

NOTES

CONSTITUTIONALITY OF ANTI-MISCEGENATION STATUTES*

BELIEF in non-Caucasian inferiority is a comforting rationale for discrimination in a purportedly equalitarian society.¹ Legislative prohibitions against racial intermarriage in twenty-nine states are a logical consequence of this caste order.² Heretofore, courts have uniformly upheld these statutes without carefully considering whether scientific evidence revealed material race inferiorities.³ But in *Perez v. Lippold*⁴ the Supreme Court of California,

**Perez v. Lippold*, 32 A.C. 757 (Cal. 1948).

1. If the Negro can be placed lower in the biological order than the Caucasian, there is no difficulty in rationalizing him out of the Caucasian's social order. The Negro then receives some of the attributes of full citizenship not as rights, but as charities extended to an inferior being. 1 MYRDAL, *AN AMERICAN DILEMMA* 101-10 (1944).

2. These are listed and discussed in MANGUM, *THE LEGAL STATUS OF THE NEGRO* 263-73 (1940), and Appendix *infra*. The states still banning miscegenation are the only part of the world, outside of the Union of South Africa, with extensive prohibitions against miscegeny. Brief for Respondents, p. 8, *Perez v. Lippold*, 32 A.C. 757 (Cal. 1948).

3. None of these decisions reveals any examination of recent and unbiased scientific evidence. Only in one case has an anti-miscegenation statute been invalidated, *Burns v. State*, 48 Ala. 195, 198 (1872) (statute prohibiting minister from performing marriage of white and Negro held unconstitutional), and this case was expressly overruled by *Green v. State*, 58 Ala. 190 (1877).

The Supreme Court of the United States has never directly ruled on the constitutionality of these statutes, having declined the gambit in *In re Monks' Estate*, 48 Cal. App.2d 603, 120 P.2d 167 (1941), *app. denied*, 317 U.S. 590 (1942) (on ground papers not filed in time), and *Lee v. Monks*, 318 Mass. 513, 62 N.E.2d 657 (1945), *cert. denied*, 326 U.S. 696 (1946) (both cases involving loss of Negro wife's dower rights because marriage to white man void under Arizona anti-miscegenation statute). But in *Pace v. Alabama*, 106 U.S. 583 (1882), the Court upheld an Alabama statute making fornication a felony for a Negro and white, but merely a misdemeanor for any other couple, on grounds that the statute was non-discriminatory and was directed at the offense rather than at any particular race or color. *Id.* at 585. The California court distinguished this decision on the ground that while there is a basic right to marry, there is no right to adultery or fornication. *See Perez v. Lippold*, *supra* note 2, at 772.

Lower federal courts have upheld two anti-miscegenation statutes despite attacks based on the Fourteenth Amendment: *Stevens v. United States*, 146 F.2d 120 (10th Cir. 1944) (marriage of Negro to deceased full-blooded Creek Indian void in Oklahoma; statute affects all parties alike); *State v. Tutty*, 41 Fed. 753, 762 (C.C.S.D.Ga. 1890) (comity does not require recognition of out-of-state marriage of Negro and white residents of Georgia who returned to Georgia to live, where such marriage is against state's public policy).

The state cases directly upholding these statutes as valid under the Fourteenth Amendment are: *Kirby v. Kirby*, 24 Ariz. 9, 206 Pac. 405 (1922) (marriage purely a subject for state regulation); *Dodson v. State*, 61 Ark. 57, 31 S.W. 977 (1895) (marriage is subject to exercise of state police power). Occasionally the ground for decision is more esoteric: *Green v. State*, 58 Ala. 190 (1877) (God made black and white different and meant them to be separate); *State v. Gibson*, 36 Ind. 389 (1871) (natural law forbids racial intermarriage).

in a four to three decision, examined such evidence and declared the California anti-miscegenation⁵ statute unconstitutional, ordering issuance of a marriage license to a white woman and a Negro.

Interestingly enough, the court did not rely on the ground primarily asserted by the petitioning couple, that marriage is a religious rite protected by the First Amendment as incorporated in the Fourteenth.⁶ Indeed, this contention seems unconvincing, since marriage, while recommended by most major religions, is required by none.⁷ But the court found strong ground for its decision in the "equal protection" clause of the Fourteenth Amendment.⁸ Agreeing with the Supreme Court of the United States that legislation stratifying people by race warrants not a presumption of validity but rather the closest scrutiny,⁹ the California court found no evidence

Statutory variations on the standard anti-miscegenation theme have been similarly treated: *Frasher v. State*, 3 Tex. App. 263 (1877) (statute penalizing only whites for miscegenation); *Ford v. State*, 53 Ala. 150 (1875) (statute making miscegenous adultery a felony while non-miscegenous adultery is a misdemeanor). Among the more intriguing fact situations is *Blake v. Sessions*, 94 Okla. 59, 220 Pac. 876 (1923) (marriage of man three-fourths Indian and one-fourth Negro to woman three-fourths Indian and one-fourth white; statute prohibiting marriage of Negroes to anyone not Negro held valid).

