“Brought Up Among Their Own People”: Mixed Race Families and Custody in the Post-Civil Rights Era

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Thesis
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I. Abstract

Although the United States’ legal system has always contended with families which crossed racial boundaries, the legalization of interracial marriage in 1967 and the accompanying civil rights era significantly altered the legal and social status of these families. In the era that followed, family courts across the country struggled to account for the racial composition of these families when they became involved in custody disputes. The mid- to late-1970s and the early-1980s provide a number of informative court cases which dealt with questions about mixed race families in custody disputes. In 1984, one case even rose to the level of the United States Supreme Court. These cases are largely notable for their diversity and inconsistency, so it is difficult to make definitive statements about what these cases demonstrate about race in this period. That said, the cases do reveal a debate about how to evaluate the harms of racial discrimination when determining a child’s best interests. While some courts deemed the harms of racial discrimination to be important in deciding a child’s living situation, others suggested that ignoring the issue of race would result in better outcomes for both society and for children themselves. Using evolving doctrines of social science and changing terminology, courts did their best to offer definitive legal standards on the use of race in custody cases but, in the end, often left the questions they confronted unanswered.
II. Introduction

In 1950, a judge in Washington state called them “victims” of their parents’ marriages.¹ In front of the Supreme Court, a lawyer used the term “martyrs,” recipients of “more psychological problems than parents have a right to bequeath to them.”² A New York judge in 1977 felt that it was “self-evident” that they would face “special problems” and that their background represented an “extraordinary circumstance.”³ Four years later, a different New York court ruled that they could be “expected to endure identity problems” with “consequences [that] can be damaging and destructive.”⁴

All of these comments were used to describe mixed race children involved in custody disputes. As their tone and vocabulary suggest, these children were considered to be a challenge to courts and social workers. While children of all colors could be the subject of legal battles and controversy, mixed race dependents were viewed as a unique case, as judges struggled to account for their racial background in their decisions about child welfare and placement. More than that, judges often either implicitly or explicitly considered them to be victims of their own identity, hurt by the very fact of their mixed race status and by the mixed race partnership which created them. Whether out of racial animus or out of genuine concern for their welfare, judges lamented the struggles of mixed race children, worrying over what place they might have in a society that often judged people in black and white.

These worries were not new: indeed, they had a long history in the United States. But they gained new significance in the wake of the civil rights era. As hard-fought struggles in the

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1950s and 1960s eliminated some legal aspects of racial segregation (including bans on interracial marriage), courts began to contend with new questions about the place of mixed race families in a changing society. Before the civil rights era, the legal system had often viewed race mixing as inherently wrong or unnatural. Up until the pivotal *Loving v. Virginia* Supreme Court decision in 1967, this argument carried weight in many courts. *Loving*, however, marked a shift. With the Supreme Court unanimously agreeing that interracial marriage was a Constitutional right, claims about miscegenation’s “unnatural” character would persist, but no longer held up in court. In 1971, for instance, an Alabama judge ruling on that state’s anti-miscegenation law felt that the legality of interracial marriage “cannot be seriously questioned by any trained in law.”

The *Loving* decision, therefore, was an important validation of mixed race families. It did not, however, eliminate the tangle of legal questions which surrounded them, especially when they broke apart. Custody cases, which required definitive rulings about a child’s placement and thus their “best interests,” forced courts to confront how “race” and “racial discrimination” – factors that were at once obviously important and difficult to define – should play a role in their decisions and thus in children’s lives. As a result, custody cases can reveal how courts struggled between accounting for America’s long history of racial discrimination and hoping to move past it through a more colorblind approach. Through their inconsistencies and ambiguities, legal debates about mixed race families give voice to hopes that the United States could overcome racial differences through familial love – and to fears that ignoring racial realities would merely entrench discrimination in the post-civil rights era.

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I. Terminology: What Is a “Mixed Race Family”?

This paper will refer repeatedly to “interracial” couples and to “mixed race” children and families, but what do these terms mean? With categories as historically and sociologically complicated as race, they are hard to define. The courts which dealt with child custody and marriage often used conflicting terms around race, which will be discussed later. Even without the added complications of defining “mixed race,” people who were judged by the courts to have a single race were called by different terms: the difference between the terms “black” and “Negro” was particularly significant. Furthermore, as was the case in Virginia before the Loving v. Virginia decision, many states had also historically judged anyone with any amount of black ancestry to be black, thus complicating the label of “mixed race.”

Explaining the full complexity of even one of these racial categories could fill volumes. This paper will attempt to consider how segments of the U.S. legal system in the mid to late twentieth century understood the categories of race and race mixture and reveal the complexities and insufficiencies in that system’s categories. Thus this paper will only consider court cases which the courts themselves identified as involving marriage, adoption, or custody which crossed racial boundaries. This allows the courts’ own flawed definitions of race, mixed race, and interracial to define the parameters of the research, but hopefully in service of understanding some of the limitations, challenges, and implications of these definitions.

Almost all of the court cases discussed here involve the boundary between the “white” racial category and the “black” or “Negro” racial category. These categories, of course, do not encompass the full diversity of racial categories in the United States, nor can the issues involving racial mixing between white and black be applied to other racial groups without serious
consideration. Nevertheless, the way that racial mixing between white and black was handled by courts has implications for other forms of racial mixing and vice versa: take, for instance, the case of *Naim v. Naim* (1955), which involved the interracial marriage of who a man the court considered “Chinese” and a woman the court considered “Caucasian.” The Virginia Supreme Court ruled that that couple’s marriage would not be recognized in Virginia because it violated the state’s anti-miscegenation law.\(^6\) Eleven years later, the same court would cite *Naim* in its ruling on the *Loving* case, which dealt with the marriage between a “white” man and a “colored” woman.\(^7\) Many of the issues surrounding racial mixing discussed in this paper are specific to mixing between white and black; nevertheless, the topic of black-white intermarriage and custody cannot be truly separated from other forms of race mixing.

Finally, this paper mainly considers custody issues within mixed race families, which does not always mean that children within these families were themselves mixed race. Although this was true in many cases, in some, including *Boone v. Boone* (1977) and *Palmore v. Sidoti* (1984), the children involved in the custody dispute were considered to be of a single race. Race became a factor in these disputes not because of the race of the children themselves, but because of the interracial remarriages of their parents. Part of the complexity of the cases examined here comes from the fact that their circumstances were often unique, making it difficult for judges to make consistent rulings across different kinds of cases. Because these different kinds of cases provide insight into the varied challenges courts confronted when making custody judgements, however, they are being discussed together in this paper. For this reason, the thesis will often refer to custody issues facing “mixed race families” as a way of encompassing not just custody

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disputes involving mixed race children, but also those involving children considered to be of a single race whose parents were interracially partnered.

