June 2003

Legal Feeling: The Place of Intimacy in Interracial Marriage Law

Nancy Bentley

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol78/iss2/12

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.
LEGAL FEELING: THE PLACE OF INTIMACY IN
INTERRACIAL MARRIAGE LAW

NANCY BENTLEY*

Does law properly control sexual and family intimacy? Debates about this question have tended to turn not on whether it is proper, but rather when it is proper, and a shared assumption about the need to regulate intimacy has a visible function in legal history. Midway through their reasoning in support of segregation law, for instance, the justices in *Plessy v. Ferguson* paused to remind the public of the self-evident fact that the law prohibits—must and should prohibit—black-white intermarriage.¹ Requiring no elaboration, the terse paragraph locates a baseline legitimacy for segregation that is confirmed through a shared understanding—surely this much we all know. In the legal history following *Plessy*, of course, this knowledge would eventually fall away. But while a ban on interracial marriage is now seen as plainly unjust, where it was once held self-evident, the felt need to have laws govern the bounds of intimacy remains a touchstone in legal debates.² That the assumption endures while its content changes is instructive. It suggests that to ask whether law should control intimacy may be to get things backwards; in important respects, intimacy can be said to direct or control law.

The history of anti-miscegenation laws in the nineteenth-century United States is part of a broader cultural history that reverses our usual way of speaking about law as governing the limits of intimacy. What cultural historians have called the “power of sentiment” proved

---

¹ 163 U.S. 537, 545 (1896).
² Vehemently rejecting a petition to recognize the marriage of a black-white couple, one Tennessee judge observed that toleration of their marriage would surely lead to accepting father-daughter marriage, the Turk “establish[ing] his harem at the doors of the capitol,” or “revolting” specters of incest and polygamy, *State v. Bell*, 66 Tenn. 9, 10–11 (1872). These arguments have continued to be invoked in debates about marriage law long after the U.S. Supreme Court found anti-miscegenation laws unconstitutional.
capable in the nineteenth century of directing or reforming legal regimes in momentous ways, from the abolition of slavery to the liberalization of divorce.\(^3\) These forms of sentiment have continued through the twentieth century and into our own time in uneven ways. But to the extent that we still live in a society governed by norms of proper feeling (and some observers see these social powers of feeling as vast and only increasing in strength and scope), the power of sentiment remains a potential force.\(^4\) The cultural force of intimacy, I shall argue, lies in the shared sense that it originates somewhere outside either culture or law, in the immediacy of individual feeling. This conviction is questionable at best; feelings cannot transcend history any more than can the individuals who experience them. Yet the belief that feeling is ahistorical has allowed forms of intimate feeling to make history.

In the United States, interracial intimacy bespeaks a national history. After much intellectual effort to define what is distinctively American about American culture, scholars in American Studies have turned away from an “exceptionalist” framework that presumed a national distinctiveness in advance.\(^5\) But recently one scholar, speaking seriously and waggishly in equal measure, has stepped forth to suggest that the question of what distinguishes American culture may be answerable after all: American-ness is the “prohibiting [of] black-white heterosexual couples from forming families and withholding legitimacy from their descendants.”\(^6\) Werner Sollors demonstrates that the protracted ban on black-white unions may well be America’s most distinctive cultural difference from other Western societies.\(^7\) Like a negative photographic exposure, a will to prohibit black-white marriage defines the outlines of a national culture.


4. See, e.g., LAUREN BERLANT, THE QUEEN OF AMERICA GOES TO WASHINGTON CITY: ESSAYS ON SEX AND CITIZENSHIP 5 (Michèle Aina Barele et al. eds., 1997) (arguing that contemporary U.S. culture increasingly “renders citizenship as a condition of social membership produced by personal acts and values, especially acts originating in or directed toward the family sphere,” a trend that gives greater political valence to a sphere of intimacy and private feeling while simultaneously devaluing the public sphere of politics as such).


