elimination of those who are weak or unfit.”<sup>109</sup> This view of racial mixture as a disease led to the Holocaust, which targeted Jews, homosexuals, Gentile Poles, Roma, Sinti, the disabled, and Jehovah’s Witnesses.<sup>110</sup> Hitler characterized these groups as a “poison which has invaded the racial body” which needed to be “eliminated so long as there still remains a fundamental stock of pure racial elements.”<sup>111</sup>

### *B. Fear Ingrained in Law: The Racial Integrity Act*

Virginia’s history of antimiscegenation laws<sup>112</sup> exhibits a remarkable conflation of law, public administration, and private prejudice.<sup>113</sup> The ideological correlation of eugenics and Nazism did not deter its political growth in the United States.<sup>114</sup> Eugenicist thought, veiled as hard science, found an ideological heir in Virginia’s antimiscegenation statutes. Three amateur scientists, Walter Plecker<sup>115</sup>, Earnest Sevier Cox<sup>116</sup>, and John

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<sup>108</sup> *Id.* at 50.

<sup>109</sup> *Id.* at 50.

<sup>110</sup> See generally, Raul Hillberg, *The Destruction of the European Jews*; Yisrael Gutman and Robert Rozett estimate between 5.59 and 5.86 million Jewish victims in their *Encyclopedia of the Holocaust*

<sup>111</sup> Hitler *supra* note 106 at 225.

<sup>112</sup> See generally, Barbara K. Kopytoff & A. Leon Higginbotham, Jr., *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO L. J. 1967 (1989). Also JOSHUA D. ROTHMAN, *NOTORIOUS IN THE NEIGHBORHOOD: SEX AND FAMILIES ACROSS THE COLOR LINE IN VIRGINIA, 1787-1861* (2003).

<sup>113</sup> Lombardo *supra* note 3 at 427.

<sup>114</sup> As Vice President, Calvin Coolidge accepted eugenic arguments as scientific fact. In an opinion statement on which groups should be allowed to emigrate to America, he wrote, “Biological laws tell us that certain divergent people will not mix or blend.” *Quoted in* Judy Scales-Trent, *Racial Purity Laws in the United States and Nazi Germany: The Targeting Process*, 23 HUMAN RIGHTS QUARTERLY 259, 290 (2001).

<sup>115</sup> Walter Ashby Plecker, a physician, served as Virginia’s registrar of the Bureau of Vital Statistics from 1912 to 1945. See, Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. Davis L. Rev. 421,425 (1987-1988).

<sup>116</sup> Ernest Cox was an amateur ethnologist who based many of his theories upon youthful travels throughout the African continent. See generally, EARNEST SEVIER COX, *THE SOUTH’S PART IN MONGRELIZING THE NATION* (1926). As Joel Williamson has written, Cox firmly believed that blood “was the carrier of

Powell<sup>117</sup>, led a campaign of racial politics in the state which classified miscegenation as “a curse and a menace to our State and civilization...a crime against society.”<sup>118 119</sup> By insisting on the legitimacy of eugenics<sup>120</sup>, which they defined as “the science of improving stock whether human or animal,”<sup>121</sup> the trio presented a racial apocalypse attributed to imprudent choices of sexual partners. A pamphlet published by the state Bureau of Vital Statistics warned young men and women “considering marriage, the greatest and most important of human relations” and also lawmakers, who were “responsible for the future of the State and welfare of the race.”<sup>122</sup> By presenting the future of the white race as dependent on personal choice, these Virginians attempted to ignite a race panic<sup>123</sup> that would soon be ingrained in law.

In an effort to transform eugenics from propaganda to policy, the three men spearheaded the creation of the Anglo-Saxon Clubs of America.<sup>124</sup> These clubs, which grew to as many as twenty-five chapters by 1923, lobbied for a bill in the Virginia State

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civilization, and to mix the blood and recognize the mixture was to destroy civilization.” JOEL WILLIAMSON, *NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES* 106 (1995).

<sup>117</sup> John Powell was a concert pianist who published a series of articles “The Last Stand,” for the Richmond Times-Dispatch. These columns ran during the period that the Virginia legislature reviewed the Racial Integrity Act in 1926. Lisa Lindquist Dorr, *Arm in Arm: Gender, Eugenics, and Virginia's Racial Integrity Acts of the 1920s*, *JOURNAL OF WOMEN'S HISTORY* Spring 1999 at 143.

<sup>118</sup> Bureau of Vital Statistics, State Board of Health, *EUGENICS IN RELATION TO THE NEW FAMILY AND THE LAW ON RACIAL INTEGRITY* 9 (1934).

<sup>119</sup> Sherman *Supra* Note 90 at 72.

<sup>120</sup> See generally MADISON GRANT, *PASSING OF THE GREAT RACE* (Arno Press, 1970); EARNEST SEVIER COX, *THE SOUTH'S PART IN MONGRELIZING THE NATION* 93 (The White America Society, 1926); WALTER PLECKER, *THE NEW FAMILY AND RACE IMPROVEMENT* (Virginia Bureau of Vital Statistics, 1925); WALTER PLECKER, *EUGENICS IN RELATION TO THE NEW FAMILY AND THE LAW ON RACIAL INTEGRITY* (Virginia Bureau of Vital Statistics, 1924); *THE FOUNDERS OF THE REPUBLIC ON IMMIGRATION, NATURALIZATION AND ALIENS* (Madison Grant & Charles Stewart Davidson eds.) (1928);

<sup>121</sup> Bureau of Vital Statistics, State Board of Health, *EUGENICS IN RELATION TO THE NEW FAMILY AND THE LAW ON RACIAL INTEGRITY* 3 (1934)

<sup>122</sup> The New Family *supra* note 5 at 4.

<sup>123</sup> As John Mencke has depicted “One drop of black blood, carrying as it did these myriad undesirable characteristics, was enough to brand its possessor as a child of Africa, with all of the connotations of savagery and sensuality which such a designation inherently involved in the white mind.” JOHN G. MENCKE, *MULATTOES AND RACE MIXTURE* 61 (1979).

<sup>124</sup> Through the Anglo-Saxon Clubs, Powell, Cox, and Plecker successfully lobbied the state legislature to create laws banning racial intermarriage. Gregory Michael Dorr, *Principled Expediency: Eugenics, Naim v. Naim and the Supreme Court*, 42 *AMJLH* 119, 127 (1998).

Assembly that would prevent the unfortunate contamination of the white race.<sup>125</sup> Adhering to an absolutist dogma that held on to a seemingly rigid conception of racial purity, the proponents and their clubs aimed for nothing less than a complete expulsion of all impure elements from the white race.<sup>126</sup> In a political victory for the Anglo-Saxon Clubs, state legislators passed the 1924 Racial Integrity Act<sup>127</sup>, which prohibited all interracial marriages in the state between white and nonwhite persons.

The Integrity Act instituted structure, reliance, and rigidity to a social classification system viewed as insufferably ambiguous. With racial identity assuming a prominent legislative purpose, the Act necessitated the demarcation of racial lines that defined nonwhite persons as anyone with the ancestry of anything other than Caucasian. As Richard Sherman observes in his artful study of the 1924 Integrity Act, three objectives stood out as hallmarks of Virginia's proposed race regime. First, the Act required all citizens within the state born after June 14, 1912 to register their racial composition with the Bureau of Vital Statistics<sup>128</sup>, with Walter Plecker<sup>129</sup> as director.<sup>130</sup>

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<sup>125</sup> Sherman *supra* Note 90 at 74.

