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A REAPPRAISAL OF THE CONSTITUTIONALITY OF MISCEGENATION STATUTES*

Andrew D. Weinberger†

Today, twenty-five States of the Union by statute forbid marriages on racial grounds.¹ These statutes are neither uniform in the racial groups against whom the ban is applicable, nor in defining membership in the various ethnic groups. Thus, while in Idaho white-Mongolian marriages are illegal and void,² in North Carolina they are permitted.³ In Arkansas, where white-Negro marriages are void, a Negro is defined as "any person who has in his or her veins any Negro blood whatever."⁴ In Florida, one ceases to be a Negro when he has less than "one-eighth of . . . African or Negro blood";⁵ and in Oklahoma, anyone not of "African descent" is miraculously transmuted into a member of the white race.⁶

The racial groups⁷ affected by such statutes include Mongolians,⁸

* The author gratefully acknowledges the valuable assistance of Don J. Hager, Ph.D., Professor of Anthropology, Princeton (1948-1953) and that of Marvin T. Hyman, Esq., of the New York Bar.

† See Contributors' Section, Masthead, p. 223, for biographical data.

¹ Ala. Code tit. 14, § 360 (1940); Ariz. Code Ann. § 63-107 (1939), as amended (1942); Ark. Stat. § 55-104 (1947); Colo. Rev. Stat. Ann. c. 90, § 1-2 (1953); Del. Code Ann. tit. 13, § 101 (1953); Fla. Const., art. XVI, § 24; Fla. Stat. Ann. § 741.11 (1944); Ga. Code § 53-106 (1933); Idaho Code Ann. § 32-206 (1948); Ind. Ann. Stat. § 44-104 (Burns, 1952); Ky. Rev. Stat. § 402.020 (1953); La. Civ. Code art. 94 (Dart 1945); Md. Ann. Code art. 27, § 466 (1951); Miss. Const., art. 14, § 263; Miss. Code Ann. § 459 (1942); Mo. Rev. Stat. § 451.020 (1949); Neb. Rev. Stat. § 42-103 (1943); Nev. Comp. Laws § 10197 (1929); N.C. Const., art. XIV, § 8; N.C. Gen. Stat. § 51-3 (1950); Okla. Stat. tit. 43, § 12 (1951); S.C. Const., art. 3, § 34; S.C. Code § 20-7 (1952); Tenn. Const., art. 11, § 14; Tenn. Code Ann. § 36-402 (1956); Tex. Rev. Civ. Stat. art. 4607 (1948); Utah Code Ann. § 30-1-2 (1953); Va. Code Ann. § 20-54 (1950); W. Va. Code Ann. § 4701(1) (1955); Wyo. Comp. Stat. Ann. § 50-108 (1945).

This contrasts with seventeen States having statutes requiring segregation in education. *Brown v. Board of Education*, 347 U.S. 483 (1954); 349 U.S. 294 (1955). See also Comments, 32 Calif. L. Rev. 269 (1944); 20 So. Calif. L. Rev. 80 (1946).

There is no federal policy against intermarriage. None of the territories or possessions has such statutes. Apparently Guam at one time had such prohibitions, but these were abolished in 1951. (Public Law 19, First Guam Legislature.)

Those States which at one time had anti-miscegenation statutes, together with the date of repeal, are: Iowa, 1851; Kansas, 1857; Maine, 1883; Massachusetts, 1840; Michigan, 1883; Montana, 1953; New Mexico, 1866; North Dakota, 1955; Ohio, 1877; Oregon, 1951; Rhode Island, 1881; South Dakota, 1957; Washington, 1867.

² Idaho Code Ann. § 32-206 (1948).

³ North Carolina Constitution, N.C. Gen. Stat. supra note 1.

⁴ Ark. Stat. § 41-808 (1947).

⁵ Fla. Stat. § 1.01 (1953).

⁶ The Oklahoma Constitution, art. XXIII, § 11 provides:

Wherever in this Constitution and laws of this State the word or words "colored" or "colored race," "Negro" or "Negro race" are used, the same shall be construed to mean or apply to all persons of African descent. The term "white race" shall include all other persons.

⁷ Ethnic groups would be a more correct description as these are not each a separate race.

⁸ Idaho, Nevada, Utah and Wyoming.

Malays,⁹ Hindus,¹⁰ Chinese,¹¹ Japanese,¹² Ethiopians,¹³ American Indians,¹⁴ Cherokees,¹⁵ Mestizos,¹⁶ Halfbreeds,¹⁷ and "the brown race."¹⁸ The sole racial group (other than white persons) affected by all twenty-five statutes is the Negro.¹⁹

The courts of last resort of twelve States²⁰ have upheld anti-miscegenation statutes and the statutes of the other thirteen States have been enforced in the lower courts. In only one State, California, has a legislative prohibition of marriage between the races been declared unconstitutional.²¹

The United States Supreme Court accepted jurisdiction in a case from Virginia which squarely raised the question whether a statute proscribing the marriage of the Chinese appellant to a Caucasian woman was violative of the equal protection clause of the Fourteenth Amendment. The Court decided the record was incomplete as to the domicile of the parties and remanded it to the Virginia Supreme Court to be returned to the trial court so that additional evidence could be taken.²²

⁹ Arizona, California, Maryland, Missouri, Nevada, Utah and Wyoming.