7. Id. at 4–5.
This Article examines two cultural forces that operate in this legal history: the surprising claims that intimacy can make on legitimacy, and the opposing force of legal stigma that that intimacy may provoke. In an attempt to pinpoint these forces, I begin with an instructive moment in what we could call the public history of intimacy. At the height of the slavery crisis, Lincoln, in his speeches, would ridicule Democrats' charge that critics of slavery were really proponents of miscegenation. "I protest [the idea]," Lincoln would announce, "that because I do not want a negro woman for a slave, I do necessarily want her for a wife." Taking their cue, audiences would break into laughter. But upon what exactly did this joke turn? By laughing, Lincoln's white audiences joined him in a rather complex public ritual. The predicted laughter depended on a shared understanding that while a black woman might well be desirable as a slave, she could never be desirable as a wife. Lincoln's line was tactically brilliant, as artful as it was compressed. Because the rhetoric of abolitionists had long made wanting a Negro woman for a slave a code for sexual possession the joke allowed Lincoln to subtly redirect the miscegenation charge back at his pro-slavery critics. At the same time, the line allowed him to substitute for sex the very different issue of marriage, when marrying a Negro was more easily held up as a laughing matter—or at least as a matter of easier laughter—than that of sex. With this deft maneuver, Lincoln gave the slip to the miscegenation trap.

But, though preeminently tactical, Lincoln's laugh line also anticipated a cultural operation of racial stigmatizing that would become a central feature of Jim Crow society. Lincoln's joke was compulsive, an artifact of speech enacting an anxiety that was both expressed and contained through repetition. For, if Lincoln's joke treated marriage to a black woman as self-evidently absurd, it was a self-evidence that required the ritual-reinforcement of regular public affirmation. As historian Martha Hodes has shown, in antebellum America black-white marriages were far from unknown despite widespread anti-miscegenation laws that punished these "shameful

8. ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832-1858, at 397-98, 454-55, 636 (Don E. Fehrenbacher ed., 1989); see also SAIDIYA V. HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 184 (1997) (linking this oft-repeated line in Lincoln’s campaign speeches to broader postemancipation efforts to finesse a "divided commitment to equality and inferiority" in federal law).
Communities, North and South, knew of and in degrees tolerated the desire of some Americans to marry across the color line. Though distasteful, then, such marriages in that period were not unthinkable; that they were not unthinkable could be said to have prompted a white public to insist they were laughable, and to prove it by perpetually laughing. The response was expressive of a will to stigmatize; Lincoln's laugh line defended black liberation by publicly marking the abjection of the black woman and directing ridicule at any white man who consented to marry her. And it is no coincidence that Lincoln expressed that will to stigmatize precisely in the moment he advocated the liberation of black men and women from slaves into legal subjects. The fullest expression of the will to stigmatize took the form of law through the Jim Crow legislation that, like the Plessy decision, named and acknowledged the civil rights of African Americans only by deforming those rights in invidious racial terms. Even in conferring rights and legal personhood, law could inflict what the Brown v. Board of Education ruling would eventually call "stigmatic injury."

Even as it anticipated a later regime of law, however, the Lincoln anecdote also underscored an important affective dimension to this system of legal stigma. The marital intimacy that Lincoln's joke both named and ridiculed had a key importance in the post-Reconstruction conflict over civil rights. Intimate feeling posed a particular legal dilemma. Radical Republicans insisted that the Fourteenth Amendment's protection of the rights of contract meant that citizens of African descent were free to exchange vows of marriage with a spouse of any race, and in several Southern states legislators removed anti-miscegenation laws from the books. After only a
few years, however, the Southern Redeemers, who had ousted
Republican legislatures, swiftly reinstated anti-miscegenation laws—at the same time nullifying the black-white marriages contracted during that brief period and installing far more draconian penalties. Although the anxiety concerning the genetic mixing of racial populations ran high, it is striking that interracial sex was not the chief target of these marriage prohibitions. Indeed, the same laws that newly banned interracial marriage often decriminalized or reduced the penalties for black-white concubinage—the sexual relationship white men would frequently establish with black women.14

