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Supreme Court of the State of New York

Appellate Division – First Department

DANIEL HERNANDEZ and NEVIN COHEN,
LAUREN ABRAMS and DONNA FREEMAN-TWEED,
MICHAEL ELSASSER and DOUGLAS ROBINSON,
MARY JO KENNEDY and JO-ANN SHAIN,
and DANIEL REYES and CURTIS WOOLBRIGHT,

Plaintiffs-Respondents,

- against -

VICTOR L. ROBLES, in his official capacity as
CITY CLERK of the City of New York,

Defendant-Appellant.

BRIEF OF AMICI CURIAE

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Amici Curiae, the New York County Lawyers' Association ("NYCLA"), the National Black Justice Coalition ("NBJC") and the Metropolitan Black Bar Association ("MBBA") submit this brief in support of Justice Doris Ling-Cohan's decision below in *Hernandez v Robles* (7 Misc 3d 459 [Sup Ct, NY County 2005]) rejecting New York's prohibition on marriage between same-sex partners as unconstitutional under New York's Constitution. For the reasons set forth herein and in the Record, the decision below should be affirmed.

STATEMENT OF INTEREST OF *AMICI*

A. The New York County Lawyers' Association

NYCLA is a not-for-profit membership organization of approximately 8,500 attorneys practicing primarily in New York County, founded and operating specifically for charitable and educational purposes. NYCLA's certificate of incorporation specifically provides that it is to seek reform in the law and do what it deems in the public interest and for the public good.

In 1907, a group of lawyers gathered in Carnegie Hall to address the prospect of forming a bar group where heritage and politics were not obstacles to inclusion. The bar leaders who met were determined to create, in the words of Hon. Joseph H. Choate, who would become president in 1912, "the great democratic bar association of the City [where] any attorney who had met the rigid standards set up by law for admission to the bar should, by virtue of that

circumstance, be eligible for admission." Adherence to professional standards alone would determine eligibility.

When NYCLA was founded, it was the first major bar association in the United States of America that admitted members without regard to race, ethnicity, religion or gender. Since its formation in 1908, NYCLA has played a leading role in the fight against discrimination under local, state and federal law. Although various factors inspired NYCLA's creation, none was as strong as its rejection of the "selective membership" that other bar associations employed to deny large groups of lawyers the opportunity to participate in bar association activities. Throughout its history, NYCLA's bedrock principle has been the inclusion of all who wish to join the active pursuit of legal system reform.

Consistent with its opposition to discrimination in the legal profession, in 1943 NYCLA refused to renew its affiliation with the American Bar Association because it would not admit African-American lawyers. And in December 2003, the NYCLA Board of Directors adopted a resolution endorsing full equal civil marriage rights for same-sex couples.

NYCLA's endorsement of equal civil marriage rights for same-sex couples grew out of its concern that an entire class of New York couples and their families lack the protections afforded to families led by heterosexual couples. To ensure that all rights, benefits and responsibilities attendant to civil marriage are

available to same-sex couples in New York, NYCLA submits that it is necessary to extend civil marriage rights to same-sex couples without diluting these rights through piecemeal legislation or the ambiguous "civil union" or "domestic partnership." In the absence of state-recognized marriage rights, same-sex couples are relegated to second-class citizenship when they are denied the equal rights that are available to heterosexual couples and their families.

B. The National Black Justice Coalition

NBJC is a non-profit, civil rights organization of black lesbian, gay, bisexual and transgender people and allies dedicated to fostering equality. NBJC has more than 3,000 members nationwide and advocates for social justice by educating and mobilizing opinion leaders, including elected officials, clergy and media, with a focus on black communities. Black communities have historically suffered from discrimination and have turned to the courts for redress. With this appeal, we turn to the courts again. The issue presented by this appeal has significant implications for the civil rights of black lesbians and gay men in this State – whether they will receive equal treatment under the law and the legal recognition and protections of marriage for their relationships and families. NBJC envisions a world where all people are fully empowered to participate safely, openly and honestly in family, faith and community, regardless of race, gender-identity or sexual orientation.

C. The Metropolitan Black Bar Association

MBBA is a New York City-wide organization of mainly black and other minority attorneys dedicated to aiding the progress of attorneys of color and to assisting the progress of the legal profession generally. MBBA was formed 21 years ago through a merger of two of the oldest minority bar associations in the country: the Harlem Lawyers Association, formed in 1921, and the Bedford-Stuyvesant Lawyers Association, formed in 1933. Since the founding of MBBA's predecessor organizations—at a time when minority attorneys were prevented from joining most mainstream bar associations—black attorneys have been at the forefront of the fight against discrimination on all fronts. MBBA is committed to equal justice for all and preventing state-sanctioned discrimination and, accordingly, the issue presented by this appeal is of extreme importance to MBBA's member attorneys and the community it serves.

PRELIMINARY STATEMENT

This Nation has a history of discrimination that was once commonplace and acceptable, but is resoundingly rejected today. Other types of discrimination continue, such as that in issue now before this Court: the prohibition on civil marriage between same-sex couples. The current prohibition on marriage between individuals of the same sex is rationalized today based on its longstanding history and supposed equal application to men and women.

For centuries, these same rationalizations were used to justify the prohibition of interracial marriage—a prohibition that no one today would defend as even arguably constitutional. Thus, in any analysis of today's restrictions on the right to marry for same-sex couples, we must be mindful of this Nation's history of discriminating against couples of different races. At the core of both prohibitions lies the violation of an individual's right to marry.[1] On February 4, 2005, Supreme Court Justice Doris Ling-Cohan in the decision below, *Hernandez v Robles* (7 Misc 3d 459 [Sup Ct, NY County 2005]), rejected New York's prohibition on marriage between same-sex partners as unconstitutional under New York's Constitution. The decision below recognized the striking similarity in the nature of the history of racial discrimination in the realm of restrictions on marriage partners:

> "An instructive lesson can be learned from the history of the anti-miscegenation laws and the court decisions which struck them down as unconstitutional. The challenges to laws banning whites and non-whites from marriage demonstrate that the fundamental right to marry the person of one's choice may not be denied based on longstanding and deeply held traditional beliefs about appropriate marital partners. . . . [T]he United States Supreme Court was not deterred by the deep historical roots of anti-miscegenation laws [(*Loving v Virginia*, 388 US 1, 7, 10 [1967])]; their continued prevalence [(*id.* at 6 n 5)]; nor any continued popular opposition to interracial

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[1] *Amici* recognize that the long history of racial discrimination in this country extended well beyond restrictions on marriage rights.

> marriage. [(*Id.* at 7)]. Instead, the Court held that '[u]nder our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State,' declaring that 'marriage is one of the "basic civil rights of man," fundamental to our very existence and survival.' [(*Id.* at 12 (quoting *Skinner v Oklahoma ex rel. Williamson*, 316 US 535, 541 [1942])]."

(*Id.* at 461-462).

This brief provides a detailed historical background of the prohibition on interracial marriage in the United States and an analysis of judicial opinions that ultimately recognized the prohibition as an unconstitutional violation of an individual's fundamental right to marry. Viewed against this background, *Amici* respectfully request that this Court affirm that the prohibition on civil marriage between same-sex couples is also unconstitutional.

ARGUMENT

I. HISTORICAL BACKGROUND

A. Interracial Marriage Was Prohibited In This Nation For More Than 300 Years

The interracial marriage prohibition was deeply rooted in our Nation's history and tradition. Statutes prohibiting interracial marriage were enforced in American colonies and states for more than three centuries. (*See* Peter Wallenstein, *Tell the Court I Love My Wife: Race, Marriage & Law—An American History* 253-254 [2002], annexed to the Appendix as Tab A). The first anti-

miscegenation law was enacted in Maryland in 1661. (Rachel F. Moran, *Interracial Intimacy: The Regulation of Race & Romance* 19 [2001], annexed to the Appendix as Tab B). Virginia followed suit soon after. (*See id.*).

Interracial marriage was so far outside of the realm of traditional marriage in colonial America that Virginia amended its anti-miscegenation law in 1691 to banish from the community any white person who married a "negro," "mulatto" or Indian. (Wallenstein, *supra*, at 15-16). Couched in "the language of hysteria rather than legalese," the avowed purpose of Virginia's 1691 law was to prevent "that abominable mixture and spurious issue" of whites with blacks or Indians. (*Id.* at 15).

Although the first American anti-miscegenation laws were enacted in the Chesapeake Bay colonies, they quickly spread throughout the country. Massachusetts enacted an anti-miscegenation law in 1705. (Carter G. Woodson, *The Beginnings of Miscegenation of the Whites and Blacks, in Interracialism: Black-White Intermarriage in American History, Literature & Law* 42, 45, 49 [Werner Sollors ed., 2000], annexed to the Appendix as Tab C). Pennsylvania passed its anti-miscegenation law in 1725, and Delaware enacted a similar law in 1726. (Charles Frank Robinson II, *Dangerous Liaisons: Sex & Love in the Segregated South* 4 [2003], annexed to the Appendix as Tab D).

By the time of the Civil War, laws prohibiting interracial marriage covered most of the South and much of the Midwest, and they were beginning to appear in Western states. (*See* David H. Fowler, *Northern Attitudes Toward Interracial Marriage: Legislation & Public Opinion in the Middle Atlantic & the States of the Old Northwest, 1780-1930* 214-219 [1987], annexed to the Appendix as Tab E). The proponents of these laws argued that they were necessary to uphold the law of nature:

> "Hybridism is heinous. Impurity of races is against the law of nature. Mulattoes are monsters. The law of nature is the law of God. The same law which forbids consanguineous amalgamation; forbids ethnical amalgamation. Both are incestuous. Amalgamation is incest."

(Henry Hughes, *Treatise on Sociology, Theoretical & Practical* 239-240 [1854], annexed to the Appendix as Tab F).

Although New York State never enacted an anti-miscegenation law, interracial relations were still subject to strong taboo here and vilified in the political arena. Indeed, the term "miscegenation" was first used in an anonymous propaganda pamphlet printed in New York City in 1863. The term was coined from two Latin words meaning "to mix" and "race." The pamphlet – falsely attributed to the Republican Party and abolitionists -- advocated the "interbreeding" of the white and black races so that they would become indistinguishably mixed. The pamphlet was later exposed as a "dirty trick"

instigated by Democrats to discredit Republicans. (*See e.g.* Wikipedia: The Free Encyclopedia, *Miscegenation* <en.wikipedia.org/wiki/Miscegenation> [last accessed August 3, 2005]; *The Miscegenation Hoax* <www.museumofhoaxes.com/miscegenation.html> [last accessed August 3, 2005]).

During Reconstruction, southern Democrats adopted the New York-minted term "miscegenation" and insisted on the necessity of preserving the sanctity of marriage by banning interracial marriage. (*See* Moran, *supra*, at 26). A few southern states repealed their anti-miscegenation laws during Reconstruction, but societal pressure to spurn interracial relationships remained steadfast. (*Id.*). When white southern males regained control of their state legislatures after Reconstruction, they promptly reinstated anti-miscegenation laws. (*See id.* at 27).

Nor did ratification of the Fourteenth Amendment and its guarantee of equal protection bring any change in the courts' view of the constitutionality of these laws. Over the next century, scores of courts confronted challenges to these racial restrictions and (with only two exceptions) consistently upheld the laws on the basis of longstanding tradition, "equal" application to the races and the "logic" of prohibiting interracial marriage. For example, in 1878, the Supreme Court of Appeals of Virginia stated:

> "The public policy of this state, in preventing the intercommingling of the races by refusing to legitimate marriages between them has been illustrated by its legislature for more than a century. . . . The purity of

> public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization . . . all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion."

(*Kinney v Virginia*, 71 Va 858, 869 [1878]; *see e.g. Dodson v Arkansas*, 61 Ark 57, 60-61, 31 SW 977, 977-978 [1895] (anti-miscegenation law held not unconstitutional or even "affected" by amendments to Federal Constitution); *Missouri v Jackson*, 80 Mo 175, 177 [1883] (traditional anti-miscegenation law held not to be discriminatory and violative of the Fourteenth Amendment to the Federal Constitution as it applies equally to the races); *Green v Alabama*, 58 Ala 190, 195-197 [1877] (same); *Lonas v Tennessee*, 50 Tenn 287, 312 [1871] (holding anti-miscegenation law unaffected by the Fourteenth Amendment to the Federal Constitution); *Indiana v Gibson*, 36 Ind 389, 393-394 [1871] (same); *Scott v Georgia*, 39 Ga 321, 323, 327 [1869] (upholding constitutionality of anti-miscegenation law and stating that "the offspring of these unnatural connections are generally sickly and effeminate")).

Despite the proliferation of anti-miscegenation laws, opponents of interracial marriage feared that state laws were insufficient to protect the sanctity of marriage. In December 1912, Representative Seaborn Roddenberry of Georgia proposed to amend to the United States Constitution to declare "Intermarriage

between Negroes or persons of color and Caucasians . . . is forever prohibited." (49 Cong Rec 502 [Dec. 11, 1912]). Leaders from around the country denounced interracial marriage. For example, Governor William Mann of Virginia called miscegenation "'a desecration of one of our sacred rites.'" Even New York's Governor John Dix called it "'a blot on our civilization'" and "'a desecration of the marriage tie [that] should never be allowed.'" (*See* Robinson, *supra*, at 79; *see also* Denise C. Morgan, *Jack Johnson: Reluctant Hero of the Black Community*, 32 Akron L Rev 529, 548 [1999]).

B. Marriage Prohibitions Extended To Numerous Racial Groups

Although the first anti-miscegenation laws targeted whites and blacks, many states expanded their application to other racial groups. (*See* Peggy Pascoe, *Miscegenation Law, Court Cases & Ideologies of "Race" in Twentieth Century America, in Interracialism: Black-White Intermarriage in American History, Literature & Law* 178, 183 [Werner Sollors ed., 2000], annexed to the Appendix as Tab G). Twelve states prohibited marriage between whites and Native Americans. (*Id.*). After the mid-eighteenth century, when people from the Far East began to immigrate to the United States, states with substantial populations of Chinese and Japanese responded by enacting anti-miscegenation laws prohibiting marriage between whites and "Mongolians." (Moran, *supra*, at 28-36).

As new "nonwhite" immigrant communities formed, states amended their anti-miscegenation laws to prevent marriages between whites and these immigrants. (*Id.* at 31-32). In 1862, Oregon passed its first anti-miscegenation law. (*See* 1862 Or Laws § 63-102). In 1866, Oregon amended the statute to prohibit marriage between "any white person, male or female" and "any negro, Chinese, or any person having one fourth or more negro, Chinese, or Kanaka [Native Hawaiian] blood, or any person having more than one-half Indian blood." (*See* 1866 Or Laws § 23-1010).

In 1850, California enacted a law prohibiting marriages between "white persons" and "negroes or mulattoes." (Leti Volpp, *American Mestizo: Filipinos & Anti-Miscegenation Laws in California, in Mixed Race America & the Law: A Reader* 86 [Kevin R. Johnson ed., 2003], annexed to the Appendix as Tab H). Then, in 1878, California amended its constitution to restrict the intermarriage of whites and Chinese. (*See* Moran, *supra*, at 31). Shortly thereafter, the California Legislature amended the Civil Code to ban the union of "'a white person with a negro, mulatto, or Mongolian.'" (*Id.* [citation omitted]). Later, it amended the law to include "'members of the Malay race'" as well. (*See id.* at 38 [citation omitted]).

The specific targets of anti-miscegenation laws varied from state to state, as different racial or national groups were singled out by specific statutes

reflecting legislative bigotry directed at particular racial groups. (Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity & Adoption* 220 [2003], annexed to the Appendix as Tab I). Other states enforced their anti-miscegenation policies on the basis of judicial decisions that turned on white/non-white distinctions. For example, Virginia voided a marriage between a white person and a person of Chinese descent on the basis of that state's statute making it "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." (*See Naim v Naim*, 197 Va 80, 81, 87 SE2d 749, 750 [citation omitted], *vacated and remanded* 350 US 891 [1955], *adhered to* 197 Va 734, 90 SE2d 849 [1956]). All told, thirty-eight states had anti-miscegenation laws in effect at one time or another. (*See* Wallenstein, *supra*, at 253-254). By the end of World War II, thirty states still had such statutes. (*See id.* at fig. 8).[2]

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[2] Of course, affluent people could avoid certain consequences of the anti-miscegenation laws. For example, John Mercer Langston, the first African American to be elected to public office and the founder in 1868 of the Howard University School of Law, was able to succeed to the wealth of his white father (and the opportunities that such wealth would enable) as a result of his father's capacity to contract around certain consequences of Virginia's anti-miscegenation laws to ensure that his children would inherit his wealth. Upon their parents' deaths, those children, including John Mercer Langston, were taken in by a family friend in a free state -- Ohio. (*See* John Mercer Langston Bar Assn web site <www.jmlba.org/JMLBio.htm> [last accessed August 3, 2005]; Kansas St Hist Soc'y web site <www.kshs.org/publicat/history/1999winter_sheridan.htm> [last accessed August 3, 2005]). Similarly, same-sex couples of means who are denied

State anti-miscegenation laws were considered constitutional until 1967, when the U.S. Supreme Court struck down such discrimination as an unconstitutional interference with an individual's fundamental right to marry. (*Loving*, 388 US at 12; *see also Naim*, 197 Va at 81, 87 SE2d at 750; *Kinney*, 71 Va at 869; *Dodson*, 61 Ark at 60-61, 31 SW at 977-978 (anti-miscegenation law held not unconstitutional or even "affected" by amendments to Federal Constitution); *Jackson*, 80 Mo at 177 (traditional anti-miscegenation law held not to be discriminatory and violative of the Fourteenth Amendment to the Federal Constitution as it applies equally to the races); *Green*, 58 Ala at 195-197 (same); *Lonas*, 50 Tenn at 312 (holding anti-miscegenation law unaffected by the Fourteenth Amendment to the Federal Constitution); *Gibson*, 36 Ind at 393-394 (same); *Scott*, 39 Ga at 323, 327 (upholding constitutionality of anti-miscegenation law and stating that "the offspring of these unnatural connections are generally sickly and effeminate").[3]

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the right to marry can, with respect to at least a certain few of the benefits attendant to marriage (*i.e.*, rights of succession), contract for the same, albeit privately and at great expense. This juxtaposition highlights yet another dimension to the inequity that flows from the deprivation of equal marriage rights -- a built-in preference for those affected persons of means.

[3] Clearly, a lengthy catalog of discriminatory law cannot, as apparently argued by Appellants in their brief (at 30-37), effectively justify the perpetuation of the discrimination in question. Not one iota of the resoundingly "democratic" bigotry expressed through statutes, public opinion and legal decisions rendered the same constitutionally permissible.

C. Anti-Miscegenation Laws Enjoyed Vast Popular Support

Bans on interracial marriage reflected contemporary public sentiment. In 1958, a Gallup Poll indicated that 96 percent of all Americans opposed interracial marriage. (*See* Nicholas D. Kristof, *Marriage: Mix and Match*, NY Times, Mar. 3, 2004, at A23). In 1972—five years after the Supreme Court declared bans on interracial marriage unconstitutional—a Gallup Poll reported that 75 percent of all white Americans still opposed interracial marriage. (*See* Charlotte Astor, *Gallup Poll: Progress in Black/White Relations, But Race is Still an Issue* <usinfo.state.gov/journals/itsv/0897/ijse/gallup.htm> [last accessed August 3, 2005]). In 2000, Alabama became the last state to repeal its anti-miscegenation law, with 40 percent of its electorate voting to *keep* the prohibition on the books. (TheFreeDictionary.com, *Miscegenation* <www.encyclopedia. thefreedictionary. com/miscegenation> [last accessed August 3, 2005]).

II. THE CITY'S ARGUMENTS ATTEMPTING TO CIRCUMSCRIBE THE FUNDAMENTAL RIGHT TO MARRY DO NOT WITHSTAND SCRUTINY

The decision below should be affirmed. *Amici* urge this Court to keep in mind the history described above in determining whether New York's prohibition on marriages between individuals of the same sex violates the New York State Constitution. The City argues that the government has the power to deny same-sex couples the right to enter into civil marriages by defining the right

too narrowly and by suggesting that the recognition of that right must somehow become more "popular" before it is accepted. Taking a cue from the "reasoning" employed by the opponents of interracial marriage before *Loving*, the City also suggests that denying same-sex couples the right to enter into civil marriage is not discriminatory because it is "equally" applied. This Court should reject those narrow and misleading arguments.

A. Contemporary "Popular Opinion" Does Not Define The Fundamental Right To Be Free From Unwarranted Governmental Intrusion

All parties to this case agree that the right to marry is a constitutionally protected fundamental right. The reason that individuals have a fundamental right to be free from unwarranted governmental intrusion in decisions involving marriage is that the decision to marry is fundamentally personal and private in nature. (*See Griswold v Connecticut*, 381 US 479, 486 [1965] ("We deal with a right of privacy older than the Bill of Rights")). Marriage is among those matters "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment." (*Planned Parenthood v Casey of Southeastern Pa.*, 505 US 833, 851 [1992]).

Although the parties agree that there is a fundamental right to marry, they disagree about the scope of this right. Respondents and *Amici* view the right

as the right of one individual to enter into a marriage with another individual of his or her choice. The City argues that the right at issue is limited to the right to enter into a marriage with a member of the opposite sex. The City claims that Respondents are seeking a new right to "same-sex marriage" that has never before existed. This narrow interpretation of the right to marry finds no support in constitutional jurisprudence and is inconsistent with decisions striking down anti-miscegenation statutes.

The City has advanced three overlapping arguments in this area to restrict Respondents' rights in this case. First, it claims that courts should always define fundamental rights as narrowly as possible. Second, it claims that a right is fundamental only if (and to the extent that) it has been exercised and protected throughout our nation's history. Third, the City essentially claims that a right is fundamental only if its exercise is generally accepted in our society. *Amici* respond to each point in turn.

1. Fundamental Rights Should Not Be Defined Narrowly to Incorporate the Challenged Governmental Restriction

The City argues that fundamental rights must be defined narrowly, framing the issue in this case as whether there is a fundamental right to same-sex marriage. This view contradicts a long line of constitutional law and, in particular, cases involving anti-miscegenation statutes.

Challenges to claimed violations of fundamental rights require a two-step analysis: (1) Does the statute at issue restrict or burden the exercise of a fundamental right? If so, (2) is the restriction or burden narrowly tailored to serve a compelling government interest? (*See e.g. Hernandez*, 7 Misc 3d at 479-480; *Zablocki v Redhail*, 434 US 374, 388 [1978]).

The New York Constitution does not contain any of the constraints urged by the City to "narrow" the liberty of New York citizens. Article I, § 11 of the New York State Constitution provides, in pertinent part, that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof." (NY Const, art I, § 11). And Article I, § 6 of the New York State Constitution provides, in pertinent part, that "[n]o person shall be deprived of life, liberty or property without due process of law." (NY Const, art I, § 6).

The right to liberty necessarily includes the right to be free from unjustified government interference in one's privacy. (*See People v Onofre*, 51 NY2d 476, 486-489 [1980], *cert denied* 451 US 987 [1981]). Thus, the analysis of Respondents' due process claim begins with the question whether the right to marriage is a fundamental right entitled to due process protection, both as a general liberty right and as a specific privacy right. *Amici* submit that it is both. Here, the City tries to avoid this analytical framework by incorporating the challenged form of bigotry itself into the definition of the "right." This technique of "creative

definition" was also employed by the opponents of interracial marriage until its fallacy was exposed nearly forty years ago.

Furthermore, the City's argument should wither here, given that the whole purpose of the New York State Constitution is to secure people's freedom. Indeed, the Preamble of the New York State Constitution proclaims "[w]e, the People of the State of New York, grateful to Almighty God for our [f]reedom, in order to secure its blessings, do establish this Constitution." (NY Const, Preamble). And, to quote the 1992 Supreme Court of Kentucky decision in *Kentucky v Wasson* (842 SW2d 487 [Ky 1992]), which struck down Kentucky's anti-sodomy laws:

> "[g]iven the nature, the purpose, the promise of our Constitution, and its institution of a government charged as the conservator of individual freedom, I suggest that the appropriate question is not '[w]hence comes the right to privacy?' but rather, '[w]hence comes the right to deny it?'"