II. *Loving*: A Turning Point for Mixed Race Families

In April 1967, the U.S. Supreme Court heard oral arguments in the case of *Loving v. Virginia*. *Loving* was a case about race and marriage: at issue was the union of Mildred and Richard Loving, an interracial couple whose marriage in Washington, D.C. was not recognized in their home state of Virginia. Mildred and Richard were happily married and the placement of their children was not in dispute. However, both the history of Virginia’s anti-miscegenation laws and the oral arguments in the case reveal that *Loving* was not a case about marriage alone, but also about racially mixed families and children. The law that *Loving* challenged was a product of the Jim Crow era and the eugenicist logic which underpinned it. Its fall before a unanimous Supreme Court was a significant victory against segregationism and made the legal legitimacy of mixed race families unquestionable for the first time in American history. Despite its sweeping significance, however, the *Loving* case also reveals emerging arguments about the psychological problems of mixed race families. Though these arguments did not change the outcome of the case, their use demonstrates how fears about race mixture were changing in changing times.

Virginia, like many states, had a long history of anti-miscegenation law which dated back to colonial times, but the statute that the Lovings challenged in the 1960s was passed into law in 1924. The 1920s were an important era in America’s racial history, an era when the Ku Klux Klan saw an immense rise in popularity and when the emphasis on racial “purity,” even among
European Americans, was as important as ever. It was also a period when “science” was increasingly important in justifications of racial discrimination. Among those espousing racist doctrines were “quite a large number of people eminent in the sciences and social sciences” who “were genuinely convinced that races vary greatly in innate intelligence and temperament.” The word “innate” is key. Eugenicists and others who bought into the predominant racial views of the era focused on racial inferiority (and superiority) as an outcome of unalterable biology. Believing that whites were simply naturally superior, many lawmakers felt no need to conceal their views about race in their law making or in their judicial defenses.

In this spirit, Virginia’s 1924 Racial Integrity Act (RIA) was unabashedly white supremacist and played on fears of racial mixture. As believers in eugenic theories which professed the “innate inferiority” of the black race, the RIA’s advocates believed that black people should be on the path to extinction. The fact that black populations did not die out, however, left such thinkers especially paranoid about the possibility of the “infiltration” of black people into white society through genetic mixing. Perhaps black people were avoiding the laws of natural selection by surreptitiously corrupting the white race. Their numerous statements about the Racial Integrity Act demonstrate that their concern was not only about interracial marriage but also about the expected results of such marriages: mixed race children.

Eugenicists had often rejected any possibility that racial mixing could have any positive impact, even on blacks, writing that people of mixed black and white heritage were “associated with a physique of a much more degenerate type than either of the ancestors.” The advocates of

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9 Ibid., 373.
10 Gregory Michael Dorr, “Mongrel Virginians’: Eugenics and the Race Question,” in *Segregation’s Science: Eugenics and Society in Virginia*, (University of Virginia Press, 2008), 139.
11 Ibid., 140.
the Racial Integrity Act were deeply disturbed by the way that “mix-blooded” individuals could sometimes pass into whiteness.\(^\text{12}\) Certain that such people represented a degraded and inferior part of humanity, the RIA’s authors believed that such mixture foreshadowed the downfall of “white civilization.”\(^\text{13}\) In his written endorsement of the bill, one advocate wrote that “It is the insidious increase of mixed breeds in the lower strata of society which has heretofore undermined and ruined many white civilizations.”\(^\text{14}\) It was with such dire warnings in mind that the Virginia legislature passed the Racial Integrity Act, codifying its infamous “one drop rule” which mandated that a person with even a single black ancestor could be considered black and thus unable to intermarry with “pure” white people.

From the beginning, courts recognized the absurdity of the one drop rule. No one could truly prove that they had completely “pure” ancestry, and the judges immediately faced difficult cases where individuals of ambiguous heritage struggled to prove their whiteness.\(^\text{15}\) Nevertheless, the law remained. Its advocates also worked to expand their work beyond the law itself, acknowledging that preventing mixed marriages “was not sufficient, public sentiment must be so aroused that inter-mixture out of wedlock will cease.”\(^\text{16}\) The persistent efforts of eugenicists to intimidate and humiliate those who dared cross the color line, married or unmarried, is a reminder that the institution of marriage was not their only target. Racially mixed people were a threat regardless of the union that produced them.

\(^\text{12}\) Dorr, 142.  
\(^\text{14}\) Ibid.  
\(^\text{15}\) Lombardo, 441-442.  
\(^\text{16}\) Ibid., 438.
Before *Loving v. Virginia* reached the U.S. Supreme Court, the Commonwealth of
Virginia opposed interracial marriage in court based on the inherent harms of the marriage and of
mixed race children. At the lower court level, the state’s arguments remained similar to the
original eugenic arguments against interracial marriage. When the Loving’s case was first
reviewed in the Caroline County Court, Judge Leon Bazile declared the Lovings guilty of “a
most serious crime.” According to Bazile’s opinion in the case, “the best interest of both races”
relied on the prevention of racial mixing. Further, “the fact that [God] separated the races shows
that he did not intend for the races to mix.”

Once *Loving* reached the Virginia Supreme Court, the ban on miscegenation was upheld based on the precedent of *Naim v. Naim*, a 1955 Virginia court case which had also attempted to challenge restrictions on interracial marriages.

In the Virginia Supreme Court’s opinion for *Loving*, judges repeatedly cited their decision in *Naim*, where they had written that the “natural law which forbids their intermarriage and the social
amalgamation which leads to a corruption of races is as clearly divine as that which imparted to
them different natures.” Judges also found that the Fourteenth Amendment did not “prohibit the
State from enacting legislation to preserve the racial integrity of its citizens” or prevent the
regulation of marriage “so that it shall not have a mongrel breed of citizens.” The opinion
continued:

> We find there no requirement that the State shall not legislate to prevent the obliteration
> of racial pride, but must permit the corruption of blood even though it weaken or destroy
> the quality of its citizenship. Both sacred and secular history teach that nations and races
> have better advanced in human progress when they cultivated their own distinctive
> characteristics and culture and developed their own peculiar genius.

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While the judges also invoked the importance of the “institution of marriage” independently of the threat of racial mixture, their final conclusions rested primarily on the issue of “the corruption of blood” and the “mongrel breed of citizens.” By upholding and extending this logic in the *Loving* case, the Virginia Supreme Court revealed the persistent fear of the “pollution” caused by racial mixture.

The description of races as having “different natures” which had to be protected by “racial pride” also demonstrated the continued influence of arguments like those used by the eugenicists who had originally written the Racial Integrity Act. True, neither Judge Bazile nor the Virginia Supreme Court explicitly described the white race as superior to non-white races, a position clearly held by eugenicists. Nevertheless, these judges still focused on the harm of racial mixing as inherent to the act and therefore unavoidable. Obvious in the decisions of the lower courts in *Loving* was the assumption that racial mixture was a crime not only against the state, but also against a natural or God-given order. Judge Bazile invoked the fact that “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents” as evidence that racial mixture was a violation of divine intent. The Virginia Supreme Court focused less on God, but their frequent citations of “natural law” is evidence that they saw racial differences as equally innate as their County Court counterpart. The opinions written in the *Loving* case before it reached federal courts demonstrate that for many in the 1960s, including many people with legal authority, the fear of racial mixture was based in a belief that it inherently violated an indisputable order.

