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Recommended Citation

Linda McClain, *Palmore v. Sidoti: The Troubling Effects of "Private Biases"*, No. 20-18 Boston University School of Law Public Law & Legal Theory Paper (2020).

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Effects of "Private Biases"***

Boston University School of Law
Public Law & Legal Theory Paper No. 20-18

May 2020

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To be published in: *PAINTING CONSTITUTIONAL LAW* (Howard Wasserman and M.C. Mirow, eds., Brill, forthcoming 2020, in Brill's *Legal History Library* series)

Palmore v. Sidoti: The Troubling Effects of “Private Biases”

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Eyes are a central motif in Xavier Cortada’s artistic portrayal of *Palmore v. Sidoti*, and appropriately so. The disembodied and disapproving eyes, in (as Cortado puts it) ‘a sea of Caucasian skin’, surround the three figures forming a family tableau at the center of the painting: Linda Sidoti Palmore, a white mother holding onto her young daughter, Melanie, also white, who in turn holds the hand of Clarence Palmore, a Black man, who became Linda’s new husband, and for a brief period, Melanie’s stepfather. This interracial family tableau so alarmed Linda’s ex-husband (and Melanie’s father), Anthony Sidoti, that, in 1982, he succeeded in persuading a state court judge in Tampa, Florida, where they all resided, to transfer custody of Melanie, then five years old, from Melanie’s mother to him. Two years later, a unanimous United States Supreme Court reversed that ruling, agreeing with Linda Sidoti Palmore that it violated the Constitution to remove her child from her because of her interracial marriage. It was unusual for a custody determination, typically the province of state courts, to reach the Supreme Court, but, as Chief Justice Burger explained in his opinion for the Court, the state court’s reliance on ‘what it regarded as the damaging impact on [Melanie] from remaining in a racially mixed household’ as a reason for transferring custody away from the mother raised ‘important federal concerns arising from the Constitution’s commitment to eradicating discrimination based on race.’¹

¹ *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). This chapter capitalizes “Black” when referring to people of African ancestry unless it is quoting historical sources that use “black.” See Nancy Coleman, ‘Times Insider: Why We’re Capitalizing Black’ *New York Times*, July 5, 2020, at A2.

Palmore is famous for two very different views about whether the effects of racial prejudice – or ‘private bias’ – are a proper basis for judicial decision-making about custody: one expressed by Hillsborough County Circuit Court Judge Morison Buck in ruling for Anthony Sidoti, the other by the Supreme Court in ruling for Linda Sidoti Palmore. Those two views reflect different reactions to those many eyes looming in the background of Cortada’s family portrait. The Supreme Court’s rejection of Judge Buck’s view set an important precedent about the role of race in family law cases, but it also has had more far-reaching effects in understanding the limits to public endorsement of private prejudice and discrimination.

The reported case, however, tells only part of the story of Linda Sidoti Palmore’s effort to regain custody of Melanie. Although, as Cortada observes in the label for his painting, ‘a unanimous Supreme Court saw things her way’, she never regained custody of her daughter. Her case vindicated an important principle, but she went without a remedy. Indeed, she, Clarence, and Melanie formed a family tableau only briefly. It was not just those judgmental eyes – those of her ex-husband and state court judges – that doomed this interracial family almost from the start. It was also the blind eye the Supreme Court turned to Linda’s requests for emergency relief to have her daughter returned to her while she pursued her constitutional claim before the Court and then after she prevailed. Similarly, state court judges in Florida and Texas failed to heed her pleas and instead aided the legal maneuverings by her ex-husband, determined to keep custody of Melanie. It is a truism, in property law, that ‘possession is nine tenths of the law’. While a child is not a parent’s ‘possession’, it is a

For Cortada’s painting of *Palmore*, originally part of his “May It Please the Court Series,” an exhibit in the rotunda of the Supreme Court of Florida, see <http://www.cortada.me/gallery/paintings/2004/palmore.htm>.

similar truism, in custody law, that continuity and stability are paramount in determining the ‘best interests of the child’. Through his initial legal action dispossessing Linda of custody of her child and through his strategic use of the state court system, Anthony kept Melanie with him even after the nation’s highest court ruled that he had obtained custody on an unconstitutional ground.

This tragic dimension of *Palmore* – a wrong unremedied despite a landmark Supreme Court ruling–also could be captured with imagery of eyes. Cortada portrays Linda holding and gazing lovingly at Melanie as Melanie holds her hand and the hand of Clarence, who stands next to Linda. But the more typical portrait of this family during Linda’s legal ordeal is of she and Clarence seated together, without Melanie; Linda’s eyes are focused on a framed photograph of her daughter. Melanie’s absence from Linda’s life was nearly constant during those years, with occasional, too brief, chances for Linda to see or even to speak to her daughter. No wonder Florida newspaper headlines of that time referred to the ‘cost’ or ‘price’ paid by Linda for her marriage to Clarence. As she put it in one story, after her initial loss of custody: ‘They are denying me the right to choose to marry who I want to. I’m being persecuted by society because I do something out of the ordinary’.²

Understandably, Linda Sidoti Palmore believed she had a right to marry without punishment. More than a decade earlier, the Supreme Court, in *Loving v. Virginia* (1967), declared invalid Virginia’s antimiscegenation law – and that of sixteen other states, including Florida – because it unconstitutionally used a racial classification to determine who may and may not marry.³ *Palmore* is a significant companion to *Loving* in taking up some of *Loving*’s

² Frank DeLoache, ‘Interracial Couple Says Race Cost Them Custody of Daughter’ *Tampa Bay Times*, Feb. 7, 1983.