(*Id.* at 503 [Combs, J., concurring]).

The New York Court of Appeals has expressed its willingness to uphold our state's Constitutional protections when individual liberties and fundamental rights are at issue. (*See People v Harris*, 77 NY2d 434, 437-438 [1991] ("Our federalist system of government necessarily provides a double source of protection and State courts, when asked to do so, are bound to apply their own

Constitutions notwithstanding the holdings of the United States Supreme Court. . . . Sufficient reasons appearing, a State court may adopt a different construction of a similar State provision unconstrained by a contrary Supreme Court interpretation of the Federal counterpart") [citation omitted]).

A review of cases in which the U.S. Supreme Court has found government intrusion on fundamental rights in violation of the Fourteenth Amendment's Due Process Clause reveals that, in determining the existence of a fundamental right, the Court considers the nature of the right at issue rather than some very specific governmental restriction being challenged. For example, in *Meyer v Nebraska* (262 US 390, 401-403 [1923]), and in *Pierce v Society of Sisters of Holy Names of Jesus & Mary* (268 US 510, 534-535 [1925]), the Court considered whether parents had a right to be free from unwarranted governmental intrusion in decisions about how to educate their children. The Court did not frame the issue as whether there was a fundamental right for children to learn the German language or whether there was a fundamental right to attend a private school. In *Skinner* (316 US at 541), the Court considered whether there was a fundamental right to be free from unwarranted governmental intrusion in decisions about whether to have offspring, not whether a convicted criminal had the fundamental right to bear children. In *Zablocki* (434 US at 384-385, 388), and *Turner v Safley* (482 US 78, 95-96 [1987]), the Court considered whether there was a fundamental

right to be free from unwarranted governmental intrusion in decisions to marry, not whether deadbeat dads or prison inmates in particular had a specific right to marry. Most recently, in *Lawrence v Texas* (539 US 558, 578 [2003]), the Court considered whether there is a fundamental right to be free from unwarranted governmental intrusion into matters of private, consensual sexual conduct, not whether there is a specific right to engage in homosexual sodomy. The very notion of "fundamental" rights reserved to all people naturally flows from the nature of a written constitution that defines the limited power of the State. That notion reflects the view that people are beings possessed of personal dignity and human worth. States exist to preserve that dignity, worth and autonomy. Only totalitarian regimes view themselves as "dispensing" rights to people at the whim of a transitory majority or the favor of a particular faction.

The U.S. Supreme Court's rejection of anti-miscegenation statutes exposes the fallacy of the City's argument in this case. In *Loving* (388 US at 12), the Supreme Court did not ask whether there was a specific right to enter into an interracial marriage. Instead, the Court asked more generally whether there was a fundamental and general right to be free from unwarranted governmental interference in decisions regarding marriage. After answering that question affirmatively, the Court considered whether the prohibition on interracial marriage

was narrowly tailored to serve a compelling state interest and, of course, concluded it was not.

Significantly, the Supreme Court has since emphasized the broad basis of its decision in *Loving*. The Court has explained that its decision in *Loving* "could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause. . . . But the Court went on to hold that the laws arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry." (*Zablocki*, 434 US at 383 [citation omitted]). The California Supreme Court took a similarly broad perspective when it struck down an anti-miscegenation statute almost twenty years before *Loving*. Justice Traynor wrote:

> "[Marriage] is a fundamental right of free men. There can be no prohibition of marriage except for an important social objective and by reasonable means. . . . Since the right to marry is the right to join in marriage with the person of one's choice, a statute that prohibits an individual from marrying a member of a race other than his own restricts the scope of his choice and thereby restricts his right to marry."

(*Perez v Lippold*, 32 Cal 2d 711, 715, 198 P2d 17, 19 [1948]).

And there is substantial New York Court of Appeals precedent speaking to the breadth of the fundamental right to marry under New York Law. As Justice Ling-Cohan explained in the decision below:

> "New York courts have analyzed the liberty interest at issue in terms that recognize and embrace the broader principles at stake. . . . Indeed, as the Court of Appeals has consistently made clear, '[A]mong the decisions protected by the right to privacy, are those relating to marriage.' ([*Doe v Coughlin*, 71 NY2d 48, 52 [1987], *cert. denied* 488 US 879 [1988]]; *see also* [*People v Shepard*, 50 NY2d 640, 644 [1980]] (noting courts' willingness 'to strike down State legislation which invaded the "zone of privacy" surrounding the marriage relationship') [citation omitted]; [*Levin v Yeshiva Univ.*, 96 NY2d 484, 500 [2001, Smith, J., concurring]] ('[M]arriage is a fundamental constitutional right'); [*Mary of Oakknoll v Coughlin*, 101 AD2d 931, 932 [3d Dept 1984]] ('[T]he right to marry is one of fundamental dimension'))."

(7 Misc 3d at 477-478).[4]

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[4] In its *amicus* brief (at 15 n 1), the New York State Catholic Conference cites Justice Scalia's dissent in *Casey* (505 US at 980 n 1), asserting that the Equal Protection clause of the Federal Constitution "explicitly establishe[d] racial equality as a constitutional value." The Catholic Conference does so to support its effort to take the anti-miscegenation laws entirely out of the context of a "fundamental right to marry" analysis, as does the United Families International in its *amicus* brief (at 18) where it declares that the anti-miscegenation laws "must be seen as a logical extension of racial law, not of marriage law." But, as set forth by the California Supreme Court when it struck down California's anti-miscegenation law, "[t]he equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or any other race, but to the rights of individuals." (*Perez*, 32 Cal 2d at 716, 198 P2d at 20). Furthermore, as set forth in Points I.A. & I.B. above, after its ratification and until *Loving*, many courts rejected claims that the Fourteenth Amendment prohibited interracial marriage.

Finally, the claims that the decision below is a "betrayal" of *Perez* and *Loving* and that the struggle of same-sex couples for equal civil marriage rights is analogous in any way to "the white supremacists' marriage project" (United Families International amicus brief at 21-24) are preposterous. Just as *Perez* and *Loving* prohibited discriminatory views about proper marriage partners from interfering

2. The City's Focus on the Historical Recognition of the Right to Marry Is Overly Narrow

The City argues that the right to marry must be narrowly viewed to include only opposite-sex marriages because fundamental rights are deeply grounded in our nation's history. This argument is contrary to constitutional jurisprudence and decisions striking down anti-miscegenation statutes because "deeply grounded" bigotry can never justify contemporary discrimination.

While the determination of a fundamental right looks to history and the ordered concept of liberty, the City can cite no New York case that requires tying the definition of a fundamental right to the state's "traditional" definition thereof. Indeed, it is hard to imagine that any form of discrimination can be styled as permissible merely because it has been "traditionally pervasive." The United States Supreme Court has never held that it will solely rely on history when evaluating a constraint on fundamental rights. In *Casey*, the Supreme Court stated:

> "[S]uch a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by

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with individuals' fundamental right to marry their loved one, so too must discriminatory views about the sex of marital partners be prohibited from interfering with what is being sought here – the ability of individuals to marry the one person they love.

> the substantive component of the Due Process Clause. . . ."

(505 US at 847-848).

Thus, the Supreme Court's analysis of fundamental rights is grounded in our Nation's historical tradition of protecting uniquely personal and intimate decisions from unjustified government intrusion, not in the history of a specific act or decision. "If the question whether a particular act or choice is protected as a fundamental right were answered only with reference to the past, liberty would be a prisoner of history." (Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 Harv L Rev 2684, 2689 [2004]).

> "Clearly, the right to choose one's life partner is quintessentially the kind of decision which our culture recognizes as personal and important. . . . The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one's own life partner is so rooted in our traditions."

(*Brause v Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, *4 [Alaska Super Ct Feb. 27, 1998], *aff'd sub nom Brause v Alaska Dept. of Health & Soc. Servs.*, 21 P3d 357 [Alaska 2001]).

The history of interracial marriages exposes the fallacy of the City's argument: It was once argued that there is no fundamental right to marry someone of a different race because such marriages had a long history of being prohibited. (*See e.g. Lonas*, 50 Tenn at 293-295; *Britell v Jorgensen (In re Takahashi's*

Estate), 113 Mont 490, 493-494, 129 P2d 217, 219 [1942]; *Perez*, 32 Cal 2d at 747, 198 P2d at 38 [Shenk, J., dissenting] (arguing that the prohibition of interracial marriage had a long history and twenty-nine states continued to have such laws)). In 1948, when the California Supreme Court struck down California's anti-miscegenation statute, Justice Carter acknowledged that "[t]he freedom to marry the person of one's choice has not always existed" but nonetheless concluded that the right was fundamental and that anti-miscegenation statutes impermissibly violated that right.[5] (*Perez*, 32 Cal 2d at 734-735, 198 P2d at 31 [Carter, J., concurring]).

In *Loving*, the Supreme Court recognized an individual's fundamental right to be free from governmental intrusion in marriage not because interracial marriage was permitted at common law, but because the Constitution required it. (388 US at 12). Likewise, in *Perez*, the California Supreme Court recognized each individual's fundamental right "to join in marriage with the person of one's choice," despite the many historical restrictions imposed upon the exercise of that right. (32 Cal 2d at 717, 198 P2d at 21).

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[5] As the court below set forth in ruling the prohibition of marriage for same-sex couples to be unconstitutional: "The challenges to laws banning whites and non-whites from marriage demonstrate that the fundamental right to marry the person of one's choice may not be denied based on longstanding and deeply held traditional beliefs about appropriate marital partners." (*Hernandez*, 7 Misc 3d at 461).

Additionally, as set forth above, until 1967, this Nation had a long and deep-seated history of prohibiting and disapproving of interracial marriages. The statutes were routinely defended as having "been in effect in this country since before our national independence." (*Perez*, 32 Cal 2d at 742, 198 P2d at 35 [Shenk, J. dissenting]). Indeed, anti-miscegenation laws were the most deeply embedded form of legal race discrimination in our nation's history—lasting over three centuries. (Peggy Pascoe, *Why the Ugly Rhetoric Against Gay Marriage is Familiar to This Historian of Miscegenation* [2004] <hnn.us/articles/4708.html> [last accessed August 3, 2005]).

3. The Prevalence of Existing Laws Is Irrelevant

The City also suggests that there is no right to marry someone of the same sex because prohibitions on such marriages are still nearly universal in the United States. According to this theory, anti-miscegenation statutes should have remained constitutional as long as they remained prevalent. Such an argument is both historically and legally wrong.

As an initial matter, the sheer prevalence of a law does not determine its constitutionality. For example, *Lawrence* (539 US at 577-578) quoted from Justice Stevens's dissent in *Bowers v Hardwick*, 478 US 186, 216 [1986] -- "'the fact that the governing majority in a State has traditionally viewed a particular

practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.'"

Moreover, disapproval of interracial marriage was also once commonplace. When anti-miscegenation statutes were challenged, states relied upon their prevalence and acceptance to defend them. (*E.g. Henkle v Paquet (In re Paquet's Estate)*, 101 Or 393, 399, 200 P 911, 913 [1921] (miscegenation statutes "'have been universally upheld as a proper exercise of the power of each state to control its own citizens'") [citation omitted]; *Kirby v Kirby*, 24 Ariz 9, 11, 206 P 405, 406 [1922]; *Lee v Giraudo (In re Monks' Estate)*, 48 Cal App 2d 603, 612, 120 P2d 167, 173 [Ct App 1941], *appeal dismissed* 317 US 590 [1942]). Prohibitions on interracial marriage remained commonplace at the time those prohibitions were invalidated. As set forth above, when the California Supreme Court struck down an anti-miscegenation statute in 1948, thirty states had similar statutes. And when the Supreme Court struck down anti-miscegenation statutes in *Loving*, sixteen states still had similar statutes, and 75 percent of white Americans still opposed interracial marriage. (*See* Astor, *supra*).

More importantly, prohibitions on interracial marriage did not become unconstitutional because they were found in fewer states; the laws were always contrary to constitutional principles. (*Perez*, 32 Cal 2d at 736, 198 P2d at 32 [Carter, J., concurring] ("the statutes now before us never were constitutional")).

The fact that only sixteen states had such laws in 1967 may have made the Supreme Court's decision in *Loving* less controversial, but the Court's long-overdue decision was not based on the number of states having anti-miscegenation laws at the time.

Like the prohibitions on interracial marriage, prohibitions on the right of same-sex couples to enter into civil marriage cannot withstand serious constitutional scrutiny based on mere repetition of the claim that there is no fundamental right to "same-sex marriage" or because many states and members of the public continue to support such prohibitions.

B. The City's "Applied Equally" Argument Does Not Support The Prohibitions On Marriage Between Individuals Of The Same Sex

In addition to burdening a fundamental right, prohibitions on marriages between individuals of the same sex are discriminatory. Some argue that the prohibition does not discriminate because it applies equally to men and women. Claims of "equal treatment" were also made to justify prohibitions on interracial marriage. An examination of those claims and the cases that ultimately rejected those "justifications" should inform this case.[6]

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[6] The New York State Catholic Conference argues in its *amicus* brief (at 25-26) that the anti-miscegenation laws differ from gender-based marriage laws because the former were enacted with the *intent* to "stigmatize[] blacks as inferior to whites." For many of the reasons set forth in great detail in this brief, the New York State Catholic Conference's reasoning here is flawed. (*See e.g.* Points I.A

Defenders of anti-miscegenation statutes repeatedly argued that the statutes did not discriminate because they applied equally to both black and white people:

> "[The prohibition] was not then aimed especially against the blacks. . . . They have the same right to make and enforce contracts with whites that whites have with them, but no rights as to the white race which the white race is denied as to the black. The same rights to contract with each other that the whites have with each other; the same to contract with the whites that the whites have with blacks. . . ."

(*Lonas*, 50 Tenn at 298-299). In 1877, the Alabama Supreme Court relied upon a similar rationale:

> "[I]t is for the peace and happiness of the black race, as well as of the white, that such laws should exist. And surely there can not be any tyranny or injustice in requiring both alike, to form this union with those of their own race only, whom God hath joined together by indelible peculiarities, which declare that He has made the two races distinct."

(*Green*, 58 Ala at 195). The City's argument here echoes the 1883 words of the Missouri Supreme Court holding that "[t]he act in question is not open to the objection that it discriminates against the colored race, because it equally forbids white persons from intermarrying with negroes, and prescribes the same

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and II.A.2). In any event, the anti-miscegenation laws prohibited interracial marriage in the same way the current law of New York bars same-sex couples from the institution of civil marriage. In both contexts, adult citizens are denied liberty and privacy rights, indeed they are denied their fundamental right to choose the individual whom they wish to marry.

punishment for violations of its provisions by white as by colored persons. . . ." (*Jackson*, 80 Mo at 177). Likewise, in 1921, the Supreme Court of Oregon upheld a ban on marriages between Native Americans and whites, stating simply that "the statute does not discriminate. It applies alike to all persons. . . ." (*In re Paquet's Estate*, 101 Or at 399, 200 P at 913). And, in 1942, the Supreme Court of Colorado stated: "There is here no question of race discrimination. The statute applies to both white and black." (*Jackson v City & Cty of Denver*, 109 Colo 196, 199, 124 P2d 240, 241 [1942]).

In 1948, the California Supreme Court finally rejected this unthinking mantra, explaining the fallacy of "equal application":

> "It has been said that a statute such as section 60 does not discriminate against any racial group, since it applies alike to all persons whether Caucasian, Negro, or members of any other race. . . . The decisive question, however, is not whether different races, each considered as a group, are equally treated. *The right to marry is the right of individuals, not of racial groups.* The equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or any other race, but to the rights of individuals."

(*Perez*, 32 Cal 2d at 716, 198 P2d at 20 [emphasis added; citation omitted]). Thus, the proper analysis of the issue focuses on the individual. Because a black individual was not permitted to marry an individual whom a white individual could marry, the anti-miscegenation statute was found to discriminate on the basis of

race. Similarly, the statute discriminated on the basis of race because a white individual could not marry an individual whom a black individual could marry.

Almost twenty years later, the United States Supreme Court reached the same conclusion: "[W]e reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription. . . ." (*Loving*, 388 US at 8; *see also McLaughlin v Florida*, 379 US 184, 191 [1964] ("Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation")). For the same reason, any simplistic "equal application" argument must fail, as its rhetorical appeal is matched only by its logical weakness. Accordingly, the decision below should be affirmed.

CONCLUSION

For the reasons set forth above, NYCLA, NBJC and MBBA, as *amici curiae*, respectfully request this Court to affirm Justice Doris Ling-Cohan's decision in the court below rejecting New York's prohibition on marriage between same-sex partners as unconstitutional.

Dated: New York, New York
August 3, 2005

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Supreme Court of the State of New York

Appellate Division – First Department

DANIEL HERNANDEZ and NEVIN COHEN,
LAUREN ABRAMS and DONNA FREEMAN-TWEED,
MICHAEL ELSASSER and DOUGLAS ROBINSON,
MARY JO KENNEDY and JO-ANN SHAIN,
and DANIEL REYES and CURTIS WOOLBRIGHT,

Plaintiffs-Respondents,

- against -

VICTOR L. ROBLES, in his official capacity as
CITY CLERK of the City of New York,

Defendant-Appellant.

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APPENDIX

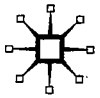
TAB

Tell the Court I Love My Wife

Race, Marriage, and Law—An American History

Peter Wallenstein

palgrave
macmillan



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For my miracle,
Sookhan

CHAPTER 1

SEX, MARRIAGE, RACE, AND FREEDOM IN THE EARLY CHESAPEAKE

"For prevention of that abominable mixture and spurious issue which hereafter may encrease in this dominion, as well by negroes, mulattoes, and Indians intermarrying with English, or other white woman, as by their unlawfull accompanying with one another"

—Law of Virginia (1691)

No wedding photos, no baby pictures, commemorate the events. John Rolfe and Pocahontas married in 1614, and their son Thomas was born in 1615, when the English colony that was planted in 1607 at Jamestown, Virginia, was still very new. Multiracial Virginians originated as early as that time, and many people—sojourners and residents, English and Native Americans alike—welcomed the interracial marriage that enhanced the likelihood of peace in the Chesapeake region of North America.[1]

No law at that time specifically governed interracial sex, interracial marriage, or multiracial children. Law or no law, few whites married Native Americans in colonial Virginia, so the union of John Rolfe and Pocahontas proved a notable exception. Restrictive laws, when they emerged, reflected lawmakers' overriding concerns regarding Virginians of African ancestry, but they affected people in all other groups, too. At about the same time that Virginia began to legislate on the identity and status of mixed-race people, Maryland did as well.

When slavery supplanted servitude in supplying a labor force for the Chesapeake colonies, more African Americans lived in Virginia and Maryland combined than in all the other British North American colonies put together. For some years after the American Revolution, the two states on the Chesapeake Bay continued to contain a majority of all people with African ancestry living in the

new nation. Thus the Chesapeake region generated the dominant experience of black and multiracial people in the settler societies of British North America and the early American republic.

Race, sex, slavery, and freedom commingled with society, economics, politics, and law in Virginia and Maryland in various and changing ways. In 1607—just before men on three ships from England made their way up what they named the James River, arrived at a place they called Jamestown, and established a colony there—the many residents of the Chesapeake region were all Native Americans. Over the next two centuries, newcomers and their progeny from both Europe and Africa soared in numbers while Indians seemed to vanish.

If the patterns had been more simple than they were, it might be possible to speak as though everyone was either white or black, and as though all blacks were slaves, whether in 1750 or 1850. But such was not the case, and boundaries were not so clear. Some black residents were free; Indians refused to vanish; and many people in Maryland and Virginia were multiracial. Some mixed-race people, though born unfree, were designated to remain so only for specific (though lengthy) periods—18, 21, 30, or 31 years. Some people, moreover, though born into lifelong slavery, gained their freedom.

Within marriage or outside it, people of European origin had children with Native Americans or people of African ancestry. This chapter and the next explore each of those complicating features of the social landscape, emphasizing two groups, those descended from white mothers and black (or mixed-race) fathers and those claiming Indian foremothers. Both chapters focus on a region—where most Virginians lived, east of the Blue Ridge mountains—whose population, in the years between 1760 and 1860, was roughly half white and half nonwhite, half free and half slave. In many times and places, only a minority was white, yet only a minority was slave. Tilting the balance was a middle group of people who were considered free but not white. This chapter takes a fresh look at their origins. In particular, it offers a history of the beginnings of legal restrictions on marriage between colonists who were defined as white and people who were defined as nonwhite.

Like Mother, Like Child

Before a law of race could fully develop, definitions of racial categories had to be put in place. In seventeenth-century Virginia and Maryland, these took a while to develop, although some kind of line separating white from nonwhite was ever-present. When, for example, the Virginia House of Burgesses wanted to refer to people of various groups, Europeans might variously be termed "Christians," "English," and "English or other white" persons. Race or color, religion, language or nation of origin—any category might do. Other people tended to get lumped under such categories as "negroes, mulattoes, and other slaves"; "negroe slaves"; "Indians or negroes manumitted, or otherwise free"; and any "negroe, mulatto, or Indian man or woman bond or free."[2]

In 1662, Virginia's colonial assembly first addressed the question of the status of the children of interracial couples. The question before the legislators was whether "children got by any Englishman upon a negro woman should be slave or ffree." The new law supplied a formula: "all children borne in this country [shall be] held bond or free only according to the condition of the mother."[3]

According to the 1662 law, children would follow the status of their mothers. Slave women would have slave children, regardless of who the father was; if she were a slave, then any child she had, even with a white father, would be a slave. Free women, whether white or not, would have free children, again no matter who the father was; if the woman was free, her child—black, white, or mixed-race—would be free too. All depended on whether the woman—whatever her racial identity—was slave or free. The father's identity did not matter, so neither could his race or his status. Moreover, the 1662 law assumed that the mixed-race child was born to a couple who were not married to each other—in many cases, a slave woman and the white man who owned her. It did not address the question of interracial marriage itself.

Marriage, Children, and the Racial Identity of the Father

A successor act in 1691 took on the matter of marriage. That year, the Virginia assembly took action against sexual relations between free whites and nonwhites, at least in certain circumstances, regardless of whether the couple were single or had married. As a rule, colonial governments and churches fostered marriages between adults, but—reflecting a widespread pattern in colonial America—the Virginia assembly was not necessarily going to do any such thing regarding interracial unions. Slaves could contract no marriages that the law recognized. Free people could, but, after 1691, white people were not free to marry across racial lines. Prior to this time, some white women had married nonwhite men; the assembly tried to curtail the practice, punish infractions, and contain the consequences.[4]

The 1691 act, couched in the language of hysteria rather than legalese, was designed "for prevention of that abominable mixture and spurious issue which hereafter may encrease in this dominion, as well by negroes, mulattoes, and Indians intermarrying with English, or other white woman, as by their unlawfull accompanying with one another." In the cultural world that these legislators inhabited, it was anathema for white women to have sexual relations

with nonwhite men. For the relationship to be sanctified in marriage was no better—if anything, it was worse—than if the couple remained unwed.[5]

The 1691 statute targeted sexual relations between white women and black men (the "abominable mixture") and the children of such relationships (the "spurious issue"). The first thing the new law did was to outlaw interracial marriage for white men and white women alike. Actually, it did not ban the marriage but, rather, mandated the banishment of the white party to any interracial marriage that occurred, if that person was free and thus owed labor to no planter: "Whatsoever English or other white man or women being free shall intermarry with a negroe, mulatto, or Indian man or woman bond or free, shall within three months after such marriage be banished and removed from this dominion forever."[6] If the bride in the interracial couple was white, then she would vanish from Virginia, and her mixed-race child would be born and raised outside Virginia.

The law began by condemning all marriages between whites and nonwhites, but its main intent was to target white women who strayed across racial lines, whether they actually married nonwhite men or not. An occasional white woman, even though unmarried, would have a child whose father was "negro or mulatto" (here lawmakers did not include Indians). Concerned about that contingency, legislators targeted the white mothers of interracial children—"if any English woman being free shall have a bastard child by any negro or mulatto," she must, within a month of the birth, pay a fine of 15 pounds sterling to the church wardens in her parish. Her crime, such as it was, entailed a sexual relationship with a nonwhite man—in particular, a relationship that resulted in a mixed-race child.[7]

If the white mother of a multiracial child was free but could not pay the fine, the church wardens were to auction off her services for five years. The penalty called for her to pay in either money or time, property or liberty. But if she was an indentured servant, the law did not mean to punish her owner by denying him her labor (and thus his property). If she was a servant and thus not the owner of her own labor at the time of the offense, her sale for five years would take place after she had completed her current indenture.