The use of the threat of mixed race children as the justification for Virginia’s anti-miscegenation law did not end in the state court, but the nature of the justification changed
in important ways. Primarily, Virginia’s arguments before the federal bench shifted away from a focus on race mixing as a wrong in and of itself and instead reframed the problem around its resultant psychological issues and its anticipated burden on the state. While this argument ultimately failed to convince the Supreme Court to condemn interracial marriage, it marks a change of emphasis which reflected the changing times in which the *Loving* decision was made.

In the oral arguments before the United States Supreme Court, R.D. McIlwaine, Assistant Attorney General for the Commonwealth of Virginia, set new terms for the defense of interracial marriage bans. A longtime political figure in Virginia, McIlwaine had supported the state’s resistance to school desegregation and other integrationist policies.\(^{20}\) In the *Loving* case, he focused on children as an essential reason why mixed marriages could not be allowed. In the opening of his arguments, McIlwaine presented the case that the statutes being challenged “serve a legitimate, legislative objective of preventing sociological, psychological evils which attend interracial marriages.”\(^{21}\) Though he did not initially specify what he meant by these evils, his point gradually became clear. “Out of the fruits of marriage,” he argued, “spring relationships and responsibilities with which the state is necessarily required to deal.” Because these “fruits of marriage” would become state responsibilities, it was essential for states to regulate them. “Interracial marriages bequeath to the progeny of those marriages, more psychological problems than parents have a right to bequeath to them,” he argued, focusing on supposedly scientific evidence that the potential children of mixed marriages were the real reason to prevent such unions. He continued: “It is not infrequent that the children of intermarried parents are referred to


not merely as the children of intermarried parents but as the victims of intermarried parents and as the martyrs of intermarried parents.”

McIlwaine’s points had some commonalities with eugenic arguments. By claiming the support of “the prevailing climate of scientific opinion,” McIlwaine hewed rather closely to the “scientific” claims of the eugenicists who had written the statutes he was defending. Though the Justices repeatedly pointed out the contested nature of the scientific sources he cited during oral arguments, McIlwaine remained adamant that objective evidence was on his side. The defense of Virginia’s anti-miscegenation laws also echoed eugenicists’ fears about the threat of race mixing to “civilization,” as McIlwaine suggested that the Supreme Court had held that “the institution of marriage…has more to do with a welfare and civilizations of the people than any other institutions” and that “interracial marriages are definitely undesirable that they hold no promise for a bright and happy future for mankind.” Just as advocates of the Racial Integrity Act argued more than forty years before, McIlwaine claimed that mixed race families remained a threat to the social order.

In other ways though, McIlwaine’s arguments were a notable departure from earlier defenses of Virginia’s laws. His focus on the issue of children when defending Virginia’s anti-miscegenation statute is a point of consistency with the law’s original intent, but the language he used before the Supreme Court did not claim that racial mixture was a violation of natural law. Instead, McIlwaine focused on the “relationships and responsibilities with which the state is necessarily required the deal.” Though the use of “scientific” justifications for preventing interracial marriage was not new, the focus on the psychological challenges faced by mixed race children was. The harm in racial mixing had moved from being a violation of natural differences
to being an internal struggle within the minds of mixed race people themselves. Though McIlwaine never explicitly stated as much, his arguments implied that these struggles might eventually lead to behavioral problems which the state would be obliged to address and account for. Thus the harm of race mixing was now linked to its potential burden on the state (and by extension the society it represented), rather than its inherently unnatural character.

The fear that certain kinds of people were more susceptible to psychological problems and would, as a consequence, become a burden to society was not limited to mixed race people, of course. In the late 1960s, when *Loving* was being decided, this logic about social adjustment was being frequently applied to black people, perhaps most infamously in *The Negro Family: The Case for National Action*, written by Assistant Secretary of Labor Daniel Patrick Moynihan. Published in 1965, two years prior to *Loving*, the so-called Moynihan Report sought to identify the reasons for the inequality of blacks and whites in America and prescribe potential solutions to this inequality. Heavily debated from the moment of its publication, the report came to represent the complicated and intensely controversial mix of racial, cultural, sexual, and economic issues which simmered at the surface of American life during the 1960s and beyond. Although many of the report’s key arguments were not original and had been debated for decades (indeed, Moynihan drew heavily from the work of other scholars of race and sociology to form his ideas), the report is a useful indicator of some of the most salient issues which were being contested during this period, including the “pathology” of black families.

As part of the argument for ending Jim Crow laws, advocates of racial equality had pointed to “the notion that white racism injured black psyches and distorted black social life.”

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23 Ibid., 52.
These arguments had been critical in the landmark Brown v. Board of Education decision and had been used to help discredit the “scientific” views of earlier decades which asserted the innate inferiority of black people. But the view that black people and black society were psychologically damaged could be used either to attack the racism which caused this damage or as justification for the inequalities black people experienced. While the Moynihan Report was often inconsistent about the order of cause and effect when it came to the “damaged” character of black social life, many interpreted the report as a condemnation of black people’s failure to adopt more normative family and social structures within their communities.24 Although Moynihan considered himself a liberal when writing it, the report was later associated with neoconservative views which rejected the usefulness of race-conscious social assistance because of the belief that black people needed to address the “pathological” nature of their family life in order to succeed in the United States.

The legacy of the Moynihan Report is incredibly controversial, but it often serves as a stand in for how debates about race were evolving in the late 1960s and early 1970s. Some of the same issues which pervaded the report emerge in McIlwaine’s arguments in the Loving case. Moynihan focused on the psychological problems of black families while the state of Virginia directed its focus on mixed race ones, but their conclusions were often similar. Moynihan saw black children, regardless of class, as “constantly exposed to the pathology” of black family life. Virginia argued that mixed race children were recipients of “more psychological problems than parents have a right to bequeath to them.”25 Moynihan described black families as a “tangle

24 Geary, 6.
of pathology” whose structure “because it is so out of line with the rest of American society, seriously retards the progress of the group as a whole.” Virginia claimed that mixed race families “are wrong because they are most frequently if not solely entered into under the present day circumstances by people who have a rebellious attitude towards – towards society.” Both arguments relied heavily on sociological and psychological diagnoses of the problems of non-white families. Both saw the deviations these families took from the norms of white families as evidence of their sickness. And while their prescriptions for how to treat these ill families were different, their similarities illustrate a clear concern within white institutions about the threat of racial difference to an established social order. Arguing before the federal Supreme Court, the state of Virginia focused its claims against interracial marriage on the ways such families deviated from the norms of society and thus risked producing deviant children that the state would be forced to account for. It was safer and more just, the state implied, to prevent such children from existing at all than to attempt to contend with the host of issues they were sure to pose to American society.

