

1996

What Does a White Woman Look Like? Racing and Erasing in Law

Katherine M. Franke

Columbia Law School, kfranke@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Law and Gender Commons](#), [Law and Race Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Katherine M. Franke, *What Does a White Woman Look Like? Racing and Erasing in Law*, 74 *TEX. L. REV.* 1231 (1996).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/497

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

What Does a White Woman Look Like? Racial and Erasing in Law

Katherine M. Franke*

In significant ways, legal texts produce a narrative of national identity. They weave stories about who we are, what we are committed to, and what we expect of one another, individually and collectively. The concept of justiciability can be understood as a set of rules determining what stories courts are allowed to tell about who we are and who we can be. In this sense, Ronald Dworkin's account of judging as writing ongoing chapters in a chain novel provides a compelling conception of law as both describing where we have been and directing where we are going.¹ If the salience of national identity is derived, in significant part, from our membership in an imagined community,² then the production of a national symbolic through legal storytelling is an appropriate and legitimate role for courts—particularly in a nation as large as ours. In this process, certain foundational fictions, like "We the People," provide the glue that over time binds a people to its past and to one another as a nation.

But should law play the same role with respect to other aspects of human identity? I think not. Current debates surrounding affirmative action, congressional redistricting, the Million Man March, and the appointment of Clarence Thomas to the Supreme Court all represent cultural flashpoints in an ongoing national discussion about two fundamental questions: what does it mean to have a race or be a member of a particular race, and who has the authority to decide?

In the service of enslaving, segregating, and subordinating African Americans, law has claimed for itself the authoritative license to tell the story of racial meaning in this country—whether by declaring a certain race of people the status of property,³ by defining as negro any person who has

* Associate Professor of Law, University of Arizona College of Law. J.D. 1986, Northeastern University; LL.M. 1993, J.S.D. Candidate, Yale University.

1. See RONALD DWORKIN, *LAW'S EMPIRE* 229, 228-38 (1986) (comparing the judge to a novelist who "interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on").

2. BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 14-16 (1983).

3. *E.g.*, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 410 (1857) ("The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property . . .").

one drop of negro blood,⁴ or by determining that race is a factor that may not be taken into account in the distribution of social goods or political rights because our Constitution is color-blind.⁵

Therefore, I have selected *Sunseri v. Cassagne*⁶ as my favorite judicial opinion. It represents an absolutely fascinating judicial confrontation with the problems of proof that arise when racial identity is litigated in a manner similar to that of, say, quieting title.⁷ In *Sunseri* the Louisiana Supreme Court considered an appeal from a trial court order granting the request of Cyril Sunseri, a white man, that his marriage be annulled because, he maintained, his wife was legally negro.⁸ Verna Cassagne, the woman Sunseri married and who all agreed was phenotypically white, sought a divorce and alimony because, she insisted, she was white.⁹ In 1935, when the couple was married, the state of Louisiana prohibited and rendered void the marriage of any white person to any person having a trace of negro blood.¹⁰

The court was thus faced with adjudicating Verna Cassagne's racial identity. It was presented with this problem only because it took it as given that *looking like* and *identifying as* a white person did not mean that one *was* a white person. Several interesting consequences flow from this conception of racial identity: if a person could look white, but not be white, then what does it mean to be white? Could one be white but not look white? Perhaps looking white is a necessary yet not sufficient condition of being white. What does a white woman look like anyway? If phenotype is not what racial identity means, then is how you look a *representation* of racial identity? If so, a representation of what? Finally, who should decide the answers to any of these questions?

In determining whether Cassagne possessed a trace of negro blood, the court rejected the reliability of Cassagne's white looks and denied her the

4. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 5 (1967) (striking down a Virginia miscegenation statute that in part stated, "Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person . . ." (quoting VA. CODE ANN. § 1-14 (1960 Repl. Vol.)); *Morgan v. Virginia*, 328 U.S. 373, 382 (1946) (citing the state codes of Alabama, Arkansas, Georgia, Oklahoma, and Virginia as defining a person with "any ascertainable Negro Blood" as a colored person for the purposes of separation).

5. See, e.g., *Holder v. Hall*, 114 S. Ct. 2581, 2598 (1994) (Thomas, J., concurring) ("The assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution.").

6. 196 So. 7 (La. 1940) [hereinafter *Sunseri II*].

7. See generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1725-45 (1993) (arguing that "whiteness" is theoretically, expectationally, functionally, and legally akin to a property right).

8. *Sunseri II*, 196 So. at 7.

9. See *id.* at 9 ("[T]he defendant and her mother have always been considered as being of the white race by their acquaintances in the City of New Orleans.").

10. LA. CIV. CODE art. 94 (Bobs-Merrill 1932) (repealed 1972).

authority to declare her own race. Thus, the court had to look to other evidence to prove her “true race”—statutorily defined in sanguinary terms. Because there is no scientific test to determine either the racial makeup of particular blood samples or the percentage of a particular kind of racialized blood that a person has in her veins, racial identity quickly reveals itself to be a metaphor, essentialized through the sign of blood. But how does one go about proving a metaphor? By resort to anecdote, of course—anecdote masquerading as objective fact. Given the statute at issue, Cassagne’s racial identity was to be resolved atavistically, that is, by focusing upon the racial identity of Verna Cassagne’s relatives, particularly her great-great grandmother Fanny Ducre, a slave.¹¹ Sunseri maintained she was “a full-blooded negress,” while Cassagne swore she was an Indian.¹²