4. 32 A. C. 757 (Cal. 1948), *rehearing denied*, October 28, 1948 (communication to the YALE LAW JOURNAL from the Clerk of the Supreme Court of California, November 15, 1948, in Yale Law Library), *app. waived*, N.Y. Times, December 13, 1948, p. 37, col. 7. Traynor, J., wrote the court's opinion, in which Gibson, C. J., and Carter, J., joined, *id.* at 777; separate concurring opinions were written by Carter, J., *id.* at 777, and Edmonds, J., *id.* at 785; Shenk, J., dissented, along with Schauer, J., and Spence, J. *Id.* at 787.

5. The term miscegenation, when used in this note, means sexual relations between members of different races, unless specially qualified.

6. Brief for Petitioners pp. 9-19, *Perez v. Lippold*, 32 A. C. 757 (Cal. 1948).

7. Moreover, the Supreme Court in the Mormon polygamy cases upheld restrictions on marriage even where it was required by religion. *Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy an act in violation of social duties or subversive of good order, and thus regulable despite incidental religious restriction). In *Cleveland v. United States*, 329 U.S. 14, 18 (1946) (Mann Act prosecution of polygamists), the Supreme Court reaffirmed this earlier stand.

The court evaded a direct ruling on this issue, 32 A.C. 757, 759 (Cal. 1948). But see Edmonds, J., (concurring), *supra* note 4 (right to marry is protected by Constitutional guarantee of religious freedom).

8. 32 A. C. 757, 777 (Cal. 1948). The right to marry is also protected by the "due process" clause, and cannot be infringed by action that is arbitrary or bears no reasonable relation to legitimate legislative objectives. See *Meyer v. Nebraska*, 262 U.S. 390, 399, 400 (1923).

The state invoked the precedents of *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding state law for sterilization of mental incompetents because public welfare may require that citizens be deprived of fundamental right to marry and bring up children), and *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (distinction between citizens based on race upheld). But the California court rejected these on the grounds, *inter alia*, that the sterilization statute guaranteed a comprehensive investigation in each case before it was applied, and that in the Nisei case the exigencies of the war situation made discrimination permissible. 32 A. C. 757, 761, 772 (Cal. 1948). See Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L. J. 489 (1945).

9. In answering the state's assertion of a presumption of validity, the court relied on

of Negro inferiority which justified infringement of "equal protection."¹⁰

Evidence educed in support of these statutes consists largely of biological reports of Negro mental and physical inferiority,¹¹ and the allegedly disastrous results of miscegenation.¹² The California decision recognizes that this material is now largely outdated,¹³ lacks sufficient investigative bases,¹⁴

the opinions in *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 94 (1945) and *Oyama v. California*, 332 U.S. 633, 646 (1948) (only most exceptional cases can excuse discrimination on the basis of race or color).

10. 32 A.C. 757, 761-74 (Cal. 1948).

11. See REUTER, RACE MIXTURE 107, 108 (1931), who claims that the Negro group is mentally inferior because it has produced few men of real ability and no one whose accomplishments have not been surpassed by scores of white men. Intelligence testing shows an "enormous and reliable superiority of whites over Negroes. . . ." PETERSON, 5 MENTAL MEASUREMENT MONOGRAPHS 151 (1929); cf. Castle, *Biological and Sociological Consequences of Race Crossing*, 9 AMER. JOURNAL OF PHYS. ANTHROPOLOGY 152-3 (1926).

For reports of physical inferiority, see HOLMES, THE NEGRO'S STRUGGLE FOR SURVIVAL 47 (1937) (Negro general mortality higher than white); EMBREE, BROWN AMERICANS 40 (1943) (Negro death rate is more than 33% above the white rate. The death rate from tuberculosis is three times that of the whites; from syphilis, maternal and child ills, heart disease and pneumonia, it is ten times that of the whites); cf. Hoffman, *Race Traits and Tendencies of the American Negro*, XI PUB. AM. ECO. ASS'N 146-8 (1896); Davenport, *State Laws Limiting Marriage Selection Examined in the Light of Eugenics*, 9 EUGENICS RECORD OFFICE BULLETIN (1913) (Negroes are apt to form keloid and uterine tumors). 2 CYCLOPEDIA OF MEDICINE, SURGERY AND OBSTETRICS 275 (1946) (sickle cell anemia is a congenital disease occurring only in Negroes).

