SMU | Dedman School of Law

SMU Law Review

Volume 62 | Issue 4 Article 3

January 2009

Color of Testamentary Freedom

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THE COLOR OF TESTAMENTARY FREEDOM

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Wills that prioritize the interests of nontraditional families over collateral heirs test courts' dedication to observing the posthumous wishes of testators. Collateral heirs who object to will provisions that redraw the contours of "family" are likely to profit from the incompatibility of testamentary freedom and social deviance. Thus, the interests of married, white adults may claim priority over nonwhite, unmarried others. Wills that acknowledge the existence of moral or social transgressions—namely, interracial sex and reproduction—incite will contests by collateral heirs who leverage their status as white and legitimate in order to defeat testamentary intent.

This Article turns to antebellum and postwar will contests between disinherited white heirs and mixed-race devisees to question the role of courts in defining "family" and the expectancy of collaterals to uphold this limitation. While other studies have separately examined the myth of testamentary freedom and argued for the legitimacy of diverse families, scholars have paid less attention to the color of inheritance. Drawing on Cheryl Harris's groundbreaking work on property and racial expectation interests, this Article illustrates the centrality of whiteness in the validation of testamentary transfers. At the same time, it questions the legal resistance to nontraditional families, which substantially weakens the aspirational theory of donative freedom—the cornerstone of trusts and estates law. Through the intersection of wills law and family law, this Article initiates a critical inquiry of the influence of race in testamentary transfers.

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* Assistant Professor of Law, Syracuse University College of Law. I would like to thank Don Herzog and Anita Allen for their thorough comments, as well as various faculty colloquia and conferences at New York Law School, Seton Hall University, and the Syracuse University College of Law Junior Faculty Forum. A heartfelt thanks to Sonia Katyal for her perspicacity and professionalism and to Anita Krishnakumar, Josh Tate, Bernie Jones, Adrienne Davis, Tonya Hernandez, Jason Gillmer, Trina Jones, Frances Foster, Laura Rosenbury, Melynda Price, and especially my wonderful colleague Rose Cuison Villazor. Parts of this research could not have been completed without the help of the O'Neill family of Charleston, the Avery Center for African-American History and Culture, and the South Carolina Historical Society. A special thank you to Rachel Godsil and Annette Gordon-Reed for their elegant insight.

I. INTRODUCTION

DEATH is a tragedy, but its aftermath can be a drama. Will contests over race, sexuality, and legitimacy unearth silent judgments[1] about the meaning of family[2] and the expectations created in kinship,[3] which incite a legal articulation of the color of testamentary freedom. Families mourn the decedent, and if the will jettisons normative ideas and expectations about family and kinship, the collateral heirs may contest the estate envisioned by the testator as the last will and testament.[4] Selective attention paid to the testator's intent reveals a paradoxical contingency of testamentary freedom, the core legal tenet that the decedent may "do what he will with his own."[5] Courts join in this jurisprudential melody that celebrates the American ideological duet of

1. For a thorough discussion of lawsuits over dispositions considered "unjust" or "unnatural," see Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 959, 964 (2006).

2. James Hugo Johnston accumulated a number of these family disputes from the antebellum era. *See generally* JAMES HUGO JOHNSTON, RACE RELATIONS IN VIRGINIA & MISCEGENATION IN THE SOUTH, 1776-1860 (1970).

3. Testamentary disagreements are recorded as early as Blackstone, who argued that biological children received no automatic bounty in their parents' estate. 2 WILLIAM BLACKSTONE, COMMENTARIES *10-11 (Wayne Morrison ed., Cavendish Publishing Ltd. 2001) (1783) ("The right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive at first view that it has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom.").

4. Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 268-64 (1999). Note that modern courts have strayed from basing family court decisions, namely custody battles, on private biases. *See* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (ruling that private biases and the possible injury they might inflict are impermissible considerations for removal of a white child from the custody of its natural mother, who remarried a man of a different race).

5. *See* Blumenthal, *supra* note 1, at 963 (characterizing testamentary freedom as part of the Scottish Common Sense tradition as applied by judges).

liberty and freedom, yet statuses of race,[6] sexuality,[7] and marriage[8] potentially curtail this posthumous wish.[9] Historically, representations of testamentary diversity—the after-death interests of nontraditional "family" over the unnamed interests of collateral heirs—tested courts' dedication to observing the unorthodox wishes of testators.[10] Concomitantly, transfers with white, legitimate devisees as the objects of testamentary intent have routinely passed.[11] When pitted against an issue of moral or social transgression,[12] testamentary intent fails.[13]

This Article criticizes the doctrine of testamentary intent through a historical analysis of an antebellum interracial will contest as a paradigmatic example of the color of testamentary freedom. Other studies have explored the juridical anomalies of interracial will disputes but have re-

6. *See also* Succession of Filhiol, 44 So. 843, 844-45, 847-48 (La. 1907) (refusing to expand statute to include interracial transfer due to public policy); *In re* Monks' Estate, 120 P.2d 167, 172-75, 177 (Cal. Dist. Ct. App. 1941) (declaring a surviving spouse ineligible to inherit because interracial marriage was void). *See generally* R.A. Lenhardt, *Beyond Analogy:* Perez v. Sharp, *Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CAL. L. REV. 839, 842-44 (2008) (arguing that state-imposed obstacles to interracial marriage have affected citizen rights); Florence Wagman Roisman, *The Impact of the Civil Rights Act of 1866 on Racially Discriminatory Donative Transfers*, 53 ALA. L. REV. 463 (2002) (exploring the effect of the 1866 Civil Rights Act on donative transfers).

7. *See In re* Estate of Cooper, 592 N.Y.S.2d 797, 797, 799 (App. Div. 1993) (rejecting the right of election against a decedent's will in regard to same-sex marriage); *In re* Kaufmann's Will, 247 N.Y.S.2d 664, 686 (App. Div. 1964) (claiming undue influence of gay life partner on testator), *aff'd*, 257 N.E.2d 864 (1965); *see also* Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 239-48 (1981).

8. Trimble v. Gordon, 430 U.S. 762, 770-71, 776 (1977) (declaring unconstitutional an Illinois statute prohibiting a nonmarital child from inheriting from the biological father).

9. Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 87-88 (1994) (calling for a change in inheritance laws to reflect the changing American family).

10. Blumenthal, *supra* note 1, at 960.

11. Bernie D. Jones, *"Righteous Fathers," "Vulnerable Old Men," and "Degraded Creatures": Southern Justices on Miscegenation in the Antebellum Will Contest*, 40 TULSA L. REV. 699, 699 (2005).

12. *See* Blumenthal, *supra* note 1, at 963-64; *see also* Dees v. Metts, 17 So.2d 137, 142 (Ala. 1944) (describing a white man who left property to a black woman as "sinful"). Wills involving same-sex partners also incite morality battles by disgruntled biological family members. *See* Amy D. Ronner, *Homophobia: In the Closet and in the Coffin*, 21 LAW & INEQ. 65, 73 (2003) ("[T]he will contest becomes a device for righting the wrong, for ousting the villainous converter, and for reassembling the broken family.").

13. Courts have served as repositories of moral sentiment in regard to protecting disinherited family members. A number of scholars have addressed this issue with a call for more inclusive approaches to donative transfers. *See, e.g.*, Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996) (examining courts' employment of moral values in wills law); E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 276 (1999) [hereinafter Spitko, *Gone But Not Conforming*] (championing the "testator-compelled arbitration as a means for overcoming the trier of fact's propensity to invalidate any estate plan that does not conform to majoritarian cultural norms"); E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1064-66 (1999) (considering the merits of same-sex inclusion within intestacy law) [hereinafter Spitko, *Non-Marital Inclusion*]; Alfred L. Brophy, Teaching the Race of Testamentary Freedom (Feb. 2005) (unpublished manuscript, on file with author) (addressing the effects of gender and race on testamentary freedom).

mained silent on the inherent pairing of wealth and whiteness in transfers of property.[14] Will transfers that cross color lines directly challenge donative freedom by asking courts to eschew social norms in favor of the testator's intent.[15] Testators who have eschewed traditional devises to spouses, relatives, and institutions in favor of mistresses, slaves, or both have often incited will contests that succeeded in overturning their deviant wills.[16] Building upon Cheryl Harris's concept of racialized expectancies in property theory,[17] my research shows that white collateral heirs, as both a first and last resort, have leveraged whiteness to contest wills that consciously excluded them.[18] In the eyes of the state, probating an interracial will that requests an acknowledgement of forbidden love[19] and its outcomes not only diminishes the authority of the law,[20] but also contradicts statutory intent.[21] State-sanctioned racial supremacy generates no surprises in the antebellum South,[22] but its overwhelming persistence in blatant opposition to the language of the will clearly illustrates the central and tragic fallacy of testamentary intent.[23]

A surprising gap in the legal literature demonstrates a failure to contemplate race in wills as a presumptive indicator of family membership.[24] While studies have separately examined the myth of testamentary freedom,[25] testamentary incapacity in interracial transfers,[26] and the legitimacy of diverse families,[27] scholars have paid less attention to the triangulation of race, marriage, and property as indices of the legal pa-

14. *See* Jason A. Gillmer, *Suing For Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary and Antebellum South*, 82 N.C. L. REV. 535, 535-36, 573-78, 619 (2004) (addressing the rights of mixed-race slaves who sued for their freedom); *see also* Jones, *supra* note 11, at 699 (using interracial will contests to analyze the attitudes of antebellum jurists towards interracialism).

15. Roisman, *supra* note 6, at 466, 468-71.

16. Blumenthal, *supra* note 1, at 964.

17. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1713-14 (1993).

18. Davis, *supra* note 4, at 263-64 (describing will challenges initiated by white collateral heirs).

19. Mary Boykin Chesnut's diary reveals the conflict between public oblivion and private knowledge of the interracial sexuality of the slave system:

> God forgive us, but ours is a monstrous system and wrong and iniquity . . . . Like the patriarchs of old our men live all in one house with their wives and their concubines, and the mulattoes one sees in every family exactly resemble the white children—and every lady tells you who is the father of all the mulatto children in everybody's household, but those in her own she seems to think drop from the clouds . . . .

Id. at 286.

20. *Id.* at 223-24, 231-32, 235.

21. Jason A. Gillmer, *Base Wretches and Black Wenches: A Story of Sex and Race, Violence and Compassion, During Slavery Times*, 59 ALA. L. REV. 1501, 1552-54 (2008).

22. Davis, *supra* note 4, at 221.

23. *See* Leslie, *supra* note 13, at 236-37 (refuting the "oft-repeated axiom that testamentary freedom is the polestar of wills law").

24. Professor Blumenthal has also written on deviance in wills, particularly interracial transfers of property. Her article differs from this one because it focuses more on the psychological aspects of wills law than the limits of testamentary freedom.

25. *See* Leslie, *supra* note 13, at 236-37.

26. *See* Davis, *supra* note 4, at 226-28.

