

**Nation and Miscegenation:  
Comparing Anti-Miscegenation Regulations in North America**

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## I. Introduction

The recognition of intimate life as a site of state governance runs contrary to standard conceptualizations of the role of the state in the “bedrooms of society”. However, the distinctions drawn between public and private – that is, where the boundary lay dividing the spheres in particular circumstances – are seldom permanently contrived; ephemeral, and simultaneously arbitrary and purposeful, numerous examples (same-sex marriage, adoption, prostitution) point to the role of the state in regulating intimacies in a variety of contexts, shifting the boundaries of public and private to conform with ideas about race, gender, and sexuality in the service of its own interests. The politics of intimacy have been a central concern of those who rule, implicating the production and regulation of raced and gendered bodies and identifying familial relations as a site of power. In effect, the personal is extraordinarily political.

In the United States, the historical prohibition of interracial relationships exemplifies the state’s regulation of intimate life. Anti-miscegenation laws prohibiting interracial sex and marriage predate the Declaration of Independence by more than a century. At one time or other 41 of the 50 states have enacted such legislation, encompassing restrictions not simply against Blacks, but also Asians, Indians, Native Americans, “Orientals,” “Maylays,” Native Hawaiians, and in some cases, simply all non-Whites. These laws were universally declared unconstitutional in the 1967 landmark civil rights case of *Loving v. Virginia*.<sup>1</sup> Anti-miscegenation laws named as such were not enacted in Canada, though an informal and extra-legal regime ensured that the social taboo of racial intermixing was kept to a minimum (Walker, 1997; Backhouse, 1999; Walker, 2000). However, it is arguable that Canada’s various manifestations of the federal *Indian Act* were designed to regulate interracial (in this circumstance, Aboriginal and non-Aboriginal) marital relations and the categorization of mixed-race offspring. Of particular interest is the former section 12.1.b, finally amended in by Bill C-31 in 1985, which stipulated that Aboriginal women who married non-Aboriginal men and the offspring of these interracial relationships would be denied Indian legal status, while Aboriginal men who married non-Aboriginal women would retain the Indian status that would also be given to their wives and children. Both anti-miscegenation laws and the *Indian Act* are, in short, striking examples of the state’s regulation of the intimate sphere.

These two circumstances are not often compared. While a number of legal and historical studies consider the emergence and existence of anti-miscegenation laws in the United States (Williamson, 1980; Fowler, 1987; Davis, 1991; Pascoe, 1996; Sollors, 2000; Moran, 2001; Wallenstein, 2002; Lubin, 2005) comparative studies on this subject are virtually non-existent.<sup>2</sup> In fact, most studies of anti-miscegenation laws begin with an affirmation of American exceptionalism and a confirmation that the ‘race problem’<sup>3</sup> in the United States is unique.

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<sup>1</sup> *Loving v. Virginia*, 388 U.S. 1 (1967). At the time of the case in 1967, 17 states had anti-miscegenation laws invalidated by the decision.

<sup>2</sup> A notable exception discussed below is Wolfe (2001).

<sup>3</sup> Winant (2001) defines ‘race’ as “a concept that signifies and symbolizes socio-political conflicts and interests in reference to different types of human bodies. Although the concept of race appeals to biologically based human characteristics (so-called phenotypes), selection of these particular human features for the purposes of racial signification is always and necessarily a social and historical process. There is no biological basis for distinguishing human groups along the lines of ‘race’...” (Winant, 2001: 317. n.1; emphasis in original). Some sociologists

However, documented historical evidence demonstrates an institutional concern with the regulation of interracial marriages and the existence of mixed-race progeny in varied contexts throughout the world, including but not limited to Indonesia (Stoler, 2002), Australia (Wolfe, 2001), Canada (Van Kirk, 2002; Freeman, 2003), the United States (Williamson, 1980; Davis, 1991; Root, 1996; Spencer, 2006), Great Britain and her colonies in Africa (Young, 1995; Hall, 2002; Bland, 2005), the Caribbean (Hall, 2002), Germany (Adams, 1990; Weikart, 2004), India (Ballhatchet, 1980; Ghosh, 2006), South Africa (McClintock, 1995) and Brazil (Marx, 1998). In fact, it seems that in any country where (supposedly) distinct ‘races’ live in close proximity, there has been concern (mostly espoused by the dominant group) about racial intermixing. This concern has sometimes, but not always, led to state regulation of interracial sex and marriages, which has varied among contexts. This begs an interesting question that remains unasked and unanswered in the literature: what accounts for variances in the regulation of interracial intimacies?

I contend that we cannot understand the regulation of interracial relationships in comparative context without reference to racial ideas. An emphasis on the autonomy and influence of ideas about race will reveal a number of themes that permeate the regulation of interracial intimacies in both Canada and the United States: the transgression of gendered/raced social boundaries; the exposure of raced/gendered sexualities; the interlocking and mutually reinforcing nature of patriarchal, white supremacist and capitalist systems of domination; the threat of non-white access to white capital; the potential of mixed-race progeny; and the predicament of racial categorization precisely at the points at which categories come undone, classification schema crumble and ‘race’ is most clearly illustrated as a social and political construction with *real* consequences. Above all else, this paper will reveal the law as an important site where boundaries around identities are created and manipulated. Our purpose, among others, is to explore why the boundaries of race and gender lie where they do and to expose that the determination of inclusiveness and exclusivity of racial categorizations are neither obvious nor given.

## II. Theoretical Framework

Before delving into the comparison, we must first address the methodological concerns surrounding the comparability of these two circumstances of intimate regulation. First, why compare the regulation of interracial relationships in Canada and the United States? Comparisons across space – that is, between different countries, as will occur in this research – invariably face the problem of unit homogeneity (King *et al*, 1994: 201) but are critical for studying historical change. This problem can be alleviated (though not fully resolved) by adopting Przeworski and Teune’s (1970) “most similar systems” research design, which allows for the development of theory by comparing units with many similar features, while allowing for variation on the

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advocate the use of the term ‘racialization’ to demonstrate that social processes are the means by which certain groups are singled out for unequal treatments on the basis of real or imagined phonological differences (Li, 1999: 8). The jury is still out on the issue of whether or not the use of inverted commas is mere sarcasm or the reinforcement of the socially constructed nature of ‘race’; though I wholeheartedly agree that race is socially – and, as this paper will demonstrate, *politically* – constructed, those identified and labelled by the term undoubtedly experience excessively real consequences because of this four-letter word. I have chosen not to employ scare quotes in order to confirm the stark tangibility of racial reality.

dependent variable. The process of “matching” units, however, increases the likelihood of omitted variable bias – variables unaccounted for which are related to both the independent and dependent variables (King *et al*, 1994: 203).