12. Race crossing of the primary races leads to retrogression, and to eventual extinction of the resultant type unless fortified by reunion with the parent stock: Dixon, *Morbid Proclivities and Retrogressive Tendencies in the Offspring of Mulattoes*, 20 JOURN. AMER. MED. ASS'N 1 (1893); WOODRUFF, THE EXPANSION OF RACES 251 (1909); GREGORY, THE MENACE OF COLOR 229 (1925) (where two distinct races are in contact, inferior qualities are not bred out and may be emphasized in progeny); DAVENPORT AND STEGGERDA, RACE CROSSING IN JAMAICA (1929) (study of 300 adults in Jamaica indicates that crossing of distinct races is biologically undesirable); HOLMES, *op. cit.* *supra* note 11, at 175-7 (setting out findings of Nott in 1843 that mulattoes of South Carolina were decidedly infertile); Castle, *supra* note 11 ("race crossings disturb social inheritance"); Matas, *Surgical Peculiarities of the Negro*, 4 TRANS. AM. SURG. ASS'N (1896) (dental caries are rare in pure blooded Negroes but frequent in mulattoes); Davenport, 27 CURRENT HISTORY 403 (1927) (mulattoes are not fully compatible with their environment, "combin[ing] something of the white man's intelligence and ambition with an insufficient intelligence to realize that ambition"); LASKER, FILIPINO IMMIGRATION 35 n. 3 (1931) ("[C]onsidering the necessity of adaptation to conditions controlled by the dominant race, the results of interbreeding . . . are decidedly dysgenic"); Mjoen, *Harmonic and Disharmonic Race Crossings*, 2 EUGENICS IN RACE AND STATE 41-61 (1923) (hybrid offspring of Lapps and Scandinavians are inferior to either of their parents); see *Perez v. Lippold*, 32 A.C. 757, 801-5 (Cal. 1948) (dissenting opinion). See also, Brief for Respondents, pp. 61-97, *Perez v. Lippold*, *supra*.

13. KLINEBERG, CHARACTERISTICS OF THE AMERICAN NEGRO 335 (1944), claims that the superior techniques employed in investigations subsequent to those set out in notes 10 and 11 *supra*, clearly shift the burden of proof to those who contend that there are innate differences in the intelligence of persons of pure and mixed bloods. Many of the materials cited in notes 10 and 11 *supra* were mentioned in Judge Shenk's dissent, and in the Respondent's Brief, *supra* note 12. A concurring judge skillfully equated portions of the state's brief with quotations from Hitler's *Mein Kampf*. 32 A.C. 757, 784-5 (Cal. 1948).

14. Even Castle, *supra* note 11, at 146, states that there are no biological obstacles to

and fails to allow for environmental factors.¹⁵

Contentions of Negro mental inferiority are based primarily on the fact that American Negroes have scored lower than whites from the same geographical area in most intelligence tests given by race. But there is reason to believe that this disparity is the product of environment rather than of innate inferiority.¹⁶ The Army's famed Alpha Test of World War I, for example, found the median score of Northern Negroes substantially above that of Southern Caucasians.¹⁷ A series of comparative tests in four cities showed similar results. While the performance of Nashville Negroes was substantially below that of their white neighbors, the disparity was smaller in Chicago and non-existent in New York City. And Negro children in Los Angeles, who were relatively few in number and were educated in the same classroom with white children, had an average I.Q. slightly above that of their white companions.¹⁸ The difficulty, of course, is that no testing techniques can completely discount environment: there is as yet no way of testing a newborn infant before the umbilical cord is cut.¹⁹

Equally unproved are contentions that the average American Negro is

crossings between the most diverse human races, while HOLMES, *op. cit. supra* note 11, at 176, points out that there is insufficient data on how the mixed origin of the mulatto affects fertility.

KLINEBERG (a cultural anthropologist) *op. cit. supra* note 13, at 328, states that the samples used in the DAVENPORT-STEGGERDA report, *op. cit. supra* note 12, were too small and were drawn from too heterogeneous a population to provide any trustworthy conclusions. Montagu (a physical anthropologist), in *MAN'S MOST DANGEROUS MYTH—THE FALLACY OF RACE* 116-19 (1942), implies that Davenport's work is not objective; he also attacks the grotesque reasoning of eugenicists like Mjoen, Gregory (by profession a geologist), and Hoffman (a statistician for an insurance firm), (all cited *supra* notes 11 and 12), on grounds that eugenics, being concerned with breeding a superior group, starts with an inherent doctrine of racism. *Id.* at 134, 135.