¹⁰ Arizona.

¹¹ Nebraska.

¹² Nebraska.

¹³ Nevada.

¹⁴ North Carolina and South Carolina.

¹⁵ North Carolina.

¹⁶ South Carolina.

¹⁷ South Carolina.

¹⁸ Nevada.

¹⁹ There was no such prohibition at common law. 1 Bishop, Marriage, Divorce, and Separation 308 (1873); Madden, Persons and Domestic Relations 35 (1931).

Early in the development of the colonies severe penalties were enacted for sexual intercourse between members of different racial groups. As early as 1661, Maryland provided by statute that English women having children fathered by Negro slaves were to be slaves of the Negro's master. By 1717, the colony's laws provided that where a child resulted from a miscegenistic connection, the white parent was to be placed in servitude for seven years; the Negro, if free, was to be slaved for life; and the child was to be placed in servitude for thirty-one years. In Virginia, the white parent was banished from the colony, and in North Carolina, along with the child, was placed in servitude. Reuter, Race Mixture 78 (1931).

²⁰ Green v. Alabama, 58 Ala. 190 (1877); State v. Pass, 59 Ariz. 16, 121 P.2d 882 (1942); Dodson v. State, 61 Ark. 57, 31 S.W. 977 (1895); Jackson v. Denver, 109 Colo. 196, 124 P.2d 240 (1942); Scott v. Georgia, 39 Ga. 321 (1869); State v. Gibson, 36 Ind. 389 (1871); Miller v. Lucks, 203 Miss. 824, 36 So. 2d 140 (1948); State v. Jackson, 80 Mo. 175 (1883); State v. Kennedy, 76 N.C. 251 (1877); Eggers v. Olson, 104 Okla. 297, 231 Pac. 483 (1924); Lonas v. State, 50 Tenn. 287 (1871); Naim v. Naim, 197 Va. 80, 87 S.E.2d 749, remanded, 350 U.S. 891 (1955), aff'd, 197 Va. 734, 90 S.E.2d 849, app. dismissed, 350 U.S. 985 (1956).

²¹ Perez v. Sharpe, 32 Cal. 2d 711, 198 P.2d 17 (1948). The California Supreme Court, by a four to three decision, sitting as a court of the first instance (at that time actions against a public official were initiated in the Supreme Court) granted mandamus against a County Clerk who refused to issue a marriage license to petitioners, one of whom was Negro and the other white, holding the statute violative of the Fourteenth Amendment. The statute has not been repealed but the decision, not the statute, is observed as the law. For a discussion of this case see Notes, 1 Stan. L. Rev. 289 (1949); 58 Yale L.J. 472 (1949).

²² Naim v. Naim, 350 U.S. 891 (1955). The opinion per curiam reads:

The inadequacy of the record as to the relationship of the parties to the Common-

Thereupon, that court, presumptuously, held that the record clearly showed that the plaintiff was a resident of Virginia; the defendant a non-resident, and that both parties had been married in North Carolina for the purpose of circumventing the Virginia anti-miscegenation statute. Therefore, the court concluded, the case was decided upon a complete record and there was no procedure to remand the case to the trial court to take further evidence and, in complete contravention of the Supreme Court's determination, affirmed its own decision.²³ Nevertheless, upon application to the Supreme Court to recall the remand or to argue *de novo*, the Court held that the second judgment of the Virginia court left the case devoid of a properly presented federal question and denied the application.²⁴

Of all discriminations practiced against Negroes, Mexicans, Indians, and other ethnic minorities, the prohibition against intermarriage is the one which the minority groups are least interested in abolishing. Myrdal lists a "White Man's Rank Order of Discriminations"²⁵ as an organizing principle in his study. His order of importance of types of discrimination, that is, the order in which white believers in segregation object to integration, is:

1. Intermarriage.
2. Barriers against dancing, bathing, eating and social intercourse generally.
3. Segregation in schools, churches and transportation.
4. Political disenfranchisement.
5. Discrimination in law courts, by the police and other public servants.
6. Discrimination in housing, employment, credit and public relief.

The non-Caucasian's rank order of objectionable attitudes is parallel but *precisely inverse* to that of the white segregationist.²⁶

The tremendous struggle of recent years in and out of the courts for racial equality has been to abolish discrimination and segregation in employment, housing, education, voting and the use of public facilities. In the mass of litigation, publications and addresses sponsored by the

wealth of Virginia at the time of the marriage in North Carolina and upon their return to Virginia, and the failure of the parties to bring here all questions relevant to the disposition of the case, prevents the constitutional issue of the validity of the Virginia statute on miscegenation tendered here being considered "in clean cut and concrete form, unclouded" by such problems. *Rescue Army v. Municipal Court*, 331 U.S. 549, 584. The judgment is vacated and the case remanded to the Supreme Court of Appeals in order that the case may be returned to the Circuit Court of the City of Portsmouth for action not inconsistent with this opinion.

²³ 197 Va. 734, 90 S.E.2d 849 (1956).

²⁴ 350 U.S. 985 (1956).

²⁵ Myrdal, *An American Dilemma* 60 (1944).

²⁶ *Id.* at 60, 61.

