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Miscegenation, the Constitution, and Science

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MISCEGENATION, THE CONSTITUTION, AND SCIENCE

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"Any person, firm, or corporation who shall be guilty of printing, publishing, or circulating printed, typewritten, or written matter urging or presenting for public acceptance or general information, arguments or suggestions in favor of social equality or intermarriage between whites and negroes, shall be guilty of a misdemeanor and subject to a fine not exceeding five hundred dollars or imprisonment not exceeding six months or both fine and imprisonment in the discretion of the court." — Mississippi Code, Section 2339 (1959)

"Men and Women of full age, without any limitation due to race, nationality, or religion have the right to marry and to found a family."—Article 16.1 of the Universal Declaration of Human Rights approved by the General Assembly of the United Nations.

I. INTRODUCTION

Miscegenation[1] is a hydra-headed term. It can mean the marriage between persons of different races, or the genetic crossing of races, or the sexual relations of two persons of different races. Our use of the term will refer generally to the first meaning—marriage between members of different races—and our concern is whether miscegenation laws, i.e., laws forbidding such marriages, are within the states' powers as they are limited by the United States Constitution.

Presently, there are twenty-three states which have such laws on their books.[2] Our study will show that these statutes are not based upon any scientific findings but that they are the result of local prejudice.[3] Yet there have been only two instances in which appellate courts have held such laws to be unconstitutional.[4] The first case was decided in 1872 by the Alabama Supreme Court. The court found that the Alabama miscegenation statute and the accompanying statute which punished anyone solemnizing the marriage of a white person and a Negro were both in violation of the spirit of the Fourteenth Amendment which, in their opinion, demanded that any "persons who acquire citizenship under it shall not be distinguished from the former citizens for any of the causes, or any of the grounds, which previously characterized their want of citizen-

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1 We apologize for using such an ill-sounding word. Since our outlook on the matter is one of liberality, we would prefer the term "interracial marriage". Unfortunately, the word "miscegenation" is handier sometimes and is the commonly used term in the law. We bow to tradition for the sake of convenience.

2 See Appendix I.

3 Only seven of the states are not of what is generally considered the South, and only one, Delaware, is of the Northeast. The statement is premature, but we intend to demonstrate it.

4 Burns v. State, 48 Ala. 195 (1872); Perez v. Lippold, 32 Cal.2d 711, 198 P.2d 17 (1948). Harry Bridges, a labor leader, made the headlines of the country's press when he attempted to marry a Nisei in Nevada. He was at first refused a license, but a state district court ordered the issuance of the license stating, "[T]he right to marry is the right of the individual, not the race . . . If we are to take the proposition that all men are born free and equal seriously, then we can't very well ignore the implications." Time, Dec. 22, 1958, p. 17. A Maryland statute which made it a crime for a white woman to bear a Negro's child was held unconstitutional in State v. Howard, 2 R.R.L.R. 676 (Baltimore Crim. Ct. 1957), cited in Greenberg, Race Relations in American Law 346 (1959).

ship."[5] "It cannot be supposed that this discrimination was otherwise than against the negro. . . ."[6]

The judicial climate in Alabama changed radically in 1877 when the conviction of a party to a Negro-Caucasian marriage was upheld and the former case expressly overruled. The court explained their action by saying: "The natural law, which forbids their intermarriage and that amalgamation which leads to a corruption of races, is as clearly divine as that which imparts to them different natures."[7] Later in the same year another case reached the Alabama Supreme Court concerning the conviction of a Negro and a Caucasian who had married in 1875 upon the assurance of a probate judge that the Supreme Court of Alabama had decided that the law forbidding such a marriage was null and void. He gave them a license authorizing any justice of the peace to marry them. The court upheld their conviction (and a sentence of at least two years in the penitentiary) and declared that ignorance of the law was no excuse.[8] The decision is rather amgibuous on the latter point since it is not clear whether "ignorance of the law" applied to the defendants or to the 1872 court. If the appellation applied to the defendants then it is obvious that the court was in error. It was not a case of the defendants being ignorant of the law, but of being corrupted by the court's first decision which blinded them from perceiving that "clearly divine" natural law.

In 1948 Davis Knight, age twenty-three, was sentenced to five years imprisonment by a Mississippi court for marrying a white girl. His only Negro ancestor was a great-grandmother whom neither he nor his parents had known about.[9] By all anthropological criteria this person was a Caucasian, but not so according to the law of Mississippi. Unfortunately, the persons who have been convicted under these laws are either ignorant of their existence or they have not the means or the opportunity to move to a state whose laws do not make them criminals. Such laws may also have disastrous side effects. The children may be illegitimate and disabled from inheriting,[10] as well as the "spouse."[11] The right of a widow

5 Burns v. State, *supra* note 4, at 197.
6 *Id.* at 196.
7 Green v. State, 58 Ala. 190 (1877).
8 Hoover v. State, 59 Ala. 57 (1877).
9 Time, Dec. 27, 1948, p. 18. The police were informed by a relative who, as the result of an old family feud, dug up Knight's genealogy.
10 See, e.g., Neb. Rev. Stat. §42-328 (1943); Greenhow v. James' Ex'r, 80 Va. 636 (1885).
11 Steven v. United States, 146 F.2d 120 (20th Cir. 1944); Eggers v. Olson, 104 Okla. 297, 231 Pac. 483 (1924).

to workmen's compensation may be denied.[12] Even the minister who performs such a marriage may suffer.[13] If the couple are not prosecuted they still may be persecuted by the police until they leave the state.[14]

II. HISTORY OF MISCEGENATION

Laws prohibiting marriage between certain races are relatively modern when viewed on the time scale of western civilization. Although dominant nations have taken slaves and prohibited their citizens from intermarrying with them ever since the time of ancient Egypt and ancient Babylon,[15] different cultures have treated the matter as one of legal and social status rather than as being biologically harmful. Early Roman law, for instance, prohibited marriages between the Patrician class and the Plebeians.[16] Hellenic Greece and the Roman Empire had a master-slave economy in which marriage between the freeman and a slave was considered a social disgrace and it was usually prohibited.[17] The average freeman had disdain for the slaves whether they were from Africa or Gaul.[18]

The concept of race was undoubtedly first developed in America because of the institution of slavery which was largely confined to a distinct African group whose physical appearance differed greatly from the European settlers. To be sure, in pre-Columbian history, man had always been identified as belonging to different cultures, religions, distinct nationalities, and as having different physical characteristics, "but strong as patriotism and national feeling might be, they did not think of themselves in terms of ethnology, and, in making war for every other sort of reason, never made it for the sake of imposing their own type of civilization . . . . In none of such cases did the thought of racial distinctions come to the front."[19]

The first slaves were brought to the New World around 1510. Historians have found that the slave commerce became so large that the landowners in the West Indies and the American mainland could no longer justify the barter and sale of human beings with the myth that they were war captives and criminals. Public opinion in America and England began to grow against the slave trade as time went on and there was increasing knowledge of the harsh conditions on the plantations and the trip over from the African continent. Southern landowners found an answer to these objections in the theory that Africans were subhuman and incapable of human feelings. The same process can be seen in the settlement of Europeans in other parts of the then expanding world. The intellectual concept of a hierarchy of biological races grew and spread over the globe with

12 Rodriguez v. Utilities Eng'r & Constr. Co., 281 P.2d 946 (Okla. 1955).
13 See, *e.g.*, Ark. Stats. Ann. 55-105 (1947).
14 For illustrations see Greenberg, Race Relations and American Law 347-48 (1959).
15 The Code of Hammurabi provided that the master of a female slave could take her as a concubine, but "that concubine shall not rank with his wife." The Code of Hammurabi, sec. 145 (Harper transl. 1904).
16 This was changed in 445 B.C. Hunter, Roman Law 688 (3d ed. 1897).
17 *Id.* at 683. There were some restrictions on marrying aliens also. See Devis, S., Race Relations in Ancient Egypt 54 (1952).
18 Diller, Race Mixture Among the Greeks Before Alexandria (1937). Some had decided tastes, however, in their choice of slaves. Cicero wrote to wealthy slave-owner friend Atticus: "Do not obtain your slaves from Britain, because they are so stupid and so utterly incapable of being taught that they are not fit to form part of the household of Athens." Quoted in Montagu, Man's Most Dangerous Myth, 174 (3d ed. 1952).
19 Bryce, Race Sentiment as a Factor in History 26 (1925).

the rise of colonization. It was an easy abstraction, because the inferior social status of the Negro and his different features and color and his illiteracy lent credence to the idea of his being a different biological species whose mind and body were not human.

The institution of Negro slavery was engendered by the spreading of colonialism. The attitude of the conqueror to the conquered contributed to the efficacy of the institution because the conqueror desired to maintain a stable society of essentially imperialistic design. In Spanish-American colonies marriage between Spaniards and Indians was at first forbidden, but as early as 1514 the ban was lifted and such marriages were encouraged in hope that legitimate unions would induce the Spanish to make permanent settlements in the New World.[20]

Neither the common law of England nor its statutory law prohibited miscegenation. The earliest record we have of an English colonial law barring racial amalgamation was in Jamestown in 1630. In this instance it was ordered that a white man should be publicly whipped before an assemblage of Negroes and whites "for abusing himself to the dishonour of God and the shame of Christians by defiling his body in lying with a Negro."[21]

Legal opposition against such relationships developed more slowly in other colonies. The general custom and law of the time gave a child the status of his mother, i.e., free or slave. Apparently many of the immigrating English-women were marrying Negro slaves due to the severe shortage of Negro women in the New World. Thus the master lost the offspring of male slaves because they were born into a freeman's status. In 1661 Maryland passed a law which made such women slaves with their husbands, and made the children of the marriage slaves also.[22] This was not a miscegenation statute since it did not outlaw the marriages, but it does reveal certain economic motives which presented themselves in that era's legislation. According to some historians,[23] it became a practice of plantation owners to encourage marriages between the lower classes of Europeans and the slaves in order to gain more slaves by their progeny. Lord Baltimore soon put a halt to such penalties when he learned that some of the servant girls he had sent over were being made slave women.[24] In 1861 Maryland passed a statute placing a penalty upon any master who would encourage a marriage between a Negro slave and a European woman, but still the marriage was recognized.[25] Since the issue of such marriages were no longer slaves because of Lord Baltimore's intervention, there was no interest on

20 *Miscegenation* 9 Encyclopedia of Social Sciences 531.