<sup>126</sup> The clubs had three written goals: "First, by the strengthening of Anglo-Saxon instincts, traditions and principles among representatives of our original American stock; second the intelligent selection and exclusion of immigrants; and third the fundamental and final solution of our racial problems in general, most especially of the negro problem." Lombardo *Supra* note 3 at 429.

<sup>127</sup> An Act To Preserve Racial Integrity, 1924 Va. Acts ch. 371 (Repealed 1975).

<sup>128</sup> "Be it enacted by the general assembly of Virginia, That the State registrar of vital statistics may, as soon as practicable after the taking effect of this act, prepare a form whereon the racial composition of any individual, as Caucasian, Negro, Mongolian, American Indian, Asiatic Indian, Malay, or any mixture thereof, or any other non-Caucasic strains, and if there be any mixture, then, the racial composition of the parents and other ancestors, in so far as ascertainable, so as to show in what generation such mixture occurred, may be certified by such individual, which form shall be known as a registration certificate." An Act To Preserve Racial Integrity, 1924 Va. Acts ch. 371 (Repealed 1975).

<sup>129</sup> Praising Virginia's system of racial registration, Plecker wrote that "Hitler's genealogical study of the Jew is not more complete." See, Lombardo, *supra* note 3 at 449.

<sup>130</sup> Walter Plecker developed a reputation for vindictiveness during his term as Registrar. For example, in 1924, Plecker rebuked Mrs. Robert Cheatham, a white woman, for falsely reporting her spouse's race on the birth certificate of their child. The Lynchburg health department, Plecker revealed, listed her husband as black, although she has listed him as white. In a letter dated April 20, 1924, Plecker wrote "This is to give you warning that this is a mulatto child and you cannot pass it off as white. You will have to do something about it." He added, "You will have do to something about this matter and see that this child is



Second, the race registration certificates determined a valid marriage, thus preventing any nonwhites from illegally marrying whites. Third, and most notably, the Act defined a white person as one “whose blood is entirely white, having no known, demonstrable or ascertainable admixture of the blood of another race.”<sup>131</sup> This wording of “no known” admixture underscored the traditional conception of white racial identity that disallowed a cognizant declaration of a hybrid past.<sup>132</sup>

### C. Accommodating the Elite: Redefining the Parameters of Whiteness

Despite popular and political discourse surrounding racial intermixture, the absolutism of the Racial Integrity Act threatened to undermine Virginia’s social definition of “white” which allowed for minimal traces of American Indian ancestry. The *Richmond News Leader* criticized this proposal as “an amazing ignorance of Virginia history and works the most cruel sort of injustice.”<sup>133</sup> State legislators successfully amended the restriction to avoid the reclassification of white elites with remote traces of Indian blood. In this demonstration of racial instability, Judy Scales-Trent points out that the original measure could have “outed” no less than sixteen legislators who thought of themselves as white.<sup>134</sup> The revised Act ensured the legal protection of prominent white Virginians who openly declared an ancestral link to the famed marriage of John Rolfe

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not allowed to mix with white children. It cannot go to white schools and can never marry a white person in Virginia. It is an awful thing.” He also lambasted the midwife who performed the delivery, writing “it is a penitentiary offense to willfully state that a child is white when it is colored. You have made yourself liable to very serious trouble by doing this thing.” J. Douglas Smith, *The Campaign for Racial Purity and the Erosion of Paternalism in Virginia, 1922-1930: “Nominally White, Biologically Mixed, and Legally Negro”* JOURNAL OF SOUTHERN HISTORY, Feb. 2002 at 65.

<sup>131</sup> Sherman *Supra* note 90 at 85.

<sup>132</sup> Racial passing required that one disavow nonwhite ancestry as a part of one’s racial identity. See, F. James Davis, WHO IS BLACK? 14(1997). See also, Randall Kennedy, Racial Passing, 62 OHIO ST. L.J. 1145 (2001).

<sup>133</sup> Sherman *Supra* note 90 at 85 (quoting RICHMOND NEWS LEADER Feb 8, 1926).

<sup>134</sup> Judy Scales-Trent, *Racial Purity Laws in the United States and Nazi Germany: The Targeting Process*, 23 HUMAN RIGHTS QUARTERLY 259, 269 (2001).

and the “Indian Princess” Pocahontas.<sup>135</sup> In this effort, “white” was redefined as one “whose admixture does not include other than white and North American Indian blood, and their legal descendants, shall be deemed to be white persons.”<sup>136</sup>

This incorporation did not include all persons of mixed Indian-white ancestry, however. Bowing to opposition from more conservative quarters that portended the “death knell of the white man,”<sup>137</sup> the legislature drafted a definition sufficient to appease the eugenicists and accommodate the nominal Indians. The Senate passed an amendment that “members of Indian tribes living on reservations allotted them by the Commonwealth of Virginia having one-fourth or more of Indian blood and less than 1/16 of Negro blood shall be deemed tribal Indians so long as they are domiciled on said reservations.”<sup>138</sup> Assimilated mixed bloods with minimal amounts of Native ancestry would register as “white,” while other mixed bloods with strong ties to Indian communities would register as “Indian.” The spirit of the original proposal did not vanish quietly, however. Powell predicted the downfall of white Virginia as a result of this relaxed standard: “If a solution be not found by the present generation, it will never be found, and our civilization and our race will be swallowed up in the quagmire of mongrelization. There is no minute to be lost. Virginians, be awakened from your lethargy of pleasure and prosperity. The call has pealed forth for the last stand.”<sup>139</sup>

Within this racial police state, miscegenistic exceptionalism assumes a curious place. Hybridity within a context of racial panic seems spurious when paired with a

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<sup>135</sup> Randall Kennedy insightfully recognizes that the Rolfe-Pocahontas marriage—a fullblood Indian woman and an Englishman—would have constituted a felony. Kennedy, *INTERRACIAL INTIMACIES*, note 43 at 276.

<sup>136</sup> An Act To Preserve Racial Integrity, 1924 Va. Acts ch. 371 (Repealed 1975).

<sup>137</sup> Sherman *Supra* note 90 at 78.

<sup>138</sup> *Id.* at 90.

<sup>139</sup> *Id.* at 87, quoting RICHMOND TIMES-DISPATCH, Feb 16, 1926.

frenzied campaign to police the purity of whiteness itself. In this case, state law manifests the social practice of exempting “no other admixture of blood than white and American Indian”<sup>140</sup> Similarly, such allowances appear to blatantly contradict the desired ideal of impeccable whiteness, one that evokes Madison Grant’s characterization of miscegenation as “a frightful disgrace to the dominant race.”<sup>141</sup>

The law’s very limited tolerance of mixed blood reveals both the popular and juridical conceptions of whiteness in Virginia.<sup>142</sup> Contrary to the American doctrine of hypodescent<sup>143</sup> which assigns racial identity according to the most disadvantaged race, the amended Virginia statute enveloped “tainted” blood as a valid genealogical ingredient. Thus, a person with 1/16<sup>th</sup> Indian ancestry and 15/16 white ancestry would not be categorically denied the privileges and protections of whiteness<sup>144</sup>, despite the damaging taint that would otherwise disqualify a clear assertion of racial purity. This exceptionalism extended to Native ancestry only—similar amounts of African ancestry would automatically reclassify the person as irreparably black. The Racial Integrity Act

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<sup>140</sup> Racial Integrity Act of Virginia, 1924, VA.CODE ANN. § 20--54 (1960 Repl. Vol.).