³ *Loving v. Virginia*, 388 U.S. 1 (1967).

unfinished business. But unlike Mildred Jeter and Richard Loving, whose love story and legal victory in the aptly named case have become iconic cultural references, *Palmore* did not produce a similar happy ending for Linda and her family.

This essay is not, however, unrelentingly bleak. The social and legal landscape today is different today for interracial – or multiracial -- families. Public opinion is more favorable toward interracial marriage than it was in the 1980s, when these events unfolded. So, too, has the share of intermarried couples grown steadily since 1980, when just three percent of married people had a spouse of a different race or ethnicity. One in six new marriages in the United States crosses racial or ethnic lines, although the white-Black line is crossed less frequently than other lines, such as white-Asian, white-Latinx, or other combinations.⁴ Due to cases like *Loving* and *Palmore v. Sidoti*, the legal landscape is more protective of such family ties.

This chapter proceeds in three parts. The first part discusses the state court proceedings, and how a Hillsborough County court gave credence to private prejudice, as depicted in Cortada's portrait of hovering eyes. The second part discusses the Supreme Court's reversal of the state court and the limits it set on public officials, such as judges, 'giving effect' to private prejudice. The third part describes how the Court turned a blind eye – or deaf ear – to Linda's requests to restore custody to her, contributing to the stark disparity between her legal victory and her continuing deprivation of her daughter during years of state court proceedings. These first three parts draw on contemporary media coverage of the case. The fourth part moves forward in time to consider the significance of *Palmore* in the present

⁴ Gretchen Livingston & Anna Brown, 'Intermarriage in the U.S. 50 Years After *Loving v. Virginia*' Pew Research Center (May 18, 2017).

day. *Palmore* continues to inform custody law, when judges must determine the best interests of the child. Judges, however, read *Palmore* differently, with some interpreting it to require ‘colorblindness’ (or not taking race into account in any way) and others interpreting it to allow some ‘race-conscious’ decision-making.

The Florida Court: The Inevitability of ‘Social Stigmatization’ Due to an Interracial Household

When Linda and Anthony Sidoti, both white, divorced in May 1980, the court awarded Linda custody of their three-year-old daughter, Melanie.⁵ Awarding custody to the mother with visitation by the father was fairly typical for the time. (Years later, as states became less hostile toward joint custody, Florida would adopt a legal presumption in favor of shared parental responsibility, unless it would be detrimental to a child.) At some point after her divorce, Linda met Clarence Palmore, a truck driver, at Tampa College, a business school where she worked as a secretary and took classes. They had a ‘casual relationship’ for nearly a year before he moved in with her.⁶ In September 1981, her ex-husband filed a petition to modify custody because of ‘changed conditions’ since the original custody order: ‘[t]he change was that the child’s mother was then cohabiting with a Negro, Clarence Palmore, Jr., whom she married two months later’.⁷ He also alleged that Linda had not properly cared for

⁵ *Palmore*, 466 U.S. at 430. The legal facts in this section are drawn from the Supreme Court’s statement of the case, unless otherwise indicated. I draw the portrait of the parties from various newspaper and magazine stories about the state court and then Supreme Court phases of the case.

⁶ ‘Woman Takes Claim for Child to Nation’s Highest Court’ *Galveston Daily News*, Feb. 26, 1984, at 32.

⁷ *Palmore*, 466 U.S. at 430.

Melanie, asserting that Melanie ‘had head lice on two occasions and was sent to school in mildewed clothing’.⁸ But one news account quotes Linda, by then Linda Sidoti Palmore, as stating that, ‘We were divorced more than a year and there had never been a word about custody. There was no indication Tony wanted any responsibility – until he saw a black man in my kitchen hanging curtains’.⁹ After a hearing before Judge Buck and an investigation by a social worker, the judge ordered a transfer of custody to the father. He made no findings about the father’s allegations of inadequate care. To the contrary, he made a finding that ‘there is no issue as to either party’s devotion to the child, adequacy of housing, or respectability of the new spouse of either parent’. (By the time he filed his petition, Anthony had remarried, to a white woman.) Instead, the crux of Judge Buck’s ruling was Linda’s interracial marriage and its, in his view, inevitable harmful impact on Melanie. In the following passage, Judge Buck offers his rationale for concluding that it was in the ‘best interests’ of Melanie to award custody to her father:

The father’s evident resentment of the mother’s choice of a black partner is not sufficient to wrest custody from the mother. It is of some significance, however, that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him. Such action tended to place gratification of her own desires ahead of her concern for the child’s future welfare.¹⁰

⁸ The details of these allegations are mentioned in the later state court case, *Palmore v. Sidoti*, 472 So. 2d 843, 844 (Fla. Dist Ct. 1985). Many news reports mention these allegations, as well.

⁹ ‘Woman Takes Claim for Child to Nation’s Highest Court’ *Galveston Daily News*, Feb. 26, 1984, at 32.

¹⁰ *Palmore*, 466 U.S. at 431 (quoting Appendix to Petition for Certiorari, 26-27).