In view of the provision for banishment, few white Virginians involved in interracial marriages would still be in the colony when their children came along. But this addressed only the question of the children—the "spurious issue"—of white women who actually went through a wedding ceremony, whose relationship would have been, before 1691, lawful. What about children whose parents' "accompanying with one another" was "unlawful"—that is, the couple was unmarried? Any "such bastard child," mixed-race and born in Virginia, was to be taken by the wardens of the church in the parish where the child was born and

"bound out as a servant . . . untill he or she shall attaine the age of thirty yeares."[8]

If the mother stayed in Virginia and retained her freedom, therefore, she lost her child, who would be bound out as a servant until the age of 30. As is evident from this act, mixed-race children troubled the Virginia assembly if their mothers were white, not if they were black. The old rule continued to operate for the mixed-race children of white fathers, but a new rule targeted the problem of mixed-race children of white mothers. The law said nothing, however, about the nonwhite father of a white woman's child. It imposed no penalty of loss of labor or liberty, though it surely broke up any family there might have been. The father was important to the law because, regardless of whether he was free or slave, he was nonwhite and had fathered a child by a white woman. But the penalties were imposed on the woman and the child.

The status, slave or free, of the child of a white man and a black woman continued, under the 1662 law, to depend on the status of the mother. The 1691 legislature worried about other questions, and it devised a new rule to address them. The new rule meant that the father's identity could be as important as the mother's. By 1691, the central question regarding the status of a child in Virginia had to do with whether the mother was white or black as much as whether she was free or slave. Most black women were slaves, so most children of black women would be slaves, although nonslave, nonwhite mothers would still bear nonslave children. If the mother was white, the answer depended on the racial identity of the father.

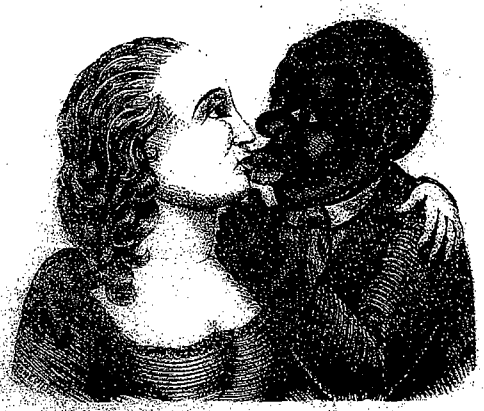
The legislature had, as its primary object, seeing that white men retained exclusive sexual access to scarce white women. It also had, as a significant secondary object, propelling the mixed-race children of a white mother out of the privileged white category and into a racial category that carried fewer rights, and out of the group born free and into long-term servitude to a white person.[9]

Eighteenth-Century Amendments

Legislation in 1705 modified the 1691 statute in several significant ways. In framing an act "declaring who shall not bear office in this country" that excluded "any negro, mulatto, or Indian," the Virginia legislature defined "mulatto"—for the purpose of "clearing up all manner of doubts" that might develop regarding "the construction of this act, or any other act"—as "the child, grand child, or great grand child, of a negro."[10] It thereby defined as "mulatto" any mixed-race Virginian with at least one-eighth African ancestry. The statute probably sufficed at the time to exclude virtually all Virginians with any traceable African ancestry. In 1705, only some 86 years after the arrival in 1619 of

WHAT MISCEGENATION IS!

—AND—



WHAT WE ARE TO EXPECT

Now that Mr. Lincoln is Re-elected.

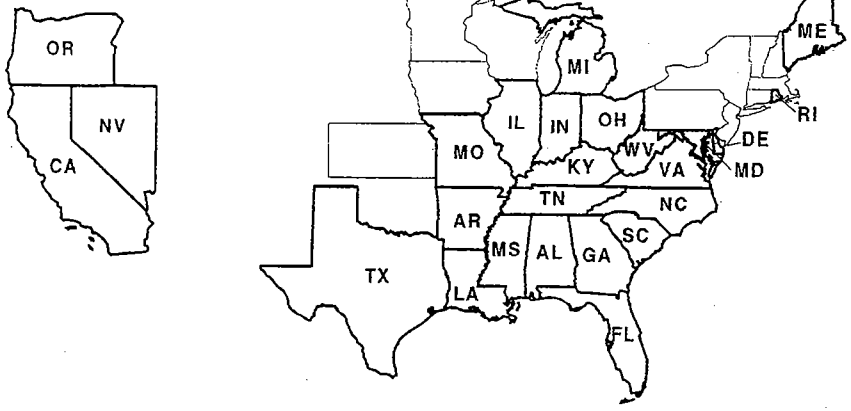
By L. SEAMAN, LL. D.

WALLER & WILLETTS, Publishers,
NEW YORK.

Figure 4. What Miscegenation Is! *(1865). The word was widely adopted soon after its introduction in the 1864 presidential election year, and this pamphlet—its caricature of an African American man with a Caucasian woman reflecting, and designed to foster, fears of black men mixing with white women—came out soon after Abraham Lincoln was reelected. Courtesy of the Library of Congress.*

(left) Figure 5. Justice John Marshall Harlan was the U.S. Supreme Court's sole dissenter in The Civil Rights Cases *(1883) and again in* Plessy *v.* Ferguson *(1896), but in* Pace *v.* Alabama *(1883), also about the Fourteenth Amendment and "equal protection of the laws," he failed to dissent, so the Court unanimously upheld a miscegenation statute. Courtesy of the Library of Congress.*

(below) Figure 6. The South was solid in its allegiance to the antimiscegenation regime in 1866—one year after the Confederacy's defeat in 1865 and one year before Congress passed the Reconstruction acts of 1867. But many states outside the South also had such laws at that time. Some of the former Confederate states had just inaugurated such laws during the previous year; and seven—whether by legislative or judicial action—soon dropped their miscegenation laws for at least a few years. Produced by John Boyer, geography department, Virginia Tech.



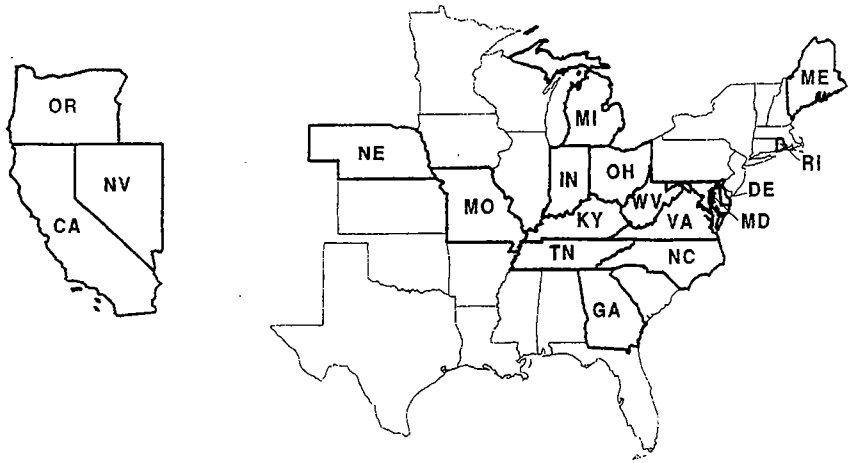


Figure 7. Of the 37 states in 1874, at least 9 (of 21) in the North and another 9 (of 16) in the South had miscegenation laws. Many western territories (not shown here) also had such laws, but most states of the Lower South had lifted them. Produced by John Boyer, geography department, Virginia Tech.

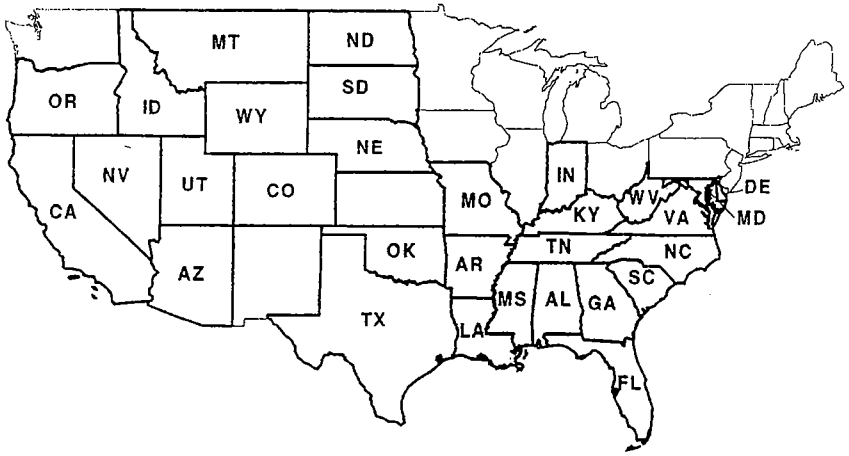


Figure 8. Between 1913 (when the last state enacted such a law) and 1948 (when the California Supreme Court overturned that state's law), the antimiscegenation regime's power was at its peak, and its territory held at 30 of the 48 states. Produced by John Boyer, geography department, Virginia Tech.

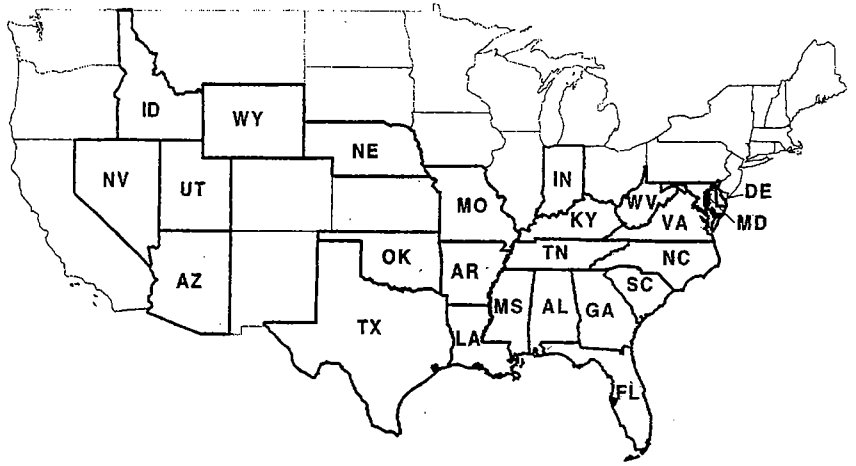


Figure 9. When the Lovings were arrested in 1958 in Virginia for their interracial marriage, 24 of the 48 states still had miscegenation laws on the books. Virginia's law dated all the way back to 1691, Wyoming's only to 1913. Produced by John Boyer, geography department, Virginia Tech.

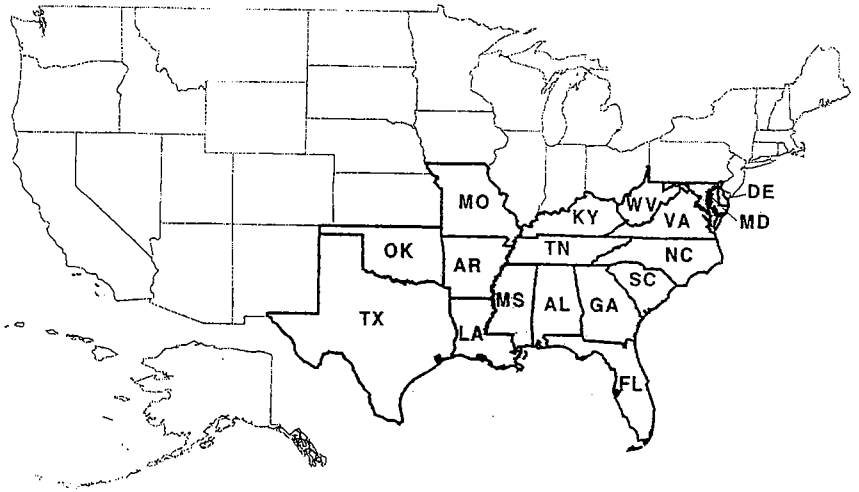


Figure 10. By 1966, the territory controlled by the antimiscegenation regime had shrunk to one-third of the nation—17 of the 50 states, clustered in the South. Into the 1960s, laws that banned interracial marriage continued to be enforced in those states. Produced by John Boyer, geography department, Virginia Tech.

APPENDIX I

PERMANENT REPEAL OF STATE MISCEGENATION LAWS, 1780–1967

The territory governed by the antimiscegenation regime kept changing. After beginning in the seventeenth century in the Chesapeake colonies, it spread north as well as south and then, in the nineteenth century, west to the Pacific. Over the years, some states peeled away from the regime, either temporarily or permanently. Suspensions of miscegenation laws took place in most of the Deep South during Reconstruction but proved temporary. With restoration there, and repeal in some northern states, the territory took on its twentieth-century contours, and was eventually—very briefly—restricted to the South.

As many as 12 states (or as few as 8) never had laws restricting interracial sex or marriage. Four of these were among the original 13 states: New Hampshire, Connecticut, New Jersey, and New York (although New York, when it was New Amsterdam, a Dutch colony, had a law against interracial sex). Five other states never had such laws: Vermont, Minnesota, and Wisconsin, together with Hawaii and Alaska, both admitted in 1959. Three territories had such laws for a time but repealed them before statehood: Kansas (1859), New Mexico (1866), and Washington (1868); Wyoming did so, too (1882), but then it passed a new miscegenation law in 1913.

Between 1780 and 1887, 8 states (in addition to those 3 territories) permanently repealed their miscegenation laws (and 7 southern states abandoned the antimiscegenation regime for some years after 1867). Then, for many years, no states repealed such measures, while additional states inaugurated miscegenation laws as late as 1913, and 30 states (out of 48) retained those laws at the end of World War II. Repeal by 13 of the 30 by 1965 left 17 holdout states—Maryland (which repealed its law shortly before the Supreme Court handed down the decision in *Loving* v. *Virginia* in June 1967) and 16 other states, from Delaware to Texas. The *Loving* decision brought an end to the enforceability of miscegenation laws in those remaining 16 states: Alabama, Arkansas, Delaware,

Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

A list of states with miscegenation laws follows, together with the years in which—through state action, between 1780 and the eve of the *Loving* decision in 1967—they permanently ended their participation in the antimiscegenation regime:[1]

Pennsylvania	1780
Massachusetts	1843
Iowa	1851
Illinois	1874
Rhode Island	1881
Maine and Michigan	1883
Ohio	1887
California (court decision)	1948
Oregon	1951
Montana	1953
North Dakota	1955
South Dakota and Colorado	1957
Idaho and Nevada	1959
Arizona	1962
Utah and Nebraska	1963
Wyoming and Indiana	1965
Maryland	1967

APPENDIX 2

INTERMARRIAGE IN NAZI GERMANY AND APARTHEID SOUTH AFRICA

The antimiscegenation regime in America endured from a Maryland law in 1664 to the Supreme Court decision in *Loving* v. *Virginia* in 1967; corresponding systems developed in the twentieth century on other continents. In Europe, Germany's was born in 1935, and it died with Allied victory in World War II in 1945. A South African version, in place by 1949, was repealed in 1985; and Protas Madlala and American-born Suzanne Leclerc married that summer.[1]

For ten years, the color line in the law of marriage and the family in the United States had its counterparts in Hitler's Germany. Who had what racial identity? What pool of prospective marriage partners did that identity allow? What was the status, and the identity, of the children of a mixed marriage? What penalties might await violations of the law of race and marriage? A number of the major themes of America's antimiscegenation regime recurred in Hitler's Germany under the Nuremburg Laws of 1935. Though American culture tends to view the term "Jewish" as connoting "religion" rather than "race," race was the more relevant category in Hitler's Germany. There the preferred equivalent for the term "miscegenation" was "Rassenschande," or "race defilement."

Under the Nazi regime, people were classified in terms of their ancestry going back two generations, and that classification could change if a grandparent remarried and this time the spouse was Jewish rather than Aryan. Germans were divided into several categories, chiefly "Jews" (people with either three or four Jewish grandparents) and "Aryans" (who had none), although "mixed blood" people, "Mischlinge," fell in between. The rules governed which group could marry within which other groups. Mixed marriages were viewed as better if the man was "Aryan" than if he was the "Jewish" partner.

Mixed marriages already entered into could cause enough of a problem, but entering new ones could be out of the question. Authorities and informal influences alike pressured people in mixed marriages to separate and divorce. Partners

Interracial Intimacy

The Regulation of Race & Romance

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To my parents, who taught me how
to cross boundaries and how to love

Conclusion

Williams's memoir reminds us of the power of race and intimacy. Looking back on his early years as a boy navigating uneasily between black and white worlds, he realizes that all of his later professional success cannot shield him from the impact of his racial heritage and family ties:

> I was fortunate to be able to achieve my goal of becoming a lawyer, and later my dream of being a law professor. I have held positions that even in my wildest fantasies during the nights at 601½ Railroad Street I could not envision for myself. Yet when I stand in front of students, my mind often wanders back to the pain and rejection of the Muncie years. Almost as if it were yesterday, I vividly recall watching Dad being beaten by the police, and the day we were chased from the "white" waiting room in Louisville. I never felt more impotent and powerless to control my life than I did in those days. When I think of those times, I remember what Dad used to say:
>
> "Son, one day this will all pale into insignificance."
>
> He was wrong. Muncie has never paled into insignificance. It has lived inside me forever.[42]

The time is long overdue to recognize the singular importance of interracial intimacy. It has not paled into insignificance, nor should it. Interracial intimacy is far more than an incidental consequence of racial equality or a particular proof of personal autonomy. As this book will show, those who choose love across the color line challenge the conventional wisdom that racial equality can be achieved in the absence of a rich network of interracial relationships and that love is truly free when it is cabined by pervasive segregation.

TWO

Antimiscegenation Laws and the Enforcement of Racial Boundaries

ANY HISTORY OF antimiscegenation laws must begin with the regulation of black–white intimacy, but it must not end there. Laws barring sex and marriage between blacks and whites had the longest history and the widest application in the United States. As one historian of intermarriage has pointed out, however, antimiscegenation "laws were enacted first—and abandoned last—in the South, but it was in the West, not the South, that the laws became most elaborate. In the late nineteenth century, western legislators built a labyrinthine system of legal prohibitions on marriages between whites and Chinese, Japanese, Filipinos, Hawaiians, Hindus, and Native Americans, as well as on marriages between whites and blacks."[1] At one time or another, thirty-eight states adopted laws regulating interracial sex and marriage. All of these laws banned black–white relationships, but fourteen states also prohibited Asian–white marriages and another seven barred Native American–white unions.[2] No state ever officially banned Latino–white intermarriage, though, presumably because treaty protections formally accorded former Spanish and Mexican citizens the status of white persons.

Antimiscegenation laws have played an integral role in defining racial identity and enforcing racial hierarchy.[3] To understand the distinctive ways in which antimiscegenation statutes were used to establish norms about race, it is essential to focus on the two groups that suffered the most onerous legal burdens: blacks and Asians. For blacks, the laws identified them as diminished persons marked with the taint of slavery and inferiority, even after they were nominally free. Although the statutes

formally limited the freedom of blacks and whites alike, the restrictions clearly functioned to block black access to the privileges of associating with whites. For Asians, antimiscegenation laws confirmed their status as unassimilable foreigners. Already marked as racially distinct and unfit for citizenship by federal immigration laws, state constraints on intermarriage prevented Asian male immigrants from integrating into communities by thwarting their sexuality, hindering them from developing ties to the United States through marriage, and deterring them from having children who would be American citizens by birth. For both blacks and Asians, segregation in sex, marriage, and family was a hallmark of intense racialization and entrenched inequality.

The Black Experience: Drawing the Color Line and Keeping It in Place

The regulation of sex and marriage played a singularly important role in drawing the color line between whites and blacks. Antimiscegenation laws in the South laid a critical foundation for securing the full personhood of whites and entrenching the diminished status of blacks. Whenever racial ambiguity threatened the established social order, statutory restrictions on interracial sex and marriage were imposed to keep the color line firmly in place. During the colonial era, Southern states faced special challenges in drawing racial boundaries and establishing sexual norms. In New England, settlers were mostly farmers and artisans who arrived with families, settled in towns, and had strong religious traditions. In these homogeneous communities, same-race families were the norm and sex outside of marriage was relatively rare.[4] By contrast, in the Chesapeake world of Virginia and Maryland, settlers came from a wide range of backgrounds. Many arrived alone as indentured servants, who had contracted to work until they paid for their passage to America. No sense of community based on shared origins, townships, or religious beliefs bound the newcomers together. Men outnumbered women by four to one. In addition, the scarcity of marriageable women was exacerbated because indentured female servants could not marry until they completed their terms of service. Under these circumstances, rates of extramarital sex and out-of-wedlock pregnancy soared despite laws punishing fornication, adultery, and rape.[5]

When slavery began to replace indentured servitude as the primary source of labor in the upper South during the last decades of the seventeenth century, white indentured servants often worked in close proximity to black slaves. In some instances, coworkers became sexual intimates, and interracial sex and marriage began to blur the color line.[6] Antimiscegenation laws became a way to draw a rigid boundary between slave and free, black and white. Maryland enacted the first antimiscegenation statute in 1661, and Virginia followed suit one year later. Even before that, Virginia authorities in the 1630s and 1640s had whipped and publicly humiliated those who participated in interracial sexual liaisons.[7]

By punishing interracial sex severely, authorities in Maryland and Virginia sent a clear message that whites were not to adopt the sexual practices of slaves. Slaves typically did not enjoy access to the formal institution of marriage, although they did conduct their own slave marriage rituals. Some slaves practiced polygamy or polygyny, and many did not condemn premarital intercourse. Without social stigma, a woman might have sex and even bear children by a man before having been recognized by other slaves as "married" to him.[8] Legislation prohibiting interracial intimacy clearly condemned these alternative sexual and marital practices as heathen and unfit for right-minded, white Christians.

In the early settlement years, interracial marriage had been tolerated, presumably because of the uncertain racial status of blacks and the shortage of women. As the institution of slavery was consolidated in the late seventeenth century, marriages across the color line became anomalous and dangerous exceptions to the emerging racial hierarchy. Interracial unions enabled black women to control access to their sexuality through marriage, and it enabled black men to occupy a superior position to white women in a patriarchal institution that treated the husband as master. Marriages across the color line could give blacks and their mixed-race offspring access to white economic privileges by affording them the property protections that marriage and inheritance laws offered.[9] Black–white marriages threatened the presumption that blacks were subhuman slaves incapable of exercising authority, demonstrating moral responsibility, and capitalizing on economic opportunity. If whites could share their emotional lives and economic fortunes with blacks, how could blacks be anything less than full persons?

The Chesapeake colonies enacted statutes to ensure that, rather than benefit blacks, interracial marriages would simply degrade Whites. Under Virginia's 1691 law, a white spouse was to be banished from the colony within three months of an interracial wedding. In 1705, Virginia authorized jail sentences of six months for whites married to blacks or mulattoes. In Maryland, "freeborne English women" who married

"Negro slaves" were required to serve their husbands' masters during their husbands' lifetimes.[10] These laws stripped whites of racial privileges based on their intimacy with blacks.