National Association for the Advancement of Colored People, there has been no effort whatever favoring intermarriage. As a prominent Negro writer said:

One barrier to a closer drawing together of the white and Negro races in America has been the misconception on the part of many whites that the Negro desires amalgamation. . . .

Speaking as a Negro, I know that most Negroes do not desire sexual relationships with white women. . . . Negro men resent the mingling of white men and Negro women as much as white men fear miscegenation of white women and Negro men.²⁷

Yet the ethnic minorities understandably find statutes repugnant which classify them as inferior and unfit to marry persons they may choose.²⁸ As DuBois said:

But the impudent and vicious demand that all colored folk shall write themselves down as brutes by a general assertion of their unfitness to marry other decent folk, is a nightmare.²⁹

Substantial injury to more tangible interests is, moreover, often a factor to be weighed. In addition to the prohibition of marriage, criminal penalties are often prescribed,³⁰ and by statute the offspring of such marriages are declared illegitimate.³¹ Other social situations³² such as violation of the vagrancy statutes,³³ the marital privilege available to a defendant in a criminal prosecution,³⁴ and the right to receive property bequeathed by will,³⁵ or passing under the laws of intestacy,³⁶ are thereby affected.

Despite the differences in holdings between the States, in 1954 the

²⁷ Logan, *A Negro's Faith in America* 27 (1946).

²⁸ Myrdal, *op. cit.* supra note 25 at 64, 65; DuBois, *Crisis* 106 (Editorial 1920).

²⁹ DuBois, *ibid.*

³⁰ Ala. Code Ann. tit. 14, § 360 (1940) (felony); Colo. Rev. Stat. Ann. c. 90, § 1-3 (1953) (misdemeanor); Del. Code Ann. tit. 13, § 102 (1953) (misdemeanor); Fla. Stat. § 741.12 (1953) (felony); Ga. Code Ann. § 53-106 (1933) (felony); Ind. Ann. Stat. § 10-4222 (Burns 1952) (felony); Ky. Rev. Stat. § 402-990 (1955) (felony); La. Crim. Code art. 740-79 (Dart 1943) (felony); Md. Ann. Code art. 27, § 513 (1951) (felony); Miss. Code Ann. § 2339 (1942) (felony); Mo. Rev. Stat. § 451.020 (1949) (misdemeanor); Nev. Comp. Laws, § 10198 (1929) (misdemeanor); N.C. Gen. Stat. § 14-181 (1952) (misdemeanor); Okla. Stat. tit. 43, § 13 (1951) (felony); S.C. Code § 20-7 (1952) (misdemeanor); Tenn. Code Ann. § 36-403 (1956) (felony); Tex. Pen. Code Ann. art. 492 (1952) (felony); Va. Code Ann. § 20-59 (1950) (felony); W. Va. Code Ann. § 4697 (1955) (misdemeanor); Wyo. Comp. Stat. Ann. § 50-109 (1945) (misdemeanor).

³¹ E.g., Florida Statute, supra note 1.

³² See Comments, 32 Calif. L. Rev. 269 (1944); 20 So. Calif. L. Rev. 80 (1946).

³³ *Jackson v. Denver*, supra note 20. The defense to a charge of vagrancy (which included meretricious cohabitation) was marriage. The court held that the marriage was void because of the racial differences of the spouses and, therefore, the defense was untenable.

³⁴ *State v. Pass*, supra note 20.

³⁵ *Miller v. Lucks*, supra note 20.

³⁶ *Eggers v. Olson*, supra note 20.

United States Supreme Court refused certiorari in a case in which the constitutionality of the Alabama statute was directly raised.³⁷ However, a year later the Court accepted jurisdiction in the *Naim* case, and though it was thwarted from making a constitutional determination by procedural defects, it is reasonable to believe that at the next opportunity the Court will pass on this question.

It is accordingly timely to reappraise the constitutionality of the miscegenation statutes and their concept of a "mongrel breed of citizens."³⁸

RACIAL CLASSIFICATION AND THE RIGHT TO MARRY

The right to marry is a civil right and it is, therefore, within the purview of the equal protection clause. In *Meyer v. Nebraska*,³⁹ the Court said:

While this court has not attempted to define with exactness the liberty thus guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to . . . marry, establish a home and bring up children. . . .

Judge Traynor in the *Perez* case described the nature of the right to marry and the constitutional protection afforded it in even more eloquent terms.

Marriage . . . is something more than a civil contract subject to regulation by the state; it is a fundamental right of free men. There can be no prohibition of marriage except for an important social objective and by reasonable means. . . .

Legislation infringing such rights must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws.⁴⁰

To this concept of marriage as a civil right there should then be applied the prohibitions, as previously defined by the Court, against classification by race. Consider first *Strauder v. West Virginia*⁴¹ in which the Court said:

. . . all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by laws because of their color. . . .⁴²

³⁷ *Jackson v. State*, 37 Ala. App. 519, 72 So. 2d 114, cert. denied sub nom., *Jackson v. Alabama*, 348 U.S. 888 (1954).

³⁸ *Naim v. Naim*, 197 Va. 80, 90, 87 S.E.2d 749, 756 (1955). For a critical discussion of this case see 1 *Howard L. Rev.* 84 (1955).