So far, the court's reasoning might seem to rest solely on the mother's perceived immorality in cohabiting. At that time, in a number of states, a divorced parent's nonmarital sexual conduct (particularly that of a mother) could disadvantage them in any custody proceeding. (Until 2016, nonmarital cohabitation was a crime in Florida.) But by the time the court issued its ruling, Linda had married Clarence, whom the court described as a 'respectable' spouse. Instead, in a key passage quoted frequently in news coverage of the case, Judge Buck made clear that it was the racial composition of the household and its perception by the outside world that was at the core of his ruling:

This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.¹¹

Melanie, in other words, will be vulnerable to the disapproving eyes of her peers. Why would she suffer such social stigma? As if Judge Buck's race-based reasoning were not clear enough from the above passage, he also referred to the court counselor's recommendation that custody be changed to the father because 'the wife [Linda] has chosen for herself and for her child, a life-style unacceptable to the father and to society. . . The child. . . is, or at school age will be, subject to environmental pressures not of choice'.¹²

¹¹ *Id.*

¹² *Id.* at 430-31.

Society generates social stigma. An interracial marriage in Tampa, Florida, in the early 1980s, was, on this view, an ‘unacceptable’ lifestyle. The *Palmore* marriage was legal in Florida—following *Loving*’s rejection of antimiscegenation laws; that did not mean it was socially acceptable. In 1982, Ernest Porterfield, author of one of the first ethnographic studies of Black-white marriages, observed that ‘no other [intermarriage] mixture touches off such widespread condemnation as Black-white race mixing’.¹³ News coverage of the time reveals that, even as the number of such ‘mixed’ couples was on the rise, problems of prejudice and lack of acceptance – particularly by the white community – had not decreased.¹⁴

Judge Buck was remarkably candid in his race-conscious reasoning. In the years between *Loving* and *Palmore*, a number of white women lost custody after they entered into an interracial romance, although courts often tried to mask the role played by the racial element.¹⁵ In one case from Oklahoma, where a white mother lost custody after she started an interracial sexual relationship with an African American man, the trial and appellate courts insisted that the issue was the immorality of cohabitation, rather than that of the race of her partner: whether the mother’s ‘swain’ was ‘white, yellow, red, brown or black’, she had allowed her child to live in a “‘home environment society currently considers immoral’”.¹⁶ When a white mother prevailed in court despite an interracial relationship, the opinions suggest ‘continuing disapprobation of interracial romance’, even a decade or more

¹³ Ernest Porterfield, ‘Black-White American Intermarriage in the United States’ (1982) 1 *Marriage & Family Review* 17, 17. His study is: Ernest Porterfield, *Black and White Mixed Marriages: An Ethnographic Study of Black-White Families* (Chicago: Nelson-Hall, 1978).

¹⁴ Ricki Furman, ‘Mixed Couples on Increase, and So Are Their Problems’ *Chicago Tribune*, Oct. 12, 1980.

¹⁵ See Melissa Murray, ‘The Regulation of Sex and Sexuality’ (2017) 86 *Fordham Law Review* 2671 (discussing cases).

¹⁶ *Id.* at 2687 (quoting *Brim v. Brim*, 532 P.2d 1403 (Okla. Civ. App. 1975)).

after *Loving*. A Louisiana trial court granted custody to the white mother, even as it spoke of the ‘scandal and gossip in the community’ caused by her interracial, adulterous relationship, adding that such conduct was ‘particularly scandalous and offensive to the sensibilities of the local community in that her lover was of another race’.¹⁷ The reviewing court reversed, stressing the mother’s ‘open and public adultery’. Although the reviewing court did not mention explicitly the interracial dimension of this conduct, it seems likely the court had that in mind in referring to the mother’s ‘disregard of the embarrassment and injuries which might be sustained by the children’.¹⁸

By comparison, Judge Buck made his race-conscious reasoning clear. Following the ruling, Linda observed in *Florida Today*: ‘The first time I was before Judge Buck he thought I was a terrific lady. Then his whole opinion changed and I was not good. It was because I loved a black man. I hadn’t changed. Neither had my love for my daughter’.¹⁹ In another story, she commented: ‘They treat my husband like he was nonhuman. I realize now just a little bit of what the black race has gone through’.²⁰ Linda’s association across racial lines and assumptions about the impact it would have on Melanie triggered Anthony’s custody petition, and Judge Buck’s ruling.

The Florida appellate court affirmed Judge Buck’s ruling without a written opinion. Facing a deadline of February 8, 1983, when she was to surrender Melanie to her father’s custody, Linda made an emergency appeal to Justice Powell (the Justice assigned to hear

¹⁷ *Id.* at 2687 (quoting *Schexnayder v. Schexnayder*, 364 So. 1318, 1318 n.1 (La. Ct. App. 1978), *rev’d*, 371 So. 2d 769 (La. 1979)).

¹⁸ *Id.* at 2688 (quoting *Schexnayder v. Schexnayder*, 371 S. 2d 769, 772-773 (La. 1979)).

¹⁹ Pat Leisner, ‘Racial Custody Fight Reaches High Court’ *Florida Today*, February 19, 1984.

²⁰ Frank DeLoache, ‘Interracial Couple Says Race Cost Them Custody of Daughter’ *Tampa Bay Times*, Feb. 7, 1983.

such appeals from Florida), asking the Court to allow her to keep Melanie while she pursued her appeal to the Supreme Court.²¹ Her attorney argued that she sought to avoid ‘destroying the stability essential to the well being of a child’; the child would suffer by ‘being bounced back and forth between parents’, should Linda prevail before the U.S. Supreme Court.²² But Justice Powell denied her request – a denial that would prove consequential.²³ Although Linda quickly reapplied for a stay to Justice Marshall (as the Court’s rules permitted) and her second request ‘piqued greater interest’ on the Court, by the time the Court considered and voted to deny her request, Melanie was back in Anthony’s custody.²⁴ This made her request, as lawyers say, ‘moot’.²⁵

The Court granted certiorari in October, 1983. Anthony Sidoti had urged the Court not to take the case, arguing that ‘in acknowledging the realities of contemporary American life’ – evidently the ‘social stigmatization’ to which Judge Buck referred – ‘the state of Florida does not necessarily violate the constitutional strictures against racial discrimination’.²⁶ A *New York Times* story observed that the case was ‘an unusual one’ for the Court to hear, since it had been ‘reluctant’ to be involved in ‘the large number of domestic disputes that arrive steadily from the state courts’; a few years earlier, the Justices refused to review a case of a mother who lost custody because she lived with a man to whom she was not married.²⁷ Linda Palmore Sidoti’s attorney, Robert Shapiro, argued that the

²¹ Richard Bockman, ‘High Court Rejects Woman’s Plea in Custody Fight’ *Tampa Tribune*, Feb. 3, 1983.