This project seeks to compare the regulation of interracial relationships in Canada and the United States. These cases are comparable on a number of levels; control variables include language,<sup>4</sup> level of development and industrialization, economy, democratic regime, and similarities in social values and political culture. Demography, and particularly the racial composition of the population, is important, but not determinative.<sup>5</sup> Significantly, each of these countries is increasingly racially diverse yet remains plagued by racial inequality and stratification in social and economic factors such as housing, employment and education (Dawson, 1994; Henry, 1995; Henry, 2004; Reitz and Banerjee, 2007). I hope to demonstrate that the commonalities of these cases make them comparable and their differences make the comparison worthwhile. It is also important to compare the United States and Canada in order to debunk two permeating myths of the historical relationship each country has with the racialization of its population. As previously mentioned, the myth of American exceptionalism has often worked to preclude comparative analysis in the general study of race, where only a handful of comparative studies exist within political science. In Canada, multiculturalism and a national myth that there is “no place for race” (Vickers, 2002; Smith, 2003) have allowed Canadians to negate racism as a historical and contemporary fact of Canadian society by using a logic that denies by comparison to the more overt racism of the United States. This denial is made easily in Canada, for explicit race production or racism named and acknowledged as such is difficult to find. As Backhouse (1999) points out, colour-blindness is a Canadian mechanism for responding to racial issues, allowing Canadians to maintain a “stupefying innocence...about the enormity of racial oppression” (278). A comparison of these two cases in the area of race is therefore both methodologically sound and warranted.

Secondly, can we compare the application of state regulation of interracial intimacies to different racial populations? Though Aboriginal peoples have historically been classified and categorized in accordance with both biological and social conceptions of race, it is important to note from the outset the inclusion of Aboriginal peoples under a ‘race’ framework is heavily contested by a number of scholars, who often invoke ‘internal colonialism’ to confer the differences between the racism faced by Aboriginal peoples as compared to other racial minorities (Razack, 1998; Tully, 2000; Alfred, 2005; Green, 2007). This project, however, does not seek to explain the difference experiences of race and racialization; rather, its intent is to explore the state’s regulation of interracial sexual and marital relations in comparative context. This ultimate concern of this project not only make Canada’s *Indian Act* regimes comparable to

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<sup>4</sup> Quebec and French Canada is an obvious exception. However, the regulation of interracial relationships occurs within a national, rather than sub-national or provincial, jurisdiction and is therefore available in both English and French.

<sup>5</sup> In his study of the emergence of anti-miscegenation laws in the United States, Joel Williamson (1980) demonstrated that the size of the nonwhite population was not always a factor in the emergence of anti-miscegenation legislation in the early to mid-19<sup>th</sup> century, but rather, regulation was often caused by a swell not in the black population, but in the mulatto population (1980: 28). Further, racial demographics certainly cannot explain the existence of anti-miscegenation laws in racially homogenous states such as Indiana, Montana, Nebraska, North Dakota, South Dakota, Oregon, and Wyoming.

American anti-miscegenation laws, but also permit the analysis of an overlooked exemplification of the state's regulation of interracial intimacies and racial categorizations.

Finally, are these forms of state control comparable under the subsuming notion of "regulation"? Regulation here refers to state action designed to identify and control populations and their behaviour(s) by mandating conformity with rules or principles, which are often legislated. Though state action is but one way to regulate the behaviour of individuals, the connotations that coincide with the notion of regulation are important. Regulation is the classic and most formalized way that the state attempts to control the behaviour of individuals and groups, demanding conformity and often criminalizing what it deems to be deviant behaviour. Anti-miscegenation laws represent this kind of regulation – *the regulation of people, groups and their behaviour and interactions* – whereby the contravention thereof carries legal sanctions.<sup>6</sup> Scholars have generally not labelled the *Indian Act* as an anti-miscegenation law, though Wolfe (2001) does compare anti-miscegenation legislation in the United States to the regulation of Aborigine sexual relations in Australia. This begs an important question concerning comparability: can the *Indian Act* really be considered in the same category as anti-miscegenation laws?

I contend that these two regulatory regimes are comparable for a number of reasons. First, both are cases of the government's regulation of the intimate sphere in a liberal paradigm that demands a theoretical, though contestable, separation between public (where regulation was necessary to protect individual freedoms) and private (where the state had 'no place') domains. Second, both circumstances are not simply a regulation of the intimate sphere, but a regulation of the sexuality of certain identities. Anti-miscegenation regimes in the United States and the *Indian Act* in Canada were both concerned with drawing boundaries around various racial identities, determining who was – and who was not – acceptable as a sexual or marital partner in accordance with prominent ideas of race and gender at the time. Thirdly, the purpose of these regulatory instruments varied; in Canada, the state interest was in gaining title to Aboriginal lands through assimilative means, while the United States was occupied with maintaining the hierarchical boundaries among races. In both circumstances, however, these regulations were not universal, but rather were applicable to very specific racialized populations and it is on that level that comparisons can be made. Finally, both the *Indian Act* and anti-miscegenation laws carried state sanctions. Though anti-miscegenation laws in the United States were often felony offences (for example, the Lovings of *Loving v. Virginia* were ordered to leave Virginia for a period no less than 25 years or face one year each in jail, the minimum penalty under Virginia's criminal code for violating the state's 1924 anti-miscegenation statute), there were also sanctions attached to violations of the *Indian Act*. Aboriginal women who married non-Aboriginal men paid the high price of being denied Indian status, expelled from reserve land, expunged from band membership lists and denied access to federal services designed for status Indians only. These sanctions were, in fact, severe. They entailed a loss of identity and community alongside the loss of an official legal position vis-à-vis the Crown. In sum, I contend that the provisions of the *Indian Act* that caused Aboriginal women to lose status for marrying outside their designated racial boundaries are comparable to anti-miscegenation regimes. In both circumstances state

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<sup>6</sup> Criminal sanctions for violating anti-miscegenation laws in the United States varied by state, as did the laws themselves. See David Fowler (1987).

authority played a constitutive role in legalizing norms of behaviour which entail tacit but clear racial hierarchies in the attempt to govern and regulate the intimate sphere.

This paper will demonstrate that this regulation, however, could not occur without the presence of “racial ideas”. Race and gender are indeed social and political constructions, but they are also discursive sets of power relations. Neither is objective nor neutral; rather, they should be considered as socio-historical constructs which are riddled with the exertion of power but nonetheless have ontological value. This power is not monopolized by the state, though the state will be revealed as an important site of the maintenance and manipulation of racial categories and gendered sexualities. In order to demonstrate the complex relationship between race and the state this project will reveal race as a discursive concept that is both embedded in and created by numerous strategic processes of state power. In this conceptualization, race and gender are more than mere amorphous social categories: they are both discursive and instrumental, existing within, through and beyond the reach of the state, and above all else, they are subject to and an object of power relations among social participants. Such a conceptualization of race/gender thus necessitates that we consider them as more than supposed biological differences or institutional categories, but rather as being encompassed in ideologies and ideas about how society should operate and the role of the government in maintaining a particular social order. Race, then, will be revealed as both a *means of institutional categorization* and a *powerful idea* about how humanity can (or should) be divided. This paper will demonstrate that regulations of interracial intimacy are more than a simple byproducts of other, more powerful ideas about race; rather, the creation, proliferation, discourse, and consequences of laws regulating the sexual and marital relationships of people categorized and classified as racially different has also helped to shape ideas about and our conceptualizations of race, gender, sexuality and their interlocking and systemic relationships with one another.