³⁹ 262 U.S. 390, 399 (1923). See also, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

⁴⁰ *Perez v. Sharpe*, 32 Cal. 2d 711, 714-15, 198 P.2d 17, 18-19 (1948).

⁴¹ 100 U.S. 303 (1880).

⁴² *Id.* at 307.

In *Edwards v. California*,⁴³ Mr. Justice Jackson said that race was "constitutionally an irrelevance."⁴⁴ And while the doctrine of "separate but equal" is no longer accepted, *Plessy v. Ferguson*⁴⁵ is still authority for the proposition that "the object of the [Fourteenth] Amendment was undoubtedly to enforce the absolute equality of the two races before the law."⁴⁶

Consistently in area after area the Court has held that race may not be a means of legislative classification.

A Louisville, Kentucky, ordinance which established white and colored residential zones was tested against the equal protection clause in 1917 and held void.⁴⁷ Racial restrictive land covenants were held judicially unenforceable in 1948.⁴⁸ In *Brown v. Board of Education*,⁴⁹ the Court required that public schools be desegregated, holding that separation itself was a denial of equality.

The Court has held that the States are prohibited by the Fourteenth Amendment from using race as a test in licensing laundries⁵⁰ and commercial fishermen.⁵¹

The only exception to this long line of decisions, one after another denouncing racial classification in legislation, is the military restrictions imposed on persons of Japanese descent during World War II.⁵² *Hirabayashi v. United States* and *Korematsu v. United States* were justified by the Court as war measures taken by the Federal Government. But they were criticized by leading scholars immediately after the decisions were published and the Court subsequently retreated from its position.⁵³ Furthermore, they are no authority for racial grouping by the States.⁵⁴

The basis for the State courts' finding of constitutionality rests primarily upon two arguments:

A. The statutes are not discriminatory as they apply equally to all races; and

⁴³ 314 U.S. 160 (1941).

⁴⁴ *Id.* at 185.

⁴⁵ 163 U.S. 537 (1896).

⁴⁶ *Id.* at 544.

⁴⁷ *Buchanan v. Warley*, 245 U.S. 60 (1917).

⁴⁸ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

⁴⁹ 347 U.S. 483 (1954); 349 U.S. 294 (1955).

⁵⁰ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

⁵¹ *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410 (1948).

⁵² *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

⁵³ Dembetz, "Racial Discrimination and the Military Judgment," 45 *Colum. L. Rev.* 175 (1945); Rostow, "The Japanese American Cases—A Disaster," 54 *Yale L.J.* 489 (1945). See also *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

⁵⁴ However, this uniformity of protection has not been extended to aliens. *Clarke v. Deckenbach*, 274 U.S. 392 (1927); *Truax v. Raich*, 239 U.S. 33 (1915); *Patsone v. Pennsylvania*, 232 U.S. 138 (1914). See also, Konvitz, *The Alien and the Asiatic in American Law* (1946).

B. The racial classifications made in the statutes are reasonable in view of the legislative objective and, therefore, do not violate the due process or equal protection clauses of the Fourteenth Amendment.⁵⁵

EQUAL APPLICATION OF MISCEGENATION STATUTES

*Pace v. Alabama*⁵⁶ is often cited as holding that the miscegenation statutes place an equal inhibition upon both white and non-white persons, and therefore are constitutional.⁵⁷ This is strained reasoning since *Pace* was an appeal from a conviction for violation of an Alabama statute providing penalties for fornication and adultery where one party to the crime was white and the other Negro. In challenging the constitutionality of this statute, it was argued that a similar statute provided lesser penalties where both parties were white or both were Negro. The statute considered was tested by the Court, however, against the penalties in the statute itself, and those penalties were found to be equal for both the white and the non-Caucasian person involved.

Indeed, the offense against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.⁵⁸

In considering the effect of this case, it should not be overlooked that penal prohibition of illicit intercourse can hardly be equated with a similar prohibition of a sanctified relationship. The *Pace* decision is far from a constitutional approval of a prohibition of interracial marriage.⁵⁹

While there is apparent equal treatment of the different races and ethnic groups in the statutes on miscegenation, it is self-evident even if

⁵⁵ A third argument sometimes advanced is that segregation promotes public peace by preventing race conflicts which would arise upon desegregation. The Supreme Court in *Buchanan v. Warley*, 245 U.S. 60, 81 (1917) stated that "important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." Judge Traynor is even more forceful in rejecting this contention. "It is no answer to say that race tension can be eradicated through the perpetuation by law of the prejudices which give rise to the tension." *Perez v. Sharpe*, 32 Cal. 2d 711, 725, 198 P.2d 17, 25 (1948).

⁵⁶ 106 U.S. 583 (1882).

⁵⁷ Thurgood Marshall, *The Supreme Court as Protector of Civil Rights: Equal Protection of the Laws*, *The Annals of the American Academy of Political and Social Science* 101 (May 1951):

Pace v. Alabama . . . upheld the constitutionality of a legislative proscription of intermarriage between Negroes and white persons. It should not be overlooked, however, that this was written in 1951 before *Brown v. Board of Education*, supra note 1.

⁵⁸ 106 U.S. at 585.