²² *Id.*; ‘Custody Plea Goes to Justice’ *Florida Today*, Feb. 2, 1983, at 4B.

²³ Bockman, *supra* note 21.

²⁴ Katie Eyer, ‘Constitutional Colorblindness and the Family’ (2014) 162 *University of Pennsylvania Law Review* 537, 559-62.

²⁵ *Id.* at 561.

²⁶ ‘Justices to Review Use of Race in a Custody Case’ *New York Times*, Oct. 18, 1983, at A18.

²⁷ *Id.*

Court should take the case to clarify that it was unconstitutional to rely on a parent's subsequent interracial marriage as a basis for ordering a change of custody. 'No modern decision of this court has sustained a racial classification which burdens or stigmatizes black citizens upon the basis of race'; yet, he argued, Judge Buck's 'decision . . . exacts a terrible price from petitioner because her new husband is black'.²⁸ Linda was already paying that 'price', because Melanie was in the custody of her father, who was living in Mulberry, Florida but would soon move with Melanie to Texas.

The U.S. Supreme Court: The Law Cannot Give Effect to 'Private Biases', Even if It Can't Reach Them

The Supreme Court phase of Linda Sidoti Palmore's custody battle generated considerable interest -- many eyes were on the case. Media reports about the case frequently quoted Judge Buck's statement about Melanie's inevitable 'social stigmatization' despite 'strides' in bettering race relations. Columnist William Raspberry pondered the Florida judge's reasoning, asking whether the judge would toss a coin if Melanie's father married a Black woman or if a Chinese wife or stepmother would bring less 'stigmatization' than a Black one. In the alternative, if the father married a 'certifiably white woman', what stigmatizing trait or combination of traits -- such as being a 'certifiable drug addict, bigot,

²⁸ Pat Leisner, 'Racial Custody Fight Reaches High Court' *Florida Today*, Feb. 19, 1984; Frank DeLoache, 'Interracial Couple Says Race Cost Them Custody of Daughter' *Tampa Bay Times*, Feb. 7, 1983.

gossip, atheist, exhibitionist, loudmouth . . . [or] alcoholic’ – would be ‘sufficient to tip the scales of custody in favor of a mixed-race couple?’²⁹

Several leading civil rights organizations filed *amicus curiae* briefs on Linda’s behalf, including the ACLU, the NAACP Legal Defense and Education Fund, and the National Organization for Women Legal Defense and Education Fund. So, too, did the United States, in a brief filed by the Reagan-era Department of Justice (‘DOJ’). These briefs express sharp opposition to Judge Buck’s view about how to respond to the problem of persisting racial prejudice and the constitutional limits on capitulating to such disapproval.

The DOJ brief, for example, granted that ‘racial prejudice still exists in our society and that children subjected to such prejudice may be adversely affected’. But ‘this Court has made it clear in a variety of contexts that bowing to popular prejudice, whether to protect the potential victims of such prejudice or to avoid racial unrest generally, cannot constitute a sufficient justification for departing from the constitutional command of equal protection’.³⁰ The brief cited examples of cases in which the Court rejected claims that maintaining racially segregated facilities or stalling on desegregation of public spaces was necessary to ‘prevent interracial disturbances, violence, riots, and community confusion and turmoil’.³¹

While Florida law appropriately uses ‘best interests of the child’ as the lodestar for custody matters, the DOJ brief added, other states, using this same standard, had made clear that racial considerations should be irrelevant to determining best interests. What of the disapproving eyes of society? In the words of the Iowa Supreme Court, in a different case:

²⁹ William Raspberry, ‘Plot Too Mixed Even for Shakespeare’ *Austin-American Statesman*, Oct. 21, 1983, at 24.

³⁰ Brief for the United States as Amicus Curiae Supporting Petitioner, *Palmore v. Sidoti*, 466 U.S. 429 (1984), No. 82-1734, 1983 U.S. S. Ct. Briefs LEXIS 1179, at *15.

³¹ *Id.* at *16 (citing *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963)).

‘community prejudice, even when shown to exist, cannot be permitted to control the makeup of families’.³²

Some briefs turned to the rhetoric of bigotry to describe the societal disapproval that may not shape custody decisions. The American Civil Liberties Union Foundation (ACLU) reminded the Court of its numerous civil rights-era cases in which it had ‘refused to hold constitutional values hostage to racial bigotry in any form’ or be ‘pressured into race conscious decisions by the reprehensible actions of a small minority of bigots’.³³ A noteworthy brief filed by Leigh Earls, a white child raised in an interracial home, spoke of the positive effects from her experience being raised by her white mother and Black stepfather. She expressed her concern that if courts were allowed ‘to presume that an interracial home is detrimental to the interests of a white child, she could [have been] taken from her home’.³⁴ Earls’s brief, joined by several civil rights and children’s rights organizations, discussed family law cases rejecting Judge Buck’s reliance on the assumed prejudice and stigma Melanie would encounter: “‘a court must never *yield* to prejudice because it cannot *prevent* prejudice”’.³⁵ Earls cited a California case from 1968 for the proposition that “[w]hile the Constitution cannot prevent bigotry, it can prevent an

³² *Id.* at *17 (citing *Commonwealth ex rel. Myers v. Myers*, 360 A.2d 587, 591 (Pa. 1976), and *In re Marriage of Kramer*, 297 N.W.2d 359, 361 (1980)).