Both the Moynihan Report and Virginia's defence in Loving reflect fears about racial “pathology” and psychological abnormality which could harm the social order. In the case of Loving, however, whatever potency these fears may have had failed to convince the Supreme Court that miscegenation should be prevented. Unanimously, the court struck down the nation’s remaining interracial marriage bans, ruling that “Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State.” It was a victory for Mildred and Richard Loving and for organizations like the

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27 Moynihan, 29.
American Civil Liberties Union (ACLU), who had supported their case. While miscegenation bans remained on the books in some states for years or even decades, they no longer carried legal weight. Interracial couples could now be married nationwide.

*Loving* also helped bring down the nation’s last bans against transracial adoptions, which had existed in a few Southern states. Within a year, Texas’ ban on adopting across racial lines was struck down, with the judge citing the “very recent” *Loving* decision in his ruling.30 In 1972, Louisiana, the last state with a ban on transracial adoptions on its books, also saw that ban lose out in court, with *Loving* again being cited as one of the important precedent cases for the decision.31 Thus *Loving* was indeed transformative for mixed race families, both in cases of marriage and adoption. It formally legitimized many families that existed already and, through adoption, enabled the legal formation of others. Families, however, were complicated, and many legal questions remained, especially as they related to child custody.

III. Love Is Blind? Recognizing Racism and Aspiring to Equality in the Courtroom

In custody cases, courts were forced to contend with the messy realities of race in family life, deciding, in the absence of a federal judicial rulings on the subject, on the place of racial classifications in deciding the fate of children and their families. How these courts handled such disputes varied from state to state, from year to year, and from case to case. Nevertheless, these cases shared with *Loving* and with each other a similar concern about the psychological health and social position of mixed race children. Many brought into their arguments the fears of the psychological damage afflicting mixed race families, as *Loving* had. Others focused on the harms

30 In re Marriage of Gomez, 424 S.W.2d 656 (1967).
of social stigma and contemplated the role such stigma should play in determining a legal
decision. Almost all agreed that mixed race children would face challenges as a result of their
heritage, but the courts that heard these cases differed on how these challenges should be handled
and overcome. Their decisions reflect fears about the damage caused by racial discrimination but
also hopes about the possibility that family care and love could overcome even the deepest social
divisions.

One of the central issues for family courts was whether race should be considered at all. Racial issues were often introduced in courts by feuding parents who hoped that their perceived
racial similarity to their children could be an advantage in a custody dispute. Thus judges often
could not avoid tackling complicated, philosophical questions about the place of race in law.
With no federal cases to guide and unify their decisions, state and local courts were forced to
make determinations about the placement of a growing number of mixed race children in an
increasingly heterogeneous society.

Courts sometimes chose to reject the use of racial classifications in custody disputes, as
was the case when Beazley v. Davis came before the Supreme Court of Nevada in 1976. When a
white woman and a black man had divorced, a lower court had used race to decide the placement
of their two children, as the district judge “after reviewing photographs of the children decided
that their physical characteristics were Negroid and therefore custody should remain with their
father.”32 The district court also determined that placing the mixed race children with their white
mother, who had remarried a white man and might have eventually have white children, would
“do nothing less than eventually cause emotional trauma” for the mixed race children.33

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33 Ibid.
Meanwhile, the mixed children’s black father had remarried a white woman, and their potential children “would have similar physical characteristics” to their half-siblings and allow them to “fit far more comfortably and be less susceptible to emotional trauma during their formative years.” Upon appeal, however, the Nevada Supreme Court invalidated the actions of the district judge. Looking to legal precedents which had emerged largely in the civil rights era of the 1950s and 1960s, the court saw the need to apply a “strict standard used to test the constitutionality of legislation classifying persons according to race.” Appealing to the precedents of other courts that while “racial prejudice and tension are inevitable,” if “children are raised in a happy and stable home, they will be able to cope with prejudice and hopefully learn that people are unique individuals who should be judged as such.”

*Beazley* identified the risk of racial prejudice from living in a racially mixed household as a potential harm. The lower court’s concern about the physical characteristics of mixed race children and their similarity to their potential half-siblings demonstrates that the fear of a family looking “abnormal” could have real weight in some courts. Even the Nevada Supreme Court acknowledged that mixed race families would face prejudice. When the Nevada Supreme Court overturned the lower court ruling, however, it generally rejected the use of racial classification in custody decisions in its jurisdiction. The decision in *Beazley* pointed to the need to apply “the most rigid scrutiny” to any state actions “which classify persons according to race.” Both the focus on strict scrutiny for racial classifications and the judges’ hope that the children involved in the dispute would grow up to see beyond race professed a worldview in which race should be

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35 Ibid.
36 Ibid.
37 Ibid.
considered as little as possible. While the Nevada court did not apply their decision outside of
the realm of custody or completely eliminate the possibility of using racial classifications in law,
its language suggests a strong preference for a “colorblind” legal system.

Just a year after Beazley, the case Raysor v. Gabbey came before the Supreme Court of
the State of New York. Also relating to the custody of a mixed race child, Raysor took a very
different approach to the issue of racial classifications and law. In this case, a half-white,
half-black girl, Samantha, had been raised by her white mother until her mother’s death. At that
point, her white maternal grandparents claimed custody of their granddaughter while her black
father also petitioned for custody. Where Beazley had expressed a hope that race could be
eliminated as much as possible from custody decisions, Raysor mandated its consideration. In
the final opinion issued by the New York Supreme Court, the judges took note not only of the
race of the family members involved in the dispute but also of the racial composition of their
neighborhoods and social circles. Samantha, the court noted, had lived with her white mother in
a “racially mixed neighborhood” until her mother’s death, at which point she had moved into the
“all-white residential neighborhood” of her maternal grandparents.\(^{38}\) In contrast with Beazley,
where judges suggested the challenges faced by mixed race children could be overcome through
the care of a loving household, the judges in Raysor judged that it was “self-evident that a child
of racially mixed union potentially faces special problems unknown to a child whose parents are
both white or both black.” For this reason, the court ruled that “any decision on custody ought to
reflect an awareness of the court of these problems and some consideration by it of which

prospective custodian is best able to guide the child, not only for the present, but when she
confronts them in the future.”\textsuperscript{39}

The stark differences between the views of the Nevada Supreme Court in 1976 and the
New York Supreme Court in 1977 demonstrate the inconsistency of state and local courts on the
subject of racial classification in this time period. Even as the Nevada court was pronouncing the
importance of “strict scrutiny” when it came to the use of race in the courtroom, the New York
court was declaring the consideration of race essential to making a just decision. Indeed, the
judges in New York declared that “the ability of the custodian to recognize the stresses arising
through racial differences” was of “first importance in weighing the child’s best interests.”\textsuperscript{40}
The opinion in 	extit{Raysor} also called racial issues “a matter of prime significance,” again placing them at
the top of the list of issues to consider in a case of this nature. The rulings of these state supreme
courts made definitive statements – in opposing ways.