<sup>141</sup> Grant, *supra*, note 95 at Chapter vii.

<sup>142</sup> The act of remembering and claiming Pocahontas as an ancestor comprises an entire subfield of genealogy. The book, *Pocahontas’ Descendants*, lists thousands of living persons who can accurately trace ancestry to her child and grandchildren. This book, last updated in 1997, has been continually expanded and revised since its inception in 1887. See generally POCAHONTAS’ DESCENDANTS (Stuart E. Brown & Lorraine F. Meters eds., 1997).

<sup>143</sup> F. James Davis defines hypodescent as “meaning that a single drop of black blood makes a person black.” F. JAMES DAVIS, WHO IS BLACK ? 5(1997).

<sup>144</sup> The idea of “whiteness as property” has become a much debated and analyzed issue in critical scholarship. Similar to real property, Cheryl Harris’s form of racial property paralleled the main characteristics of real property. Imbuing race with property traits, exclusion and subjugation, Harris argues that the object of value (race or property) increases with exclusivity. Ownership of this construct “evolved for the very purpose of racial exclusion.” Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1737 (1993).

proclaimed that any trace of African ancestry, regardless of how remote, unquestionably made a person black.<sup>145</sup>

Confusing and contradictory exceptions to racially based regimes arise in even the most oppressive circumstances. Virginia's unorthodox exception contrasts sharply with eugenic arguments that allegedly decried the slightest relaxation of racial boundaries. Unlike the "science" of eugenics, some state governments overlooked ancestry as a determinant of privileged citizenship and looked to reputation instead, thus rejecting hypodescent as the major determinant of racial identity. In South Carolina's high court in 1835, Justice William Harper abstained from the common practice of fractional genealogy for a more interpretive approach to racial classification.<sup>146</sup> In his support of a more fluid conception of race rather than a mathematical alchemy<sup>147</sup>, Harper secured the status of many a "white" citizen by overlooking their ancestry and turning to their reception in the community instead. In *State v. Cantey*<sup>148</sup> he wrote that reputation based on public opinion, in addition to personal character and conduct should be considered in deciding one's reputation. Under this scheme, two people of similar racial compositions could be classified differently, according to their reception the community. Thus, blood alone should not stand as the sole determinant, because 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."<sup>149</sup>

Exceptional definitions of what it means to be white may shift to reflect

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<sup>145</sup> See Generally: Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998).

<sup>146</sup> Kevin M. Maillard, *The T'aint of Taint: Memory and the Denial of Mixed Race in the U.S.* 118(2004)(unpublished Ph.D. dissertation, The University of Michigan) (on file with author).

<sup>147</sup> RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 25, (2001).

<sup>148</sup> 11 S.C. Eq. 614, 615 (2 Hill Eq.) (1835)

<sup>149</sup> *Id.*

community and temporal standards of inclusion and privilege.<sup>150</sup> As Ian Haney Lopez has written, “whiteness, or the state of being white, thus turns on where one is.”<sup>151</sup> Preservation of a racially-based regime rested upon an absolute right of “superiors” to define the parameters of the white race.<sup>152</sup> South Carolina’s interpretation allowed people with certifiable black ancestry to be considered white because people in the community thought of them as white. Such a social definition of race accorded privilege to those who had proven worthy of inclusion. Similar exceptions were given to people of Japanese ancestry in Nazi Germany, who were exempted from their racial purity laws.<sup>153</sup> Even though the ancestry of these citizens by definition thwarted a conception of a pure German race, the state amended its definition of Aryan to accommodate them.<sup>154</sup> As Virginia’s selective attention to the meaning of “white” demonstrates, the quest for racial purity, even in the most extreme of racial regimes, permits exceptions to the dogmatic rules that define them.

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<sup>150</sup> Greek and Italian –American miners fought for classification as white in a 1912 strike demanding that “the category of Caucasian worker changed and expanded” to include them. James R. Barrett and David Roediger, *How White People Became White*, CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 404, (Richard Delgado & Jean Stefancic eds., 1997). See also J. Alexander Karlin, *The Italo-American Incident of 1891 and the Road to Reunion*, JOURNAL OF SOUTHERN HISTORY, 8(1942); Gunthar Peck, *Padrones and Protest: ‘Old’ Radicals and ‘New’ Immigrants in Bingham, Utah 1905-1912*, WESTERN HISTORICAL QUARTERLY, (May 1993). Irish Americans faced racial epithets such as “niggers turned inside out,” while African Americans were sometimes called “smoked Irish.” NOEL IGNATIEV, HOW THE IRISH BECAME WHITE 41(1995). See also DAVID R. ROEDIGER, THE WAGES OF WHITENESS 133(1991); RICHARD BROOKHISER, THE WAY OF THE WASP (1991). American Jews embodied the greatest fears of European eugenists, who directed their miscegenist ire to Jewish-Gentile mixing. JOHN HIGHAM, STRANGERS IN THE LAND 226(1955). See also Karen Brodtkin Sacks, *How Did Jews Become White Folks?*, CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 404, (Richard Delgado & Jean Stefancic eds., 1997); HENRY L. FEINGOLD, ZION IN AMERICA 143(1974).

<sup>151</sup> Lopez *supra* note 18 at xiii.

<sup>152</sup> Cheryl Harris’ conceives of a relation between race and property interests where “possessors of whiteness were granted the legal right to exclude others from the privileges inhering in whiteness.” Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1736 (1993).

<sup>153</sup> Scales-Trent *supra* note 134 at 269

<sup>154</sup> *Id.* at 269.

#### IV. THE LEGEND OF POCAHONTAS

The legend of Pocahontas claims the rarefied status of glorious and desirable miscegenation. Over two million living Virginians, remarkably “white” in all respects, very “proudly trace their ancestry back to the Indian girl.”<sup>155</sup> Included in this massive population are descendants of the noted First Families of Virginia<sup>156</sup> (“F.F.V.”), an exalted superstrata of American citizenry characterized by exceptional wealth and social influence in the colonial era.<sup>157</sup> Mark Twain lampooned the reputation of the F.F.V.’s in the novel *Puddn’head Wilson*. Satirizing the aristocratic clannishness of Old Virginia, he writes:

In their eyes it was a nobility. It had its unwritten laws, and they were as clearly defined and as strict as any that could be found among the printed statutes of the land. The F.F.V. was born a gentleman; his highest duty in life was to watch over that great inheritance and keep it unsmirched. Those laws were his chart; his course was marked out of it; if he swerved from it by so much as half a point of the compass it meant shipwreck to his honor; that is to say, degradation from his rank as a gentleman.<sup>158</sup>

A mocking truth emerges from Twain’s comedy. By invoking birth and inheritance, he underscores the importance placed on genealogy while lambasting their obsession with their ancestral past. Within this stratum are noted families whose surnames evoke the colonial past of Virginia and the nation itself: Jefferson, Lee, Randolph, and Marshall.<sup>159</sup>

Many of these sentries of lineage cabined the desire to “keep it unsmirched” by celebrating Pocahontas as a cooperative and forward-thinking Indian Princess who willingly embraced European culture. With this kind of exaltation, Pocahontas, the

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<sup>155</sup> Philip Young, *Mother of Us All*, KENYON REVIEW 394 (1962).