Despite these harsh sanctions, some whites paid the price to marry across the color line. In Maryland in 1681, Nell Butler, known as "Irish Nell," fell in love with a slave known as "Negro Charles." When Nell, an indentured servant, informed Lord Baltimore, her master, of the planned marriage, he warned her that she and all her descendants would live as slaves. Unswayed and defiant, Nell replied that she would rather marry Charles than Lord Baltimore himself. She did marry Charles and spent the rest of her life working for his masters, probably as an indentured servant. Had she not married Charles, her contract of servitude with Lord Baltimore would have ended in four or five years. Nell reportedly died "much broken and an old woman." Still, Lord Baltimore was wrong about Nell's offspring. In the eighteenth century, a Maryland court held that neither Nell nor her descendants could be slaves. Subsequently, masters complained of runaway mulatto slaves who claimed to be "descendants of the famous Nell Butler."[11]

As the story of Irish Nell suggests, the problem of mulatto offspring was a serious one in a slave economy predicated on a clearcut boundary between whites and blacks. Despite laws punishing interracial sex, one-fifth of children born out of wedlock at the end of the seventeenth century were mulattoes.[12] Whether slave or free, these mulattoes complicated the enforcement of slavery and compromised its claims to moral authority. Mulatto slaves who could pass as white were considered particularly risky property because they could easily run away and escape detection. In 1835 in Virginia, whites refused to bid on one male slave because he was "too white" and might "too easily escape from slavery and pass himself as a free man." Later on, light-skinned mulatto slaves were used to call into question the very propriety of slavery. A favorite theme of abolitionist literature was the "white slave," who reminded white audiences that they too might be held in bondage.[13]

With widespread interracial sex that threatened the color line, the Virginia legislature had to define and ultimately confine the relevance of the mulatto. A 1705 law classified a mulatto as "the child of an Indian and the child, grandchild, or great grandchild of a negro."[14] During the Revolutionary era, high rates of emancipation coupled with Virginia's "one-fourth black" rule allowed some free mixed-race individuals to claim the privileges of whites, although they obviously had some African

ancestry. Officials concluded that "[m]ulattoes must be made black, and the unfreedom of blacks must be defined and made universal."[15] To this end, the upper South adopted a one-drop rule, which defined as black any person with traceable African ancestry.

The adoption of a rule of hypodescent kept blacks from transmitting special privileges to the next generation through interracial sex or marriage. This racial tax on offspring precluded them from gaining official recognition of their white ancestry. By erasing their white heritage, the racial classification scheme converted mulattoes into blacks by a type of parthenogenesis: It was almost as though the child had been generated by a single parent without intercourse across the color line. As slavery hardened the lines between whites and blacks, the racial tax on mulattoes increased. Their curtailed privileges clearly identified them as nonwhite, and even the lightest mulattoes were denied the privileges of whiteness.

The imperative of consolidating racial boundaries was so great that Chesapeake authorities were willing to undo the legal tradition of paterfamilias. A long-standing English rule mandated that a child's status follow that of the father. Given the initial scarcity of white women in the Chesapeake, most interracial sex probably took place between white men and black women. As a result, the majority of mulatto offspring were free under the English approach. In 1662, Virginia departed from tradition by making a child's status follow that of the mother.[16] Under this matrilineal approach, children like Irish Nell's would be free, but most mulattoes would be slaves. Even mulattoes born to white mothers enjoyed only tenuous liberties. Under a 1691 Virginia law, they could still be sold as servants until the age of thirty. Mulattoes could not hold public office, and by 1723, free mulattoes were stripped of many of the privileges—including voting and the unrestricted right to bear arms—that white citizens enjoyed.[17] Virginia authorities also were concerned that doting white fathers might subvert laws that made their mulatto offspring slaves by emancipating them. To discourage manumission of mulatto offspring, masters had to send their freedmen out of the colony, and authorities were encouraged to eliminate roving bands of "negroes, mulattoes, and other slaves [perhaps Indians]."[18] In 1723, Virginia made private emancipation even more difficult.[19] Restricting the liberty of racially ambiguous mulattoes was essential to ensuring their definition as nonwhite.

Despite formal, legal restrictions, an influential and powerful white father sometimes could rely on his privileged position to win local—

albeit fragile and informal—acceptance of a mixed-race child. In 1805 in Campbell County, Virginia, Robert Wright, the mulatto son of a wealthy white landowning father and black slave mother, inherited his father's estate and became a well-to-do planter. Robert's father, a lifelong bachelor, was estranged from his white brothers and sisters and determined to pass on his substantial holdings to his beloved only son. With his father's support and guidance, Robert learned to manage the land and gained entry into the uppermost echelons of Campbell County's white society. One year after inheriting his father's property, Robert married a white woman. Although the county clerk and minister never recorded the marriage because of its illegality, Robert and his wife lived openly as a married couple and had a child together without being ostracized by their white neighbors.

Robert's troubles began when his wife ran away with a white man. In petitioning Virginia legislators for divorce so that he could marry another white woman, Robert sought formal acceptance of his white privilege, but the jerry-built, informal status of his father's making could not survive legal scrutiny. In his petition, Robert emphasized that he, his wife, and her lover were all free. He argued that despite the ban on interracial marriage, the union was "to all intents and purposes valid and binding between the parties" because they had obtained a marriage license and been married by a clergyman. Even if the minister had destroyed the marriage certificate, the marriage clearly had been recognized as valid for approximately a decade in the Campbell County community. White citizens in the community wrote in support of Robert's petition, noting his propriety, kindness to his wife, and reputation as "an honest, upright, and good citizen."[20]

Despite Robert's status in Campbell County, the state of Virginia could not permit its official ban on interracial marriage to be subverted. The Virginia House of Delegates decisively rejected Robert's divorce petition, making clear that "Robert Wright could be married to a white woman in his community, [but] he could not be married to her in law."[21] With the illusion of his whiteness destroyed, Robert lost standing in Campbell County. On tax rolls, his designation was changed from "White" to "M," for mulatto. When he persisted in living with the white woman he had hoped to wed, many of his neighbors condemned his public adultery. Humiliated and ostracized, Robert died at the age of 38, two years after the House of Delegates stripped away the pretense of his whiteness.[22]

Robert Wright's story is remarkable primarily because it demonstrates the privileges that white fathers could confer on mulatto offspring even in the face of antimiscegenation laws. Robert's father demonstrated his power as a white landowner in the community by subverting the legal restrictions on his mulatto son's ability to manage a white man's estate, mingle with the white elite, and marry a white woman. Yet even someone as influential as Robert's father could not create a foolproof escape from restrictions on personhood and identity that were essential to the preservation of racial inequality. Once Robert's wife left him for a white lover, the mulatto's manliness and his entitlement to the privileges of whiteness were called into question. Robert was no longer free to marry the woman of his choice, and his neighbors ceased to think of him as morally deserving or racially white. Robert's despoiled identity as mulatto was marked by incursions on his autonomy to associate with whites as he pleased.

In other instances, though, informal recognition of mulatto children reinforced racial hierarchy and subverted sexual mores that condemned incest and adultery. For example, in antebellum Loudon County, Virginia, a quadroon slave woman named Ary lived with her white paternal uncle. There she became the concubine of her young master, who also was her cousin. Far from challenging racial privilege, Ary's circumstances reinforced it: She avoided associating too closely with blacks, perhaps remembering her master's admonition not to get involved with "colored men" because they "weren't good enough" for her.[23] Nor did the situation trigger outrage at her sexual exploitation: Ary insisted that she was her father's favorite child, and she proudly described her elite white heritage and her young master's attentions to her. The price of Ary's sense of superiority to blacks was a complete dependency on white male relatives for validation of her racial and sexual worth. Because of their racial privilege, these men could define Ary's identity wholly in relation to their sexual needs, regardless of their relationship to her as father, uncle, or cousin.

In general, interracial relationships were tolerated only insofar as they left norms of racial and sexual privilege intact. By deprecating white women who cohabited or had intercourse with blacks, the affairs could be dismissed as indecent and depraved. According to historian Martha Hodes, local communities regularly turned a blind eye to black or mulatto men and poor white women who lived together as man and wife, so long as they remained on the outskirts of white society. These long-

term liaisons as well as brief sexual encounters could be explained by characterizing the women as low-class and licentious.[24] For instance, in North Carolina in 1825, Polly Lane, a white indentured servant, accused Jim, a slave, of rape. Although Jim pleaded innocent, he was convicted and sentenced to death. As Jim awaited execution, white neighbors noted that Polly appeared to be pregnant, and they became suspicious of her claim of rape.[25] Four doctors submitted a statement that "without an excitation of lust, or the enjoyment of pleasure in the venereal act, no conception can probably take place."[26] When Polly gave birth to a child declared to be of "mixed blood," Jim was eventually pardoned "in part by invoking the white woman's bad reputation, thereby demonstrating that a poor and transgressing white woman could be worth less to elite whites than the profitable labor of a slave."[27]

Where the pressure to consolidate racial and sexual norms was less intense, sex across the color line was commonplace despite its racially ambiguous consequences. White men enjoyed ready and open access to black and mulatto women as a mark of their untrammeled freedom and privilege. In the lower South, for example, free mulattoes were rare and posed little threat to the system of slavery. The issue of interracial sex was openly debated in newspapers in South Carolina in the 1730s, and one anonymous poet wondered: "Kiss me black or white, why need it trouble you?"[28] This laissez-faire attitude toward sex across the color line allowed wealthy white planters regularly to indulge their appetite for black and mulatto women. In New Orleans and Charleston, there was a profitable "fancy trade" in mulatto women, who brought twice the price of a prime field hand. Free mulatto women went to quadroon balls in New Orleans to meet wealthy white men. Under a system of concubinage known as "placage," the men could make formal arrangements to support the women for a few years or for life in exchange for sexual services.[29] Without fear of social reprisal, plantation owners set up special residences for black and mulatto mistresses, and some slave owners even went so far as to bring concubines into their own homes, where their white wives had to endure the humiliation in silence.[30] At a time when the New England colonies and upper South frowned on extramarital sexuality, planters in the lower South openly flouted the norm of fidelity in marriage. Tolerance of concubinage commodified black and mulatto women, but it also damaged the status of white women. One northern visitor to the South in 1809 remarked that the "dull, frigid insipidity, and reserve" of southern women was one of the most insidious costs of slavery.[31]

The lower South's tolerance for interracial relationships was linked to an unwillingness to adopt hard and fast legal definitions of blackness. As Judge William Harper wrote in 1835:

> We cannot say what admixture of negro blood will make a colored person. The condition of the individual is not to be determined solely by distinct and visible mixture of negro blood, but by reputation, by his reception into society, and his having commonly exercised the privileges of a white man. . . . [I]t may be well and proper, that a man of worth, honesty, industry, and respectability, should have the rank of a white man, while a vagabond of the same degree of blood should be confined to the inferior caste.[32]

A flexible classification scheme permitted mulattoes to earn the privileges of whiteness through personal accomplishments and social connections. This reward system enhanced the mulattoes' value to whites as racial mediators: Mulattoes would not identify too closely with blacks, for fear of jeopardizing the benefits associated with their White heritage. Tolerance for mulattoes was so great in some parts of the lower South that they were able to establish themselves as a separate elite. In Louisiana, mulattoes amassed large estates and slaves to work their properties, educated their children abroad, and developed their own elegant, cultural traditions. Labeled "Creoles," these highly successful mulattoes kept their social distance from both whites and blacks by adopting a norm of endogamy, or in-marriage.[33]

By the 1850s, the industrial revolution had transformed the textile industry, and the demand for cotton had grown dramatically. Southern planters needed a growing number of slaves, and the proportion of mulattoes in bondage increased. As the slave population became "lighter," the free mulatto population seemed increasingly anomalous and dangerous. Grand juries were convened to identify the hazards associated with free mulattoes. As one jury concluded, "We should have but two classes, the Master and the slave, and no intermediate class can be other than immensely mischievous to our peculiar institution."[34] When the lower South found it necessary to rigidify racial boundaries, it followed the lead set in the upper South. States punished interracial sexual contacts, encouraged free people of color (of whom 75 percent were mulatto) to leave the jurisdiction, and adopted a one-drop rule that denied the relevance of mixed-race origins altogether. Vigilantes reinforced these legal changes by punishing those who had interracial sex and by threatening free people of color with violence.[35]

Although the one-drop rule had been consolidated in the South before the Civil War, the war and its aftermath threatened to undo racial boundaries. Nothing was better calculated than the prospect of interracial sex and marriage to stir up fears that the color line was crumbling completely. For this reason, when calling for emancipation, orthodox abolitionists shunned the issue of sex and marriage across racial boundaries. Indeed, when freethinker Francis Wright established an interracial community and called for amalgamation of the races, she was promptly dubbed the "priestess of Beelzebub" and dropped by mainstream abolitionists who feared her radicalism would hurt the movement.[36] Similarly, after the war, most Reconstruction efforts focused on "political" equality, such as the right to vote, sit on juries, and hold office. Republican reformers deflected concerns that political equality would lead to "social" equality, as typified by race-mixing in integrated communities. When southern Democrats coined the term *miscegenation* to ridicule the quest for racial equality during Reconstruction, Republicans chided their opponents for implying that cross-racial sexual liaisons were even tempting.[37] The distinction between political and social equality made clear that the races would remain separate and distinct. Blacks would be formally rehabilitated as full persons before the law, but they would remain subordinate in informal and intimate spheres of life.

Although a few southern states did eliminate antimiscegenation laws after the Civil War, black–white intermarriage dropped sharply. The decline is particularly striking because of the strong incentives for white women to cross the color line. The ranks of white males had been decimated by the bloody conflict, and black men enjoyed newfound status and freedom of movement. Yet only in places with a particularly liberal view of race relations like New Orleans did some white women become involved with black men.[38] Presumably, the harsh pressures of public opinion prevented white women and black men from crossing the color line. Many white southerners blamed their defeat on the corrupting influence of miscegenation:

> It does seem strange that so lovely a climate, and country, with a people in every way superior to the Yankees, should be overrun and destroyed by them. But I believe that God has ordered it all, and I am firmly of the opinion . . . that it is the judgement of the Almighty because the human and brute blood have mingled to the degree it has in the slave states. Was it not so in the French and British Islands and see what has become of them.[39]

To prevent further transgressions, self-appointed vigilante groups delivered swift and terrible punishment to black men suspected of consorting with white women. The Ku Klux Klan formed at about this time, and it sometimes lynched freedmen prominent in Reconstruction politics under the guise of retribution for the mistreatment of white women.[40] Through this clandestine attack on interracial relations, whites were able to send a clear message that political equality would not dismantle the color line. Restrictions on sex, marriage, and family would continue to be a cornerstone in defining racial difference.

Although black men suspected of having sex with white women could be lynched,[41] black women were unable to fend off the advances of white men. Ironically, once slavery ended, black and mulatto women found it more difficult than during the antebellum period to limit their sexual availability to only one white male. As a result, the number of mulatto offspring increased after emancipation. Reconstruction legislators did try to protect black and mulatto women from sexual exploitation. Efforts to outlaw concubinage failed, but some states adopted bastardy statutes that enabled black and mulatto women to file paternity suits so that white men would be forced to support their illegitimate mulatto children. These bastardy statutes eventually were repealed.[42]

Even though interracial marriages were exceedingly rare during Reconstruction, white southern males promptly reinstated antimiscegenation laws when they regained control of state legislatures in the post-Reconstruction era. With the one-drop rule of racial classification in place,[43] the color line could once again be officially consolidated by regulating sex and marriage. Under this regime, antimiscegenation laws became critical to conserving the integrity and purity of the white race. Without these prohibitions, blacks could gain access to white wealth and privilege through marriage. After all, in black–white marriages, the one-drop rule dictated that the heirs to white fortunes would be black.

Interracial sexuality outside of marriage became a means of establishing racial power and domination. White men could enjoy the sexual favors of black women with impunity, but black men would pay with their lives for sexual contact with white women. When white men impregnated black women, the offspring were illegitimate and generally could not even seek support from their fathers. The children of these black–white relationships threatened neither white identity nor privilege. By contrast, if black men had adulterous relations with married white women, any resulting offspring threatened the racial integrity of

white men's families. After Reconstruction, then, antimiscegenation laws reaffirmed antebellum definitions of racial identity and reasserted the superiority of whites as marital partners. White men expressed their sexual dominance by policing access to white women and enjoying the favors of black women without obligations of marriage or support.

The Chinese and Japanese Experience: Racial Unassimilability and Sexual Subordination

Although antimiscegenation laws were used to draw racial boundaries between whites and blacks during the colonial era and early years of nationhood, the color line was well-established by the time Chinese and Japanese began to immigrate to the United States in substantial numbers during the mid- to late 1800s.[44] Definitions of blackness evolved through state legislation, but for Asians, federal immigration law made their status as nonwhite wholly unambiguous. Much of the racialization of Asians took place as successive waves of immigrants were labeled nonwhite, unassimilable, and unfit for citizenship. The Chinese were the first to arrive, coming in substantial numbers after 1848 when gold was discovered in California.[45] Early on, the U.S. government made plain that the Chinese were not white. Under a 1790 naturalization law, only "free white persons" were eligible for citizenship.[46] When Chan Yong applied for citizenship in 1854, a federal district court denied his application because he did not qualify as white, although newspaper accounts at the time stated that he was lighter-skinned than most Chinese.[47]

After the Civil War, race relations in America were contested. Congress amended the naturalization law to permit "aliens of African nativity" and "persons of African descent" to petition for citizenship. When the naturalization law was codified in 1875, the reference to "free white person" was dropped, leaving open the possibility that the Chinese could naturalize. Chinese immigrants quickly capitalized on the statutory uncertainty by filing petitions for naturalization in San Francisco.[48] Shortly thereafter, a federal court made clear that as nonwhites, Chinese immigrants continued to be ineligible for citizenship.[49]

A few years later, the federal government went even further in defining the Chinese as undesirable nonwhite aliens. In 1882, by an overwhelming margin, Congress passed the Chinese Exclusion Act, the first statute to ban a group from immigrating to the United States based solely on race or ethnicity. The Act prohibited any Chinese laborer or miner from

entering the United States, and it barred any state or federal court from naturalizing any Chinese.[50] After passage of the Act, the Chinese population in the United States declined precipitously.[51] Periodically renewed and strengthened by Congress,[52] the law remained in force until 1952 when the McCarran-Walter Act nullified racial restrictions and substituted a quota system for immigration based on national origin.[53]

The Japanese began to arrive in the United States about twenty years after the Chinese. Most Japanese emigrated to Hawaii to work in the sugar industry, and their numbers were small because of restrictive Japanese emigration policies.[54] After 1890, two important changes in Japanese immigration occurred. First, the number of immigrants increased substantially so that by 1910, the Japanese outnumbered the Chinese; and second, Japanese immigrants began to arrive in the western continental United States, particularly California, to replace the dwindling numbers of Chinese laborers and to escape low wages and poor working conditions in Hawaii.[55] Having observed the mistreatment of the Chinese, the Japanese struggled to avoid occupying the same place in the racial hierarchy by distinguishing themselves from the Chinese under federal naturalization policy. Although the 1790 law permitted only whites to become citizens, the Chinese Exclusion Act of 1882 withheld the privilege of naturalization only from the Chinese. Several hundred Japanese successfully petitioned for citizenship in lower federal courts on the ground that they were not covered by legislation targeting the Chinese.[56] The federal government soon moved to clarify the status of the Japanese as nonwhite. In 1905, the U.S. attorney general informed President Theodore Roosevelt that the Japanese were and always had been ineligible for naturalization based on their race. One year later, the attorney general issued a formal opinion to that effect.[57]

Despite this setback, the Japanese continued to try to win favorable treatment under immigration laws by highlighting their capacity to assimilate to an American way of life. In a 1922 case, Takao Ozawa asked that his petition for naturalization be granted because the word *free* was more important than the word *white* in determining eligibility of "free white persons" for citizenship. Ozawa insisted that even though he was nonwhite, he should be allowed to naturalize because he could successfully shoulder the responsibilities of democratic freedom.[58] Despite Ozawa's proofs of good moral character and individual accomplishment, the U.S. Supreme Court denied his eligibility for citizenship. According to the Court, Ozawa's status as nonwhite barred him from naturalization, regardless of his ability to conform to an American way of life.[59] Race

was a categorical stigma, one that did not permit individuals to escape through acculturation and achievement.

The federal government's treatment of immigrants from India cemented the racialization of Asians.[60] Unlike the Chinese and Japanese, Asian Indians were treated as Caucasian under the prevailing scientific taxonomy. Even so, the U.S. attorney general refused to find that Asian Indians qualified as "free white persons,"[61] but several federal district courts reached a different conclusion.[62] To remedy the confusion, the U.S. Supreme Court made clear in its 1923 decision in *United States v. Thind*[63] that Asian Indians were ineligible for citizenship because they were nonwhite. According to *Thind,* Congress used the term *white* rather than *Caucasian* because it was relying on popular, not scientific, conceptions of race. As the Court explained: "It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today. . . ."[64] Just as personal accomplishments could not save the Japanese, science could not save the Asian Indian from racialization. All Asians—whether Chinese, Japanese, or Asian Indian—had been definitively categorized as nonwhite. Any claims of racial ambiguity were decisively laid to rest by Congress, the attorney general, and the Supreme Court.

By labeling Asian immigrants unassimilable and unfit for citizenship, the federal government made them easy targets for racial discrimination in the western states where they settled. Bans on intermarriage were one of a number of state restrictions on Asian immigrants' liberties, all of which were designed to mark them as inferior and undesirable. With the color line clearly drawn by federal immigration laws, the statutes reinforced the temporary status of Asian sojourners, who came to the United States to work and then return to their home countries. Antimiscegenation laws marked the newcomers' marginal and subordinate status, prevented them from developing permanent ties to America through marriage and family, and severely restricted sexual options for Asian men in bachelor communities.

The racialized imagery that informed federal immigration policy dominated debates about the personhood of Asians. Popular accounts analogized the Chinese to blacks because of their willingness to work in conditions akin to slavery, their incapacity to handle freedom, and their distinctive physical appearance.[65] One politician compared the Chinese to Native Americans and recommended their removal to reservations.[66] These racial images in turn were linked to a degraded sexuality. One

California magazine confirmed the depravity of Chinese women by noting that their physical appearance was "but a slight removal from the African race."[67] As early as 1854, the *New York Tribune* characterized the Chinese as "lustful and sensual in their dispositions; every female is a prostitute of the basest order."[68] Other journals claimed that debauched Chinese males went to Sunday school only to ravage white female teachers. Readers were warned that Chinese men could not be left alone with children, especially little girls. Sexual anxieties about the Chinese were exacerbated by religious differences, as Christian missionaries sought to proselytize a people characterized as base and lecherous pagans.[69]

California's laws were particularly important because so many Asian immigrants resided there. During the convention to draft the 1879 California constitution, the chairman of the Committee on the Chinese warned: "Were the Chinese to amalgamate at all with our people, it would be the lowest, most vile and degraded of our race, and the result of that amalgamation would be a hybrid of the most despicable, a mongrel of the most detestable that has ever afflicted the earth."[70] To address these concerns, the delegates proposed an 1878 constitutional amendment to restrict intermarriage of Chinese and whites: "The intermarriage of white persons with Chinese, negroes, mulattoes, or persons of mixed blood, descended from a Chinaman or negro from the third generation, inclusive, or their living together as man and wife in this State, is hereby prohibited. The Legislature shall enforce this section by appropriate legislation."[71] The California electorate ratified the provision the following year, and the California legislature quickly moved to enact antimiscegenation statutes. The California Civil Code was amended in 1880 to prohibit the issuance of marriage licenses authorizing the union of "a white person with a negro, mulatto, or Mongolian."[72]

Although levels of interracial sex and marriage among whites and Chinese were quite low, the California legislature criminalized Chinese–white intermarriage in 1901.[73] That same year, the legislation was held unconstitutional based on a procedural defect.[74] California did not reenact the statute until 1905, primarily in response to intensified concerns about amalgamation with a new group of Asian immigrants, the Japanese.[75] As with the Chinese, Americans feared what they presumed to be Japanese immigrants' alien racial identity and unbridled sexual impulses. When the Japanese government successfully lobbied for its nationals to be exempted from laws that segregated the Chinese, political leaders warned of the dangers of white girls "sitting side by side in the school rooms with matured Japs, with their base minds, their lascivious

thoughts, multiplied by their race and strengthened by their mode of life."[76] California's 1905 antimiscegenation law reflected fears of both racial difference and sexual deviance. The statute addressed eugenic concerns that Asian immigrants were a threat to the "self-preservation of [the white] race"[77] as well as anxieties about the lawless sexuality of Japanese immigrants.[78]

Even with state antimiscegenation laws in place, concerns about Asian intermarriage persisted. In 1907, Congress had passed an Expatriation Act,[79] which stripped American women of their citizenship if they married foreign nationals. In 1922, in response to protests from women's groups, Congress passed the Cable Act. In general, the Act did away with the practice of treating a woman's nationality as derivative of her husband's, thereby assuring a wife the freedom to choose her own allegiance. In the area of race, though, women who crossed the color line to marry Asian immigrants remained disempowered. The Cable Act continued to strip American women of their citizenship if they married aliens ineligible to naturalize. The marital autonomy of white women was sacrificed to preserve racial distinctions.

