IN THE

Supreme Court of the United States

October Term, 1966.

No. 395.

RICHARD PERRY LOVING, et al.,
Appellants,

v.

COMMONWEALTH OF VIRGINIA.

On Appeal From the Supreme Court of Appeals for Virginia.

BRIEF OF AMICI CURIAE JAPANESE AMERICAN CITIZENS LEAGUE.

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v.

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ON APPEAL FROM THE SUPREME COURT OF APPEALS
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BRIEF OF AMICI CURIAE JAPANESE AMERICAN CITIZENS LEAGUE.

INTEREST OF AMICI CURIAE.

According to the 1960 United States census report compiled by the Bureau of the Census, Department of Commerce, there were 1,733 "Japanese" residing in the state of Virginia. The 1960 census report also lists 464,332 Japanese to be residing in the United States of whom 17,911 were residents of the seventeen States which presently maintain anti-miscegenation statutes.[1] And while of these

1. Alabama 500; Arkansas 237; Delaware 152; Florida 1,315; Georgia 885; Kentucky 664; Louisiana 519; Maryland 1,842; Mississippi 178; Missouri 1,473; North Carolina 1,265; Oklahoma 749; South Carolina 460; Tennessee 507; Texas 4,053; Virginia 1,733 and West Virginia 176.

seventeen States, only Georgia's anti-miscegenation statute expressly mentions "Japanese" [2] several other anti-miscegenation statutes employ terms such as "Malay race",[3] "Mongolian",[4] and in Oklahoma [5] and Texas [6] presumably Japanese would be classed as "white persons" although this is by no means clear. Further, as to the remainder of these seventeen States it is similarly unclear as to whether or not a person of Japanese ancestry is a member of the class severally designated as "white person", "Caucasian" or "colored person."

Because of these confusions which peculiarly plague persons of Japanese ancestry and those similarly situated and further as an American organization vitally interested in, and concerned with, the dignity and liberty of all Americans, the Japanese-American Citizens League ("J.A.C.L.") files this brief *amici curiae*. Briefly, the J.A.C.L. is a non-profit, charitable organization with a national membership in excess of 20,000 persons who reside throughout the United States and while its membership is largely comprised of persons of Japanese ancestry, its membership also includes, without limitations, Americans of varied faiths, creed and color.

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2. Georgia Code Annotated, Tit. 53, § 312. *"White person defined.* The term 'white person' shall include only persons of the white or Caucasian race, who have no ascertainable trace of either Negro, African, West Indian, Asiatic Indian, Mongolian, Japanese, or Chinese blood in their veins. No person, any one of whose ancestors has been duly registered with the State Bureau of Vital Statistics as a colored person or person of color, shall be deemed to be a white person." (Other relevant sections of the Georgia Code are set forth in Appendix A, under "Relevant Portions of State Statutes".)

3. Anno. Code of Maryland, Art. 27, § 398.

4. Mississippi Code Anno., § 459; Vernon's Anno. Missouri Stat. § 451.020.

5. Oklahoma Constitution, Art. 23, § 11.

6. Vernon's Texas Penal Code, Art. 493.

SUMMARY OF ARGUMENT.

I.

Since *Pace v Alabama,* 106 US 583 (1882) the rights, privileges and immunities of the individual in many facets and spheres of his life have, under the Fourteenth Amendment, been safeguarded to him, free of the odious circumscription of laws based on race. Vital and all-important as these rights are to the individual and to the preservation of a democratic society of free men, such rights appear as palpable and material ones in contrast to the intimate, personal right of privacy in marriage: *Griswold v Connecticut,* 381 US 479. Freedom in marriage concerns one of the most basic and fundamental rights of the individual, rooted, indeed, in one of man's biological drives. The mutual exercise by two individuals of such a right,—a noble goal otherwise promoted and blessed by society,—should not be converted into a crime or otherwise stigmatized by law merely because of race.

It would constitute a shocking outrage if the anti-miscegenation laws of Virginia (and the other sixteen States) directed that its citizens must marry a person of a *different* race. That this same operative principle is geared to operate in the other direction by the anti-miscegenation statutes makes it no less demeaning to the citizen and an invidious invasion of a basic, fundamental right.

Rather, the freedom of choice,—the freedom of choice *not* to marry a person of another race as well as the freedom to marry another without regard to race,—should and must reside with the individual, not with the government.

Pace v Alabama, supra, is not authority for sustaining anti-miscegenation laws: First, the "limited view [of *Pace*] of the Equal Protection Clause has not withstood analysis in the subsequent decisions of this Court": *McLaughlin v Florida,* 379 US 184, 188. Secondly, it is respectfully but firmly submitted that the narrow view expressed in *Pace*

was inherently faulty and misleading. What *Pace* failed to consider was whether or not "the same punishment to both offenders, the white and the black" (106 US at 207), would have been meted out if there had been two males, one white and the other Negro, who had been guilty of *identical acts* of "adultery and fornication" with the *same female* (white or "black"); it is clear that the punishment would differ and differ solely because of race. The same inequities would apply with even more gross injustice in the enforcement of anti-miscegenation laws, for miscegenous couples would be punished for engaging in an act, i.e. marriage, which is not only otherwise legal but which also is actually otherwise encouraged and blessed by the state.

II.

Where the exercise of state police power "trenches upon the constitutionally protected freedom from invidious discrimination based on race" such "bears a heavy burden of justification. . . .": *McLaughlin v Florida,* 379 US 184, 196. Virginia's state policy in support of its anti-miscegenation laws has been expressed in terms of maintaining "purity of public morals", "the preservation of racial integrity" and to prevent a "mongrel breed of citizens" as well as "obliteration of racial pride." Even assuming *arguendo* such objectives to be valid state interests (and within this racist context we cannot accept such assumption), since all races *other than white* remain free to intermarry with one another and thereby destroy *their* racial "purity", "integrity" and "pride", the insidious sophism of Virginia's state policy, as well as those of the other sixteen states with anti-miscegenation laws, is readily exposed as a racist, "white supremacy" law which is repugnant "to a free people whose institutions are founded upon the doctrine of equality": *Hirabayashi v United States,* 320 US 81, 100.

III.

Anti-miscegenation statutes have grown out of fundamental misconceptions of fact and serve no public purpose. The use of racial classification as a basis upon which to regulate the actions of individuals must be immediately suspect because such classifications are necessarily arbitrary and incapable of precise application. The stated purpose of the anti-miscegenation laws is to preserve pure races which the legislators thought were separate and distinct entities, but this is clearly not so and there is no such thing as a pure race. The underlying purpose is to preserve racial superiority—of the white race only—but there is no proof that the white race is superior. Moreover, the entire concept of a "master race" is repugnant to our society. When the fictitious foundations of these laws have been dispelled, the only remaining purpose is to preserve differences, such as skin color, nose size or hair types, which are clearly not valid bases of legislation. Finally, the laws must fall because they contain standards of proof which are impossible of application and are unconstitutionally vague. Such statutes, the surviving vestige of an era of exploitation and ignorance, cannot be tolerated.

ARGUMENT.

I.

It Is Respectfully But Firmly Urged That *Pace v Alabama*, 106 US 583, Should Be Overruled Not Only Because the Reasoning in That Early Case Is Inconsistent With Subsequent Decisions of This Court But Also Because the Reasoning in That Case Was and Is Inherently Fallacious.

(A) The Reasoning of *Pace v Alabama* Is Inconsistent With the Subsequent Decisions of This Court and Such Reasoning Should No Longer Be Given Any Currency.

Since 1882, almost 85 years ago, when an Alabama criminal statute founded solely upon race was upheld in *Pace v Alabama*, 106 US 583, on the reasoning that it applied "the same punishment to both offenders, the white and the black", this Court has over the years repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality". *Hirabayashi v United States*, 320 US 81, 100. The torchlight of the Constitution has been wielded to expose and burn away these remaining shackles to individual liberty and to cast forth light extending "to the full range of conduct which the individual is free to pursue, and [which] cannot be restricted except for a proper governmental objective." *Bolling v Sharpe*, 347 US 497, 499-500. And so it was that various rights of citizens and residents of this land have been reaffirmed and upheld, including the right to follow an occupation without discriminatory harassment or restrictions on account of race;[7] to freely enter into contracts[8]

7. *Yick Wo v Hopkins*, 118 US 356; *Truax v Raich*, 239 US 33; *Takahashi v Fish and Game Commission*, 334 US 410; *Steele v Louisville & Nashville RR Co.*, 323 US 192; *Colorado Anti-Discrimination Commission v Continental Air Lines*, 372 US 714.

8. *Adkins v Children's Hospital*, 261 US 525; *Holden v Hardy*, 169 US 366; *Allgeyer v Louisiana*, 165 US 578.

and to own land;[9] to learn foreign languages[10] or to maintain business records in a foreign language;[11] to receive schooling without regard to race,[12] without procrastination by purported spectres of racial violence[13] and free of schemes to perpetuate racial segregation;[14] to freely engage in inter-racial sports[15] and to attend public events on a non-segregated basis[16] as well as to have equal access to public facilities without regard to race;[17] to register to vote[18] and cast ballots unhampered by racial gerrymandering schemes[19] using ballots free of racial designations of candidates;[20] to travel freely from State to State[21] on non-segregated transportation facilities;[22] to have freedom of

9. *Oyama v California,* 332 US 633.

10. *Meyer v Nebraska,* 262 US 390.

11. *Yu Cong Eng v Trinidad,* 271 US 500.

12. *Brown v Board of Education,* 347 US 483.

13. *Cooper v Aaron,* 358 US 1.

14. *Goss v Board of Education,* 373 US 683.

15. *State Athletic Commission v Dorsey,* 359 US 533, affirming 168 F. Supp. 149 (E.D. La. 1958).

16. *Schiro v Bynum,* 375 US 395, affirming 219 F. Supp. 204 (E.D. La. 1963).

17. *New Orleans v Barthe,* 376 US 189 (public parks and playground), affirming 219 F. Supp. 788 (E.D. La. 1963); *Evans v Newton,* 382 US 296 (public park, title to which had been transferred to individual trustees); *Wright v Georgia,* 373 US 284 (public playground); *Burton v Wilmington Parking Authority,* 365 US 715 (restaurant in parking facilities leased from municipality); *Turner v Memphis,* 369 US 350; *Katzenbach v McClung,* 379 US 294 (public restaurant); *Johnson v Virginia,* 373 US 61 (seating in courtroom); *Atlanta Motel v United States,* 379 US 241 (public accommodations).

18. *Louisiana v United States,* 380 US 145; *South Carolina v Katzenbach,* 383 US 301.

19. *Gomillion v Lightfoot,* 364 US 399.

20. *Anderson v Martin,* 375 US 399.

21. *Edwards v California,* 314 US 160; *United States v Guest,* — US —, 16 L ed 2d 239.

22. *Taylor v Louisiana,* 370 US 154; *Bailey v Patterson,* 369 US 31; *Morgan v Virginia,* 328 US 373.

association unfettered by the taxing power;[23] and to have the security of "protection of equal laws"[24] so that criminal penalties are not imposed upon persons for certain acts merely because the actors happen to be of differing races.[25]

These are but some of the rights and protections safeguarded to the individual. "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." *Shelly v Kraemer,* 334 US 1, 22. Now the question before the Court is whether the vitally personal "right of the individual . . . to marry . . . to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men", *Meyer v Nebraska,* 262 US 390, 399-400[26] may be circumscribed by racial classifications or whether such classification constitutes "an invidious discrimination forbidden by the Equal Protection Clause". *McLaughlin v Florida,* 379 US 184, 192-193. It involves "one of the basic civil rights

23. *Bates v Little Rock,* 361 US 516.

24. *Yick Wo v Hopkins,* 118 US 356; "The equal protection of the laws is 'a pledge of the protection of equal laws' ". *Missouri ex rel Gaines v Canada,* 305 US 337, 350.

25. *McLaughlin v Florida,* 379 US 184.

26. *Meyer v Nebraska,* 262 US 390, 399-400: "While this court has not attempted to define with exactness the liberty thus guaranteed, the term ["No state . . . shall deprive any person of life, liberty, or property without due process of law"] 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 acquire useful knowledge, *to marry,* establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally *to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.* [Cases cited] *The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest,* by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." Emphasis added.

of man": "Marriage and procreation are fundamental to the very existence and survival of the race." *Skinner v Oklahoma,* 316 US 535, 541.

So personal is the exercise of this basic right of two individuals mutually selecting one another as their respective life partners in marriage,[27] and so intertwined is that choice with the fundamental concept of "life, liberty and the pursuit of happiness", that even under the now-rejected "separate but equal" doctrine of *Plessy v Ferguson,* 163 US 537, such right could not be abrogated by an edict directing an individual to seek a different mate who is just as "equal". For example, if his mutual selection involved one of two identical twins, no power, no statute, no edict could, or should, direct him to shift his choice even to the other "equal" identical twin. This is the nature of the basic fundamental right presently before this Court.[28]

In *McLaughlin v Florida, supra,* even though the Florida statutory prohibition involved "concepts of sexual decency . . . dealing . . . with extramarital and premarital promiscuity", *supra* at 193, yet because such statute was formulated on racial classification and laid "an unequal hand on those who . . . committed intrinsically the same quality of offense", *supra* at 194, this Court struck down such statutory provision as "invidious official discrimination based on race." *Supra* at 196. On the other hand, in the instant case of the appellants before this Court, the state statute of Virginia seeks, not to deter sexual promis-

27. *Griswold v Connecticut,* 381 US 479, 491: "To hold that a right so basic and fundamental and so deep rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments . . . or elsewhere in the Constitution would violate the Ninth Amendment . . ."

28. Cf *Perez v Lippold,* 32 Cal. 2d 711, 714, 198 P. 2d 17, 18-19 (1948); "Marriage is thus 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."

cuity or such similar opprobrious activity but rather the noble and necessary goal common to all persons—"[m]arriage and procreation [which] are fundamental to the very existence and survival of the race." *Skinner v Oklahoma,* 316 US 535, 541. If racial classification may not be imposed in a purported effort to curb sexual promiscuity then clearly racial classifications ought not be imposed to curb a person's noble aspiration of marriage.