21 Statutes at Large of Virginia, cited in Stonequist, Race Relations and Race Problems (Thompson ed. 1939).

22 "And forasmuch as divers freeborn English women, forgetful of their free condition, and to the disgrace of our nation [note that the word *race* has not yet been adopted] do intermarry with negro slaves, by which also divers suits may arise, touching the issue of such women, and a great damage doth befall the master of such negroes, for preservation whereof for detering such freeborn women from such shameful matches, be it enacted; That whatsoever free-born women shall intermarry with any slave, from and after the last day of the present assembly, shall serve the master of such slave during the life of her husband: and that all the issues of such free-born women so married shall be slaves as their fathers were. And be it further enacted: That all issues of English or other free-born women, that have already married negroes, shall serve the master of their parents, till they be thirty years of age and no longer." Proceedings of the General Assembly of Maryland, 1637-1664, pp. 533-534. Quoted in Woodson, *Beginnings of Miscegenation of Whites and Blacks*, 3 Journal of Negro History 339 (1918).

23 Calhoun, I., A Social History of the American Family 325 (1917), and McCormac, White Servitude in Maryland 68 (1904).

24 McCormac, *op. cit. supra* note 23, at 69.

25 *Ibid.*

the part of the masters to encourage such unions. In fact, the Mulatto children became the burden of the master since they were the legal children of his male slaves. When they reached a mature age they were free to go. It became necssary to frame laws which compelled the white servant girls to reimburse the master for the costs of supporting their children.[26] Eventually marriage between the two races was prohibited and severe penalties were inflicted upon women who had illegitimate children by a person of another race.[27]

Similar development took place in other colonies. In 1691 Virginia enacted a statute which declared that any white person who married with a Negro, Mulatto or Indian "shall within three months after such marriage be banished and removed from this dominion forever."[28] Eventually miscegenation laws were passed in nearly all the colonies and in the nineteenth century a total of thirty-eight states had at one time or another some kind of prohibition of interracial marriage. The laws were quite ineffective in preventing interbreeding.[29] Illicit relations between the races were common

26 *Id.* at 70.

27 Dorsey, The General Public Statutory Law and Public Local Law of the State of Maryland, from 1692-1839 at 79, cited in Woodson, *op. cit. supra* note 22, at 349.

28 Ballagh, White Servitude in the Colony of Virginia 72-73 (1895).

29 The Pennsylvania miscegenation statute was passed in 1725; in 1780 the records of Chester County showed that one-fifth of the Negro population was classified as Mulatto. By 1860 Mulattoes constituted one-third of the Negro population of Pennsylvania. Statistics quoted by Woodson, *op. cit. supra* note 22, at 338.

occurrences in all the colonies.[30] Mulattoes were rapidly becoming a numerous element in the American population.

After the Civil War the northern states began to repeal their miscegenation laws, but most southern states found it desirable to make theirs more harsh. Southern vigilance against "contamination" reached its highest point in Georgia in 1927 and Virginia in 1930 when these states passed laws requiring all citizens to register with the state and identify which "race" they belonged to. In both states "a single drop of Negro blood" disqualified a person from marrying a "white person".

III. THE CONSTITUTIONAL ASPECTS OF MISCEGENATION LAWS

In 1932 there were thirty states which forbade interracial marriages. In 1951 there were twenty-nine such states. Today there are twenty-three. Six states have the restriction expressly stated in their constitutions.[31] All the statutes prohibit Negro-white marriages, but some include other races such as Malayans, Mongolians, American Indians, Hindus, Mestizos, Chinese, and Japanese. The highest courts of only twelve states have ever decided the question of the constitutionality of these laws. Only a California decision remains on the books declaring such a law to be in contravention to the Constitution.[32] The United States Supreme Court has never passed on the question although they have had opportunity to do so.[33]

Pace v. Alabama[34] is sometimes cited as upholding the constitutionality of laws prohibiting intermarriage between races. This case dealt with the statutory punishment for fornication between a Caucasian and a Negro. The Court upheld the statute on the theory that both races were equally treated although the punishment was greater for interracial relations than the punishment for the same act between two members of the same race. The reasoning in *Shelley v. Kraemer*[35] probably overrules *Pace* since that case holds that the equal protection clause applies to individuals and not to races. Additionally, *Pace* did not concern itself with the right to marry a per-

30 In the Louisiana territory it seems that concubinage of a white man and a Negro slave was prohibited, but the practice was so common that a law was passed providing that if a man have a child by such a slave and be not already married then she was to be a freewoman and remain his wife. See Woodson, *op. cit. supra* note 22, at 338.

31 Alabama, Florida, Mississippi, North Carolina, South Carolina, and Tennessee. See Appendix I.

32 Prez v. Lippold, 32 Cal.2d 711, 198 P.2d 17 (1948). Evidently Alabama had a "carpet-bag" Supreme Court in 1872 when they declared their miscegenation law unconstitutional. Their decision was later overruled in 1877. See notes 5-7 *supra* and accompanying text.

33 In *In re* Monk's Estate, 48 Cal. App.2d 603, 120 P.2d 167 (1941) the Supreme Court dismissed the appeal on the ground that the record did not show that the appeal was applied for within the time provided by law. 317 U.S. 590, rehearing denied 317 U.S. 711 (1942). The Court denied certiorari of Jackson v. State, 37 Ala. App. 519, 72 So.2d 114 (1954) in 348 U.S. 888 (1954). In Naim v. Naim, 297 Va. 80, 87 S.E.2d 749 (1955) the Court upon appeal remanded to state court, 350 U.S. 891, for further findings of fact. The Virginia Supreme Court of Appeals refused to send the case down to the trial court because they had no procedural rules by which they would remand a case after the court's decree affirming the judgment became final. 197 Va. 734, 90 S.E.2d 849 (1956). The U.S. Supreme Court dismissed the appeal from this action on the ground that no federal question remained. 350 U.S. 985 (1956). This seems incorrect. The state court's action was in direct conflict with the U.S. Supreme Court's order that "the judgment of the said Supreme Court of Appeals in this cause be, and the same is hereby, vacated." (The order is quoted in 90 S.E.2d at 849.)

34 106 U.S. 583 (1882).

35 334 U.S. 1 (1948).

son of one's choice, but was limited to the question of inequality of punishment for fornication which is admittedly within the state's power to proscribe.

There are a few lower federal court decisions upholding state miscegenation laws.[36] The rationale of the decisions of state courts upholding these laws can be grouped into three main theses:[37] (1) that miscegenation is against the law of Nature, God, etc.[38]; (2) there is no race discrimination because the statute applies to both races equally[39] (no court has said *all* races are treated equally since nearly every statute leaves out one or more of the commonly accepted races

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36 *In re* Hobbs, 12 Fed. Cas. 262 (No. 6,550) (C.C.N.D. Ga. 1871) upholding a Georgia statute; *Ex parte* Kinney, 14 Fed. Cas. 602 (No. 7,825) (C.C.E.D. Va. 1879) upholding a Virginia statute; *Ex parte* Francois, 9 Fed. Cas. 699 (No. 5,047) (C.C.W.D. Texas) upholding a Texas statute; State v. Tutty, 41 Fed. 753 (C.C.S.D. Ga. 1890) upholding a Georgia statute; Stevens v. United States, 146 F.2d 220 (10th Cir. 1944) upholding an Oklahoma statute.

37 All the latest decisions are grouped in the next three footnotes. Other state supreme courts have reviewed miscegenation statutes but did not expressly rule on the question of constitutionality. Miller v. Lucks, 203 Miss. 824, 36 So.2d 140 (1948); *In re* Takahashi's Estate, 113 Mont. 490, 129 P.2d 217 (1942); State v. Kennedy, 76 N.C. 251 (1887); Eggers v. Olson, 104 Okla. 297, 231 Pac. 483 (1924) were cases where the constitutionality was not questioned by the appellant. In State v. Brown, 236 La. 562, 108 So.2d 233 (1959) the statute prohibited both cohabitation and marriage of Negroes and Caucasians. The defendants were charged with cohabitation, but the court in dictum discussed the constitutionality of the marriage clause.

38 "And surely there can not be any tyranny or injustice in requiring both alike, to form this union with those of their own race only, whom God hath joined together by indelible peculiarities, which declare that He has made the two races distinct." Green v. State, 58 Ala. 190, 195 (1877). " . . . it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts." State v. Gibson, 36 Ind. 389, 405 (1871).

39 Jackson v. City and County of Denver, 109 Colo. 196, 124 P.2d 240 (1942); Scott v. State, 39 Ga. 321 (1869); *In re* Paquet's Estate, 101 Ore. 393, 200 Pac. 911 (1921); Naim v. Naim, 197 Va. 80, 87 S.E.2d 749 (1955).

of mankind); and (3) discrimination because of race or not, racial purity is a legitimate object of the state police power.[40]

In the California case of *Perez v. Lippold*[41] the court, in a four-to-three decision striking down the California statute, gave an excellent discussion of the question. Since the statute denied a person a privilege merely because of race, it could be upheld only if it were directed at some social or biological evil. The court examined the findings of scientists and could find no such evil. Therefore, there was a denial of equal protection. Also, the statute was thought to be too indefinite since it failed to define the method of ascertaining to which race a given individual of mixed blood belonged.

Although there has been a great amount of interbreeding between Caucasians and Negroes in this country, most of it occurred before this century as the result of illicit relationships. Today interracial marriage is probably distasteful to the vast majority of both Negroes and Caucasians. However, there are still those few people who are unjustly convicted for merely marrying a person of their own choice, sometimes knowing they are of two different races and occasionally oblivious to the fact.[42] Two sections of the Constitution suggest that these convictions and rulings are unconstitutional.