27. *See* Spitko, *Gone But Not Conforming*, *supra* note 13, at 279, 281-84.

rameters of kinship. This Article sharply denounces the expectation interest created by these norms, which facilitates the provenance of racial supremacy and marital privilege to exclude nontraditional family forms.[28] Statutory schemes remain underinclusive, as they may not provide legal protection for those infinitely diverse articulations of family and association[29] that exist beyond the comprehension and acceptance of the law.[30] By determining who stands eligible to inherit, wills law constructs a property interest in legitimacy that inherently discredits, discounts, and ultimately exposes the success of testamentary intent as contingent on social conformity.[31]

This Article turns to history in order to examine the direct link between property, race, and sex. The records for this case remained virtually untouched in Charleston, South Carolina, for 137 years.[32] The records include motions, opinions, and personal correspondence, all written by hand in calligraphic style. I focus on an interracial will dispute in South Carolina that straddled the end of the Civil War and the closing of the slave regime. In this case, white collateral heirs contested the will of their brother, Paul Durbin Remley, who had devised his estate to his slave mistress and their two children.[33] In this same devise, the testator disinherited his white relatives, exercising his belief in testamentary freedom.[34] By thinking of this mixed-race family as "deviant," the white, legally legitimate Remleys, in clear opposition to the donative intent, reaped the benefits of the color of testamentary freedom.[35]

This historical account of an interracial will dispute retains timeless value in its demonstration of the conflict between testamentary freedom and race. Part II discusses the inherent testamentary privilege of whiteness. By looking at antimiscegenation law as a deterrent for the interracial transmission of property, the state's support of a normative idea of the family becomes clear. A presumption of illegitimacy existed for interracial families, which sharply curtailed the survivor's rights to inherit. Part III introduces the case of Mary Remley, a white widow accused of being a black slave. In the challenge to this claim, which threatened her children's inheritance under their father's will, an unintended recipient related to the decedent asserted her status as a free white woman. This will contest not only demonstrates the legal power of whiteness, but also

28. Harris, *supra* note 17, at 1729-31.

29. JENS BECKERT, INHERITED WEALTH 111 (Thomas Dunlap trans., 2008) (noting "the internal diversification of the model of the conjugal family").

30. *See* Spitko, *Gone But Not Conforming*, *supra* note 13, at 276.

31. The status of family can outweigh the actual nature of relationships. Blood ties, however remote, may trump the interest of a long-term, live-in, but nonmarital, domestic partner who is not a legal spouse. Frances H. Foster, *The Family Paradigm Of Inheritance Law*, 80 N.C. L. REV. 199, 240-42 (2001) (explaining that "family paradigm prizes status above need, desert, or affection").

32. Rutledge & Young (Charleston, S.C.), Paul Remley Estate Case Records, 1861-1867 [hereinafter SCHS] (on file with South Carolina Historical Society).

33. *See infra* Part IV.

34. *See id.*

35. *See id.*

underscores that privilege by resisting erroneous assaults on racial identity. This privilege allows whites to exclude the legal expectancies and pecuniary interests of other whites, as long as their whiteness remains valid. Part IV looks at the younger Remley son's bequest to a black slave and their two children. In this conflict, race shifts from a disqualifier to an indicator of the limits of family. Finally, the Article concludes that racial and familial constructions that defy social norms challenge the aspirational concept of testamentary freedom, which ultimately reveals an inherent weakness in the cornerstone of wills law.

II. INHERENT PRIVILEGE

Will contests force an intersectional analysis of family law and secession law by forcing private issues of deviance into the public realm.[36] In constructing laws to protect kinfolk from unjust disinheritance by testators, statutory safeguards reflexively exclude parties who fall outside the juridical conception of family.[37] On the one hand, statutory schemes protect vulnerable family members from predictable patterns of disinheritance[38] that disfavor neglected spouses[39] and nonmarital, nonbiological children.[40] Spouses generally may not disinherit each other,[41] and in most states, nonmarital children have the same inheritance rights as marital children.[42] At the same time, these protections may completely contradict the testamentary intent of the decedent by directing property away from intended devisees and into the hands of "approved," legally legitimate family members that the decedent wished to circumvent entirely.[43] This presumption favoring legitimacy entirely devalues the cor-

36. Blumenthal, *supra* note 1, at 964-65.

37. Intestacy statutes approximate what the decedent would have wanted in the absence of a will. These statutory constructions of family prioritize biological family over chosen family. NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 184-89 (2008); *see also* Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 5 (2000) ("[I]ntestacy laws still reflect the nuclear family norm.").

38. Blood relations are deemed so important by courts that distant relatives can have stronger claims over a decedent's estate than a domestic partner. The specter of the "laughing heir" looms large as a preventative doctrine, yet these testamentary safeguards baselessly privilege biological family over chosen family, which allows collateral heirs to reap the benefits of legal legitimacy. The Uniform Probate Code has taken measures to limit the scope of succession, which prohibits inheritance beyond grandparents and their descendants. UNIF. PROBATE CODE § 2-103 (1990) (amended 2008).

39. The Uniform Probate Code allows for spouses who were left out of a premarital will to recover the same amount as an intestate share, with some exceptions. UNIF. PROBATE CODE § 2-301 (1990) (amended 1993). Additionally, all spouses displeased with their share in a will may opt for an elective share, depending on the length of the marriage. UNIF. PROBATE CODE § 2-202 (1990) (amended 2008).

40. Trimble v. Gordon, 430 U.S. 762, 770-71, 776 (1977).

41. Forty-nine states (all but Georgia) give the surviving spouse some right in the estate of the decedent. Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1244-46.

42. Gary, *supra* note 37, at 5 (examining the rights of adopted children); Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711 (1984) (examining treatment of adopted children in succession laws).

43. Foster, *supra* note 31, at 240-41.

nerstone of wills law, testamentary intent, by imposing an unwanted statutory construction of family that eclipses the decedent's subjective definition, which deviates from the state's and society's norms of kinship.[44]

The idea of the "changing American family"[45] perpetually fluctuates, with the only constant aspect being the law's recognition of a limited version.[46] Marriage has long stood as the unifying characteristic of family, yet this venerable institution has been subject to state control.[47] Concomitant with regulation of marriage is the regulation of property transmission, and stringent controls on who can get married necessarily dictate, in turn, who may inherit.[48] Regulation has prevented people of the same sex[49] as well as interracial couples,[50] related people,[51] minors,[52] and slaves from legally consolidating their interests.[53] Relationships that fit the state's conception of appropriate prospective spouses receive state

44. The meaning of "family" in wills law offers a presumption strongly in favor of the nuclear family. Beneficiaries outside this protected circle must rebut this presumption in order to inherit. *See* Spitko, *Gone But Not Conforming*, *supra* note 13, at 280-81; *see also* Mary Louis Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 13 (1998). Ralph Brashier offers a comprehensive examination of diverse families and the problems they face with inheritance. *See generally* RALPH C. BRASHIER, INHERITANCE LAW AND THE EVOLVING FAMILY (2004).

45. A number of scholars have engaged this term to describe the challenge of law to embrace difference rather than imposing uniformity and penalizing diversity. *See* Foster, *supra* note 31, at 201; Gary, *supra* note 37, at 4, 58. One scholar argues that modern families have eclipsed the specter of 1950s nuclear television families. T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55, 58 (2004).

46. *See generally* MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS (Anita Bernstein ed., 2005).

47. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 386 (1978) ("[R]easonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed."); Loving v. Virginia, 388 U.S. 1, 7 (1967) (recognizing that marriage is subject to State police power, but that such power is not unlimited); Cleveland v. United States, 329 U.S. 14, 17 (1946) (finding that regulation of marriage is a state matter); *see also* MILTON C. REGAN, JR., ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE (1999); Davis, *supra* note 4, at 229 n.15.

48. *See generally* Harris, *supra* note 17, at 1713-14 (arguing that property is a form of racialized privilege).

49. Today, gay and lesbian partners, in addition to heterosexual nonmarital partners, must overcome a presumption of nonaffiliation to decedents who die intestate. David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 456-51 (1996) (discussing the rights of gays and lesbians under intestacy laws).

50. Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding unconstitutional a state statute prohibiting interracial marriages). Despite the Supreme Court's 1967 ruling, Alabama formally held on to antimiscegenation law until the year 2000. Kevin R. Johnson, *Taking the "Garbage" Out in Tulia, Texas: The Taboo on Black–White Romance and Racial Profiling in the "War on Drugs"*, 2007 WIS. L. REV. 283, 300 (2007) (citing Alabama's statute as an example of the lingering taboo of interracial relations).

51. Singh v. Singh, 569 A.2d 1112, 1121 (Conn. 1990) (voiding a marriage between a half-uncle and a half-niece).

52. Moe v. Dinkins, 533 F. Supp 623, 630-31 (S.D.N.Y. 1982); *see generally* Lynn D. Wardle, *Rethinking Marital Age Restrictions*, 22 J. FAM. L. 1 (1983).

53. Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 330-31 (1996) (summarizing effects of enslavement on inheritance).

protection of their relationship and of their property.[54] For those relationships existing outside of this realm of approval, securing these same rights proves to be a remarkably difficult process.[55]

Testamentary language indeed articulates a decedent's subjective interpretation of family, but nontraditional estate plans may confront a restrictive statutory scheme that bases kinship on traditional legal and social expectations.[56] In most cases, wills pass quickly though probate because few challenges exist to slow and lengthen the probate process. Few legal barriers prevent a civil spouse and children from being considered legitimate family members.[57] They are the rarer and more diverse conceptions of family that must overcome a presumption of illegitimacy,[58] even when the words of the testamentary document clearly indicate the familial role played by the disenfranchised.[59] Despite the clarity of intent, balancing the state's interest in the efficient distribution of property with the testator's legal interest in bequeathing directly challenges the efficient meaning of "family." This reveals under-examined aspects not only of the privileged status gained from marriage, but also of the governmental regulation of diverse expressions of family.[60] Married people's relationships receive state protection while deviant families suffer in the disruptive

54. *See* BRASHIER, *supra* note 44, at 3. For the majority of people who die without a will, the laws of intestacy approximate the decedent's presumed intent, which fails to incorporate diverse family structures. *See* Ronald J. Scalise Jr., *Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents*, 37 SETON HALL L. REV. 171, 172 (2006) ("[I]ntestacy laws are important because they embody the collective judgment of a society as to how an individual's property should devolve in the absence of an expression by the decedent.").

55. Upholding community standards and social norms in blatant conflict with testamentary intent not only institutionalizes and rewards discrimination in wills law, but it also unfairly discourages settlors to provide for their chosen family. Testators who eschewed traditional devises to spouses, relatives, and institutions in favor of mistresses, slaves, or both often incited will contests of testamentary incapacity, undue influence, or fraud. Blumenthal, *supra* note 1, at 964. Professor Foster has argued for the intangible benefits of wills, which include sentimental recognition of the survivor's importance to the decedent. Foster, *supra* note 31, at 240-43 (arguing that maintaining ownership and connection to the decedent's property "ensure[s] a continued connection with a deceased loved one"). Additionally, Professor Spitko has noted that testamentary freedom encourages testators to freely distribute property. Spitko, *Gone But Not Conforming*, *supra* note 13, at 278.

56. Leslie, *supra* note 13, at 237-38 (discussing courts' commitment to seeing that testators uphold a duty to family).

57. *See* Foster, *supra* note 31, at 200 n.2 (pointing out the mythical stereotype of the traditional nuclear family); Jennifer Tulin McGrath, *The Ethical Responsibilities of Estate Planning Attorneys in the Representation of Non-Traditional Couples*, 27 SEATTLE U. L. REV. 75, 76, 81 (2003) (explaining the legal formation of traditional, nuclear, heterosexual families); *see also* Spitko, *Nonmarital Inclusion*, *supra* note 13, at 1102 (stating that intestacy law reflects societal understandings of family which privileges heterosexual marriage).

58. Kevin Noble Maillard, *The Multiracial Epiphany of* Loving, 76 FORDHAM L. REV. 2709, 2711-12 (2008) (describing the default legal and social approach of illegitimacy or improbability of interracial families and relationships).