Moreover, the Cable Act made it more difficult than before for American men, usually native-born Chinese, to bring their wives from China. Because a woman's nationality was now independent of her husband's, the U.S. Supreme Court interpreted the Act as barring Chinese women from entering the country based on marriage to an American citizen. Previously, the women had been able to come to the United States but not naturalize. These provisions remained in effect for ten years.[80] Unable to bring wives from China and barred by antimiscegenation laws from marrying white women, even American-born Chinese had limited marital options. Citizenship by birth did not spare them from the adverse consequences of racial difference.

Restrictive immigration policies and state bans on intermarriage had particularly harsh consequences for the Chinese, who were denied access to wives of any race. Federal policy treated the Chinese as sojourners—temporary male workers who would eventually return to their homelands after fulfilling their labor contracts. Poor, unable to speak English, and unfamiliar with American customs, Chinese immigrants were ill-equipped to challenge their isolation. Many of them could not even afford their wives' additional passage. These obstacles were compounded by cultural tradition, which dictated that Chinese women join their husbands' extended families. This practice cemented the family's expectation that the men would return someday and send remittances in the meantime.[81]

Given this combination of federal policy, limited resources, and cultural traditions, the number of Chinese women coming to the United States during the 1800s was minuscule. In 1852, of 11,794 Chinese, only 7 were female. By 1870, Chinese men outnumbered Chinese women in the United States by 14 to 1. These severe imbalances in turn led to images of sexual deprivation and degradation. Men living without women in bachelor communities seemed deviant and dangerous. The few Chinese women in the United States were vulnerable to sexual exploitation, which reinforced the image of sojourners as predatory and debauched. According to the 1870 census, 61 percent of Chinese women were "prostitutes," while only 21 percent were "housekeepers."[82] Chinese women regularly worked in the sex trade after having been lured to the United States with promises of marriage, abducted, or sold into indentured servitude by needy families.

Antimiscegenation laws arguably played a more significant role in sending messages of racial inferiority than in thwarting interracial relationships. Anxieties about lustful Chinese bachelors harming white women appear to have been largely unfounded. Although interracial sex between blacks and whites remained relatively commonplace even under antimiscegenation laws, Chinese men were unlikely to cross the color line to cohabit and procreate with white women. During the early decades of Chinese migration, only the most affluent and powerful Chinese might dare to take a white wife or mistress.[83] The linguistic and cultural isolation of the Chinese, their segregation in immigrant enclaves, and their vulnerability to deportation—all of these factors undoubtedly made affairs with white women an unlikely prospect, and Chinese men frequently remained childless bachelors. Indeed, even as late as the 1920s and 1930s, many Chinese men chose to remain single rather than intermarry. According to Los Angeles County marriage records for 1924–1933, of the Chinese who married, only 23.7 percent had a non-Chinese spouse. Given that there were nine Chinese men for every two Chinese women at the time, the majority of Chinese men must have remained alone.[84] Although there is little evidence that the Chinese pursued white women for sex and marriage, western states continued to threaten the immigrants with criminal prosecution under antimiscegenation laws.

Far from alleviating the problems of bachelor communities, Congress consistently enacted immigration policies that worsened the gender im-

balances. In 1875, the Page Law barred Chinese prostitutes from entering the country. Tough interrogation techniques were used to enforce the ban. In fact, the law was so intimidating that the number of Chinese women coming to the United States dropped by 68 percent between 1876 and 1882.[85] Shortly after the Chinese Exclusion Act was passed, a federal court in 1844 held that Chinese women assumed the status of their laborer husbands and were barred from entry. Only the wives of lawfully domiciled merchants could enter the United States.[86] Immigration laws were so effective in deterring family creation that, in 1890, only 8.7 percent of the Chinese in the United States were native born.[87] Restrictive immigration policies coupled with antimiscegenation laws confirmed the sojourner's status as a dehumanized and degraded laborer: "Permitted neither to procreate nor to intermarry, the Chinese immigrant was told, in effect, to re-emigrate, die out—white America would not be touched by his presence."[88]

The only relief that the Chinese had from harsh immigration policies came with the 1906 San Francisco earthquake. Because official records had been destroyed, Chinese men claimed to be native-born citizens who could bring their wives from China to the United States. Between 1907 and 1924, ten thousand Chinese women entered the country. By contrast, before 1900, only slightly more than forty-five hundred Chinese women lived in America.[89] This loophole was closed in 1924 when Congress restricted entry of Chinese women to students and wives of clergymen, professors, and government officials.[90] One year later, the U.S. Supreme Court upheld the law, even though it barred native-born Chinese from bringing their spouses to America.[91] The Chinese themselves felt the bitter sting of the federal government's efforts to restrict female immigration: "We were beginning to repopulate a little now so they passed this law to make us die out altogether."[92]

In contrast to the Chinese, Japanese immigrants were able to build same-race families in the United States. Although the Japanese also arrived as *dekaseginin,* or "men who go out to work," they soon were converted to *teiju,* or "permanent residents abroad."[93] Arriving in California in the midst of anti-Chinese hysteria, the Japanese quickly concluded that sojourner status would subordinate and humiliate them. With the support of the Japanese government, the newcomers embarked on a strategy of settlement to ensure economic independence, social standing, and self-respect.[94] Integral to this strategy was the immigration of Japanese women, who could help to build stable, self-sufficient families and

communities. When the United States moved to restrict immigrant labor from Japan, a 1908 "Gentleman's Agreement" permitted Japanese residents to bring members of their immediate family to the United States.[95] The agreement protected the Japanese from the hardships of bachelor communities. In 1905–8, 16 percent of Japanese immigrants were women, but by 1909–14, the proportion exceeded 50 percent.[96] The ongoing arrival of Japanese women rapidly rectified gender imbalances in the immigrant community. In 1900, there were almost five Japanese men for every Japanese woman. By 1910, the ratio had dropped to 3.5 to 1, and by 1920, it was only 1.6 to 1. Moreover, nearly every adult Japanese female was married.[97]

Despite these important differences between the Chinese and Japanese immigrant experiences, both groups triggered anxieties about racemixing. Fears associated with bachelor communities persisted for the Chinese, but the fears surrounding the Japanese arguably should have dissipated by the 1920s. The Japanese had built prosperous families and communities in the United States. Carefully screened by the Japanese government, immigrants arrived with higher rates of literacy and more material resources than their counterparts from Europe.[98] A number of Japanese became entrepreneurs, running successful farms and small businesses. In addition to their economic accomplishments, Japanese immigrants were able to forge stable, same-race families due to the steady influx of women from their home country.

Because the Japanese represented the anomaly of nonwhites with material resources, however, their self-contained communities sparked conflicting anxieties about their sexual and marital proclivities among whites. Some whites concluded that the Japanese settlements were proof of the immigrants' unassimilability and chauvinism. As one witness from California testified before the Senate Committee on Immigration in 1924:

> [W]ith great pride of race, they have no idea of assimilating in the sense of amalgamation. They do not come to this country with any desire or intent to lose their racial or national identity. They come here specifically and professedly for the purpose of colonizing and establishing here permanently the proud Yamato race. They never cease to be Japanese. They have as little desire to intermarry as have the whites, and there can be no proper amalgamation, you will agree, without intermarriage. In Hawaii, where there is every incentive for intermarriage, the Japanese have preserved practical racial purity. . . .[99]

At the same time, the Japanese immigrants' ability to establish farms and businesses raised fears that they would try to convert their economic success into sexual and marital privilege. One farmer worried that property and wealth would lead Japanese men to covet white wives with disastrous consequences:

> Near my home is an eighty-acre tract of as fine land as there is in California. On that tract lives a Japanese. With that Japanese lives a white woman. In that woman's arms is a baby. What is that baby? It isn't Japanese. It isn't white. I'll tell you what that baby is. It is a germ of the mightiest problem that ever faced this state; a problem that will make the black problem of the South look white.[100]

Concerns about the Japanese immigrants' sexuality were magnified by their integration into white schools and communities. Anti-Japanese propaganda warned that the Japanese were "casting furtive glances at our young women. They would like to marry them."[101]

Despite widespread fears that prosperous Japanese men would prey on white women, the rate of outmarriage among first-generation Japanese, or *Issei,* was quite low. Los Angeles County marriage records between 1924 and 1933 indicate that of *Issei* women who married, only 1.7 percent wed non-Japanese men; of the *Issei* men who married, fewer than 3 percent had non-Japanese brides. This was the lowest rate of outmarriage for any racial group in the area. By comparison, of blacks who married, 11.3 percent had nonblack spouses, and of Chinese who married, 23.7 percent wed non-Chinese.[102] Nor is there any evidence that the Japanese regularly evaded antimiscegenation laws through extramarital affairs with whites that produced illegitimate offspring.

The self-sufficiency and success of Japanese communities presented a singular challenge in interpreting the significance of antimiscegenation laws. Although bans on intermarriage could be interpreted as an unequivocal mark of racial subordination for blacks and Chinese, the same was not true for the Japanese. By building prosperous, autonomous communities, Japanese immigrants appeared to be exercising the freedom to forge a separate but equal society in the shadow of racial restrictions. Confronted with a nonwhite population that defied easy categorization as inferior or dependent, whites could no longer assume that low intermarriage rates automatically signalled a diminished status. To preserve a sense of white superiority, the lack of Japanese–white relationships had to be attributed either to Japanese chauvinism or to thwarted sexuality.

The Filipino Experience: Not Compliance but Defiance

Although the Chinese and Japanese generally abided by restrictions on intermarriage, one group of Asian immigrants refused to accept race-based limits on their sexual and marital autonomy. Unlike other Asian immigrants, Filipinos arrived in the United States steeped in the American democratic tradition. Convinced of their entitlement to full personhood, Filipinos fought vigorously for the freedom to date and marry as they saw fit.

Filipinos arrived on the West Coast, particularly California, in the 1920s and 1930s.[103] Like the Chinese, most Filipino immigrants were male: In 1930, there were 40,904 Filipino men but only 1,640 women. By 1940, of the Filipinos in the United States, there were still seven men for every woman.[104] They, too, formed bachelor communities and sparked fears of miscegenation.[105] Popular accounts portrayed the Filipinos as lascivious dandies with a taste for white women. One anti-Filipino spokesman described the immigrants as "little brown men attired like 'Solomon in all his glory,' strutting like peacocks and endeavoring to attract the eyes of young American and Mexican girls."[106] The president of the Immigration Study Commission warned of race-mingling between "Filipino coolie fathers and low-grade white mothers," whose numerous offspring could become "a serious burden."[107] Sexual anxieties reached such a pitch that race riots broke out in 1930 when white men became angry at Filipino men who were socializing with white women.[108]

Filipinos reacted defiantly to efforts to control their sexuality. Unique among Asian immigrants, Filipinos arrived not from a foreign country but from an American territory. As a result, they had been educated in American schools, spoke English, and were familiar with American history and civics. They felt that their discriminatory treatment betrayed the ideals taught in their classrooms: "In school in the Islands we learn from the Declaration of Independence that all men are created equal. But when we get over here we find people treating us as if we were inferior."[109] Filipinos confounded their critics by reveling in their depiction as sexually powerful and threatening. In 1936, a San Francisco municipal court judge wrote in *Time* magazine that Filipinos "have told me bluntly and boastfully that they practice the art of love with more perfection than white boys."[110] The Philippine Resident Commissioner responded dryly: "[T]he Judge admits that Filipinos are great lovers."[111] Another Filipino wrote to *Time* that "We, Filipinos, however poor, are

taught from the cradle up to respect and love our women. . . . If to respect and love womenfolks is savagery, then make the most of it, Judge. We plead guilty."[112]

Filipinos in California strongly resisted the application of antimiscegenation laws. Most of California's Filipino population resided in Los Angeles County. California forbade marriages between whites and Mongolians, but the Los Angeles City Council announced in 1921 that Filipinos were exempt because they were not Mongolian. Eight years later, the California attorney general issued a contrary opinion, concluding that the term *Mongolian* included Filipinos as well as Chinese and Japanese.[113] Nevertheless, county clerks in Los Angeles continued to issue marriage licenses to Filipino–white couples.[114] In 1930, a lawsuit was filed to force the clerks to cease issuing licenses to Filipinos who were marrying whites. When a superior court judge held that the California attorney general's opinion was binding,[115] the Filipino community reacted with outrage.[116]

Filipino leaders promptly spearheaded efforts to fight the decision. By 1931, four cases were pending in Los Angeles superior courts on the legality of Filipino–white marriages.[117] Reversing itself after only one year, the superior court held that the term *Mongolian* did not include Filipinos. The California court of appeals agreed, affirming the lower court decision by a 3–3 vote. According to the court of appeals, the California legislature had not intended to cover Filipinos under the antimiscegenation law because anthropologists typically classified Filipinos as "Malays," not "Mongolians," and the legislature presumably had adopted this usage. Moreover, the original legislative debate was focused on Chinese, not Filipinos. The court added that the legislature could always amend the statute if it wanted to bar marriages between Filipinos and whites.[118] The California legislature did not take long to act on this suggestion. Nine days before the court's decision, a state senator introduced a bill that would amend the antimiscegenation statute to preclude Filipino–white marriages. Within a few months, California had adopted a new law to cover "negroes, Mongolians, members of the Malay race, or mulattoes."[119] The 1933 provision remained in effect until the California Supreme Court declared it unconstitutional fifteen years later.[120]

Faced with the ban on intermarriage, Filipinos did not concede defeat. Instead, they evaded California's antimiscegenation law by leaving the state to marry. Efforts to close this loophole met with limited success. In 1936, a California court of appeals ruled that a Filipino–white marriage that took place in New Mexico was valid in California. In that case, a white woman sought to annul her marriage on the ground that her Filipino husband had falsely represented himself to be "of Spanish Castilian descent." She testified that she would not have married him had she known he was Filipino because the marriage was illegal in California. The judge held that marriages between whites and Filipinos were legal in New Mexico, so "the ethnological status of the parties was not a ground of annulment."[121] In 1938, the California legislature passed a resolution calling on Utah to prevent whites and Filipinos from going there to evade the ban on miscegenation. Utah obliged by outlawing white–Filipino marriages that same year. Still dissatisfied, a California legislator introduced a bill to void interracial marriages that took place outside the state if they would be illegal in California. The bill died in committee.[122]

In addition to circumventing the law by going out of state, Filipinos married Mexican, Chinese, Japanese, and Eskimo women. In fact, most mixed couples in Los Angeles were Filipino–Mexican. There were some cultural affinities between Filipino immigrants and Mexican women because Spain had at one time colonized the Philippines. Consequently, many Filipinos spoke Spanish and were devout Catholics. Although Mexican-origin women were formally classified as white under California law, registrars seldom stood in the way of a marriage between a Mexican woman, particularly one who was dark skinned, and a Filipino man.[123] The prevalence of intermarriage among Filipinos was so great that by 1946, over half of the immigrants' children were biracial.[124] Far from accepting their relegation to bachelor communities, Filipino immigrants drew on their familiarity with American law and culture to challenge the ban on intermarriage. Unlike the Japanese who relied on separate settlements, Filipinos invoked their rights to freedom and equality before the law. When Filipino demands for recognition of their full personhood failed, they asserted their autonomy by using loopholes to circumvent racial restrictions.

Conclusion

Although antimiscegenation laws were identical in form, they served different functions at different times and for different groups. In the colonial era and during the early years of nationhood, bans on intermarriage were critical to drawing the color line between indentured white servants

and blacks. Once the color line was in place, the statutes became a way to enforce racial hierarchy by barring blacks from assimilating through marriage to whites. Interracial sex continued to occur on a widespread basis, but it did not threaten white identity and privilege because the one-drop rule classified any illegitimate offspring as black. Nor did the extramarital liaisons jeopardize white superiority since white men could have their way with black women, but black men faced severe sanctions for having sex with white women.

Asian immigrants were subject to harsh restrictions on intermarriage, although their racial identities already were clear from federal immigration law. The use of antimiscegenation laws to subordinate the Chinese was in some ways harsher than their use to subordinate blacks. Blacks could form same-race families, but Chinese men often remained single and childless for life because of the shortage of Chinese women. Although forced to live in bachelor communities, Chinese men did not cross the color line to procreate. Linguistically, culturally, and economically isolated, Chinese men were ill-equipped to pursue extramarital liaisons with white women. Their emasculation reinforced their powerlessness, even as they were portrayed as sexually degraded and lascivious. The penalties for whites who became involved with the Chinese also were in certain respects more severe than for those who became involved with blacks. Although a white spouse in a black–white marriage remained white, American women who wed Chinese immigrants were stripped of their nationality, thereby taking on some of their spouses' unassimilable, alien qualities.

Enforcing racial subordination was particularly critical where the prosperous Japanese were concerned. The ability of Japanese immigrants to build stable, successful businesses, families, and communities threatened a sense of white superiority. In response, nativists insisted that the Japanese could not assimilate through naturalization or intermarriage, whatever their personal accomplishments. At the same time, though, nativists feared that Japanese racial pride made them spurn assimilation to a white way of life. While intermarriage remained a daunting prospect, the possibility that the Japanese might choose to remain a separate people also threatened white superiority. Just when proof of racial subordination was most urgently needed, antimiscegenation laws could no longer offer unambiguous evidence of white desirability and unattainability.

Although the Chinese and Japanese generally complied with antimiscegenation laws, Filipino immigrants defied the statutes. Rather than simply evade the restrictions through illicit liaisons, Filipinos demanded

the right to cross the color line to date and marry women of their choice. Explicitly linking their masculinity to romantic and marital freedom, Filipinos were unwilling to forgo intimacy as the price of admission to the American workforce. Though economically marginal, Filipinos were not hampered by the linguistic and cultural isolation that doomed the Chinese to perennial bachelorhood. Often able to communicate in English and aware of American political ideals, Filipinos had a well-developed sense of democratic entitlement and acted on it. Their collective, confrontational approach to restrictions on sexual and marital freedom is unique in the annals of antimiscegenation law.

INTERRACIALISM

Black-White Intermarriage in American History, Literature, and Law

Edited by
Werner Sollors

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In memoriam

A. Leon Higginbotham, Jr.
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the operation of those natural laws which are so often quoted by Southern writers as the justification of all sorts of Southern "policies"—are questions which the good citizen may at least turn over in his mind occasionally, pending the settlement of other complications which have grown out of the presence of the Negro on this continent.

The Beginnings of Miscegenation of the Whites and Blacks*

CARTER G. WOODSON

Although science has uprooted the theory, a number of writers are loath to give up the contention that the white race is superior to others, as it is still hoped that the Caucasian race may be preserved in its purity, especially so far as it means miscegenation with the blacks. But there are others who express doubt that the integrity of the dominant race has been maintained.[1] Scholars have for centuries differed as to the composition of the mixed breed stock constituting the Mediterranean race and especially about that in Egypt and the Barbary States. In that part of the dark continent many inhabitants have certain characteristics which are more Caucasian than negroid and have achieved more than investigators have been willing to consider the civilization of the Negro. It is clear, however, that although the people of northern Africa cannot be classed as Negroes, being bounded on the south by the masses of African blacks, they have so generally mixed their blood with that of the blacks that in many parts they are no nearer to any white stock than the Negroes of the United States.

This miscegenation, to be sure, increased toward the south into central Africa, but it has extended also to the north and east into Asia and Europe. Traces of Negro blood have been found in the Malay States, India and Polynesia. In the Arabian Peninsula it has been so extensive as to constitute a large group there called the Arabised Negroes. But most significant of all has been the invasion of Europe by persons of African blood. Professor Sergi leads one to conclude that the ancient Pelasgii were of African origin or probably the descendants of the race which settled northern Africa and southern Europe, and are therefore due credit for the achievements of the early Greek and Italian civilizations.[2]

* From Carter G. Woodson, "The Beginnings of Miscegenation of the Whites and Blacks." *The Journal of Negro History* 3.4 (October 1918): 335–353.

1. MacDonald, *Trade, Politics and Christianity in Africa and the East,* chapter on inter-racial marriage, p. 239; and *The Journal of Negro History*, pp. 329, 334–344.
2. *Report of First Race[s] Congress,* 1911, p. 330 [probably G. Spiller, ed., *Papers on Inter-Racial Problems Communicated to the First Universal Races Congress Held at the University of London, July 26–29, 1911* (London: P. S. King & Son, 1911) —Ed.]; MacDonald, *Trade, Politics, and Christianity*, p. 235; and *Contemporary Review,* August, 1911.

There is much evidence of a further extension of this infusion in the Mediterranean world.

> "Recent discoveries made in the vicinity of the principality of Monaco and others in Italy and western France," says MacDonald, "would seem to reveal . . . the actual fact that many thousand years ago a negroid race had penetrated through Italy into France, leaving traces at the present day in the physiognomy of the peoples of southern Italy, Sicily, Sardinia and western France, and even in the western parts of the United Kingdom of Great Britain and Ireland. There are even at the present day some examples of the Keltiberian peoples of western Scotland, southern and western Wales, southern and western Ireland, of distinctly negroid aspect, and in whose ancestry there is no indication whatever of any connection with the West Indies or with Modern Africa. Still more marked is this feature in the peoples of southern and western France and of the other parts of the Mediterranean already mentioned."[3]

Because of the temperament of the Portugese this infusion of African blood was still more striking in their country. As the Portugese are a good-natured people void of race hate they did not dread the miscegenation of the races. One finds in southern Portugal a "strong Moorish, North African element" and also an "old intermixture with those Negroes who were imported thither from Northwest Africa to till the scantily populated southern provinces."[4] This miscegenation among the Portugese easily extended to the New World. Then followed the story of the Caramarii, the descendants of the Portugese, who after being shipwrecked near Bahia arose to prominence among the Tupinambo Indians and produced a clan of half-castes by taking to himself numerous native women.[5] This admixture served as a stepping stone to the assimilation of the Negroes when they came.

There immigrated later into Brazil other settlers who, mixing eagerly with the Amerindians, gave rise to a race called Mamelucos who began to mix maritally with the imported Negro women. The French and Dutch too in caring for their offspring by native women promoted the same. "They educated them, set them free, lifted them above servitude, and raised them socially to the level of the whites"[6] so that today generally speaking there are no distinctions in society or politics in Brazil. Commenting on this condition in Brazil, Agassiz said: "This hybrid class, although more marked here because the Indian is added, is very numerous in all cities; perhaps, the fact, so honorable to Brazil, that the free Negro has full access to all privileges of any free citizen, rather tends to increase than to diminish that number." After emancipation in Brazil in 1888, the already marked tendency toward this fusion of the slave and the master classes gradually increased.[7]

3. *Report of First Races Congress,* 1911, p. 330.
4. Johnston, *The Negro in the New World,* p. 98.
5. *Ibid.*, p. 78.
6. *Ibid.*, pp. 98–99.
7. Authorities consider the Amerindians the most fecund stock in the country, especially when mixed with an effusion of white or black blood. Agassiz, *A Journey in Brazil in 1868.*

The Spaniards mixed less freely with the Negroes than did the Portugese but mixed just the same. At first they seriously considered the inconveniences which might arise from miscegenation under frontier conditions and generally refrained from extensive intermingling. But men are but men and as Spanish women were far too few in the New World at that time, the other sex of their race soon yielded to the charms of women of African blood. The rise of the mixed breeds too further facilitated the movement. Spaniards who refused to intermingle with the blacks found it convenient to approach the hybrids who showed less color. In the course of time, therefore, the assimilation of the blacks was as pronounced in some of the Spanish colonies as in those which originally exhibited less race antipathy. There are millions of Hispanicized Negroes in Latin America. Many of the mixed breeds, however, have Indian rather than Negro blood.[8]

Miscegenation had its best chance among the French. Not being disinclined to mingle with Negroes, the French early faced the problem of the half caste, which was given consideration in the most human of all slave regulations, the *Code Noir*.[9] It provided that free men who had children from their concubinage with women-slaves (if they consented to such concubinage) should be punished by a fine of two thousand pounds of sugar. But if the offender was the master himself, in addition to the fine, the slave should be taken from him, sold for the benefit of the hospital and never be allowed to be freed; excepting, that, if the man was not married to another person at the time of his concubinage, he was to marry the woman slave, who, together with her children, should thereby become free. Masters were forbidden to constrain slaves to marry against their will. Many Frenchmen like those in Haiti married their Negro mistresses, producing attractive half caste women who because of their wealth were sought by gentlemen in preference to their own women without dot.