A. Full Faith and Credit Clause[43]

Although many states have recognized, either by statute or case law, the validity of marriages that were valid where contracted, although contrary to miscegenation laws of the forum, there are at least seven states which do not.[44] If the couple leave the forum in order to evade the marriage laws and then return, it has been repeatedly held that the forum is under no duty to recognize the marriage.[45] The general rule that a marriage is valid everywhere if valid where made has at least three exceptions: polygamous marriages, incestuous marriages, and those marriages so opposed to state public policy that the court should not recognize them. It has been suggested that miscegenetic marriages come within the last exception.[46]

The fact that there are many miscegenation laws which vary so widely as to what is prohibited under the term "miscegenation" is strong evidence that the right of certain married couples in other states to move freely throughout the Union is severly threatened. The right to move freely throughout the states is a right guaranteed

40 State v. Pass, 61 Ark. 57, 121 P.2d 882 (1942); Dodson v. State, 61 Ark. 57, 31 S.W. 977 (1895); Lonas v. State, 50 Tenn. 287 (1871); Frasher v. State, 3 Tex. App. 263 (1877) reaffirmed in Francois v. State. 9 Tex. 144 (1880). In State v. Jackson, 80 Mo. 175, 179 (1883), the court gave this reason: "It is stated as a well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites, laying out of view other sufficient grounds for such enactments." This "fact" is complete fiction. See Montagu, Man's Most Dangerous Myth 128 (1948) for a discussion of the findings of geneticists.

41 32 Cal.2d 711, 198 P.2d 17 (1948) (sometimes cited as Perez v. Sharp).

42 See note 9 *supra* where defendant was held to be a Negro even though he and his family had always assumed they were Caucasians.

43 "Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State." Art. IV, § 1, U.S. Constitution.

44 Florida, Georgia, Louisiana, Mississippi, Tennessee, Texas, and Virginia. Some of these states recognize such marriages if the parties never moved to the forum and the only issue is whether the marriage is valid for purposes of intestacy. See Miller v. Lucks, 203 Miss. 824, 36 So.2d 140 (1948); Caballero v. Executor, 24 La. App. 573 (1872).

45 See cases annotated in 3 A.L.R.2d 240 (1949).

46 State v. Bell, 7 Tenn. 9 (1872).

to citizens of the several states under Article IV, Section 2 of the Constitution.[47] Additionally, it is a privilege of citizens of the national government as guaranteed in the Fourteenth Amendment.[48] It would seem that the restrictions imposed by miscegenation laws are unconstitutional if they attempt to control the marital status of couples married outside the jurisdiction.

B. The Equal Protection Clause

Invariably it has been the Equal Protection Clause[49] in the Fourteenth Amendment which the courts have relied on to declare that laws which discriminate according to race are unconstitutional. In the *Slaughter House Cases*[50] the Equal Protection Clause was narrowly construed by the Court's prediction that it would only be applicable to situations where legislation was unfair to the Negro race. Although the Equal Protection Clause has subsequently expanded to nullify all kinds of unreasonable discrimination, the Court's decision is valuable in that it illustrates the historical necessity for the Fourteenth Amendment. It was enacted primarily to take care of the Negro's powerless position in the South.[51]

At first glance one might construe the provision "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws" to mean that an individual is entitled merely to equal procedural facilities in the courts. Clearly this would not be a substantial amendment to the Constitution since unequal substantive law could be used as a weapon by racial supremacists to circumvent the principle of equality. In *Yick Wo v. Hopkins*, Mr. Justice Matthews set the matter straight by declaring that "The equal protection of the laws is a pledge of the protection of equal laws."[52] Equality was demanded in all public law and in the administration of the law.

There was no indication by the Supreme Court that there could be absolutely no legislation which treated special groups in a special manner. In the *Slaughter House Cases* the Court denied any inference that the Privileges and Immunities Clause meant that a status quo in all public law at the time of the Fourteenth Amendment must be maintained, as it was necessary that they recognize the states' power to enact laws which might burden one class of citizens rather than all.[53] The only requirements were that the purpose of the law be within the proper scope of what has been recognized as the police power and that the classification set up by the law to bring about the desired objective be reasonably related to the end desired. This is often interpreted by the courts to require that those similarly situated be similarly treated.[54] It is not enough that the persons affected by the law have those characteristics which iden-

47 Corfield v. Coryell, 6 Fed. Cas. 547 (No. 3,230) (C.C.E.D. Penn. 1823).
48 Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868).
49 ". . . [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Constitution, Art. XIV, § 1.
50 83 U.S. (16 Wall.) 36 (1873).
51 For a history of this amendment see tenBroeck, The Antislavery Origins of the Fourteenth Amendment, (1951).
52 128 U.S. 356, 369 (1886).
53 "Special burdens are often necessary for general benefits . . . . Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good." Barbier v. Connolly, 113 U.S. 27, 31 (1885).
54 Buck v. Bell, 274 U.S. 200, 208 (1927).

tify them as belonging to a certain class—and thus be treated as those similarly situated—but they must also possess those characteristics which are subject to state regulation under the police power. Logically, it would also mean that those who do not possess the mischievous characteristics should not be included within the defined class. This is not always possible and so the courts have compromised and asked that the classification be as reasonable as possible under the circumstances. Thus there may be many intelligent people under the age of twenty-one who are mature enough to vote, and yet it is reasonable that the class of persons under that age be precluded. It would be too burdensome, too "unreasonable" to require that the state separate minors into "mature" and "immature" classes by giving them a battery of tests.

The presumption of constitutionality generally applies to laws which are attacked as being a denial of equal protection.[55] This presumption is not indulged in when a racial classification is set up by a state law. On the contrary, it appears that the presumption is that the statute is invalid. At least the Court has stated that such classification is "constitutionally suspect."[56] Racial classification has been struck down in school segregation laws,[57] public recreational facilities,[58] and transportation.[59]

In summary, the Equal Protection Clause demands these requirements for discriminatory legislation: (1) the classification as set up by the statute must be reasonably related to bring about the ends desired, (2) the ends desired must be within the proper scope of the state police power, and (3) the state has the burden of showing the reasonableness of using race as a classification.

C. *Reasonable Classification*

There is perhaps one exception to the requirement of reasonable classification. Where a law aims at a particular evil but hits only one particular group of persons, and by its own terms does not cover all persons having the same anti-social characteristics, the law may

55 Missouri, Kansas and Texas Ry. v. May, 194 U.S. 267 (1904); Keokee Consolidated Coke Co. v. Taylor, 234 U.S. 224 (1914); Tigner v. Texas, 310 U.S. 141 (1940).

56 Bolling v. Sharpe, 347 U.S. 497, 499 (1954). And see Korematsu v. United States, 323 U.S. 214, 216 (1944) and Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (dictum in both cases).

57 Brown v. Board of Education, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).

58 Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955), *affirming* 220 F.2d 386 (1955).

59 Gayle v. Browder, 352 U.S. 903 (1956), *affirming* 142 F. Supp. 707 (1956).

be said to be "under-inclusive."[60] It would seem that such classification is not equal protection by the law; but the courts may, nevertheless, uphold the statute on the theory that since no innocent people will be affected by it, the fact that some socially harmful persons will be left untouched by the statute will not be a reason for the courts to strike it down. Mr. Justice Holmes was perhaps the first to articulate this rule of constitutional law in a case where the Court upheld a Texas statute which prohibited railroads from allowing certain types of noxious grass to go to seed on their right-of-way.[61] As to the argument that other property owners were not subject to the law, Holmes responded, "It would have been more obviously fair to extend the regulation at least to highways," but "When a state legislature has declared that in its opinion policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched."[62] Thus even this doctrine of "under-inclusiveness" has its breaking point. Where there is no fair reason for excluding a class of persons who should by common sense be included then the court will find the classification to be purely arbitrary and thus unreasonable.

Two cases which have been decided by the Supreme Court which do not involve miscegenation (but which have a bearing on the problem as we shall later point out) illustrate the "breaking point." In *Buck v. Bell*[63] the Court upheld a statute which provided for sterilization of feeble-minded patients at the state mental hospital. The statute provided for a special hearing where evidence as to the nature of the patient's disease is presented by the state and opportunity for the patient's guardian to rebut the allegation that there is a danger that the condition could be transmitted to the future offspring of the patient. As to the argument that many hereditarily feeble-minded persons would escape the purview of the law because they are in private institutions or cared for at home, Mr. Justice Holmes, again speaking for the Court, responded, "But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow."[64]

In a later case, *Skinner v. Oklahoma*,[65] the Court decided that the Oklahoma Habitual Criminal Sterilization Act was a denial of equal protection. The statute condemned to sterilization all criminals who has been convicted two or more times on felony charges involving moral turpitude, for the purpose of preventing the transmission of inheritable criminal tendencies to future generations. For some reason the legislature excepted from the definition of a felony "those offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses." The Court found the exception for embezzlers to be highly arbitrary, that there was

60 See Tussman and tenBroeck, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, for an excellent analysis of this type of law and the Equal Protection Clause in general.
61 Missouri, Kansas and Texas Ry. v. May, 194 U.S. 267 (1904).
62 *Id.* at 269.
63 274 U.S. 200 (1927).
64 *Id.* at 208.
65 316 U.S. 535 (1942).

no fair reason why embezzlers should not be included. "We have not the slightest basis for inferring that that line of distinction [between larceny and embezzlement] has any significance in eugenics nor that the inheritability of criminal traits follows that neat legal distinction which the law has marked between those two offenses."[66]

It would seem that the same reasoning would have resulted if the Oklahoma statute, instead of classifying all felonies and then making an exception for embezzlement, had merely stated separately all possible felony crimes and then left out of the list the crime of embezzlement. The exception would still be there, but not explicitly, and the Court could have argued that it was purely arbitrary that embezzlers were left out and that, therefore, the whole statute was invalid.

The usual type of miscegenation law prohibits marriage between a member of the Negro race and a member of the Caucasian race (usually called "white people" in the statute). A few of the laws mention "Orientals," "Mongolians," and an even smaller number mention Indians and Malayans. Racial classification depends largely upon which anthropological textbook one reads. Some anthropologists classify man into five races: Black, White, Yellow, Red, and Brown. Others give only three race stocks: black or Negroid, white or Caucasoid, and yellow (or yellow-brown) or Mongoloid.[67] If we take the latter as the simplest classification, then we find that only five miscegenation laws mention all three races.[68] It is doubtful that the term "Mongolian" includes the American Indian to the average person or even to the courts,[69] although it does to anthropologists who follow the three-race classification. However, if we assume that it does have that meaning in the law, then there are still eighteen miscegenation laws which have failed to cover all the situations where racial purity could be endangered. It is just as arbitrary to exclude certain races from the terms of the statutes as it was in the *Skinner* case to exclude "embezzlers." Assuming that miscegenation is biologically dangerous to future generations as the proponents of these laws claim, then upon what reasonable grounds can it be said that one or more races can be excepted from the terms of the miscegenation law? It is just as easy to mention the Indians and the Orientals as it is to mention the Negroes and Caucasians. Perhaps the defenders of the statutes would argue that in these states there is no problem as to members of those two races because there are very few persons of those races within the states. But the Court in the *Skinner* case did not rest its decision on the fact that there were a large group of embezzlers in Oklahoma, but because, categorically, there was no fair reason to include people convicted

66 *Id.* at 542.