59. Leslie, *supra* note 13, at 236.

60. Diverse expressions of family—unmarried heterosexual couples and also homosexual couples—find that their expressions of commitment fail to receive the same easy protections of the heteronormative nuclear family. *See* Rosenbury, *supra* note 41, at 1229 (exploring inheritance law as an example of the state's views on marriage and gender roles).

wake of unfounded testamentary entitlement. The collision of these interests clearly highlights the difference between statutory constructions of family and heirship and the subjective representations articulated by the decedent.[61]

A. (Il)legitimacy Explained

Testamentary freedom hinges upon the racial identity of the beneficiary. Common law dictates eligibility to inherit by declaring heirs as either legitimate or illegitimate.[62] A legitimate heir stands as a biological descendant, born to married parents and held out by the decedent as his child, thus placing the descendant within a protected class of devisees.[63] In the past, children born within state-sanctioned conjugal relationships[64] rested upon the legal privilege conferred by their parents' marriage.[65] Conversely, a child born to unmarried parents held the status of illegitimate and was not legally recognized as the decedent's natural child.[66] This exclusion from legal protection not only demonstrated a preference for married households, but also a refusal to define family outside of a nuclear, male–female marital dyad. Legal access to the decedent's estate—and the strength of that claim—depended upon the state's conception of the approved family.

Children and partners living within nonnuclear, nonmarital households have traditionally fallen short of the benchmark of protection in comparison to legally legitimate parties already enjoying the security of the law. In the wake of protecting legitimate family members, those outside this sphere of recognized kinship have remained vulnerable to being divested of their legal rights.[67] Indeed, legitimacy has its merits in protecting sur-

61. This concept describes the ability of testators to direct behavior after their death by setting requirements on devisees in order to inherit. *See* Shapira v. Union Nat'l Bank, 315 N.E.2d 825, 827-28 (Ohio Ct. C.P. 1974).

62. Blackstone characterizes bastardy, or illegitimacy, as occurring when a child is not born "either in lawful wedlock, or within a competent time after its determination" without "inheritable blood." Blackstone, *supra* note 3, at *247.

63. *See* Beckert, *supra* note 29, at 104-05.

64. Conjugal relationships normally signify marriage, although same-sex and different-sex cohabitants are also included. Canada has taken steps to expand the meaning of family "beyond" conjugality to include adults living alone, sibling pairings, and platonic cohabitating adults. *See generally* Law Comm'n of Can., Beyond Conjugality Reorganizing and Supporting Close Personal Adult Relationships (2001), *available at* http://www.samesexmarriage.ca/docs/beyond_conjugality.pdf.

65. Intestacy law upholding the exclusion of illegitimate children if there are martial children has been deemed constitutional. Beckert, *supra* note 29, at 106.

66. In wills law, preventative measures dictate minimum requirements for estate distribution, despite testamentary intent. Leslie, *supra* note 13, at 269 ("[E]lective share statutes . . . curtail 'the decedent's testamentary freedom with respect to his or her title-based ownership interests . . . . No matter what the decedent's intent.'") (quoting Unif. Probate Code art. II, gen. cmt. (1990)). The inheritance interests of legitimate family members traditionally trumped those of enumerated illegitimate counterparts, although modern reforms have given nonmarital children additional rights. Beckert, *supra* note 29, at 105. Yet traditionally, law created a hierarchy of testamentary interests that did not interpret devises to nonmarital children as viable transfers of property. *Id.* at 104.

67. Spitko, *Non-Marital Inclusion*, *supra* note 13, at 1098-99.

vivors of the decedent from disinheritance and pecuniary neglect.[68] Intestacy and elective shares ensure that spouses and children retain a state-sanctioned share of the decedent's estate.[69] These protective schemes also have a preventative efficacy in ensuring that external parties have no greater claims on the estate than do the legitimate family members.[70]

For those who could not marry, legitimacy remained an elusive status that excluded all nontraditional couples and families. States with antimiscegenation laws did not entertain the legal possibility of an interracial family.[71] And, until recently,[72] no state recognized same-sex marriages.[73] Both of these exclusions, race and sexuality, intersect to pose *legitimate* questions about the fiction of testamentary freedom.[74] If adhesions to "legitimacy" supersede the wishes of the testator, external norms of family construction and kinship eclipse any subjective posthumous wish to provide for an intended,[75] rather than (or in addition to) a legal, family. Testamentary freedom is heavily contingent on legal permissiveness rather than the actual, biological, or conjugal relationship between decedent and devisee. In order to confer rights on the relationship, a legally recognized relationship must exist. Law, as a filter of efficiency,[76] selectively casts its legitimizing gaze.

B. Racializing Legitimacy

Antimiscegenation statutes curtailed the transfer of property across racial lines. By declaring marriages between blacks and whites illegal, the law thwarted a secure interest of black and mulatto beneficiaries in the estates of white testators. Without the protective status that marriage

68. Foster, *supra* note 31, at 218 n.84 (citing Via v. Putnam, 656 S.2d 460, 466 (Fla. 1995)).

69. *Id.* at 219.

70. *Id.* at 218 n.84.

71. Maillard, *supra* note 58, at 2711-12; *see* Davis, *supra* note 4, at 231, 268.

72. California and Massachusetts grant same-sex couples the right to marry, and New York recognizes same-sex marriages performed outside of New York. *In re* Marriage Cases, 183 P.3d 384, 452-53 (Cal. 2008) (holding that limiting marriage to heterosexual couples denied gay couples of equal protection); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003) (granting same-sex couples equal rights to marriage as provided in the state constitution); Martinez v. County of Monroe, 850 N.Y.S.2d 740, 743 (App. Div. 2008) (recognizing all forms of foreign marriage, including same sex). *But see* Strauss v. Mortan, 207 P.3d 48, 122 (Cal. 2009) (upholding a state constitutional amendment not only providing that marriage between a man and a woman is held valid, but also refusing to apply one amendment retroactively to same-sex marriages performed prior to its enactment). Vermont, New Jersey, and Connecticut have granted same-sex couples the same right as different-sex married couples, but these legal unions have not been classified as "marriage." Kerrigan v. Comm'r of Publ. Health, 957 A.2d 407, 412 (Conn. 2008); Lewis v. Harris, 908 A.2d 196, 224 (N.J. 2006); Baker v. Vermont, 744 A.2d 864, 888-89 (Vt. 1999).

73. *Lewis*, 908 A.2d at 211.

74. Leslie, *supra* note 13, at 236 (referencing "the oft-repeated axiom that testamentary freedom is the polestar of wills law").

75. Tanya K. Hernandez, *The Property of Death*, *60* U. PITT. L. REV. 971, 1014 (1999) ("[S]tate legislatures can go even further in functionally recognizing families of choice.").

76. Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, *142* U. PA. L. REV. 1033, 1048 (1994) (debating the social utilities of probate efficiency).

conferred, courts viewed interracial families as inherently illegitimate, which opened estates to the rapacious strategies of white collateral heirs. The reliability of antimiscegenist amnesia—that is, the narrative that the interracial family does not legally exist—fueled the redirection of testamentary intent. With the law favoring coverage of legitimate kin over illegitimate relations, white collaterals expected courts to supplant the beneficiaries' named interests in favor of themselves. The racial identity of the beneficiaries stimulated traditional grounds for objecting to a will: incapacity, undue influence, and fraud.[77]

Miscegenation existed as a public secret in each of the slave states. The legal derecognition of formal interracial relationships belied the reality of their widespread existence. In his comprehensive study on American mulattoes, Joel Williamson comments, "[I]t is safe to assume that the lines of lust in the old South ran continually and in all directions."[78] The concubinage of black women by white men formed the majority of interracial relations, although unions between black men and white women were not unknown.[79] A northern traveler in South Carolina commented, "The enjoyment of a negro or mulatto woman is spoken of as quite a common thing: no reluctance, delicacy or shame is made about the matter."[80] Despite individual and cultural narratives asserting such liaisons through informed channels, state marriage laws upheld rigid distinctions between racial groups.[81]

Not all states prohibited interracial marriage.[82] In the deep South, South Carolina did not prohibit interracial marriage until after the Civil War, and in Charleston, occasional marriages occurred between persons of color and well-regarded whites.[83] The state suspended the prohibition in 1868, only to reenact it in 1879.[84] Although *Loving v. Virginia* ren-

77. Blumenthal, *supra* note 1, at 961, 964.

78. JOEL WILLIAMSON, NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES 41 (1980).

79. Although this aspect of miscegenation deserves mention, it goes beyond the scope of this project. For a comprehensive examination of this nexus of race and gender, *see generally* MARTHA HODES, WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH-CENTURY (1999). This Article is primarily concerned with the darkening of wealth, that is, mulatto inheritance from white kin, which concerns the transfer of property from white men to mixed race offspring. *See also* ROBERT J. SICKELS, RACE, MARRIAGE, AND THE LAW 16-19 (1972) (explaining sexual stereotypes of black men and white women).

80. WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812, at 145 (1968).

81. State statutes, such as those in Alabama, upheld boundaries between black and white in an attempt to segregate "the most fundamental unit of society, the family." Julie Novkov, *Racial Constructions: The Legal Regulation of Miscegenation in Alabama, 1890–1934*, 20 LAW & HIST. REV. 225, 225-26 (2002).

82. For an interactive map detailing which states restricted interracial couples from 1662-1967, see LovingDay, Legal Map, http://www.lovingday.org/map.htm (last visited Aug. 28, 2009).

83. *See* WILLIAMSON, *supra* note 78, at 16 ("South Carolina was unique among the British American mainland colonies not only in its blackness and easy mixing but also in that some whites positively and publicly defended interracial sex.").

84. *See* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 75-76 (2003); PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY 103-04 (2002).

dered all antimiscegenation laws unconstitutional,[85] the state retained the law in its books until 1999.[86]

Antebellum miscegenation confounds our collective understanding of racial boundaries and sexual desire. Close proximity of blacks and whites in shared spaces[87] during and immediately after the slave era facilitated sexual availability.[88] Yet within these connected physical worlds, strict hierarchies existed to maintain racial roles and boundaries.[89] Jeffersonian perceptions of racial difference articulated a public disgust for the "Oorang-ootans" of the African race, thus equating interracial sex with a form of bestiality between free white humans and enslaved black animals.[90] In dehumanizing blacks as simple mammals incapable of sentience, talent, and memory, men leveraged their status as free and white to exploit and violate black women.[91] This version of history survives as the collective understanding of miscegenation: forced, asymmetrical, and purely physical.

On the other hand, a growing body of literature espouses the possibility of an alternative narrative for interracial sex,[92] which allows for recognition of racially diverse family forms in the South.[93] Jason Gillmer

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85. Loving v. Virginia, 388 U.S. 1, 12 (1967).

86. S.C. CODE ANN. § 33 (Supp. 2007).

87. *See* JOHN MICHAEL VLATCH, BACK OF THE BIG HOUSE: THE ARCHITECTURE OF PLANTATION SLAVERY 1-17 (1993).

88. *See* WILLIAMSON, *supra* note 78, at 15 ("The great number of slaves gave abundant sexual opportunity to white masters and overseers.").

89. *See* RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE & ROMANCE 23 (2001) ("[I]nterracial relationships were tolerated only insofar as they left norms of racial and sexual privilege intact.").

90. In his *Notes on the State of Virginia*, Thomas Jefferson wrote at length on his "aversion . . . 'to the mixture of colour' in America." *See* JORDAN, *supra* note 80, at 467. Despite his own personal involvement with a mulatto slave, Sally Hemings, Jefferson wrote at length about preferring Indian–white intermixture over black–white intermixture, which he viewed as a different interaction of species.

> Are not the fine mixtures of red and white, the expressions of every passion by greater or less suffusions of colour in the one, preferable to that eternal monotony, which reigns in the countenances, that immoveable veil of black which covers all the emotions of the other race? Add to these, flowing hair, a more elegant symmetry of form, their own judgment in favour of the whites, declared by their preference of them, as uniformly as is the preference of the Oran-ootan for the black women over those of his own species.

THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 138 (William Peden ed., Univ. of N.C. Press 1955) (1787).