The inconsistency continues in other court decisions from the time period. In 	extit{Boone v. Boone},
also from 1977, the Supreme Court of New Mexico ruled on a case which linked issues
of custody with interracial marriage. After a white couple divorced, the mother, who had been
awarded custody of their children, began a relationship with a black man. Her white ex-husband
then sought a modification to custody, arguing that this interracial relationship was harmful to
his children. Specifically, he claimed that the relationship caused “embarrassment” to his
children and that they “would be better reared with members of their own race.”\textsuperscript{41}

Though the case also had a clearly gendered elements (the mother was also accused by
her ex-husband of engaging in an “immoral” relationship which was “improper” “whether [her

\textsuperscript{40} Ibid. Emphasis added.
partner] be white or black” because she was sleeping with her new partner without being married to him), the New Mexico Court noted that “it is clear to this court that racial considerations weighed heavily upon the trial court in ordering a change of custody in this case.”

In response, the court took a line close to the Nevada Court in *Beazley* (where judges had demanded “strict scrutiny” of racial classifications), ruling that “racial considerations alone cannot properly determine what is in the best interest of children.”

Despite similarities with *Beazley*, however, *Boone* was different from both *Beazley* and *Raysor* (where the court had required the consideration of race). While *Beazley* had ruled that mixed race children could not be placed with their black parent for racial reasons, *Boone* claimed that white children could not be kept away from their white mother on account of her relationship with a black man. In other words, *Boone* disavowed the consideration of race, but in a context where that consideration punished an interracial relationship. *Beazley* disavowed the consideration of race, but in a context where that consideration was about fostering a child’s “racial identity.”

This was part of the difficult line courts at all levels had to walk in the late 1970s. The law had to draw clear distinctions around the issue of race, yet there was always ambiguity. The ruling in the *Beazley* case suggested that the consideration of race should be eliminated altogether. *Raysor* went the other direction, mandating its consideration in the determination of a child’s interests. *Boone* restricted the use of race in custody cases, but dealt more with the right of interracial marriage than with custody alone. The wide variety of circumstances in which race could factor into a custody case left courts struggling with inconsistencies and uncertainties,

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43 Ibid.
debating the extent to which the law should even acknowledge the realities of race and racial prejudice.

The task of handling such a fraught issue was complicated by the fact that parents often attempted to leverage race to their advantage. In both the *Beazley* and *Raysor* cases, the black parents involved in the custody dispute sought to use the fact that their mixed race children would generally be considered black as an advantage. The fact that the district court in *Beazley* ruled that, for the children in question, their “physical characteristics were Negroid and therefore custody should remain with their father” shows how race could be used in this manner.44 In the *Raysor* case, judges described the child involved as a “racially-mixed black girl” demonstrating that she was racially identified with her black father, who introduced testimony from a social worker who argued that “an obviously black young lady” would face problems being raised in an all-white environment.45 Judges saw the importance of the girl in question integrating with “blacks sharing her ancestry.”46 Meanwhile, in the *Boone* case, the white father also attempted to use racial similarity to his advantage, arguing that his white children would be “better reared with members of their own race.”47 Whether these arguments came from white or black parents, they were clearly self-interested. Whether they should be seen differently by the court remained an open question. Courts had to decide if half-black, half-white children were black, and if they were, whether racial similarity could be a justification for a custody decision. Also important to consider was whether that justification be used by black parents or white parents or both. Finally,

46 Ibid.
most judges admitted that mixed race families would face racial prejudice, but how much to weigh that prejudice against other factors was unclear.

These questions were being considered in a time of racial change. Even the language around the subject was shifting. Custody cases from the time between *Loving* and *Palmore v. Sidoti* (1984) discuss race as a distinction between “white” or “caucasian” people (the terms are used interchangeably throughout this period) and people who are either “Negro” or “Black.” Unlike white and caucasian, the use of the terms “Negro” and “Black” are not arbitrary, but instead reflect the shifting social expectations about racial labelling and provide a useful hook for historical analysis. 1967, the year of *Loving v. Virginia*, was also the year when activist Stokley Carmichael and political scientist Charles Hamilton published the book *Black Power: The Politics of Liberation*. This profoundly influential work is widely credited for initiating the gradual shift in the preference of Black Americans for the label “Black.”48 While the term “Negro” had originally been adopted as a term of pride in the Black community, Carmichael and his contemporaries dismissed it “as denoting subservience, complacency, and Uncle Tomism.”49 Beginning in 1967, “Black” began to gain popularity as a term which indicated liberation, action, and racial pride. The origins of the term as a “starkly confrontational and militant” label meant that it was not initially embraced by all, but its gradual integration into common language (and legal language) is a useful barometer for the emergence and acceptance of new views about Black identity.50

49 Smith, 499.
50 Martin, 90.
For the most part, courts seem to have adopted the term “black” by the late 1970s. 

*Beazley* still referred to the black parent in the case as “a Negro” and his children as “Negroid,” but *Raysor* and *Boone*, both from 1977, used the term “black.” So did cases like *In re Marriage of Mikelson* (1980), which dealt with the custody of two half-white, half-black children, and *Farmer v. Farmer* (1981). These cases – from New York, New Mexico, and Iowa – showed that courts from around the country had generally adopted this new language. *Palmore v. Sidoti* (1984), however, returns to the term “Negro,” a fact that demonstrates that courts were still struggling to catch up with the language of race.

To make sweeping statements about these courts based on their use of one term would be a mistake. Still, the shifting language of race demonstrated the unstable ground on which courts made their custody rulings. As the language and expectations about race and prejudice evolved, courts attempted to make definitive rulings but often struggled to cope with the complexities and even the words used to describe the categories they were ruling on. This was especially true when mixed race children were involved. As a legacy of laws like Virginia’s Racial Integrity Act, which mandated any black ancestry made one black, and the social perceptions they expressed, mixed race dependents were often judged to be black. As in the *Beazley* case, sometimes physical characteristics were invoked as evidence of blackness. *Raysor*, as previously mentioned, referred to the subject of the custody dispute as a “racially mixed black girl,” acknowledging her mixed heritage but still declaring her black. *In re Marriage of Mikelson* also discussed mixed race children as black, with their father arguing that he could help them “establish a sense of their own black identity” and “appreciate black values.”

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51 In re Marriage of Mikelson, 299 N.W.2d 670 (1980).
Farmer, a number of expert witnesses, including psychologists and social workers, “All agreed that the child of this interracial union, with evident black physical characteristics, however, subtle, will be perceived by society as a black child.”52 This judgement seems fairly constant among many custody decisions.