Though race, gender, sexuality and class are strongly correlated, the focus of this paper will be on race, a concept that can be considered one of modernity’s longest lasting, most powerful, and most influential ideas. The ideas of race have indeed changed over time and should always be used in the plural form – for these ideas were multiple, reinforcing, and adaptable depending on the racialized population and context. This also requires an acknowledgement that racial ideas involved conceptions of “whiteness” – that is, ‘race’ is not simply a term applied to non-White bodies. Since the most important thing about races was the boundaries between them, ideas about race also invariably include perceptions about the potential and ramifications of racial mixing in the intimate realm. The major eras that have shaped our world have also coincided with shifting ideas and norms about how society should be divided and organized, and which populations should rule and be ruled. Modern thought, the age of empire and imperialism, the era of the global slave trade, colonization and conquest, industrialization of the West, the abolitionist movement, the U.S. Civil War, Darwin’s theory of evolution, the competing nationalisms of the First World War, the eugenics movement, the Great Depression, the horror of the Holocaust, the civil rights movement, globalization, the end of apartheid, the emergence of models of multiculturalism and assimilation, and the politics of terrorism of the 21<sup>st</sup> century have all created, utilized, and changed ideas about race.

This means that the idea of race is extraordinarily large, making it difficult to isolate. In order to do so, I will consider only the emergence and strengthening of these two regulations of

intimate life in both cases during the late 19<sup>th</sup> and early 20<sup>th</sup> centuries.<sup>7</sup> This time period coincides with powerful conceptualizations of race based in the pseudo-sciences<sup>8</sup> and the notion of superior White civilization. I contend that tracing the relationship between racial ideas the emergence and solidification of regulations of interracial intimacies will reveal the gendered nature of race (and the raced nature of gender) and will aid in the conceptualization of racial ideas as an autonomous force in the development of political outcomes.

### III. Regulating the Intimate Sphere: Anti-Miscegenation Laws and the *Indian Act*

#### Miscegenation in the United States

Anti-miscegenation legislation was frequently assigned to prohibit and control interracial sex and marriage, making it a prime example of the state's regulation of interracial intimacies. The term 'miscegenation' was not coined until 1864, but the West's concern with the morality and practicality of interracial mixing is documented at least two centuries prior. In the United States, the first anti-miscegenation regulation was passed by the colony of Maryland in 1664, though colonial records indicate that interracial sex was a punishable offence as early as 1630 (Williamson, 1980: 7-8). A prime example of the constitutional police powers of states,<sup>9</sup> anti-miscegenation laws varied in scope, application, timing of enactment and repeal from state to state. In pre-Civil War America, some states (Pennsylvania, Iowa, Massachusetts) repealed their laws just as others (California, Rhode Island, Nebraska, Utah, Alabama, Arkansas, Florida) enacted them. As the territory of America expanded during the 19<sup>th</sup> century, the American anti-miscegenation regime shifted constantly – expanding overall, but changing locations and territorial alignment. During Reconstruction, 7 of the 11 states of the former Confederacy lifted their ban on interracial marriage, though all southern states would have anti-miscegenation laws in the 20<sup>th</sup> century. In fact, the repeal of Ohio's anti-miscegenation law in 1887 would be the last such action until the California Supreme Court declared its anti-miscegenation law unconstitutional in 1948.<sup>10</sup> While the regulations invariably banned interracial marriage between Blacks and Whites,<sup>11</sup> some were expanded to include Asians, Filipinos, Native Americans, and in the extreme cases of Georgia, South Carolina, and Virginia, all non-whites.<sup>12</sup>

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<sup>7</sup> Due to space limitations, I mention the demise of anti-miscegenation regimes in the United States in 1967 and the amendments to the *Indian Act* in 1985 only in passing, though a more detailed analysis of these events would demonstrate the influence and importance of racial ideas – in these circumstances, the institutionalization of norms surrounding international human rights in the post-World War II era – on political outcomes as well.

<sup>8</sup> This is not to infer that the biological and scientific construction of race is a circumstance of the not-so-distant past. In fact, an emphasis on biological differences among races is a fact of our all-too-apparent present: see Rushton (1994) and Herrnstein and Murray (1994), who have appealed to genetics to explain racial superiority and inferiority of intellect. See also the critiques of their theories in Fischer et al. (1996) and Flynn (2007).

<sup>9</sup> There were, however, several calls for the U.S. government to enact a federal anti-miscegenation law, including proposed constitutional amendments in 1871, 1912 and 1928 (Stein, 2004: 629-630).

<sup>10</sup> *Perez v. Lippold* 198 P.2d 17, 27 (Cal. 1948)

<sup>11</sup> Though it is arguable that Latinos in the United States have faced barriers that are similar to a racialized population, they are officially considered to be "White" in terms of both the inapplicability of anti-miscegenation regulations and within the official categories of the U.S. census, with Latino as an ethnic designation. In terms of

Though anti-miscegenation regimes, encompassing laws, jurisprudence and societal norms in a particular jurisdiction, were both enacted and repealed before the Civil War, the regimes were solidified only after slavery met its demise in the Emancipation Proclamation. During slavery racial intermixing was relatively widespread in the South as a (demographic) means of (re)production. Sexual intercourse between white slave masters and African-American slave women – taking place often, but not always in the form of rape – was a means by which slave owners could produce a larger slave population, particularly once the congressional ban of the international slave trade was passed in 1808. During the first half of the 19<sup>th</sup> century, anti-miscegenation laws existed in both the North and South, though the laws were repealed in Kansas (1859), New Mexico (1866), Washington (1868), Illinois (1874), Rhode Island (1881), Maine (1883), Michigan (1887) and Ohio (1887) in the decades before, during, or just after the Civil War.<sup>13</sup> The abandonment of anti-miscegenation regulations of the North during this era is strongly correlated to the rhetoric surrounding racial intermixture during the Civil War. During the election of 1864, Democrats attempted to associate the politics of the Republicans and Lincoln with interracial intimacy, insinuating in political rhetoric, as U.S. Senator Stephen A. Douglas did, that Republicans “want to vote, and eat, and sleep, and marry with negroes!” (Wallenstein, 2002: 55). Lincoln replied to this allegation by denying the possibility that emancipation would inevitably lead to what was then termed the “amalgamation” of the races: “Now I protest against the counterfeit logic which concludes that, because I do not want a black woman for a slave I must necessarily want her for a wife. I need not have her for either, I can just leave her alone” (Wallenstein, 2002: 55). In fact, the 1864 origin of the term “miscegenation” is an interesting aside: during the American Civil War, two anti-abolitionist journalists (posing as advocates against the South) wrote a hoax pamphlet entitled “Miscegenation: The Theory of the Blending of Races Applied to the American White Man and Negro”. The pamphlet implied that Northerners sought to free slaves because they sexually desired them and wished to make interracial sex and marriage a permanent feature of American society.