91. *See* DEBORAH GRAY WHITE, AR'N'T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH 29-46 (1985), *cited in* Gillmer, *supra* note 21, at 1503 n.10.

92. Interracial relations between free white men and enslaved black women generate a host of reactions addressing the nature and/or possibility of consent. Many scholars might argue that slave status precludes any form of consent or a loving relationship, thus making all liaisons between free men and slave women rape. Others may view the relationships as mutually beneficial, with black women acceding to these relationships in search of better futures for themselves and their children. Analyzing the consensual possibilities of these relationships goes beyond the scope of this Article, but I do believe it would be overinclusive and anachronistic to forestall a possibility of mutual interracial attraction. *See* Davis, *supra* note 4, at 226 n.10 (citing Eugene Genovese's analysis of master–slave relationships beginning as exploitation and turning into love).

93. *See generally* JEFF FORRET, RACE RELATIONS AT THE MARGINS: SLAVES AND POOR WHITES IN THE ANTEBELLUM SOUTHERN COUNTRYSIDE (2006); ANNETTE GORDON-

argues for a more historicized look at interracial sex and families from this area, which exposes the complexity and nuance of navigating interracial relationships and families in the context of African slavery.[94] In a case study similar to the one presented in this Article, Gillmer examines an interracial family in Texas besieged by claims of illegitimacy despite the thirty-year relationship between a white master and his slave.[95] By examining both the legal and social narratives that surround the marital-like relationship between the interracial couple, Gillmer juxtaposes the inherent racial inequality of the slave system with the possibility of romantic attraction between the races.[96] Eliciting this unique, but not uncommon, case of antebellum interracial attraction reveals the practical intricacies of human interaction in relation to the legal system that presumed its implausibility.[97]

The greatest intellectual utility derived from Gillmer's work is the ability to let history tell the story of lived experiences in relation to the law.[98] In the context of miscegenation, it was a legal fiction to say that interracial sex was prohibited and void, but the more difficult project is assessing the continuing occurrence of these deviations in direct opposition to a legal culture that virtually guaranteed their illegitimacy.[99] Prohibiting marriage between blacks and whites created legal obstructions for formal recognition of these relationships, but it did not eradicate the liaisons that occurred outside the legal realm. Sex between master and slave went largely unpunished, and in the eyes of the law, unrecorded.[100] Yet in the examination of local histories, racial rhetoric and separationist doctrine implodes by opening a "window into the consciousness of ordinary

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REED, THE HEMINGSES OF MONTICELLO: AN AMERICAN FAMILY (2008); CHARLES FRANK ROBINSON II, DANGEROUS LIAISONS: SEX AND LOVE IN THE SEGREGATED SOUTH (2003); CALUDIO SAUNT, BLACK, WHITE, AND INDIAN: RACE AND THE UNMASKING OF AN AMERICAN FAMILY (2005).

94. Gillmer, *supra* note 21, at 1504-05.

95. *Id.* at 1502.

96. *Id.* at 1534-35.

97. Local studies of interracial families tell a different story of black–white sexuality and romance that confound legal prohibitions against miscegenation. Close examinations of individual families reveal stories of mutual intimacies between master and slave that give a more complete picture of interracial relations. These historical portraits reveal and give life to the conflict between everyday experience and legal regulation. *See generally* ADELE LOGAN ALEXANDER, AMBIGUOUS LIVES: FREE WOMEN OF COLOR IN RURAL GEORGIA, 1789-1879 (1993); KENT ANDERSON LESLIE, WOMAN OF COLOR, DAUGHTER OF PRIVILEGE (1995); JOSHUA D. ROTHMAN, NOTORIOUS IN THE NEIGHBORHOOD: SEX AND FAMILIES ACROSS THE COLOR LINE IN VIRGINIA, 1787-1861 (2003).

98. Gillmer, *supra* note 21, at 1505-07.

99. Many states had legal prohibitions against interracial marriage. *See* Maillard, *supra* note 58, at 2712 n.17 (citing PHYL NEWBECK, VIRGINIA HASN'T ALWAYS BEEN FOR LOVERS: INTERRACIAL MARRIAGE BANS AND THE CASE OF RICHARD AND MILDRED LOVING app. C at 227-31 (2004)).

100. Angela Onwuachi-Willig, *A Beautiful Lie: Exploring* Rhinelander v. Rhinelander *as a Formative Lesson on Race, Identity, Marriage, and Family*, 95 CAL. L. REV. 2393, 2416 n.120 (2007) (citing MORAN, *supra* note 89, at 24 ("[S]ex across the color line was commonplace despite its racially ambiguous consequences. White men enjoyed ready and open access to black and mulatto women as a mark of their untrammeled freedom and privilege.")).

people."[101]

Perceiving interracial relationships as illegitimate and implausible stems from a legal history that privileged the interests of free whites over those of black slaves. In cases of interracial conflict, whites relied on the exclusion of blacks, both slave and free, to secure and solidify their own legal interests. Cheryl Harris's landmark work on the social and legal benefits of racial discrimination uncovers the "settled expectations of whites built on the privileges and benefits produced by white supremacy."[102] Both Harris and Gillmer address the nature of privilege, but while Gillmer analyzes the problem from a grassroots level,[103] Harris depicts a legal system inherently skewed toward forwarding the interests of whites.[104] At this macrolevel, Harris forces a reconsideration of unequal racial assumptions of property.[105] Her critical approach to the unquestioned racial assumptions of property law forces a necessary reconsideration of aperspectivity.

For Harris, property inherently upholds tenets of racial supremacy.[106] Starting with a basic premise of ownership—the dialectic of possession and exclusion—she constructs a theoretical framework that captures the interests, both vested and anticipated, of owning property.[107] Property defines social relations[108] and creates expectations, both tangible and intangible.[109] Simply being white reflected an identity that signified one's status in law and social practice. While "white" marked one as inherently free and unenslaved, "black" denoted being subject to enslavement.[110] White racial identity, and the privileged position that it inhabited, invoked a property interest with expectations that "could not be permissibly intruded upon without consent."[111] The ability to hold and possess property, rather that being its subject, demonstrates the crucial aspect of racialized property interests; the absence of blackness allowed for an unencumbered legal existence.[112] Even after the slavery regime had fallen, people of African descent continued to feel the legal echoes of slave status.

This Article takes up where Harris stops. By taking seriously her claim that whiteness is property, it is possible to see property interests and racial privilege merge without subtlety in testamentary disputes. In Harris's explanation of the expectation interest inherent in property theory,

101. Gillmer, *supra* note 21, at 1505.
102. Harris, *supra* note 17, at 1731.
103. Gillmer, *supra* note 21, at 1505-07.
104. Harris, *supra* note 17, at 1714-15.
105. *Id.*
106. *Id.* at 1731.
107. *Id.*
108. *Id.* at 1728-29.
109. Harris argues that "property is a legal construct by which selected private interests are protected and upheld." *Id.* at 1730.
110. *Id.* at 1718.
111. *Id.* at 1731.
112. *Id.* at 1721.

whiteness "retain[s] its essential exclusionary character and . . . distort[s] outcomes of legal disputes."[113] White collateral heirs that the testator meant to disinherit jumped upon the opportunity to leverage their racial identity against beneficiaries of color. As both a first and a last resort, whiteness kept property within the "proper" family while serving as a trump card to defeat interracial transfers. From this assumption of entitlement emerged a triangulation of race, sex, and property that underscored the implicit association of whiteness and legitimacy.

III. RACE AS A MARKER OF TESTAMENTARY ELIGIBILITY

Paul Remley, a free white man, died in Charleston in November of 1860.[114] He left his widow, Mary Remley, a farm in Pennsylvania consisting of "19.5 acres of poor land but healthy with two small storm houses on it, no farm buildings, one old shed."[115] He appointed his son, Paul Durbin Remley (Durbin) as administrator of the estate, and Durbin assumed charge on December 1, 1860.[116] In the following summer of 1861, Durbin filed for a grant of administration of his father's will.[117] In this capacity, he was expected to share the profits of the estate with his siblings: Elizabeth Hubbell (née Remley) and Emma Remley.[118] At this time, the siblings lived in different parts of the country, with Durbin residing in Charleston and the sisters in Pennsylvania.[119]

The conflict within this family fluidly illustrates how external pressures simultaneously threatened and bolstered their legitimacy as a family. In two separate will contests involving the father, Paul's, will and the younger son, Durbin's, will, the racial identity of the beneficiaries determined the outcome. Depending on the angle, law acted both to exclude and include, and the legitimacy of heirship turned on a secure claim to whiteness. Those actors who were able to claim a legal identity as white employed the law to restrict the economic benefits of family membership to exclude those who could not.

A. Slavery and Testation

1. Strategic Accusations of Slavery

A conflict arose when Durbin applied for the grant of administration on June 3, 1861—the same day that a challenger questioned his legitimacy as an administrator. Mary Shrine, claiming to be his second cousin, filed a complaint in a Charleston Court of Ordinary, alleging herself to be a

113. *Id.* at 1778.
114. Account of Paul Remley's Estate in Pennsylvania maintained by Rutledge & Young (Charleston, S.C.) (on file with the SCHS as Paul Remley Estate Case Records).
115. *Id.*
116. Letter from William Hubbell to Rutledge & Young (Aug. 8, 1866) (on file with SCHS).
117. *Id.*
118. *Id.*
119. *Id.*

legitimate next of kin.[120] Durbin and his sisters, she alleged, were rendered ineligible due to the status of their mother.[121] Mrs. Shrine filed an affidavit, which argued that "the supposed widow of Paul Remley is a colored person" and that "she was purchased by said Paul Remley as a slave."[122] Shrine attempted to position herself not only as having a superior claim on the estate, but also as the only legitimate heir to the Remley estate.[123] If she proved the widow Mary as a slave, then the Remley children would follow her diminished status; Paul, Elizabeth, and Emma would immediately become slaves[124] and ineligible to stand as legal heirs.[125] Shrine, as the remaining nearest kin eligible to inherit (or free and white), could overcome the articulated testamentary interests of Paul Remley's children and widow.[126]

The taint of slavery as the kryptonite of testation could render any "white" heir ineligible. Mary Shrine based her argument on South Carolina's 1841 Act to Prevent the Emancipation of Slaves.[127] This Act prohibited testamentary emancipations, and it also voided all bequests to slaves.[128] Section IV reads: "That every devise or bequest, to a slave or slaves, or to any person, upon a trust or confidence, secret or expressed, for the benefit of any slave or slaves, shall be null and void."[129] Even if the Remleys had considered themselves free white persons, the possibility of a hidden condition of their mother threatened their ability to inherit their father's estate.

2. *Defending Whiteness*

The accusation of diminished legal and racial status, however farfetched, generated a flurry of representations of Remley family history.

120. *In re* Estate of Paul Remley (S.C. Dist. Ct. Ordinary June 18, 1861) (on file with SCHS).

121. *Id.*

122. *Id.*

123. *Id.*

124. Legal definitions of children's status throughout the South followed Roman law by declaring *partus sequitur ventrem*—that children followed the condition of the mother. MARINA WIKRAMANAYAKE, A WORLD IN SHADOW: THE FREE BLACK IN ANTEBELLUM SOUTH CAROLINA 13-14 (1973).

125. A number of fictional books appealed to this white fear—a sudden and unexpected relegation to slavery. In his meticulous book on mulatto imagery in Victorian fiction, John G. Mencke explains, "[W]hat threat could be more dire than that of the blood of the inferior races of the world secretly slipping into that of the mighty civilizing race of Anglo-Saxons?" JOHN G. MENCKE, MULATTOES AND RACE MIXTURE 198 (1979). Other such books include R.H. DAVIS, WAITING FOR THE VERDICT (1868); W.D. HOWELLS, AN IMPERATIVE DUTY (1893); and ALBION W. TOURGEE, PACTOLUS PRIME (1890).