Among the English the situation was decidedly different. There was not so much need for the use of Negro women by Englishmen in the New World, but there was the same tendency to cohabit with them. In the end, however, the English, unlike the Latins, disowned their offspring by slave women, leaving these children to follow the condition of their mother. There was, therefore, not so much less miscegenation among the English but there remained the natural tendency so to denounce these unions as eventually to restrict the custom, as it is today, to the weaker types of both races, the offspring of whom in the case of slave mothers became a commodity in the commercial world.

There was extensive miscegenation in the English colonies, however, before the race as a majority could realize the apparent need for maintaining its integrity. With the development of the industries came the use of the white servants as well as the slaves. The status of the one differed from that of the other in that the former at the expiration of his term of service could become free whereas the latter was doomed to servitude for life. In the absence of social distinctions between these two classes of laborers there arose considerable intermingling growing

8. Johnston, *The Negro in the New World,* p. 135.
9. *Code Noir.*

out of a community of interests. In the colonies in which the laborers were largely of one class or the other not so much of this admixture was feared, but in the plantations having a considerable sprinkling of the two miscegenation usually ensued.

The following, therefore, was enacted in Maryland in 1661 as a response to the question of the council to the lower house as to what it intended should become of such free women of the English or other Christian nations as married Negroes or other slaves.[10] The preamble reads: "And forasmuch as divers freeborn *English* women, forgetful of their free condition, and to the disgrace of our nation, do intermarry with negro slaves,[11] by which also divers suits may arise, touching the issue of such women, and a great damage doth befall the master of such negroes, for preservation whereof for deterring such free-born women from such shameful matches, *be it enacted:* That whatsoever free-born woman shall intermarry with any slave, from and after the last day of the present assembly, shall serve the master of such slave during the life of her husband; and that all the issues of such free-born women, so married, shall be slaves as their fathers were." "And be it further enacted: That all the issues of *English,* or other free-born women, that have already married negroes, shall serve the master of their parents, till they be thirty years of age and no longer."[12]

According to A. J. Calhoun, however, all planters of Maryland did not manifest so much ire because of this custom among indentured servants. "Planters," said he, "sometimes married white women servants to Negroes in order to transform the Negroes and their offspring into slaves."[12a] This was in violation of the ancient unwritten law that the children of a free woman, the father being a slave, follow the status of their mother and are free. The custom gave rise to an interesting case. "Irish Nell," one of the servants brought to Maryland by Lord Baltimore, was sold by him to a planter when he returned to England. Following the custom of other masters who held white women as servants, he soon married her to a Negro named Butler to produce slaves. Upon hearing this, Baltimore used his influence to have the law repealed but the abrogation of it was construed by the Court of Appeals not to have any effect on the status of her offspring almost a century later when William and Mary Butler sued for their freedom on the ground that they descended from this white woman. The Provincial Court had granted them freedom but in this decision the Court of Appeals reversed the lower tribunal on the ground that "Irish Nell" was a slave before the measure repealing the act had been passed. This case came up again 1787 when Mary, the daughter of William and Mary Butler, petitioned the State for freedom. Both tribunals then decided to grant this petition.[13]

10. Brackett, *The Negro in Maryland,* pp. 32–33.
11. Benjamin Banneker's mother was a white woman who married one of her own slaves. See Tyson, *Benjamin Banneker,* p. 3.
12. *Archives of Maryland, Proceedings of the General Assembly,* 1637–1664, pp. 533–534.
12a. Calhoun, *A Social History of the American Family,* p. 94.
13. Harris and McHenry Reports, I, pp. 374, 376; II, pp. 26, 38, 214, 233.

The act of repeal of 1681, therefore, is self explanatory. The preamble reads: "Forasmuch as, divers free-born *English,* or white women, sometimes by the instigation, procurement or connivance of their masters, mistresses, or dames, and always to the satisfaction of their lascivious and lustful desires, and to the disgrace not only of the *English,* but also of many other Christian nations, do intermarry with Negroes and slaves, by which means, divers inconveniences, controversies, and suits may arise, touching the issue or children of such free-born women aforesaid; for the prevention whereof for the future, *Be it enacted:* That if the marriage of any woman-servant with any slave shall take place by the procurement of permission of the master, such woman and her issue shall be free." It enacted a penalty by fine on the master or mistress and on the person joining the parties in marriage.[14]

The effect of this law was merely to prevent masters from prostituting white women to an economic purpose. It did not prevent the miscegenation of the two races. McCormac says: "Mingling of the races in Maryland continued during the eighteenth century, in spite of all laws against it. Preventing marriages of white servants with slaves only led to a greater social evil, which caused a reaction of public sentiment against the servant. Masters and society in general were burdened with the care of illegitimate mulatto children, and it became necessary to frame laws compelling the guilty parties to reimburse the masters for the maintenance of these unfortunate waifs."[15] To remedy this laws were passed in 1715 and 1717 to reduce to the status of a servant for seven years any white man or white woman who cohabited with any Negro, free or slave. Their children were made servants for thirty-one years, a black thus concerned was reduced to slavery for life and the maintenance of the bastard children of women servants was made incumbent upon masters. If the father of an illegitimate child could be discovered, he would have to support his offspring. If not this duty fell upon the mother who had to discharge it by servitude or otherwise.[16]

As what had been done to prevent the admixture was not sufficient, the Maryland General Assembly took the following action in 1728:

> Whereas by the act of assembly relating to servants and slaves, there is no provision made for the punishment of free mulatto women, having bastard children by negroes and other slaves, nor is there any provision made in the said act for the punishment of free negro women, having bastard children by white men; and forasmuch as such copulations are as unnatural and inordinate as between white women and negro men, or other slaves.
>
> *Be it enacted,* That from and after the end of this present session of assembly, that all such free mulatto women, having bastard children, either within or after the time of their service, (*and their issue,*) shall be subject to the same penalties that white women and their issue are, for having mulatto bastards, by the act, entitled, An act relating to servants and slaves.

14. Hurd, *Law of Freedom and Bondage,* VI, pp. 249–250.
15. McCormac, *White Servitude in Maryland,* p. 70.
16. Act of Assembly, Oct., 1727.

> *And be it further enacted, by the authority aforesaid, by and with the advice and consent aforesaid,* That from and after the end of this present session of assembly, that all free negro women, having bastard children by white men, (*and their issue,*) shall be subject to the same penalties that white women are, by the act aforesaid, for having bastards by negro men.[17]

Virginia which faced the same problem did not lag far behind Maryland. In 1630 the Governor and Council in Court ordered Hugh Davis to be soundly whipped before an assembly of Negroes and others for abusing himself to the dishonor of God and shame of a Christian by defiling his body in lying with a Negro, which he was to acknowledge next Sabbath day. In 1662 the colony imposed double fines for fornication with a Negro, but did not restrict intermarriage until 1691.[18] The words of the preamble give the reasons for this action. It says:

> And for the prevention of that abominable mixture and spurious issue which hereafter may increase in this dominion, as well by negroes, mulattoes, and Indians intermarrying with English, or other white women, as by their unlawful accompanying with one another, *Be it enacted by the authoritie aforesaid, and it is hereby enacted,* That for the time to come, whatsoever English or other white man or woman being free shall intermarry with a negro, mulatto, or Indian man or woman bond or free shall within three months after such marriage be banished and removed from this dominion forever, and that the justices of each respective countie within this dominion make it their perticular care, that this act be put in effectuall execution.

If any free English woman should have a bastard child by any Negro or mulatto, she should pay the sum of fifteen pounds sterling, within one month after such bastard child should be born, to the church wardens of the parish where she should be delivered of such child, and in default of such payment she should be taken into the possession of the said church wardens and disposed of for five years, and such bastard child should be bound out as a servant by the church wardens until he or she should attain the age of thirty years, and in case such English woman that should have such bastard child be a servant, she should be sold by the church wardens (after her time is expired that she ought by law to serve her master) for five years, and the money she should be sold for divided as before appointed, and the child should serve as aforesaid.[19]

It was further provided in 1753 that if any woman servant should have a bastard child by a Negro or mulatto, over and above the year's service due to her master or owner, she should immediately upon the expiration of her time, to her then present master, or owner, pay down to the church wardens of the parish wherein such child should be born for the use of the said parish, fifteen pounds current money of Virginia, or be sold for five years to the use aforesaid; and if a free Christian white woman should have such bastard child by a Negro, or mulatto,

17. Dorsey, *The General Public Statutory Law and Public Local Law of State of Maryland,* from 1692–1839, p. 79.
18. Ballagh, *White Servitude in the Colony of Virginia,* pp. 72, 73.
19. Hening, *The Statutes at Large,* I, pp. 146, 552. II, 170; III, pp. 86–88, 252.

for every such offence, she should within one month after her delivery of such bastard child, pay to the church wardens for the time being, of the parish wherein such child should be born, for the use of the said parish, fifteen pounds current money of Virginia, or be by them sold for five years to the use aforesaid; and in both the said cases, the church wardens should bind the said child to be a servant until it should be of thirty-one years of age.

And for a further prevention of that "abominable mixture, and the spurious issue, which may hereafter increase in this his majesty's colony and dominion as well by English, and other white men and women, intermarrying with Negroes or mulattoes, as by their unlawful coition with them" it was enacted that whatsoever English, or other white man or woman, being free, should intermarry with a Negro, or mulatto man or woman bond or free, should by judgment of the county court, be committed to prison and there remain during the space of six months, without bail or main-prize, and should forfeit and pay ten pounds current money of Virginia, to the use of the parish as aforesaid. It was further enacted that no minister of the Church of England, or other minister or person whatsoever, within that colony and dominion, should thereafter presume to marry a white man with a Negro, or mulatto woman, or to marry a white woman with a Negro or mulatto man, upon pain of forfeiting and paying for every such marriage, the sum of ten thousand pounds of tobacco.[20]

It developed later that these laws did not meet all requirements, for there were in subsequent years so many illegitimate children born of such mothers that they became a public charge.[21] Those of Negro blood were bound out by law. According to Russell, "In 1727 it was ordered that David James a free negro boy, be bound to Mr. James Isdel 'who is to teach him to read ye bible distinctly also ye trade of a gunsmith that he carry him to ye Clark's office & take Indenture to that purpose.' By the Warwick County court it was 'ordered that Malacai, a mulatto boy, son of mulatto Betty be, by the Church Wardens of this Parish bound to Thomas Hobday to learn the art of a planter according to law.' By order of the Norfolk County court, about 1770, a free negro was bound out 'to learn the trade of a tanner.' "[22]

In making more stringent regulations for servants and slaves, North Carolina provided in 1715 that if a white servant woman had a child by a Negro, mulatto or Indian, she must serve her master two years extra and should pay to the Church wardens immediately on the expiration of that time six pounds for the use of the parish or be sold four years for the use aforesaid.[23] A clergyman found guilty of officiating at such a marriage should be fined fifty pounds. This law, according to Bassett, did not succeed in preventing such unions. Two ministers were indicted within two years for performing such a marriage ceremony. "In one case the suit was dropped, in the other case the clergyman went before the Chief

20. Hening, *Statutes at Large*, VI, pp. 360–362.
21. Meade, *Old Churches and Families of Virginia*, I, p. 366.
22. Russell, *Free Negro in Virginia*, pp. 138–139.
23. Bassett, *Slavery and Servitude in North Carolina*, p. 83.

Justice and confessed as it seems of his own accord. . . . In 1727 a white woman was indicted in the General Court because she had left her husband and was cohabiting with a negro slave. . . . So far as general looseness was concerned this law of 1715 had no force. Brickell, who was a physician, says that white men of the colony suffered a great deal from a malignant kind of venereal disease which they took from the slaves."[24]

By the law of 1741 therefore the colony endeavored to prevent what the General Assembly called "that abominable mixture and spurious issue, which hereafter may increase in this government, by white men and women intermarrying with Indians, Negroes, mustees, or mulattoes." It was enacted that if any man or woman, being free, should intermarry with an Indian, Negro, mustee or mulatto man or woman, or any person of mixed blood, to the third generation, bond or free, he should, by judgment of the county court forfeit and pay the sum of fifty pounds, proclamation money, to the use of the parish.[25] It was also provided that if any white servant woman should during the time of her servitude, be delivered of a child, begotten by any Negro, mulatto or Indian, such servant, over and above the time she was by this act to serve her master or owner for such offence, should be sold by the Church wardens of the parish, for two years, after the time by indenture or otherwise had expired.[26]

The miscegenation of the whites and blacks extended so widely that it became a matter of concern to the colonies farther north where the Negro population was not considerable. Seeking also to prevent this "spurious mixt issue" Massachusetts enacted in 1705 that a Negro or mulatto man committing fornication with an "English woman, or a woman of any other Christian nation," should be sold out of the province. "An English man, or man of any other Christian nation committing fornication with a Negro or mulatto woman," should be whipped, and the woman sold out of the province. None of her Majesty's English or Scottish subjects, nor of any other Christian nation within that province should contract matrimony with any Negro or mulatto, under a penalty imposed on the person joining them in marriage. No master should unreasonably deny marriage to his Negro with one of the same nation; any law, usage or custom to the contrary notwithstanding.[27]

There was much social contact between the white servants and the Negroes in Pennsylvania, where the number of the latter greatly increased during the first quarter of the nineteenth century. Turner says a white servant was indicted for this offence in Sussex County in 1677 and a tract of land there bore the name of "Mulatto Hall."[28] According to the same writer Chester County seemed to have a large number of these cases and laid down the principle that such admixture should be prohibited,

24. *Ibid.*, pp. 58–59. See also *Natural History of North Carolina*, p. 48; and Hawk's *History of North Carolina*, II, pp. 126–127.
25. Potter, *Revised Laws of North Carolina*, I., p. 130.
26. *Ibid.*, I, p. 157.
27. *Massachusetts Charters, etc.*, p. 747; Hurd, *Law of Freedom and Bondage*, VI, p. 262.
28. Turner, *The Negro in Pennsylvania*, pp. 29–30.

"For that hee," referring to a white man, "Contrary to his Masters Consent hath . . . got wth child a certaine molato wooman Called Swart anna." "David Lewis Constable of Haverford Returned a Negro man of his And a white woman for having a Bastard Childe . . . the Negroe said she Intised him and promised him to marry him: she being examined, Confest the same: the Court ordered that she shall receive Twenty one lashes on her bare Backe . . . and the Court ordered the negroe never more to meddle with any white woman more uppon paine of his life."[29]

Advertising for Richard Molson in Philadelphia in 1720, his master said, "He is in company with a white woman named Mary, who is supposed now goes for his wife"; "and a white man named Garrett Choise, and Jane his wife, which said white people are servants to some neighbors of the said Richard Tilghman."[30] In 1722 a woman was punished for abetting a clandestine marriage between a white woman and a Negro. In the *Pennsylvania Gazette*, June 1, 1749, appeared the notice of the departure of Isaac Cromwell, a mulatto, who ran away with an English servant woman named Anne Greene.[31]

The Assembly, therefore, upon a petition from inhabitants inveighing against this custom enacted a prohibitory law in 1725. This law provided that no minister, pastor or magistrate or other person whatsover who according to the laws of that province usually joined people in marriage should upon any pretence whatever join in marriage any Negro with any white person on the penalty of one hundred pounds. And it was further enacted that if any white man or woman should cohabit or dwell with any Negro under pretense of being married, such white man or woman should be put out of service as above directed until they come to the age of thirty-one years; and if any free Negro man or woman should intermarry with a white man or woman, such Negro should become a slave during life to be sold by order of the justice of the quarter sessions of the respective county; and if any free Negro man or woman should commit fornication or adultery with any white man or woman, such Negro or Negroes should be sold as a servant for seven years and the white man or woman should be punished as the law directs in cases of adultery or fornication.[32]

This law seemed to have very little effect on the miscegenation of the races in certain parts. In Chester County, according to the records of 1780, mulattoes constituted one fifth of the Negro population.[33] Furthermore, that very year when the State of Pennsylvania had grown sufficiently liberal to provide for gradual emancipation the law against the mingling of the races was repealed. Mixed marriages thereafter became common as the white and the blacks in the light of the American Revolution realized liberty in its full meaning. Thomas Branagan said:

> There are many, very many blacks who . . . begin to feel themselves consequential, . . . will not be satisfied unless they get white women for wives, and are likewise exceedingly impertinent to white people in low circumstances. . . . I solemnly swear, I have seen more white women married to, and deluded through the arts of seduction by negroes in one year in Philadelphia, than for eight years I was visiting (West Indies and the Southern States). I know a black man who seduced a young white girl . . . who soon after married him, and died with a broken heart. On her death he said that he would not disgrace himself to have a negro wife and acted accordingly, for he soon after married a white woman. . . . There are perhaps hundreds of white women thus fascinated by black men in this city, and there are thousands of black children by them at present.[34]

29. *Ibid.*, p. 30.
30. *The American Weekly Mercury* (Philadelphia), August 20, 1720.
31. *The Pennsylvania Gazette*, June 1, 1749.
32. *Statutes at Large*, IV, p. 62.
33. Turner, *The Negro in Pennsylvania*, p. 31.

A reaction thereafter set in against this custom during the first decade of the nineteenth century, when fugitives in the rough were rushing to that State, and culminated in an actual campaign against it by 1820. That year a petition from Greene County said that many Negroes had settled in Pennsylvania and had been able to seduce into marriage "the minor children of the white inhabitants."[35] This county, therefore, asked that these marriages be made an offence against the laws of the State. Such a marriage was the cause of a riot in Columbia in 1834 and in 1838 the members of the Constitutional Convention engaged in a heated discussion of the custom.[36] Petitions were frequently sent to the legislature asking that this admixture be penalized by law, but no such action was ever taken. Relying upon public opinion, however, the advocates of racial integrity practically succeeded. Marriages of whites and blacks eventually became so odious that they led to disturbances as in the case of the riot of 1849, one of the causes of which was that a white man was living with a Negro wife.[37] This was almost ineffective, however, in the prevention of race admixture. Clandestine intermingling went on and tended to increase in enormous proportions. The conclusive proof of this is that in 1860 mulattoes constituted one third of the Negro population of Pennsylvania.

Persons who professed seriously to consider the future of slavery, therefore, saw that miscegenation and especially the general connection of white men with their female slaves introduced a mulatto race whose numbers would become dangerous, if the affections of their white parents were permitted to render them free.[38] The Americans of the future would thereby become a race of mixed breeds rather than a white and a black population. As the lust of white persons for those of color was too strong to prevent this miscegenation, the liberty of emancipating their mulatto offspring was restricted in the slave States but that of selling them remained.[39]

These laws eventually, therefore, had their desired effect. They were never intended to prevent the miscegenation of the races but to debase to a still lower

34. Branagan, *Serious Remonstrances*, pp. 68, 69, 70, 71, 73, 74, 75, 102; *Somerset Whig*, March 12, 1818, and *Union Times*, August 15, 1834.
35. *Journal of Senate*, 1820–1821, p. 213; and *American Daily Advertiser*, January 23, 1821.
36. *Proceedings and Debates of the Convention of 1838*, X, p. 230.
37. *The Spirit of the Times*, October 10, 11, 12, 13, 17, 19, 1849.
38. Harriet Martineau, *Views of Slavery and Emancipation*, p. 10.
39. Hart, *Slavery and Abolition*, p. 182; *Censuses of the United States*.

status the offspring of the blacks who in spite of public opinion might intermarry with the poor white women and to leave women of color without protection against white men, who might use them for convenience, whereas white women and black men would gradually grow separate and distinct in their social relations. Although thereafter the offspring of blacks and whites did not diminish, instead of being gradually assimilated to the type of the Caucasian they tended to constitute a peculiar class commonly called people of color having a higher social status than that of the blacks but finally classified with all other persons of African blood as Negroes.

While it later became a capital offence in some of the slave States for a Negro man to cohabit with a white woman, Abdy who toured this country from 1833 to 1834 doubted that such laws were enforced. "A man," said he, "was hanged not long ago for this crime at New Orleans. The partner of his guilt—his master's daughter—endeavored to save his life, by avowing that she alone was to blame. She died shortly after his execution."[40] With the white man and the Negro woman the situation was different. A sister of President Madison once said to the Reverend George Bourne, then a Presbyterian minister in Virginia: "We Southern ladies are complimented with the name of wives; but we are only the mistresses of seraglios." The masters of the female slaves, however, were not always the only persons of loose morals. Many women of color were also prostituted to the purposes of young white men[41] and overseers.[42] Goodell reports a well-authenticated account of a respectable Christian lady at the South who kept a handsome mulatto female for the use of her genteel son, as a method of deterring him, as she said, "from indiscriminate and vulgar indulgences."[43] Harriet Martineau discovered a young white man who on visiting a southern lady became insanely enamored of her intelligent quadroon maid. He sought to purchase her but the owner refused to sell the slave because of her unusual worth. The young white man persisted in trying to effect this purchase and finally informed her owner that he could not live without this attractive slave. Thereupon the white lady sold the woman of color to satisfy the lust of her friend.[44]

The accomplishment of this task of reducing the free people of color to the status of the blacks, however, was not easy. In the first place, so many persons of color had risen to positions of usefulness among progressive people and had formed connections with them that an abrupt separation was both inexpedient and undesirable. Exceptions to the hard and fast rules of caste were often made to relieve the people of color. Moreover, the miscegenation of the races in the South and especially in large cities like Charleston and New Orleans had gone to the extent that from these centers eventually went, as they do now, a large

40. Abdy, *North America*, I, p. 160.
41. Child, *Anti-slavery Catechism*, p. 17; 2 *Howard Mississippi Reports*, p. 837.
42. Kemble, *Georgian Plantation*, pp. 140, 162, 199, 208–210; Olmstead, *Seaboard States*, pp. 599–600; Rhodes, *United States*, I, pp. 341–343.
43. Goodell, *Slave Code*, pp. 111–112.
44. Harriet Martineau, *Views of Slavery and Emancipation*, p. 13.

number of quadroons and octoroons,[45] who elsewhere crossed over to the other race.

White men ashamed of the planters who abused helpless black women are now trying to minimize the prevalence of this custom. Such an effort, however, means little in the face of the facts that one seventh of the Negroes in the United States had in their veins any amount of Caucasian blood in 1860 and according to the last census more than one fifth of them have this infusion. Furthermore the testimony of travelers in this country during the slavery period support the contention that race admixture was common.[46]

So extensive did it become that the most prominent white men in the country did not escape. Benjamin Franklin seems to have made no secret of his associations with Negro women.[47] Russell connects many of these cases with the master class in Virginia.[48] There are now in Washington Negroes who call themselves the descendants of two Virginians who attained the presidency of the United States.

The abolitionists made positive statements about the mulatto offspring of Thomas Jefferson. Goodell lamented the fact that Jefferson in his will had to entreat the legislature of Virginia to confirm his bequest of freedom to his own reputed enslaved offspring that they might remain in the State of their nativity, where their families and connections were.[49] Writing in 1845, the editor of the *Cleveland American* expressed regret that notwithstanding all the services and sacrifices of Jefferson in the establishment of the freedom of this country, his own son then living in Ohio was not allowed to vote or bear witness in a court of justice. The editor of the *Ohio Star* said: "We are not sure whether this is intended as a statement of actual fact, or of what might possibly and naturally enough be true." *The Cincinnati Herald* inquired: "Is this a fact? If so, it ought to be known. Perhaps 'the Democracy' might be induced to pass a special act in his favor." *The Cleveland American,* therefore, added: "We are credibly informed that a natural son of Jefferson by the celebrated 'Black Sal,' a person of no little renown in the politics of 1800 and thereafter, is now living in a central county of Ohio. We shall endeavor to get at the truth of the matter and make public the result of our inquiries."[50]

45. Featherstonaugh, *Excursion*, p. 141; Buckingham, *Slave States*, I, p. 358.
46. Writing of conditions in this country prior to the American Revolution, Anne Grant found only two cases of miscegenation in Albany before this period but saw it well established later by the British soldiers. Johann Schoepf witnessed this situation in Charleston in 1784. J. P. Brissot saw this tendency toward miscegenation as a striking feature of society among the French in the Ohio Valley in 1788. The Duke of Saxe-Weimar-Eisenach was very much impressed with the numerous quadroons and octoroons of New Orleans in 1825 and Charles Gayarré portrayed the same conditions there in 1830. Fredrika Bremer frequently met with this class while touring the South in 1850. See Grant, *Memoirs of an American Lady*, p. 28; Schoepf, *Travels in the Confederation*, II, p. 382; Brissot, *Travels*, II, p. 61; Saxe-Weimar, *Travels*, II, p. 69; Grace King, *New Orleans*, pp. 346–349; Fredrika Bremer, *Homes of the New World*, I, pp. 325, 326, 382, 385.
47. *Ibid.*, XXII, p. 98.
48. See Russell, *Free Negro in Virginia*, p. 127.
49. Goodell, *Slave Code*, p. 376.
50. *The Liberator*, December 19, 1845.