(B) The Exercise or Imposition of Governmental Laws or Power Based Upon Race Has No Proper Place in Controlling, or Seeking to Control, the Fundamental, Basic and Highly Personal Right of Marriage.

Racial classification as a standard has no proper place in governmental action invading and seeking to dictate and regulate one of the most basic and intimate areas of a citizen's life, rising, indeed, even above many fundamental liberties in that the exercise of such right by the individual also involves one of man's basic biological drives.

The anti-miscegenation laws of Virginia and of the other sixteen states attempt to use race as a standard for determining and controlling, under the threat of various criminal sanctions as well as civil consequences, whom an individual may or may not marry. The nature and extent of this infringement upon the individual's vital right to choose his, or her, life mate in marriage may be exposed by applying the operative racial principle in reverse: it would be a shocking outrage if the state marriage laws directed that all its citizens must marry a person of a *different* race. That this same operative racial principle is geared in the other direction by the anti-miscegenation statutes makes it no less a shocking outrage which is demeaning to the citizen.

Rather, the freedom of choice,—the freedom of choice *not* to marry a person of another race as well as the freedom

to marry another without regard to race,—should and must reside with the individual, not with the government.

(C) The Reasoning in *Pace* Was and Is Inherently Misleading and Thereby Faulty.

Appellee, the Commonwealth of Virginia, would seek to sustain its racial laws on the eroded foundation of *Pace v Alabama,* 106 US 583, a foundation which this Court has viewed as not having "withstood analysis in the subsequent decisions of this Court." *McLaughlin v Florida,* 379 US 184, 188. It is respectfully but firmly submitted that not only did *Pace* narrowly view the Equal Protection Clause but also that its reasoning was inherently misleading.

Pace narrowly viewed an act involving a Negro male and a white female and concluded that the equal protection requirements were satisfied because the Alabama criminal statute imposed "the same punishment to both offenders, the white and the black." *Supra* at 207. What *Pace* failed to consider, however, was whether or not the same punishment would have been meted out to a white male who also may have been engaged, or could have been engaged in the *same act* with the *same white female.* Thus if two males,—one white and the other Negro,—had each been guilty of "adultery and fornication" with the same white female (or with the same Negro female), the punishment for the very same offense would differ and differ only because of race. A similar disparity would apply to the female in each particular instance.

This very same inequitable principle is given operative effect under the anti-miscegenation laws but with even greater injustice. For example, if two "white persons" enter into the marital status, such is not only not a crime but is indeed blessed by the state; however, if this couple be divorced and thereafter the ex-husband (or the ex-wife) should again enter into the very same status, i.e. marriage, but this time with a person who happens to be non-white,

now this otherwise blessed matrimonial state is converted into a *crime*—and solely on account of race, nothing else.

The attenuated doctrine of *Pace,* including its progeny of anti-miscegenation laws, should no longer be allowed currency among "free people whose institutions are founded upon the doctrine of equality": *Hirabayashi v United States,* 320 US 81, 100. *Pace* should be expressly overruled and the anti-miscegenation laws, in particular that of Virginia's, should be struck down as an affront to the dignity of all citizenry of our society.

II.

Virginia's Anti-Miscegenation Laws, as Well as Such Laws in the Remaining Sixteen States With Anti-Miscegenation Statutes, Violate the Right to "Equal Protection of the Laws" Not Only as to Its Non-White Citizens But Also as to Its White Citizens.

Assuming that "races" can be defined,—and as discussed hereinbelow, any classification is arbitrary,—Virginia's anti-miscegenation statutes [29] further run afoul of the Equal Protection Clause. Its statute declares that it shall be "unlawful for any white person in this State to marry save a white person or a person with no other admixture of blood than white and American Indian" [30] and also declares that "All marriages between a white person and a

29. Virginia Code § 20-50 *et seq.,* set forth under "Relevant Portions of State Statutes."

30. Virginia Code § 20-54: "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. For the purpose of this chapter, the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter."

colored person[31] shall be absolutely void without any decree of divorce or other legal process."[32]

When the state exercises its police power, and, as here, "trenches upon the constitutionally protected freedom from invidious official discrimination based on race", then, "[s]uch a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification . . . and will be upheld only if it is necesary . . . to the accomplishment of a permissible state policy." *McLaughlin v Florida,* 379 US 184, 196. Virginia's "state policy" for its anti-miscegenation statutes has been expressed in terms of maintaining "purity of public morals",[33] "the preservation of racial integrity,"[34] and, more recently, to prevent "a mongrel breed of citizens" as well as "obliteration of racial pride."[35] Accepting *arguendo* at face value the "state policy" of Virginia as so expressed, it is readily apparent that the only "purity", the only "racial integrity", the only avoidance of alleged mongrelization of the race are for *whites only* and *none other,* for under Virginia's laws, *all other races* are free to intermarry and thereby "despoil" one another without similar statutory safeguards for preservation of *their* "racial integrity" and "purity" and "pride". An example of more *un*equal protection of the laws can hardly be summoned.

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31. The purported, and circuitous, definition of "colored persons" is set forth in a separate section of the Virginia Code, § 1-14, as follows: "Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one-fourth or more of American Indian blood shall be deemed an American Indian; except that the members of Indian tribes existing in this Commonwealth having one-fourth or more of Indian blood and less than one-sixteenth of Negro blood shall be deemed tribal Indians."

32. Virginia Code § 20-57.

33. *Kinney v The Commonwealth,* 71 Va. 858, 869 (1878).

34. *Wood v Commonwealth,* 159 Va. 963, 965; 166 SE 477 (1932).

35. *Naim v Naim,* 197 Va. 80, 90; 87 SE 2d 749, 755 (1955).

However, we do not for a moment suggest that the answer is to extend this racist principle,—for divested of its sophistry it is readily exposed as such,—to other races and thereby further compound this antithesis to the establishment and maintenance of a democratic society of free men.

In addition to denying the equal protection of the laws *inter*-racially, Virginia's anti-miscegenation laws also operate to deny equal protection of the laws to its citizens *intra*-racially. This comes about because Virginia's prohibition against entering into miscegenous marriages applies to a "white person *in this State*" [36] and to its residents who "shall go *out of this State,* for the purpose of being married. . . ." [37] Thus, should a non-resident interracial married couple move into Virginia and there establish a domicile then that particular interracial couple would enjoy rights and privileges which are denied to their respective counterpart citizens who are indigenous to Virginia, namely the right to marry and cohabit as man and wife without regard to racial differences.[38]

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36. Virginia Code, § 20-54. Emphasis added.

37. Virginia Code § 20-58. Emphasis added.

38. Of the remaining sixteen states with anti-miscegenation laws, the following four states appear to recognize the civil validity of interracial marriages by out-of-state non-residents:

Delaware, *Anon. v Anon.,* 46 Del. 458, 85 A.2d 706 (1951).

Kentucky, Revised Statutes, § 402.040: "If any resident of this state marries in another state, the marriage shall be valid here if valid in the state where solemnized."

Missouri, *Johnson v Johnson's Adm'r,* 30 Mo. 72 (1860); Op. Att'y Gen. No. 87, Hamilton 10-16-62.

North Carolina, *State v Ross,* 76 N.C. 242, 22 Am. Rep. 678 (1877).

The following eight states would refuse to recognize miscegenous marriages of couples who moved into these states regardless of the validity of such marriage where contracted:

Alabama, *Osoinach v Watkins,* 235 Ala. 564, 180 So. 577 (1938).

Arkansas would appear to deny recognition to out-of-state marriages of non-residents who move into Arkansas. Ark. Stat.

However, should Virginia's laws be construed and applied to bar non-resident interracial couples from coming into or residing in Virginia[39] such would violate the privileges and immunities clause of the Fourteenth Amendment.[40]

Anno., § 55-104: "All marriages of white persons with negroes and mulattoes are declared to be illegal and void." At the very least, such couples would be subject to the penalty of "concubinage" which is defined in § 41-807 as "The living together or cohabitation of persons of the Caucasian and of the negro race. . . ."

Florida, *Whittington v McCaskill,* 65 Fla. 162, 61 So. 236 (1913).

Georgia, *State v Tutty,* 41 Fed. 753 (Cir. Ct., S.D., Ga. 1890).

Louisiana, 1948—50 Op. Att'y Gen. 248.

Maryland, *Jackson v Jackson,* 82 Md. 17, 33 A. 317 (1895), *dictum.*

Mississippi, *Miller v Lucks,* 203 Miss. 824, 36 So. 2d 140 (1948).

Oklahoma, *Stevens v United States,* 146 F.2d 120 (CCA 10, 1944); *Baker v Carter,* 180 Okla. 71, 68 P.2d 85 (1937).

The remaining four states,—South Carolina, Tennessee, Texas and West Virginia,—remain unsettled as to the civil effect to be given to a miscegenous marriage validly entered into by non-residents in another state. However, in Tennessee and Texas such miscegenous couples would be subject to criminal penalties for illegal cohabitation. Tenn. Code Anno. § 36-402: "The intermarriage of white persons with negroes, mulattoes, or persons of mixed blood descended from a negro, to the third generation inclusive, or their living together as man and wife in this state is prohibited." Vernon's Texas Penal Code, Art. 492: "If any white person and negro shall knowingly intermarry with each other in this State, or having so intermarried in or out of the State shall continue to live together as man and wife within this State, they shall be confined in the penitentiary not less than two nor more than five years."

39. Va. Code § 20-57. "All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process." As indicated in footnote 38, *supra,* of the seventeen states only four would recognize an out-of-state interracial marriage of parties who move into their states. In the remaining twelve states such marriages would be invalid in eight states and highly questionable in the last four states.

40. "The right to move freely from State to State is an incident of *national* citizenship protected by the privileges and immunities

Aside from the question of vagueness arising from statutes, courts and juries seeking to do what anthropologists with their scientific expertise have difficulty doing, namely, attempt to formulate and classify races of mankind, there also exist insidious uncertainties as well as confusion in these anti-miscegenation laws. For further example, under Virginia's penal provision § 20-59 criminality applies only to intermarriages of a "white person" and a "colored person" and § 1-14 defines a "colored person" as any person "in whom there is ascertainable any Negro blood." Thus, if a "white person" and a Japanese married while such would be unlawful under § 20-54, under the penal provisions of § 20-59 only the "white person" would be subject to criminal sanctions and the Japanese, being neither a "white person" nor a "colored person" presumably would, on the face of things, incur no criminal penalties. But this is far from being clear by reason of the last sentence of § 20-54 which reads:

> "All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter."

Thus, by this catch-all provision, an unsuspecting Japanese, as well as any other person similarly situated, might suddenly find himself swept into the web of those particularized provisions which, by their very specificity, appear to exclude Japanese.

The anti-miscegenation laws of the other sixteen states are similarly fraught with inconsistencies and injustices

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clause of the Fourteenth Amendment against state interference. Mr. Justice Moody in *Twining v New Jersey,* 211 US 78, 97 . . . stated, 'Privileges and immunities of citizens of the United States . . . are only such as arise out of the nature and essential character of the National Government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States.' And he went on to state that one of these rights of *national* citizenship was 'the right to pass freely from State to State.'" Justice Douglas (concurring opinion) *Edwards v California,* 314 US 160, 178.

and some of these are referred to under "comments" of the *amici curiae* in the Appendix of the "Relevant Portions of State Statutes".

III.*

Anti-Miscegenation Statutes Are Based on Fundamental Misconceptions of Fact Which Render Them Unconstitutionally Arbitrary and Vague and Which Bear No Relationship to Any Legitimate Legislative Purpose.

(A) Racial Classification Necessarily Requires Arbitrary Selection of Population Groups and Its Use for Purposes of Legislation Must Be Highly Suspect.

> "The scientific study of human races is at least two centuries old. There are nevertheless few natural phenomena, and probably no other aspect of human nature, the investigation of which has so often floundered in confusion and misunderstanding." [41]

Although anti-miscegenation laws were enacted during the height of the confusion and misunderstanding about the concept of race, even upon today's understanding, race is a tremendously difficult subject involving arbitrary classifications which are not fit categories for legislation.

It is now generally agreed that Man, the genus *Homo,* is represented by a single species to which all living races belong. Species are groups of inbreeding natural populations, reproductively isolated from other such groups. "Reproductive isolation" does not refer to spatial or geo-

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* Some of the bibliographical source material concerning the theoretical aspects of race used in this section were suggested by S. H. Katz, Department of Anthropology, University of Pennsylvania and L. Van Horn, Department of Anthropology, Hunter College, New York.

41. Dobzhansky, *Mankind Evolving,* 253 (1962).

graphical isolation, but rather to *inability* to mate with other species to produce fertile progeny. A species, therefore, is a genetically closed system, since new genes, the biological units of inheritance, cannot be obtained from other groups and passed on through fertile hybrids. Thus, the species is the basic group for biological and anthropological classification.[42]

Between the individual organism—which is the basic unit of the species—and the species itself, is another layer of classification known as race. Racial classification is a classification based on population groups within the species, which because of social or geographical boundaries, have tended to inbreed among themselves over long periods of time. As a result of this endogamy, they tend to express certain similar physical and genetic characteristics.[43]

The process of classification has recently been described in this manner:

> "A race of *Homo sapiens* is a Mendelian population, a reproductive community of individuals sharing a common gene pool. The level at which the reproductive community is defined depends upon the problem one is interested in investigating. There is no absolute, final or 'true' level at which these reproductive communities are defined. All members of our species belong to one Mendelian population, and its name is *Homo sapiens*. This large species-wide Mendelian population may be divided into smaller Mendelian populations, for all practical purposes an infinitely large number of them . . . Races are open genetic systems, and as such they are quite different from species." [44]

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42. See generally: Simpson, *Principles of Animal Taxonomy* 18, 148-152 (1961); Dobzhansky, *op. cit.* (1962).