126. It must be pointed out, however, that race did not serve as a constant determinant of status. For children with parents of different races, the mother could be black or mulatto and pass her free status to her child. Likewise, children of black or mulatto slave fathers and free white women, while very few in number, retained free status, despite their father's condition. WIKRAMANAYAKE, *supra* note 124, at 13-14.

127. Act to Prevent the Emancipation of Slaves, and for Other Purposes (1841), *quoted in* Jolliffe v. Fanning, 31 S.C. L. (10 Rich.) 186, 190 (1856); *see also* Davis, *supra* note 4, at 250-51.

128. *Jolliffe*, 31 S.C.L. (10 Rich.) at 190.

129. *Id.*

The competing claims to the status of Mary Remley, who offered no voice in the available correspondence, demonstrated a legal panic in the race to reassert the primacy of whiteness and freedom. If the Remley children followed the condition of their mother, they would lose not only their testamentary and legal standing, but also their public reputations as free white persons.

In an effort to bolster their legitimacy, the Remleys offered testimony from "respectable" white persons to verify their freedom and race.[130] These narrative contributions necessarily referred to the past, offering a subjective view of Mary Remley's standing in the community.[131] These acts of remembering had legal and practical relevance, but they also reasserted the Remley family as white, privileged citizens. In reconstructing their racial identity by means of community opinion, the family followed a well-established precedent. Whether these claims were made public outside the protection of the court remains unknown, but the singular assertion and multiple refutations as documented in the legal records commemorate a type of juridical discussion of sexual and racial privacy that was routinely relegated beyond the scope of public discourse.

The Remley "defendants," like any party in litigation, selectively remembered advantageous facts and omitted pejorative ones.[132] Soon after the supposed cousin filed the accusatory affidavit in the Court of Ordinary, the Remley party called upon Sam Wagner, a free white man and a churchgoing citizen of Charleston, to verify Mary Remley's whiteness.[133] As a member of Bethel Methodist Church, Mr. Wagner testified that Paul and Mary Remley were "always recognized as white persons in the use of all the privileges of the Church."[134] He continued by attesting to their status as "acceptable members" and active "Class Leaders."[135] Unmentioned in this written testimony were references to miscegenation or slavery. Mr. Wagner's narrative limits itself to public interpretations of racial identity.[136] As expected, he made no mention of Mary Remley's questionable origins, focusing instead on Mr. Remley's secure status as a free white man and Mary Remley's white father.[137] Additionally, he remained silent on the Church's significant black and mulatto members, who at that time constituted the majority of Charleston's approximately 6,000 black Methodists.[138]

Characterizing the allegation as a "question of Pedigree and legitimacy," the Court of Ordinary postponed the decision of grant in order to accommodate the contestant, Mrs. Shrine, by allocating one week for her

130. For example, see Affidavit of Sam Wagner (June 27, 1861) (on file with SCHS).
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *See* HISTORIC CHURCHES OF CHARLESTON, SOUTH CAROLINA 42-43 (Edward Guerrant Lilly ed., 1966); F.A. MOOD, METHODISM IN CHARLESTON 201 (1875).

to provide corroborating testimony.[139] When she failed to prove the slavery claim, the court found Durbin legally competent to administer his father's estate.[140] In the absence of supporting evidence from Mrs. Shrine regarding the truth of her accusation, Wagner's sole opposing affidavit proved sufficient to defeat the objection to Durbin's grant of administration.[141] The court qualified this ruling, however, by distinguishing legitimacy for administration from legitimacy for distribution.[142] Noting that the possible truth of Shrine's claim would not greatly affect the pending grant, the court added, "altho it may become so in a progress of settlement of assets of said Estate."[143]

Legally, the court's finding voided the issue, but the family continued to discuss the "great annoyance and mortification."[144] In correspondence and memoranda, Elizabeth Hubbell continued to refute the claims of race and slavery, writing from Philadelphia to her brother, Durbin, a "very long epistle" chronicling their family's history of respectability and whiteness.[145] Mrs. Hubbell's pride seems to have prevented her from explicitly addressing the assault to her family's racial identity, as she told her brother that "the astonishment the thing has occasioned may be better imagined than described."[146] To her knowledge, their father was "not the man to lower himself by such a degrading act as is alleged."[147] She viewed these charges as a "conspiracy" organized by "low people" who unjustifiably wanted to deprive the Remley children of their inheritance.[148] In desperation, Mrs. Hubbell expressed her conviction that the "whole thing [was] gotten up by some of [Durbin's] enemies," notwithstanding the "[un]intelligent" Mrs. Shrine, whose "[m]other was subject to some sort of fits."[149]

B. Reconstructing Whiteness

Elizabeth Hubbell took an adversarial stance in her letters, which makes these documents a source of critical interpretation. In her writing, she expressed her racial frustrations, while advocating her biased conception of her family's racial identity.[150] Looking backward to the past for explanation, she drew upon unquestioned relationships to justify her own self-identity and that of her mother.[151] She became the architect of her

139. *In re* Estate of Remley (S.C. Dist. Ct. Ordinary June 29, 1861) (on file with SCHS) (Decree).
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. Letter from Elizabeth Hubbell to Paul D. Remley (July 7, 1861) (on file with SCHS).
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*

family's history by realigning the past to justify her present needs. Even if Mrs. Hubbell's labor of remembering found ground in unstable sources, she appropriated a verisimilitude to her past that may be at odds with historical truths.[152] In this battle of competing whitenesses, all the parties expected their legal rights to follow the privileged condition of their racial identity.

Three primary examples of lived whiteness form Mrs. Hubbell's grounds for remembering her family as white. First, she recalled that her mother was registered at the multiracial Bethel Methodist Church in Charleston as a "free white person," a demonstrative fact that she interprets as conclusive proof.[153] "[H]ad there been any doubt of the fact," she wrote, "I imagine her name *could* not have been *entered there*."[154] Second, her mother's wedding to her father at Bethel serves as proof of their supposedly irreproachable whiteness. Mrs. Hubbell maintained that her mother's bridesmaids were "ladies of respectability" who would not have been "intimate with a person of doubtful pretensions."[155] Her logic assumed an if–then calculation that made reputation a barometer of racial identity: "If she had been purchased and held as a slave all these things could not have been."[156] Lastly, she turned to her mother's parentage and upbringing, noting that her mother's mother was an orphan "brought up by strangers."[157] Her mother's father, of Jacksonboro, South

152. *See generally* WHERE THESE MEMORIES GROW: HISTORY, MEMORY, AND SOUTHERN IDENTITY (W. Fitzhugh Brundage ed., 2000).

153. Letter from Elizabeth Hubbell to Paul D. Remley, *supra* note 144. Her reliance on the church's record of its members does not account for the possibility of errors in representation, similar to simple and learned mistakes of census takers. Oftentimes, census takers and other keepers of official records make erroneous estimates of a person's race, thus recording some African-Americans of fair complexion as "white." In sole reliance upon these subjective measures of record-keeping for posterity, genealogists, historians, and other scholars may draw fatuous conclusions that have substantial effects on contemporary interpretations of racial identity. For an insightful interpretation of this problem, see KENNEDY, *supra* note 84 at 1-12 (chronicling the events of *Green v. City of New Orleans*).

154. Letter from Elizabeth Hubbell to Paul D. Remley, *supra* note 144.

155. *Id.*

156. *Id.*

157. *Id.* Elizabeth Hubbell's husband, William, rushed to his wife's defense by composing a memorandum to his attorney that traced the ancestry of his wife's mother, which he did not send "on account of hostilities preventing." Memorandum for James B. Campbell, Esq., In the Matter of the Estate of Paul Remley, Deceased, on behalf of his Widow Mary Remley & Children (1861) (document not shared until November 9, 1886) [hereinafter W. Hubbell Memo]. He, too, employed an equation of race and reputation to dismiss Shrine's claims: polite white persons marry and consort with persons like themselves; Mrs. Remley married a decent white man and kept company with proper white Charlestonians; therefore, Mrs. Remley must be white. *Id.* William Hubbell fortified this logic with genealogical information about her parents Thomas and Leah Whitley, offering additional evidence to his wife's rendition. *Id.* Thomas Whitley, he argued, came from an English family of "respectable noble descent," which he attested to be listed in *Burke's Peerage of Landed Gentry*. *See generally* BERNARD BURKE, BURKE'S GENEALOGICAL AND HERALDIC HISTORY OF THE LANDED GENTRY (L.G. PINE ED., 1952). Leah, on the other hand, was portrayed as a daughter of a fallen soldier of the Revolutionary War and a woman of unknown origins. W. Hubbell Memo, *supra*. Remarkably, he did not question any deeper meaning or possibility of "unknown." *See id.* Still, this liaison of high and low, noble and

Carolina, "was of a respectable family—scarcely likely to intermarry with a low person."[158] In each of these specious arguments, Mrs. Hubbell blindly accepted a tautology of race and reputation that equated "respectability" with whiteness and freedom and "doubtful pretensions" with blackness and slavery.[159]

Mrs. Hubbell's letter to her brother assumed a candid tone, revealing potentially shameful family intimacies. She did not intend for it to be used in a court of law—rather she vented her personal frustrations into a written narrative that memorialized her shock, pain, and disbelief in the fragility of her racial identity. Both Mrs. Hubbell and her husband William created lively renditions of the Remley past in order to protect their testamentary legitimacy. It seems that Mrs. Shrine's claim never penetrated the veil of believability for either the court or the Remleys, but her far-fetched claim provides an illuminating script to analyze the use of race as a qualifier of standing for inheritance.[160] It also demonstrates the extent to which courts would entertain such a testimony in patent opposition to the elder Remley's intent. Freedom of testation would fail in the event of a legitimate claim of slavery. Knowing this, Mrs. Shrine floated on the presumption of the incompatibility of blackness and inclusion.

IV. RACE AND THE LIMITS OF FAMILY

The authority to contest a will directly relates to one's status within the law. Those who enjoy the legal privileges of property—in this case, the security of whiteness—enter a will contest on the offensive. The younger Paul Remley (Durbin), disinherited his white family in Pennsylvania upon his death in 1863, devising his South Carolina estate to a black woman and their two children.[161] In this subsequent case, the Pennsylvania family assumed the role of white collateral heirs, in sharp contrast to their role as besieged and presumed slaves. At this point, they became unassailably white. Although Durbin's choice of family became quite apparent in his will, the South Carolina Equity Court resisted recognition of this nonmarital, interracial unit. Again, freedom of testation hinged on the racial identity of the beneficiaries. The Hubbell-Remleys, as legitimate and white collateral heirs, challenged the will that acknowledged interracial sexuality. Durbin's nontraditional devisees did not convince

plebian produced "an exemplary moral and Christian woman" who with her husband, operated a well-known grocery store in Charleston. *Id.*

158. Letter from Elizabeth Hubbell to Paul D. Remley, *supra* note 144.

159. William Hubbell (spouse of Elizabeth) offered a radically different explanation for Mrs. Remley's alleged status. He surmised that a love triangle spawned the accusation that Mary Remley's mother was a "colored slave." Apparently, Leah Whitley jilted Joseph Mitchell, who in turn married Mary Mitchell, the informant. W. Hubbell Memo, *supra* note 157. Embittered by a prolonged two years of rejection, Mitchell maliciously told others that Leah was a "colored slave." *See id.*

160. *See* Harris, *supra* note 17, at 1741; Jones, *supra* note 11, at 701-02.