A later report of miscegenation of this kind was recorded by Jane Grey Swisshelm in her *Half a Century*, where she states that a daughter of President John Tyler "ran away with the man she loved in order that she might be married, but for this they must reach foreign soil. A young lady of the White House could not marry the man of her choice in the United States. The lovers were captured and she was brought to His Excellency, her father, who sold her to a slave-trader. From that Washington slave-pen she was taken to New Orleans by a man who expected to get twenty-five hundred dollars for her on account of her great beauty."[51]

Interracial Marriage and the Law*

WILLIAM D. ZABEL

In the past decade, the law and the Supreme Court have done a great deal to ensure the equality of all races and to guarantee equal civil rights. But in the area of interracial marriage, the statutes of nineteen states continue to deny the individual the freedom to marry the person of his choice. The vagaries of these statutes and the failure of the Supreme Court to act are here set forth by William D. Zabel, a practicing lawyer in New York.

When a reporter asked former President Harry S. Truman if interracial marriage—miscegenation—would become widespread in the United States, Mr. Truman said, "I hope not; I don't believe in it." Then Mr. Truman asked the reporter that hackneyed question often spouted at anyone advocating racial integration, "Would you want your daughter to marry a Negro?" The reporter responded that he wanted his daughter to marry the man she loved whoever he might be. "Well, she won't love someone who isn't her color," the former President continued, and, as if he had not said enough, added that racial intermarriage ran counter to the teachings of the Bible.

The question of miscegenation can make a man like Truman, whose past support of integration in other respects is not open to question, appear unthinking if not bigoted. The fact of interracial marriage can cause a young Radcliffe-educated "liberal" to refuse to attend the wedding of her only brother, or a civilized, intelligent judge to disown and never again speak to his daughter. How many persons are repelled or at least disconcerted at the mere sight of a Negro-white couple? Perhaps their number tells us how far we are from achieving an integrated society.

51. Swisshelm, *Half a Century*, p. 129.

* From William D. Zabel, "Interracial Marriage and the Law." *Atlantic Monthly* (October 1965): 75–79.

If usually tolerant and rational persons can react this way, it is not surprising that many experts consider the fear of miscegenation the strongest reason for the desire of whites to keep the Negro permanently segregated. Next in importance in the "white man's rank order of discrimination," according to Gunnar Myrdal in his classic study, *An American Dilemma*, are other social conventions, the use of public facilities, political franchise, legal equality, and employment. On the other hand, the social and legal barriers to miscegenation rank at the bottom of the Negro's list of grievances; quite naturally, he is more concerned with obtaining a job, decent living accommodations, and an education than with marrying "your daughter." A recent Ford Foundation study of more than seven hundred Negro families in Chicago concluded: "There is no evidence of a desire for miscegenation, or even interest in promoting it, except among a tiny minority."

Even though the Negro has finally attained equality under the law in most areas of American life, a Negro and a white still cannot marry in nineteen states having antimiscegenation statutes—mostly Southern and "border" states, but also including Indiana and Wyoming. No other civilized country has such laws except the Union of South Africa.

The United States Supreme Court has never ruled on the constitutionality of these statutes. In 1954, a few months after its historic decision prohibiting segregation in public schools, the Court refused to review the case of Linnie Jackson, a Negro woman who had been convicted under the Alabama miscegenation statute. Later, in 1956, the Court again avoided the issue, dismissing an appeal in a miscegenation case from Virginia. This dismissal was termed "wholly without basis in law" by a leading authority on constitutional law, Professor Herbert Wechsler of the Columbia Law School, because there was no appropriate legal reason for avoiding the decision.

In December, 1964, the Court upset the conviction of Connie Hoffman, a white woman, and Dewey McLaughlin, a Spanish-speaking merchant seaman from British Honduras. They had violated a Florida criminal law punishing extramarital cohabitation only if the offending couple were a Negro and a white person. The Court invalidated this statute as a denial of equal protection of the law guaranteed by the Fourteenth Amendment but refused to express "any views about [Florida's] prohibition of interracial marriage."

The Court may again be confronted with this question in a case instituted by a white construction worker and his part-Negro wife, Richard and Mildred Loving. They are seeking to have the Virginia miscegenation law declared unconstitutional so that they and their three children may reside in the state from which they have been banished. The Lovings have no connection with the civil rights movement and are not represented by attorneys of a Negro civil rights organization. Both had spent all their lives in Caroline County, Virginia, south of Fredericksburg. They were married in Washington, D.C., in 1958 and returned to Virginia. Five weeks later, they were charged with the crime of marrying each other, and because of this crime were convicted and sentenced to one year in prison. But Virginia County Circuit Judge Leon M. Bazile suspended the sentences and provided instead that the Lovings leave Virginia "at once and do not return together or at the same time" for twenty-five years.

DANGEROUS LIAISONS

Sex and Love in the Segregated South

Charles Frank Robinson II

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This book is dedicated to the absolute love of my life, my son, "C3"—
Charles F. Robinson III

Virginia expanded its anti-miscegenation efforts in 1691 with the passage of a law that prohibited marriage between blacks and whites. The edict threatened white violators with banishment while providing no direct penalty for the black person involved in the interracial liaison. Although Virginia lawmakers left no record to indicate why they punished only whites with physical ostracism, one can conjecture that because most blacks were slaves, lawmakers probably did not want to deprive masters of their laborers.[11]

The Virginia law of 1691 had other clauses that demonstrated its link to maintaining labor. The measure penalized English women who produced children from black men with a fine of fifteen pounds. Failure to pay resulted in the woman being "disposed of for five years" so that she could pay the fine through her labor. Further, the law empowered authorities to take possession of the woman's child and to bind him out for service until he reached the age of thirty.[12]

The anti-miscegenation codes of other colonies also revealed the tie between the law and slavery. Maryland's 1664 anti-miscegenation law required a white woman who married a male slave to serve the master for the lifetime of her slave husband. In addition, Maryland's law insisted that any children resulting from the union be required to labor for the parish for thirty-one years. In a subsequent measure passed by the Maryland assembly in 1692, free blacks who married white women suffered the penalty of life in bondage.[13]

Pennsylvania's anti-miscegenation law, erected in 1725, followed that of Maryland, punishing free blacks who married whites with the sentence of life bondage. The Pennsylvania law, likewise, outlawed interracial sexual relations outside the institution of marriage. All free persons convicted of interracial fornication could receive the sentence of seven years in bondage.[14]

Proscriptions similar to those found in the laws of Virginia, Maryland, and Pennsylvania also marked the anti-miscegenation statutes of Massachusetts (1705), North Carolina (1715), South Carolina (1717), Delaware (1726), and Georgia (1750). In each colony a violation of the law required some party, man, woman, and/or child, to make restitution by sacrificing freedom. Anti-miscegenation laws, therefore, definitely served as one of the colonial cornerstones in sustaining and expanding the institution of slavery.[15]

Interracial sexual codes in colonial history also had another purpose. Although the laws did not prevent interracial sex, they attempted to control how and between whom it occurred. As has already been suggested, by implication the laws allowed sex between white masters and slave women. Because a slave's paternity did not matter, colonial authorities would scarcely attempt to prosecute white men for sex with slave women. The laws, however, did bring the sexual choices of white women under greater public scrutiny, making them special targets of enforcement. In practice white women who had sex with black men ran a greater risk of being punished for their activities because in most cases they were not slave owners and because many anti-miscegenation laws specifically singled out white women for punishment. Hence, the white men of the Virginia assembly probably viewed the colony's first anti-miscegenation law as a means of placing stricter controls on the sexuality of white women.[16]

Indeed, colonial officials made white women special targets of anti-miscegenation enforcement. As mentioned earlier, the anti-miscegenation laws of Virginia and Maryland levied special punishments on white women who crossed the color line. The colonial records detailed a number of cases of courts punishing white women for their interracial sexual transgressions. For example, in Elizabeth City County, Virginia, a court convicted Ann Hall, a free English woman, of "having two mulatto bastards by a Negro." In Chester County, Pennsylvania, a court ordered a white woman to "receive twenty-one lashes on her bare" back for "inticing" a black man to cross the sexual color line.[17] In Westfield, Massachusetts, the general court dissolved the marriage of a white couple, Nicholas and Agnes Brown, after Nicholas charged Agnes with engaging in sexual relations with several black men.[18]

Why did white colonials target the sexuality of white women? The answer appears to be five-fold. First, bastardy constituted a special problem in and of itself to colonial communities as it placed greater pressure on the community to provide for the children born out of wedlock. By establishing severe penalties for bastardy, colonial officials hoped to discourage white women from delivering children outside of marriage and thus mitigate economic burdens on the local community.[19] Second, Englishmen had very negative perceptions of female morality. Many colonials believed that women were particularly vulnerable to satanic

proved critical. If she confessed to sharing mutual affection with a black man, the state would most likely indict them both or in a few cases ignore them. If the white woman intimated that a black man had forced himself upon her, whites would likely employ lynch law and murder the black man.

By the last decade of the nineteenth century, race relations in the South had moved far away from Reconstruction's egalitarianism or Redemption's delicate balance. Southern white conservatives solidified their dominance by disenfranchising blacks and relegating them to second-class citizenship. The federal government that had at one time served as a guardian of black rights relinquished that role, choosing to view the repressive actions of the white South through the blinders of a "separate but equal" legal philosophy. Under these conditions interracial couples found it more difficult to publicly sustain their relationships. To Southern white authorities, formal black/white intimacy, especially that involving black men and white women, could no longer be tolerated. To allow such affiliations to go unchallenged undermined both white male gender privileges and notions of white supremacy. Undoubtedly, this repressive environment discouraged many from daring to choose intimacy across the color line. For those who did maintain their relationships, this hostile atmosphere gave them little choice but to mask them.

CHAPTER V

Expanding the Color Divide

The Anti-miscegenation Effort during the Progressive Era

On December 12, 1912, James Arthur Johnson of Galveston, Texas, the first black heavyweight boxing champion, married Lucille Cameron, a nineteen-year-old white woman from Minnesota. Instead of holding a private ceremony, the controversial Johnson opened his nuptials to the public, knowing that his actions would produce national rancor. Newspapers throughout the country reported the virulent condemnation of the Johnson marriage. A *Los Angeles Times* article recorded the reaction of a group of Louisiana whites who questioned whether or not the people of Illinois knew what "sea-grass ropes were made for" and announced that they had started a fund to "take care" of Johnson. The *Cleveland Gazette* noted the anger of an Oklahoma woman who declared that the people of Oklahoma would never have allowed Johnson to marry Cameron. The official organ of the NAACP, the *Crisis*, announced that two Southern ministers had recommended the lynching of Johnson.[1]

Prominent officials across the nation also expressed their strident disapproval of the Johnson marriage. Governor William Mann of Virginia called the marriage "a desecration of one of our sacred rites." Governor John Dix of New York referred to the Johnson marriage as "a blot on our civilization." Cole Blease, the governor of South Carolina, explained that Johnson, "the boasted hero of blacks . . . could not disgrace South Carolina by having himself united to a white woman within its borders."[2]

NORTHERN ATTITUDES TOWARDS INTERRACIAL MARRIAGE ★ Legislation and Public Opinion in the Middle Atlantic and th States of the Old Northwest, 1780–1930

David H. Fowler

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about the negro race, and that, by pursuing a proper course towards them, they might be elevated far above the position they now occupy?

Still another speaker argued later in the convention debates against the theory of polygenesis:

> All respectable authority on zoology, physiology, and divinity agree, in reference to the unity of origin of the white and black man. They are the same in organization and governed by the same laws of organization. They are subject to the same disease--they have the same mental faculties--they possess the same sympathies and instinct. With different species it is not so.[142]

One theory set forth by Dr. Nott, used often to support the position that genetic intermixture of Negroes and whites violated the law of nature as well as the law of God, argued that hybrid offspring of whites and blacks were weaker than either parent stock and tended to die out rapidly.[143] The difficulties of free Negroes, many of whom were mulattoes, under the conditions of life in the North, lent obvious force to this argument. In legislative debates, occasional mention was made of the idea of mulatto inferiority, but it was usually treated as a self-evident fact rather than a proposition requiring proof by evidence or even illustration.

If state statutes, taken by themselves, furnished a reliable guide to social conditions, the observer would be forced to conclude that in the years before the Civil War caste lines were becoming more rigid in the East North Central states, while weakening only slightly in the

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[142] Report of Debates of the Convention for Revision of the Constitution, I, 563; II, 1933.

[143] Josiah C. Nott, "The Mulatto a Hybrid," American Journal of Medical Science, new series 6 (1843), 252-256; Stanton, Leopard's Spots, pp. 66-68 76-77.

Middle Atlantic area. Yet laws tell only a part of the story. The emergence of interracial marriage as a public issue, debated in legislatures and the press, helps the reader to see how deeply divided were whites in the North--especially in the East but also in parts of the Midwest--on the question of public responsibility for the maintenance of caste. This discussion also reveals how subversive to caste were the ideas and ideals of Revolutionary liberalism and Christian humanitarianism, given fresh strength by their application to the anti-slavery movement.

Both advocates and opponents of intermarriage laws agreed, as the debates make clear, on the social value of caste lines. But where advocates insisted on a total social separation of Negroes and whites, which could be achieved only by open and forceful public sanctions, opponents argued that virtual social separation of the races, which would be enforce in any case by private social pressure, was good enough. Moreover, the opponents continued, public enforcement of caste violated social values even more primary than caste, namely, Christian brotherhood and the political equality of free individuals. The danger to caste, however enforced, of these ideas can be seen in the fact that they left social separation without any ideological support. Where caste in India has had strong religious justifications and occupational identification, and where caste in the American South had both slavery and actual fear of racial conflict to support it, caste in the American North had comparatively weak support from any of these justifications or identifications. The use of Christianity and democratic philosophy to attack legalized caste thus served to undermine all caste lines.

This interpretation of Christian and democratic principles grew in influence among Northern whites during the pre-Civil War period. The

repeal of the Massachusetts intermarriage law, the repeal of some of the Ohio black laws (the Ohio intermarriage law of 1861 notwithstanding), the resistance to intermarriage legislation in Pennsylvania and Wisconsin and the absence of sentiment for such laws in New York and New Jersey, and finally, the repeated attacks on the disfranchisement of Negroes in nearly all the states with restrictions, spelled out a serious challenge to caste everywhere in that section. How Northern whites might have answered that challenge without a Civil War no one can say, but the challenge did exist.

The agitation over intermarriage laws probably did not, however, carry as much significance for the future of caste in the North as did agitation over suffrage restrictions. The high value accorded the franchise in the United States stems from the peculiar force of popular suffrage in a democracy with widespread literacy, widespread economic opportunity, and traditions of individualism and political participation. Prevention of social mobility at any given time is as essential to the perpetuation of caste as is the intermarriage taboo, and of the possible levers which free Negroes had available to them to bring about improvements in their pariah status, the franchise was the most obvious. Opponents of Negro suffrage argued, with much logic, that if this particular right were granted, Negroes would use their new political power to obtain other rights. It is worth noting that while four of the states being examined had no intermarriage laws in this period, all eight limited the franchise pretty effectively to whites. It was easy to envision Negroes in large numbers taking immediate advantage of the suffrage, but to conceive of a change in the intermarriage rate in the near future required much greater imagination. Thus the controversy over Negro suffrage had a reality and an immediacy which gave it added significance and more

frequent exposure.

The passage or repeal of intermarriage laws elsewhere in the United States between 1831 and 1865 shows both strong similarities and sharp contrasts to the trends seen in these eight states. Inaction in New England resembled that in New York and New Jersey. New Hampshire, Vermon and Connecticut continued without prohibitions. The Massachusetts law wa of course, repealed in 1843, but the laws of Maine and Rhode Island remained undisturbed. One suspects that outside Massachusetts, abolitionis activity against the laws was not militant, while racial relations in the whole region were quite stable in the years before the Civil War. Negroes in New England increased in number from 21,379 to only 24,711 between 1830 and 1860, constituting only 0.8 per cent of the region's population in the latter year.[144] Problems of Negro-white relationships ware probably insignificant compared to those arising from contact of the native-born with the hundreds of thousands of foreign-born who arrive in New England in the 1840's and 1850's.

The slave states adopted relatively little legislation on intermarriage during these years, partly because most of them had laws already partly, no doubt, because the caste line was generally so sacrosanct that intermarriage did not become an issue. Two states which did not possess intermarriage laws before the Civil War, Alabama and Mississippi, had negligible numbers of free Negroes, and thus the slave codes effectually prevented intermarriages. South Carolina, which retained its colonial punishment of interracial bastardy, did not prohibit intermarriage, nor did Georgia. The latter acted in 1852 and 1861, however, to punish interracial cohabitation. New laws were passed in Florida in 1832, Miss

[144] Bureau of the Census, Negro Population, 1790-1915, table 13, pp. 43-45; table 5, p. 51.

in 1834 or 1835, Texas (then an independent nation) in 1837, and Arkansas in 1838, while North Carolina altered its law slightly in 1837 and again in 1838, and Kentucky revamped its prohibition in a revision of its law code in 1852.[145]

The above new laws, like those of Maine, Michigan, Indiana, and perhaps Illinois, suggest that it was commonplace for an area which achieved separate territorial or state status to adopt an intermarriage law during the early years of independent jurisdiction. This tendency also appeared in the new territories and states beyond the Mississippi. Iowa Territory prohibited intermarriage in 1840, California in 1850, Kansas Territory, Nebraska Territory, and Washington Territory in 1855, New Mexico Territory in 1857, Nevada Territory in 1861, Oregon in 1862, Idaho Territory and Colorado Territory in 1864, and Arizona Territory in 1865. Utah Territory, which did not prohibit intermarriage at this time, did in 1852 ban sexual intercourse between whites and "persons of the African race." Minnesota was the only trans-Mississippi jurisdiction to violate this pattern; like neighboring Wisconsin, it never prohibited intermarriage. Finally, West Virginia took no action to prohibit intermarriage in the first years of its separation from Virginia.[146]

Before the Civil War only two of these Western jurisdictions joined Massachusetts on repealing their intermarriage statutes. They were Iowa, which omitted its 1840 law from a statutory revision in 1850, and Kansas where in 1859 anti-slavery adherents repealed the whole code of black laws

[145] See appendix. Alabama and Mississippi authorized ministers and officials to perform marriages between free whites and between free Negroes, but seem to have given no thought to forbidding specifically the performance of interracial marriages.

[146] See appendix.

adopted by the earlier pro-slavery legislature in 1855.[147] New Mexico and Washington territories were to repeal their laws in 1866 and 1868, after the war.[148]

In the absence of detailed study, it is impossible to evaluate the strengths of the various factors which impelled the Western jurisdictions which had few Negroes, to adopt intermarriage laws. Undoubtedly routine imitation of the law codes of Eastern states took place. Certainly the transplanted Easterners who wrote those codes took their habits and prejudices along with them. An additional factor which may have had some significance, however, was one which echoed the frontier experience of seventeenth century Virginia and early nineteenth century Indiana: there existed a characteristic, and sometimes acute, shortage of white women in frontier areas. A federal census report in 1864 observed:

> The great excess of males in the newly settled Territories, illustrates the influence of immigration in effecting a disparity in the sexes. The males of California outnumber the females near 67,000, or about one-fifth of the population. In Illinois the excess of males amounts to about 92,000, or one-twelfth of the entire population. In Massachusetts the females outnumber the males some 37,600. Michigan shows near 40,000

[147] It is doubtful whether the omission of the Iowa intermarriage prohibition was realized by the legislators who took the action. The legislature in 1848 had appointed three men to revise the code of laws, The Code of Iowa, passed at the session of the General Assembly of 1850-1 and approved 5th February 1851 (Iowa City, 1851), p. 470. The legislature adopted the section on marriage, which contained no reference to interracial marriage (sec. 85). The general attitude of the legislature may be inferred from the fact that they also passed in 1851 a prohibition of the immigration of free Negroes into the state, Acts . . . passed at the Regular Session of the Third General Assembly . . . (Iowa City, 1851), pp. 172-173. The free-state legislature in Kansas Territory decided in 1858 to take the laws of Ohio (which then contained no prohibition of intermarriage) as the basis for a new Kansas code, Kansas Territory Council Journal, 1858, pp. 72-73, 78.

[148] See appendix.

excess of males; Texas, 36,000; Wisconsin, 43,000. In Colorado the males to females, are as twenty to one. In Utah the numbers are nearly equal; and while in New York there is a small preponderance of females, the males are more numerous in Pennsylvania.[149]

[149] Population of the United States in 1860; compiled from the Original Returns of the Eighth Census, under the direction of the Secretary of the Interior, Joseph C. G. Kennedy, Superintendent of Census (Washington, D. C., 1864), p. xviii.

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"This same morning, as we sat by the Dolphin-fountain, and threw barley-bread to the lame swan; he gave us this precept, with its glosses: that for showing the truth, perspicuity is the only ornament of style; that the logical is unfriendly to the rhetorical; and that in the matter of style, nked and sandy nakedness, (*nuditas palæstrica*) is better, for conviction; and dramatic drapery, for entertainment. This plainness, which, said he again, is logical neatness, is grateful not to the popular many, but to the philosophic few. He then added somewhat abruptly, that public opinion is not the opinion of the public. Seeing some of the younger of us smile, he explained at once. He simply meant, he said, that the popular, changed with the philosophic, opinion; or that in other words, the thinkers rule, and must be first convinced. The conference on the Greek Styles then ended; and we all rose, and left the fountain."

Warrantees' right to philosophic or educational power, order, and liberty is not yet actualized. If justice economically authorized it; the educational means or power might be added to wages. If not this; any other method following justice.

But political independently of economic justice, does not now authorize the systematic education of warrantees. The warranteeism of the United States South, is that with the ethnical qualification. The existence-rights of both or of one of these races, now forbids to the other, this progress-right. The educational is at present antagonistic to the political system. This antagonism is accidental and temporary. It is not necessary or natural to warranteeism. It is due to a temporary outside fact. This fact is from an error which confounds essentials and accidentals; which is rather aggressive against the greater good essential, than progressive from the lesser bad accidental. It is bad opposition from good disposition. It is philanthropy in design, and misanthropy in deed. But between warrantors and warrantees, there is naturally no educational antagonism. The educational and economic systems, are syntagonistic. So also, the political and educational systems; but this, only after the political fact as it is, shall be the political fact as it ought to be.

CHAPTER XIV.

In the United States South, the rights of warrantees under the political system, are such as are just. Their political status is not wrong. It is right; it is from duty; it is a moral necessity. They have now the political power, order, and liberty to which they are rightly entitled; neither more nor less.

In the civil government of republics, the people are the sovereign. They are the supreme orderer. But republics are representative governments; the sovereign people constitute representatives. These representatives in their capacity as such, are magistrates; or supersovereign. In the political system, they are the orderers. They adapt and regulate. But all the people are not sovereign or supersovereign. Some only are sovereign. These are such alone as are peculiarly qualified. They must be males. They must be of a certain age. They must be of sound mind. They must be residents. In some commonwealths, property qualifications, are necessary; in some, religious qualifications. There may be other qualifications just or unjust.

All other people in the State, who are not sovereign people, are subsovereign. To this class belong women, minors, criminals, lunatics and idiots, aliens, and all others unqualified or disqualified.

Such, the three classes of people. In republics, all are represented. The representatives or orderers, represent and are responsible to their constituents, the sovereign people. But these are not constituents only; they likewise

represent the class of subsovereign people; these are constituents of those. A man represents his family. This is special; he also represents the interests of other subsovereigns; this, his general duty.