43. See Johnston, *The Population Approach to Human Variation,* 134 Annals of the New York Academy of Sciences (Feb. 28, 1966), pp. 507-515.

44. Beuttner-Janusch, Book Review, American Journal of Physical Anthropology, 25:2, September, 1966, p. 184.

The practical truth of the statement that races are infinite is shown by Garn and Coon in an article "On the Number of Races of Mankind." [45] Differing classificatory systems have listed as few as two races and as many as two hundred. The difference depends upon whether the classifier is a "lumper," who groups a number of varieties into one broad category because the differences are too trivial to warrant special classification, or a "splitter," who believes that any distinct variety merits attention.[46] The problem usually resolves itself into the classification of a few geographical races, or many local or microgeographical races.

A geographical race may be defined as "a collection of similar populations inhabiting a broad continental area or island chain." A local race is a more neatly circumscribed physically or socially isolated inbreeding population group. If the classifier uses the geographical races, then the number is "approximately six or seven." If the classifier uses local races, the number is "upwards of thirty." [47] In other words, even at the level of greatest generalization, the number is only an approximation.[48] Geographical races, as used in the Virginia statute, are merely "collections of convenience." [49]

Moreover, when an individual leaves his population group and mates with an individual in another group, the racial classification of the offspring is immediately put in question. When miscegenation—which within the last five

45. 57 American Anthropologist 996 (1955).

46. Garn, *Human Races,* 12 (1961).

47. Garn & Coon, *op. cit.* 999.

48. The Virginia statute appears to be based on geographical races when it uses the terms Caucasian, Negro, Mongolian, American Indian, Asiatic Indian and Malay as the basis for its certificates of racial composition in § 20-50. But there is, of course, no agreement on the precise number of geographical races or of the peoples included within them. See classifications noted in Comas, *Manual of Physical Anthropology,* 1960, pp. 18-19; 303-309, and Dobzhansky, *op. cit.* pp. 262-265.

49. Garn and Coon, *op. cit.* 1000.

centuries has risen to rates unprecedented in human history —becomes wide-spread, the arbitrary "classifications of convenience" become even more blurred. And yet these are the standards which have been enacted into law as the basis upon which citizens of Virginia can be imprisoned for up to five years. Such statutes must be immediately suspect.

(B) Statutes Based on Racial Discrimination Serve No Public Purpose and Are Therefore Invalid.

[1] *Racial Purity Can Not Be Preserved Because Racial Purity Does Not Exist.*

The stated purpose of the present Virginia statute is "the preservation of racial integrity."[50] A similar statute was upheld in Missouri as a valid attempt to preserve "the purity of African blood" (although it contained no prohibition against Negro-Japanese or other Negro-non-white marriages).[51]

From an understanding of the concept of race as the classification of generally endogomous population groups separated only by geographical and/or social barriers, it necessarily follows, however, that there is no such thing as a "pure race". Anthropologists are unanimous in their conclusion that pure races do not now exist and never have.

> "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."[52]

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50. The legislative history of the Virginia statutes (see Appellants' Brief) illustrates that the original anti-miscegenation laws were based in part on the premise that the races must be kept separate for political, social and economic reasons associated with slavery. The concept of such separation enforced by law is now so repugnant to our legal system that it need not be discussed.

51. *State v Jackson,* 80 Mo. 175 (1883).

52. Dobzhansky, "The Race Concept in Biology", The Scientific Monthly, LII (Feb., 1941), pp. 161-165; see also citations collected in Weinberger, "A Reappraisal of the Constitutionality of Miscegenation Statutes", 42 Cornell L.Q. 208 (1957).

The geographical and social barriers which separate races are not absolute and there has always been intermixture of the groups. By this logic, as soon as there was a single hybrid offspring, the race was no longer pure. Enough population movement has been known to our species to make it clear that such miscegenation has not been an isolated or rare phenomenon. A statute intended to preserve the non-existent purity of an arbitrarily selected class cannot stand.

[2] *Preservation of Racial Superiority Is Neither a Meaningful Nor Legitimate Statutory Purpose.*

(a) *The Myth of Racial Superiority Developed Along With the Original Misconceptions of Race.*

When Europeans launched the great Age of Exploration, 500 years ago, they began to come into contact with peoples never before seen, or known only through fragmentary reports of brief contacts. The physical differences between the European and the American "Indian", the African Negro and the Asian were obvious and provided the means of classifying races as separate and distinct peoples. More important this phenomenon led to the association of these physical differences with behavioral and cultural differences, and to the assumption that these differences resulted from "inferiority." [53]

> "When the European encounters a barefooted native wearing bizarre clothing, or watches one eating in an apparently unmannerly fashion, or observes some, to him, superstitious or meaningless ritual, he sees these departures from his own standards of behavior not simply as cultural differences, but as indications of

53. See Montagu, *The Idea of Race,* 9-10 (1965); Shapiro, *Race Mixture,* 7-12 (Third Printing, 1965).

> inferiority. It is a subtle thing which the traveler rarely escapes. Even where the conventions and trappings of a foreign culture are impressive in their complexity, this strangeness often lends them an air of unreality, of *opera bouffe,* that in the end renders them somewhat childlike, if not ridiculous." [54]

The feeling of superiority in the beholder is a common reaction—not limited to Europeans. The travel literature of the Chinese, for example, is also filled with similar judgments.[55] But it was the European view of superiority which was enacted into law.

The Europeans' natural feeling of superiority was confirmed as a result of the slave trade which brought to their midst the African Negro, obviously different from the white man and "obviously inferior" to his white captors. It was sustained and further buttressed with the popularization of Darwin's theories of evolution, which were indiscriminately and improperly applied to prove that the "white" race was superior to all others, having reached the pinnacle of evolution.[56]

In his seminal work "On The Origin of the Species" first published in 1859, Darwin had shown how species—not races—had evolved over time by a long process of natural selection which resulted in the "survival of the fittest". His doctrine was solely biological. It had no application to cultures and yet its phraseology lent itself readily to use by the "social Darwinists," who applied the theories of biological evolution to explain cultural difference. Combined with the earlier concept of a "scale of nature," a ladder on which each group had its rank, it provided

54. Shapiro, *op. cit.* 28.

55. Shapiro, *op. cit.* 28; see also; Hulse, *The Human Species,* 376 (1963), "The names by which the people of a preliterate tribe call themselves, as distinct from everybody else, can very often be translated as *men,* or *real men.*"

56. See generally Eiseley, *Darwin's Century,* especially pp. 297, *et seq.* (1958).

"scientific logic" with which racists could explain the natural and eternal superiority of the white man and justify the separation of the races. Although the theory was widely believed,[57] it had no justification. None of the concepts of racial superiority has survived scientific investigation.

(b) *There Is No Basis for Equating Race and Cultural Potential.*

Cultural activities are man's way of reacting to his environment and there is no evidence of a connection between "race" and cultural or intellectual potential.

> "The evolutionary facts indicate that the mental capacities of human beings in different populations called 'races' are so much alike that for all practical purposes we can assume that given adequate opportunities, the members of any one group could, with the same or similar frequencies, achieve whatever the members of any other group with the adequate opportunities have achieved. Wherever it has been possible to put this

57. A Georgia court upheld anti-miscegenation statutes on the ground that: "[moral and social] equality does not exist and never can. The God of nature made it otherwise, and no human law can produce it and no human tribunal can enforce it. There are gradations and classes throughout the universe. From the tallest archangel in Heaven, down to the meanest reptile on earth, moral and social inequalities exist and must continue to exist through all eternity." *Scott v Georgia,* 39 Ga. 321, 326 (1869).

A Missouri court upheld a statute on the ground that: "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 . . ." *State v Jackson,* 80 Mo. 175, 179 (1883).

This quotation is significant not because it now appears so ludicrous but because it suggests that only 80 years ago it was thought that Negroes and whites were different species incapable of intermarrying to create fertile progeny!

For convincing evidence that the Virginia statutes were enacted to preserve the superiority of the white race—and the white race only—see Appellants' Brief.

hypothesis to the test, it has been supported by the findings." [58]

The belief "that physical and mental traits are linked, that the physical differences are associated with rather pronounced differences in mental capacities, and that these differences are measurable by IQ tests and the cultural achievements" of populations is what Montagu calls "the myth" of race.[59]

(c) *There Is No Basis for the Belief in Biological Superiority.*

Although racial classifications may reflect some observable physical differences within mankind, "they do so in an artificial and even misleading manner. They tend to give the impression that the human species is naturally partitioned into discrete, discontinuous groups, whereas in studying the geographical distribution of physical characters, we commonly find gradual changes as we pass from one region to another rather than sharp boundaries and abrupt transitions." [60]

The fact of the matter is that "all peoples of the earth are infinitely more alike than they are different." [61] The differences are ones of degree and not of kind.

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58. Montagu, *The Idea of Race,* 62 (1965).

59. Montagu, *Man's Most Dangerous Myth: The Fallacy of Race,* 24 (4th Edition, 1964); See also Garn, *Human Races,* 111 (1961): "There is no evidence for racial differences in character and temperament, other than those due to cultural conditioning."; Stern, *Human Genetics,* 701 (1960): "It is difficult enough to define an over-all social psychology, but even when some valid approximation can be made, it seems to apply only to specific historical periods, or, if the race occupies different parts of the globe, only to specific regions. Differences in group psychology are also well known in different social layers of populations presumably rather genetically homogeneous."

60. Harrison, Weiner, Tanner and Barnicot, *Human Biology,* 191 (1964).

61. Krogman, *Physical Anthropology and Race Relations: A Biosocial Evaluation,* The Scientific Monthly, LXVI, No. 4, April, 1948, p. 317.

No race has a monopoly on any single trait or group of traits. They all include individuals running a scale from short to tall, broad to narrow and light to dark. The differentiation of races by morphological characteristics, therefore, becomes a statistical problem of determining differences in group averages. Having determined the averages, however, nothing necessarily follows about the specific characteristics of individuals within the race.

Herskovits illustrates this fact with the following example.

> "It is a commonplace that the noses of Europeans are narrow, those of Africans broad. Among the broadest-nosed Negroes are the Kajji of the Niger Delta of West Africa; among the Caucasoids with narrowest nostrils are the Swedes. If we set down the average values of this measurement for these two populations, a striking difference between them is to be seen:
>
> | | |
> |---|---|
> | 55 Kajji | 45.5 mm. |
> | 260 Swedes | 30.2 mm. |
>
> Yet when we take into account the variability of these two populations in this trait, we see that even such a marked difference in nose form does not prevent *some* Swedes from having broader nostrils than *some Negroes,* and that *some* Negroes have narrower nostrils than *some* Swedes. Kajji noses vary between about 30 to 54 millimeters, while Swedish noses range from about 19 to 37 millimeters. Therefore, if one were to draw a line between 30 and 37 millimeters long, and present it to an expert, asking him to designate whether this line represented the nose-width of a Negro or a Swede, he could not tell from which group it had been taken. This would be true in spite of the fact that we are dealing here with populations that represent ex-

treme forms taken by their respective races in the characteristic being measured.[62]

". . . Consequently, we may state as a general principle that *greater differences exist in the range of physical traits that characterize any single race of mankind than between races taken in their entirety.*" [63]

It becomes clear that the use of physical features as the basis for racial definitions of groups or racial identifications of individuals becomes a very slippery problem.[64]

The development in the last century of a scientific study of human genetics has not solved the problems in obtaining the perfect delineation of race. Certain blood types, such as the ABO blood groupings and the rhesus factor, in which heredity patterns can be exactly traced, have been studied exhaustively throughout the entire world. Although the techniques are highly scientific, the studies suffer from the same fundamental weakness as the morphological studies. *If* the classifier can find an isolated and endogamous population group, which itself could be designated as a race, he can make some general conclusions about the average blood type frequencies for the *group.* However, he cannot say from the group averages what type blood an individual will have. And he cannot tell from

62. The subjects used in this example were not selected at random from their respective geographical white and negro races, but were selected because of a special characteristic peculiar to a limited population group which might be considered a local race. Had the study used random measurements from the geographical races, we could have expected greater range within the races and even greater areas of overlap between them.

63. Herskovits, *Cultural Anthropology,* 61-62 (1964).

64. Even the selection of typologic traits for use in determining race appears to be arbitrary depending on what kind of race the classifier wants to find. Montagu indicates that racial classification became a "parlor game" in which "only those methods of 'race' classification which indicated the 'right sort' of 'race differences' were encouraged and utilized." Montagu, *The Fallacy of Race,* 66; See also Dobzhansky, *Mankind Evolving,* 256.

a person's blood type to what race he necessarily belongs.[65] And also, like the morphological classifications, when significant admixture has occurred, the problem of classification becomes vastly more difficult.[66]

Much of the foundation for the biological supremacy argument has come from studies proving that there are average differences in certain biological characteristics. The error of the lawmakers—like the error of the early observers of race—was to equate difference with biological supremacy, and average differences of a whole population with specific differences in individuals.

Most biological differences between races are believed to represent adaptations to the specific environment in which the race developed. For example the dark skin of the Negroes may provide a shield against the burning sun of the equatorial regions while the lighter skin of northern peoples may permit the less intense light rays to penetrate the skin and help manufacture vitamin D. The long narrow nose of the Caucasoids may allow for warming up cold outside air before it enters the lungs, while the shorter broader nose of the Africans may be more suited to their evenly warmer surroundings.[67]

Even these differences are not as significant today as they may have been in the past, because technological developments "have so greatly changed man's environment and his ability to cope with it . . . that adaptations to former environments are becoming largely obsolete."[68]

But to dwell on this type of question is to confuse the whole issue of biological superiority. The real issue was succinctly put by the distinguished team of human biologists

65. "When the classifications were based on serological criteria rather than the populations, the results were understandably bizarre." Garn, *Human Races,* 50 (1961). See also, studies in Comas, *op. cit.* pp. 303-307; Hulse, *op. cit.* pp. 295-340.