More important to the repeal of anti-miscegenation laws in the North was the reality and accusation of hypocrisy the North faced in the post-Civil War era. They had gone to war with their Southern neighbours to fight for the freedom of African-Americans; yet, a glance at Northern law and policies towards Blacks and Asian immigrants on the West Coast in the latter half of the 19<sup>th</sup> century quickly demonstrates that *de jure* discrimination was widespread (Smith, 1997: 170-179; 357-369). Following the end of the Civil War, anti-miscegenation laws were repealed or invalidated in Alabama, Arkansas, Florida, Louisiana, Mississippi, South Carolina

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anti-miscegenation regulations, “no state ever officially banned Latino-white intermarriage...presumably because treaty protections formally accorded former Spanish and Mexican citizens the status of white persons” (Moran, 2001: 17).

<sup>12</sup> This designation of “non-white” should not be mistaken for a reference to bodily appearance. Though the rule of hypodescent – or the “one-drop” rule – did not hold at all times and in all places, it was codified in legislation in states such as Virginia and Louisiana and dictated that any person who had any trace of African blood would be considered non-white. Though anti-miscegenation laws were declared unconstitutional in 1967, policies of racial designation in accordance with the one drop rule continued and gained notoriety when Susan Phipps, who was designated as “colored” on her birth certificate but insisted that she was “brought up white” and “married white twice,” challenged the Louisiana law in court in 1982 – and lost. Louisiana later changed its racial classification law after intense negative publicity.

<sup>13</sup> Laws were repealed in Kansas, New Mexico and Washington before reaching statehood.

and Texas whilst Republicans controlled the Reconstruction South. The Republican-controlled courts were also more amenable to anti-miscegenation law challenges based on the newly inscribed Fourteenth Amendment, which were successful only for a short time and under very specific circumstances following the Civil War. For example, in 1872 the Alabama Supreme Court declared the ban on interracial marriages unconstitutional by relying on the *Civil Rights Act* of 1866 and the Fourteenth Amendment.<sup>14</sup> Emphasizing that marriage was a contract, the Court concluded that Blacks now had the right to make any contract that a White citizen could make (Moran, 2001: 77). However, shortly after Reconstruction came to a dismal close and Republicans lost control of legislatures in the South anti-miscegenation laws were upheld by the courts. The legal precedent was set by the U.S. Supreme Court in *Pace v. Alabama*,<sup>15</sup> when the Court ruled that Alabama's law punishing interracial fornication and adultery more severely than same-race fornication or adultery was constitutional. Justice Stephen J. Field, writing for the unanimous Court, reasoned that "Whatever discrimination is made in the punishment prescribed...is directed against the offence designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same" (at 585). In essence, the Court declared anti-miscegenation statutes constitutional on the grounds that punishment was equally applied to both parties equally, irregardless of their race.

And thus the anti-miscegenation regime in the United States became solidified as the laws were condoned by the Supreme Court and the seven states that had repealed or invalidated their anti-miscegenation laws re-enacted them, sometimes with more stringent definitions of who was Black and harsher penalties for interracial relationships. Further, at the same time the Northern states repealed their legislation by implication or omission from revised codes, others were enacting anti-miscegenation laws for the first time: Oregon (1862), Colorado (1864), Idaho (1864), Arizona (1865), West Virginia (1870), Oklahoma (1897), North Dakota (1909), South Dakota (1909), Montana (1909) and Wyoming (1913). Combined with the seven states that did not alter their anti-miscegenation laws in the aftermath of the Civil War (Georgia, North Carolina, Virginia, Delaware, Maryland, Kentucky, and Tennessee), this formed a formidable anti-miscegenation regime that would last into the mid 1950s, with some states even writing anti-miscegenation provisions into their constitutions.<sup>16</sup>

Anti-miscegenation laws are a significant but often overlooked aspect of American race relations. They are not often considered in the same category as Jim Crow; in fact, in Woodward's (1974) landmark book, *The Strange Career of Jim Crow*, anti-miscegenation laws receive no mention. Yet the multiple regimes of interracial intimacy regulation both pre- and post-dated Jim Crow segregation and represented a violation of, in Hannah Arendt's words, "an elementary human right compared to which the right to attend an integrated school, the right to sit where one pleases on a bus, the right to go into any hotel or recreation are or place of amusement, regardless of one's skin or color or race are minor indeed" (Arendt, 1959: 49). Anti-miscegenation laws were also more extensive than either legalized segregation or slavery, existing in 41 out of the 50 states at one point or other. They also outlasted the *de jure* end of Jim

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<sup>14</sup> *Burns v. State*, 48 Ala. 195 (1872)

<sup>15</sup> *Pace v. Alabama*, 106 U.S. 583 (1882)

<sup>16</sup> South Carolina and Alabama only removed the provisions of their state constitutions banning interracial marriage in 1998 and 2000, respectively.

Crow by more than a decade and extended not simply in the Deep South, but across regional divides, paralleling the expansion of American territory towards the West. And while the laws invariably involved prohibitions against Black-White interracial marriages, anti-miscegenation regimes in 18 states banned marriage between Whites and other racial populations, reinforcing anti-immigrant sentiment and American xenophobia.<sup>17</sup>

### Canada's *Indian Act*

The *Indian Act*, with all its variations, clearly restricted and provided penalties for interracial sex and/or marriages, providing criteria against which the category of "Indian" is to be measured, just as was the case in U.S. anti-miscegenation regulations. During the colonial era, intermarriage was encouraged and seen as vital to both by the European fur traders and Aboriginal groups (Van Kirk, 1980). Once the frontier came under the control of the British colonial power, however, this trend became more condemnable. The first of the legal instruments designed to regulate the classification of Aboriginal peoples can be traced back to 1850, when Upper and Lower Canada passed "An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass or injury" and "An Act for the better protection of Lands and Property of the Indians in Lower Canada," respectively (Leslie, 1978: 23). As the original *Act* in Lower Canada included in the definition of 'Indian' those who resided among them, it was quickly amended in 1851 to provide a characterization of "Indian and none other" based on having Indian blood, descent from Indians, and women married to those who met the first two criteria. This definition of "Indian," with the basis in blood quantum that would remain until 1951, strongly resembles the anti-miscegenation regimes in the United States, which went so far as to determine racial identity based on various fractions (1/4, 1/8, 1/16) of non-white blood.