Both parties relied heavily on anecdotal testimony to show the race of Cassagne’s relatives. Cassagne showed that her mother was christened and confirmed as a white person in a white church, educated as a white girl in a white school, registered as a white democratic voter, patronized hotels as a white woman, and traveled as a white person in buses, railroad cars, and streetcars.¹³ When Verna was born, her mother was assigned to the white maternity ward.¹⁴ And, if that weren’t enough, the court noted that all of Verna’s parents’ friends and associates were white. The court thus observed that “the overwhelming testimony [is] that [Verna] and her immediate associates have always been regarded as members of the white race and have associated with persons of that race.”¹⁵

Yet, proof of this nature demonstrates the social, not legal, race of Cassagne and her relatives. Given the impossibility of proving legal race according to the sanguinary formula set forth in the statute, what else could she look to? One might wonder how evidence of this sort survived a relevance objection from Sunseri. While the court did not address the issue, proof of social race was relevant to a determination of legal race on two primary grounds: First, one might believe that social race bears a “stands for” relationship to legal or true race. In this sense, social race was indirect proof of the thing itself. Second, one might argue that notwithstanding her actual sanguinary pedigree or lack thereof, the community or an intimate associate such as a husband, or both, were estopped from denying Cassagne’s whiteness where she and her relatives had relied, over generations, on the community’s and her husband’s acquiescence in and acceptance of her identity as white. Given the great social significance of and investment in rigid racial boundaries, the court was not

11. *Sunseri v. Cassagne*, 185 So. 1, 2 (La. 1938) [hereinafter *Sunseri I*].

12. *Id.*

13. *Id.* at 4-5.

14. *Id.* at 4.

15. *Sunseri II*, 196 So. 7, 9 (La. 1940).

prepared to allow the conduct of some members of the community to bind the larger culture by permitting a kind of racial amnesty for people like Cassagne who could pass. Passing was not and could not be the same thing as being white.

Ultimately, the court determined that the question of Cassagne's true race turned on the contents of three legal documents: Cassagne's birth certificate, which registered her as colored, and the marriage license applications of her mother's sisters, which had been stamped "colored."¹⁶ The court then proceeded to cite approvingly the testimony of two white men who had stated that they "knew" that many of Cassagne's relatives were negro and that they had always been so regarded in the community.¹⁷ Based upon this, the court concluded that it had no alternative but to affirm the annulment of the marriage of Sunseri and Cassagne because there was "no room for doubt" that Cassagne was legally negro.¹⁸

This case shows the authority of law to race bodies through what Eva Saks calls an autonomous miscegenous discourse¹⁹—autonomous in the sense that the legal meaning of race stands independent of and often in opposition to the social meaning of race. As such, in cases like *Sunseri* a person who is socially white can be declared legally black. Verna Cassagne told a story about her racial identity that was authentic—for her. The court and Cyril Sunseri, however, had another story of what it meant to be a white woman in Louisiana in 1940. Many may agree that racial identity is not something that we can take literally at face value, but rather is something that needs interpretation. What then emerges is a struggle over whose interpretation counts—law's "official" story or the story of the party to be raced?

At stake in the current debates about affirmative action, racial redistricting, Justice Thomas's ascension to the Supreme Court, and the Million Man March are fundamental questions about what it means to be African American and who gets to decide. There are many who claim that Justice Thomas is not really black. Or that he has betrayed his black identity. Many have criticized the vision of African-American masculinity that was promoted by the leaders of the Million Man March in Washington last year.²⁰ What was powerful about the event, however, was the

16. *Id.* at 7-8.

17. *Id.* at 8-9.

18. *Id.* at 7.

19. See Eva Saks, *Representing Miscegenation Law*, RARITAN, Fall 1988, at 39, 40 ("[M]iscegenation cases have a relative autonomy from other social definitions of miscegenation. This autonomy, along with their internal cohesiveness and cross-references, allow them to be analyzed as a genre: miscegenation discourse.").

20. See, e.g., Marlene Cimon, *'Unity' March Exclusion Divides Women*, L.A. TIMES, Oct. 17, 1995, at A14 ("Listen carefully to what the leaders of this event are saying: 'We've been bad masters; now we're going to be good ones.'" (quoting Marcia Gillespie)).

wresting of control of the instruments of identity away from government and the assertion of a degree of agency by some African Americans with respect to what it means to be an African-American man, at this time, in this culture.

The power to name oneself is fundamentally critical to any individual and to any civil rights movement. One of the negative consequences of affirmative action has been the degree to which control over the meaning of racial difference and identity has been ceded to government for the purpose of achieving remedial redistribution of resources. The government now has interpreted the goal of our constitutional and statutory equality principles to be the creation of a color-blind society. The call for children to be judged by the content of their characters and not by the color of their skin has been taken to mean that we should aspire to a world in which racial differences are understood as normatively equivalent to differences in hair color—that is, meaningless. The radical individualism of this normative vision of the Fourteenth Amendment has frustrated the empowerment of peoples of color in this country. A politics of empowerment, as contrasted with an ethic of formal equality, requires a thick conception of racial identity produced through a fluid cultural, nonlegal process of self-definition engaged in by the communities to be empowered. Law is ill-suited to this task because racial meanings are always local and partial—they are always *in media res*.

Whether the state invokes its power to reinforce the salience of race, as it did in *Sunseri*, or to erase the salience of race, as it has with contemporary equality jurisprudence, the state renders legally static that which must remain contested and fluid. The cultural contestation of racial meaning and identity must be reclaimed from government as a significant foundation of our struggles for racial empowerment. Empowerment requires not only that we demand what we want, but also that we define who “we” are.