67 Kroeber, Anthropology 141 (1948) gives a history of race classifications.

68 Mississippi, Nevada, Utah, Wyoming, and Missouri. Arizona's use of the term "Mongolian" probably does not include Indians since the statute originally included that term specifically, but was dropped in 1942. If we take the five-race (or even a four-race) classification, then none of the statutes could be said to mention them all.

69 In U.S. v. Bhagat Singh Thind, 261 U.S. 204 (1923), the Court in interpreting a naturalization law declared a high caste Hindu of full Asiatic Indian blood not to be a "white person" as far as naturalization was concerned. "What we now hold is that the words 'free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word 'Caucasian' only as that word is popularly understood. As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs." at 214-215.

of larceny but exclude persons convicted of embezzlement. Besides, the statistics do not uphold the argument except in the deep South.[70]

This seems to be a classification which is unfair and is aimed at only two particular races—the Orientals in some of the states and the Negroes in all the states which have these miscegenation laws. When classification is concerned with fundamental rights such as the right to marry and have children, shouldn't the courts be very strict in the definition of "reasonable classification"? This was exactly the situation in the *Skinner* case, dealing with sterilization of felons. The Court said, "We are dealing here with legislation which involves one of the most basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the [human] race."[71]

In matters of tax law and property law, the doctrine of "underinclusiveness" may save a statute from being declared unconstitutional, but when the doctrine involves a pseudo-scientific statute based on the assumption of inheritance of bad genetic combinations, the Court is very careful to protect individual rights and it will require the legislation to treat equally all those who are similarly situated. It will not do to arbitrarily leave out certain races of men. "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made an invidious discrimination as if it had selected a particular race or nationality for oppressive treatment."[72] As we shall discuss later, there are many decisions which state that any racial classification is immediately suspect; in fact, since the *Segregation Cases*,[73] which overruled the "separate but equal doctrine," there no longer remain any Supreme Court decisions which uphold classification based on race in any state laws. Aided by this

70 A few examples: Arizona places no restrictions on Indian-Caucasian marriages, but does on Negro-Caucasian marriages, and yet there are over twice as many Indians as Negroes in the state. The same is true of Utah, unless the word "Mongolian" includes Indians. Oklahoma forbids only Negro-Caucasian marriages and yet there are about 55,000 people who belong to other races. In contrast, Nebraska forbids Oriental-Caucasian marriages and the Orientals compose no more than 00.075% of the population. (Statistics compiled from the 1950 census, World Almanac 1960.)

71 Skinner v. Oklahoma, 316 U.S. 535, 541 (1952).

72 *Ibid.*

73 Brown v. Board of Education, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 597 (1954).

overwhelming presumption of invalidity of race-type statutes it can be fairly predicted that statutes which prohibit only some types of interracial marriage but exclude others would be declared unconstitutional by the Supreme Court.

There is another defect in these statutes—in fact in all the miscegenation statutes. Even if they forbid intermarriage between a Negro and a Caucasian and between a Mongolian and a Caucasian, they fail to prohibit marriages between Mongolians and Negroes. If racial interbreeding is dangerous to racial purity, then why are members of the Caucasian race the only ones protected? The answer is, of course, that when the law-makers think of racial purity they think only of their own race and by doing this they have revealed the true source of these laws—bigotry.[74] Certainly a Negro or an Oriental could claim that he was being denied equal protection of the law.[75]

Let us suppose, however, that a statute names the three (or four, or five) races of man and then proceeds to bar intermarriage between any of these races. It might seem that this would circumvent the Equal Protection Clause. Such a statute, we submit, is still unconstitutional for several reasons.

There is a large class of people who are not of pure racial stock. Estimates of anthropologists and sociologists as to the number of Negroes having ascertainable Caucasian "blood" vary from one-third of the Negro population to as high as three-fourths.[76] Just how are these people to be classified? All the statutes unfairly discriminate against "Negroes" and "Mulattoes" because when they define those terms they may provide that a Negro or Mulatto is anyone with one-eighth[77] Negro blood or any trace of Negro blood.[78] Some states do not define the terms.[79] Here again prejudice is seen

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74 One Georgia Supreme Court Justice made a revealing remark in a decision which upheld their miscegenation statute. After declaring that the law was not a denial of equal protection because it sought to keep both races pure from unnatural offspring that were inferior to both, he went on and refuted his own rationalization by declaring, "It is sometimes urged that such marriages should be encouraged, for the purpose of elevating the inferior race. The reply is, that such connections never elevate the inferior race to the position of the superior, but they bring down the superior to that of the inferior. They are productive of evil, and evil only . . . . " Scott v. State, 39 Ga. 321, 323 (1869). Does not the court admit that the law was designed to protect the "superior" white race only?

A more recent example is to be found in State v. Pass, 59 Ariz. 16, 121 P.2d 882, 884 (1942) where the court explained, "The evident purpose of the miscegenation statute was to prevent the named races, to wit, Indians, Negroes, etc. from mixing their blood with the blood of the white man and such purpose is lawful." 121 P.2d at 884.

75 North Carolina has a law (See Appendix I) which clearly violates the idea of equality before the law: Negroes are prohibited from marrying Cherokee Indians of Robeson County, but no other Indians. For the interesting story behind this law that dates back to the early 16th century, see Stephenson, G. T., Race Distinctions in American Law 90-91 (1910). In Arizona the legislature went so far as to define a Mulatto in such terms that he could not marry anyone. This was pointed out by the court in State v Pass, 59 Ariz. 16, 121 P.2d 882 (1942) and that year the legislature changed the law by dropping the prohibition against interracial marriage with Indians. As it stands now, a Mulatto in Arizona can marry an Indian; but if he should marry a Negro, a Caucasian, or another Mulatto, he would be violating the law. For the change in the law see Arizona Laws 1942, 1st S.S., ch. 12, § 1.

76 Reuter, The American Race Problem 58-60, 126-133 (1927), and Herskovitz, The American Negro 60-62 (1928).

77 Ten states. Some of these provide that anyone of Negro descent to the third generation is a Negro. See Appendix I.

78 Four states. See Appendix I.

79 Nine states. See Appendix I Proof of race in state courts is a many splendored thing. Missouri has provided by statute the method of putting the individual on the stand and letting the jury decide his race from his appearance. Mo. Ann. Stat. (1953) § 56.3.240 The fact that the individual associates with Negroes may make him one in North Carolina. Hopkins v. Bowers, 111 N.C. 175, 16 S.E. 1 (1892). In Texas the fact that a woman "looks like a white woman" has been held insufficient evidence to prove it. Moore v. State, 7 Tex. App. 608 (1880). In one case a Filipino had to appeal to the California Court of Appeals to find out whether he was a Mongolian. It was decided he was a Malayan and not a Mongolian. Roldan v. Los Angeles County, 129 Cal. App. 267, 18 P 2d 706 (1933).

to be the basis of miscegenation laws and such laws are unreasonable and arbitrary in their classification. If racial purity is the goal of these laws then why do they allow a "pure Negro" to marry a person who is seven-eights Caucasian and only one-eighth Negro?

D. Is Racial Purity a Proper Objective of State Laws?

Even if the statute confined marriages of "pure Negroes" to "pure Negroes" and marriages of "pure Caucasians" to "pure Caucasians," etc. and provided that all persons of mixed bloods could marry only among themselves, a very paradoxical result would arise. By strictly confining members of pure races to themselves, there is created a new race—the Hybrids. If pure Negroes and pure Caucasians are forbidden to intermarry on the theory that it will produce an inferior offspring, then we have a clear case of racial prejudice being the sole motivation of the law. For, if the Hybrids are now classified as a race unto themselves, then a legislature is forbidden by the Fourteenth Amendment to pass a law which is aimed at that particular race on the theory that it is inferior to other races.

> The words of the Fourteenth Amendment, it is true are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemptions implying inferiority in civil society . . . and discriminations which are steps towards reducing them to the condition of a subject race.[80]

> When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory"—that is, based upon differences between "white" and "Negro."[81]

Offspring of these marriages are being discriminated against because of their race before they are even born. It is no answer to say that this is excusable because unborn children have no rights and do not constitute a race. The truth of the matter is that there are at least four million Mulattoes in the United States today and our hypothetical statute implies that they are a biologically inferior race of people.[82] The children of a Caucasian and a Negro are genetically of the same "mixture" as the children of two true Mulattoes and yet the begetting of children of the first couple is prohibited by law. This is a clear case of a statute being founded on a belief of race superiority.

That this whole discussion may seem over-mathematical shows that the traditional conception of race is based on the false illusion

80 Strauder v. West Virginia, 100 U.S. 303, 307 (1879).
81 Hernandez v. Texas, 347 U.S 475, 478 (1954).
82 "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Hirabayashi v. United States, 320 U.S 81, 100 (1943).

of the existence of pure genetic stocks. Many people cannot be classified into the so-called race "types." They may not even be Mulattoes, or quadroons, or octoroons. There are some people who have Caucasian, Negro, and Indian ancestry. There are some people in this country who were born in Hawaii who may have Polynesian, Caucasian, Japanese, and Filipino forefathers. Many people do not know to which "race" their forefathers belonged. Indeed, very few of us have records of genealogical history that go further back than a few generations. It is submitted that no law can be designed which can apply equally to individuals similarly situated and at the same time satisfy the theory that nonamalgamation of races is best for all people. If we could start mankind over again, the racists' arguments might be valid. As it is now, everyone is but a conglomeration of many antique races[83] and the Negro and Caucasian races have already interbred to a high degree since the first slaves were brought to this country.[84]

Some courts have upheld miscegenation laws on the theory that they promote public morality[85] and health.[86] It can hardly be said that miscegenation is immoral without implying that one of the races is inferior to another. This so-called morality is the same motive behind the school segregation laws which the Supreme Court has struck down. It is the same excuse which has been made for every discriminatory legislation against Negroes and other minority groups. To allow miscegenation laws to stand on such a claim would be conceding that laws can be passed which primarily result in nothing but keeping alive racial prejudice. The Fourteenth Amendment "was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color."[87]

As to the argument that these laws are within the police power to promote and preserve the health of the people, there is no evidence that members of different races are somehow allergic[88] to one another or that their offspring will be physically inferior. We will

83 "With respect to race-mixture, the evidence points unequivocally to the fact that this has been going on from the earliest times. Indeed, one of the chief processes of race formation and race extinction or absorption is by means of hybridization between races or ethnic groups. Furthermore, no convincing evidence has been adduced that race mixture of itself produces biologically bad effects . . . ." Statement on Race, UNESCO, statement 13, drawn up by a committee of the world's outstanding scientists on the subject.