15. HOLMES, *op. cit. supra* note 11, at 130, states that "the mortality of the Negro is so greatly affected by his environment and habits of life, that for most diseases, it is quite impossible to detect an influence of hereditary racial factors . . ." EMBREE, *op. cit. supra* note 11, at 40, specifies that the Negro death rate today is less than half of what it was fifty years ago.

16. See KLINEBERG, *NEGRO INTELLIGENCE AND SELECTIVE MIGRATION* 59 (1935).

1 MYRDAL, *op. cit. supra* note 1, at 149, states that "when we . . . [study the Negro's performance on psychological tests] on the hypothesis that differences in behavior are to be explained largely in terms of social and cultural factors, we are on scientifically safe ground. If we should, however, approach them on the hypothesis that they are to be explained primarily in terms of heredity, we do not have any scientific basis for our assumption."

17. Yerkes, *Psychological Examining in the U.S. Army*, 15 MEM. NAT. ACAD. SCI. 705-42 (1921); KLINEBERG, *RACE DIFFERENCES* 182 (1935). Studies of troops in World War II are not yet available.

18. PETERSON, *op. cit. supra* note 11, at 6, 11, 12, 38, 91, 96; KLINEBERG, *op. cit. supra* note 17, at 183. The average I.Q. of the Los Angeles Negro children was 104.7, as against an average of 75 for Southern Negro children and 100.0 for Los Angeles white children. Price, *Negro-White Differences in General Intelligence*, 3 J. NEGRO EDUCATION 424, 441 (1934).

19. For a brief statement of the problems not yet met in testing, see 1 MYRDAL, *op. cit. supra* note 1, 149-53.

physically inferior to the average American white. Modern anthropologists state that no inherent inferiority has yet been measured by scientific methods.²⁰ Through popular exaggeration, actual differences in physical appearance, in combination with many imaginary ones, have become synonymous with inferiority.²¹ Admittedly, many of these have played a strategic function in the justification of the American caste system.²² But, after all, they are merely aesthetic differences, which a potential spouse is far more qualified to evaluate than is the legislature.

Nor is there scientific proof that Negroes are inherently more susceptible to diseases such as tuberculosis and pneumonia-influenza.²³ Again, any discrepancy in susceptibility seems to be environmental rather than inherited.²⁴ While the Negro death rate from tuberculosis is now higher than that of the whites, recent studies have shown that it is declining and is lower today than the white rate of a few decades ago.²⁵ And there is some evidence that, prior to the Civil War, tuberculosis was more prevalent among whites than among Negroes.²⁶ One study of a few unusual Tennessee communities, where Negroes work and live in healthier surroundings than do whites, has shown that the Negro tuberculosis rate is the lower of the two.²⁷ In the case of pneumonia-influenza, evidence as to the environmental factor is less direct, but there is little scientific support for any theory of racial susceptibility.²⁸

20. *Id.* at 138, 143. See *Perez v. Lippold*, 32 A.C. 757, 768-70 (Cal. 1948).

21. The differences more commonly referred to are: shorter stature; greater amount of black pigment; wooly or frizzy hair; less body hair; flattened nose; thicker lips; and protruding jaw. 1 MYRDAL, *op. cit. supra* note 1, at 139; BENEDICT, *RACE: SCIENCE AND POLITICS* 100-7 (1940); HERSKOVITS, *ANTHROPOMETRY OF THE AMERICAN NEGRO* (1930) *passim*; KLINEBERG, *op. cit. supra* note 17, 73-89; HERSKOVITS, *THE AMERICAN NEGRO* 34-50 (1928).

As for "primitive characteristics," it is interesting to note that the anthropoids have hairy coats and thin lips, and that the whites most closely approximate these characteristics. Thus the Negro's thick lips and lack of body hair seem to evidence more advanced physical development. BENEDICT, *op. cit. supra* at 101.

Some of the imaginary beliefs are that the Negro has a peculiar and repulsive body odor, and that male Negroes have unusually large genitalia; both of these play a role in the sexual taboos designed to maintain the Caucasian social order. 1 MYRDAL, *op. cit. supra* note 1, at 139-40.

22. See note 1 *supra*.

23. See note 10 *supra*. 1 MYRDAL, *op. cit. supra* note 1, at 140-2 also lists pellagra, syphilis and nephritis. HOLMES, *op. cit. supra* note 11, at 47-129, also lists whooping cough, malaria, tetanus, syphilis, nephritis, heart disease, keloid tumors, nervous disorders, and childbirth diseases.