66. Stern, *op. cit.* 689.

67. Stern, *op. cit.* 695.

68. *Id.*

assembled in 1964 by UNESCO to formulate a statement on the biological aspects of race.

> "Certain physical characters have a universal biological value for the survival of the human species, irrespective of the environment. The differences on which racial classifications are based do not affect these characters, and therefore, it is not possible from the biological point of view to speak in any way whatsoever of a general inferiority or superiority of this or that race." [69]

Thus it becomes entirely clear that the whole superiority notion on which these statutes are based is fallacious.

(d) *Miscegenation Is Not Biologically Harmful.*

By the same token, the judicial justification of the statutes on the basis of detrimental effects upon the offspring of interracial marriages [70] falls completely upon investigation. It has never been proved that interracial marriages have biological disadvantages.[71] This has recently

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69. Statement on The Biological Aspects of Race, UNESCO, 1964. The UNESCO statement so clearly sets forth the fundamental concepts of race and so clearly shows the invalidity of miscegenation laws that it is printed in its entirety as "Appendix B" of the Brief. The statement was signed by many of the world's foremost biologists and anthropologists, including Carlton Coon, whose work has been widely misinterpreted as providing material for racist arguments.

70. "The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observations show us, that the offspring of these unnatural connections are generally sick and effeminate, and that they are inferior in physical development and strength to the full blood of either race . . . Such connections never elevate the inferior race to the position of superior, but they bring down the superior to that of the inferior. They are productive of evil, and evil only, without any corresponding good." *Scott v Georgia,* 39 Ga. 321, 323 (1869).

71. UNESCO Statement, paragraph 9.

been confirmed by one of the most exhaustive studies of interracial matings over conducted, the results of which were released this year. A ten-year investigation of 179,000 births in Hawaii, a state which prides itself on its racial mixture and its lack of racial prejudice, concluded that there are no significant adverse effects detectable from racial mixtures.[72]

In fact, it has been suggested that miscegenation can be positively beneficial to the species by increasing stature, resistance to disease, viability and fertility, a phenomenon known as "hybrid vigor."[73]

(e) *The Preservation of Racial Superiority Is Not a Fit Purpose of Legislation.*

Moreover, the whole concept of a biologically superior race is anathema to our society. We reacted in horror when Hitler proclaimed and enacted laws based on the theory of a "master race" in Germany. He too, had recognized the "higher or lesser value" of the races and had sought to prevent a "niggerized world" in which his concept of "the humanly beautiful and sublime . . . would be lost forever."[74] We found nothing tolerable in Hitler's view of

72. Morton, Chung, Mi, *Genetics of Interracial Crosses in Hawaii* in the series *Monographs in Human Genetics,* 1967.

73. Stern, *op. cit.* p. 699-701; Harrison, *et al., op. cit.* 163-164.

The UNESCO Statement reads: "It has never been proved that interbreeding has biological disadvantages for mankind as a whole. On the contrary, it contributes to the maintenance of biological ties between human groups and thus to the unity of the species in its diversity.

The biological consequences of a marriage depend only on the individual genetic make-up of the couple and not on their race.

Therefore, no biological justification exists for prohibiting intermarriage between persons of different races, or for advising against it on racial grounds."

74. *Mein Kampf,* pp. 383-84. Quoted in Shirer, *The Rise and Fall of the Third Reich,* 88 (1960).

racial superiority. It is far less tolerable in our own society today.

(f) *When the Myths Are Stripped Away, the Anti-Miscegenation Statutes Are Exposed as Being Totally Without Valid Public Purpose.*

Thus, since there is no factual basis to support the concept of biological superiority, the only remaining purpose of the anti-miscegenation statutes is to preserve biological differences; that is, to maintain differences in the color of one's skin, the shape of one's nose and the texture of one's hair. The mere statement of such a purpose shows the absurdity of the entire concept. We do not legislate on such differences within a race; there is no public purpose to be served by regulating nose size. These differences, for legislative purposes, are entirely neutral.[75]

No one would seriously contend that a law which prohibits marriage between light-skinned and dark-skinned people or between blue-eyed and brown-eyed people could be constitutionally sustained. Nor would anyone seriously contend that a law prohibiting marriage between Protestants and Catholics or between Italians and French would be constitutional. Whatever differences may exist between these groups can not provide proper bases for fixing public policy. Nor can the differences between Negroes and whites. Since the anti-miscegenation statutes provide discriminatory treatment merely on the basis of these legislatively neutral differences, they are, by definition, arbitrary and unconstitutional.

75. The statutes, of course, do not even assure the fulfillment of these purposes. By operating indirectly on a racial basis rather than directly on the actual characteristics, they allow marriage of persons within the same race, even though one party may express certain features which are more likely found in the other race. More important, they prohibit marriages between members of different races, even though they do not possess the traits with which the legislature might have been concerned.

(C) The Anti-Miscegenation Statutes Must Fail Because They Provide Standards of Proof Which Are Impossible of Application and Are Unconstitutionally Vague.

Although the Virginia statute defines a "white" person as one who "has no trace whatever of any blood other than Caucasian," there is, of course, no such thing as "white blood" or "Negro blood" as imagined by the Virginia legislature. But assuming that blood is interpreted to mean ancestry, the state would have to prove beyond a reasonable doubt that Richard Loving had no ancestor *anywhere in his genealogy* who was not "Caucasian". Defendant Richard Perry Loving, in "admitting" he was a "white person" within the meaning of Virginia's penal code (and thereby convicting himself) could not, in fact, have made a knowing admission; nor could the state otherwise have proved he was such a "white person."

Similarly the anti-miscegenation statutes in the other sixteen states are based on the faulty concept of racially different blood, prohibiting marriage between "whites" (or "Caucasians") and "Negroes" or persons of more than a certain proportion of 'Negro blood". But even if they are based on racial ancestry, these terms—which attempt to set forth the essential elements of the crime—are unconstitutionally vague.

> "It is obfuscating, in science, to use the words negroid, mongoloid, caucasoid. Related expressions such as colored, black, yellow, white, do not set any biological contest, either. They have never been defined with any degree of precision or consistency by those who use them." [76]

It should be clear by now that these classifications *cannot* be made or applied with precision.[77]

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76. Beuttner-Janusch, *op. cit.* 184.

77. This Court has had occasion to consider the use of "Caucasian" as a racial definition and to note its vagueness: "It is at best

Furthermore, the courtroom proof of race necessarily depends upon appearance. Proof that one's father came from Africa is not sufficient to make him a Negro—particularly if his father had been the Prime Minister of Rhodesia. A defendant would be considered a "Negro" only if he *looked* like a "Negro" to a judge or jury (laymen) and that determination could be made only upon the morphological basis which scientists have rejected as an unreliable indicator of race. Thus the appearance test destroys any pretense of objectivity.

> "Owing to the variation within all races and the overlapping between contiguous races, it is unsafe to classify persons by their appearance and it should never be done for research purposes." [78]

If the test is too dangerous for the purpose of scientific study which carries with it no direct consequences to the individual involved, certainly it is too dangerous in the hands of a layman for the purposes of depriving a man of his liberty for ten years. It is well-established that—

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a conventional term, with an altogether fortuitous origin, which, under scientific manipulation, has come to include far more than the unscientific mind suspects. According to Keane, for example (The World's Peoples, 24, 28, 307, *et seq.*) it includes not only the Hindu but some of the Polynesians (that is, the Maori, Tahitians, Samoans, Hawaiians, and others), the Hamites of Africa, upon the ground of the Caucasic cast of their features, though in color they range from brown to black. We venture to think that the average well-informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogeneous elements." *US v Bhagat Singh Thind,* 261 US 211.

The statutory classifications, which deal with arbitrarily selected and constitutionally vague concepts to begin with, become even more arbitrary by the use of different tests for determining race. In Virginia, a person is "white" only if he is "pure" white, but he is "Negro" if there is any taint of "Negro blood." A more inconsistent and arbitrary classification could hardly be imagined.

78. Laughlin, "Races of Mankind: Continental and Local", Anthropological Papers of the University of Alaska, Vol. 8, No. 2, May, 1960; Reprinted in Lasker (ed.), *Physical Anthropology, 1953-1961,* Yearbook of Physical Anthropology, Vol. 9, pp. 149, 153.

> "a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide without any legally fixed standards what is prohibited and what is not in each particular case." *Giaccio v Pa.*, 382 US 399, 402-403.

The anti-miscegenation statutes clearly run afoul of this test. On this basis alone, they cannot stand.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

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APPENDIX A

RELEVANT PORTIONS OF STATE STATUTES PROHIBITING INTERRACIAL MARRIAGES

(With Comments of Amici Curiae)

1. Alabama

Ala. Const. Art. IV, §102. The legislature shall never pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro.

Ala. Code Tit. 1, §2. *Meaning of certain words and terms.* The word "negro" includes mulatto. The word "mulatto" or the term "person of color" means a person of mixed blood descended on the part of the father or mother from negro ancestors, without reference to or limit of time or number of generations removed.

Tit. 14, §16. *Living in adultery or fornication.* If any man or woman live together in adultery or fornication, each of them shall, on the first conviction of the offense, be fined not less than one hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months; on the second conviction for the offense, with the same person, the offender shall be fined not less than three hundred dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than twelve months; and, on a third, or any subsequent conviction, with the same person, shall be imprisoned in the penitentiary for two years.

Tit. 14, §360. *Marriage, adultery, and fornication between white persons and negroes.* If any white persons and any negro, or the descendant of any negro intermarry, or live

in adultery or fornication with each other, each of them shall, on conviction, be imprisoned in the penitentiary for not less than two nor more than seven years.

Tit. 14, §361. *Officer issuing license or performing marriage ceremony.* Any probate judge who issues a license for the marriage of any persons who are prohibited by section 360 of this title, from intermarrying, knowing that they are within the provisions of that section; and any justice of the peace, minister of the gospel, or other person by law authorized to solemnize the rites of matrimony, who performs a marriage ceremony for such persons, knowing that they are within the provisions of such section, shall each, on conviction, be fined not less than one hundred or more than one thousand dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county for not more than six months.

Tit. 14, §419. *Seduction.* Any man who, by means of temptation, deception, arts, flattery, or a promise of marriage, seduces any unmarried woman in this state, shall, on conviction, be imprisoned in the penitentiary for not less than one nor more than ten years; but no indictment or conviction shall be had under this section on the uncorroborated testimony of the woman upon whom the seduction is charged; and no conviction shall be had if on trial it is proved that such woman was at the time of alleged offense, unchaste.

Tit. 14, §16. *Living in adultery or fornication.* If any man or woman live together in adultery or fornication, each of them shall, on the first conviction of the offense, be fined not less than one hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months; on the second conviction for the offense, with the same person, the offender shall be fined not less than three hundred dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than twelve months; and, on a third, or any sub-

sequent conviction, with the same person, shall be imprisoned in the penitentiary for two years.

Comments. Both the Constitution and Code of Alabama invoke criminal penalties under the above provisions where a "negro, or descendant of a negro" is involved, thereby imposing upon any particular individual the uncertainties of the heavy burden that *no ancestor* of his had *any* "negro blood". Thus, merely the person's appearance may support a conclusion that he is a Negro; *Metcalf v. State*, 16 Ala. App. 389, 73 So. 305 (1918), and the testimony of a single individual will suffice: *Wilson v. State*, 20 Ala. App. 137, 101 So. 417 (1924).

While marriage is an absolute defense to a prosecution for seduction: *Martin v. State*, 19 Ala. App. 251, 96 So. 734 (1923), presumably such defense would not be available to an interracial couple whose marriage itself would constitute a crime.

Further, presumably a Japanese individual would be in a "twilight zone" who may freely intermarry either with a "white" or a "negro" without running afoul of the anti-miscegenation provision; or such individual may very well be found guilty upon marrying *either* a "white" *or* a "negro" depending upon the impression he may make upon a jury which may decide he is a "white" or a non-Negro, or a "negro", or perhaps "mulatto".

2. Arkansas (Ark. Stat. Anno.)

§41-806. *Concubinage—Penalty.* Concubinage between a person of the Caucasian or white race and between a person of the negro or black race, is hereby made a felony and whoever shall be convicted thereof in any court of competent jurisdiction shall, for each offense, be sentenced to imprisonment at the discretion of the court for a term of not less than one [1] month nor more than one [1] year in the penitentiary at hard labor.

§41-807. *Concubinage—Proof of violation—Definition.* The living together or cohabitation of persons of the Caucasian and of the negro race shall be proof of the violation of the provisions of section one [§41-806] of this act. For the purpose of this act [§§41-806- 41-810] concubinage is hereby defined to be the unlawful cohabitation of persons of the Caucasian race and of the negro race, whether open or secret.

§41-808. *"Person of negro race" defined.* The words "person of negro race" as used in this act [§§41-806-41-810] shall be held to apply and include any person who has in his or her veins any negro blood whatever.

§41-809. *Enforcement of concubinage statute.* It shall be the duty of the judges of the several district courts of this State to specially charge the grand juries upon this act [§§41-806-41-810], and it shall be the duty of the magistrates of the counties in which the offense of concubinage between a person of the Caucasian race and a person of the negro race has been committed, or where there shall be complaint made to the magistrate that any woman resident in the county who shall have been delivered of a mulatto child, charging on oath any person with being the father of such child, the magistrate shall issue a warrant, in the name of the State, against the accused person to the sheriff or any constable of the county, commanding him forthwith to arrest and bring the accused person before the magistrate to answer such charge and if the magistrate is of opinion that there is not sufficient cause

for believing that the defendant has committed the offense of concubinage or unlawful cohabitation as defined by this act, he shall discharge the defendant from custody and make an entry thereof on the minutes, however, if the magistrate be of the opinion from the examination that there are reasonable grounds to believe the defendant guilty of the offense charged he shall be held for trial and committed to jail or discharged on bail to answer at the next term of the circuit court.