<sup>156</sup> The William and Mary Quarterly published a short piece that asked the question, “Who Were the F.F.V.’s?” which noted that the term “obviously had no reference to the early settlers, but to those families who in colonial times were socially prominent and wealthy.” *The F.F.V.’s of Virginia*, WILLIAM AND MARY COLLEGE QUARTERLY HISTORICAL MAGAZINE, 23.4 (April 1915): 227.

<sup>157</sup> See generally Marshall Fishwick, *F.F.V.’s* 11 AMERICAN QUARTERLY 147(1959).

<sup>158</sup> SAMUEL LANGHORNE CLEMENS, *PUDDN’HEAD WILSON* 58 (Sidney Berger ed., Norton Co. 1980).

<sup>159</sup> Young, *supra* note 155 at 394.

“Indian Princess,” stands as the first American aristocrat.<sup>160</sup> Although this group as a whole was tacitly limited by race and explicitly characterized by power, open assertions of nonwhite ancestry left no taint on their cherished reputation. In 1811, Augustus John Foster remembered her as “Our Indian Queen Pocahontas,”<sup>161</sup> echoing John Dales’ 1614 characterization of “Motoa the daughter of Powhatan.”<sup>162</sup> Pocahontas, who John Rolfe initially chafed for her “rude education, manners barbarious and cursed generation,”<sup>163</sup> is proudly claimed by many Americans as a legitimate ancestor. Uniformly, these descendants continue to identify as white Americans.<sup>164</sup>

Like many family legends, the story of Pocahontas exists somewhere between practical truth and romanticized fiction. Much of her legend has been recreated in art and literature, a problematic representation that perpetuates fiction as authoritative fact.<sup>165</sup> It is widely agreed that she was the daughter of the Indian leader Powhatan<sup>166</sup>, who headed a confederation of tribes in the southeast portion of what is now known as Virginia.<sup>167</sup> She is famously believed to have saved the English explorer John Smith from death, and

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<sup>160</sup> Rayna Green, *The Pocahontas Perplex: The Image of Indian Women in American Culture*, in *UNEQUAL SISTER: A MULTICULTURAL READER IN U.S. WOMEN’S HISTORY* 15 (Ellen Carol Dubois and Vicki L. Ruiz ed., 1990).

<sup>161</sup> Margaret Bailey Tinkcom, *Caviar Along the Potomac: Sir John Augustus Foster’s NOTES ON THE UNITED STATES, 1804-1812*, *THE WILLIAM AND MARY QUARTERLY*, 3<sup>rd</sup> Ser. 8 (1951): 104.

<sup>162</sup> Henry Culverwell Porter, *Alexander Whitaker: Cambridge Apostle to Virginia*, *THE WILLIAM AND MARY QUARTERLY* 3<sup>rd</sup> Ser. 14 (1957): 339.

<sup>163</sup> *Id.* at 393.

<sup>164</sup> David Morenus, *Pocahontas Descendants*, at <http://www.pocahontas.morenus.org> (last updated November 4, 2005).

<sup>165</sup> In literature, art, and drama, Pocahontas as history developed into Pocahontas as legend. In these artistic representations, history becomes entertainment, and these lessons learned take on additional goals compounded with the transmission of mere facts of the past. Barker’s physical descriptions of *La Belle Sauvage* recreate her as an indigenized Helen of Troy. John Rolfe describes Pocahontas’ beauty, declaring, “Where’er thou art, still art thou heavenly/ The rudest clime robs not thy glowing bosom of its nature.” JAMES NELSON BARKER, *THE INDIAN PRINCESS, OR LA BELLE SAVAUGE, AN OPERATIC MELO-DRAME IN THREE ACTS* 29 (1808). (hereinafter “Barker”). Flowing from such representations, contemporary culture and scholarship routinely describe Pocahontas as beautiful.

<sup>166</sup> Rebecca Blevins Faery, *CARTOGRAPHIES OF DESIRE* 112 (1999); William M.S Rasmussen & Robert S. Tilton, *Pocahontas*, *AMERICAN HISTORY*, July 1, 1995 at 1076.

<sup>167</sup> *Id.* at 1077.

to have alerted the colonists of her father's future attacks.<sup>168</sup> As eulogized in James Nelson Barker's drama, *La Belle Sauvage*,

Oh, do not, warriors do not!  
 Father, incline your heart to mercy;  
 He will win your battles, he will vanquish your enemies.  
 Brother, speak! Save your brother!  
 Warriors are you brave, preserve the brave man!  
 Miami, priest, sing the song of peace;  
 Ah! Strike not, hold! Mercy!  
 White man, thou shalt not die; or I will die with thee!<sup>169</sup>

Barker's dramatization portrays a sympathetic Indian girl who bravely stood for cooperation between natives and colonists. As she pleads for her father's mercy upon the white man, she places herself in the midst of an interracial conflict characterized by violence and death. In declaring "I will die with thee," Barker canonizes Pocahontas as a tribal mediator and potential martyr who readily offers her life for the cause of intercultural peace. John Smith's own account of the rescue, written in 1624, offers a firsthand account of Pocahontas' bravery:

...two great stones were brought before Powhatan: then as many as could layd hands on him, dragged him to them, and thereon laid his head, and being ready with their clubs, to beate out his braines, Pocahontas the Kings dearest daughter, whom no intreaty could prevaile, got his head in her armes, and laid her owne upon his to save him from death: whereat the Emperour was contented he should live to make him hatchets, and her bells, beads, and copper.<sup>170</sup>

Like Barker's fictionalization, Smith's rendition celebrates her affinity for intercultural

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<sup>168</sup> An abundance of literature exists on the famous story of John Smith and Pocahontas. *See generally* DAVID PRICE, *LOVE AND HATE IN JAMESTOWN: JOHN SMITH, POCAHONTAS, AND THE HEART OF A NEW NATION* (2003); ANN UHRY ABRAMS, *The PILGRIMS AND POCAHONTAS: RIVAL MYTHS OF AMERICAN ORIGIN* (1999); FRANCES MOSSIKER, *POCAHONTAS: THE LIFE AND LEGEND* (1976); MARIE A. LAWSON, *POCAHONTAS AND CAPTAIN JOHN SMITH: THE STORY OF THE VIRGINIA COLONY* (1950). *See also* CARL BRIDENBAUGH, *JAMESTOWN, 1544-1699* (1980); LAUREN PAINE, *CAPTAIN JOHN SMITH AND THE JAMESTOWN STORY* (1973).

<sup>169</sup>Barker *supra* note 165 at 30.

<sup>170</sup> JOHN SMITH, *THE COMPLETE WORKS OF CAPTAIN JOHN SMITH*, Vol. 2, 150-1 (Phillip Barbour ed., 1986).



cooperation. Rebecca Blevins Faery observes that viewing Pocahontas's relationship with the colonists as love and sacrifice reveals a need by white Americans to "tolerate our history."<sup>171</sup> This rendition of her sacrifice appeals to a humanistic approach to racial difference by asserting the common brotherhood of Indian and white.