24. See note 15 *supra*, and 1 MYRDAL, *op. cit. supra* note 1, at 142-3.

25. 1 MYRDAL, *op. cit. supra* note 1, at 142. An excellent study of the physical anthropology of the Negro is LEWIS, *THE BIOLOGY OF THE NEGRO* (1942).

26. See Hoffman, *op. cit. supra* note 11, at 69 (citing preponderant opinion of southern physicians in pre-civil war practice); HOLMES, *op. cit. supra* note 11, at 39. And a survey in Charleston, South Carolina, revealed that the tuberculosis rate in the period 1841-1848 was somewhat lower for Negroes than for whites. See WEATHERFORD & JOHNSON, *RACE RELATIONS* 375 (1934); EMBREE, *BROWN AMERICA* 49 (1st ed. 1931).

27. EMBREE, *op. cit. supra* note 26, at 54.

28. Studies of respiratory diseases have not revealed an hereditary susceptibility. See

Again, investigation reveals no proof of necessarily inferior progeny from miscegenation. Contentions of mulatto sterility²⁹ are unsupportable, for even as their proponents admit they are based on inadequate data which fails to account for such factors as mulattoes passing as whites or Negroes.³⁰ More significantly, since racial commingling has already rendered the pure-blooded Negro a biological rarity,³¹ studies proving the absence of inherent medical and physical inferiorities in the modern Negro group disprove contentions of mulatto inferiority.

In addition to contentions of Negro inferiority, sociological considerations are offered as indicia of the reasonableness of anti-miscegenation statutes. Inasmuch as these considerations probably underlie both legislative and judicial attitudes towards the problem, they merit particular consideration even though their basis is societal rather than constitutional.

Proponents of the statutes argue that miscegenation occurs among the "dregs of society," and that the progeny, therefore, are likely to become a

1 MYRDAL, *op. cit. supra* note 1, at 143; Lowe and Davenport, *A Comparison of White and Colored Troops in Respect to Incidence of Disease*, 5 PROCEEDINGS OF NAT. ACAD. OF SCI. 58-67 (1919).

29. See REUTER, *op. cit. supra* note 11, 50-3; 1 MYRDAL, *op. cit. supra* note 1, at 142-3; Brief for Respondents, pp. 74-5, *supra* note 12.

30. "Passing" is the backwash of miscegenation and one of its surest results. Sometimes it occurs only for limited occupational or recreational purposes. The extent of "passing" is difficult to determine, since those who do pass conceal the fact, and many persons are completely unaware that one of their parents or grandparents has passed. 1 MYRDAL, *op. cit. supra* note 1, 129-130; 2 MYRDAL, *op. cit. supra* note 1, 1209-12; KLINEBERG, *supra* note 14, 301-19. Day, *A Study of Some Negro-White Families in the United States*, 10 HARVARD AFRICAN STUDIES 5, 44-6 (1932), states that out of the 346 families studied, 35 included one or more individuals who had passed. There was an average of 7.3 adults in these families, so her statement would allow an estimate, as a minimum, that 15 out of any 1000 Negroes passed.

See EAST, HEREDITY AND HUMAN AFFAIRS 100 (1927): "A favorite short-story plot . . . is one where the distinguished scion of an aristocratic family marries the beautiful girl with the telltale shadows on the half-moons of her nails and in due time is presented with a coal-black son. . . . There is only this slight imperfection. . . . The most casual examination of the genetic formulae . . . demonstrates its absurdity. If there ever was a basis for the plot in real life, the explanation lies in a fracture of the seventh commandment, or in a tinge of Negro blood in the aristocrat as dark as that in his wife." And see Day, *supra*, at 107.

Another factor is that sex relations between Negroes and whites seem to be decreasing. See REUTER, *op. cit. supra* note 11, 49-51; Day, *supra*, at 108; HERSKOVITS, ANTHROPOMETRY, *op. cit. supra* note 21, 240-1 and AMERICAN NEGRO, *op. cit. supra* note 21, at 30; 1 MYRDAL, *op. cit. supra* note 1, at 127.

31. See 1 MYRDAL, *op. cit. supra* note 1, at 113. In point of fact, the great majority of American Negroes have Caucasian as well as Negroid ancestry. HERSKOVITS, THE AMERICAN NEGRO 25 (1928), states that 80% of American Negroes show mixture with white or American Indian blood. See also EMBREE, *op. cit. supra* note 26, at 9; HERSKOVITS, ANTHROPOMETRY, *op. cit. supra* note 21, at 177; and 2 MYRDAL, *op. cit. supra* note 1, at 1200. "In Latin America whoever is not black is white: in . . . [the United States] whoever is not white is black." 2 BRYCE, THE AMERICAN COMMONWEALTH 555 (Rev. Ed. 1912). In British colonies and dominions the hybrids are considered a group distinct from both whites and Negroes.

burden on the community.³² But the evidence indicates that racial intermarriage now occurs most frequently in the better educated groups.³³ Moreover, the statutes do not purport to aim at or define the amorphous category of "dregs," but rather apply to all racial groups.