161. Will of Paul D. Remley (Dec. 14, 1863) (on file with the Avery Research Center for African American History and Culture, College of Charleston) (Remley's Point Collection).

the court that probating the will was morally justifiable.[162]

Apparently, Durbin lived a quiet life as a wealthy planter in the Carolina Lowcountry. Few, if any, texts of state history record his name as a prominent figure in southern politics, agricultural affairs, or Charleston society. At the time he applied to administer his father's will in 1861, he lived on a plantation known as Remley's Point in the Charleston District. On this 305-acre plot, situated in Christ Church Parish at the junction of the Cooper and Wando Rivers,[163] Paul Durbin Remley lived with his slave, Philis,[164] and their two children. Durbin also owned a brick house and lot[165] on Society Street in downtown Charleston, which was a common practice for wealthy planters in the Carolina Lowcountry.[166] State records show that he bought and sold slaves fairly regularly.[167]

Interracial sex and cohabitation existed in the antebellum South within unspoken codes of behavior. Durbin could maintain Philis and their children at his plantation with impunity because her slave status eviscerated any claim of legitimacy on their sexual relationship. As the slave mistress of Durbin, she tacitly assumed the role of wife and paramour and he remained unmarried throughout his life. As the mother of his only two children, Philis claimed a distinct role at Remley's Point. Nominally a slave but almost a wife, she assumed an ambiguous role of partner and servant not unknown to women of color in the antebellum South.[168] Even though South Carolina law allowed for interracial marriage,[169] it applied to free blacks only, thus preventing the legal legitimization of

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162. *See* Leslie, *supra* note 13, at 236.

163. Historical Overview of the 4th Avenue Tract, Remleys Point (on file with the Avery Research Center for African American Culture, College of Charleston).

164. No official bill of purchase exists for the slave Philis, but census records loosely provide an understanding of who she was. The 1870 South Carolina census lists her as "black" rather than "mulatto," so we may assume that Philis was of sufficiently dark complexion as to lead the census taker to classify her as of unmixed blood. *See* 2 SOUTH CAROLINA 1870 CENSUS INDEX: L-Z 1468 (Bradley W. Steuart ed., 1989). In 1861, she would have been approximately eighteen years old, the mother of a seven-year old son Charles, and pregnant with her daughter Cecile. However, litigation documents in 1866 verify Cecile being five years old. These records would also make her a mother at age 12.

165. He also owned two uninhabited lots in Charleston. *See* Plat for 16 Town Lots Between Wentworth, Anson, East Bay and Society Streets in Charleston, (Dec. 1843) *microfilmed on* Series L10005, Reel 0001, Plat 00493 (S.C. Dep't of Archives & History).

166. *See* EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 427 (1974) (discussing Charleston's development as a cosmopolitan center for the plantation aristocracy).

167. *See* Bill of Sale For a Slave Named Amey from George Henry to Paul Remley (Sept. 9, 1820), *microfilmed on* Series S213003, Vol. 005D, p. 0001 (S.C. Dep't of Archives & History); Bill of Sale For a Slave Named Limehouse to Paul Remley to Thomas Buller King (Nov. 17, 1830), *microfilmed on* Series S213003, Vol. 005K, p. 00314 (S.C. Dep't of Archives & History).

168. The question of emotion and intimacy in interracial relations in the South, particularly between white men and black slave women, has received great attention in many disciplines, with no agreement on how to characterize them. This Article is certainly not intended to address that contentious issue, as it goes beyond the scope of this project. Other scholars, however, offer meticulous historical studies. *See generally* F. JAMES DAVIS, WHO IS BLACK?: ONE NATION'S DEFINITION (2001); GENOVESE, *supra* note 166; HODES, *supra* note 79; ROTHMAN, *supra* note 97.

169. *See* Legal Map, *supra* note 82.

miscegenous relationships between master and slave. Slavery precluded any legally recognized relationships, thus securing the sexual freedom of white men. Furthermore, Durbin and Philis did not challenge what Adrienne Davis has termed the southern "sexual economy"[170] by formally affirming their relationship with the state. In this choice, Durbin faithfully believed that recorded word would suffice in the distribution of his estate.

Testator appreciation for wills—their ritual, solemnity, and gravity—incorrectly assumes that death solidifies intended posthumous transfers, thus following the common law aspiration of freedom of testation.[171] This doctrine would doggedly argue for the careful distribution of property as the decedent saw fit, in accordance with a validly drawn, witnessed, and executed will.[172] Far too often, however, courts and collateral heirs ignore testamentary language to reformulate a will to more closely conform to state-mandated schemes of distribution. The color of testamentary freedom defeats donative intent to reapportion the estate for the unintended benefit of related but clearly undesirable heirs.

A. "DIE AND ENDOW, A COLLEGE OR A CAT"

Yet Durbin would show his appreciation for this relationship upon his death. He died while hunting on December 25, 1863, which Philis describes in a letter as "the discharge of his Gun by shooting marsh hens in company with Major Bolks & John Antley the ball entered his lungs of which he survived 13 days after being shot."[173] In his will, he provided for his slave–widow and their children an annuity of $500 per year, to be paid from the sales of his property, both real and personal.[174] He also bequeathed "his Negroes," meaning Philis, Charles, and Cecile, to a friend "to have the labor and services of the said slaves and their issue for and during his natural life."[175] Durbin did not intend to relegate his family to a state of abject slavery, but to place them "under the control of kind and indulgent owners, who will, whenever the law permits manumit and make them free."[176]

South Carolina courts frequently tried such issues. In *Fable v. Brown*, a white man established a trust in his will for his "two (illegitimate) coloured children by a female slave."[177] The plaintiffs, claiming to be the next of kin of the testator, objected to the will, claiming that such bequests to slaves were invalid.[178] On appeal, the court approved the be-

170. Davis, *supra* note 4, at 228.
171. Leslie, *supra* note 13, at 235 ("Courts and scholars often treat freedom of testation as if it were a fundamental tenet of our liberal legal tradition.").
172. *Id.* at 245.
173. Letter from Philis Remley to Elizabeth Hubbell (June 1, 1865) (on file with SCHS).
174. Will of Paul D. Remley, *supra* note 161.
175. *Id.*
176. *Id.*
177. Fable v. Brown, 11 S.C. Eq. (2 Hill Eq.) 378, 379 (1835).
178. *Id.*

quest on its face, upholding the testator's wishes.[179] As a caveat, however, the court compared the man's will to the freedom of providing posthumous support for a favorite pet or object, quoting the expression, "Die and endow, a college or a cat."[180] Even though the court validated the will, the property reverted to the state, because slaves, as property, could not inherit.[181]

Durbin's scheme differs, however, because of timing, thus allowing circumvention of the legal prohibition on slave bequests and manumissions. He did not leave his property to his slave family directly, but to an administrator to carry out his wishes.[182] In this testamentary trust, his family would receive the interest resulting from the sale of his personal property, which he could not leave to them directly because they were slaves.[183] Additionally, he did not manumit the slaves in his will, but he allowed for that possibility in the future.[184] However, at the time of probate, this issue was moot. Had the will been executed while Phillis and the children remained slaves, the court may have followed *Fable*.

Durbin's semantics of slavery in his will deserve further scrutiny. Although Philis argued that she and her children had been emancipated by the time he wrote his will, he nevertheless referred to them as though they were slaves.[185] Had he left them property directly, he would have placed their interests in jeopardy, considering that the 1841 prohibition on slave bequests had yet to be overturned.[186] Additionally, he did not free them in the will, but he expressed the hope that their new owners would manumit them "whenever the law permits."[187] Although the Emancipation Proclamation affected many states, it did not necessarily

179. *Id.* at 400.

180. *Id.* at 397. The court quotes Alexander Pope, who, at his death, wrote, "But thousands die without this or that, Die, and endow a college or a cat."

181. *Id.* at 400.

182. Will of Paul D. Remley, *supra* note 161.

183. *See* Act to Prevent the Emancipation of Slaves, and for Other Purposes, *supra* note 127.

184. Will of Paul D. Remley, *supra* note 161.

185. *Id.*

186. The prohibition reads:

> *Be it enacted*, by the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That any bequest, deed of trust, or conveyance, intended to take effect after the death of the owner, whereby the removal of any slave or slaves, without the limits of this State, is secured or intended, with a view to the emancipation of such slave or slaves, shall be utterly void and of no effect, to the extent of such provision; and every such slave so bequeathed, or otherwise settled or conveyed, shall become assets in the hands of any executor or administrator, and be subject to the payment of debts, or to distribution amongst the distributees or next of kin, or to escheat, as though no such will or other conveyance had been made.
>
> . . . .
>
> . . . That every clause or bequest, to a slave or slaves, or to any person, upon a trust of confidence, secret or expressed, for the benefit of any slave or slaves, shall be null and void.

See Act to Prevent the Emancipation of Slaves, and for Other Purposes, *supra* note 127.

187. Will of Paul D. Remley, *supra* note 161.

free all slaves in South Carolina, but all slaves, regardless of residence, were freed by the Thirteenth Amendment in 1865.[188] In referring to them as slaves, Durbin captured a memory of them as favored and faithful servants instead of beloved and deserving family members. In this move, he formally maintains distance between himself and Philis, thus underscoring a Southern code of racial propriety.

Durbin's goodwill toward his black family makes a strong statement as to his parental allegiances. Although he did not acknowledge his children as his blood, his testamentary wishes clearly state his economic concerns for his family, and he memorialized his intimacy with Philis in a legal document that leaves little room for alternative explanations. He expressed a desire to sell his property "to be appropriated for the use, clothing and comfort in sickness and health" for her and the children.[189] In this document, he rejected the interests of his collateral white heirs, whom he noticeably refrained from mentioning until the end of the will.[190] In this devise, he left his residual estate to his mother, Mary Remley, and, upon her death to his sister, Emma.[191] In no place in the will did he mention his sister, Elizabeth Hubbell.[192]

Durbin disinherited his sisters because he found their opinions of his family objectionable. Elizabeth's previous letter regarding their mother's racial identity revealed strong disapproval of race-mixing, which she described as "degrading" and "low."[193] In finding a subject to channel her frustrations and convictions, she demonstrated her disapproval of miscegenation to her brother without explicit mention of his own transgressions.[194]

The Remley case stands apart from other interracial inheritance cases because of the prevalent influence of the Civil War. Durbin's will remained untouched for three years after his death, which coincides with the war's end. Presumably, hostilities between the Union and the Confederacy deterred not only the rapid administration of wills, but also communications between the North and the South. Correspondence among

188. At the time of Durbin's death, President Lincoln had issued the Emancipation Proclamation, which declared that "all persons held as slaves . . . shall be then, thenceforward, and forever free." ABRAHAM LINCOLN, *Emancipation Proclamation*, *in* 6 COLLECTED WORKS OF ABRAHAM LINCOLN 28-31 (Roy P. Basler ed., 1953) (made January 1, 1863). This decree most likely did not change Philis's slave status, as South Carolina remained a rebellious state that resisted actual emancipation until the physical arrival of Union troops. LARRY KOGER, BLACK SLAVEOWNERS: FREE BLACK SLAVE MASTERS IN SOUTH CAROLINA, 1790-1860, at 190 (1985). The possibility of the exceptional change in her status would have entangled Durbin's will in a problematic archaism—he made provisions for slave succession after emancipation and these promises found no political or legal grounding. Durbin's legacy to Philis, Charles, and Cecile, who were possibly free but indicated as slaves in the will, made itself vulnerable to attack as a post-emancipation testament.

189. Will of Paul D. Remley, *supra* note 161.

190. *Id.*

191. *Id.*

192. *Id.*

193. Letter from Elizabeth Hubbell to Paul D. Remley, *supra* note 144.

194. *Id.*

multiregional families such as the Remleys dissipated to such an extent that years passed without hearing news from relatives in distant places. This case is no exception, and the postwar letters circulated among the family demonstrate delayed notifications of salient events. In the period between Durbin's death and the subsequent litigation, the transformations of war raised this standard, yet mildly transgressive, postmortem distribution to a juridical exercise of reconstructing the past.