³³ Brief Amici Curiae of the American Civil Liberties Union Foundation, the American Jewish Committee, and the National Association for the Advancement of Colored People in Support of Petitioner, *Palmore v. Sidoti*, 466 U.S. 429 (1984), No. 82-1734, at *19-*20 (citing *Cooper v. Aaron*, 358 U.S. 1 (1958) (responding to Little Rock school board’s attempt to postpone integration)).

³⁴ Brief Amici Curiae of Leigh Earls, The Washington Lawyers’ Committee for Civil Rights Under Law, the Children’s Defense Fund, the Anti-Defamation League of B’Nai Brith and the American Jewish Congress in Support of Petitioner, *Palmore v. Sidoti*, 466 U.S. 429 (1984), No. 82-1734, at 2.

³⁵ *Id.* at 12 (citing *In re Custody of Temos*, 450 A.2d 111, 120 (Pa. 1982)) (emphasis in original).

individual from involving the State, through its Courts, in such bigotry”³⁶ The Supreme Court’s eventual opinion would mirror this declaration closely, although substituting ‘private bias’ and ‘prejudice’ for ‘bigotry’.

At oral argument, Robert Shapiro, Linda’s attorney, similarly argued that the Court should not bow to ‘racial hatred and prejudice’, or give the ‘racial bias of [the] few the force of law’ – as Judge Buck did. Shapiro also challenged Judge Buck’s premise that ‘social stigmatization’ was inevitable, arguing that ‘there is not one scintilla of evidence, nor is there a finding of fact that there is any adverse effect as a result of the interracial marriage’.³⁷ Shapiro argued that Linda, like the couple in *Loving*, was ‘being punished for having exercised her right to marry a person, without regard to race’. It made no difference that the interracial marriage in *Loving* triggered the ‘penalty of imprisonment’, while for Linda ‘the interracial marriage itself triggered the forfeiture of the child, with no facts to justify the penalty’.³⁸

The Justices asked Shapiro far fewer questions than they asked Anthony’s attorney, but one issue on the minds of some Justices concerned adoption: could a state ‘consider the biological characteristics of the adoptive parents in an effort to place the child in a family with similar characteristics of the baby or child being placed’? Shapiro conceded that adoption was a different case than custody, which involves a biological parent, and that,

³⁶ *Id.* at 12 (citing *DeLander v. DeLander*, 37 U.S.L.W. 2139 (Calif. Super. Ct. 1968)).

³⁷ Transcript of Oral Argument, *Palmore v. Sidoti*, 466 U.S. 429 (1984), No. 82-1734, at 7.

³⁸ *Id.* at 10.

provided no ‘racial slur’ was involved in doing so, the state ‘may take race into consideration’.³⁹

By comparison, the Justices peppered Anthony’s attorney, John Hawtrey, with questions; news reports described the questions as ‘tough and even ‘unusually harsh.’⁴⁰ Hawtrey faced the formidable task of arguing that Judge Buck’s ruling did not rest on an impermissible racial classification – or at least, not solely on that basis. He attempted to shift the focus from Linda’s interracial marriage to the impact that it had on her relationship with her daughter. In response to questions about whether there were ‘nonracial grounds’ for leaving custody with the father, he attempted to interpret Judge Buck’s words as referring to the judge’s ‘primary feeling’ that ‘the mother couldn’t cope with the new relationship’ with Clarence, in terms of her ‘incapability’ of handling the impact of that relationship on Melanie, and her ‘inability to relate to her child’. But he conceded that the supposed inability to relate was connected to a ‘racial matter’ – the effects of an interracial marriage.⁴¹ Asked by Justice Marshall to put a number between 1 and 10 on the importance of race “in this case,” Hawtrey said 5, but insisted that the state’s concern was with the impact the parent’s new marriage had on the quality or quantity of the parent-child relationship. Hawtrey made weak attempts to distinguish the criminal penalties in *Loving*, leading one Justice to ask if he were suggesting that taking a mother’s child away from her was not akin to a penalty. He

³⁹ *Id.* at 8. The papers of the justices indicate some were concerned about a ruling that would prohibit the practice of considering race in adoption placements. See Eyer, *supra* note 24, at 572-79.

⁴⁰ Paul Anderson, ‘High Court Hears Case on Interracial Custody’ *Austin-American Statesman*, Feb. 23, 1984, at D21.

⁴¹ Transcript of Oral Argument, *supra* note 37, at 18-22.

also seemed to argue that if Judge Buck had made a racially-based decision, it could be approved because of present societal attitudes about interracial marriages.⁴²

Press coverage of the oral argument focused on the Justices' skepticism about Hawtrey's arguments. Stories noted both that Linda and her husband, as well as 'black community leaders in Tampa', viewed Judge Buck's decision as racist and that Anthony complained that news coverage of the case 'unfairly branded him a racist'.⁴³ One story quoted Anthony saying 'I think interracial marriage has a great effect on a child and I think the judge should be able to consider that to do his job . . . (but) my own feelings on interracial marriage have nothing to do with this case'.⁴⁴

Meanwhile, Melanie continued to live with her father in Texas. Starkly contrasting photographs of the parties appeared in the press. In one, Anthony smiles and relaxes on a sofa, eyes looking off to the side, while Melanie sits in front of him, looking straight at the camera with her hand propped under her chin. In another, of the Palmores in their Florida home, as the *Jet* magazine caption aptly described the scene: 'Linda and Clarence Palmore view portrait of daughter Melanie'.⁴⁵ Their family portrait remained one of painful absence, rather than presence.