The purpose of the *Indian Act* regime was stated plainly in the preamble of the next incarnation thereof, the 1857 *Act for the Gradual Civilization of the Indian Tribes in the Canadas*: "Whereas it is desirable to encourage the progress of Civilization among the Indian Tribes in this Province, and the gradual removal of all legal distinctions between them and her Majesty's other Canadian Subjects, and to facilitate the acquisition of property and the rights accompanying it, by such individual Members of the said Tribes as shall be found to desire such encouragement and to have deserved it..." (Leslie, 1978: 26). This assimilative goal was also clear in later manifestations: between the first *Indian Act* (designated as such) and the recent amendments in 1985. Prior to 1951 revisions were made every decade since the 1850s, providing for increasingly stringent requirements on the definition of who was entitled to Indian status. While the original idea was that enfranchisement would be voluntary, over the years it became involuntary in a number of circumstances and losing one's status as Indian actually became quite easy: an Indian women who married a non-Indian lost status, and children of that marriage were not entitled to status (1869); Indian status became contingent on male lineage (1876); obtaining a university degree (1876); being deemed 'fit for enfranchisement' by a board of examiners who then made it so (1920); and the Indian Registrar could add - but more importantly, delete - names from either General Lists (of status Indians) or Band Membership Lists (1951) (Canada, 1991: 7-19).

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<sup>17</sup> These states are Maine, Missouri, Nebraska, South Dakota, Georgia, North Carolina, South Carolina, Virginia, Maryland, Mississippi, Tennessee, Arizona, California, Idaho, Montana, Oregon, Utah and Wyoming.

In contrast to the anti-miscegenation laws in the United States, the *Indian Acts* were designed to remove Indian status, called ‘enfranchisement’ by the legislation itself. However, much like the United States, this was not an attempt by the government to ensure the equal treatment of Aboriginal people in Canadian society at large. Rather, the federal government was tied by constitutional convention to the Royal Proclamation of 1763, which confers the Crown’s responsibility for “Her Majesty’s Indians,” who live “under the protection of the Crown”. The removal of Indian status, therefore, was more a purposeful attempt to alleviate the burden of Indian administration than to confer or promote racial equality. The legal category of ‘status Indian,’ after all, “is the only category to whom a historic nation-to-nation relationship between the Canadian and the Indigenous people is recognized” (Lawrence, 2003: 6). Several provisions of the *Indian Act* also reveal the gendered nature of the retention or loss of Indian status. Under what would become the infamous section 12.1.b of the 1876 *Indian Act*, Indian women who married non-Indian men would lose status, as would their offspring. Indian men who married non-Indian women, however, would not only retain status for himself and his progeny, but his wife would gain status as well. As Bonita Lawrence writes, “Clearly, if the mixed-race offspring of white men who married Native women were to inherit property, they had to be legally classified as white....Because of the racist patriarchal framework governing white identities, European women who married Native men were considered to have stepped outside the social boundaries of whiteness. They became, officially, status Indians” (Lawrence, 2003: 8-9).

#### **IV. Analysis and Points of Comparison**

Two major explanations have been provided to account for the regulation of interracial marital and sexual relations. In a rare article that compares anti-miscegenation regulations in different national contexts, Patrick Wolfe (2001) contends that policy variance can be explained by reference to a state’s political economy and the role of racialized populations in that economy. In the United States, he argues, the labour-based plantation society necessitated a large enslaved population and anti-miscegenation laws preventing Black and White sex and marriage were designed to maintain an enslaved (and later impoverished) workforce. In Australia, however, the political economy was built on obtaining access and rights to the land; as such, miscegenation was encouraged so as to ‘whiten’ the Aborigine population and remove indigenous title to the land. However, Wolfe’s cannot account why anti-miscegenation regulations applied to other racial populations in the United States (i.e. Asians, Filipinos, and in some cases, “all non-whites”), nor can it explain the specific targeting of Aboriginal women in Canada or the state’s implementation of the *Indian Act* when title to more than two-thirds of Canada’s land mass was already ceded to the Crown by the historic treaties. Joel Williamson (1980) provides a demographic-based explanation for the emergence of anti-miscegenation laws in the United States, arguing that the size of the non-White population was not always a factor in the emergence of anti-miscegenation legislation in the early to mid-19<sup>th</sup> century; rather, regulation was often caused by a swell not in the black population, but in the mulatto population (1980: 28). However, this explanation cannot explain the regulation of interracial intimacy in comparative context, nor can it account for the existence of anti-miscegenation laws in racially homogenous states such as Indiana, Montana, Nebraska, North Dakota, South Dakota, Oregon, and Wyoming.

A more compelling explanation for the emergence and strengthening of these regulatory regimes must convey the importance of racial ideas. The dominant discourses concerning interracial relationships were conceptualized in terms of innate biological tendencies of non-

White races and the superiority of White civilization. In tandem, these ideas concerned and were reinforced by perceptions of gender and the proper place of White and non-White men and women on race and gender hierarchies. However, ideas about race and gender exist in the plural; Aboriginal men in Canada and Black and Asian men in the United States were each constructed differently in the discourses of interracial intimacy just as White women, Black women and Aboriginal women were. In the construction of all racial subjects, it is possible to extract the dominant discourses that coexisted and intersected in the design and consequences of anti-miscegenation laws and *Indian Act* provisions.

These dominant discourses invariably involved the biological construction of race, which posits morphological and physiological characteristics such as skin colour, eye shape and size, nose width, and hair texture as immutable traits that are determinative of culture, temperament, disposition and behaviour. The latter half of the 19<sup>th</sup> century can be set aside from its predecessors not for the emergence of the idea of race, which undoubtedly precedes the 19<sup>th</sup> century, but for the domination of scientific explanations of variation in humankind. Though the use of the newly developed scientific method to explore the variations of humanity have commonly been called the pseudo-sciences, it is important to note that during the time of their prominence, there was nothing ‘pseudo’ about explorations in comparative anatomy, ethnology, anthropology, biology, and craniology. Though we may now pass judgement on the fallacies of the racial sciences of this era, theories of the origins and differences of and between races represented the height of scientific knowledge of the time. This period also represents the solidification of ideas about racial inferiority and superiority; legislation prohibited interracial marriage because the deep-seated differences between the races were interpreted as evidence that the races were never intended to mix.<sup>18</sup> Bans on miscegenation were important because it was believed “the crossing of such diverse types leads either to a short-lived and unprolific breed or to a type that even if permanent is inferior to whites in those innate qualities giving Caucasian civilization its progressive and creative characteristics” (Frederickson, 1971: 321).