The Farmer case is instructive, however. In this case “an uncommonly long and bitter nonjury trial” emerged when Bethany Farmer, who was white, and Billie Farmer, who was black, both sought custody of their daughter after their divorce.53 Both Bethany and Billie recruited expert witnesses to testify on their behalf. Though all the witnesses in the case agreed that a mixed race child would be seen as black, this did not prevent them from arguing that the child would also struggle due to a mixed race identity. Referring to the “internal conflicts which are the product of confused identity,” these experts demonstrated the persistent concerns about both the internal psychological challenges and the external social pressures on mixed race children.54 As had been argued in Loving, psychological experts in Farmer and beyond believed that mixed race children would face challenges because of their background. Unlike in Loving, these witnesses attributed these challenges to social prejudice. Those who argued that Bethany, the child in question, should be placed with her black father contended that “black people have… been more tolerant of persons with interracial backgrounds.”55 As one witness, Dr. Arthur Dozier, phrased it: “Black people, in a general sense, have been more accepting of the ‘zebras’ that have occurred, from Jeffersonian times to date.”56 By professing the need to place Bethany in a social situation which would minimize prejudice against her, the witnesses called on behalf

53 Ibid.
54 Ibid.
55 Ibid.
56 Ibid.
of her black father were claiming that racial prejudice should indeed play a role in deciding custody. In contrast, two experts who testified on behalf of Bethany’s white mother argued that the “child’s need for love, warmth, and caring” outweighed racial factors. In contrast with the earlier witnesses, these experts presented the case that prejudice might be overcome through the personal bonds between mother and child. Though all the experts on both sides of the case acknowledged that mixed race children would face stigma, they could not agree on what role that stigma should play in making a legal decision.

The variety of witness testimony in Farmer points to another complicating factor for courts: the growing importance of social science in custody. In her history of child custody in the United States, historian Mary Ann Mason tracks the “ascendancy of the social sciences” in custody determinations. Though she emphasizes the gradual nature of this ascendancy, Mason points to the 1970s and 1980s as a critical time when judges turned towards social science theories for guidance on issues of custody. In part because social changes in the 1960s had eliminated the automatic preference for mothers over fathers in custody disputes, courts came to lean on social science as an objective means of judging the “best interests” of children. Testimony and citations from experts could certainly be clarifying, but they also added a new layer of complexity to already tangled racial questions. Social scientists often disagreed, and opposing family members could come to court with their own set of witnesses lined up to defend their side. Indeed, the long history of the use of “science” in issues involving mixed race families, from Virginia’s eugenicist laws to Loving and beyond, demonstrates the way that

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58 Mason, 161.
59 Mason, 167.
60 Ibid., 164.
seemingly objective truths could be highly controversial. Any judge trying to take the input of “science” would face a challenge when experts so often disagreed.

In the Farmer case, the New York Supreme Court ultimately decided that race should not be a “dominant, controlling or crucial factor.”61 Walking a careful line between condemning the consideration of race altogether and insisting it be considered, the court ruled that it “is to be weighed along with all other material elements of the lives of this family.”62 In the judge’s conclusion, the opinion focused on the fact that the parent given custody had to be “competent, caring, warm and stable.” He also argued that a mixed race child would be able to overcome challenges associated with social stigma through “an adequate sense of self-worth” which was “the result of being treated as worthwhile, valuable, important, and loved.”63

With this language, Farmer mirrored the language of Beazley by hoping that individual love, affection, and care could overcome the potential prejudice towards mixed race families. This notion was a touching and optimistic appeal to the power of family love, and court rulings gave it real legal weight in some states. This optimism, however, was tempered by the long shadow of racial oppression in America, a shadow which legal and academic discourse had only begun to address. The 1970s had seen a growing effort on the part of some academics and activists to write a new narrative about race and racism which stressed the “persistence, or more ominously, the permanence, of American racism”64 and the need for “color-conscious” policies to combat it.65 On this trend, historian Daniel Rodgers contends that the post-civil rights era

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\begin{align*}
61 & \text{Farmer v. Farmer, 109 Misc.2d 137 (1981).} \\
62 & \text{Ibid.} \\
63 & \text{Ibid.} \\
64 & \text{Andrew Hartman, A War for the Soul of America: A History of the Culture Wars (Chicago: University of Chicago Press, 2015), 108.} \\
65 & \text{Hartman, 113.}
\end{align*}
\]
marked a new phase of “racial assertiveness” when Black and other racial minority communities began to claim new levels of collective identity.\textsuperscript{66} As these communities, particularly the Black community, “took the language of race–with all its stigmas, its social disadvantages, its pains and injuries–and reshaped it as a point of pride,” they became more adamant about asserting the value of their identities. Pride and racial solidarity had certainly been an important part of the civil rights era as well, but they gained new significance when fights for racial equality focused less on legal discrimination and more on social equality. Meanwhile, the conservative backlash to “identity politics” can be seen in the opposition to policies like affirmative action, which had once drawn support from both Democrats and Republicans.\textsuperscript{67} The much discussed “Conservative Ascendancy” – traced by some from Nixon’s election in 1968 – traded on racial fears but also pushed a rhetoric of colorblindness which ran counter to strengthened racial identity.\textsuperscript{68}

Supposedly colorblind rhetoric had long been used as a way of avoiding the reality of racial disparities, but it gained new significance in the wake of legal desegregation. With explicit racial segregation no longer defensible in court, the use of supposedly race-neutral language and policy making could allow the perpetuation of discriminatory policies. In the view of many, colorblindness was no more than a “rhetorical prophylactic,” as “colorblind language provided protective cover for color-based suppression and oppression.”\textsuperscript{69} When examining the custody rulings which appealed to a love which could transcend race, it is hard to assess intent or sincerity. In part because of the very nature of the post-civil rights judicial system, any racial bias is deeply concealed and never made explicit. Regardless of intent, however, it can easily be

\textsuperscript{67} Hartman, 104-105.  
\textsuperscript{68} Ibid., 113.  
argued that the effect of colorblind rulings could be to undermine black identity and benefit white parents. This argument came to the fore clearly in the opposition to interracial adoption of black and biracial children in this same period. Although adoption cases worked under different assumptions than custody cases (largely because the differing legal rights of natural and adoptive parents), the arguments made against interracial adoptions in the 1970s are instructive for understanding the issues courts were considering in custody cases.