§41-810. *Delivery of mulatto child as prima facie evidence. Definition.*—Any woman who shall have been delivered of a mulatto child, the same shall be prima facie evidence of guilt without further proof and shall justify a conviction of the woman, but no person shall be convicted of the crime of concubinage upon the testimony of the female, unless the same is corroborated by other evidence.

Provided, that this act [§§41-806-41-810] shall apply to cases of concubinage which is here defined to be the keeping and maintaining for immoral purpose persons of the opposite races named in this act.

§55-104. *White and negroes or mulattoes forbidden to marry.* All marriages of white persons with negroes or mulattoes are declared to be illegal and void.

§55-105. *Unlawful marriage—Penalty.* Whoever shall contract marriage in fact, contrary to the prohibitions of the third and fourth [§§55-103, 55-104] sections of this act, and whoever shall knowingly solemnize the same, shall be deemed guilty of a misdemeanor, and shall upon conviction be fined or imprisoned, or both, at the discretion of the jury who shall pass on the case, or if the conviction shall be by confession, or on demurrer, then at the discretion of the court.

§55-228. *Race other than Caucasian to be designated on record.* It shall be the duty of the Clerks of the county courts of the State to designate upon the record of all marriages the race of the participating parties where such race is other than Caucasian or white.

§55-229. *Violation of preceding section—Penalty.* Any violation of the provisions of this act [§§34-1208, 55-228, 55-229] shall, on conviction, be punished by a fine of twenty-five dollars ($25.00) for each offense.

Comments. Under Arkansas' concubinage laws prohibiting cohabitation of "Caucasian" and "negro", presumably marriage would be no defense even though validly contracted in another state. Further, it is to be noted that giving birth to a "mulatto child" constitutes "prima facie evidence of guilt" (§41-810) without any statutory exceptions for marriages which may have been validly entered into in another state. Cases construing the cohabitation provisions include: *Hovis v. State,* 162 Ark. 31, 257 S.W. 363 (1924), holding that more than frequent sexual relations between a white male defendant and the Negro woman must be shown; *Wilson v. State,* 178 Ark. 120, 13 S.W. 2d 24 (1929), convicting a white woman under the concubinage laws; *Poland v. State,* 232 Ark. 669, 339 S.W. 2d 421 (1960); *Hardin v. State,* 232 Ark. 672, 339 S.W. 2d 428 (1960).

3. Delaware (Del. Code Anno.)

Tit. 13, §101. *Void and voidable marriages.*

(a) A marriage is prohibited and void between—

(1) A person and his or her ancestor, descendant, brother, sister, uncle, aunt, niece, nephew or first cousin;

(2) A white person and a negro or mulatto.

* * * * * * *

Tit. 13, §102. *Entering into a prohibited marriage—penalty.* The guilty party or parties to a marriage prohibited by section 101 of this title shall be fined $100, and in default of payment of the fine shall be imprisoned not more than 30 days.

Tit. 13, §103. *Issuing license for, or solemnizing prohibited marriage—penalty.* Whoever, being authorized to issue a marriage license, knowingly or willfully issues a license for a marriage prohibited by this chapter, or, being authorized to solemnize a marriage, knowingly or willfully assists in the contracting or solemnizing of a prohibited marriage, shall be fined $100, and in default of the payment of such fine shall be imprisoned not more than 30 days.

Tit. 13, §104. *Entering into prohibited marriage outside the State—penalty.* If a marriage prohibited by this chapter is contracted or solemnized outside of the State, when the legal residence of either party to the marriage is in this State, and the parties thereto shall afterwards live and cohabit as husband and wife within the State, they shall be punished in the same manner as though the marriage had been contracted in this State.

Tit. 13, §105. *Status of children of prohibited marriages.* Children of void or voidable marriages shall be deemed to be legitimate.

Comments. While Delaware residents who go out of the State and enter into a miscegenous marriage prohibited by Delaware and return to Delaware to "live and cohabit as husband and wife" would be subject to criminal *punishment* (Tit. 13, §104), there is no provision that such marriage itself would be void. There appear to be no definitions as to the terms "white", "negro" or "mulatto."

4. Florida.

Fla. Const., Art. 16, §24. *Intermarriage of white persons and negroes prohibited.* All marriages between a white person and a negro, or between a white person and a person of negro descent to the fourth generation, inclusive, are hereby forever prohibited.

Fla. Stat. Anno. §1.01 *Definitions* (6) The words "negro," "colored," "colored persons," "mulatto" or "persons of color," when applied to persons, include every person having one-eighth or more of African or negro blood.

§741.11 *Marriages between white and negro persons prohibited.* It is unlawful for any white male person residing or being in this state to intermarry with any negro female person; and it is in like manner unlawful for any white female person residing or being in this state to intermarry with any negro male person; and every marriage formed or solemnized in contravention of the provisions of this section shall be utterly null and void, and the issue, if any, of such surreptitious marriage shall be regarded as bastard and incapable of having or receiving any estate, real, personal or mixed, by inheritance.

§741.12 *Penalty for intermarriage of white and negro persons.* If any white man shall intermarry with a negro, or if any white woman shall intermarry with a negro, either or both parties to such marriage shall be punished by imprisonment in the state prison not exceeding ten years, or by fine not exceeding one thousand dollars.

§741.13 *County judges not to issue licenses for white and negro intermarriages.* All county judges are prohibited from knowingly issuing a license to any person to intermarry against whom the disabilities in sec. 741.11 specified may or do attach, under the penal sum of one thousand dollars, to be recovered by action of debt in any court of record having jurisdiction, for the use of the school fund.

§741.14 *Penalty for violation of sec. 741.11.* If any county judge shall knowingly and willfully issue a marriage license for a white person to marry a negro, he shall be punished by imprisonment not exceeding two years, or by fine not exceeding one thousand dollars.

§741.15 *Marriage between white and negro persons not to be performed.* Any of the persons described in sec. 741.07, who shall knowingly perform the ceremony of marriage between any persons who by the provisions of sec. 741.11 are prohibited to intermarry shall in like manner forfeit and pay the penal sum of one thousand dollars, to be recovered in like manner as in sec. 741.13 for the use of the school fund.

§741.16 *Penalty for marrying white and negro persons.* If any judge, justice of the peace, notary public or minister of the Gospel, clergyman, priest or any person authorized to solemnize the rites of matrimony, shall willfully and knowingly perform the ceremony of marriage for any white person with a negro, he shall be punished by imprisonment not exceeding one year, or by fine not exceeding one thousand dollars.

§798.04 *White persons and negroes living in adultery.* If any white person and negro, or mulatto, shall live in adultery or fornication with each other, each shall be punished by imprisonment not exceeding twelve months, or by fine not exceeding one thousand dollars.

§798.05 *Negro man and white woman or white man and negro woman occupying same room.* Any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the night time the same room shall each be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars.

Comments. Insofar as a person of Japanese ancestry is concerned, the same dilemma as exists under Alabama's laws—whether a Japanese resident is "white" or "negro"

—is posed with the attendant risk of making the wrong assumption if such a person should intermarry with a "white" person *or* with a "negro". Also while any person in the "fourth generation" (Fla. Const., Art. 16, §24) may likewise face a similar dilemma imposed by the possible bloodlines of his great-grandparents, this burden is somewhat alleviated by the requirement that proof that a defendant is one-eighth Negro "must be proved beyond and to the exclusion of every reasonable doubt". *Free v. State,* 142 Fla. 233, 194 So. 639 (1940). Under §741.12, the court is not required to punish both parties to the prohibited marriage. Presumably this violates the Equal Protection clause.

5. Georgia (Ga. Code Anno.)

Tit. 53, §106. *Miscegenation prohibited.* It shall be unlawful for a white person to marry anyone except a white person. Any marriage in violation of this section shall be void.

Tit. 53, §301. *Registration of individuals as to race, supervision, forms, etc.* The State Board of Health shall prepare a form for the registration of individuals, whereon shall be given the racial composition of such individuals, as Caucasian, Negro, Mongolian, West Indian, Asiatic Indian, Malay, or any mixture thereof, or any other non-Caucasian strains, and if there shall be any mixture, the racial composition of the parents and other ancestors, in so far as ascertainable, so as to show in what generation such mixture occurred. Said form shall also give the date and place of birth of the registrant, name, race, and color of the parents of the registrant, together with their place of birth if known, name of husband or wife of registrant, with his or her place of birth, names of children of registrant with their ages and place of residence, place of residence of registrant for five years immediately preceding registration, and such other information as may be prescribed for identification by the State Board of Health.

Tit. 53, §303. *Local registration.* Each local registrar shall personally or by deputy, upon receipt of said forms, cause each person in his district or jurisdiction to execute said form in duplicate, furnishing all available information required upon said form, the original of which form shall be forwarded by the local registrar to the State Board of Health, and a duplicate delivered to the ordinary of the county. Said form shall be signed by the registrant, or, in case of children under fourteen years of age, by a parent or guardian, or other person standing in loco parentis. The execution of such registration certificates shall be certified to by the local registrar.

Tit. 53, §304. *Authenticity of statement.* If the local registrar shall have reason to believe that any statement made by any registrant is not true, he shall so write upon such certificate before forwarding the same to the State Board of Health or ordinary, giving his reason therefor.

Tit. 53, §306. *False registration prohibited.* No person shall wilfully or knowingly make or cause to be made a registration certificate false as to color or race, and upon conviction thereof in such case the State Board of Health may change the registration certificate so that it will conform to the truth.

Tit. 53, §307. *Marriage license, form of application for, provided.* The State Board of Health shall prepare a form for application for marriage license, which form shall require the following information to be given over the signatures of the prospective bride and groom: name and address; race and color; place of birth; age; name and address of each parent; race and color of each parent; and whether the applicant is registered with the Bureau of Vital Statistics of this or any other State, and, if registered, the county in which such registration was made. The State Board of Health shall at all times keep the ordinary of each county in this State supplied with a sufficient number of said forms of application for marriage license to care for all applications for marriage license. Each prospective bride and each prospective groom applying for a marriage license shall fill out and execute said application in duplicate.

Tit. 53, §309. *Report of State Board of Health after examination as to registration of applicant.* The ordinary shall withhold the issuing of any marriage license until a report upon such application shall have been received from the State Board of Health. Said report shall be forwarded to the ordinary by the next return mail, and shall state whether or not each applicant is registered in the Bureau of Vital Statistics; if registered, the report shall state whether the statements made by each applicant as to race and color are

correct according to such registration certificate. If the registration certificate in the office of the Bureau of Vital Statistics shall show that the statement of either applicant as to race or color is untrue, the report of the State Board of Health shall so state, and in such case the ordinary shall not issue a marriage license to the applicants until the truth of such statements of the applicants shall have been determined in a legal proceeding brought against the ordinary to compel the issuing of such license. If the report from the State Board of Health shall show that the applicants are not registered, and if the State Bureau of Vital Statistics shall have no information as to the race or color of said applicants, the ordinary shall issue the marriage license if he shall have no evidence or knowledge that such marriage would be illegal. If one of the applicants shall be registered with the State Bureau of Vital Statistics and the other applicant shall not be so registered, if the Bureau of Vital Statistics shall contain no information to disprove the statements of either applicant as to color or race, the ordinary shall issue the marriage license, if he shall have no evidence or knowledge that such marriage would be illegal; Provided, that where each party is registered and such registration certificate is on file in the office of the ordinary of the county where application for marriage license is made, it shall not be necessary for the ordinary to obtain any information from the State Bureau of Vital Statistics; and Provided further, that when any person who has previously registered as required herein shall move to another county, he may file with the ordinary of the county of his new residence a certified copy of his registration certificate, which shall have the same effect as if such registration had been made originally in said county.

Tit. 53, §312. *"White person" defined.* The term "white person" shall include only persons of the white or Caucasian race, who have no ascertainable trace of either Negro, African, West Indian, Asiatic Indian, Mongolian, Japanese, or Chinese blood in their veins. No person, any one of whose ancestors has been duly registered with the

State Bureau of Vital Statistics as a colored person or person of color, shall be deemed to be a white person.

Tit. 53, §313. *Report of violation of chapter, duty of State Board of Health.* If any case of a marriage in violation of the provisions of this chapter shall be reported to the State Board of Health, it shall investigate such report and shall turn over to the Attorney General the information obtained through such investigation.

Tit. 53, §314. *Birth of legitimate child of white parent and colored parent, report of, and prosecution.* When any birth certificate, showing the birth of a legitimate child to parents one of whom is white and one of whom is colored, shall be forwarded to the Bureau of Vital Statistics, it shall be the duty of the State Board of Health to report the same to the Attorney General or the State, with full information concerning the same. Thereupon it shall be the duty of the Attorney General to institute criminal proceedings against the parents of such child for any violation of the provisions of this Chapter which may have been committed.

Tit. 53, §315. *Attorney General, duty to enforce chapter.* It shall be the duty of the Attorney General of the State, as well as the duty of the solicitor general of the superior court where such violation shall occur, to prosecute each violation of any of the provisions of this Chapter, when the same shall be reported to him by the State Board of Health. If the Attorney General shall fail or refuse to prosecute any such violation so reported to him, the same shall be grounds for impeachment, and it shall be the duty of the State Board of Health to institute impeachment proceedings in such case.

Tit. 53, §9902. *Intermarriage of whites and colored people.* If any officer shall knowingly issue a marriage license to persons, either of whom is of African descent and the other a white person, or if any officer or minister of the gospel shall join such persons in marriage, he shall be guilty of a misdemeanor.

Tit. 53, §9903. *Miscegenation; penalty.* Any person, white or colored, who shall marry or go through a marriage ceremony in violation of the provisions of section 53-106 shall be guilty of a felony, and shall be punished by imprisonment in the penitentiary for not less than one year and not more than two years.