Correspondence from Charleston completed the cycle of belated information about uncommunicated family episodes. As proxy for Durbin, Philis responded to the sisters on June 1, 1865, with her own tragic news of Durbin's death.[195] In this response, she conveyed a sense of loneliness, despair, and depression.[196] Philis's letter sparked a chain of events that led to the eventual dispute over inheritance. In this correspondence, she conveyed an intimacy with Durbin that alluded to mutual intimacy. A full two years after his death, she recalls:

> My Dear Mistress the morning of which he died was Christmas on that Morning he Called me to wash him saying that he felt so much better and said that he did not think that his mother was alive and was Desirous of seeing his sisters also he said on the Morning that Christmas Morning was a Mourning Day to the Family which after he called on me to give Him the Bible to read of which I did & said that he was thankful to God for his Mercies towards Him to spare his life to see that happy Morning[.][197]

This candid vignette shows intimacy between Durbin and Philis that she relayed without hesitation to his two white sisters. Philis nevertheless remained deferential and observant in her writing by repeatedly referring to Durbin as "My Dear Master," but she also conveys her attachment to him by eventually admitting "you do not know how it destroyed me" and "I truly Miss him."[198] At the close of her letter, she pled for the sisters to return to Charleston "to relieve [her] Distressing mind" and to "find a Friend."[199] The exercise of recalling her beloved's death renewed the pain she once felt as she lamented, "I would say more but by heart ache me to think of the past or look at the present."[200]

B. Race-ing to a Will Contest

Durbin's will serves as intriguing memoranda of a socially averted yet physically manifested chapter of slaveholding society. Yet, this case turned that silence on its head. *In re Remley* does not stand alone by any means—other cases in South Carolina exemplify the not uncommon practice of miscegenation and concomitant testamentary expressions of

195. Letter from Philis Remley to Elizabeth Hubbell, *supra* note 173.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*

compassion.[201] The law's resistance to testamentary diversity demonstrates the existence of a "problem" that could not be avoided. The transfer of property and wealth from white to black memorializes the testator's preference to designate these goods in the interests of his mixed-race family. This deliberate act of prioritizing the economic interests of his black family invites a public postmortem discussion of miscegenation that in his lifetime remained purely private. In this act, he calls upon the law to investigate, affirm, and sustain the legitimacy of his subjective articulation of family. Yet within a racial regime that prioritized propriety over deviance, the question of whose interests are served challenges the lofty theory of testamentary freedom.

Counsel for the Hubbells contended that the will intended to spite Elizabeth and her mother by "putting the Negroes over" their interests.[202] In this contest, the sisters objected to the will on three primary grounds: (1) testamentary transfers to slaves were invalid; (2) Durbin appropriated his father's estate for his own use and enjoyment; and (3) the postwar devaluation of Durbin's estate deprived them of any interest in his property.

1. The Slavery Claim

Durbin's intention to establish a trust for Philis and the children immediately drew the attention of the Hubbells, who viewed family not as eligible parties for a testamentary transfer, but rather as bonded persons precluded from exercising legal and economic interests.[203] A bill of complaint opposing Philis's interest described the bequest as "contrary to Equity and good conscience."[204] This rebuttal drew upon a conception of the past that eternally equates blackness with slavery. Even though Durbin wrote his will after Lincoln's emancipation of Philis and the children, common sense would dictate that the Hubbells' slavery claim found no legitimate ground. Still, Elizabeth and her husband persisted in contesting Durbin's intent to provide for and support his chosen family; they saw not a family, but a gang of slaves that threatened their free and racialized interest in his estate.

Their focus on the slave status of Philis and her children demonstrates the Hubbells' racially motivated objections, and they relied on race privilege as a persuasive method for denying the validity of the will. They do not deny the existence of the miscegenous relationship, as their correspondence demonstrated this knowledge. Because they did not directly attack Philis and her children's racial status as impediments to inheri-

201. *See, e.g.*, Monk v. Pinckney, 30 S.C. Eq. (9 Rich. Eq.) 279 (1857); Jolliffe v. Fanning, 44 S.C.L. (10 Rich. Eq.) 186 (1856); Ford v. Dangerfield, 29 S.C. Eq. (8 Rich. Eq.) 95 (1856); Dougherty v. Doughtery, 21 S.C. Eq. (2 Strob. Eq.) 63 (1848); Carmile v. Carmile 275 S.C.L. (2 McMul. Eq.) 454 (1842); Farr v. Thompson, 25 S.C.L. (Chev) 37 (1839); Fable v. Brown, 11 S.C. Eq. (2 Hill Eq.) 378 (1835); Miller v. Mitchell, 8 S.C. Eq. (Bail. Eq.) 437 (1831); Somers v. Smyth, 2 S.C. Eq. (2 Des. Eq.) 214 (1803).

202. Memorandum to Messrs. Ledyard and Boulon (Nov. 9, 1866) (on file with SCHS).

203. *See id.*

204. Bill of Complaint of Ziba B. Oakes, Oakes v. Hughes (S.C. Eq. Nov. 9, 1866) (on file with SCHS).

tance, the slavery argument displaces this expected rebuttal by fixating on their former lives as slaves. Presumably, the Hubbells realized the weakness of this objection to the will, seeing that its postwar execution and contestation dates made the slavery issue almost moot. Only under Confederate law could this claim have succeeded.

Philis readily responded to this fatuous claim by asserting her rights, gained as a free woman.[205] In her answer to the Hubbells' complaint, she insisted upon the validity of the will, emphasizing that it was created after her manumission.[206] Arguing for its possible validity under the regime of slavery, she emphasized that "having been actually emancipated and made free before the distribution of the estate of Paul D. Remley such bequest should be held good and valid."[207] On the strength of this claim, she succeeded in establishing her ability to inherit property.[208]

2. *Whether Durbin's "Appropriation" Was Proper*

Competing conceptions of the past re-emerge in the interpretation of "property" of the elder Paul Remley's estate. As stated above, the Hubbells maintained that Philis and her children were ineligible to inherit as slaves, but they expanded this argument by also asserting that the slaves existed as part of the elder Remley's estate.[209] In this line of thought, their father's death entitled them to a share in the slave property, which they argued that Durbin "appropriated . . . to his own use and purposes."[210] They expected Durbin, once appointed as administrator of the estate, to convert the father's personal property into money and divide the proceeds equally among the heirs.[211] Of this personal property, which William Hubbell estimated at $36,000, Elizabeth, Emma, and Durbin would each receive $12,000.[212]

In the interest of securing a share in Durbin's estate, the Hubbells appropriated the meaning of chattel slavery. Here, they did not view Philis as a long-term acquaintance or fellow heir, but as merchandise that Durbin mishandled in the administration of his father's estate. Philis shifts from an article of property to an obstruction of right, one that displaces their expectation to inheritance.[213] In other words, Durbin's enumeration of Philis as a beneficiary rather than a parcel reduced the total value of the money they argued belonged to them:

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205. *See* Separate Answer of Philis a Freed Woman, Oakes v. Hughes, (S.C. Eq. Dec. 28, 1866) (on file with SCHS).
206. *Id.*
207. *Id.*
208. Order, Oakes v. Hughes (S.C. Eq. Aug. Aug. 12, 1867) (on file with SCHS).
209. Letter from William Hubbell to Rutledge & Young, *supra* note 116.
210. *Id.*
211. *Id.*
212. Hubbell catalogues the personal property as: "about 30 negroes value $25,000 and personal property on the farm value $4,000; Cotton value $2,000. He cut wood also which he had no right to do, a thousand or more cords: value $3,000; Insurance stock $2,000. [TOTAL] $36K." *Id.*
213. *See* Harris, *supra* note 17, at 1740, 1758.

> He says they are *his* slaves and then dispenses of their services as his own property to another person, exclusive of the other heirs—"expressis imicis alterias exclusis." If they as he says are taken as his and dispenses of by *him as his* then he excludes the other heirs and they can claim for value received by him.[214]

Philis, they believed, was not exclusively Durbin's. Even though he called them "my negroes Philis and her children,"[215] the Hubbells claimed they were theirs as well. This way of remembering the past, although legally motivated, aimed to diminish the status of Philis as a rightful beneficiary. Even by invoking her monetary value, they could not reasonably relegate her to slave status, but they could insist on recovering this money to aggrandize the shares than Durbin had allotted. Thus, in describing Philis as an object of property rather than its recipient, the white collateral heirs sought financial security through a shrewd manipulation of the past.

3. *The Devaluation of Durbin's Estate*

The value of Durbin's estate directly related to the outcome of the Civil War. He wrote his will after the war began,[216] taking into account the then-current value of his property. At that time, he considered his estate valuable enough to yield $500 a year for the comfort and clothing of Philis and her children.[217] Alternatively, he authorized his trustee, James Gray, to pay them the amount in full "if in his judgment he shall deem it judicious and proper."[218] This estimate of his finances and holdings pre-dated the fall of the Confederacy and the collapse of its economy. Durbin remained aware of the possible effects of the war, as he directed his executors to invest his money conservatively to safeguard his postmortem worth throughout the war.[219] He entrusted them to invest in "safe Securities, or real estate . . . until the declaration of peace between these Confederate States and the United States."[220]

Durbin's antebellum legacy to his black family, which would not take effect until after the war, makes an intriguing study of the influences of history on memory. At once, the document encompasses three modes of temporality—past, present, and future—each intervening to construct, commemorate, and sustain posterity of interracial wealth marked by the mercurial economy of the embattled South. When he wrote his will, Durbin remembered his property as he could have only imagined it; however, the economic upheaval of the agrarian-based political system, which supplied his wealth, superseded his testamentary objectives. As much as he tried to secure his property for Philis, he could not accurately account

214. Memorandum to Messrs. Ledyard and Boulon, *supra* note 202.
215. Will of Paul D. Remley, *supra* note 161.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*

for the devaluation of his estate that would swallow his secondary bequests to his mother, Mary, and sister, Emma. From his standpoint, the subversive act of enriching the economic lives of his black kin would transcend his death. In his own act of remembering and securing the past, he could not contemplate an unforeseen and unprecedented future.

The Civil War's effect on property values generated additional testimonies. His executor, Optimus Hughes, submitted an answer to the Equity Court that described the conditions of the estate in the aftermath of the Civil War.[221] Returning to Charleston after serving in the Confederate Army, Hughes found his papers and accounts destroyed.[222] He recalled the poor economic climate, saying that "everybody was oppressed with anxiety and great poverty scarcely knowing what to do to obtain food for their families."[223]

The disinherited Hubbells argued that the legacy to Philis and her children deprived them of their fair share in distribution.[224] Objecting to the "fallacy of [Durbin's] expectations," they were not "willing to bear all the losses and give her the full measure of the legacy."[225] Here lies a problem of ademption as a result of interstate conflict. In an 1866 memorandum to their attorneys, the Hubbells contended:

> But as to Durbin's will it was made with the view that there would be no loss in the Estate—but under the Southern Confederacy would be valuable and that he could afford to give her $500 a year on 8,000 or so absolutely equity out of his share—and have much left.[226]

The Hubbells' primary objection to Durbin's bequest focused not only on the devaluation, but also on his misappropriation of property to which they felt entitled. While the two sisters had moved north to Pennsylvania, Durbin remained in South Carolina, inhabiting the valuable plantation at Remley's Point and the other properties in Charleston. They believed that, even if Durbin's will did not make them primary beneficiaries, they deserved a share in their father's estate, which they believed Durbin had hoarded for himself. If his executors sold this property to provide for Philis, she would take "their" property.