84 See in general, Reuter, The Mulatto in the United States (1918)

85 "The purity of public morals, the moral and physical development of both races . . . require that they should be kept distinct and separate. . . . " Kinney v. Commonwealth, 71 Va. 858, 869 (1878).

86 Green v. State, 58 Ala. 190 (1877); Blake v. Sessions, 99 Okla. 59, 220 Pac. 876 (1923).

87 Railway Mail Assn. v. Corsi, 326 U.S. 88, 94 (1944).

88 For a discussion of alleged allergies see Montagu, Man's Most Dangerous Myth 237-241 (3d ed. 1952).

later review the authorities on this matter. As a consensus we can take the following statement made by a committee of prominent geneticists, psychologists, anthropologists, and medical doctors for UNESCO:

> Furthermore, no convincing evidence has been adduced that race mixture of itself produces biologically bad effects. Statements that human hybrids frequently show undesirable traits, both physically and mentally, physical disharmonies and mental degeneracies, are not supported by the facts. There is, therefore, no biological justification for prohibiting intermarriage between persons of different ethnic groups.[89]

In many instances miscegenation laws actually promote greater hybridization of genetic stock since anyone who has enough Negroid characteristics to be considered a Mulatto cannot marry a white person even though he may be seven-eights Caucasian. As Mr. Justice Jackson remarked, "There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority."[90]

E. The Presumption Against Racial Classification

There is another and even stronger argument against miscegenation laws which is also based on the Equal Protection Clause. The Supreme Court has stated that classifications based solely on race are "constitutionally suspect."[91] Indeed, there are many cases in which the Court struck down a statute because on its face it set up a racial classification.[92] After *Brown v. Board of Education*[93] removed the "separate but equal" doctrine from constitutional law, every former decision by the Supreme Court which upheld classification by race in a state law has been impliedly overruled.[94] This is so because *Brown v. Board of Education* has been the case on which the Court later relied in striking down segregated public facilities in fields outside of education.[95]

There are only two cases which could be said to remain as good precedent for racial classification and both of them deal with federal power as opposed to state power. Both cases demonstrate that racial classification is constitutionally suspect since the Court excused the decisions on the ground that the federal war power was involved and should not be interfered with by the courts unless the abuse is clear and without good reason. In *Hirabayashi v. United States*[96] a special curfew order that was issued soon after World

89 Statement on Race, UNESCO, statement 13.

90 Skinner v. Oklahoma, 316 U.S. 535 (1942) concurring opinion at 546.

91 Bolling v. Sharpe, 347 U.S. 497, 499 (1954). See also Korematsu v. United States, 323 U.S. 214, 216 (1944) and Hirabayashi v. United States, 320 U.S. 81, 100 (1943)(dictum in both cases).

92 See, e.g., Buchanan v. Warley, 245 U.S. 60 (1917) (municipal ordinance); McCabe v. Atchison T. & S.F. Ry. Co., 235 U.S. 151 (1914); Strauder v. West Virginia, 100 U.S. 303 (1879).

93 347 U.S. 483 (1954).

94 A possible exception might be Pace v. Alabama, *supra* note 34.

95 Muir v. Louisville Park Theatrical Ass'n, 202 F.2d 275 (6th Cir. 1953), reversed and remanded in light of the Segregation Cases, 347 U.S. 971 (1954); Lonesome v. Maxwell, 220 F.2d 386 (4th Cir. 1955) *aff'd per curiam sub nom.* Mayor, etc., of Baltimore v. Dawson, 350 U.S. 877 (1955); Detiege v. New Orleans City Park Improvement Ass'n, 252 F.2d 122 (5th Cir. 1958), *aff'd* 358 U.S. 54 (1958); Holmes v. City of Atlanta, 350 U.S. 879 (1955), *vac'g* 223 F.2d 93 (5th Cir. 1955). These cases all dealt with public recreational facilities. As for transportation (intrastate) see Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956) *aff'd*, 352 U.S. 903 (1956) ("we think that Plessy v. Ferguson has been impliedly, though not explicitly overruled," 142 F.Supp. at 717).

96 320 U.S. 81 (1943).

War II broke out applied only to Japanese on the west coast. The Court upheld the order and pointed out that the danger of espionage and sabotage to our military resources was imminent and that the curfew order was an appropriate measure to meet it. The Court declared:

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has been held to be a denial of equal protection .... We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas.[97]

The other case also dealt with Japanese during the war. In *Korematsu v. United States*[98] the Court upheld by a six-to-three decision an executive order for the evacuation of all Japanese from the west coast for the purpose of removing any danger of espionage and sabotage. The Court said:

> It should be noted to begin with that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that the courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.[99]

The Court then explained why it thought that this was not racial antagonism:

> Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. . . . Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire.[100]

Thus the Court is demanding a pure motive on the part of the federal authorities. Although it is questionable whether the War Department's motive was pure, i.e., whether it was exercised without some influence of racial prejudice,[101] it must be remembered that the Court has always been reluctant to censor military orders in time of war. From the above statements taken from the two cases it would appear that not even Congress could pass a miscegenation law for the District of Columbia or a territorial possession unless it could be shown that it was enacted free of racial antagonism and there was a pressing public necessity for such a law.[102]

It would seem from all the foregoing that there is a strong presumption that any statute which sets up race as a classification is

97 *Id.* at 100.
98 323 U.S. 214 (1944).
99 *Id.* at 216.
100 *Id.* at 223.
101 See footnotes in 323 U.S. on pp. 236, 237, 241 in the dissenting opinion.
102 Where racial classification in federal law was held a denial of due process, see Hurd v. Hodge, 334 U.S. 24 (1948) and Bolling v. Sharpe, 347 U.S. 497 (1954).

unconstitutional. A case in point is *Oyama v. California* where the Court was confronted with a California statute that raised a presumption of violation of an alien land law (*i.e.*, ineligible aliens were forbidden to own land) when the consideration was paid by an ineligible alien for a transfer of land to a citizen or eligible alien. The appellant was an American citizen whose father was a Japanese citizen not eligible for naturalization. The father paid for land transferred to the son and the trial court held that since the presumption had not been overcome by Oyama his land escheated. The United States Supreme Court ruled that Oyama was denied equal protection of the law because the statutory presumption applied to him only because of his racial descent:[103]

> There remains the question of whether discrimination between citizens on the basis of their racial descent, as revealed in this case, is justifiable. Here we start with the proposition that only the most exceptional circumstances can excuse discrimination on that basis in the face of the equal protection clause and a federal statute giving all citizens the right to own land. . . . [A]ssuming, for the purpose of argument only, that the basic prohibition is constitutional, it does not follow that there is no constitutional limit to the means which may be used to enforce it. In the light most favorable to the State, this case presents a conflict between the State's right to formulate a policy of landholding within its bounds and the right of American citizens to own land anywhere in the United States. When these two rights clash, the rights of a citizen may not be subordinated merely because of his father's country of origin.[104]

Whether this means that the burden of showing the reasonableness of racial classification is on the state is not entirely clear, but

103 The Court speaks of "race" at one point and "country of origin" at another. It is not clear which the Court regarded as denying the appellant equal protection. The terms are of course not synonymous. That one of the two concepts was the defect in the statute is clear, though. The decision was not based on the theory that the presumption was a denial of due process in that it was arbitrary, because it distinguished this case from Cockrill v. California, 268 U.S. 258 (1925), in which the same presumption was upheld against a non-descendant of the ineligible alien who paid the consideration.

104 332 U.S. 633, 646-7 (1948).

in *Bolling v. Sharpe,* in which the Court reviewed a school segregation law in the District of Columbia, it said, "Classification based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."[105] The statute was held unconstitutional even though there was no evidence submitted by the complainant that the statute was unreasonable. The decision was based on the reasoning in *Brown v. Board of Education*[106] which was decided the same day and in which the Court apparently took judicial notice of the findings of psychologists and sociologists. After the Court stated that separate facilities in schools have a tendency to inculcate feelings of inferiority in the Negro child which in turn affect his motivation to learn, it added, "this finding is amply supported by modern authority" and then cited in a footnote psychological and sociological studies. It is significant that the Court applied this finding (that separate facilities are inherently unequal) to all four of the cases that were decided under the title *Brown v. Board of Education* even though only two of the lower courts so found as a fact.[107]

Another argument that the presumption is against the validity of a statute which uses race as a criterion is the number of holdings that have struck down laws which are innocent on their face but discriminatory in their application. In *Patton v. Mississippi*[108] a Negro had been convicted by an all white jury. The Court received evidence that there was a large percentage of the local population that was Negro but that no Negroes had ever been called for jury duty. The state court had shown that one must be a qualified voter before he can be called for jury service, and that only one out of 400 voters was a Negro, even though one out of three citizens was a Negro. The trial judge's rationalization was that the jury commissioner was not discriminating against Negroes, but rather that Negroes did not have the proper qualifications as determined by election laws. The Court rejected this argument and held that the statistics for the past thirty years had made a prima facie case of racial discrimination. "But whatever the precise number of qualified colored electors in the county there were some; and if it can possibly be conceived that all of them were disqualified for jury service by reason of the commission of crime, habitual drunkenness, gambling, inability to read and write or to meet any other or all of the statutory tests, we do not doubt that the state could have proved it."[109] Thus the presumption is that any law is a denial of equal protection which in its application treats people differently because of their race. The burden is upon the state to show that the law as applied is necessary to promote the health, safety, morals, or general welfare of the community. Other cases have held that a prima

105 347 U.S. 497, 499 (1954).
106 347 U.S. 483 (1954).
107 For the view that the finding was not a "finding of a fact" in the traditional sense but what may be called a "legislative" one, such as courts always must make in assessing general social or economic conditions as a basis of constitutional law decision, see Greenberg, *Social Scientists Take the Stand — A Review and Appraisal of Their Testimony in Litigation,* 54 Mich. L. Rev. 953 (1956).
108 332 U.S. 463 (1948).
109 *Id.* at 468.

facie case has been made when circumstances similar to those in the *Patton* case were shown.[110]

If the burden is upon the state to show the reasonableness (or somehow explain the prima facie case) of racial classification in the *application* of a statute, then it would seem that *a fortiori* there is a prima facie case of discrimination when the statute *on its face* treats one person differently than another solely because of his race. Indeed, most such statutes have been held unconstitutional without even discussing the possibility that the state could come forward with evidence to explain the reasonableness of such a classification.[111] Is not a miscegenation law "a statute which on its face treats one person differently than another solely because of his race"? Suppose that A, a white male, and B, a Negro male, both wish to marry Z, a Negro female. The law allows B to marry her and will protect him in all those rights that accompany marriage, but A is not given that protection. A is denied equal protection merely because of his race.