What could it mean that marriage was, in the eyes of the law, a greater scandal or violation than consensual sexual relations? Historians and legal scholars have answered that question by pointing to property. The far harsher punishment of interracial marriage in the postbellum era, historians argue, was an effort by white lawmakers to limit the ability of African Americans to inherit white wealth. This contention is no doubt true, yet, there is evidence to suggest a motive even more fundamental than the white control of property. In the dominant culture of nineteenth-century America, marriage, in opposition to sex, bespoke a species of feeling or intimacy that had become a powerful source of social legitimacy. The evidence suggests that the ban on interracial marriage was an attempt to censor—to make all but unspeakable—a desire not for sex, but for marriage, precisely because marital intimacy posed a more profound challenge to the racial order than either the black inheritance of property or any genetic mixing of the populations.

The operative distinction between sex and marriage is clearly visible in Lincoln’s laugh line. Lincoln did not attempt to deflect the scandal of miscegenation by denying sexual desire; indeed, he effectively stipulated that sex across the color line was a recognizable temptation—a potential desire. But he did so in order to subtract

jurisdiction’s miscegenation laws were probably enforced more stringently after the Civil War than before”).


14. See Eva Saks, Representing Miscegenation Law, in INTERRACIALISM, supra note 6, at 61, 671.

15. See, e.g., id. at 66–68.

16. See generally Kennedy, supra note 12 (discussing the operative legal distinction between black-white sexual relations and marriage).
that desire ("if I do not want a black woman for a slave") and thereby isolated the desire he could count on to incite derision (the wish to marry her). In other words, he isolated the desire for wedlock alone. What is at stake here is a desire for law, for licit-ness itself.

Is a desire for lawfulness a feeling we can locate and define in a meaningful way? Attempts to obtain a marriage license are one kind of evidence that such a feeling exists, but we have to look elsewhere for some record of the feeling as a lived sentiment. For the nineteenth century, the temporal knitting together of desire and law was the special provenance of the novel. Literary historians have demonstrated that the genre of the domestic novel was one of the central cultural instruments for isolating and transmitting dominant notions of private feeling as the surest indices of social legitimacy.\textsuperscript{17} Here is how one wife in a nineteenth-century novel described this brand of legal feeling in a meditation on her own certificate of marriage: "A marriage certificate, rightfully procured, was scarcely less solemn, so far as it went, than the Bible itself. Her own she cherished as the apple of her eye. It was the evidence of her wifehood, the seal of her child's legitimacy, her patent of nobility."\textsuperscript{18} Like bibles, marriage contracts can be counted as seals or patents, material objects with a concentrated cultural meaning through which individuals can cathect a highly personal, highly affective identification with the law. Novels themselves were almost identical sorts of objects: material things in which a reader was invited to identify with numinous properties of legal feeling—wifehood, legitimacy, nobility—in short, the rewards of legality as manifested in the intimacies of everyday life.

The wife who speaks of her marriage certificate as a "seal" of her human nobility is a character from \textit{The Marrow of Tradition}, a novel published in 1901 by African-American novelist Charles W. Chesnutt.\textsuperscript{19} A trained lawyer, Chesnutt also published informed essays condemning segregation laws and the \textit{Plessy} decision.\textsuperscript{20} But in

\textsuperscript{17} For influential studies of the novel's role in giving family sentiment the power of legitimization, see generally NANCY ARMSTRONG, DESIRE AND DOMESTIC FICTION: A POLITICAL HISTORY OF THE NOVEL (1987); GILLIAN BROWN, DOMESTIC INDIVIDUALISM: IMAGINING SELF IN NINETEENTH-CENTURY AMERICA (1990).