Tit. 53, §9904. *False statement in application for marriage license; penalty.* Any person who shall make or cause to be made a false statement as to race or color of himself or parents, in any application for a marriage license, shall be guilty of a felony, and shall be punished by imprisonment in the penitentiary for not less than two nor more than five years.

Tit. 53, §9906. *Refusal to execute registration certificate, etc.* Any person who shall refuse to execute the registration certificate as provided in Chapter 53-3, or who shall refuse to give the information required in the execution of the same, shall be guilty of a misdemeanor. Each such refusal shall constitute a separate offense.

Tit. 53, §9907. *False registration.* Any person who shall wilfully or knowingly make or cause to be made a registration certificate false as to color or race, in violation of section 53-306, shall be guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state penitentiary for not less than one year and not more than two years.

* * *

Tit. 79, §103. *Persons of color, who are.* All Negroes, mulattoes, mestizos, and their descendants, having any ascertainable trace of either Negro or African, West Indian, or Asiatic Indian blood in their veins, and all descendants of any person having either Negro or African, West African, West Indian, or Asiatic Indian blood in his or her veins, shall be known in this State as persons of color.

Tit. 26, §5801. *Punishment; suspension of prosecution by marriage.* Any man and woman who shall live together in a state of adultery or fornication, or of adultery and fornication, or who shall otherwise commit adultery or fornication or adultery and fornication, shall be severally indicted, and shall be severally punished as for a misdemeanor; but it shall at any time be within the power of the parties to prevent or suspend the prosecution and the punishment by marriage, if such marriage can be legally solemnized.

* * *

Tit. 26, §6001. *Definition and punishment.* Any person who shall, by persuasion and promises of marriage or other false and fraudulent means, seduce a virtuous unmarried female and induce her to yield to his lustful embraces and allow him to have carnal knowledge of her, shall be punished by imprisonment and labor in the penitentiary for not less than two nor more than 20 years.

* * *

Tit. 26, §6002. *Prosecution may be stopped by marriage; bond of seducer.* A prosecution under the preceding section may be stopped at any time before arraignment and pleading, and not otherwise, by the marriage of the parties, or a bona fide and continuing offer to marry on the part of the seducer: Provided, that the seducer shall, at the time of obtaining the marriage license from the ordinary of the county of the female's residence, give a good and sufficient bond in such sum as said ordinary may deem reasonable and just, taking into consideration the condition of the parties, payable to said ordinary and his successors in office, and conditioned for the maintenance and support of the female and her child or children, if any, for the period of five years. If the defendant is unable to give the bond, the prosecution shall not be at an end until he shall live with the female in good faith for five years. In case the defendant fails to comply with the provisions of this section, the wife shall be a competent witness to testify against the husband in all such

cases, whether the marriage to suspend such prosecution was before or after indictment of said defendant.

Comments. Georgia's efforts to set forth a comprehensive statute presents several inconsistencies. Initially, a "white person" may marry only a "white person": (§53-106); however, the penal provision imposes criminal sanctions only on miscegenous marriages of "white or colored" persons: (§53-9902). While "Japanese" are included in the specific enumerations of §53-312, such persons are *not* identified as "persons of color" in §79-103. Therefore, should a "white person" marry a "Japanese", i.e., a non-white person, then under §53-9903 *only* the "white person" would be subject to criminal sanctions but not the "Japanese", although by operation of §53-106 the marriage would be "void". This, of course, results in unequal protection of the laws against "white persons". However, the "Japanese" may very well be prosecuted for "adultery or fornication" (§26-5801) which, however, is a misdemeanor as compared to a felony under §53-9903.

While marriage or a "bona fide and continuing offer to marry on the part of the seducer" (§26-6002) is a defense to the charge of seduction, it would appear quite certain that such a defense would be denied to a defendant where the marriage, or proposed marriage, would run afoul of the prohibitions of §53-106.

6. Kentucky (Ky. Rev. Stat.)

§402.020. *Other Prohibited Marriages.* Marriage is prohibited and void:

(1) With an idiot or lunatic;

(2) Between a white person and a Negro or mulatto;

* * *

§402.040. *Marriage in another state.* If any resident of this state marries in another state, the marriage shall be valid here if valid in the state where solemnized.

§402.990. *Penalties.*

(1) Any party to a marriage prohibited by KRS 402.010 or between a white person and Negro or a mulatto shall be fined not less than five hundred nor more than five thousand dollars. If the parties continue after conviction to cohabit as man and wife, either or both of them shall be imprisoned in the penitentiary for not less than three nor more than twelve months.

(2) Any person who aids or abets the marriage of any feeble-minded person, or attempts to marry, or aids or abets any attempted marriage with, an idiot or lunatic shall be fined not less than fifty nor more than five hundred dollars.

(3) Any authorized person, with or without a license, who knowingly solemnizes a marriage prohibited by this chapter shall be fined not more than one thousand dollars or imprisoned not less than one month nor more than twelve months, or both.

(4) Any minister or priest who breaches the covenant required by KRS 402.060 shall be fined not more than two thousand dollars.

(5) Any person who attempts to solemnize a marriage without a marriage license or without being authorized by the county court to solemnize marriages shall be fined not more than one thousand dollars or imprisoned for not less than one month nor more than twelve months, or both.

(6) Any unauthorized person who solemnized a marriage under pretense of having authority, and any person who falsely personates the father, mother or guardian of an applicant in obtaining a license shall be imprisoned in the penitentiary for not more than three years.

(7) Any person who falsely and fraudulently represents or personates another, and in such assumed character marries that person, shall be imprisoned in the penitentiary for not less than one nor more than five years. Indictment under this subsection shall be found only upon complaint of the injured party and within two years after the commission of the offense.

(8) Any clerk who knowingly issues a marriage license to any persons prohibited by this chapter from marrying shall be fined not less than five hundred nor more than one thousand dollars, and removed from office by the judgment of the court in which he is convicted.

* * *

§436.010. *Seduction of female under twenty-one.*

(1) Any person who, under promise of marriage, seduces and has carnal knowledge of any female under twenty-one years of age, shall be confined in the penitentiary for not less than one nor more than five years.

(2) No prosecution under subsection (1) of this section shall be instituted where the person charged has

married the girl seduced or offers and is willing to marry her unless he willfully and without a cause constituting a ground of divorce provided in KRS 403.020 for the husband, abandons or deserts her within three years after the marriage.

(3) Any prosecution instituted under subsection (1) of this section shall, upon the request of the defendant, be suspended if the accused marries the girl before final judgment. The prosecution shall be renewed and proceed as though no marriage had taken place if the accused, willfully and without cause constituting a ground of divorce provided in KRS 403.020 for the husband, abandons or deserts wife within three years after the marriage.

(4) All prosecutions under subsection (1) of this section shall be instituted within four years after the commission of the offense.

Comments. Kentucky makes no attempt to define the terms "white person" or "Negro" or "mulatto". However, in *McGoodwin v. Shelby,* 182 Ky. 377, 206 S.W. 625 (1918) a mulatto was defined as a person with one-fourth or more of Negro blood. The court there relied primarily on the physical description of the grandmother. Also see *Theophanius v. Theophanius,* 244 Ky. 689, 51 S.W. 2d 957 (1932).

While it is by no means clear, presumably a Japanese and white may marry in Kentucky; however, whether a Japanese and a "Negro" may marry is problematical since it is not clear whether or not a Japanese may be considered a "white person".

7. Louisiana (West's La. Stat. Anno.)

La. Civil Code, Art. 94. *Impediments of direct line relationship; miscegenation.* Marriage between persons related to each other in the direct ascending or descending line is prohibited. This prohibition is not confined to legitimate children, it extends also to children born out of marriage. Marriage between white persons and persons of color is prohibited, and the celebration of all such marriages is forbidden and such celebration carries with it no effect and is null and void.

Art. 117. *Civil Effects of Putative Marriages.* The marriage, which has been declared null, produces nevertheless its civil effects as it relates to the parties and their children, if it has been contracted in good faith.

La. Rev. Stat. Ch. 9, §201. *Marriage between Indians and Colored Persons Prohibited.* Marriage between persons of the Indian race and persons of the colored or black race is prohibited, and the celebration of all such marriages is forbidden and such celebration carries with it no effect, and is null and void.

Ch. 14, §79. *Miscegenation.* Miscegenation is the marriage or habitual cohabitation with knowledge of their difference in race, between a person of the Caucasian or white race and a person of the colored or negro race.

Whoever commits the crime of miscegenation shall be imprisoned, with or without hard labor, for not more than five years.

Ch. 9, §391. *Legitimation of Natural Children.* Natural fathers and mothers shall have the power to legitimate their natural children, by act declaratory of their intentions, made before a notary public and two witnesses; provided there existed at the time of the conception of such children, no other legal impediments to the inter-marriage of their natural father and mother except those resulting from color or the institution of slavery.

Ch. 9, §221. *Going outside State to contract marriage prohibited in State.* If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state goes outside this state and there contracts a marriage prohibited and declared void by the laws of this state, the marriage is null and void for all purposes in this state with the same effect as though it had been entered into in this state.

Ch. 14, §79.2. *Conceiving and giving birth to an illegitimate child.* Conceiving and giving birth to two or more illegitimate children is hereby declared to be a crime. Both the father and mother of such children shall be equally guilty of the commission of this crime. Each such birth shall be a separate violation hereof.

A birth certificate showing a child to be illegitimate shall be prima facie proof of that fact.

Whoever commits the crime of conceiving and giving birth to two or more illegitimate children shall be fined not more than one thousand dollars, or imprisoned, for not more than one year, or both.

Comments. It is noted that whereas the criminal provision is aimed only at "miscegenation" between "a person of the Caucasian or white race and a person of the colored or negro race" (Ch. 14, §79) the civil prohibitions also include marriages between "persons of the Indian race and . . . colored or black race" (Ch. 9, §201).

According to an opinion of the Louisiana Attorney General (1948, 50 Op. Atty Gen. 248) a Negro serviceman who had married a white woman in New York would be prosecuted for miscegenation if he and his wife were transferred to Louisiana.

8. Maryland (Anno. Code of Md.)

Art. 27, §393. *Minister marrying negro with white person.* If any minister, pastor or other person who, according to the laws of this State do usually join people in marriage, shall upon any pretense join in marriage any negro with any white person, he shall on conviction be fined one hundred dollars.

Art. 27, §398. *Miscegenation.* All marriages between a white person and a negro, or between a white person and a person of negro descent, to the third generation, inclusive, or between a white person and a member of the Malay race or between a negro and a member of the Malay race, or between a person of negro descent, to the third generation, inclusive, and a member of the Malay race, are forever prohibited, and shall be void; and any person violating the provisions of this section shall be deemed guilty of an infamous crime, and punished by imprisonment in the penitentiary not less than eighteen months nor more than ten years; provided, however, that the provisions of this section shall not apply to marriages between white persons and members of the Malay race, or between negroes and members of the Malay race, or between persons of negro descent, to the third generation, inclusive, and members of the Malay race, existing prior to June 1, 1935.

Art. 27, §416. *White woman permitting herself to be got with child by negro.* Any white woman who shall suffer or permit herself to be got with child by a negro or mulatto, upon conviction thereof in the court having criminal jurisdiction, either in the city or county where such child was begotten or where the same was born, shall be sentenced to the penitentiary for not less than eighteen months nor more than five years.

Rule S-76. *Annulment—Criminal Conviction.* When a court shall convict one or both of the spouses of bigamy, of marrying within any prohibited degree, or of marrying be-

tween races prohibited by law to intermarry, the judgment of conviction shall serve as an annulment of the unlawful marriage, provided that there shall be recorded at the instance of any interested person on the records of a court of equity of the same county, a complete transcript of the docket entries in the criminal proceedings leading to said judgment of conviction.

Comments. Maryland's statutes contain no definition of the terms "white person" or "negro" or "a member of the Malay race". Whether a Japanese is any, or none, of these is uncertain; thus what criminal sanctions that a Japanese may be subjected to is similarly uncertain. It is also to be noted that a white married woman of a prohibited interracial marriage may be subjected to the criminal penalties of Art. 27, §416 if she has a child by her negro husband; presumably it would make no difference that the couple may have been validly married in another state: *Jackson v. Jackson*, 82 Md. 17, 33 A. 317 (1895), *dictum*.

9. Mississippi

Constitution, Art. 14, §263. The marriage of a white person with a negro or mulatto, or person who shall have one-eighth or more of negro blood, shall be unlawful and void.

Miss. Code Anno. §459. *Unlawful marriages—between white person and negro or Mongolian prohibited.* The marriage of a white person and a negro or mulatto or person who shall have one-eighth or more of negro blood, or with a Mongolian or a person who shall have one-eighth or more of Mongolian blood, shall be unlawful, and such marriage shall be unlawful and void; and any party thereto, on conviction, shall be punished as for marriage within the degrees prohibited by the last two sections; and any attempt to evade this and the two preceding sections by marrying out of this state and returning to it shall be within them.

§2000. *Adultery and fornication—between certain persons forbidden to inter-marry.* Persons being within the degrees within which marriages are prohibited by law to be incestuous and void, or persons who are prohibited from marrying by reason of race or blood and between whom marriage is declared to be unlawful and void, who shall cohabit, or live together as husband and wife, or be guilty of a single act of adultery or fornication, upon conviction, shall be punished by imprisonment in the penitentiary for a term not exceeding ten (10) years.

§2002. *Adultery and fornication—going out of this state to marry.* If any persons, citizens or residents of this state, who are prohibited by the laws thereof from marrying, because of kindred or race, shall go out of this state for the purpose of marrying, and shall marry in any other state or country, and return to this state and live together and cohabit as man and wife, or be guilty of a single act of copulation, they shall, on conviction, be punished, notwithstanding their marriage out of this state, by imprisonment in the peniten-

tiary not longer than ten years, or be fined five hundred dollars, or both.

§2339. *Races—social equality, marriages between—advocacy of punished.* 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 of 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.