This seems simple enough, but it is surprising to see how many courts avoid this fact by asserting that since each race is similarly treated, the statute gives them equal protection. It is easy to argue in such terms until one is reminded that races do not marry, only individuals marry, and that the Fourteenth Amendment applies to individuals, not to racial groups.[112] Thus in *Shelley v. Kraemer*[113] the Court, in response to the argument that restrictive covenants could be enforced against the whites as well as against the Negroes, declared, "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color."[114] The Court dealt with the right of an individual to own and occupy property. This was considered a matter of individual choice. The Court held that a person cannot be denied this choice merely because white neighbors object. The same has been held as to the right to follow a chosen trade.[115] So it should be held with marriage. Marriage has been regarded by the Court as one of the liberties guaranteed by the Fourteenth Amendment.[116] It is true that reasonable regulation of marriage has always been recognized as within the police power of the state.[117] State law can prohibit what the legislature regards as incestuous marriages and can limit the choice to individuals who are above a certain age and mentally and physically capable of founding a family. But these restrictions

110 Reece v. Georgia, 350 U.S. 85 (1955); Hernandez v. Texas, 347 U.S. 475 (1954); Avery v. State, 345 U.S. 559 (1953); Hill v. Texas, 316 U.S. 400 (1942); Pierre v. Louisiana, 306 U.S. 354 (1939); Norris v. Alabama, 294 U.S. 587 (1935); Neal v. Delaware, 103 U.S. 370 (1880). Where the discriminatory application has been declared unconstitutional *per se* without any reference to a prima facie case see Smith v. Allwright, 321 U.S. 649 (1944); Smith v. Texas, 311 U.S. 128 (1940); Hale v. Kentucky, 303 U.S. 613 (1938); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

111 See cases cited in note 92 *supra*.

112 " . . . nor shall any State . . . deny to any person . . . the equal protection of the laws."

113 334 U.S. 1 (1948).

114 *Id.* at 22.

115 Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

116 Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (dictum).

117 Maynard v. Hill, 125 U.S. 190 (1888).

are not based upon racial lines. Miscegenation laws are, and therefore are immediately suspect.

The fact that there is a danger that in some Southern states white persons may stage riots in protest of an interracial marriage is no ground for contending that the state should have the power to prohibit such marriages. The Supreme Court has definitely declared that individual rights that are protected by the Constitution cannot be denied because there are local prejudices that refuse to recognize those rights. In dealing with a city ordinance which prohibited Negroes from living in a white neighborhood the Court said, "This drastic measure is sought to be justified under the authority of the state in the exercise of the police power. It is said such legislation tends to promote the public peace by preventing racial conflicts, that it tends to maintain racial purity; . . . [T]he police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution."[118]

Since *Brown v. Board of Education,* the Court has maintained the rule that no segregation of races by state law in any kind of public service is constitutional.[119] This case overruled the doctrine of "separate but equal facilities" which had been formulated in the 1896 case of *Plessy v. Ferguson.*[120] It would be tempting to argue that this must impliedly affect the validity of all miscegenation laws. There is, however, admittedly a difference between segregation in schools, buses, and recreational facilities and laws which prohibit intermarriage. The segregation laws affected many people in their everyday movements. Segregated public schools touch every Negro child. It is a social phenomenon that Negroes in America resent. Miscegenation laws, however, deal only with those relatively few cases where individuals go against the community mores and attempt to enter into an interracial relationship which is admittedly unpopular to both Negroes and whites alike. There is less demand for liberty here by large groups of people than in education and job opportunities.[121] It is significant that the National Association for the Advancement of Colored People filed briefs in all the recent segregation cases as *amicus curiae,* but apparently has taken no interest in recent miscegenation cases that have gone to appellate courts. In the segregation cases the Court talked in terms of races and whether Negroes were being discriminated against *en masse.* They pointed out the bad social effects it would have on the Negro children and how separated facilities would retard any chance of the children to gain acceptance on an equal level with whites. A mis-

118 Buchanan v. Warley, 245 U.S. 60, 73-74 (1917). Under a plan of gradual desegregation of schools in Little Rock, Arkansas, public hostility and threats of mob violence forced the federal government to send troops to insure protection of the Negro children. The school board petitioned the District Court in June, 1958, to suspend the operation of the desegregation program for two years due to public turmoil. The request was granted. The Court of Appeals reversed. The Supreme Court affirmed and held that public opposition could not deprive Negroes of their constitutional rights. Cooper v. Aaron, 358 U.S. 1 (1958).

119 Brown v. Board of Education, 347 U.S. 483 (1954); Florida ex rel. Hawkins v. Board of Control, 347 U.S. 971 (1954); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954); Tureaud v. Board of Supervisors of La. State Univ., 347 U.S. 971 (1954); Lucy v. Adams, 350 U.S. 1 (1955); Mayor and City of Baltimore v. Dawson, 350 U.S. 877 (1955); Holmes v. City of Atlanta, 350 U.S. 879 (1955); Board of Trustees of Univ. of N. Carolina v. Frasier, 350 U.S. 979 (1956); Gayle v. Browder, 352 U.S. 903 (1956); Cooper v. Aaron, 358 U.S. 1 (1958).

120 163 U.S. 537 (1896).

121 Negroes seem to demand the following social equalities (in order of decreasing preference): (1) economic activities such as land ownership, jobs; (2) legal rights in courts; (3) political rights; (4) use of public facilities on a non-segregated basis; (5) personal relations, eating, dancing, etc., with whites; (6) intermarriage and sexual relations with white people. 1 Myrdal, An American Dilemma: The Negro Problem and Modern Democracy 60, 61 (1944).

cegenation law does not affect large groups of people since relatively few persons have the desire to marry with a person of a different race. There is nothing about the nature of man that demands this taste for his own race; it is an American problem which has its roots in our particular social history.

Still the precise legal issue in the segregation cases was whether an *individual* was being denied equal protection of the laws. It is apparent then that the difference between the two situations — segregated schools and miscegenation laws—is a matter of degree and not a difference of kind. The Court has held racial classification unconstitutional even when the Court was aware that at the time there was little demand by Negroes in general for equal facilities. Thus, a railroad coach law which permitted carriers to provide sleeping and dining cars only for white persons was a denial of equal protection, notwithstanding the fact there was little demand by Negroes for Pullman and dining car service. The Court remarked of such argument, "It makes the constitutional right depend upon the number of persons who may be discriminated against, where as the essence of a constitutional right is that it is a personal one."[122]

As a summary of the constitutional aspects of miscegenation laws we can say that the burden is upon the twenty-three states which now have them to show by competent evidence that they are necessary to the health of the community and are not outgrowths of the same racial antagonism that engendered school segregation laws. Is there such evidence? If there is, will it match other evidence which can be produced to show that there is no sound scientific basis for such laws? And even if the Supreme Court later declares that their holding in *Bolling v. Sharpe* that race laws are "constitutionally suspect" did not mean that the presumption of validity no longer attaches, is there any evidence of which the Court can take judicial notice, as they did in *Brown v. Board of Education*, that such laws are scientifically indefensible?

IV. THE SCIENTIFIC ASPECTS OF MISCEGENATION[123]

A. Physiological Effects of Race-Crossing

Many studies have been made attempting to reveal inherent defects in the process of amalgamation of races. R. R. Gates, a biologist, wrote a book[124] in 1929 which has been widely cited to uphold the theory of racial purity. He postulated that each race of man is actually a separate species and that some are more advanced than others in terms of biological evolution. He did not say that all race-crossing was to be avoided. Only when an "advanced" stock and a very "primitive" stock interbreed do serious malefactors arise. He said, "The racial elements of the more primitive stock will dilute and weaken the better elements of the more progressive stock, with a retarding or degrading effect on the progressive stock as a whole. It is, therefore, clear that miscegenation between, for example, the

122 McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151, 161 (1914).

123 For an excellent discussion of the scientific aspects of miscegenation, see Wirth and Goldhamer, *The Hybrid and the Problem of Miscegenation* in Characteristics of the American Negro 253-370 (Klineberg, ed. 1944).