⁵⁹ In *Moore v. Missouri*, 159 U.S. 673, 678 (1895), the Court, citing the *Pace* case, said: The general doctrine [is] that the [Fourteenth] Amendment in respect of the administration of criminal justice, requires that no different degree or higher punishment shall be imposed on one than is imposed on all for like offense. . . .

the doctrine of "separate but equal" were still valid, that it cannot apply in the marital relationship. How can it be said that when two persons are denied the right to marry because of race, they may find equal opportunity within their own groups? In *Perez*, decided before *Brown* and the 1956 decision in *Gayle v. Browder*,⁶⁰ the difference in the violation of constitutional rights in prohibitions of marriage and the denial of other less personal rights, was already indicated.

A holding that . . . segregation does not impair the right of an individual to ride on trains or to enjoy a legal education is clearly inapplicable to the right of an individual to marry. Since the essence of the right to marry is freedom to join in marriage with the person of one's choice, a segregation statute for marriage necessarily impairs the right to marry.⁶¹

While the decision in the *Brown* case has changed the "holding" as to public education and *Gayle v. Browder* as to transportation, the latter part of the statement remains as true today as it was in 1948. The "separate but equal" theory, so recently rejected with regard to public education and transportation, has never logically had any place in the discussion of interracial marriage.

The choice of a spouse is a subjective act, the act of individuals and not races. It would therefore follow that a classification by statute of those prohibited from marrying each other must be made on an individual basis and not on a group basis.⁶²

SUPPOSED EFFECTS OF INTERRACIAL MARRIAGE UPON SOCIETY— A VALID LEGISLATIVE OBJECT?

Statutes prohibiting marriage on grounds other than racial ones have a place in society. Prohibition of marriages of feeble-minded persons or

⁶⁰ 352 U.S. 903 (1956), affirming 142 F. Supp. 707 (D.C. Ala. 1956).

⁶¹ *Perez v. Sharpe*, 32 Cal. 2d 711, 717, 198 P.2d 17, 21 (1948).

⁶² "The petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws. . . ." *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938); see also, *Shelley v. Kraemer*, 334 U.S. 1 (1948).

Even though discriminatory statutes generally affect the minority races more than Caucasians, the anti-miscegenation statutes are more discriminating towards Caucasians. Thus the Virginia statute on miscegenation, *supra* note 1, reads in part:

It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian.

There is no other prohibition based on race in the Virginia statute. It follows that while a white person must seek a spouse only among Caucasians, the members of all other ethnic groups may freely marry anyone other than a white person within the borders of all the groups. See also *State v. Pass*, 59 Ariz. 16, 121 P.2d 382 (1942). In this case, the interesting proposition was raised that since the Arizona statute provided "the marriage of persons of Caucasian blood or their descendants, with Negroes, Mongolians, members of the Malay race, or Hindus or their descendants shall be null and void," persons of mixed ancestry could not marry anyone. The question was not resolved as the record did not indicate whether the parties were of mixed genes. The Arizona legislature subsequently removed the words "or their descendants" from the statute. This same confusion is found in the Texas statute, and was pointed to in the *Perez* case, 32 Cal. 2d at 721, 198 P.2d at 23.

of persons with communicable diseases are not uncommon. Each of these is supported by demonstrable scientific knowledge⁶³ that such marriages present a potential danger to society through physically or mentally ill offspring. In these statutes, the requirements of a reasonable legislative objective and a reasonable connection between the legislation and the ends sought have been met.⁶⁴

In support of the statutes prohibiting interracial marriage, much the same argument is offered. Could it be demonstrated that biologically inferior children would be the result of such marriages, the necessity of a reasonable legislative objective would be met. While some courts have attempted a reasonable analysis, ordinarily they simply repeat outmoded and unscientific genetical conclusions. Thus a Georgia court said:

The amalgamation of the races is not only unnatural, but it is always productive of deplorable results. Our daily observation shows us that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full blood of either race.⁶⁵

The Virginia Supreme Court in the *Naim* case found the legislative object to be "to preserve the racial integrity of . . . [the state's] citizens . . . [and] to regulate the marriage relation so that it will not have a mongrel breed of citizens."⁶⁶

No authorities or sources whatever were cited for the opinions on race and heredity in that case. And the dissenting opinion in the Cali-

⁶³ In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Court had before it a statute providing for compulsory vaccination of all adults residing in a smallpox epidemic area. *Jacobson* refused to be vaccinated, contending that this was not a proper exercise of the police power. Holding that the police power extends to matters of health, the Court found that "for nearly a century most of the members of the medical profession have regarded vaccination, repeated after intervals, as a preventive of smallpox." (197 U.S. at 23) The Court concluded that there was a reasonable connection between the statute and the end sought.

In substantiating its conclusion as to the effect of vaccination, the Court in a copious footnote, beginning at page 32 of the opinion, set forth all of the available scientific evidence supporting the efficacy of vaccination.

For an excellent discussion of the use of social science at the trial level see, Greenberg, "Social Scientists Take the Stand," 54 Mich. L. Rev. 7 (1956).

⁶⁴ *Quaker City Cab v. Pennsylvania*, 277 U.S. 389, 400 (1928); *Buck v. Bell*, 274 U.S. 200 (1927); *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192, 201 (1912).