More significant is the argument that, since miscegenous marriages expose the spouses and their progeny to social tensions, invalidation of the statutes would increase animosity towards racial minorities.³⁴ Admittedly, these tensions are acute. But the spectre of resultant community violence will materialize only when local law enforcement is lax.³⁵ To prohibit miscegenous marriage in order to avert tension perpetuates by law the very prejudices which have given rise to that tension. Such a procedure can be rationalized only by a policy which would condone total isolation of any individual from the community on the basis of prejudice alone.³⁶

In the absence of evidence establishing a rational basis, racial restrictions on marriage infringe the Constitutional guarantee of "equal protection."

32. HOLMES, *op. cit. supra* note 11, at 174, states that most mixed marriages are between white women and Negro men, and that the women are "usually either unsophisticated recent immigrants or women of very low class." See also REUTER, *op. cit. supra* note 11, at 40. Castle, *supra* note 11, at 146, states that race crossings occur between anti-social and outcast specimens of the respective races, and the "social status of the children is bound to be low, their educational opportunities poor, and their moral background bad," and see *Green v. State*, 58 Ala. 190, 194 (1877) (miscegenation must naturally cause discord, shame, disruption of family circles and the estrangement of kindred).

33. See 32 A.C. 757, 770 (Cal. 1948). The few studies made show that miscegenation occurs mostly in urban communities, and possibly among the better educated Negro males. See KLINEBERG, *op. cit. supra* note 13, 276-300. The "dregs of society" reference in Brief for Respondents, p. 108, *supra* note 12, was taken out of context from Linton, *The Vanishing American Negro*, 64 AMERICAN MERCURY 133, 135 (1947). Professor Linton's thesis was that it is not the "dregs of society," but just the opposite who miscegenated.

34. Brief for Respondents, pp. 97-116, *supra* note 12. DuBois, *Social Equality and Racial Intermarriage*, 5 THE WORLD TOMORROW 83 (March 1922), states that race mingling is dangerous because of widespread and deep-seated racial antagonisms and hatreds, and because of differences of taste. Castle, *supra* note 11, at 154 (strong social prejudice among whites against mixed marriages); REUTER, *op. cit. supra* note 11, at 103 (white sentiment almost universally opposed to mixed unions); 2 MYRDAL, *op. cit. supra* note 1, 1011-15, points out the increased tension in the South in recent years.

Intermarriage is the ultimate danger feared by adherents of a caste system. The closer an act violating a caste taboo comes to sexual association, the more furious is the public reaction. All discussions of the Negro problem sooner or later come down to the classic question, "would you like to have your daughter marry a Negro?" 1 MYRDAL, *op. cit. supra* note 1, at 587; BAILEY, RACE ORTHODOXY IN THE SOUTH 42 (1914). But seldom is reaction aroused by a white's making use of a comely Negress. See 1 MYRDAL, *op. cit. supra* note 1, at 55, 56, 586.

35. There have been few race riots or lynchings in recent years. When these occur, the local police are often known to be on the side of the whites. See 1 MYRDAL, *op. cit. supra* note 1, 567-9; OTTLEY, BLACK ODYSSEY 217, 218 (1948).

There are few reported riots attributable to miscegenation. One in 1834 and one in 1849 seem to be the sole recorded examples. See Woodson, *The Beginnings of the Miscegenation of the Whites and Blacks*, 3 JOURNAL OF NEGRO HISTORY 335, at 349 (1918).

36. See 32 A.C. 757, 772-3 (Cal. 1948).

The State of California, proposing in essence an application of the "separate but equal doctrine" to marriage, argued that the statute was not discriminatory since it applied equally to Caucasians and non-Caucasians.³⁷ But the California court rejected this contention, citing the opinion of the Supreme Court of the United States in *Shelley v. Kraemer*³⁸ that: "equal protection of the laws is not achieved through the indiscriminate imposition of inequalities." The essence of the right to marry is the right to marry whom-ever one wishes, regardless of race.³⁹

Scientific and sociological evidence indicates that anti-miscegenation statutes are merely remnants of a deep-seated cultural lag.⁴⁰ Only an abrogation of the judicial function can explain failure to follow the California court in striking down such legislative expressions of community prejudice.⁴¹

37. See Brief for Respondents, p. 59, *supra* note 12.

38. 334 U.S. 1, 22 (1947).