Pocahontas' cooperation with whites would extend to her relationship with the Englishman John Rolfe, to whom she reportedly bore a son.<sup>172</sup> Rolfe justified their match as "for the good of this plantation, for the honour of our cuntry, for the glory of God, for my owne salvation, and for converting to the true knowledge of God and Jesus Christ, an unbelieving creature, namely Pokahuntas."<sup>173</sup> Faery notes that Rolfe asked the governor of the colony for permission to marry Pocahontas, emphasizing her "savagery" by saying that he will "gyve [her] breade" and "cover" her.<sup>174</sup> This presentation of his interracial desire highlights Rolfe's religious paternalism rather than sexual longing—he appeals to conversion and insists that he is not driven by the "unbridled desire of Carnall affection."<sup>175</sup> With this plea for exceptionalism, Rolfe distanced himself from the social practices which viewed interracial marriage as a "hungrye appetite to gorge my selfe with incontineneye."<sup>176</sup> Observers of this colonial interracialism did not hesitate to extend their praise onto the felicitous match. Robert Beverley wrote of Pocahontas's son

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<sup>171</sup> Faery, *supra* note 77 at 118.

<sup>172</sup> In Barker's drama, *La Belle Sauvage* (1808), Pocahontas expresses her exogamous love for the Englishman Rolfe:

I know not what a beggar is; but oh! I would I were a beggar's daughter, so thou wouldst call me love. Ah! Do not any longer call me king's daughter. If thou feelest the name as I do, call me as I call thee; thou shalt be my lover, I will be *thy* lover." Barker, *supra* note 165 at 39.

<sup>173</sup> *Quoted in Woods, supra* note 49 at 50-1.

<sup>174</sup> Faery *supra* note 77 at 118-9.

<sup>175</sup> *Id* at 199.

<sup>176</sup> *Id.*

Thomas Rolfe, “from whom are descended several families of note in Virginia.”<sup>177</sup> In a letter to the Queen of England, telling her of the first Indian to have a “child in marriage by an English man,” John Smith characterized the match as a “matter surely, if my meaning be truly consider’d and well understood, worthy a Prince’s Information.”<sup>178</sup> Smith also later remarked that Pocahontas’ “prosperity is at this day in good Repute in Virginia.”<sup>179</sup>

Such renditions fuel the epitomic myth of the “Indian Princess” as the foremother of a multiethnic nation. Henry Adams asserted that “No American needs to learn that Pocahontas is the most romantic character in the history of this country.”<sup>180</sup> This aptly describes a tale originating in Virginia,<sup>181</sup> the Old Dominion State, which George Willison has described as a fertile field for romancers.<sup>182</sup> As an arbiter of colonial diplomacy, Pocahontas may be viewed as the patron saint of harmonious race relations. This interpretation distinguishes her from others of her community and time; her legendary sense of adventure and worldliness becomes fertile ground in which the ambitious seeds of nationhood take root and grow. In a 1962 issue of the *Kenyon Review*, Phillip Young magnified her name as “one of our few, true native myths, for with our poets she has successfully attained the status of goddess, has been beatified and made

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<sup>177</sup> JOHN DAVIS, *THE LIFE AND SURPRISING ADVENTURES OF THE CELEBRATED JOHN SMITH, FIRST SETTLER OF VIRGINIA, INTERSPERSED WITH INTERESTING ANECDOTES OF POCAHONTAS, AN INDIAN PRINCESS* 55 (Pittsburgh, PA 1815).

<sup>178</sup> *Id.* at 41-2.

<sup>179</sup> *Id.* at 44.

<sup>180</sup> HENRY ADAMS, *Captaine John Smith*, in *HISTORICAL ESSAYS* 56 (Scribner’s Sons, 1891).

<sup>181</sup> This characterization is an apt one, seeing that Virginia is the birthplace to a substantial number of iconic American events and personages, and this locale has stood as representative of not only the gentility of the Old South, but also as emblematic of American patriotism.

<sup>182</sup> GEORGE WILLISON, *BEHOLD VIRGINIA: THE FIFTH CROWN. BEING THE TRIALS, ADVENTURES & DISASTERS OF THE FIRST FAMILIES OF VIRGINIA, THE RISE OF THE GRANDEES & THE EVENTUAL TRIUMPH OF THE COMMON & UNCOMMON SORT IN THE REVOLUTION* (1951).

holy, and offered as a magical and moving explanation of our national origins.”<sup>183</sup>

Pocahontas survives as the eternally willing colonial subject, a lyrical and national ideal for cooperative colonialism.<sup>184</sup> Two episodes of her life: her rescue of Smith and her interracial romance, persist in American collective memory that memorialize her as a pliant Indian maiden willing to sacrifice her community and family to the delight of European colonists.<sup>185</sup> Like the ancient Greeks who turned to venerable myths to explain the origin of Athenian citizens, Americans look to Pocahontas to provide an autochthonous origin<sup>186</sup>. The poet Vachel Lindsay nearly deified *Our Indian Mother*<sup>187</sup> in 1917: “John Rolfe is not our ancestor/ We rise from out the soul of her.”<sup>188</sup> This thespian hymn of the sanctity of the original Indian Princess portrays the original union as an American/Immaculate conception; the symbolic womb of Pocahontas, “The

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<sup>183</sup> Young, *supra* note 155 at 392.

<sup>184</sup> Barker’s *La Belle Sauvage* (1808) encapsulates the hope of the ethical colonialist in the ideal solution for the Indian problem, in that it portrays Pocahontas as a willing subject in the transformation from savage to civil. His play exemplifies a revived memory of Pocahontas, for as a form of entertainment, it conveys to audiences some 200 years after her death the imagined particulars of her life. In art, then, we see not only the author’s particular rendition of the legend, but also the version of it that contributed to the re-imaginings of its viewers. This reading fuels the spectator’s vision of Pocahontas as a privileged daughter of a powerful Native confederation—a historical and mythical figure that accepted the marked difference and cultural disparity between her own land and that of “Virginia.” She tells her suitor:

Thou’st ta’en me from the path of savage error,  
Blood stain’d and rude, where rove my countrymen,  
And taught me heavenly truths, and fill’d my heart  
With sentiments sublime, and sweet, and social.

This depiction of her awakening, that “path of savage error,” and the perceived consent to its rapid transformation are the very force of romantic imaginations because they forward and archetypal image of the participating and submissive colonial subject. This popular story, circulated as folklore and history, provides the ultimate image of inconsequential conquest: the culmination of white hopes for an idealized, nonviolent, and beautiful past. Barker, *supra* note 165 at 52.

<sup>185</sup> Paula G. Allen has written an alternative biography of Pocahontas that tells her story from within an American Indian Oral Tradition, thus honoring the “myths, the spirits, the supernatural, and the worldview that informed her actions and character.” Paula Gunn Allen, *POCAHONTAS: MEDICINE WOMAN, SPY, ENTREPRENEUR, DIPLOMAT* (2003).

<sup>186</sup> See generally ANN UHRY ABRAMS, *THE PILGRIMS AND POCAHONTAS: RIVAL MYTHS OF AMERICAN ORIGIN* 8 (1999).

<sup>187</sup> Vachel Lindsay, *Our Indian Mother*, in *COLLECTED POEMS* 106 (1925).

<sup>188</sup> *Id.* at 106.