\textsuperscript{19} Id.

his fiction, Chesnutt was able to draw upon and then manipulate the affective power that marital intimacy held for his largely white reading audience. In Chesnutt's novel, there is, in good Victorian-novel fashion, a secret in the white Carteret family of North Carolina. But the hidden, shameful secret, is not sex, not a *mésalliance* of black and white lovers, nor even the shame of bastardy. At the heart of the novel is a critical generic inversion: the Carteret family secret is not illicit sex but a legal heterosexual marriage.\textsuperscript{21} Crucially, Olivia Carteret's extravagant praisesong to her own marriage certificate is prompted by the panic of discovering a counterdocument, the marriage certificate of her now dead father and a black woman, Julia Brown, whom her father married in a secret second marriage during the brief window when Southern states permitted black-white unions.\textsuperscript{22}

Julia was presumed to have been the wealthy man's mistress, their cohabitation taken for the nonscandal of an open secret. The piece of paper proving their marriage, however, presented a wildly different matter, a scandal issuing from legality itself. Importantly, Chesnutt dwells on the particular contours of Olivia's feelings when she discovered the hidden certificate. "[D]azed" and then under great "agitation," she reels from the scandal of the legality of her father's relations with Julia. "Such a stain upon her father's memory would be infinitely worse than if he had not married her."\textsuperscript{23} The document filled Olivia with a distinct kind of repulsion because it forced a recognition of the marriage with Julia as an object of her father's wishes—his desire not just for sex with Julia (something long conceded) but a desire for wedlock with her. Much more than any record of illicit sex, the hidden certificate was a kind of obscenity, the equivalent of a pornographic text. It was, in other words, a profane document that raised indignation and a fearful question about what could be desired.

That Chesnutt implanted a secret document, shocking in its legality rather than in its criminality, reflected a canny use of the social force of fiction. By presenting to readers a legal document that operated as something weirdly harmful or prurient, Chesnutt forced


\textsuperscript{21} CHESNUTT, supra note 18, at 571.

\textsuperscript{22} Id. at 665–68.

\textsuperscript{23} Id. at 665–66, 671.
readers to acknowledge a moment when legitimacy (the certified marriage) and proper family feeling (Olivia’s horror) were no longer identical. The divergence opened a rift in a crucial historical association that developed through the novel form in particular, and that looked to the realm of intimate feeling for moral and ethical confirmation of middle-class norms.

Like Chesnutt’s character Olivia, the social theorist Jürgen Habermas used the term “seal” when he described the Intimsphäre—the sphere of private feeling that developed in the middle-class conjugal family.24 Family intimacy was a seal, Habermas argued, because it became the public guarantor of a private realm of free and autonomous human subjectivity.25 Historically, as the bourgeoisie ascended by way of commerce over aristocracies, their emancipation produced a consciousness of themselves as private, civil subjects, beholden only to the supposed reason of the market. “Such an autonomy of private people,” Habermas writes, “had to be capable of being portrayed as such.”26 Thus, “[t]o the autonomy of property owners in the market corresponded a self-presentation of human beings in the family. The latter’s intimacy, apparently set free from the constraint of society, was the seal on the truth of a private autonomy exerci[s]ed” in a free marketplace.27

If the seal of family feeling confirmed a human autonomy and dignity independent of social caste, it was largely the genre of the novel in which that feeling was presented to public view. Novels placed the “seal” of legitimacy on particular plots and descriptions of sentiment as they were displayed in print. Habermas, among others, demonstrated the way specific forms of writing, in particular the literary genres of the personal letter and the domestic novel, became the vehicle by which intimate feeling came to know itself as such. Only genres set apart as forms for the expression of interior feeling could materialize private family sentiment as the essence of the human.28


25. Id. at 46.

26. Id.

27. Id.

28. On the genre of the personal letter, Habermas observes:
Although this intimacy, then, had its origins in economic and social developments, intimate family feeling became the discernable mark or seal to authenticate a domain of pure humanity. And marital feeling, above all, was the "seal of truth" on the human. Because true marriage was established voluntarily by free individuals, and presumed a lasting community of love between spouses, the ideal of marital intimacy bespoke the noninstrumental development of the highest human faculties and relations.\textsuperscript{29} Intimacy, understood as universally human and wholly private, in that very privacy tended to serve the specific ends of a bourgeois society seeking to reproduce its own social and class relations. But this structure meant that it was intimacy that proved the validity of the social and not vice versa. Feeling preceded the law.