Opposition to interracial adoptions had a long history. Up through the 1950s and 1960s, scholars such as Julie Berebitsky highlight the emphasis placed on “matching” in adoption. Even as international adoptees began to arrive in the United States in significant numbers, adoption agencies still attempted to create families which “should parallel the “natural” family as closely as possible”\textsuperscript{70} and which, in fact, “not only mirrored biological ones, but reflected an idealized version of them.”\textsuperscript{71} Because of this, domestic interracial adoptions gained little acceptance until the late 1960s. In her essay discussing the politics of placing black adoptees, Elizabeth Bartholet argues that the civil rights movement’s “integrationist ideology made transracial adoption a sympathetic idea to many adoption workers and prospective parents” as the decade came to a close.\textsuperscript{72} However, a “brief era of relative openness to transracial adoption came to an abrupt end” when the National Association of Black Social Workers (NABSW) published a position statement against the interracial adoption of black children in 1972.\textsuperscript{73}

\textsuperscript{71} Ibid., 36.
\textsuperscript{73} Ibid., 354.
The NABSW’s paper was influential in the adoption world, and the concerns it raises about the fate of black and biracial children in white adoptive homes can be applied to custody debates as well. Proclaiming the value of black culture and family life, the position paper denounced the placement of black children in white homes as a means of erasing and suppressing already marginalized identities.\textsuperscript{74} The paper also addressed the issue of social stigma as a reason for placing black and biracial children in black homes, as “Only a Black family can transmit the emotional and sensitive subtleties of perception and reaction essential for a Black child’s survival in a racist society.”\textsuperscript{75} As in some court cases from this period, the fact that the cause of the harm to a mixed race family came from society did not negate the reality of the harm in the eyes of the authors. Addressing specifically the issue of children who were part-black, part-white, the paper recognized the way that historical assumptions that such children were black by default were changing, and objected to such shifts:

Those born of Black-White alliances are no longer Black as decreed by immutable law and social custom for centuries. They are now Black-White, inter racial, bi-racial, emphasizing the Whiteness as the adoptable quality; a further subtle, but vicious design to further diminish black and accentuate white. We resent this highhanded arrogance and are insulted by this further assignment of chattel status to Black people.\textsuperscript{76}

As the psychological experts in the Farmer case had identified, black people were generally more accepting of mixed race individuals than white people. The NABSW demonstrated that that acceptance came at least in part from the fact that mixed race individuals were not distinguished as a unique category. For social workers and courts to distinguish the “unique” challenges of

\textsuperscript{75} Ibid.
\textsuperscript{76} Ibid.
mixed race children from those of black children was problematic (and clearly controversial) in cases of adoption.

The logic of the NABSW paper could apply to custody cases such as Farmer or Beazley, where a white parent and a black parent both sought custody of their mixed race child after a divorce. Its influence and the philosophies it represented also complicated the consideration of race in custody decisions, as it drew a clear distinction between the use of race on behalf of a black parent and the use of race on behalf of a white parent. As the NABSW made clear, the asymmetrical nature of race history made treating such claims “equally” a complicated proposition.

The NABSW paper was not isolated, of course. It emerged from a context in which “interracial marriage,” and, by extension the progeny of those marriages, “became more contested among blacks” and “was increasingly seen as an engine for assimilation that would allow successful blacks, especially black men, to leave the community behind as they focused on their own economic and social advancement.” Controversy about intermarriage was not new in the black community: indeed, reaching back to the era of Virginia’s Racial Integrity Act, white advocates of that law had met with and occasionally praised the work of black activists like Marcus Garvey, who had opposed intermarriage. However, opposition to interracial marriage (and to transracial adoptions and custody determinations) gained new meaning in the late 1960s and late 1970s. For one, the nationwide legalization of interracial marriage in the Loving case and the subsequent removal of the last legal barriers to interracial adoptions (in Texas and Louisiana) made such arrangements a far more pressing issue. For another, the potential for racial

78 Dorr, 141.
mixing to act as a force of assimilation was vastly increased. Historically, due to the strong prejudices in the white community and “one drop” laws like those in Virginia meant that assimilation into white communities was extraordinarily difficult. Rather than blacks assimilating through their marriages with whites, “whites who married blacks were far more likely to assimilate into the black community” and thus interracial marriages “did not raise the same concerns about a loss of racial identity or community” in the pre-civil rights era.Indeed, the NABSW was right to observe that “Before the 1970s, interracial couples usually raised their children as black, not as white or even as biracial.” Legal and social attempts to preserve white “purity” prevented black or mixed race people from assimilating into white society.

As some of the legal barriers to black advancement began to fall, however, the concern that the growing acceptance of integrationist rhetoric among white people masked an attempt at assimilation grew. Thus, the fears of assimilation and cultural suppression became part of the discussion about child custody. Even as some judges expressed hope that race issues could be overcome through parental care and affection, a growing number of voices asserted the need to account for the ugly history of racism by drawing attention to its continuing impact on the way all children, but perhaps especially mixed race children, grew up.

IV. Palmore: Reasonable Caution

Of course, bias against mixed race families remained prevalent among white people, as cases like Boone, where a white parent was angered by the placement of white children in a racially mixed home, show. Even long after miscegenation was legalized across the country, the

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79 Romano, 220.  
80 Ibid.
“complications facing interracial couples came together most clearly around the issue of children.” 81 Because of the intense fear which surrounded the “taint” of mixed blood, “whites considering intermarriage were nearly always asked the question ‘what about the children?’” 82 Further, the issue of children remained a topic of great concern even after a marriage was finalized. White families often worried that even single race white children “could potentially be ‘remade’ as something less than white through association with racially transgressive parents.” 83 This anxiety can be seen in the 1984 Supreme Court case Palmore v. Sidoti. Almost two decades after Loving and after many state and local cases which tackled the issue of race and custody, Palmore demonstrated both the enduring fears about race mixture and the questions about the use of racial classifications in law. In its ruling, the federal Supreme Court expressed its continued support for the rights of mixed race married couples and also avoided making sweeping statements about the place of race in law.

In this case, the divorce of a white couple, Anthony and Linda Sidoti, left their daughter Melanie in her mother’s custody. However, when Linda Sidoti married a black man, Anthony brought his ex-wife to court seeking a modification of their daughter’s living arrangements. Although he alleged that Melanie had been neglected in Linda’s care, the Florida court that heard his case found no evidence to support this claim. Instead, the court ruled in favor of Anthony on the basis of his claims about the racial issues Melanie was likely to experience growing up in a mixed race household. The district court noted Anthony’s “evident resentment” of Linda’s “choice of a black partner,” and argued that this resentment was not grounds for Linda’s loss of custody of her daughter. However, after noting that there was no reason to doubt the suitability

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81 Ibid., 73.
82 Romano, 73.
83 Ibid., 76.
of either Linda or Anthony as parents, the district judge argued that “it is inevitable that Melanie
will, if allowed to remain in her present situation and attain school age, and thus more vulnerable
to peer pressures, suffer from the social stigmatization that is sure to come” as a result of the
mixed race character of her household.\textsuperscript{84} This “social stigmatization” was judged a sufficient
reason for Linda to lose custody of her daughter.