Mother of Our Nation” becomes the birthplace of America.<sup>189</sup> From the body of the Indian woman and the ideals of the European man is born a Native citizen to face and conquer the New World. This view of Indians as America’s version of “Goths and Gauls”<sup>190</sup> roots the concept of the “melting pot”<sup>191</sup> in the ancient foundation of a mystical Indian blood. European and minimally native, the new and unique American creature comprises a new nationality that fuses the best elements of Europe while borrowing the symbolic gene of the American Indian Princess.<sup>192</sup>

## V. THE VANISHING INDIAN

Contemporary social practice approximates Virginia’s 1924 ratification of Indian exceptionalism. Claiming Native ancestry has acquired a certain vogue amongst non-Indians, in stark contrast to claiming African ancestry. The American Indian population

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<sup>189</sup>See generally, PHILIP JENKINS, DREAM CATCHERS: HOW MAINSTREAM AMERICA DISCOVERED NATIVE SPIRITUALITY (Oxford University Press, 2004).

<sup>190</sup> This formulation led William Gilmore Simms to envision a perfect subject for the establishment of America as a nation with an independent cultural past. SUSAN SHECKEL, THE INSISTENCE OF THE INDIAN: RACE AND NATIONALISM IN 19<sup>TH</sup> CENTURY AMERICAN CULTURE 9 (1998).

<sup>123</sup>This argument may raise concerns about the meaning of ethnic blending in America, but I raise this issue only to reexamine the inclusion of Native ancestry as a method of achieving an independent, American nationality without succumbing to the calculations of hypodescent. Israel Zangwill, author of THE MELTING POT, famously wrote:

“Europe are melting and re-forming! Here you stand, good folk, think I, when I see them at Ellis Island, here you stand [Graphically illustrating it on the table] in your fifty groups, with your fifty languages and histories, and your fifty blood hatreds and rivalries. But you won’t be long like that, brothers, for these are the fires of God you’ve come to--these are the fires of God. A fig for your feuds and vendettas! Germans and Frenchmen, Irishmen and Englishmen, Jews and Russians--into the Crucible with you all! God is making the American.”

ISRAEL ZANGWILL, THE MELTING-POT: DRAMA IN FOUR ACTS 33 (Macmillan, 1923) (characterizing America as a divinely mandated “crucible” to melt the “fifty” barbarian tribes of Europe into a metal from which He can cast Americans).

<sup>192</sup> Faery *supra* note 77 at 152 (“That mythohistory offered a crucial ideological foundation for the nation’s future.”)

has grown from 524,000 in 1960 to 2,726,000 at the time of the 2000 Census.<sup>193</sup> This increase may have occurred due to a number of factors: changing American attitudes toward Native Americans, growing fascination with Indian spirituality<sup>194</sup>, and financial incentives of tribal membership.<sup>195</sup> Commentators have also noted this striking increase in the Native population.<sup>196</sup> Each of these factors points to Indian blood as the new frontier of mixed race, with a healthy suspicion placed on those Indian “wannabes” who have recently discovered their Native ancestry.<sup>197</sup> While multiraciality is and should be a question of personal autonomy in defining oneself, attenuated strains of blood in “new Indians” who assert tribal connections and seek indigenous culture are individual matters. What separates these recent declarations of identity (and concomitant cultural shift) from

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<sup>193</sup> 1960 Indian population 524,000. Department of Commerce, Bureau of the Census; *U.S. Census of Population: 1960*, Vol. I at 29.

2001 American Indian, Alaska Native population 2,726,000. U.S. Census Bureau, Statistical Abstract of the United States:2002 at 16.

2000 American Indian or Alaskan Native and White 1,118,466. American Indian or Alaskan Native and Black 191,261. Ingram, Parker, Schenker, Weed Hamilton, Arias, Madans. *United States Census 2000 Population With Bridged Race Categories*. National Center for Health Statistics. Vital Health Stat 2(135) 2003 at 16.

<sup>194</sup> Shari Huhndorf, *From the Turn of the Century to the New Age: Playing Indian, Past and Present*, in *AS WE ARE NOW: MIXBLOOD ESSAYS ON RACE AND IDENTITY* 181 (William S. Penn ed., 1997). See also, Shari Huhndorf, *Going Native: Indians in the American Cultural Imagination* (2001), Phillip Deloria, *Playing Indian* (1998)

<sup>195</sup> At a congressional hearing on Indian gaming, James Martin, executive director of United South and Eastern Tribes, Inc, said that casino proceeds have funded a range of social programs, including “home ownership initiatives, tuition assistance for everything from private schools to post-doctorate work, national health insurance for tribal members, and access to top-notch health clinics.” *Oversight Hearing Before the Committee on Resources*, U.S. House of Representatives at 74, (statement of James T. Martin) (2005).

<sup>196</sup> From 1960 to 1990 the number American Indians in the U.S. Census more than tripled. Joane Nagel attributes much of the population increase to “ethnic switching:” a practice where “non-Indians” in one census become “Indians” in the next. Joane Nagel, *American Indian Ethnic Renewal: Politics and the Resurgence of Identity*, 60 *AMERICAN SOCIOLOGICAL REVIEW* 947 (1995). See generally Michael Omi, *Racial Identities and the State: The Dilemmas of Classification*, 15 *Law & Ineq.* 7 (1997), Jeffrey S. Passel, *The Growing American Indian Population, 1960-1990: Beyond Demography*, 16 *Population Res. & Pol'y Rev.* 11, 17 (1997).

<sup>197</sup> Regarding the opinions of tribal members on “new Indians,” Jack Hitt of the New York Times writes, “This joke -- about the white person claiming a Cherokee princess -- is heard pretty often these days from any Indian, coast to coast. In the same way that blacks poke fun at white men who can't jump or Jews mock goyim mispronunciations of Yiddish words, it is not meant as much to put down others as to enunciate the authenticity and insider status of the person telling the joke. It is a way to assuage a new kind of ethnic unease that can be felt throughout Indian Country.” Jack Hitt, *The Newest Indians*, N.Y. Times, August 21, 2005 at Sec. 6.

others is the extent of identification that engendered by blood quantum. To announce a connection to a “Cherokee Indian Princess,” may indeed be a valid, yet unquestionably fleeting, assertion of ancestry, but associating, identifying, and commiserating with a specific Indian community goes beyond symbolic and historic declaration to mark a dynamic shift in racial epistemology.

*A. The Indian Grandmother Complex: A Different Kind of Birth for the Nation*

Vine Deloria, Jr. has famously critiqued this “Indian Grandmother Complex.” In *Custer Died for Your Sins*, he laments the countless times that well-intentioned whites “visit my office and proudly proclaim that he or she was of Indian descent.”<sup>198</sup> But rather than merely criticizing these fantastic anecdotes, he questions the “need to identify as partially Indian.”<sup>199</sup> He acknowledges that most often, claimants avoid the genealogical perils and familial horrors of a male Indian ancestor, which he interprets as an avoidance of the fearful progenitor who “has too much of the aura of the savage warrior, the unknown primitive, the instinctive animal, to make him a respectable member of the family tree.”<sup>200</sup> To crown the *grandmother* a princess, however, aggrandizes genealogical prestige by centralizing a romantic story of the chief’s daughter and the rugged frontiersman. This parallels the story of Pocahontas, who deserted the House of Powhatan and fled to England, thus renouncing her “barbarous” culture of origin to convert to the civilized world of her Christian hero.<sup>201</sup>

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<sup>198</sup> Deloria *supra* note 34 at 10.

<sup>199</sup> *Id.* at 11.

<sup>200</sup> *Id.* at 11.

<sup>201</sup> Faery *supra* note 77 at 17.