The specific constructions and applications of these discourses varied in accordance with the non-White threat. By the end of the 18<sup>th</sup> century the international slave trade (dominated by Europeans) was extensive and slavery was almost exclusively Black. Black skin slowly became associated with a corporeal sign of physical and mental inferiority, and by the mid-19<sup>th</sup> century a solidified racial hierarchy was in place, with Europeans at the top, Africans at the bottom, and other races staggered in between in an order that was roughly associated with darkness of skin tone. In the excellent study *White Over Black: American Attitudes Toward the Negro, 1550-1812*, Winthrop Jordan (1968) argues that the first encounter of the English with West Africans in 1550 had a dramatic effect, and the darker colour of Africans’ skin became a point of focus. Blacks became associated with evil and ugliness, ultimately reinforced by African slavery. This differentiation of colour and designation of slave, Jordan argues, has had unique consequences for the African/European relationship, not paralleled in other colonial relationships. This racial inferiority was further equated with sexual aggression denoted by the term “black peril,” which

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<sup>18</sup> These sentiments lasted well into the 20<sup>th</sup> century; in 1965, the judge who heard the Lovings’ original case refused to reconsider his decision, declaring: “Almighty God Created the races white, black, yellow, maylay, and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.” See *Loving v. Commonwealth*, 147 S.E. 2d 78, 79 (1966).

was used throughout the United States and the British Empire to reference sexual danger Black men posed to White women, also connoting the political danger of challenge to White male hegemony (Bland, 2005: 32). Though other men of colour did not carry the stigma of enslavement, the discourses surrounding their sexuality were strikingly similar to the mythology of the Black rapist. The notion of “yellow peril” combined sexual anxieties about relationships between Asian men and White women with “a fear of the ‘inscrutable,’ magically dangerous and duplicitous Far East,” (Bland, 2005: 43) particularly on the West Coast of the United States where Chinese immigration increased by the decade before its ban in 1882. The competition these non-White immigrants posed to White men was two fold – xenophobic sentiments around immigrants taking “White” jobs were compounded by the threat of immigrants taking White wives. Miscegenation laws, therefore, were designed to prohibit transgressions of sexual space – which were really transgressions of and challenges to social, political, and economic positions on the racial hierarchy.

In contrast to racial ideas operating through and contributing to discourses of American anti-miscegenation laws, Canada’s program of assimilation towards Aboriginal peoples, and its use of marriage as a primary mechanism of involuntary enfranchisement for Aboriginal women, reflect a different (yet interrelated) set of ideas about race. Though Aboriginal people were enslaved in the early days of North American colonies, the policy was neither consistent nor enforceable for, unlike the imported Africans, Natives often had communities to return to. Aboriginals also served a valuable military and political purpose in the early colonial period as trading partners, guides, and military allies. From the historical legacy as a colony of Great Britain, Canada’s Indian policy has shown a consistent uniformity during the 19<sup>th</sup> and 20<sup>th</sup> centuries, that of “civilizing the Indian”<sup>19</sup> (Bartlett, 1978: 582). Natives were not threatening in the same way as other non-White races; rather, they were considered wards of the state in need of government protection. At its core, the discourse of North American conquest “regards tribal peoples as normatively deficient and culturally, politically, and morally inferior” (Williams, 1990: 326). This discourse was purposefully adopted in Canada, where politicians of the newly born state hoped to avoid the expensive and disastrous “Indian Wars” that plagued the United States. Constructing Natives as dependent and primitive served this purpose well. Interracial relationships, however, were still conceived as problematic by the colonizers because it “symbolized the mixing of irreconcilable dichotomies: civilized versus primitive and Christian versus heathen” (Van Kirk, 2002: 1).

Given these dominant discourses of racial difference, it is possible to extract several points of comparison between America’s anti-miscegenation laws and Canada’s *Indian Acts* that reveal the corollary relationship between ideas about race, gender, and sexuality. First, both regimes identify a male head of household in which women and children are related to as though

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<sup>19</sup> Bartlett notes that this uniformity is evidenced by the tone of language in governmental reports throughout the 19<sup>th</sup> and 20<sup>th</sup> centuries: “[O]ur Indian legislation generally rests on the principle that the aborigines are to be kept in a condition of tutelage and treated as wards or children of the State. The soundness of this principle I cannot admit. On the contrary, I am firmly persuaded that the true interests of the aborigines and of the State alike require that every effort should be made to aid the red man in lifting himself out of his condition of tutelage and dependence, and that it is clearly our wisdom and our duty, through education and every other means, to prepare him for a higher civilization by encouraging him to assume the privileges and responsibilities of full citizenship.” Report of Department of the Interior (1876), Sessional Paper no. 9.

property. Pascoe's (1991) research indicates that anti-miscegenation laws were applied to racial groups that were considered a threat in the likelihood of *men* pursue and attempt to marry *White women*. Anti-miscegenation laws thus invariably invoked prohibitions against Blacks and mulattoes – reinforcing stereotypes of dangerous Black masculine sexuality. This myth, recreated through anti-miscegenation laws, is an intense hypermasculinization of the Black male subject, which is then used to identify him as a sexual predator and a threat to the purity of White womanhood. White women are constructed in a discourse of victimhood against racial sexual aggression while White men are discursively identified as the heroic inceptor. In this discourse, women of colour are invisible – both disempowered and silent, once again reaffirming the interlocking nature of both sexism and racism. In the post-Civil War era there was a social transformation from slavery to freedom, in which the measure of an African-American man's claim to citizenship was precisely his status as a man. The threat to systems of white supremacy was not just about racial difference, but sexual sameness – to be masculine is to be on top of the hierarchy and anti-miscegenation laws reaffirmed the subordinate position of non-White men. Statutes were also invoked that prohibited White/non-White intermarriage to Chinese, Japanese, and Filipinos, whose immigration in the late 19<sup>th</sup> century was largely male. In the United States, these laws were applied less frequently to Native Americans, who had access to women of their own race, and Hispanics, who were legally considered to be Caucasian because of treaties with Mexico after the Spanish-American war. The concern was clearly, however, about the predatory nature of non-White men, for both White and non-White women could never be conceived of as threatening to patriarchal domination. The *Indian Act* relied upon this logic; in many ways, Native identity was considered a patrilineal trait. In the eyes of the law, only men could be enfranchised – women and children simply followed the status of the male head of household. If Aboriginal men married non-Aboriginal women, these women would gain status while the men and their offspring retained Indian status. This was not, however, an affirmation of racial equality nor was it an endorsement of interracial intimacy:

One might ask why, given their Eurocentric assumptions, settler society would permit its own women to sink to the status of Aboriginal. It seems that the likelihood of this happening was too appalling to contemplate, there is no evidence that this corollary was even discussed, much less sanctioned. Intermarriage, as we have seen, has been shaped by its own gender dynamics: there was no symmetry in the pattern of these relationships (Van Kirk, 2002: 6).

In effect, the model of colonization perfected on non-White peoples of the world dictates that though males of the dominant society may form sexual and marital unions with females from the colonies, such men had little tolerance for the possibility that their own (perceptions of) racial and patriarchal supremacy could be challenged (Van Kirk, 2002: 6).