The Court announced its decision in *Palmore* on April 25, 1984. Chief Justice Burger, writing for a unanimous Court, reversed the Florida appellate court's affirmance of Judge

⁴² *Id.* at 22-29.

⁴³ Paul Anderson, 'High Court Hears Case on Interracial Custody' *Austin American-Statesman*, Feb. 23, 1984, at 49; Al Christopher, 'Supreme Court Told that Racism "Tainted" Child Custody Ruling' *Tampa Tribune*, Feb. 23, 1984, at 112.

⁴⁴ 'Woman Takes Claim for Child to Nation's Highest Court' *Galveston Daily News*, Feb. 26, 1984.

⁴⁵ Paul Anderson, 'High Court Hears Case on Interracial Custody' *Austin American-Statesman* Feb. 23, 1984, at 49; "Mr. & Mrs. -- High Court Hears Florida Child Custody Battle," *Jet*, March 12, 1984.

Buck's custody order. Echoing the briefs of Linda and her amici, the Court rejected Judge Buck's view of the impact that racial prejudice should have on custody decisions. The Court had 'little difficulty' concluding that 'the reality of private biases and the possible injury they might inflict' are not 'permissible considerations for removal of an infant child from the custody of its natural mother'. The Court cited its own precedent rejecting the appeal to 'acknowledged racial prejudice' to justify racial classifications. For example, in *Buchanan v. Warley* (1917), the Court declared invalid a Kentucky law forbidding African Americans from buying homes in white neighborhoods that had been justified as 'promot[ing] the public peace by preventing race conflicts'.⁴⁶ Burger wrote: 'Whatever problems racially mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917'.⁴⁶

Notably, the Chief Justice did not draw on *Loving* for the idea that Linda was being punished for exercising the right to marry the person of her choice. Nonetheless, he cited *Loving* to explain that racial classifications are 'subject to the most exacting scrutiny' because such classifications are 'more likely to reflect racial prejudice than legitimate public concerns'.⁴⁷

The opinion grants the state's 'substantial governmental interest' in determining custody based on the 'best interests of the child'. It further acknowledges the present-day persistence of prejudice and that such prejudice could impact a child in an interracial household:

⁴⁶ *Palmore v. Sidoti*, 466 U.S. 429, 434 (citing *Buchanan v. Warley*, 245 U.S. 60 (1917)).

⁴⁷ *Id.* at 432.

It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents not of the same racial or ethnic origin.

But Burger concluded that such considerations were an ‘impermissible’ basis on which to take custody from Linda. In a passage frequently quoted in media reports about the decision, Burger states:

The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.⁴⁸

With these words, the Court rejected Judge Buck’s vision about the impact that the hovering cloud of eyes bearing down on Mrs. Palmore’s interracial family should have on her parental rights.

To be sure, the Court’s unanimous opinion was a significant victory for Linda Sidoti Palmore. And its language about law not giving effect to ‘private biases’ has played a significant role in other constitutional struggles, including for LGBTQ rights. In reversing the Florida courts, however, the Court did not order that custody be restored to Linda to reconstitute the family disrupted by Judge Buck’s unconstitutional ruling. Instead, the Court’s reversal led to a remand of the case to the trial court, presumably so that it could rule

⁴⁸ *Id.* at 433.

on Anthony's motion to change custody in a constitutional manner, that is, without basing a decision on the alleged social consequences of Linda's marriage and her racially mixed household.

The Less Visible Aftermath of a Canonical Case

The rest of the tale is a sobering example of how constitutional rights may be vindicated in what becomes a canonical case, but the individual wrong that spurred that case may persist. Here, I tell of an aftermath not visible in Cortada's portrait of Linda, Clarence, and Melanie.

Just a day after the Court's ruling, Anthony persuaded a Texas court to issue a temporary restraining order prohibiting Linda from removing Melanie from her father's custody in Texas during the 25-day waiting period he had to seek a rehearing by the Supreme Court. As with its initial denial of Linda's request for emergency relief to avoid giving up her child while the case was pending, the Supreme Court then denied her emergency request to stop Texas courts from intervening in her attempt to regain custody in the Florida court.⁴⁹ A turf war ensued between the Florida and Texas courts over jurisdiction over Melanie. Judge Manuel Menendez, Jr., the Florida judge assigned to the case, declined to order that Melanie be returned to her mother, despite the Supreme Court's ruling, saying he 'wanted time to study the dispute'; instead, he awarded Linda temporary visitation rights.⁵⁰ In mid-August, 1984, during the procedural wrangling, news stories reported that Linda was 'ecstatic' and

⁴⁹ 'Judge: Keep Melanie Sidoti With Father' *Florida Today*, April 28, 1984, at 1A; 'Texas Can Act In Custody Case' *Paris News*, May 3, 1984, at 1.

⁵⁰ 'Mom Allowed to See Child, Judge Rules' *Ford Lauderdale News*, Aug. 15, 1984, at 10.