⁶⁵ *Scott v. Georgia*, 39 Ga. 321, 323 (1869). That opinions such as this are not exclusively held by the white race is evidenced by this quotation from *Scarborough, On the Trail of Negro Folk-Songs* 20 (1925):

. . . I learned of a quarrel Uncle Israel had with one of the mulatto house servants about this question of color. She had disrespectfully called him a Nigger and he had retorted:

"What if I is a Nigger? I b'longs to a race of people. But you ain't. I didn't never read in de Bible about whar it speaks of mulattoes as a race of people. You is mules, dat's what you is."

. . . He said to me, "De mulattoes ain't live as long as white folks or colored either. Dey ain't healthy folks. I'll tell that to deir face."

⁶⁶ *Naim v. Naim*, 197 Va. 80, 89, 87 S.E.2d 749, 756 (1955).

ifornia Supreme Court in 1948 in the *Perez* case is of the same school of thinking, that is, it completely disregards the twentieth-century developments in the science of human genetics. The rationale of the state courts is abhorrent to American science and jurisprudence. They adhere to and perpetuate three erroneous assumptions: (1) that "pure races" either exist in the present or have existed in the past; (2) that crossing between different racial groups results in biologically inferior offspring; (3) that cultural level is dependent upon racial attributes. Contemporary physical anthropology and human genetics disprove these three assumptions.

(1) *The Idea of "Pure Races"*

To speak of race "mixtures" or "mongrelization" is to imply that "pure races" either still exist or have existed in the past. Contemporary biological research and theory refute both of these implications. The idea of "pure" racial groups, either past or present, has long been abandoned by modern biological and social science. To the contrary:

Race mixture has been going on during the whole of recorded history. Incontrovertible evidence from studies on fossil human remains shows that even in pre-history, at the very dawn of humanity, mixing of different stocks, at least occasionally, took place.⁶⁷

The scientific position concerning the idea of "pure races" is contained in this statement by a distinguished American geneticist:

The idea of a pure race is not even a legitimate abstraction; it is a subterfuge used to cloak one's ignorance of the phenomenon of racial variation.⁶⁸

The idea of "pure races" is refuted by paleontological and genetical studies of human evolution. All mankind is a member of a single species, *Homo sapiens*. All known physical variations among men, therefore, continue to take place *within* species boundaries, not without. When considering human evolution and modern "races," we are not dealing with separate species. Interbreeding among human groups manifesting differences in physical attributes produces live, fertile offspring—the mark of membership in a single species. It has been established empirically that the offspring of mixed marriages are no less physically and

⁶⁷ Dunn and Dobzhansky, *Heredity, Race and Society* 115 (1952).

⁶⁸ Dobzhansky, "The Race Concept in Biology," *The Scientific Monthly* 161-65 (February, 1941). For additional corroborating evidence rejecting the idea of "pure races," see Boyd, *Genetics and the Races of Man: An Introduction to Modern Physical Anthropology* 184-209 (1950); Dobzhansky, *Genetic Differences Among Men, Evolutionary Thought in America* 86-155 (1950); Kluckhohn, *Mirror for Man* 102-44 (1949); Ashley Montague, *A Consideration of the Concept of Race* 15, *Origin and Evolution of Man, Cold Spring Harbor Symposia on Quantitative Biology* 315-36 (1950); Ashley Montagu, *Man's Most Dangerous Myth: The Fallacy of Race* 100-33 (1945).

psychologically sound than those where both parents are of the same race.⁶⁹

Under the sponsorship of the United Nations Educational, Scientific and Cultural Organization (UNESCO), twelve scientists representing physical anthropology and human genetics met in June 1951 to consider the preparation of a statement which would effect a crystallization of scientific theory and opinion on matters of race and race differences. *The Statement on the Nature of Race and Race Differences* was released by UNESCO in September of 1952.⁷⁰

The *Statement* at Article 7 said concerning "pure races":

There is no evidence for the existence of so-called "pure" races. Skeletal remains provide the basis of our limited knowledge about earlier races. In regard to race mixture, the evidence points to the fact that human hybridization has been going on for an indefinite but considerable time. Indeed, one of the processes of race formation and race extinction or absorption is by means of hybridization between races. As there is no reliable evidence that disadvantageous effects are produced thereby, no biological justification exists for prohibiting intermarriage between persons of different races. (Emphasis added.)

⁶⁹ Reuter, *The Mulatto in the United States* 117 et seq. (1918). That popular opinion is to the contrary is shown by an Associated Press dispatch from Bastrop, La., dated November 2, 1955, which read in part:

The Morehouse Parish School Board has voted unanimously to discontinue use of a ninth-grade general science textbook which some persons say "contains un-American ideas on the origin of races."

Superintendent of Schools Luckey told the board the book could be set aside if the school board objected to it. He said the title was "Science for Better Living."

This passage was among those cited as objectionable:

"Living things which belong to recognizable kinds, which are like in most physical traits, and which breed freely with each other, are said to belong to one species. All men on this earth belong to one species—homo sapiens."

Persons who object to the book said this was a plain insinuation that races "breed freely with each other" and is a dangerous Socialistic trend of thought to instill into the younger generation.