C. Testamentary Drama

The performative aspect of will disputes surfaces in the courts, where competing conceptions of the past come forth. Three parties offer different versions of what the testator intended to bequeath to the heirs. First, the deceased party offers a written document as evidence of his intentions. In this testamentary language, he outlines desired plans for the

221. Separate Answer of Optimus Hughes, Oakes v. Hughes (S.C. Eq. Dec. 27, 1866) (on file with SCHS).
222. *Id.*
223. *Id.*
224. Letter from William Hubbell to Rutledge & Young, *supra* note 116.
225. *Id.*
226. Memorandum to Messrs. Ledyard and Boulon, *supra* note 202.

estate after his death in the presence of witnesses that can attest to its veracity. Durbin, with three witnesses and an equal number of executors, constructed a plan to support his companion and their children beyond his death.[227] Second, the named beneficiary offers a similar conception of the past, and she persists in proving the will as legal and valid. Philis insisted that Durbin, as the head of her household, earnestly intended for her entitlement to his estate. As an explicitly listed distributee, she offered the will itself as proof of his unquestionable design.[228] Lastly, the objectors to the will submit an alternative version of the true intention of the will, and they envision a radically different plan of distribution, which they argued as the appropriate version. According to each of these parties, the version of the past presented stands correct.

But in litigation, multiple versions of the same story always exist. Without this conflict, the issue would become moot, unequal and unpleasant distributions would not occur, everyone would agree, and all would accede to a singular account of history. As argued by Paul Antze and Michael Lambek, interpretive conventions greatly influence the types of actors and events that receive attention, and also the kinds of evidence accepted as testaments to the past.[229] The divisive and tumultuous factor of race institutes an additional narrative convention in re-creating the past and viewing the family, and interracial conflicts aptly illustrate this interpretive diversity. In interracial inheritance disputes, the color of testamentary freedom often allowed collateral heirs to deny the existence of mixed race. In relying on a legal system that rewarded and prioritized the circumstance of whiteness, testators retained no assurance that their wishes would be carried out.[230]

This case effectively demonstrates the color of testamentary freedom and the vested property interest of whiteness. First, Mary Shrine could have jeopardized the Remleys' ability to inherit from their father's estate if they were found to have African ancestry. Mrs. Shrine could have limited the definition of legitimate family to those persons who could prove themselves white. Second, Durbin's collateral heirs relied upon the racial privilege afforded them by law to deny Philis a monetary legacy that would recognize and perhaps legitimate her own family. The likelihood of their surprise at the relationship between Durbin and Philis is low. Yet the fictional barricade that facilitated white denial in the face of blatant knowledge acted to deny people of color from taking part in the benefits accorded legally recognized family members.[231]

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227. Will of Paul D. Remley, *supra* note 161.

228. Separate Answer of Philis a Freed Woman, *supra* note 205.

229. TENSE PAST: CULTURAL ESSAYS IN TRAUMA AND MEMORY, at xviii (Paul Antze & Michael Lambek eds., 1996).

230. Oftentimes, however, South Carolina courts observed the testators' wishes. *See supra* note 201.

231. Edward Ball describes similar reluctances in his own family to recognize black kin descended from slaves once owned and sired by his family in South Carolina. *See generally* EDWARD BALL, THE SWEET HELL INSIDE: THE RISE OF AN ELITE BLACK FAMILY IN THE SEGREGATED SOUTH (2002); EDWARD BALL, SLAVES IN THE FAMILY (1999).

Durbin's siblings indeed objected to the interracial will, as they appealed to the Equity Court to "cut the Negroes out entirely."[232] They recognized that Durbin's bequest to his black family was "sufficient to take up the whole of his interest in his father's Estate and that there [was] nothing left for any other party."[233] By excluding his mistress and children, the sisters attempted to erase the recorded legacy that entitled former slaves, then-current kin, to a share in Durbin's estate. William Hubbell wrote a letter advising his attorneys to "attack . . . the validity of the will itself" and to absorb all of Durbin's interest to "[leave] nothing for it to take effect upon."[234] Their objections to the will, in addition to procuring additional wealth for themselves, stemmed from their displeasure with Durbin's tenuous relationship with his white family. They complained that Durbin "never wrote to them, nor sent anything during the Rebellion" and that "[h]e never sent them a dollar."[235] Additionally, "he did not even send his Mother money to pay his Father's funeral expenses."[236]

These letters of objection reveal a desire to re-invent a familial history devoid of the taint of miscegenation. Hubbell wrote that they wished to "undo all that he has done," explicitly rejecting the past that Durbin had memorialized in his will.[237] In denying the testator's death wishes, the collateral heirs re-created history in their own image, championing themselves as the legally and racially eligible distributees. Despite the fact that Durbin's wishes were recorded on paper and ratified by witnesses, the white tentative heirs retold a story of Durbin's ill health, arguing that his disabled condition from the gun wound led him to write an invalid will.[238] Only "with a load of shot and wad in his lungs," they argued, could they rationalize Durbin's wishes to spite his family for a gaggle of slaves.[239] According to this line of thought, respectable white persons would not reasonably relinquish their property and wealth to bastards and Negroes.

Although the white collateral heirs' depiction of Durbin's infirmity and irresponsibility garnered sympathy from the Equity Court, they did not wholly attempt to derail Philis from her proper inheritance. But this nominal inclusion must not be confused with accepting her as a legitimate distributee. They recognized Philis not as part of Durbin's family, but as a servant to their father, who deserved compensation "in consideration of her attention . . . in his sickness at the Point two or three years before his death."[240] Seeing themselves as the primary heirs rather than Philis and her children, the white heirs agreed to allot $2,000 "for her comfort, when

232. Letter from William Hubbell to Rutledge & Young, *supra* note 116.
233. Bill of Complaint of Ziba Oakes, *supra* note 204.
234. Letter from William Hubbell to Rutledge & Young, *supra* note 116.
235. *Id.*
236. *Id.*
237. *Id.*
238. Memorandum to Messrs. Ledyard and Boulan, *supra* note 202.
239. *Id.*
240. *Id.*

she as things proceed proves worthy of it."[241] In stark contrast to Durbin's testamentary intent, Philis received a pittance while Elizabeth took the majority of his estate. The Equity Court Master approved this consolation scheme, recommending that "it be accepted as advantageous to [Philis]."[242]

CONCLUSION

The conflict that instigated the Remley conflict escaped traditional legal methods of resolution. The complex nature of the case required special attention that the courts of the common law could not adequately provide. Due to the radical changes in the South's political, economic, and legal climate caused by the Civil War, pertinent law that directly and fairly addressed the postwar administration of an antebellum interracial will did not exist. Moreover, probate of the will, so soon after the war, yet four years after the testator's death, lingered in the postwar instability of South Carolina's legal system. Ademption of Durbin's estate hinged on whether Philis and the children could be considered a loss of "property" and a misappropriation of the elder Remley's estate. Yet no slave system existed at the time of probate to fund the estate. Thus, South Carolina's Equity Court heard the case because it did "not fit[ ] within the existing rules of law," administering a ruling with a heightened sensitivity to the individual interests of the parties.[243] This courtly invocation of empathy viewed the disinheritance of white heirs (in favor of black ones) as a viable application for equitable principles.

This case, which spanned both antebellum and postwar regimes, forces an examination of public secrets being legally recognized. As Austin Sarat and Thomas Reams argue, "[M]emory may be attached, or attach itself, to law and be preserved in and through law."[244] This method of constructing the past in relation to the juridical structures particular to a place and time works to legitimate and authorize a historical account of possibilities and improbabilities. This is a surprising result from a contemporary viewpoint. To imagine that a former slave's right to inheritance decreased after the Civil War confounds a modern understanding of historical memory. It is far easier to imagine Philis's chances of inheritance as secure after the war, but it is more difficult to interpret her diminishing rights after the domestic conflict that presumably attempted to enable them. Furthermore, to examine her shrinking interest in Durbin's

241. In the end, Philis bore the brunt of the execution of Durbin's original will. Out of the $2,000 allotted to her, all debts and legal fees were deducted, and half of this amount was given to Optimus Hughes, the administrator. Order, Oates v. Hughes (S.C. Eq. Aug. 12, 1867) (on file with SCHS). Thus, Philis received money, but she was required to pay the costs generated from the white heirs' objections. *Id.*

242. Remley Case Master's Report (July 5, 1867) (on file with SCHS).

243. *See* Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1263 (2002).

244. Austin Sarat & Thomas R. Kearns, *Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction*, *in* HISTORY, MEMORY, AND THE LAW 1, 12 (Austin Sarat & Thomas R. Kearns eds., 1999).

estate in light of his testamentary wishes presents a peculiar definition of "equity." While this translates to an overt assertion of racial supremacy in objection to clear testamentary intent, it also demonstrates a shrewd manipulation of legal definitions of family. The Hubbells portray Durbin's effort as a wanton death desire of a country planter "with a load of shot and wad in his lungs."[245]

The claim of incapacity allows the collateral heirs to make legal sense of Durbin's unconventional assertion of a multiracial family in the antebellum and postwar South.[246] Durbin did not marry Philis, even though Philis was technically not a slave and state law permitted interracial marriages at the time of his death. Had he married her, his siblings would not have had legal grounds to contest the will, and the combination of her free status and her spousal protection would have enabled her to inherit without restriction. Yet South Carolina law enabled the white heirs to succeed in their will challenge because the legal system upheld the restricted notion of a white, legitimate, recognized family, which did not include Philis and the children.

State law resisted the probate of Durbin's will as he intended. His testamentary objective was clear: he wanted to provide for Philis and the children and leave his sister with nothing. The competing conceptions of family—his black one and his white one—found different treatments in South Carolina courts. Even though he made provisions for Philis's "use, clothing and comfort,"[247] he could not overcome the legal privilege accorded to free whites. His collateral heirs were able to capitalize upon the law's favoring of free, white persons as a way of denying any recognition of Philis as a family member. Moreover, the massive transformations stemming from the Civil War changed the composition of Durbin's estate. The Civil War, the Emancipation Proclamation, and the weakening of the southern plantocracy undermined Philis's claim to her share of Durbin's property. He lived to see neither the economic devaluation of his property nor the legal wranglings that weakened his own family's testamentary interests. He did not foresee that the law would force his posthumous gifts toward the family that he wished to disinherit. These influences, in addition to the challenges presented by the Hubbells, precluded Philis—the rightful heir—from obtaining her due legacy.

The historical failure of donative intent stifles the ability of marginalized families to secure their due inheritance. Not limited to finances alone, the law's role in quashing the testator's intent underscores a collec-

245. Memorandum to Messrs. Ledyard and Boulon, *supra* note 202.

246. Contrary to amnesiatic legal histories, extralegal miscegenation did occur in the antebellum South, but whites carefully distinguished between *knowledge* and *acknowledgement*, with the former concerning gossip, and the latter concerning recognition. This crucial distinction illuminates the Southern dialectic of miscegenation: publicly, it affronts the race-based slavery regime, while privately, it provides pleasure and reinforces dominance. CHARLES FRANK ROBINSON II, DANGEROUS LIAISONS: SEX AND LOVE IN THE SEGREGATED SOUTH 1, 3 (2006).

247. Will of Paul D. Remley, *supra* note 161.

tive belief in the normativity of traditional families. In this way, the larger legal system supports testamentary larceny in blatant contradiction to explicit legal language recognizing, promoting, and memorializing intimate connections between black and white. Testamentary freedom, in all of its aspirational claims, means nothing in the face of a legal system rooted in the restrictive and damaging conformity of "legitimate" families. In the case of the Remleys, Durbin's "family" did not exist as a reality in a legal regime that defined intimacy in terms of black and white, with nothing in between.