124 Gates, R.R., Heredity in Man (1929).

white races and the African races—which for ages has been undergoing separate evolution—is wholly undesirable from a eugenic viewpoint."[125] Gates does not show by statistics that such has occurred. His only justification is that Mulattoes in the United States are not socially as successful as whites. This has been shown by many studies to be due to their inferior education, job opportunities and social status.[126]

Furthermore, leading anthropologists deny that there is yet any evidence justifying the notion that some races are more advanced biologically than others.[127] The leading student of the evolution of man, Franz Weidenreich, has said of Gates' theory that each race is a separate species of animal: "Raising the differences between racial groups to the rank of specific differences by giving those groups specific names is nothing but an attempt to exaggerate the dissimilarities by the application of a taxonomic trick."[128] Anthropologists are fond of refuting the idea that Negroes are laggards in the evolutionary process by comparing the physical traits of Negroes, Caucasians, and apes. They point out that apes are very hairy on the body, Caucasians are less hairy, and Negroes are the least hairy. Apes have very thin lips, Caucasians thicker lips, and Negroes the thickest of them all. The epidermus of the ape is chalk white, Caucasians are slightly more pigmented, and Negroes are dark. The hair on the head of an ape is straight, the Caucasian has straight or wavy hair, and the Negro has kinky or woolly hair. Some persons have tried to demonstrate that Negroes have inferior mental equipment because their average brain size is smaller than the Caucasian's.[129] This argument backfires when it is pointed out that the Negro "Kaffirs" and Amahora of Africa, the Japanese, the American Indians, the Eskimos and the Polynesians all have brains which are on the average larger than the Caucasian's.[130]

An outspoken opponent of race mixture was Davenport who made a study of race-crossing between whites and Negroes in Jamaica.[131] He compared the hybrids with the whites and Negroes in every conceivable way. He came to the conclusion that the arms and legs of Negroes are longer in proportion to their trunks than the whites and that the hybrids seemed to inherit these long legs but the shorter arms of the Caucasians. He claimed that this was an unnatural disharmony. Other scientists studied his findings and thought results were plainly exaggerated—that his own statistics showed that the order of difference in total stature was not more than one inch,[132] and the most that could be said of this was that the half breed would be put to a slight disadvantage in picking things up from the ground. Most scientists considered the study to

125 *Id.* at 329.

126 The most thorough studies are Klineberg: Race Differences (1935); Negro Intelligence and Selective Migration (1935); *Mental Testing of Racial and National Groups*, Scientific Aspects of the Race Problem 251-94 (1941); *Race and Psychology*, The Race Question in Modern Science 55-84 (UNESCO 1956). See also Characteristics of the American Negro (Klineberg ed. 1944).

127 1 Myrdal, *op. cit. supra* note 121, at 138, 143.

128 Weidenreich, Apes, Giants, and Man 2 (1946).

129 See for instance Bean, *Some Racial Peculiarities of the Negro Brain*, 5 American Journal of Anatomy 353-415 (1906). Prof. Franklin P. Mall in whose laboratory at Johns Hopkins this research was conducted was so dissatisfied with the interpretation of the evidence that he was led to investigate the problem for himself. Mall, the leading anatomist of his time, came to the conclusion that nothing at all had been proved. See Montagu Man's Most Dangerous Myth 225 (1952).

130 For a table of cranial capacities, see Montagu, An Introduction to Physical Anthropology 336-37 (2d ed. 1951).

131 Davenport and Steggerda, Race Crossing in Jamaica (1929).

132 Castle, *Race Mixture and Physical Disharmonies*, 71 Science 603-06 (1930).

show no disadvantage in miscegenation, despite the claims of Davenport.[133] Castle remarked, "The honestly made records of Davenport and Steggerda tell a very different story about hybrid Jamaicans from that which Davenport . . . tells about them in broad, sweeping statements. The former will never reach the ears of eugenics propagandists and Congressional committees; the latter will be with us as the bogy-man of pure-race enthusiasts for the next hundred years."[134]

Several studies of mixed blood groups lend support not only to the argument that no harm results of mixed marriages, but that there may even be some biological advantage in being the child of such a marriage. These studies are, on the whole, more recent than the study made by Davenport and Steggerda which was claimed to show bad results.[135] Probably the most interesting case history of cross-breeding was of the descendants of the mutineers of the famed English ship *The Bounty*. The mutineers settled on Pitcairn Island in the South Pacific with Polynesian women in 1790. Isolated from the world for over a century except for rare visits by explorers, this colony flourished magnificently. The descendants, who are still living there, have always had unusually long life-spans and are taller, more vigorous, and on the whole healthier than the original settlers. Schapiro, who has studied them,[136] thinks that although environmental factors may have contributed largely to the increased vitality of the people, hybridization itself may have played a part. The average generation averaged 7.44 children per family, the second generation 9.10, and the third, 5.40. The rate in the second generation is one of the highest on record for any community and reflects an unusual reproduction level.

The community is free of any race tensions since all were of mixed strains after the first settlers died out, and the people are

133 *Ibid.* See also Krober, Anthropology 200-01 (1948); Wirth and Goldhamer, *op. cit. supra* note 123,, at 328.

134 Castle, *op. cit. supra* note 132, at 606.

135 See, e.g., Boas, Race, Language and Culture 138-48 (1940), a study of "half-breed" Indians show that the hybrids were taller and more fertile than the parental stocks. Fischer, Die Rehobother Bastaards (1913) similar findings as to descendants of Dutch and Low German peasant mixture with Hottentot women in South Africa. These two racial stocks are very dissimilar and if disharmonies were ever likely to occur, it would be here. The descendants were well proportioned, taller, and more fertile than the parents. Lotsy and Goddijn, *Voyages of Explorations to Judge of the Bearing of Hybridization upon Evolution* (I. South Africa), 10 Genetica viii-315 (1928) showing favorable results of race crossing among Bushmen, Basontos, Mongoloids, Caucasians and others. Pourchet, *Brazilian Mestizo Types*, V Handbook of South American Indians 111-20 (1950) and Freyre, The Masters and the Slaves (1946); both studies are of the mixed bloods of Negroes, Indians and Caucasians in Brazil. Keesing, The Changing Maori (1928), race crossing in New Zealand. Adams, Interracial Marriage in Hawaii (1937). Krauss, *Race Crossing in Hawaii*, 32 Journal of Heredity 371-78 (1941).

136 Schapiro, H. The Heritage of the Bounty. The story of Pitcairn through six generations (1936).

unusually peaceful. Crime is a rare occurrence. A democratic rule developed early with all men and women enjoying equal political rights, long before political rights were granted to women in the western world. All children were required to attend school until the age of sixteen.

The most important works on the physical characteristics of American Negroes and Mulattoes are by Day[137] and Herskovitz.[138] Although the purpose of their studies was not to prove or disprove the danger of miscegenation, they found, incidentally, that there was no sign of evolutionary retrogression in Mulattoes or decrease in fecundity.

Geneticists agree with the foregoing findings by anthropologists. The works of Dunn and Dobzhansky[139] may be summarized thusly: (a) miscegenation has existed since the beginning of human life, (b) miscegenation results in greater somatic and psychic variability and allows of the emergence of a great variety of new gene patterns which are more easily adapted to new environments, (c) biologically speaking, miscegenation is neither good nor bad, although there is evidence in some cases of hybrid vigor, (d) an overwhelming number of modern geneticists refute the theory that miscegenation causes retrogression.

B. Mentality of Racial Hybrids

Let it be said from the outset that very little work has been done in the field of psychology on the question of intelligence of Mulattoes. Most of the following discussion will of necessity deal with studies that include Negroes and Mulattoes compared as a group with the whites' performance on the mental tests.

Klineberg has demonstrated that the inferiority of the average Negro in mental tests results from social environment which is largely deleterious to Negro children except possibly in certain large cities in northern states.[140] This was demonstrated, for instance, in World War I (comparable studies were not made in World War II) when aptitude tests were given to inductees and the scores were correlated with race. The average Negro from Ohio scored higher than the average white person from any one of the Southern states.[141] Thus, if we take a Negro and compare his score with a white from another part of the country, there is revealed the strong influence that one's socio-economic surroundings play in his mental alertness. Klineberg's later work[142] on this subject fully confirmed the indications of the Army tests. To guard against the element of selective migration—i.e. "the smart Negroes went north and left the dumb ones behind"—Klineberg took the scores of Negro children after they had recently moved to the North. There was no difference between their scores and the Southern Negro children's

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137 Day, C. B. A study of Some Negro-White Families in the United States, 10 Harvard African Studies (1932).
138 Herskovitz, M. The Anthropometry of the American Negro (1930).
139 Dunn, L. C. and T. Dobzhansky, Heredity, Race and Society (1951). See also Boyd, W. C. Genetics and the Race of Man (1950).
140 Klineberg, Negro Intelligence and Selective Migration (1935); Peterson, Mental Measurement Monographs No. 5 (1929).
141 See Appendix III.
142 Klineberg, op. *cit. supra* note 140.

scores. Then, in an extensive battery of tests, he showed that the longer the children lived in northern cities the higher they scored. With only minute deviations, his results showed a close relationship between mental test scores and length of residence in the favorable environment.[143] He makes the cautious statement that "even under these better environmental conditions Negro children do not on the average quite reach the white norms. Since the environment of the New York Negro child is by no means the same as that of the white, except perhaps as far as schooling is concerned, this result does not prove that the Negro is incapable of reaching the white level."[144]

Early studies by Ferguson[145] showed a pronounced correlation in Mulattoes' scores between the degree of white blood and mental scores. The same correlation was found of half-breed Indians. The results were interpreted by many to demonstrate that whites possessed a greater inherent mental capacity than Indians and Negroes, and thus was transmitted genetically to the mixed blood group.[146] Klineberg's more careful investigations show that it is equally possible to account for the correlation by the fact that mixed bloods have a higher socio-economic position in society than full blooded Indians and Negroes. Of course, any argument that it is the Negroes' own fault that they have a lower status is totally unrealistic. They were originally brought into a strange culture against their will and had no opportunity to benefit from the advantages of the advanced civilization as long as they had no legal rights as slaves. Since the emancipation of the slaves, it is rarely that whites have given them any positive help to improve their social environment. And it is a mistake to believe that western civilization was more advanced because it was composed of Caucasian peoples. Culture does not depend on race. Any historian can readily recall examples in antiquity where leading cultures of yesterday were composed of people who today are of relatively less advanced countries. Egypt and Greece are the prime examples.

In the World War I Army examinations, some attempt was made to separate the scores of Negro recruits into those of darker-skinned and lighter-skinned subgroups, the latter containing those estimated to be Mulattoes or less than one-half Negro. The light-colored groups scored about 50, the dark-colored groups only 30.[147] The consensus seems to be that this is largely due to environmental influences. Kroeber explains how this may have come about:

> But the Mulattoes of slavery days were likely to be house servants, brought up with the Master family, absorbing manners, information, perhaps education; their black half-brothers and half-sisters stayed out in the plantation shacks. Several generations have elapsed since those days, but it is probable that the descendants of Mulattoes have

143 See Appendix II.
144 Klineberg, *op. cit. supra* note 110, at 59.
145 Ferguson, G. O. *The Psychology of the Negro*, Archives of Psychology, No. 36.
146 Garth, Race Psychology (1931).
147 Kroeber, *op. cit. supra* note 133, at 198.