⁷⁰ UNESCO has distributed the *Statement* in a variety of publications. It is one of several publications in the series, *The Race Question in Modern Science*. The 1952 *Statement* was drafted at Unesco House, Paris, on June 8, 1951, by Professor R. A. M. Bergman, Royal Tropical Institute, Netherlands Anthropological Society, Amsterdam; Professor Gunnar Dahlberg, Director, State Institute for Human Genetics and Race Biology, University of Upsala; Professor L. C. Dunn, Department of Zoology, Columbia University; Professor J. B. S. Haldane, Head, Department of Biometry, University College, London; Professor M. F. Ashley Montagu, Chairman, Department of Anthropology, Rutgers University; Dr. A. E. Mourant, Director, Blood Group Reference Laboratory, Lister Institute, London; Professor Hans Nachtshain, Director, Institut für Genetik, Freie Universität, Berlin; Dr. Eugene Schreider, directeur adjoint du laboratoire d'anthropologie physique de l'École des Hautes Etudes, Paris; Professor Harry L. Shapiro, Chairman, Department of Anthropology, American Museum of Natural History, New York; Dr. J. C. Trevor, Faculty of Archeology and Anthropology, University of Cambridge; Dr. Henri V. Vallois, professeur au Muséum d'histoire naturelle, directeur du Muséum de l'Homme, Paris; Professor S. Zuckerman, Head, Department of Anatomy, Medical School, University of Birmingham, Eng.; Professor Th. Dobzhansky, Department of Zoology, Columbia University; Dr. Julian Huxley contributed to the final wording. It was agreed that the *Statement* should be submitted to as many anthropologists and geneticists as possible; therefore, an additional 69 renowned scientists contributed to its final form.

(2) *The Assumption that Race Crossing Results in Biologically Inferior Offspring*

Ultimately, statutes prohibiting interracial marriage are a reflection of the popular but erroneous stereotype that such marriages give rise to biologically inferior offspring. The fact that the stereotype persists even when the weight of scientific evidence is against it testifies to its ideological rather than scientific character. Although there is no lack of research and literature assessing the biological consequences of race-crossing, "hardly any well-substantiated examples of disharmonious constitution resulting from miscegenation have been reported."⁷¹ Independent evaluations of this literature tend to conclude that prohibitions against interracial marriage are primarily social and psychological and not biological.⁷²

(3) *The Assumption that Cultural Level is Dependent Upon Racial Attributes*

Statutes prohibiting interracial marriage commonly perpetuate another assumption that is totally inconsistent with valid knowledge pertaining to the relationship between race, progress and cultural achievement.⁷³ There is no evidence to sustain the contention that cultural level is dependent upon racial or biological attributes.

Race, in its scientific dimension, refers only to the bio-genetic and physical attributes manifest by a specified population. It does not, under any circumstances, refer to culture (learned behavior), language, nationality, or religion. One of the fundamental axioms of both physical and cultural anthropology is that culture (behavior) is independent of race. Civilizations and cultural achievement are not based on genes or physical characteristics. There are no known racial or biological barriers to the acquisition or creation of any cultural tradition,⁷⁴ a fact

⁷¹ Stern, *Principles of Human Genetics* 570 (1949). See especially Chapter 26, "Genetic Aspects of Race Mixture," pp. 563-79.

⁷² Boyd, *Genetics and the Races of Man* 364-65 (1950); Castle, *Biological and Social Consequences of Race Crossing*, 9 *American Journal of Physical Anthropology* 145-56 (1926); Cook, *Racial Fusion Among California and Nevada Indians*, 15 *Human Biology* 153 (1943); Hankins, *The Racial Basis of Civilization* 328-51 (1926); Kroeber, *Anthropology* 198-201 (1948); Ashley Montagu, *Man's Most Dangerous Myth: The Fallacy of Race* 100-33 (1945).

⁷³ Naim v. Naim, *supra* note 20: "Both sacred and secular history teach that nations and races have better advanced in human progress when they cultivated their own distinctive characteristics and culture and developed their own particular genius." 197 Va. at 90, 87 S.E.2d at 756.

⁷⁴ The literature and research denying a direct association between racial membership and cultural achievement is voluminous. However, the following references are among those giving a cogent presentation of the position of contemporary biological and social science: Beals and Hoijer, *An Introduction to Anthropology* 195-98 (1953); Hankins, *The Racial Basis of Civilization* 367-71 (1926); Kroeber, *Anthropology* 190-92 (1948);

amply demonstrated by the creation and dissemination of cultural innovations in the United States irrespective of the racial composition of that population.

The scientific material available at present does not justify the conclusion that inherited genetic or racial differences are a factor in producing the differences between cultures. Cultural and civilizational factors are transmitted by learning and education, not by the genes.⁷⁵ When the Selective Service System published its rate of rejections for mental deficiency, it showed that while Negro illiteracy exceeded white illiteracy in the South, white illiteracy in the Southeast exceeded Negro illiteracy in the Northwest and the far West.⁷⁶ Economic-socio-political factors and not race determine education and health. There are no racial monopolies on cultural achievement. Historical and comparative studies of human culture show that vast changes have taken place in the economic, political and social institutions of a given society without any, or with little, change in the racial or genetic composition of the population concerned.