This seeming priority of intimate feeling presented a stark difficulty for United States anti-miscegenation law. To the extent that black-white couples demonstrated normative feelings of intimacy by seeking to marry, the dominant society was confronted with apparent evidence that such couples possessed the same family feeling that broadly authenticated the sphere of law itself. The dilemma prompted an increasingly strenuous effort on the part of American law to disavow any sign of black-white marital desire. A North

In the intimate sphere of the conjugal family privatized individuals viewed themselves as independent even from the private sphere of their economic activity—as persons capable of entering into "purely human" relations with one another. The literary form of these at the time was the letter. It is no accident that the eighteenth century became the century of the letter: through letter writing the individual unfolded himself in his subjectivity.

\textit{Id.} at 48 (internal citation omitted). The letter, Habermas further claims, was a crucial impetus for the development of the novel. Because letters and diaries directed the expressions of the self toward a real or posited addressee, he contends, Subjectivity, as the innermost core of the private, was always already oriented to an audience (\textit{Publikum})... Thus, the directly or indirectly audience-oriented subjectivity of the letter exchange or diary explained the origin of the typical genre and authentic literary achievement of that century: the domestic novel, the psychological description in autobiographical form.

\textit{Id.} at 49.

29. The bourgeois family, Habermas argues, seemed to be established voluntarily and by free individuals and to be maintained without coercion; it seemed to rest on the lasting community of love on the part of two spouses; it seemed to permit that non-instrumental development of all faculties that marks the cultivated personality. The three elements of voluntariness, community of love, and cultivation were conjoined in a concept of the humanity that was supposed to inhere in humankind as such and truly to constitute its absoluteness: the emancipation (still resonating with talk of "pure" or "common" humanity) of an inner realm, following its own laws, from extrinsic purposes of any sort.

\textit{Id.} at 46–47.
Carolina court described, in an 1877 decision, the prospect of interracial marriage as "revolting," a juridical sentiment it underscored as crucial proof despite its concession that this was "[not] the common sentiment of the civilized and Christian world." It was not sufficient for courts to declare such marriages criminal; the motive or desire for marriage—the legitimizing feeling—was the real crux of the issue. Thus, courts, litigants, and white observers bear witness to their own disgust and distress at black-white unions, for in doing so, they offer their own juridical feeling—a lawful "revulsion"—as the only definitive evidence to counter the evidence of interracial marital desire. Interestingly, the disavowal of such marital feeling at times extended even to representations of interracial intimacy. In addition to their prohibitions on marriage, several states added statutes banning any publication of "general information, arguments, or suggestions in favor of social equality or of intermarriage between whites and Negroes," on penalty of fines, or imprisonment, or both.

This kind of impassioned concern for protecting marital feeling is visible in the court's response to a North Carolina case, *Ferrall v. Ferrall*. In the *Ferrall* suit, a husband sought to void his marriage to his wife on the grounds that she was of Negro descent "within the prohibited degree," even though she had been socially received as a white woman prior to his charge. This white man's defense against his wife's suit for alimony was that their tie was never marital; miscegenation law nullified any marriage between a white person and a person of African descent. Therefore, the Ferrall home, the husband argued, was never founded on real domestic feeling: unknownst to the world, he had no (white) wife to begin with and hence no real home.

The strategy misfired badly. The court was outraged at a man who would "for the sake of a divorce" sell off the integrity of his own

30. State v. Ross, 76 N.C. 242, 246 (1877). As to the legal implications of the nonuniversality of aversion to interracial marriage, see Kennedy, supra note 12, at 154-55.
31. William D. Zabel, *Interracial Marriage and the Law*, in *INTERRACIALISM*, supra note 6, at 54, 58. For further discussion on the censorship of representations of interracial love or marriage, see *id.* at 54-61. Also see Sollors, supra note 6, at 5, for a discussion of "the infamous American 'Motion Picture Production Code' of 1934 that urged filmmakers to uphold the 'sanctity of the institution of marriage and the home,' while simultaneously stating: 'Miscegenation (sex relationship between the white and black races) is forbidden.'"
32. 69 S.E. 60 (N.C. 1910).
33. *Id.* at 60-61.
34. *Id.* at 61-62.
35. *Id.* at 60, 62.
claim to untainted marital intimacy. "Certainly of all men he should have welcomed the verdict that decided his wife and children are white," the court intoned. The court preferred to defend the now suspect identity of the wife as a white woman and to divide the husband's property with her and her children rather than give credence to the husband's incrimination of his own marital feeling.