This case had many similarities to the \textit{Boone} case of 1977. In both disputes, a white
woman’s partnership with a black man prompted a white ex-husband to seek custody of his
children. In both cases, judges noted the man’s resentment of his ex-wife’s new partnership, with
race being a component of that resentment. \textit{Palmore} also had many connections with \textit{Loving v.
Virginia}. Although \textit{Loving} and \textit{Palmore} were very different on the surface, as \textit{Loving} revolved
around the issue of marriage while \textit{Palmore} tackled a custody dispute, the \textit{Palmore} decision
ultimately rested on the \textit{Loving} precedent. Much of the discussion of the case revolved on
whether the removal of Melanie from her mother’s custody constituted a form of punishment for
her mother’s interracial marriage. In one sharp exchange between the lawyer representing
Anthony Sidoti and Justice John Paul Stevens, Sidoti’s attorney tried to refute the idea that Linda
was being punished for her interracial marriage, pointing out that “we don't have a case here we
have a state action that's going to throw the mother in jail or fine her.” To which Justice Stevens
interrupted: “No. All you're going to do is take her child away.”\textsuperscript{85} Marriage and custody were
linked in these legal contexts. The “fruits of marriage” were key to the arguments in \textit{Loving},
while the right to marry interracially without penalty was essential to \textit{Palmore}.

\textsuperscript{85} Ibid.
The Florida district court in *Palmore* did not disparage interracial relationships or even discuss children raised by such partnerships as at risk of psychological difficulties, as the Commonwealth of Virginia did in the *Loving* case. Of course, Melanie herself was not mixed race: nevertheless, it is worth noting that the arguments in *Palmore* did not discuss her psychological state solely as the result of her mother’s new marriage. Instead, the harm seen by the court came not from the marriage itself but in its interaction with society. Because *Palmore* came before the court in a time when interracial marriage was legal (as a result of *Loving*), arguments focused on whether social stigma alone was a sufficient justification for removing Melanie Sidoti from her mother’s care. Much like cases tackled by state and local courts in the decade prior, *Palmore* was attempting to balance a growing recognition of the impact of racism on a child’s upbringing with the need for “strict scrutiny” of the use of race in legal contexts.

The fact that the district judge in the case favored Anthony Sidoti’s side by granting him custody suggests that he was troubled by the idea that a white child would be allowed to suffer racial prejudice and was willing to use racial classifications in court in order to prevent it. The ultimate decision of the Supreme Court, however, would go against Anthony Sidoti’s arguments. In his opinion, Chief Justice Warren Burger acknowledged “It would ignore reality to suggest that racial and ethnic prejudices do not exist, or that all manifestations of those prejudices have been eliminated” and acknowledged that this reality created “a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.” But Burger rejected the
idea that these social pressures could inform legal decisions, concluding that “Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”  

This decision was a victory for Linda Sidoti Palmore and for the civil rights organizations which supported her in her legal battle, including the American Civil Liberties Union, the National Association for the Advancement of Colored People, and the American Jewish Committee. As these organizations had argued, the case represented “as flagrant an example of state-enforced racism as has reached this Court in recent years.”  

Receiving a unanimous decision in their favor from the highest court in the land was an important step towards establishing legal precedents which protected mixed race families.

But the notion that private biases could not be used in the creation of law also had complicated implications. In the amicus brief filed by civil rights organizations, these organizations repeatedly called on the Supreme Court to “prevent race from playing a role in our legal system.” But they always accompanied this call with an important caveat: “except in remedial settings.”  

What they meant by this was clear in their discussion of the history of the use of race in American law. Referencing the “prophetic dissent” of Justice John Marshall Harlan in the Plessy v. Ferguson case, which, as they noted, had argued that the “effect of the 13th, 14th, and 15th Amendments was to render the Constitution ‘color-blind’” the amicus brief argued that:

Had we heeded Justice Harlan’s lone voice in Plessy, we would have been spared the anguish of a half-century of racial oppression and would not now be confronted with the question of the extent to which a color-blind Constitution permits, and even requires, race conscious remedial action designed to eliminate the fruits of past racism.

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88 Ibid.
89 Ibid.
This aside was not directly related to the *Palmore* case which the brief was addressing. After all, the court was not debating the merits of “remedial action” in *Palmore*. Its inclusion speaks to the careful balance the brief’s writers were trying to strike between eliminating the kind of racialized legal decisions which discriminated against people of color, as was the case in *Palmore*, while still permitting racialized lawmaking which was designed to address past injustices. The suggestion that a “color-blind Constitution permits, and even requires, race conscious remedial action” was a reminder to the justices of the Supreme Court that the organizations supporting Linda Palmore’s case were not asking for the kind of decision which might completely eliminate the consideration of race in legal contexts.

The amicus brief in the *Palmore* case was deliberate in its wording, carefully outlining the extent to which racial categories should be removed from the legal system. The Supreme Court’s opinion shared the brief’s caution. In his final conclusion, Chief Justice Burger wrote that “The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.”90 Read out of context, the first part of Burger’s phrase – “The effects of racial prejudice, however real, cannot justify a racial classification” – could be read as an extremely broad condemnation of the use of race in law. But placed in its full context, the decision was limited. Burger argued on behalf of the Supreme Court that racial prejudice could not justify “a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.”91 Thus the court limited the use of racial classifications to a very narrow set of circumstances. Many legal scholars analyzing the impact

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91 Ibid. Emphasis added.
of *Palmore* would be frustrated by the narrowness of this ruling, as it failed to address the place of race in law even in other kinds of custody cases. Still, given the nuances and challenges that came with dealing with a topic like race, the narrowness of the decision may have been appropriate. In a time when new ideas about race and racial identity were emerging or growing in importance, drawing strict legal lines on the topic was a complicated endeavor.

V. Conclusion

From 1967, when *Loving v. Virginia* reached the U.S. Supreme Court, interracial marriages have been legal across the nation. The legalization of these marriages also legitimized the mixed race children of these partnerships, while the *Loving* court precedent also enabled the legalization of transracial adoptions nationwide. Despite persistent prejudice, mixed race families in the United States have been given the protection and recognition of the law for more than fifty years.

But *Loving* was not the end of the legal story for racially mixed families. Especially when issues of custody were involved, *Loving* was only the beginning. In the decades that followed *Loving*, cases from across the country revealed the continued difficulties encountered by the legal system when dealing with mixed race families involved in custody disputes. In particular, these cases demonstrated the issue of whether to consider race in the courtroom and, if race was considered, how to consider it fairly. Choosing to avoid the use of race as a deciding factor could express a hope for a less racially determined future, but it also ignored the past and present, in which all courts agreed that race played a part in the well-being of children and their families.

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Meanwhile, considering race as an important part of a custody decision acknowledged the realities that families lived with, but there was no easy way to use race fairly. When even describing a person’s race could be challenging, courts struggled to establish a clear, universal, and legally defensible standard for accounting for race in custody decisions.

No single answer to this question emerges from the cases that followed in the initial decades after *Loving*. State courts proved inconsistent; meanwhile, the only nationwide case on the subject, *Palmore v. Sidoti*, remained narrowly focused, becoming notable more for what it did not say than for what it did. Because of this inconsistency, it is impossible to draw broad conclusions about how the American legal system handled these cases. Instead, the cases reveal mainly the questions being asked about race and how its painful history should or should not be addressed in the judicial system.
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Secondary