These romantic ideals of Indian-white intermarriage politely forget the dark side of Indian conquest in efforts to imagine a cooperative colonial past. Landmarks of conquest: Indian Removal<sup>202</sup>, King Phillip’s War<sup>203</sup>, Wounded Knee<sup>204</sup>, and smallpox blankets<sup>205</sup>, often remain unmentioned, alongside the resultant spoils of social injustice, incursions to sovereignty, and dishonoring of property interests. Thus, invoking the “Indian Princess Grandmother” does not assert a commonality of interests with a pan-Native<sup>206</sup> community. Rather, it announces a connection to an ambiguity of indigenusness that is more historic than personal. For nominal Indians, what remains is a nostalgia and reverence for mythical pasts—pre-historic figures that align the ancestry of the European immigrant in the preexisting continuum of natural origin and national progress. Susan Sheckel characterizes this as a “liminal space” that provides reflection for the meaning of national identity.<sup>207</sup> The grandmother serves as the “other”—an eminent and organic legend that carries out the historical expectations and hopes of positive initial encounters of Native and European.

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<sup>202</sup> See generally, FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* (1984). Angie Debo, *And Still the Waters Run* (1936).

<sup>203</sup> Lasting for approximately one year, from 1675-1676, King Philip’s War, or the Second Puritan Conquest, resulted in the deaths of over 600 white colonists and 3,000 Indians. Hundreds of surviving Indians were captured and sold as slaves in the Caribbean. New England tribes experienced great hits, with the Narragansett, Wampanoag, Podunk, and Nipmuck tribes suffering the greatest number of casualties. ROGER L. NICHOLS, *INDIANS IN THE UNITED STATES AND CANADA: A COMPARATIVE HISTORY* 84-86 (Lincoln : University of Nebraska Press 1998).

<sup>204</sup> The Wounded Knee Massacre was the final large-scale bloody conflict between the Sioux Nation and the United States. See, Susan Forsyth, *Representing the Massacre of American Indians at Wounded Knee, 1890-2000* (2003); Jerry Green, ed., *After Wounded Knee* (1995).

<sup>205</sup> Gloria Valencia-Weber has described the blankets as emblematic of the betrayal of Indian nations by the United States: “Normal ‘uninfected’ blankets enabled the political, commercial, and personal relationships pursued between the indigenous peoples and the outsiders...For the Native Americans, the blankets were objects to bind the parties in explicit understandings as well as friendship to transcend discrete events. This indigenous value of blankets, which continues today, made the infested blankets especially destructive of trust and good-will.” Gloria Valencia-Weber *The Supreme Court’s Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets* 5 U. PA. J. CON. LAW 405,406 (January, 2003 Symposium Native Americans and the Constitution).

<sup>206</sup> See Nagel *supra* note 196 at 950.

<sup>207</sup> Sheckel *Supra* note 190 at 3.

*B. To the Margins of Society: The Non-Threat of Indian Blood*

This way of thinking about the history of Indian-white interactions stands as the most significant factor in miscegenistic exceptionalism. Pocahontas and her Grandmotherly counterparts exist as historical figures rather than present identities. Safely ensconced in a distant racial past, racial impurity normally inherited from nonwhite blood disappears. Though successive generations of intermixture, the Indian, once “vanished,” is allowed to become white, saving the descendant from the pitfalls of miscegenation that disqualify one from membership in a privileged caste. Contrary to the teachings of eugenics that insisted on ancestry as the decisive element of whiteness, phenotype and community affiliation materialize as critical hallmarks of race. This divorce of racial composition and community identity surfaced as a legal construct in Virginia, which differentiated tribal Indians from assimilated whites.<sup>208</sup> Persons of mixed Indian-white ancestry could either live in tribal communities and retain a Native identity, or, with minimal blood quantum, they could disperse amongst majority communities and be counted as white.<sup>209</sup>

This differential articulation of Indian blood may stem from theoretical and historical disjuncture, and also racial essentialism. Roy Harvey Pearce has argued that the American majority limits its view of “The Indian” to a socially and morally

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<sup>208</sup>“It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this act, the term “white person” shall apply only to the person who has no trace whatsoever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this act.” An Act To Preserve Racial Integrity, 1924 Va. Acts ch. 371 (Repealed 1975).

<sup>209</sup> *Id.*



significant part of the past.<sup>210</sup> In American collective memory, Indians disappeared<sup>211</sup>, and whites multiplied.<sup>212</sup> Whether by death, famine, or acculturation, the Native population was vanquished in the wake of historical and cultural progress to survive only as a museum exhibit that merits preservation in its purest form.<sup>213</sup> Problematically, this prehistorical vision of the Noble Savage<sup>214</sup> fails to incorporate “The Indian”<sup>215</sup> as a member of contemporary society. Removed from temporal specificity, “The Indian” is reclassified as a rhetorical luminary that does not share or participate in historical advancement or social change. As Phillip Deloria has noted, “in order to be authentic, Indians had to be located outside modern American societal boundaries.”<sup>216</sup>

This collective view of Native culture may discount unfamiliar manifestations of Indianness. Unremarkable representations, such as urban mixedbloods, fail to

<sup>210</sup> See generally, ROY HARVEY PEARCE, *THE SAVAGES OF AMERICA* (1953).

<sup>211</sup> Berkhofer, *supra* note 213 at 86.

<sup>212</sup> Estimate of Pre-Columbian Indian population: “There could not have been fewer than 2,240,000 Pre-Columbians in the United States” HENRY F. DOBYNS, *NATIVE AMERICAN HISTORICAL DEMOGRAPHY* 13 (1976).

Estimates of North American Indian Population size in 1700: 1,404,745, in 1800: 1,051,688. Douglas H. Ubelaker, *North American Indian Population Size: Changing Perspectives*, *DISEASE AND DEMOGRAPHY IN THE AMERICAS* 169 (John W. Verano & Douglas Ubelaker eds.) (1992).

Population of “civilized Indians” in 1880: 66,407. Population of Whites in 1880 43,402,970.

Population of Indians in 1900:266,769. Population of whites in 1900: 56,740,739

Population of Indians in 1930: 332,397 Population of whites in 1930:108,864,207

Population of Indians in 1960: 523,591Population of Whites in 1960:158,831,732 (U.S. Census Records)

<sup>213</sup> Edward Curtis, a photographer, distinguished his career by composing nostalgic black and white portraits depicting the vanishing Indian. See generally EDWARD CURTIS, *IN A SACRED MANNER WE LIVE: PHOTOGRAPHS OF THE NORTH AMERICAN INDIAN* (1972); *HIDDEN FACES* (1996). Also, Robert Berkhofer, in *The White Man’s Indian*, includes in his book a Curtis portrait of Navajos on horses, taken in 1930. The picture, titled, “The Vanishing Race—Navaho” depicts a group of persons on horses, backs to the camera, riding away in a solemn procession. Berkhofer states that Curtis asked the “subjects” to dress up in traditional clothes and wear braided ponytail wigs to instill a sense of authenticity and romance in the portrait. See ROBERT BERKHOFFER, *THE WHITE MAN’S INDIAN*, Fig. 10 (1978).

<sup>214</sup> The “raw Indian,” adept with the land and strengthened by its fruits, assumes the stoic yet gentle position as the racially and genetically empowered minister of nature. American collective memory posits Indians as nature’s people imbued with an ancestral connection to the land. 22. See generally JEAN-JACQUES ROUSSEAU, *SECOND DISCOURSE ON INEQUALITY* (1755).