The legal disavowal of the notion that a black-white couple could possess recognizable feelings of marital intimacy continued well into the twentieth century, even as the ability to choose when and whom to marry (or to divorce) became increasingly respected as a prerogative of the individual alone. In 1917, American writer J.A. Rogers asserted that "the right to select one's mate is one of the most ancient, most sacred of individual rights." Actually, the supposed "right" that Rogers cites is neither ancient nor sacred; historically, companionate choice in marriage is a fairly new notion, and to this day, the right of selection is withheld from whole populations, namely, homosexual men and women. But it is altogether apt that Rogers expresses this belief in the sacred nature of marital choice in a novel, just as the most powerful anti-miscegenation works of the same period were the best-selling segregation novels of Thomas Dixon.

The novel form was the recognized dwelling place for expressions of authentic intimacy—its home in print. It was this fact that allowed Chesnutt to use the genre in its capacity as public vehicle for disclosing the truth of family feeling, to write a novel that turned middle-class intimacy against itself. In The Marrow of Tradition, Chesnutt can be said to be repeating Lincoln's joke in reverse. By plotting Olivia's discovery of the marriage contract, he removed the question of interracial sex in order to isolate an irrefutable desire for marital intimacy, the same desire that white laughter was meant to disavow. When Chesnutt's readers opened the generic box, as it were, where they expected to see illicit scandal, they found instead their own "seal of truth," conjugal intimacy, used to authenticate a proscribed black-white relation.

After Olivia discovered the certificate, her shock and distress ultimately led to the most blatant kind of disavowal; she burned the document, an act that testifies to the emotional "truth" it wanted most to conceal. Like the laws that prohibited any "arguments or

36. Id. at 62–63 (Clark, C.J., concurring).
37. J. A. ROGERS, FROM "SUPERMAN" TO MAN 80 (1989).
38. CHESNUTT, supra note 18, at 665–66.
suggestions” of interracial marital love, Chesnutt’s plot made clear that it is intimacy or marital feeling, not sex, that prompts this censorship. Chesnutt’s plot predicted the novel’s own fate. His contemporary readers seemed to have responded to the novel much as Olivia responded to the certificate, with a displeasure that essentially removed the narrative from public view. Reviewing Chesnutt’s novel, leading critic William Dean Howells conceded the truth of its searing critique of Jim Crow society, but labeled the novel a “bitter, bitter” book. Branded with this literary stigma, the novel was largely ignored, and after *The Marrow of Tradition*, Chesnutt’s once promising career as a novelist was over.

Despite this opposition by his contemporary readers, Chesnutt’s novel opens for us a moment when Chesnutt could seize upon marital intimacy, a desire for law, as a force able to be directed against the law itself. In this way, the novel anticipated the cultural developments that would lead to *Loving v. Virginia*. In *Loving*, the desire of a black-white couple to marry posed a claim to the feeling the Court could not continue to hold criminal without fatally undercutting the “freedom to marry” as a human desire “essential to the orderly pursuit of happiness by free men.” Yet the law’s ability, for close to seventy years, to trump the charge of “arbitrary and invidious” discrimination with “repulsive” community feeling suggests that American society long continued to selectively oppose arguments of intimacy by deploying powers of legal stigma. As the controversies over same-sex marriage law attest, if marital intimacy can still make public claims on legitimacy in the name of feeling, so too is such feeling still subject to “stigmatic injury.” Governance by legal feeling carries a tax that is borne unequally by different populations.

40. 388 U.S. 1, 12 (1967).