Comments. As indicated by Mississippi's statutes, a miscegenous marriage is subject to imprisonment "for a term not exceeding ten (10) years" (§2000) with no alternative of a fine. Moreover under this same section "a single act of . . . fornication" will subject them to the same penalty. The prohibitions of §2339 would seem to violate the guarantees of free speech of the First Amendment of The Constitution of the United States.

10. Missouri (Vernon's Anno. Mo. Stat.)

§451.020. *Certain marriages prohibited—official issuing licenses to certain persons guilty of misdemeanor.* All marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as the whole blood, between uncles and nieces, aunts and nephews, first cousins, white persons and nergoes, or white persons and Mongolians, and between persons either of whom is insane, mentally imbecile or feeble-minded, are prohibited and declared absolutely void; and it shall be unlawful for any city, county or state official having authority to issue marriage licenses to issue such marriage licenses to the persons heretofore designated, and any such official who shall issue such licenses to the persons aforesaid knowing such persons to be within the prohibition of this section shall be deemed guilty of a misdemeanor; and this prohibition shall apply to persons born out of lawful wedlock as well as those in lawful wedlock.

§563.240. *Intermarriage between white persons and negroes, penalty.* No person having one-eighth part or more of negro blood shall be permitted to marry any white person, nor shall any white person be permitted to marry any negro or person having one-eighth part or more of negro blood; and every person who shall knowingly marry in violation of the provisions of this section shall, upon conviction, be punished by imprisonment in the penitentiary for two years, or by fine not less than one hundred dollars, or by imprisonment in the county jail not less than three months, or by both such fine and imprisonment; and the jury trying any such case may determine the proportion of negro blood in any party to such marriage from the appearance of such person.

§563.250. *Marriages illegally solemnized — penalty.* Every person who shall solemnize any marriage, having knowledge of any fact which renders such marriage unlawful or criminal in either of the parties under any law of this state, or, having knowledge or reasonable cause to believe that either of the parties shall be under the age of legal consent,

or is insane, mentally imbecile, feeble-minded or epileptic, or where to his knowledge any other legal impediment exists to such marriage, and every person not authorized by law to solemnize marriages who shall falsely represent that he is so authorized, and who, by any pretended marriage ceremony which he may perform, shall deceive any innocent person or persons into the belief that they have been legally married, shall, on conviction, be adjudged guilty of a misdemeanor, and be punished by imprisonment in the county jail not exceeding one year, or by a fine not less than five hundred dollars, or by both such fine and imprisonment.

§559.310. *Seduction under promise of marriage.* If any person shall, under or by promise of marriage, seduce or debauch any unmarried female of good repute under twenty-one years of age, he shall be deemed guilty of a felony, and upon conviction thereof be punished by imprisonment in the penitentiary not less than two nor more than five years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail not exceeding one year; but, if, before the jury is sworn to try the defendant upon an indictment or information, he shall marry the woman thus seduced, it shall be a bar to any further prosecution of the offense, but an offer to marry the female seduced by the party charged shall constitute no defense to such prosecution; and in all cases where the defendant marries the woman seduced the cause shall be dismissed at the defendant's costs, and in no event shall the state or county be adjudged to pay, or pay any cost made or incurred by the defendant when said cause has been dismissed as aforesaid.

Comments. Marriages between "white persons and negroes, or . . . Mongolians" are prohibited and void: §451.020. Criminal sanctions, however, while applying to marriages between a "white person" and a "negro" (§563.240) omit marriages between a "white person" and a "Mongolian". However, to a charge of seduction involving a female "white person", presumably neither a "Mongolian" nor a "negro" could successfully avail himself of the defense of marriage.

11. North Carolina.

Constitution, Art. XIV, §8.—*Intermarriage of whites and Negroes prohibited.* All marriages between a white person and a negro or between a white person and a person of negro descent to the third generation, inclusive, are hereby forever prohibited.

Gen. Stat. of No. Car. §51-3. *Want of capacity; void and voidable marriage.* All marriages between a white person and a negro or between a white person and a person of negro descent to the third generation, inclusive, or between a Cherokee Indian of Robeson County and a negro or between a Cherokee Indian of Robeson County and a person of negro descent to the third generation, inclusive, or between any two persons nearer of kin than first cousins, or between a male person under sixteen years of age and any female, or between a female person under 16 years of age and any male or between persons either of whom has a husband or wife living at the time of such marriage, or between persons either of whom is at the time physically impotent, or is incapable of contracting from want of will or understanding, shall be void: provided, double first cousins may not marry; and provided further, that no marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section, except for that one of the parties was a white person and the other a negro or of negro descent to the third generation, inclusive, and for bigamy; provided further, that no marriage by persons either of whom may be under sixteen years of age, and otherwise competent to marry, shall be declared void when the girl shall be pregnant, or when a child shall have been born to the parties unless such child at the time of the action to annul shall be dead. A marriage contracted under a representation and belief that the female partner to the marriage is pregnant followed by the separation of the parties within forty-five (45) days of the marriage which separation has been continuous for a period of

one year shall be voidable: Provided that no child shall have been born to the parties within ten (10) lunar months of the date of separation.

§14-181. *Miscegenation.* All marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation inclusive, are forever prohibited and shall be void. Any person violating this section shall be guilty of an infamous crime, and shall be punished by imprisonment in the county jail or State's prison for not less than four months nor more than ten years, and may also be fined, in the discretion of the court.

§14-182. *Issuing license for marriage between white person and negro; performing marriage ceremony.* If any register of deeds shall knowingly issue any license for marriage between any person of color and a white person; or if any clergyman, minister of the gospel or justice of the peace shall knowingly marry any such person of color to a white person, the person so offending shall be guilty of a misdemeanor.

§14-180. *Seduction.* If any man shall seduce an innocent and virtuous woman under promise of marriage, he shall be guilty of a felony, and upon conviction shall be fined or imprisoned at the discretion of the court and may be imprisoned in the State prison not exceeding the term of five years; Provided, the unsupported testimony of the woman shall not be sufficient to convict; Provided further, that marriage between the two parties shall be a bar to further prosecution hereunder. But when such marriage is relied upon by the defendant, it shall operate as to the costs of the case as a plea of *nolo contendere*, and the defendant shall be required to pay all the costs of the action or be liable to imprisonment for non-payment of the same.

Comments. North Carolina's peculiar inclusion of "Cherokee Indian of Robeson County" in the class of "white person" in that neither may marry a "negro" is referred

to in *Goins v. Indian Training School*, 169 N.C. 736, 86 S.E. 629 (1915).

In determining whether the alleged Negro party is a "negro", the testimony that such person was known to associate with Negroes, was reputed to be a Negro and had the physical appearance of a Negro was accepted in *Hopkins v. Bowers*, 111 N.C. 175, 16 S.E. 1 (1892); also accepted were defendant's reputation in his community, the testimony by a doctor of defendant's general appearance at birth, and the physical characteristics of his parents and grandparents: *State v. Miller*, 224 N.C. 228, 29 S.E. 2d 751 (1944). Cf. *Ferrall v. Ferrall*, 153 N.C. 174, 69 S.E. 60 (1910)

12. Oklahoma

Constitution, Art. 23 §11. *Colored race—Negro race—White race.* 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.

Okla. Stat. Anno. §43.12. *Miscegenation Prohibited.* The marriage of any person of African descent, as defined by the Constitution of this State, to any person not of African descent, or the marriage of any person not of African descent to any person of African descent, shall be unlawful and is hereby prohibited within this State.

§43.13. *Penalty for miscegenation.* Any person who shall marry in violation of the preceding section, shall be deemed guilty of a felony, and upon conviction thereof shall be fined in any sum not exceeding five hundred dollars, and imprisoned in the penitentiary for not less than one nor more than five years.

Comments. In brief, in Oklahoma a person of "African descent" may marry only another person of "African descent" and such prohibition may not be avoided by Oklahoma domciliaries going to another state to be married: *Stevens v. United States*, 146 F. 2d 120 (CCA 10, 1944); *Baker v. Carter,* 180 Okla. 71, 68 P. 2d 85 (1937). Presumably a Japanese is a "white person"; this also appears to be the case under Texas' law, infra. Thus in both states, Japanese would be denied the right of marrying any person of "African descent". Query whether the term "persons of African descent" may include "white Rhodesians", for example.

13. South Carolina

Constitution, Art. 3, §33. *Marriages of whites and Negroes: sexual intercourse*—The marriage of a white person with a negro or mulatto, or person who shall have one-eighth of more of negro blood, shall be unlawful and void. No unmarried woman shall legally consent to sexual intercourse who shall not have attained the age of fourteen years.

Art. 2, §6. *Persons disqualified from voting.* The following persons are disqualified from being registered or voting:

First, Persons convicted of burglary, arson, obtaining goods or money under false pretenses, perjury, forgery, robbery, bribery, adultery, bigamy, wife-beating, house-breaking, receiving stolen goods, breach of trust with fraudulent intent, fornication, sodomy, incest, assault with intent to ravish, micegenation, larceny, or crimes against the election laws: Provided, that the pardon of the Governor shall remove such disqualification.

Second, Persons who are idiots, insane, paupers supported at the public expense, and persons confined in any public prison.

So. Car. Code. §20-7. *Miscegenation; marriages between white persons and Catawba Indians are legal.*—It shall be unlawful (a) for any white man to intermarry with any woman of either the Indian or negro races or any mulatto, mestizo or half-breed, (b) for any white woman to intermarry with any person other than a white man or (c) for any mulatto, half-breed, Indian, negro or mestizo to intermarry with a white woman; and any such marriage or attempted marriage shall be utterly null and void and of no effect. Any person who shall violate any provision of this section shall be guilty of a misdemeanor and, on conviction thereof, shall be punished by a fine of not less than five hundred dollars or imprisonment for not less than twelve months or both in the discretion of the court.

Provided, however, all white persons of this State who have occupied the relations of husband and wife and have cohabited as such with Catawba Indians prior to March 11, 1960 shall be deemed husband or wife, and entitled to all the rights and privileges and be subject to all the duties and obligations of that relation, in like manner as if they had been duly married according to law. Marriages taking place after March 11, 1960 between white persons of this State and Catawba Indians are declared legal in all respects.

§20-8. *Performing marriage ceremony involving miscegenation.*—Any clergyman, minister of the Gospel, magistrate or other person authorized by law to perform the marriage ceremony who shall knowingly and wilfully unite in the bonds of matrimony any persons of different races in violation of any provision of sec. 20-7 shall be guilty of a misdemeanor and, upon conviction thereof, shall be liable to the same penalty or penalties as provided in such section.

§20-5.1. *Marriage of parents legitimates illegitimate children.*—If the parents of an illegitimate child subsequently marry, the child shall become legitimate as if born in lawful wedlock and, as to the child so legitimated, all limitations imposed by law upon the amount of property that may be given illegitimate children by deed, will, inheritance or otherwise shall be removed. The provisions of this section shall be retroactive to the extent that they shall apply in all cases in which prior to May 2, 1951 the parents of an illegitimate child shall have married and the father and such child shall have been living on said date.

§16-405. *Seduction under promise of marriage.*—Any male person above the age of sixteen years who shall by any means of deception and promise of marriage seduce any unmarried woman in this State shall upon conviction be guilty of misdemeanor and shall be fined or imprisoned, at the discretion of the court. But no conviction shall be had under this section on the uncorroborated testimony of the woman upon whom the seduction is charged, and no conviction shall be had if on trial it is proved that such woman was at the

time of the alleged offense lewd and unchaste. And if the defendant in any action brought hereunder shall contract marriage with such woman, either before or after conviction, further proceedings hereunder shall be stayed.

§23-62. *Qualifications for registration; persons disqualified.*—Every citizen of this state and the United States who:

(1) Is twenty-one years of age or more;

* * *

shall be registered; *provided, however*, that:

* * *

(c) Persons convicted of burglary, arson, obtaining goods or money under false pretenses, perjury, forgery, robbery, bribery, adultery, bigamy, wife-beating, housebreaking, receiving stolen goods, breach of trust with fraudulent intent, fornication, sodomy, incest, assault with intent to ravish, miscegenation, larceny or crimes against the election laws shall be disqualified from being registered or voting, unless such disqualification shall have been removed by the pardon of the Governor.

Comments. As indicated, persons convicted on "miscegenation" may neither register to vote nor vote. Under the provisions of §20-7, a "white woman" is limited to marrying only a "white man"; on the other hand, a "white man" is free to marry anyone except "any woman of either the Indian or negro races or any mulatto, mestizo or half-breed. . . ." Thus, for example a "white" male may freely marry a Japanese female but a "white" female could not marry a Japanese male. Whether the progeny from a marriage of a "white" male and Japanese female would be regarded as "white" or not presents some difficult speculations. For example, if any of the progeny are females, and such are *not* regarded as "white" then presumably such female progeny could freely marry a "negro"; on the other hand, if the progeny *are* considered to be "white", then a male progeny presumably could marry a "white" female. However, these would be risky speculations at best.

14. Tennessee

Constitution, Art. 11, §14. The intermarriage of white persons with negroes, mulattoes, or persons of mixed blood, descended from a negro to the third generation inclusive or their living together as man and wife in this State is prohibited. The legislature shall enforce this section by appropriate legislation.

Tenn. Code Anno. §36-402. *Whites and negroes or mulattoes forbidden to marry or cohabit.* The intermarriage of white persons with negroes, mulattoes, or persons of mixed blood descended from a negro, to the third generation inclusive, or their living together as man and wife in this state, is prohibited.

§36-403. *Penalty for violating preceding section.* The person knowingly violating the provisions of sec. 36-402 shall be guilty of a felony, and undergo imprisonment in the penitentiary not less than one (1) nor more than five (5) years; and the court may, on the recommendation of the jury, substitue, in lieu of punishment in the penitentiary, fine and imprisonment in the county jail.

§36-419. *Solemnizing marriage between incapable persons—misdemeanor—penalty.* If any such minister or officer knowingly join together in matrimony two persons not capable thereof, he shall be guilty of a misdemeanor, and, also forfeit and pay the sum of five hundred dollars ($500), to be recovered by action of debt, for the use of the person suing.