If the weight of the scientific evidence formerly prevalent justified the fear of biologically inferior offspring through intermarriage, then a sound legislative objective was being sought. However, now that these theories have been proven false, the legislative object is also fallacious. Legislative determination cannot reverse empirical fact. Constitutional construction cannot remain unchanged when originally predicated upon a false premise.⁷⁷

The statutes are self-contradictory, containing within themselves certain permissible areas of miscegenistic marriage. Apparently, "scientific" thought varies from State to State. As has been shown, some legislatures see no danger in white-Mongolian marriages, while others do. None, with the exception of North Carolina, perceive any evidence of deterioration in the offspring of intermarriage among any of the races other than white.⁷⁸ Even as to Negroes, the degree of Negro genes thought sufficient to cause contamination varies from State to State, and

Ashley Montagu, *An Introduction to Physical Anthropology* 352-81 (1951); Ashley Montagu, *Man's Most Dangerous Myth: The Fallacy of Race* 146-55 (1945).

⁷⁵ UNESCO Statement on the Nature of Race and Differences, *supra* note 70, at article 6.

⁷⁶ Ginzburg and Bray, *The Uneducated* 43 (1953).

⁷⁷ The Court in *Brown v. Board of Education* recognized that a changing society might require a different constitutional construction when it said: "Public education is today a wholly different thing from what it was when the Fourteenth Amendment was adopted." 347 U.S. at 493.

⁷⁸ In that State, intermarriage between a Cherokee Indian of Robeson County and a Negro or person of Negro descent to the third generation is prohibited. There is no similar restriction against Cherokees of counties other than Robeson nor against Indians other than Cherokees regardless of their county. N.C. Gen. Stat. § 51-3 (1950).

in the most absurd instance, Colorado permits in one part of the State interracial marriages which are prohibited in another part of the State.⁷⁹

It is not scientifically possible to determine whether a person is "one-eighth Negro," "one-half Malay," or is one of the many varieties of fractionated racial memberships. Such terms as "half-breeds," "octarooms," "full-bloods," and the like, are misleading when used in anything but the fictional or social sense; for example, the popular expression that a person is "one-quarter Chinese" has no necessary biological or genetic meaning—it does mean, pragmatically, only that one of a set of grandparents of that person was *socially defined* as a person of Chinese ancestry. It carries no genetically meaningful import, for example, that one-quarter of the genes of that person are "Chinese." Genes are not known to be transmitted in any such predetermined or culturally labeled quantities—an observation that has prompted one scholar to remark:

Laws prohibiting marriage between "whites and persons having one-eighth or more of Negro blood" are compounded of legal fiction and genetic nonsense.⁸⁰

In actual fact, the miscegenist prohibition is based not upon rationation at all but rather upon deep-seated racial attitudes.⁸¹ As was said by one court:

. . . the social relation and practices of the races have, in the interest of our civilization as well as in expression of the natural pride of the dominant Anglo-Saxon race and of its preservation from the degeneration social equality, between the races, would inevitably bring, imperatively necessitated and created immutable rules of social conduct and social restraint, that the just ends indicated might be attained and permanently maintained. . . . Among these are: The inhibition against the authorization or legalization of marriage between any white person and a negro. . . .⁸²

CONCLUSION

When subjected to the test of the Fourteenth Amendment, such emotionalism must yield to rational thinking. Marriage is a civil right and as such subject to constitutional protection. Not only do the anti-mis-

⁷⁹ Colo. Rev. Stat., *supra* note 1:

All marriages entered into between Negroes or mulattoes of either sex, and white persons are declared to be absolutely void. Nothing in this section shall be so construed as to prevent the people living in that portion of the state acquired from Mexico from marrying according to the customs of that country.

It would appear that the marital customs of Mexico would be a matter of judicial notice. Yet in one case it was held that since the customs of that country were not in the record, the court could not rule on whether the statute was complied with. *Jackson v. Denver*, 109 Colo. 196, 124 P.2d 240 (1942).

⁸⁰ Hager, "Some Observations on the Relationship Between Genetics and Social Science," 13 *Psychiatry* 371, 375 (1950).

⁸¹ Myrdal, *op. cit.* *supra* note 25.

⁸² *Story v. State*, 178 Ala. 98, 103, 59 So. 480, 482 (1912).

regation statutes have no scientific basis, but their philosophy is an affront to millions of our citizens.

Repugnant as is the rationale of "social practices,"⁸³ at least that statement has the virtue of honesty as distinguished from the biologic nonsense of "mongrel breed"⁸⁴ and "weak and effeminate offspring."⁸⁵ But the right of equal protection may not be denied even though a substantial segment of the population finds it distasteful. The Court required desegregation of the schools⁸⁶ and transportation⁸⁷ despite the violence of the opposition.

Classification by race based upon non-existent racial traits does not serve any valid legislative purpose but merely continues a classification of Americans as superior and inferior in contradiction to the American concept of equality.

⁸³ *Ibid.*

⁸⁴ *Naim v. Naim*, 197 Va. 80, 90, 87 S.E.2d 749, 756 (1955).

⁸⁵ *Scott v. Georgia*, 39 Ga. 321, 324 (1869).

⁸⁶ *Brown v. Board of Education*, 347 U.S. 483 (1954); 349 U.S. 294 (1955).

⁸⁷ *Gayle v. Browder*, 352 U.S. 903 (1956), affirming 142 F. Supp. 707 (D. C. Ala. 1956). 707 (D.C. Ala. 1956).