> kept a step or two ahead of the descendants of the pure blacks in literacy, range of experience and the like. It is well known that modern American Negroes tend to accord higher status among themselves to the lighter-skinned Caucasian-featured individuals. Successful Negroes tend to marry light-colored spouses. A light skin and a convex nose count for almost as much as a good education or successful parents—both among Negroes themselves in their internal social cleavages, and in getting jobs or other opportunities from Whites.[148]

It is clear, anyway, that the racists' claim that miscegenation produces children inferior to both parental groups has absolutely no foundation in fact. Not only are the children's physical characteristics intermediate between the Negro and Caucasian characteristics, but their mental test scores lie between the respective norms.

C. Personality Traits

Some writers[149] have contended that the fact that there is a social stratification in the Negro culture whereby Mulattoes are a somewhat distinctive group, leads to tension in the Mulatto's life which is manifested by a higher degree of mental illness than among the darker Negroes. There is no evidence to support this theory, however. One possibility of testing this contention was attempted by a sociologist who studied the relation of insanity and Negro neighborhoods in Chicago.[150] He found an inverse ratio between insanity rates and the neighborhood economic level. Since the Mulattoes occupy the upper levels of the economic scale it would seem that they would have lower insanity rates.

The suggestion that Mulattoes have a higher rate of criminal activity has been challenged by a study similar to the one above. Frazier found that in Chicago there was an inverse relation between crime rates and the socio-economic status of the neighborhood. Since he also found that more Mulattoes live in the better neighborhoods, it is unlikely that there is any truth in the contention that they tend towards criminality.[151]

White supremacists reveal an inconsistent hypocrisy when they first defend miscegenation laws on the ground that it will prove harmful to both races and when they try to explain how it is that some Negroes have achieved noteworthy success in professional, scientific, and artistic fields. Their stock explanation here is that the successful ones are successful because they have some white blood in their veins. If they back down part of the way and say that miscegenation lowers only the standards of the white race, then they have admitted that the laws are based on the theory that the white race is superior and must be protected regardless of individual liberties.

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148 Id. at 199.
149 See for example, Stonequist, E. V., The Marginal Man (1937).
150 Rosenthal, *Racial Difference in the Incidence of Mental Disease*, Journal of Negro Education 484 (1934).
151 Frazier, The Negro Family in the United States (1939). Another study by Hooton shows similar results, Crime and the Man (1939).

To demonstrate that Mulattoes have achieved a high status in the Negro population, Reuter took compilations of Negro leaders from various history books, biographical encyclopedias, Who's Who, etc. Through interviews and investigation he determined which ones were Mulattoes. For the purpose of his study Reuter defined a Mulatto as "a Negro with sufficient admixture of white blood to readily distinguish him from Negroes of pure stock." His figures show that of the persons listed, there was one black to fourteen Mulattoes in the various biographical reference books, and one black to nine Mulattoes in selected history books.[152] Although estimates of the number of Mulattoes in America vary widely, it is clear that they do not outnumber full-blooded Negroes by such ratios. Although Reuter earlier accounted for this superiority in achievement because of genetic differences,[153] he later changed his viewpoint and recognized the importance of social and economic advantages of the Mulatto which have been present since before the Civil War.[154] For instance according to the 1850 census, 581 of every 1000 free Negroes were Mulattoes, and only 83 of every 1000 slaves were Mulattoes. The significance of Reuter's study for our purposes is the definite showing that Mulattoes are not social outcasts of both white and Negro people. There are absolutely no grounds for the argument that offspring of interracial marriages will suffer because they are not of "Pure" Race.

V. CONCLUSION

The dignity of a democratic people cannot reconcile itself with the invidious concept of bigotry. Our Constitution does not tolerate statutes and decisions which tend to maintain an unwarranted dominance by one race over others. The day has not yet come, however, when an American can hold his head high when he hears that this is the land of the free. Sooner or later he will. Sooner or later all laws which flaunt the democratic ideal will be abolished. Eventually, we predict, our Supreme Court will declare miscegenation laws unconstitutional. We remain—only waiting for the word, only hoping for the time.

152 Reuter, The Mulatto in the United States 212, 245 (1918).
153 Reuter, Race Mixture, Studies in Intermarriage and Miscegenation 129-163 (1931).
154 *Id.* in a later chapter, "The Hybrid as a Sociological Type" at 183-201.

APPENDIX 1

State and Citations	*Persons Affected*	*Penalties*
Alabama, Const. art. 4, § 102. Ala. Code, tit. 14, § 360 (1940)	Any descendant of a Negro cannot marry a white.	2-7 years.
Arizona, Rev. Stat. § 25-101 (1956).	Negro, Mongolian, Malay, Hindu cannot marry a person with Caucasian blood. (Notice that this means that a Mulatto can probably only marry an Indian) See change in statute: Ariz. Laws 1942, 1st S.S., ch. 12, § 1.	None
Arkansas, Ark. Code, tit. 55, §§ 104, 105, 110 (1947).	Negroes and Mulattoes cannot marry whites.	Misdemeanor
Delaware, Del. Code Ann., tit. 13, §§ 101, 102 (1953).	Negroes and Mulattoes cannot marry whites.	$100 fine or 30 days.
Florida, Const. art. 16, 24. Fla. Stat. §§ 741.11, 741.12, 1.101 (1957).	Any person of 1/8 or more Negro blood cannot marry a white person.	Up to 10 years or $1000 fine.
Georgia, Ga. Code §§ 53-106,-214,-312,-9903; 79-103 (1947).	No one can marry a white who has any ascertainable trace of Negro, African, West Indies, Asiatic Indian, Malayan, Japanese, or Chinese blood.	1-2 years.
Indiana, Ind. Stat. Ann. §§ 44-104,-105,-107,-209; 10-4222 (1952).	Any person of 1/8 or more Negro blood cannot marry a white.	Up to 10 years and/or $500-$5000 fine.
Kentucky, Kent. Rev. Stat. §§ 391.100; 402.020,-040,-990 (1956).	A Negro or Mulatto cannot marry a white person.	3-12 months and/or $500-$5000 fine.
Louisiana, La. Rev. Stat. ch. 14, art. 79; ch. 9, art. 201 (1950).	Caucasian and Negro cannot marry if they have knowledge of difference in race. Indian and Negro cannot marry.	Up to 5 years of hard labor. No penalty for Indian-Negro marriage attempt.
Maryland, Md. Code Ann., art. § 398 (1957).	Marriage forbidden between (1) whites and persons of Negro descent to 3rd generation, (2) whites and Malayans, and (3) Malayans and persons of Negro descent to 3rd generation.	18 months- 10 years.
Mississippi, Const. art. 14, § 263. Miss. Code §§ 2000, 20002, 2339 (1952).	Persons of 1/8 or more Negro blood and persons of 1/8 or more Mongolian blood cannot marry a white person.	Up to 10 years and/or $100 fine.
Missouri, Mo. Rev. Stat. § 451.020 (1949).	Any person of 1/8 or more Negro or Mongolian blood cannot marry a white person.	Up to 2 years and/or $100 fine.
Nebraska, Neb. Rev. Stat. §§ 44-103, 42-117, 42-328 (1949).	Any person of 1/8 or more Negro, Japanese, or Chinese blood cannot marry a white person.	Up to 6 months and/or $100 fine.
Nevada, Nev. Rev. Stat. § 122.180 (1959).	Any person of Ethiopian or black race, Malay or brown race, or Mongolian or yellow race cannot marry a member of Caucasan or white race.	Misdemeanor
North Carolina, Const. art. art. 14, § 8. N. Car. Gen. Stat. § 51-3 (1950).	Any person of Negro or Indian descent to 3rd generation cannot marry a white person. Negroes are prohibited from marrying Cherokee Indians of Robeson County	4 months - 10 years and/or fine for white-Negro marriage, but no penalty for Negro-Indian marriage.

State and Citations	*Persons Affected*	*Penalties*
Oklahoma, Const. art. 23, § 11. Okl. Stat. §§ 43-12,-13 (1954).	Any persons of African descent cannot marry anyone but themselves.	1-5 years and up to $500 fine.
South Carolina, Const. art. 3, § 33. S. Car. Code §§ 20-7,-8 (1952).	Persons having 1/8 or more Negro blood, and Indians, and Mestizos cannot marry a white.	1-5 years and up to $500 fine.
Tennessee, Const. art. 11, 14, Code Ann. §§ 36-402,-403 (1956).	Persons of Negro descent to 3rd generation cannot marry a white person.	1-5 years
Texas, Vern. Civ. Code § 4607; Vern. Penal Code §§ 492, 493 (1950).	Any person of African descent to 3rd generation cannot marry a white person.	2-5 years
Utah, Code Ann. § 30-1-1 (1953).	Any Negro, Mongolian, Malayan, Mulatto, Quadroon, Octoroon cannot marry a white person.	None
Virginia, Code §§ 1-14, 20-54, -57,-58 (1950).	Persons with any ascertainable trace of Negro blood cannot marry a white person. A "white person" is one who has no trace of non-Caucasian blood except 1/16 or less American Indian blood.	1-5 years
West Virginia, Code Ann. §§ 4701, 4086, 4697 (1955).	Negroes cannot marry whites.	Up to $100 and 1 year.
Wyoming, Wyo. Stat. §§ 20-18, 20-19 (1957).	Negroes, Mulattoes, Mogolians, and Malays cannot marry a white person.	$100-$1000 and/or 1-5 years.

Appendix II*

Klineberg's statistics of the development of New York City Negro children born in the South who moved North.

Years in New York City	Average I.Q.
1 or 2	72
3 or 4	76
5 or 6	84
7 or 8 or 9	92
Born in the North	92

*Source: a summary of statistics found in Klineberg, *Negro Intelligence and Selective Migration* (1935).

Appendix II*

Army Comprehensive Alpha Test Scores

Whites		*Negroes*	
State:	Median score	State:	Median score
Arkansas	35.60	Ohio	45.35
Mississippi	37.65	Illinois	42.25
North Carolina	38.20	Indiana	41.35
Georgia	39.35	New York	38.60
Louisiana	41.10		
Alabama	41.35		
Kentucky	41.50		
Oklahoma	43.00		
Texas	43.40		
Tennessee	44.00		
South Carolina	45.05		

*Sources: Montagu, *Man's Most Dangerous Myth* 161 (1952).