§1-305. *Definitions of terms used in Code.*

* * *

(11) "Negro" includes mulattoes, mestizos, and their descendants, having any blood of the African race in their veins.

15. Texas

Vernon's Tex. Civ. Stat., Art. 4607. *Certain intermarriages prohibited.*—It shall not be lawful for any person of Caucasian blood or their descendants to intermarry with Africans or the descendants of Africans. If any person shall violate any provision of this article, such marriage shall be null and void.

Vernon's Tex. Penal Code.

Art. 492. *Miscegenation.* If any white person and negro shall knowingly intermarry with each other in this State, or having so intermarried in or out of the State shall continue to live together as man and wife within this State, they shall be confined in the penitentiary not less than two nor more than five years.

Art. 493. *"Negro" and "white person."* The term "negro" includes also a person of mixed blood descended from negro ancestry from the third generation inclusive, though one ancestor of each generation may have been a white person. Any person not included in the foregoing definition is deemed a white person within the meaning of this law.

Art. 505. *Seduction.* If any person by promise to marry shall seduce an unmarried female under the age of twenty-five years and shall have carnal knowledge of such female, he shall be confined in the penitentiary not less than two nor more than ten years.

Art. 506. *Marriage obliterates offense.* If the parties marry each other at any time before the defendant pleads to the indictment before a court of competent jurisdiction, the prosecution shall be dismissed. If after the prosecution is begun and before he pleads to the indictment before a court of competent jurisdiction, the defendant in good faith offers to marry the female so seduced and she refuses to marry him, such refusal shall be a bar to further prosecution. This arti-

cle shall not apply to the case of a defendant who was in fact married at the time of committing the offense.

Comments. Since the civil statute employs the term "Caucasian" whereas the penal code employs the term "white person"—and the two terms are not equated by definition,—then a marriage between a "white person" and a one-sixteenth "negro" would not be subject to criminal penalties but nevertheless may be "null and void" under Art. 4607 of the civil statute. Also, presumably a Japanese is a "white person" for purposes of the penal code; however, since it is by no means clear that a Japanese is also a "Caucasian" within the meaning of the civil statute, it is conceivable that a marriage between a Japanese and "negro" would be valid for civil purposes and yet be subject to criminal sanctions.

16. Virginia (Va. Code)

§1-14. *Colored persons and Indians defined.* Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one-fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one-fourth or more of Indian blood and less than one-sixteenth of Negro blood shall be deemed tribal Indians.

§20-50. *Certificates of racial composition.* The State Registrar of Vital Statistics may prepare a form whereon the racial composition of any individual, as Caucasian, Negro, Mongolian, American Indian, Asiatic Indian, Malay, or any mixture thereof, or any other non-Caucasic strains, and if there be any mixture, then, the racial composition of the parents and other ancestors, insofar as ascertainable, so as to show in what generation such mixture occurred, may be certified by such individual, which form shall be known as a registration certificate. The State Registrar of Vital Statistics may supply to each local registrar a sufficient number of such forms for the purpose of this chapter; each local registrar may, personally or by deputy, as soon as possible after receiving the forms, have made thereon in duplicate a certificate of the racial composition, as aforesaid, of each person resident in his district, who so desires, born before June fourteenth, nineteen hundred and twelve, which certificate shall be made over the signature of such person, or in the case of children under fourteen years of age, over the signature of a parent, guardian, or other person standing in loco parentis. One of such certificates for each person thus registering in every district shall be forwarded to the State Registrar of Vital Statistics for his files; the other shall be kept on file by the local registrar.

* * *

§20-51. *False registration or certificate.* It shall be a felony for any person wilfully or knowingly to make a registration certificate false as to color or race. The wilful making of a false registration or birth certificate shall be punished by confinement in the penitentiary for one year.

§20-53. *License not to issue until clerk assured statements are correct.* No marriage license shall be granted until the clerk or deputy clerk has reasonable assurance that the statements as to color of both man and woman are correct.

If there is reasonable cause to disbelieve that applicants are of pure white race, when that fact is stated, the clerk or deputy clerk shall withhold the granting of the license until satisfactory proof is produced that both applicants are "white persons" as provided for in this chapter.

The clerk or deputy clerk shall use the same care to assure himself that both applicants are colored, when that fact is claimed.

§20-54. *Intermarriage prohibited; meaning of term "white persons."*—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. For the purpose of this chapter, the term "white person" shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter.

§20-56. *Certain colored persons not married to be deemed husband and wife; children legitimated.*—Where colored persons prior to the twenty-seventh day of February, eighteen hundred and sixty-six, agreed to occupy the relation to each other of husband and wife, and were cohabiting together as such at that date, whether the rites of marriage

had been celebrated between them or not, they shall be deemed husband and wife, and be entitled to the rights and privileges, and subject to the duties and obligations of that relation in like manner, as if they had lawfully married; and all their children shall be deemed legitimate, whether born before or after such date. And where the parties had ceased to cohabit before the twenty-seventh day of February, eighteen hundred and sixty-six, in consequence of the death of the woman, or from any other cause, all the children of the woman, recognized by the man to be his, shall be deemed legitimate.

§20-57. *Marriages void without decree.*—All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process.

§20-58. *Leaving State to evade law.*—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in §20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.

§20-59. *Pumishment for marriage.*—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.

§20-60. *Pumishment for performing ceremony.*—If any person perform the ceremony of marriage between a white person and a colored person, he shall forfeit two hundred dollars, of which the informer shall have one half.

Comments. Under §1-14 a Japanese presumably would not be a "colored person" although the last sentence of §20-54 appears to place a Japanese in the same category.

However, a person who was one-quarter American Indian and three-quarters Japanese would presumably be an "American Indian" under §1-14; if such person left Virginia with a "white person" and married out of the state and returned to Virginia, such marriage would be unlawful and void (§§20-54, 20-57) but may not be in violation of the evasion provision of §20-58 which does not apply to an "American Indian".

17. West Virginia (W. Va. Code Anno.)

§48-1-19. *Miscegenation; Penalties.*—Any white person who shall intermarry with a negro shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not exceeding one hundred dollars, and confined in jail not more than one year. Any person who shall knowingly perform the ceremony of marriage between a white person and a negro shall be guilty of a misdemeanor, and, upon conviction thereof shall be fined not exceeding two hundred dollars.

§48-2-1. *For What and When Marriage Void.*—All marriages between a white person and a negro; and all marriages prohibited by law because of the following:

1) One of the parties already married

* * *

shall be void from the time that they are so declared by a decree of nullity.

§61-8-3. *Adultery and Fornication; Penalty.*—If any person commit adultery or fornication, he shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than twenty dollars.

§61-8-4. *Lewd and Lascivious Cohabitation and Conduct; Penalty; Persons presumed to be Unmarried.*—If any persons, not married to each other, lewdly and lasciviously associate and cohabit together, or, whether married or not, be guilty of open or gross lewdness and lasciviousness, they shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty dollars, and may, in the discretion of the court, be imprisoned not exceeding six months, and, upon a repetition of the offense, they shall, upon conviction, be confined in jail not less than six nor more than twelve months. In prosecutions for adultery and fornication, and for lewdly and lasciviously cohabiting together, the persons named in the indictment shall be presumed to be unmarried persons in the absence of proof to the contrary.

Comment. No definition or attempted clarification of the terms "white person" and "negro" appearing in the statute, a Japanese resident, for example, of West Virginia would be taking a risk of making the wrong guess by marrying either a "white person" or a "negro"; or, of course, he may not be subject to any criminal sanctions or civil consequences. It is by no means clear. Under §48-1-19, only the "white person" shall be guilty of the offense, although the "negro" may be guilty under §61-8-4.

APPENDIX B

1964 UNESCO STATEMENT

PROPOSALS ON THE BIOLOGICAL ASPECTS OF RACE

The undersigned, assembled by Unesco in order to give their views on the biological aspects of the race question and in particular to formulate the biological part for a statement foreseen for 1966 and intended to bring up to date and to complete the declaration on the nature of race and racial differences signed in 1951, have unanimously agreed on the following:

1. All men living today belong to a single species, *Homo sapiens*, and are derived from a common stock. There are differences of opinion regarding how and when different human groups diverged from this common stock.

2. Biological differences between human beings are due to differences in hereditary constitution and to the influence of the environment on this genetic potential. In most cases, those differences are due to the interaction of these two sets of factors.

3. There is great genetic diversity within all human populations. Pure races—in the sense of genetically homogeneous populations—do not exist in the human species.

4. There are obvious physical differences between populations living in different geographic areas of the world, in their average appearance. Many of these differences have a genetic component.

   Most often the latter consist in differences in the frequency of the same hereditary characters.

5. Different classifications of mankind into major stocks, and of those into more restricted categories (races, which are groups of populations, or single populations) have been proposed on the basis of hereditary physical traits. Nearly all classifications recognize at least three major stocks.

   Since the pattern of geographic variation of the characteristics used in racial classification is a complex one, and since this pattern does not present any major discontinuity, these classifications, whatever they are, cannot claim to classify mankind into clear-cut categories; moreover, on account of the complexities of human history, it is difficult to determine the place of certain groups within these racial classifications, in particular that of certain intermediate populations.

   Many anthropologists, while stressing the importance of human variation, believe that the scientific interest of these classifications is limited, and even that they carry the risk of inviting abusive generalizations.

   Differences between individuals within a race or within a population are often greater than the average differences between races or populations.

   Some of the variable distinctive traits which are generally chosen as criteria to characterize a race are either independently inherited or show only varying degrees of association between them within each population. Therefore, the combination of these traits in most individuals does not correspond to the typological racial characterization.

6. In man as well as in animals, the genetic composition of each population is subject to the modifying influence of diverse factors: natural selection, tending towards adaptation to the environment, fortuitous mutations which lead to modifications of the molecules of desoxyribonucleic acid which determine he-

redity, or random modifications in the frequency of qualitative hereditary characters, to an extent dependent on the patterns of mating and the size of populations.

Certain physical characters have a universal biological value for the survival of the human species, irrespective of the environment. The differences on which racial classifications are based do not affect these characters and, therefore, it is not possible from the biological point of view to speak in any way whatsoever of a general inferiority or superiority of this or that race.

7. Human evolution presents attributes of capital importance which are specific to the species.

The human species, which is now spread over the whole world, has a past rich in migrations, in territorial expansions and contractions.

As a consequence, general adaptability to the most diverse environments is in man more pronounced than his adaptations to specific environments.

For long millennia, progress made by man, in any field, seems to have been increasingly, if not exclusively, based on culture and the transmission of cultural achievements and not on the transmission of genetic endowment. This implies a modification in the role of natural selection in man today.

On account of the mobility of human populations and of social factors, mating between members of different human groups, which tend to mitigate the differentiations acquired, has played a much more important role in human history than in that of animals. The history of any human population, or of any human race, is rich in instances of hybridization and those tend to become more and more numerous.

For man, the obstacles to interbreeding are geographical as well as social and cultural.

8. At all times, the hereditary characteristics of the human populations are in dynamic equilibrium as a result of this interbreeding and of the differentiation mechanisms which were mentioned before. As entities defined by sets of distinctive traits, human races are at any time in a process of emergence and dissolution.

   Human races in general present a far less clear-cut characterization than many animal races and they cannot be compared at all to races of domestic animals, these being the result of heightened selection for special purposes.

9. It has never been proved that interbreeding has biological disadvantages for mankind as a whole.

   On the contrary, it contributes to the maintenance of biological ties between human groups and thus to the unity of the species in its diversity.

   The biological consequences of a marriage depend only on the individual genetic make-up of the couple and not on their race.

   Therefore, no biological justification exists for prohibiting intermarriage between persons of different races, or for advising against it on racial grounds.

10. Man since his origin has at his disposal ever more efficient cultural means of nongenetic adaptation.

11. Those cultural factors which break social and geographic barriers enlarge the size of the breeding populations and so act upon their genetic structure by diminishing the random fluctuations (genetic drift).

12. As a rule, the major stocks extend over vast territories encompassing many diverse populations which differ in language, economy, culture, etc.

There is no national, religious, geographic, linguistic or cultural group which constitutes a race *ipso facto*; the concept of race is purely biological.

However, human beings who speak the same language and share the same culture have a tendency to intermarry, and often there is as a result a certain degree of coincidence between physical traits on the one hand, and linguistic and cultural traits on the other. But there is no known causal nexus between these and therefore it is not justifiable to attribute cultural characteristics to the influence of the genetic inheritance.

13. Most racial classifications of mankind do not include mental traits or attributes as a taxonomic criterion.

Heredity may have an influence in the variability shown by individuals within a given population in their responses to the psychological tests currently applied.

However, no difference has ever been detected convincingly in the hereditary endowments of human groups in regard to what is measured by these tests. On the other hand, ample evidence attests to the influence of physical, cultural and social environment on differences in response to these tests.

The study of this question is hampered by the very great difficulty of determining what part heredity plays in the average differences observed in so-called tests of over-all intelligence between populations of different cultures.

The genetic capacity for intellectual development, like certain major anatomical traits peculiar to the species, is one of the biological traits essential for its survival in any natural or social environment.

The peoples of the world today appear to possess equal biological potentialities for attaining any

civilizational level. Differences in the achievements of different peoples must be attributed solely to their cultural history.

Certain psychological traits are at times attributed to particular peoples. Whether or not such assertions are valid, we do not find any basis for ascribing such traits to hereditary factors, until proof to the contrary is given.

Neither in the field of hereditary potentialities concerning the over-all intelligence and the capacity for cultural development, nor in that of physical traits, is there any justification for the concept of 'inferior' and 'superior' races.

The biological data given above stand in open contradiction to the tenets of racism. Racist theories can in no way pretend to have any scientific foundation and the anthropologists should endeavour to prevent the results of their researches from being used in such a biased way that they would serve non-scientific ends.

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