39. On this ground, the California court attempted to distinguish segregated marriage from segregated travel and education. See 32 A.C. 757, 771 (Cal. 1948). Conceivably, however, holding that there can be no truly equal substitute for the individual's choice in marriage may not be a far cry from holding that there can be no truly equal substitute for the individual's choice in travel and education. The very human relations that so obviously make "separate but equal" inapplicable to marriage, make it just as inapplicable to other relationships. See Note, *Segregation in Public Schools—A Violation of "Equal Protection of the Laws,"* 56 YALE L. J. 1059 (1947).

40. These statutes have extensive repercussions. Most of them are silent as to the effect on the legitimacy of children, but it seems that if the marriage is expressly declared void rather than voidable, the children will be held illegitimate in the absence of a statutory provision to the contrary. *Moore v. Moore*, 30 Ky. L. 383, 98 S.W. 1027 (1907) (even where there was a subsequent valid marriage in another state); *Greenbow v. James*, 80 Va. 636 (1885). *Contra*: *Succession of Caballero*, 24 La. Ann. 573 (1872) (white and Negress had been living together in Louisiana, were married under Spanish law intending to live in Spain. They legitimized their daughter in Spain, and she became their lawful heir in Louisiana). FLORIDA REV. GEN. STAT. §§ 3938-9 (1920) provide that the issue of a miscegenous union shall be regarded as bastards and shall be incapable of having or receiving any estate real, personal, or mixed, by inheritance.

An additional problem posed by these anti-miscegenation statutes is that of dower rights. See cases cited note 3 *supra*; *Britell v. Jorgensen*, 113 Mont. 490, 129 P.2d 217 (1942); *Succession of Gabisso*, 119 La. 704, 44 So. 438 (1907).

A moral problem also ensues. By preventing marriage, the probable effect of illicit relations may be covertly encouraged. In a few instances, moreover, the statutes have been resorted to in an attempt to dissolve a marriage. *Kirby v. Kirby*, 24 Ariz. 9, 206 Pac. 405 (1922); *Ferrall v. Ferrall*, 153 N. C. 174, 69 S.E. 60 (1910).

Additional confusion stems from the conflict of laws rules applied by the different states, some of which make racial intermarriage an exception to the rule that a marriage is valid everywhere if valid where celebrated. See 1 VERNIER, AMERICAN FAMILY LAWS § 45 (1931) and Comment, *Intermarriage With Negroes—A Survey of State Statutes*, 36 YALE L. J. 858, 864-6 (1927). California is not one of these. See *Pearson v. Pearson*, 51 Cal. 120, 125 (1875), and 32 A.C. 757, 775 (Cal. 1948).

41. Two similar cases have recently arisen. A husband claiming to be white was found to be part Negro and sentenced to five years in prison for violating the Mississippi anti-miscegenation statute, N.Y. Times, December 19, 1946, p. 56, col. 1. Perhaps inspired by this decision a lady has now brought similar charges against her son-in-law under the Virginia anti-miscegenation statute. Washington, D.C. Post, December 25, 1948, p. 1, col. 6; December 29, 1948, p. 1, col. 2; December 30, 1948, p. 16, col. 5; January 1, 1949, p. 1, col. 6.