‘thrilled’ that she was able to see her daughter for the first time in nearly two years.⁵¹ A few months later, Judge Menendez agreed to allow the Texas court to determine custody, since Texas was now Melanie’s home state.⁵² Linda vowed to continue to fight to be reunited with her daughter.

By December, 1984, Linda’s marriage took a disturbing turn, her family life departing most starkly from the seeming harmony between the couple portrayed in Cortada’s portrait. News reports indicated that she filed for divorce from Clarence and was granted a temporary restraining order against him, based on her complaint that he physically abused her several times during their three years of marriage. The judge granting that order was Judge Menendez, who had yielded jurisdiction over her custody case to the Texas courts.⁵³ Several months later, a more shocking story appeared: Clarence Palmore was in the hospital after being stabbed in a ‘domestic fight’. ‘Mrs. Palmore denied stabbing her husband’, and accused him of ‘bruising her wrist’. Each signed a waiver, declining to prosecute the other.⁵⁴ One news account referred to Linda’s allegation, in her divorce filings, of physical violence by Clarence. In asserting that ‘[t]he marriage to Palmore cost Mrs. Palmore custody of her daughter by a previous marriage’, such account almost seemed a morality tale of the heavy toll of her marriage, ignoring the causal role of her ex-husband’s legal maneuverings in dispossessing her of such custody.⁵⁵

⁵¹ Clarence Reid, ‘Palmore Gets Visitation Rights for Daughter’ *Tampa Tribune*, Aug. 16, 1984, at 126; ‘Woman Gets Temporary Custody of Daughter’ *Victoria Advocate*, Aug. 16, 1984, at 5.

⁵² ‘Texas Court Gets Custody Case’ *Tampa Tribune*, Oct. 16, 1984, at 26.

⁵³ Barry Klein, ‘Woman Seeks to End Interracial Marriage That Sparked Custody Dispute’ *Tampa Bay Times*, Dec. 28, 1984; ‘Palmares May Divorce’ *United Press International*, Dec. 27, 1984; ‘New Event May Change Palmore Custody Case,’ *Tampa Tribune*, Dec. 27, 1984.

⁵⁴ ‘Interracial Custody Couple Involved in Stabbing,’ *AP*, April 23, 1985; ‘Husband in Hospital After Domestic Fight’ *Fort Lauderdale News*, April 23, 1985, at 11.

⁵⁵ ‘Interracial Custody Couple Involved in Stabbing’ *supra* note 54.

In July, 1985, Linda lost her appeal of Judge Menendez's ruling. Although Anthony had violated a court order in moving Melanie to Texas without prior approval, the Florida appellate court concluded that he probably would have received approval had he asked, since his move was for 'business reasons' -- a 'valid' purpose -- and not for 'child snatching'. The court claimed to express no views on the merits of who should receive custody, insisting that the Texas court must be allowed to make a full consideration of the custody issue, since the Supreme Court did not order reinstatement of the original custody order.⁵⁶ The court indicated that Linda had not established that it was in Melanie's 'best interests' to order her returned to Linda; instead, 'we cannot disagree [with Judge Menendez] that it appears to be in the best interests of Melanie that she continue in the status quo at least for the time being until the custody issue is finally resolved'.⁵⁷ The court did not refer to the recent problems in Linda's marriage, her filing for divorce, or the impact those new events might have on the merits of her custody case. It observed, however, that 'we have no knowledge from the record of any relevant events which might have occurred during the relatively long period subsequent to [Judge Buck's 1982] order which was the basis for the appeal to the Supreme Court'.⁵⁸

Continuity and stability again worked against Linda, who had tried to keep Melanie with her to preserve continuity in her life after the original custody order. The Florida appellate court details the shifting household arrangements that Melanie has already experienced over the course of the various legal proceedings, concluding that the 'eight-year-old child appears to have had substantial upheavals of her life, and we find no compelling

⁵⁶ *Palmore v. Sidoti*, 472 So. 2d 843, 846 (Fla. Dist. Ct. App. 1985).

⁵⁷ *Id.* at 847.

⁵⁸ *Id.* at 846.

reason at this point to add a further upheaval'. It ends its opinion by admonishing, 'A child custody suit is not a game to be played for the benefit of either parent', ignoring Anthony's tactical success in (as it were) gaming the state court systems for the last three years.⁵⁹ By August 1985, Linda Sidoti Palmore and Clarence Palmore were divorced, with Melanie's custody case pending in Texas.

In contrast to this troubling demise of the Palmore marriage, one year later NBC produced a docu-drama, *A Fight For Jenny*, loosely based on the still-ongoing custody battle between Linda and Anthony and featuring a glamorous cast. Reviews of the film offered occasion to quote again Judge Buck and Chief Justice Burger's sharply contrasting views about how law should deal with the reality of ongoing racial prejudice.⁶⁰ Some reviews noted that, in 1986, interracial relationships were still seldom and 'gingerly' depicted on television; perhaps for that reason the film went into 'contortions' to make the interracial couple 'acceptable' to as many viewers as possible, painting 'David' (the Black husband) as a 'saint' and 'model stepfather', and 'Kelsey' (the white wife and mother) as a 'loving and totally dedicated mother'.⁶¹ On October 8, 1986, a newspaper reported that Mrs. Palmore was expected to sign papers within the next month giving custody of Melanie to Anthony Sidoti, but leaving her with visitation rights. The story quotes the attorney appointed to represent

⁵⁹ *Id.* at 847.

⁶⁰ John J. O'Connor, 'NBC's "Fight for Jenny"' *New York Times*, Oct. 6, 1986. Leslie Ann Warren played "Kelsey" (based on Linda Palmore) and Philip Michael Thomas played "David" (based on Clarence Palmore).