Secondly, both regimes were concerned explicitly with interracial intimacy involving White women and the control of their sexualities. During slavery, miscegenation laws contributed to the control of White women's sexuality, even as White men possessed a great deal of sexual access to Black women who were enslaved (Pascoe, 1991: 7). In fact, in early regulations of interracial intimacy in the United States provided the most severe penalties for White women involved with Black men. Victorian myths of the Ideal Woman created images of delicacy, refinement, and moral superiority, her image as mother and wife always derived from her relationship to a male. In contrast, as Dorothy Roberts (1997) notes, Black women were exiled from the norm of true womanhood, constructed as immoral, careless, domineering and

devious (1997: 10). In the late 19<sup>th</sup> century, social taboos, cultural norms and the *Indian Act* ensured that there was a gendered nature of unions between Aboriginals and non-Aboriginals – the vast majority were between Aboriginal women and White men. The reverse rarely occurred and was looked upon negatively when it did. Much like the conception of the “purity of White womanhood” used in anti-miscegenation legislation and whose supposed need for protection was so often used as a rallying cry for lynch mobs, White women were constructed similarly in Canada as the guardians of morality and the vessels through which White civilization would continue. For a White woman to marry an Aboriginal man, she would be required to commit the sin of crossing racial boundaries and stepping beyond the societal norms of acceptable behaviour for the moral, chaste, proper, and civilized ideal of femininity. And, once again in comparison with the American example, whenever White womanhood forms the standard against which the ideal of a proper woman is to be measured, Aboriginal women were consistently constructed as socially and sexually deviant.

Thirdly, both regulations of interracial intimacy posit heterosexual marriage and monogamy as the only recognizable forms of intimacy. Though anti-miscegenation laws in the United States concerned both interracial sex (“cohabitation”) and marriage, the latter was targeted far more than the former. Pascoe (1996) concludes that while some states did prohibit both interracial sex and marriage, more than twice as many targeted only marriage (1996: 50). Similarly, section 12.1.b of the *Indian Act* only applied to Aboriginal women who *married* non-Aboriginal men; interracial sex was only targeted in 1879 in a prohibitory manner that did not deprive Indian women of their status but was designed to curtail the prostitution of Native women. More than being a recognizable (though still condemnable) form of interracial intimacy, marriage was the only legal, morally sanctioned and socially acceptable type of monogamous relation permissible. In both circumstances there is documented concern that non-White women who were not married were likely to become prostitutes. Rather than conceptualizing this circumvention of sexual regulation as an exercise of women’s agency or a means of challenging the patriarchal and racist systems of regulatory domination in the intimate sphere, instances of interracial sex outside of marriage reaffirmed racial and gendered stereotypes of the delinquent, degenerate, and lascivious Black Jezebel and the immoral, helpless and destitute Aboriginal Squaw. This mythology was confirmed in clauses 95 and 96 of the 1880 *Indian Act*, penalizing not Indian women but the “keeper of the house” for engaging in the illicit activity (Leslie, 1978: 77). This was amended in 1887 to make both the “keeper” and “inmates” of the house liable to a fine of one hundred dollars or six months imprisonment (Leslie, 1978: 92). Since slaves could not be parties in contracts – a right only citizenship and personhood could offer – slave marriages were not formally recognized by the law. Before the Civil War abolitionists in the North tied the anti-miscegenationist logic to their goal of eliminating the institution of slavery, which, according to the 1850 census, had produced more than 400,000 mulattoes from interracial extra-marital relations between Black slaves and White masters. If Blacks were given the right to marry, President Lincoln and his fellow Republicans argued, they would choose to marry one another, rather than leaving slave women “subject to the forced concubinage of their masters” (Wallenstein, 2002: 55).

Marriage, compared with extra-marital relations, cohabitation, monogamous relationships, polygamous relationships, casual sex, or prostitution, has historically been a legally, socially, and (hetero)normatively sanctioned form of intimacy. Because legal marriage carried with it the idea of social respectability and the practicality of economic benefits not

available to people involved in illicit sex, such as inheritances or issues of child legitimacy, formal matrimony also became the site of the operation of state governmentalities. The control and manipulation of interracial intimacy is more efficient and expedient through the formal institution of marriage; further, in conjunction with other regulatory regimes operating in conjunction with anti-miscegenation laws, such as rules of racial classification, interracial sex was not as threatening to White identity and privilege because “the one-drop rule classified any illegitimate offspring as Black” (Moran, 2001: 40).

A fourth point, closely related to marriage and monogamy as recognizable forms of intimacy, is the relationship between marriage, property ownership and economic responsibility. In both types of regulation of interracial intimacy property ownership and economic responsibility were correlated to whiteness, masculinity, and national citizenship. The racial idea of the uncivilized Native was often tied to the tendency of communal property holdings and the “improper” and “unproductive” use of land. For example, Arthur Meighen, the Superintendent-General of Indian Affairs and Minister of the Interior from 1917-1920, stated on 23 April 1918:

The Indian Reserves of Western Canada embrace very large areas far in excess of what they are utilizing now for productive purposes...We want to be able to use that land in every case; but of course, the policy of the department will be to get the consent of the band wherever possible...in such spirit and with such methods as will not alienate their sympathies from their guardian, the Government of Canada...We would be only too glad to have the Indian use this land if he would; production by him would be just as valuable as production by anybody else. But he will not cultivate this land, and we want to cultivate it; that is all. We shall not use it any longer than he shows a disinclination to cultivate the land himself. (cited in Leslie, 1978: 112-13)

The process of enfranchisement, the assimilative goal of the *Indian Act*, provided land ownership rights in exchange for Indian status, insinuating that one could not both be Indian and own property. In an interracial marriage between White men and non-White women, economic responsibility and the ability to provide for one’s family was constructed as a symbol of White masculinity. Though intermarriages were relatively rare throughout the 19<sup>th</sup> century, “...the prospect of transferring economic responsibility from the state to a white husband became one of the few reasons advanced for sanctioning the marriage of Aboriginal women outside her band” (Van Kirk, 2002: 4). Marriage was also a means of transferring economic benefits to spouses and legitimate children in case of death and interracial marriages were often challenged in court because of this economic aspect. Pascoe (1996) estimates that at the appeals level of court adjudication in the United States, there were approximately 227 cases involving anti-miscegenation laws between 1850 and 1970 (132 civil and 95 criminal)<sup>20</sup> (Pascoe, 1996: 50, fn. 15). The majority of appeals cases were, in fact, concerns over inheritance, matrimonial property, and child legitimacy rather than the deviance of marriage across the colour line. Cases involving anti-miscegenation laws were often *ex post facto* attempts to invalidate interracial marriages after the death of one spouse, most often a white man, brought to court by his relatives. These lawsuits often and inevitably involved taking away property from the surviving spouse, most often a woman of colour (Pascoe, 1991: 7), thus illustrating and reinforcing the multifaceted relationships among race, gender, and class.

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<sup>20</sup> This provides evidence of the economic content and ramifications of anti-miscegenation laws but should not mislead – there is no official count of how many civil and/or criminal cases did not make it to the appeals level of adjudication.