APPENDIX I

STATE ANTI-MISCEGENATION STATUTES

<i>State and Citation</i>	<i>Marriages between Whites and the following prohibited</i>	<i>Effect given such marriages</i>
Alabama ALA. CONST., Art. 4, § 102; ALA. CODE, tit. 14, §§ 360-61 (1940).	Negro or descendent of a Negro to the third generation inclusive, though one ancestor of each generation was a white.	Parties each guilty of a felony.
Arizona ARIZ. CODE, c. 63, §§ 107-8 (1939).	Negroes, Mongolians, Malayans, Hindus, Indians.	Null and void.
Arkansas ARK. STAT., tit. 55, §§ 104-05 (1947).	Negroes or Mulattoes.	Illegal and void.
California CAL. CIVIL CODE, § 60 (Deering 1937).	Negroes, Mongolians, Malayans, or Mulattoes.	Illegal and void.
Colorado COLO. STAT. ANN., c. 107, §§ 2, 3 (1935).	Negroes or Mulattoes.	Absolutely void. Misdemeanor.
Delaware REV. CODE, § 2992 (1915) amended by Sess. Laws, p. 578 (1921).	Negro or Mulatto.	Void. Misdemeanor.
Florida FLA. CONST., Art. 16, § 24; STATS. ANN., §§ 741.11-12 (1944).	Any Negro, a person having more than or at least one-eighth Negro blood.	Utterly null and void. A felony.
Georgia GA. CODE ANN., §§ 53-106, 53-9902, 53-9903 (1937).	Negroes, Indians, Malayans, Mongolians, Asiatic Indians, West Indians, or Mulattoes.	Utterly void, null and void. A felony.
Idaho IDA. CODE, § 32-206 (1947).	Mongolians, Negroes, or Mulattoes.	Illegal and void.
Indiana IND. STAT. ANN., § 44-104 (1933).	Persons having one-eighth or more of Negro blood.	Absolutely void without any legal proceedings. A felony.
Kentucky REV. STAT. ANN., § 402.010 (1946).	Negro or Mulatto.	Prohibited and declared void.
Louisiana LA. CIVIL CODE, Art. 94 (1945).	Negroes. Intermarriage of Indians and Negroes prohibited.	Have no effect and are null and void.
Maryland Code, Art. 27, § 365 (1924); Laws, c. 60 (1935).	Negroes, or a person of Negro descent to the third generation. Malayans. Marriages of Negroes and Malayans are also prohibited.	Void. Felony.
Mississippi MISS. CONST., Art. 14, § 263; Code, tit. 4, § 459; tit. 11, §§ 2002, 2234, 2339 (1942).	Negro, Mulatto, or Mongolian. Any person having one-eighth or more Negro or Mongolian blood.	Unlawful and void. Felony.

<i>State and Citation</i>	<i>Marriages between Whites and the following prohibited</i>	<i>Effect given such marriages</i>
Missouri..... MO. REV. STAT., §§ 3361, 4651 (1942).	Persons having one-eighth or more Negro blood. Mongolians.	Prohibited and de- clared absolutely void. Felony.
Montana..... MONT. REV. CODES, §§ 5700- 5702 (1935).	Negro or a person of Negro blood or in part Negro. Chinese person and Japanese person.	Utterly null and void
Nebraska..... NEB. REV. STAT., § 42-103 (1943).	Persons possessed of one-eighth or more Negro, Japanese, or Chinese blood.	Void.
Nevada..... NEV. COMP. LAWS, §§ 10197- 10200 (1929).	Any person of Ethiopian or black race, Malay or brown race, or Mongolian or yellow race.	Unlawful. Misde- meanor.
North Carolina..... N. C. CONST., Art. 14, § 8; STAT., § 51-3 (1943).	Negro or Indian, or person of such descent to the third generation, or a Cherokee Indian of Robeson County and a Negro, or any persons of such de- scent to the third generation.	Void. Felony.
North Dakota..... N. DAK. CODE, §§ 14-0304, 0305 (1943).	Negro or person having one-eighth or more Negro blood.	Void. Felony.
Oklahoma..... OKLA. STAT., tit. 43, §§ 12- 14 (1938).	Any person of African descent.	Unlawful and prohib- ited. Felony.
Oregon..... ORE. COMP. LAWS, § 63-102 (1940).	Negro or Mongolian, or any person having one- fourth or more of Negro or Mongolian blood.	Prohibited. Felony.
South Carolina..... S. CAR. CONST., Art. 3, § 33; SO. CAR. CODE, §§ 8571, 1438 (1942).	Negroes, Indians, Mulattoes, or half-breeds.	Unlawful and prohib- ited. Misdemeanor.
South Dakota..... SO. DAK. CODE, § 14.0106 (1939).	Members of the African, Korean, Malayan, or Mongolian races.	Void. Felony.
Tennessee..... TENN. CONST., Art. 11, § 14; TENN. CODE, § 8409 (1938).	Negroes, Mulattoes, or persons of mixed blood descended from a Negro, to the third generation inclusive.	Prohibited and unlaw- ful. Felony.
Texas..... CIVIL STAT., § 4607 (1925).	Africans or the descendants of Africans.	Null and void. Felony.
Utah..... Code, § 40-1-2 (5, 6) (1943).	Negroes, Mongolians, Malayans, Mulattoes, quad- roons, or octoroons.	Void and prohibited.
Virginia..... Code, §§ 5087, 5099a(5) (1942).	Colored persons. White can only marry a person with no other admixture of blood than white or one-sixteenth or less American Indian blood.	Void without any de- cree or legal process. Felony.
West Virginia..... Code, § 4701 (1943).	Negroes.	Void. Misdemeanor.
Wyoming..... REV. STAT., c. 68-118 (1931).	Negroes, Malayans, Mongolians, and Mulattoes.	Illegal and void. Mis- demeanor.