⁶¹ *Id.*

Melanie in the custody proceedings as saying that the last time she spoke to Melanie, Melanie indicated she wanted to live with her father.⁶²

From a distance of more than thirty years, it is impossible to know what strains Melanie's absence, the long and ultimately futile battle for her return, or the 'private biases' toward interracial families placed on Linda, on Clarence, and on their brief marriage. On first viewing, Cortada's portrait seems to foreground Linda, Clarence, and Melanie with their backs to the hovering eyes, poised to step forward confidently and strongly—even moving off the canvas to get on with their family life, aided by the Court's ruling limiting the power of prejudice to thwart such a life. However, another possible interpretation of Cortada's portrait of the couple is that he alludes to the eye motif in the swirls he depicts in Linda's dress and perhaps even in circular swirls on Linda's and Clarence's arms and legs. Linda's gaze is not wholly triumphant, but looks watchful and anxious. If that interpretation is fair, then the portrait may suggest that the menace of the disapproving and watchful eyes could be internalized by the interracial couple themselves, so that the 'private biases' of society had their effect.

Gazing on Multiracial Families as a 'Reflection' of Modern Society?

The Court's famous declaration (included in Cortada's label for the painting) about the law not giving effect to private bias and prejudice has had a long afterlife in many battles

⁶² 'Movie Tinselizes Story of a Family' *Galveston Daily News*, Oct. 8, 1986, at 27. I could not find any record of an official ruling on custody by the Texas court, so perhaps these papers were a settlement the two parents reached to establish a visitation schedule with Melanie.

against discrimination, including against LGBTQ persons.⁶³ Within custody law, *Palmore*'s legacy is murkier. Some courts have read it as requiring colorblindness: courts may not consider race at all in deciding with whom children should live. On another reading, courts may consider race – be race-conscious – so long as race is not the sole factor.⁶⁴ Solangel Maldonado's review of custody cases finds courts taking both approaches, concluding that a colorblind approach, where 'racial, ethnic, or cultural differences are not acknowledged, is *more* likely to result in biased decisions'. For when courts do not think they are taking race into account, their implicit racial, ethnic, and cultural biases influence their decisions. By contrast, while judges should not rely on racial or ethnic stereotypes, custody determinations should be allowed to consider how parents would address a child's multiracial identity, particularly since such children are more likely to experience challenges not experienced by monoracial individuals, such as social exclusion and disapproval from extended family members.⁶⁵

What about the social landscape? Has the weather changed for multiracial families – and perceptions of them -- since the cloud of disapproving eyes depicted in Xavier Cortada's portrait? One possible ray of hope is, as mentioned at the outset of this essay, that families in the United States are becoming more multiracial and multiethnic and that a growing number

⁶³ See, e.g., *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 968 (Mass. 2003) (quoting *Palmore*'s language about "private biases" in a ruling that the Massachusetts constitution requires that same-sex couples be allowed to marry); Linda C. McClain, *Who's the Bigot? Learning from Conflicts over Marriage and Civil Rights Law* (Oxford University Press, 2020), 154-70 (discussing invocation of *Palmore* in Supreme Court litigation over LGBTQ rights).

⁶⁴ David D. Meyer, 'Palmore Comes of Age: The Place of Race in the Placement of Children' (2007) 18 University of Florida Journal of Law and Public Policy 183.

⁶⁵ Solangel Maldonado, 'Bias in the Family: Race, Ethnicity, and Culture in Custody Disputes' (2017) 55 Family Court Review 213, 214-216.

of people believe that intermarriage is good for society. The gaze cast on such families is more approving than in the past, although not uniformly so. The percentage who would oppose a close relative marrying someone of a different race has also fallen, while the percentage of people who say intermarriage is good for society has increased.⁶⁶

Consider also glimmers of a more positive gaze in the world of advertising, where portrayals of multiracial families are more common. A recent HoneyMaid graham cracker advertisement featured a (Black-white) multiracial family, with the slogan, ‘This is wholesome’.⁶⁷ Such depictions may reflect ‘activist advertising’, where marketers seek to shatter stereotypes, be more inclusive, and help to bring about positive change. But marketers must connect to consumers, so marketing campaigns for products are prudent to portray the diversity of the consumers they want to reach.⁶⁸ Unfortunately, these ads have generated backlash: a 2013 Cheerios commercial depicting an interracial couple and their bi-racial daughter received so much racist vitriol online that the YouTube channel for comments on the ad was closed. But Cheerios also got an outpouring of support, and ran a sequel during the 2014 Super Bowl.⁶⁹ The dramatic increase of ads portraying multiracial couples and families is (in the words of one ad executive) ‘a reflection of modern society’; people increasingly demand that the media they consume portray the diversity of their lives.⁷⁰ Undeniably, private bias and prejudice remain, but this shift inspires hope of more acceptance and appreciation of such diversity in family life and in society.

⁶⁶ Livingston & Brown, *supra* note 4, at 26-28.

⁶⁷ Joanne Kaufman, ‘Marketers Turn to Multiracial Families to Project a Modern Image’ *New York Times*, June 4, 2018, at B4.

⁶⁸ Enrica N. Ruggs, Jennifer Ames Stuart, & Linyun W. Yang, ‘The Effect of Traditionally Marginalized Groups on Consumer Response’ (2018) 29 *Marketing Letters* 319, 319-20.

⁶⁹ Kaufman, *supra* note 66.

⁷⁰ *Id.*

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