<sup>215</sup> This pithy term (“The Indian”) belies the complexity of its semantics. Instead of being individual members of a larger community (i.e., “Indians”), the totality of this cultural group is expressed as a historical phenomenon (i.e. “The Indian”).

<sup>216</sup> PHILLIP DELORIA, *PLAYING INDIAN* 115 (1998).

approximate an exotic standard of indigenoussness. Robert Berkhofer has written that “White Europeans and Americans expect even at present to see an Indian out of the forest of a Wild West show rather than on a farm or in a city.”<sup>217</sup> The late Vine Deloria, Jr. takes a more indignant view, asserting that “Indians in store-bought clothes have no romantic value whatsoever[.]”<sup>218</sup> This is the root of exceptionalism—to see Indians as “The Indians.” If fullblood Indians exist on reservations, and mixed bloods in the elective purgatory of racial identity, the miscegenistic threat is removed.<sup>219</sup> These cultural conceptions of Indian habitats and surroundings engender a cognitive dissonance that emancipates assimilated mixedbloods from the perilous realm of racial impurity.<sup>220</sup>

## VI. Conclusion

Miscegenistic exceptionalism encapsulates an underhanded truth about eugenicist regimes: racist norms must accommodate variants.<sup>221</sup> Virginia’s Integrity Act, in its efforts of genealogical fortification, could not insist on the vestal definition of white that would have turned its most prominent citizens into savage ineligible. Most notably, this statutory subversion and the social practices that reify it gaze at a mythical creature who

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<sup>217</sup> WILLIAM S. PENN, *AS WE ARE NOW: MIXBLOOD ESSAYS ON RACE AND IDENTITY* 1 (1997) (quoting Berkhofer).

<sup>218</sup> Kathryn Shanley, *The Indians America Loves to Love and Read*, in *NATIVE AMERICAN REPRESENTATIONS: FIRST ENCOUNTERS, DISTORTED IMAGES, AND LITERARY APPROPRIATIONS* (Gretchen Bataille ed., 2001) (quoting Deloria).

<sup>219</sup> Thomas Jefferson’s solution for the “Negro problem” in America was to “remove [them] beyond the reach of mixture.” Koch & Peden eds., *supra* note 55 at 143.

<sup>220</sup> As statistical evidence and social concession demonstrate, the majority of American Indians are mixed bloods in urban areas. William S. Penn estimates mixedbloods to comprise over half of the entire Indian population in the United States. Penn, *supra* note 217 at 2. But it is the traditional minority of reserve-based fullbloods that claims primacy in imagery and memory. Because this visibility is so strongly ingrained in a definitive collective memory, deviations from this aesthetic narrative fail to fulfill an idealized (and perhaps unrealistic) vision of Indianness. As Shari Huhndorf has said, the constricted view of Indianness “render[s] many Native lives unrecognizable as ‘Indian, even at times to Native people themselves.’” Shari Huhndorf, *From the Turn of the Century to the New Age*, in Penn, *id.* at 184.

<sup>221</sup> See, Scales-Trent, *supra* note 134.

supplies the exotic blood from an indigenous womb of nebulous origin. Selective attention is paid to the Indian princess, who is passively born without the parentage of the Indian chief. From this Madonna of Nativity spawns the anomalous coterie of Virginia's First Families. The legacy of Powhatan, her father and the "Emperor," finds no mention in the aural declarant whose casual relationship triggers the question of hybridity. It is the Indian female who enters our national collective memory, as demonstrated in Virginia law, who stands as the cultural meeting ground for European conquerors to impose Lockean sensibilities on the open property of indigenous women's bodes.<sup>222</sup>

The ideology of miscegenistic exceptionalism does not transfer neatly into a social practice that openly favors racial amalgamation. The Circuit Court Judge that banned Richard and Mildred Loving from the state of Virginia for 25 years invoked religious beliefs in his opinion that races should remain separate. "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."<sup>223</sup> Even though the law allowed for "red" and "white" to mix according to certain limitations, this jurisprudence demonstrates the perception, belief, and reliance on racial integrity. Much earlier, in *Kinney v. Virginia* (1878), the court held that

The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization,

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<sup>222</sup> John Locke, in his *Second Treatise on Government*, wrote of the labor theory of property and ownership: "Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property." John Locke, *TWO TREATISES OF GOVERNMENT*, 134 (Hafner ed. 1947)

<sup>223</sup> The Circuit Court Judge that banned Richard and Mildred Loving from the state of Virginia for 25 years invoked religious beliefs in his opinion that races should remain separate. "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." *Loving v. Virginia*, 388 US 1 (1967).

under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent--all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law and be subject to no evasion.<sup>224</sup>

The language in these opinions strongly opposes hybridity, but it does allow for marriage and mixture in cases characterized by unsolvable ambiguity or inconsequential threat. For Native Americans that “vanished” with the closing of the frontier, fears of savage warriors and wanton squaws capture less prominent roles in the suspicions of racial purists. This is especially true in those communities that view Indians as Pocahontan maidens laying prostrate at on the bosoms of Englishmen rather than contemporary and viable citizens and communities of the world.

Critics may argue that the “Vanishing Indian” falls behind the present reality of politically vibrant Indian communities that disprove the cultural fallacy of a fading culture. Moreover, a handful of Indian nations have achieved a reputation as financially independent, economically savvy institutions that explode the notion of disappearance.<sup>225</sup> Such cultural fortitude would entice the strengthening of weakened cultural ties and invite people to identify as Indian. It may also be contended that these desired associations reveal progressive and liberal policies that transcend racial boundaries in the interest of equality. In this sense, claiming a relation to the Indian Grandmother enriches an American cartography of race that is fundamentally rooted in boundary crossings.

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<sup>224</sup> Quoted in Barbara K. Kopytoff & A. Leon Higginbotham, Jr., *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 *Geo L. J.* 1967, 1982 (1989).

<sup>225</sup> See, Kathryn Rand, *There Are No Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 *CHAP. L. REV.* 47, 63 (2002) (describing the financial successes off the Mashantucket Pequots in Connecticut); Matthew Fletcher, *Sawnawgezewog\*: "The Indian Problem" and the Lost Art of Survival*, 28 *AM. INDIAN L. REV.* 35, 91 (2003/4) (noting Congress's citation of the Grand Traverse Band's Fountain of Youth, the Pequot's Foxwoods Casino, and the Mississippi Choctaw's business success as reasons to overhaul Indian Affairs).

Assertions of this sort demonstrate a compelling reversal of identity: a formerly reviled and historically conquered segment of the population witnesses the return of the cultural prodigals who once suppressed their connection. It is a temporary and aural homecoming of long-lost tribal relatives who flash<sup>226</sup> a neglected yet convenient connection that may have few social consequences. This says nothing of the myriad problems that plague Indian country—poverty, education, health, and exploitation fail to burden the mind of the claimant as a potential community member. As legalized by the Integrity Act and performed in social practice, partial and limited identification as American Indian remarkably fails to have meaningful impact upon the declarant. Until this type of social and legal freedom is accorded to similar declarations of remote African multiraciality, the exceptional arguments of pride and progressiveness merely underscore the perception of a lack of racial threat.

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<sup>226</sup> Limits should and certainly cannot be imposed on the perennial appearance of the Indian Princess Grandmother—elections of identity belong in the realm of their producers. Yet when compared to an absolute revulsion and prohibition of African blood in that very statute, *See*, note 8. the arguments of pride and multiraciality seem fatuous and perfunctory.