Fifth, these types of regulation are comparable for their imbedded notions of legitimate and illegitimate offspring, compounded by the policing of racial boundaries through the monoracial categorization of mixed-race offspring. In Canada, the NorthWest Rebellion of 1885 challenged the validity of the newly formed Canadian state and simultaneously threatened the incubating White nationalism stretching across the prairies. The plight of Riel and his followers was explained by reference to the degeneracy argument – the pseudo-scientific contention that different races were not intended to mix and the mixed-race background of the Métis was to blame for their violent temperament and degenerate tendencies. Indeed the notion that mixed-race people were cursed by their biological clash of bloods was immortalized in popular sentiment of the time: “in the first official history of the Pacific Northwest the American historian Hubert Howe denounced miscegenation as ‘the fur trader’s curse’” (Van Kirk, 2002: 7). In the *Indian Act* itself, the term “half-breed,” a reference to biological procreation, was indeed a real concept that carried legal and social meaning. No “half-breed” that had previously accepted scrip (small allotments of land) was considered an Indian under the meaning of the *Indian Act*, which stated that “no half-breed head of a family (except the widow of an Indian, or a half-breed who has already been admitted into a treaty), shall, unless under very special circumstances, to be determined by the Superintendent-General or his agent, be accounted an Indian, or entitled to be admitted into any Indian treaty” (Leslie, 1978: 62).

Anti-miscegenation laws were implicitly a regulation of the mixed-race progeny that resulted from interracial sex and marriage. The early anti-miscegenation laws of the Chesapeake colonies condemned both the immoral practice of interracial sex as an “abominable mixture” and labelled mixed-race offspring a “spurious issue,” relegating the offspring of slave women and free men to slavery and the offspring of White women and African men to indentured servitude until the age of 18 (females) and 21 (males) (Wallenstein, 2002: 15-17). In an era where the quantity of blood was the measure of one’s identity, Americans devised a vernacular and legal fractionalization of racial identities in order to determine who was and was not to be counted as White. Mulatto (half-Black and half-White), Quadroon (one-quarter Black) and Octoroon (one-eighth Black) were, in the eyes of the law, not the equivalent of White racial identity. In fact, Homer Plessy of *Plessy v. Ferguson*,<sup>21</sup> the famous 1896 case in which legalized segregation was validated by the U.S. Supreme Court, was described as a “light-skinned Octoroon”. Plessy had to announce to the rail conductor that he was legally considered to be a Negro in Louisiana, for he otherwise could have “passed” as White. As F. James Davis notes that without ruling directly on the definition of who, exactly, was to be counted as a Negro, “the Supreme Court briefly took what is called ‘judicial notice’ of what it assumed to be common knowledge: that a Negro or black is any person with any black ancestry” (Davis, 1991: 8). In the decades that followed, the rule of hypodescent (or the “one-drop rule”) was formalized in law in the Upper South and ensured that any person born of dual racial heritage would socially and legally be considered to be Black.

The theme of the policing of racial boundaries is prevalent in the final point of comparison, the ways in which anti-miscegenation laws and the *Indian Act* were complemented by other modes of state surveillance pertaining to the maintenance of racial boundaries. In the

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<sup>21</sup> *Plessy v. Ferguson* 163 U.S 537 (1896)

United States, official public records became gate-keeping mechanisms for the continuance of segregation in schools, hospitals, restaurants, and public spaces. For example, bureaucrats would refuse to issue marriage licenses to couples if one was suspected of being non-White, even if (s)he had the visual appearance of being White. Anti-miscegenation laws were thus further compounded by the one-drop rule. The case of Susan Phipps brought the one-drop rule notoriety when she applied for a passport in 1977 and discovered that her Louisiana birth certificate categorized her as “colored”. She challenged Louisiana’s adherence to the one-drop rule, claiming she was “brought up white,” had “married white twice,” and that the practice of interracial sex was so widespread in Antebellum Louisiana that the entire native-born population would be considered Black if the rule was applied stringently (Moran, 2001: 47). Phipps lost the case when the Louisiana Bureau of Vital Statistics provided genealogical records showing Phipps’s great-great-great-great-grandmother was a slave and some of her ancestors were classified as part Black (Moran, 2001: 47). Though Louisiana later changed its racial classification law under intense negative publicity, the Phipps case demonstrates modes of state surveillance that, together with anti-miscegenation laws, control the boundaries of racial identity and reinforce discursive conceptions about race. The *Indian Act* is a prime example of state surveillance in all aspects of life for those classified (by the definition provided in the Act) as Indian. It concerns not only interracial marriage, but also birth, deaths, education, the management of Indian lands and monies, and the organization of Indian social and political life. Though blood quantum and gender discrimination were utilized to determine Indian status until 1951 and 1985 respectively, the state control of the Indian registrar and band membership lists<sup>22</sup> ensured that the state surveillance and control of Indian identities was omnipresent and inescapable.

## V. Conclusion

Racial ideas are integral to understanding the comparative regulation of interracial intimacy in Canada and the United States. In the circumstances of anti-miscegenation laws and the *Indian Act*, the transgression of gendered/raced social boundaries, the exposure of raced/gendered sexualities, the interlocking and mutually reinforcing nature of patriarchal, white supremacist and capitalist systems of domination, the threat of non-white access to white capital, the potential of mixed-race progeny, and the predicament of racial categorization exist as a corollary of the state’s regulation of interracial intimate life. The legal system and state power are clearly important sites of the creation and manipulation of racial boundaries, acting as producers and reproducers of racial ideas. The comparable points of analysis between the two cases – the patrilineal emphasis on the male head of household, the control of White women’s sexualities, the recognition of heterosexual marriage and monogamy as the only valid form of intimacy, the relationship between marriage, property, and economic responsibility, the determination of legitimate and illegitimate offspring, and state’s surveillance and policing of racial boundaries – have demonstrated that the interracial transgressions of sexual space were also perceived as transgressions of social, economic, and political boundaries between races, posing a threat to the dominant White hegemony in North America in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries.

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<sup>22</sup> Bands gained control of their own membership lists in the 1985 amendments to the *Indian Act*.

Several implications flow from the preceding analysis and deserve mention. First, we cannot take the categories of race and gender as given; rather, we must look at the ways in which law and politics produce and produce these ideas and categories and the norms they conform with. Secondly, far from being a given, whiteness and masculinity were socio-political constructs whose boundaries constantly altered by reference to the unstable racial and gendered regimes of truth that guided both law and policy. Finally, race and gender should not be taken as separate entities, nor should we be fooled by the terminology of “intersectionality”. If the metaphor of a street intersection is apt, the notion of the intersectionality of race/gender denotes a road or path (i.e. race) moving in a particular, unilateral direction until it intersects with another such road or path (i.e. gender), travelling in a different direction. The points of intersection where the two paths collide are most often assumed to exist through the corporeality of non-White women. However, as has been demonstrated throughout this paper, this visual metaphor misses the point. We are all raced, just as we are all gendered. White supremacy, patriarchy, capitalism and heteronormativity are mutually interlocking and reinforcing systems of domination, in which the privileges and oppressions associated all genders, sexualities, class positionings, and races are encompassed not simply at points of intersection, but at every point along the way.

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