The representation of all is thus actualized.

Duties are coupled to relations. By the common law, a natural person's relations under the civil government are public or private. By the common law, private relations are those of master and servant, husband and wife, parent and child, guardian and ward.

In warrantee commonwealths, public relations are those of magistrates and people; or orderers and orderees. Magistrates are legislators, executors and adjudicators. To these the relations of the people, are those of orderees. The people are therefore, legislatees, executees and adjudicatees. The magistrates are adapters and regulators; the people, adaptees and regulatees.

In republics in which the warranteeism is that with the ethnical qualification, the warrantees are subsovereign. They have not the right of sovereignty. That is not their due; it is unjust; it is wrong. Warrantees have the right of representation. But they have not the right of political constitution. Neither ought they; they are not entitled to it. Subsovereignty is the right of warrantees. Their sovereignty is the wrong of warrantors, and others.

In the warrantee commonwealths of the United States who therefore, ought to be the sovereign people? Who ought to be the supreme power in the warrantee States? There, warranteeism with the ethnical qualification is ordained and established. What is the effect of this qualification? The people are of two races. They are ethnically related to each other. But because every act has a moral

quality; with every relation, duties are coupled. These races in their ethnical relations, differ from each other in beauty; in color; in the inclination, shape, and direction of the pile; in the conformation of their body, and in other physiological respects.

The black race must be civilly either (1), Subsovereign, (2), Sovereign, or (3), Supersovereign. If not subsovereign, they must be co-sovereign. The white race may also be subsovereign, sovereign, or supersovereign. If both races are promiscuously sovereign; that is co-sovereignty. The white race is now and has been sovereign; the black, subsovereign. This, the historical fact.

The black race ought not to be admitted to co-sovereignty. It is wrong: it is in violation of moral duty.

These races physiologically must be either equal or unequal. They must be either peers ethnically, or not peers. If not peers ethnically, the black race must be either superior or inferior. If superior, their ethnical progress forbids amalgamation with an inferior race. If the white race is superior; their ethnical progress forbids intermixture with an inferior race.

But races must progress. Men have not political or economic duties only. They have hygienic duties. Hygiene is both ethnical and ethical; moral duties are coupled to the relation of races. Races must not be wronged. Hygienic progress is a right. It is a right, because a duty. But hygienic progress forbids ethnical regress. Morality therefore, which commands general progress, prohibits this special regress. The preservation and progress of a race, is a moral duty of the races. Degeneration is evil. It is a sin. That sin is extreme. Hybridism is heinous.

Impurity of races is against the law of nature. Mulattoes are monsters. The law of nature is the law of God. The same law which forbids consanguineous amalgamation; forbids ethnical amalgamation. Both are incestuous. Amalgamation is incest.

But the relation of the two races to each other, is moral: every relation has an ethical quality: ethics is ethnic. Moral hygienic duties must not be violated. For progress must be developed, and regress, enveloped. Polity therefore—the duty of the State—prohibits the sovereignty of the black race. Because, if the black race are sovereign, they must be co-sovereign. If not politically subordinate or superordinate; they must be politically coördinate. But the black and white race must not be co-sovereign; they must not be politically coördinate. They must be, the one subordinate, and the other, superordinate. They must not be aggregated; they must be segregated. They must be civilly pure and simple from each other. This is a hygienic ethnical necessity. It is the duty of caste to prevent amalgamation: it is, caste for the purity of races. For, political amalgamation is ethnical amalgamation. One makes the other: that is the immediate, invariable antecedent of this. Subsovereignty is necessary for segregation, and both necessary to duty.

CHAPTER XV.

POLITICAL amalgamation is sexual amalgamation: one is a cause of the other. There must be either caste or co-sovereignty: this is the alternative to that. For power to rule, is power to marry, and the power to repeal or annul discriminating laws.

In States, the intercourse of sexes is either (1), Lawful or (2), Unlawful. Marriage is lawful intercourse. Of two races in a State, marriage may be (1), Between males and females of the same race; (2), Between males of one race and females of the other race; or, (3), Miscellaneously, between males and females of both races.

Of marriage, the motives or springs of action are such as are either (1), Matrimonial, or, (2), Extramatrimonial. Love is a matrimonial motive. Extramatrimonial motives are such as avarice or the desire of wealth; and ambition or the desire of power.

If therefore, marriage miscellaneously between too races, is lawful; the motives will be both matrimonial and extramatrimonial. Females of the inferior will elect males of the superior race. This, from natural preference, which is matrimonial; or from ambition, which is extramatrimonial. Males of the superior race will from avarice, ambition, or other extramatrimonial motives, elect females of the inferior race. These motives are certain; and certainty of motive, is certainty of movement; certainty of cause, certainty of effect. If therefore, intermarriage of races, is lawful; intermarriage will be actual: the cause, certain; the effect will be certain. The law must

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In memoriam

A. Leon Higginbotham, Jr.
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Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*

PEGGY PASCOE

On March 21, 1921, Joe Kirby took his wife, Mayellen, to court. The Kirbys had been married for seven years, and Joe wanted out. Ignoring the usual option of divorce, he asked for an annulment, charging that his marriage had been invalid from its very beginning because Arizona law prohibited marriages between "persons of Caucasian blood, or their descendants" and "negroes, Mongolians or Indians, and their descendants." Joe Kirby claimed that while he was "a person of the Caucasian blood," his wife, Mayellen, was "a person of negro blood."[1]

Although Joe Kirby's charges were rooted in a well-established—and tragic—tradition of American miscegenation law, his court case quickly disintegrated into a definitional dispute that bordered on the ridiculous. The first witness in the case was Joe's mother, Tula Kirby, who gave her testimony in Spanish through an interpreter. Joe's lawyer laid out the case by asking Tula Kirby a few seemingly simple questions:

Joe's lawyer: To what race do you belong?
Tula Kirby: Mexican.
Joe's lawyer: Are you white or have you Indian blood?
Kirby: I have no Indian blood.
. . . . . .
Joe's lawyer: Do you know the defendant [Mayellen] Kirby?
Kirby: Yes.
Joe's lawyer: To what race does she belong?
Kirby: Negro.

Then the cross-examination began.

Mayellen's lawyer: Who was your father?
Kirby: Jose Romero.
Mayellen's lawyer: Was he a Spaniard?
Kirby: Yes, a Mexican.
Mayellen's lawyer: Was he born in Spain?

* From Peggy Pascoe, "Miscegenation Law, Court Cases, and Ideologies of 'Race' in Twentieth-Century America." *Journal of American History* 83.1 (June 1996): 44–69.

1. Ariz. Rev. Stat. Ann. sec. 3837 (1913); "Appellant's Abstract of Record," Aug. 8, 1921, pp. 1–2, *Kirby v. Kirby*, docket 1970 (microfilm: file 36.1.134), Arizona Supreme Court Civil Cases (Arizona State Law Library, Phoenix).

Kirby: No, he was born in Sonora.
Mayellen's lawyer: And who was your mother?
Kirby: Also in Sonora.
Mayellen's lawyer: Was she a Spaniard?
Kirby: She was on her father's side.
Mayellen's lawyer: And what on her mother's side?
Kirby: Mexican.
Mayellen's lawyer: What do you mean by Mexican, Indian, a native [?]
Kirby: I don't know what is meant by Mexican.
Mayellen's lawyer: A native of Mexico?
Kirby: Yes, Sonora, all of us.
Mayellen's lawyer: Who was your grandfather on your father's side?
Kirby: He was a Spaniard.
Mayellen's lawyer: Who was he?
Kirby: His name was Ignacio Quevas.
Mayellen's lawyer: Where was he born?
Kirby: That I don't know. He was my grandfather.
Mayellen's lawyer: How do you know he was a [S]paniard then?
Kirby: Because he told me ever since I had knowledge that he was a Spaniard.

Next the questioning turned to Tula's opinion about Mayellen Kirby's racial identity.

Mayellen's lawyer: You said Mrs. [Mayellen] Kirby was a negress. What do you know about Mrs. Kirby's family?
Kirby: I distinguish her by her color and the hair; that is all I do know.[2]

The second witness in the trial was Joe Kirby, and by the time he took the stand, the people in the courtroom knew they were in murky waters. When Joe's lawyer opened with the question "What race do *you* belong to?," Joe answered "Well . . . ," and paused, while Mayellen's lawyer objected to the question on the ground that it called for a conclusion by the witness. "Oh, no," said the judge, "it is a matter of pedigree." Eventually allowed to answer the question, Joe said, "I belong to the white race I suppose." Under cross-examination, he described his father as having been of the "Irish race," although he admitted, "I never knew any one of his people."[3]

Stopping at the brink of this morass, Joe's lawyer rested his case. He told the judge he had established that Joe was "Caucasian." Mayellen's lawyer scoffed, claiming that Joe had "failed utterly to prove his case" and arguing that "[Joe's]

2. "Appellant's Abstract of Record," 12–13, 13–15, 15, *Kirby v. Kirby*.
3. *Ibid.*, 16–18.

term *racialism* to be broad enough to cover a wide range of nineteenth-century ideas, from the biologically marked categories scientific racists employed to the more amorphous ideas George M. Fredrickson has so aptly called "romantic racialism."[9] Used in this way, "racialism" helps counter the tendency of twentieth-century observers to perceive nineteenth-century ideas as biologically "determinist" in some simple sense. To racialists (including scientific racists), the important point was not that biology determined culture (indeed, the split between the two was only dimly perceived), but that race, understood as an indivisible essence that included not only biology but also culture, morality, and intelligence, was a compellingly significant factor in history and society.

My argument is this: During the 1920s, American racialism was challenged by several emerging ideologies, all of which depended on a modern split between biology and culture. Between the 1920s and the 1960s, those competing ideologies were winnowed down to the single, powerfully persuasive belief that the eradication of racism depends on the deliberate nonrecognition of race. I will call that belief *modernist racial ideology* to echo the self-conscious "modernism" of social scientists, writers, artists, and cultural rebels of the early twentieth century. When historians mention this phenomenon, they usually label it "antiracist" or "egalitarian" and describe it as in stark contrast to the "racism" of its predecessors. But in the new legal scholarship called critical race theory, this same ideology, usually referred to as "color blindness," is criticized by those who recognize that it, like other racial ideologies, can be turned to the service of oppression.[10]

Modernist racial ideology has been widely accepted; indeed, it compels nearly as much adherence in the late-twentieth-century United States as racialism did in the late nineteenth century. It is therefore important to see it not as what it claims to be—the nonideological end of racism—but as a racial ideology of its own, whose history shapes many of today's arguments about the meaning of race in American society.

The Legacy of Racialism and the *Kirby* Case

Although it is probably less familiar to historians than, say, school segregation law, miscegenation law is an ideal place to study both the legacy of nineteenth-century racialism and the emergence of modern racial ideologies.[11] Miscegenation

9. See especially Fredrickson, *Black Image in the White Mind.*

10. For intriguing attempts to define American modernism, see Daniel J. Singal, ed., *Modernist Culture in America* (Belmont, 1991); and Dorothy Ross, ed., *Modernist Impulses in the Human Sciences, 1870–1930* (Baltimore, 1994). For the view from critical race theory, see Brian K. Fair, "Foreword: Rethinking the Colorblindness Model," *National Black Law Journal,* 13 (Spring 1993), 1–82; Neil Gotanda, "A Critique of 'Our Constitution Is Color-Blind,' " *Stanford Law Review,* 44 (Nov. 1991), 1–68; Gary Peller, "Race Consciousness," *Duke Law Journal* (Sept. 1990), 758–847; and Peter Fitzpatrick, "Racism and the Innocence of Law," in *Anatomy of Racism,* ed. Goldberg, 247–62.

11. Many scholars avoid using the word *miscegenation,* which dates to the 1860s, means race mixing, and has, to twentieth-century minds, embarrassingly biological connotations; they speak of laws against "interracial" or "cross-cultural" relationships. Contemporaries usually referred to "anti-miscegenation" laws. Neither alternative seems satisfactory, since the first avoids naming the ugliness that was so much a part of the laws and the second implies that "miscegenation" was a distinct racial phenomenon rather than a categorization imposed on certain relationships. I retain the term *miscegenation* when speaking of the laws and court cases that relied on the concept, but not when speaking of people or particular relationships. On the emergence of the term, see Sidney Kaplan, "The Miscegenation Issue in the Election of 1864," *Journal of Negro History,* 24 (July 1949), 274–343 [included in this volume, pp. 219–265. —Ed.].

laws, in force from the 1660s through the 1960s, were among the longest lasting of American racial restrictions. They both reflected and produced significant shifts in American racial thinking. Although the first miscegenation laws had been passed in the colonial period, it was not until after the demise of slavery that they began to function as the ultimate sanction of the American system of white supremacy. They burgeoned along with the rise of segregation and the early-twentieth-century devotion to "white purity." At one time or another, 41 American colonies and states enacted them; they blanketed western as well as southern states.[12]

By the early twentieth century, miscegenation laws were so widespread that they formed a virtual road map to American legal conceptions of race. Laws that had originally prohibited marriages between whites and African Americans (and, very occasionally, American Indians) were extended to cover a much wider range of groups. Eventually, 12 states targeted American Indians, 14 Asian Americans (Chinese, Japanese, and Koreans), and 9 "Malays" (or Filipinos). In Arizona, the *Kirby* case was decided under categories first adopted in a 1901 law that prohibited whites from marrying "negroes, Mongolians or Indians"; in 1931, "Malays" and "Hindus" were added to this list.[13]

12. Most histories of interracial sex and marriage in America focus on demographic patterns, rather than legal constraints. See, for example, Joel Williamson, *New People: Miscegenation and Mulattoes in the United States* (New York, 1980); Paul R. Spickard, *Mixed Blood: Intermarriage and Ethnic Identity in Twentieth-Century America* (Madison, 1989); and Deborah Lynn Kitchen, "Interracial Marriage in the United States, 1900–1980" (Ph.D. diss., University of Minnesota, 1993). The only historical overview is Byron Curti Martyn, "Racism in the United States: A History of the Anti-Miscegenation Legislation and Litigation" (Ph.D. diss., University of Southern California, 1979). On the colonial period, see A. Leon Higginbotham Jr. and Barbara K. Kopytoff, "Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia," *Georgetown Law Journal,* 77 (Aug. 1989), 1967–2029 [in this volume, pp. 81–139. —Ed.]; George M. Fredrickson, *White Supremacy: A Comparative Study in American and South African History* (New York, 1981), 99–108; and James Hugo Johnston, *Race Relations in Virginia & Miscegenation in the South, 1776–1860* (Amherst, 1970), 165–90. For later periods, see Peter Bardaglio, "Families, Sex, and the Law: The Legal Transformation of the Nineteenth-Century Southern Household" (Ph.D. diss., Stanford University, 1987), 37–106, 345–49; Peter Wallenstein, "Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s–1960s," *Chicago-Kent Law Review,* 70 (no. 2, 1994), 371–437; David H. Fowler, *Northern Attitudes towards Interracial Marriage: Legislation and Public Opinion in the Middle Atlantic and the States of the Old Northwest, 1780–1930* (New York, 1987); Megumi Dick Osumi, "Asians and California's Anti-Miscegenation Laws," in *Asian and Pacific American Experiences: Women's Perspectives,* ed. Nobuya Tsuchida (Minneapolis, 1982), 2–8; and Peggy Pascoe, "Race, Gender, and Intercultural Relations: The Case of Interracial Marriage," *Frontiers,* 12 (no. 1, 1991), 5–18. The count of states is from the most complete list in Fowler, *Northern Attitudes,* 336–439.

13. Ariz. Rev. Stat. Ann. sec. 3092 (1901); 1931 Ariz. Sess. Laws ch. 17. Arizona, Idaho, Maine, Massachusetts, Nevada, North Carolina, Oregon, Rhode Island, South Carolina, Tennessee, Vir-

Mixed Race America and the Law

A Reader

EDITED BY

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American Mestizo

Filipinos and Anti-Miscegenation Laws in California

Leti Volpp

. . . By the time the Supreme Court finally declared anti-miscegenation laws unconstitutional in *Loving v. Virginia,* thirty-nine states had enacted anti-miscegenation laws; in sixteen of these states, such laws were still in force at the time of the decision. While the original focus of these laws was primarily on relationships between blacks and whites, also prohibited were marriages between whites and "Indians" (meaning Native Americans), "Hindus" (South Asians), "Mongolians" (into which were generally lumped Chinese, Japanese, and Koreans), and "Malays" (Filipinos). Nine states—Arizona, California, Georgia, Maryland, Nevada, South Dakota, Utah, Virginia, and Wyoming—passed laws that prohibited whites from marrying Malays. The statutes varied in their enforcement mechanisms: some simply declared miscegenous marriages void; others punished them as felonies.

I. California: Asian Invasions

In 1850, California enacted a law prohibiting marriages between "white persons" and "negroes or mulattoes." Twenty-eight years later, a referendum was proposed at the California Constitutional Convention to amend the statute to prohibit marriages between Chinese and whites. While the so-called "Chinese problem" was initially conceptualized as one of economic competition, created by the importation of exploitable laborers without political rights, the issue of sexual relationships between whites and Chinese also functioned as a prime site of hysteria.

Invoked were fears of hybridity. John Miller, a state delegate, speculated that the "lowest most vile and degraded" of the white race were most likely to amalgamate with the Chinese, resulting in a "hybrid of the most despicable, a mongrel of the most detestable that has ever afflicted the earth."[1] Miscegenation was presented as a public health concern, for Chinese were assumed by most of the delegates to be full of "filth and disease." Some argued that American institutions and culture would be overwhelmed by the habits of people thought to be sexually promiscuous, perverse, lascivious, and immoral. For example, in 1876 various papers stated that Chinese men attended Sunday school in order to debauch their white, female teachers. In response to the articulation of these fears, in 1880 the legislature prohibited the licensing of marriages between "Mongolians" and "white persons."[2]

The next large group of Asian immigrants—those from Japan—was also the subject of antagonism, leading to further amendment of the anti-miscegenation laws. While the impetus for tension was, again, economic, two prime sites of expressed anxiety were school segregation and intermarriage. Those who sought school segregation depicted the Japanese as an immoral and sexually aggressive group of people and disseminated propaganda that warned that Japanese students would defile their white classmates. The *Fresno Republican* described miscegenation between whites and the Japanese as a form of "international adultery," in a conflation of race, gender, and nation. In 1905, at the height of the anti-Japanese movement, the state legislature sealed the breach between the license and marriage laws and invalidated all marriages between "Mongolian" and white spouses.[3]

II. "Little Brown Men"

Tension over the presence of Chinese and Japanese had led to immigration exclusion of Chinese and Japanese laborers through a succession of acts dating between 1882 and 1924. Because industrialists and growers faced a resulting labor shortage, they began to import Filipinos to Hawaii and the mainland United States. Classified as "American nationals" because the United States had annexed the Philippines following the Filipino-American War, Filipinos were allowed entry into the country. On the mainland, a majority of Filipinos resided in California, with sizable numbers also in Washington and Alaska. By 1930 the number of Filipinos on the mainland reached over forty-five thousand. During the winter they stayed in the cities—working as domestics and gardeners, washing dishes in restaurants, and doing menial tasks others refused. In the summer they moved back to the fields and harvested potatoes, strawberries, lettuce, sugar beets, and fruits. . . .

On the mainland, 93 percent of all who emigrated from the Philippines were males, the vast majority between sixteen and thirty years of age. While some scholars have focused on patriarchal Asian values as the reason for early Asian migration being an almost exclusively male phenomenon, others have pointed to labor recruiting patterns and the specifics of immigration laws themselves as restricting the immigration of Asian women. United States capital interests wanted Asian male workers but not their families, because detaching the male worker from a heterosexual family structure meant he would be cheaper labor.

The Filipinos lived in barracks, isolated from other groups, allowed only dance halls, gambling resorts, and pool rooms of Chinatown as social outlets. They led ostracized lives punctuated by the terror of racist violence. Many restaurants and stores hung signs stating, "Filipinos and dogs not allowed."[4] Anxiety about what was called the "Third Asian Invasion" was expressed primarily around three sites: first, the idea that Filipinos were destroying the wage scale for white workers; second, the idea that

INTERRACIAL INTIMACIES

Sex, Marriage, Identity, and Adoption

RANDALL KENNEDY

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This book is dedicated to my dutiful, wise, loving parents,
Henry Harold Kennedy Sr. and Rachel Spann Kennedy.

From the early eighteenth century onward, *all* antimiscegenation laws in British North America prohibited blacks and whites from marrying one another. Other like prohibitions were imposed upon Native Americans and people of Chinese, Japanese, Filipino, Indian, and Hawaiian ancestry.* Since the founding of the United States, there have been no laws enacted against Christians marrying Jews or against interethnic marriages. In the nineteenth century, many groups that are now classified as ethnic "whites" were thought of as distinct races, among them Jews, Irish, Italians, and Hungarians.[17] Despite the intense social discriminations sometimes practiced against specific ethnic identities—think, for example, of signs reading "No Irish need apply"—state governments never prohibited interethnic marriages among whites. This fact further underscores the unique status of "color" in American life. Although social pressures have been widely brought to bear to discourage interethnic marriage, *state* power was mobilized only when authorities feared that people might marry across the color line.

Antimiscegenation laws varied widely by jurisdiction. Prior to the Civil War, officials in some states punished only whites for crimes of interracial intimacy. This approach was probably rooted in two beliefs: first, that blacks were too irresponsible and too inferior to punish, and second, that it was whites' responsibility to protect the purity of their own bloodlines. This latter belief was closely related to yet another status distinction embedded in antebellum laws regulating intimacy: a

*States that singled out other groups besides blacks as being ineligible for marriage to whites included Arizona (Mongolians, Malayans, Hindus, Indians), California (Mongolians, Malayans), Georgia (Japanese, Chinese, Malayans, Asiatic Indians), Mississippi (Mongolians), Montana (Chinese, Japanese), Nebraska (Chinese, Japanese), Nevada (Ethiopians, Malays, Mongolians), and Wyoming (Malayans, Mongolians). See the very useful tabulations of antimiscegenation laws in Fowler, *Northern Attitudes,* 339–439. "Note: Constitutionality of Anti-Miscegenation Statutes," *Yale Law Journal* 58 (1949): 472, 480–83. See also Leti Volpp, "American Mestizo: Filipinos and Antimiscegenation Laws in California," *University of California at Davis Law Review* 33 (2000): 95, 798–801; Lloyd Riley, "Miscegenation Statutes—A Re-evaluation of Their Constitutionality in Light of Changing Social and Political Conditions," *Southern California Law Review* 32 (1958):

gender differential. White women were anointed as the primary gatekeepers of white racial purity, and as such, they became the members of the white community who could, with self-evident justice, be most severely penalized for racial transgressions. Violations included, in ascending order of perceived perfidiousness, having sex across racial lines, marrying across racial lines, and giving birth to a mixed-race baby. Hence, the racial regulation of intimacy has not only pitted white people against colored people; it has also set men against women, both across racial lines and within racial groups.

After the Civil War, to comply with new federal requirements regarding formal racial neutrality, some state authorities felt compelled to mete out to blacks who married interracially the same punishment that was imposed on their white spouses.[18] No less ironic was the fact that in at least some jurisdictions, antimiscegenation laws were likely enforced more stringently *after* the Civil War than before it. The institution of slavery had given the collective ego of whites such a massive boost that many of them were willing to overlook infractions of racial regulations, even to the extent of turning a blind eye on interracial romantic involvements. The abolition of slavery, however, and the assertion of civil and political rights by blacks during Reconstruction, dealt a tremendous blow to the racial self-esteem of southern whites in particular. Many compensated by insisting upon a relentless and exacting observance of both formal and informal rules of racial caste. One hallmark of this period was enhanced criminal enforcement of antimiscegenation laws and every other restriction that reinforced the lesson of white supremacy and black subordination, white purity and black contamination.[19]

Some states, for example, punished those who performed interracial marriages. Mississippi went even further, criminalizing not only interracial marriage but even the *advocacy* of "social equality or of intermarriage between whites and negroes."* Punishments for the vio-

*"Any person, firm, or corporation who shall be guilty of printing . . . 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." See Pauli Murray, *States' Laws on Race and Color*