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## Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation

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# BLOOD WILL TELL: SCIENTIFIC RACISM AND THE LEGAL PROHIBITIONS AGAINST MISCEGENATION

Keith E. Sealing\*

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## INTRODUCTION

Laws banning miscegenation<sup>1</sup> endured in the colonies and the United States for more than 300 years.<sup>2</sup> When the Supreme Court declared all such laws unconstitutional in *Loving v. Virginia*<sup>3</sup> in 1967, sixteen such statutes and constitutional provisions<sup>4</sup> were still in effect.<sup>5</sup> These laws

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1. Miscegenation is an awkward term to use in 2000; the implication it carries is that "race" is a meaningful construct and that sex and reproduction between the races is something akin to bestiality. But it is impossible to write about anti-miscegenation laws without using the term. The word was first coined by David Croly in an 1864 pamphlet titled *Miscegenation: The Theory of the Blending of the Races, Applied to the American White Man and the Negro*. See Emily Field Van Tassel, "Only The Law Would Rule Between Us": *Antimiscegenation, the Moral Economy of Dependency, and the Debate over Rights After the Civil War*, 70 CHI.-KENT L. REV. 873, 896 n.93 (1995); see also Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, J. AM. HIST., June 1996, at 44, 48 n.11 (discussing the academic debate over whether to continue using the term miscegenation); ASHLEY MONTAGU, *MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE* 445-47 (Oxford University Press 1974) (1942) ("The term 'miscegenation' provides a remarkable exhibit in the natural history of nonsense."). Mulatto, a similarly outdated term, is also used herein, as are the various denominations for the races. The term Black is used to describe peoples of sub-Saharan African origin generally, while African American is used to describe their American progeny.

2. The first colonies enacted anti-miscegenation statutes in 1662 (Virginia) and 1663 (Maryland). See Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1191 (1966). But miscegenation was punished as early as 1630 in Virginia, just 11 years after the first African slaves were imported. The punishment consisted of a "sound whipping" for a White man who was caught "lying with a negro." *Id.* Similarly, the New Netherlands colony enacted laws against miscegenation as early as 1638. See 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* 33 (1987). A reason why anti-miscegenation statutes lasted as long as they did is that the National Association for the Advancement of Colored People placed a very low priority on overturning the anti-miscegenation laws through litigation because African Americans ranked the issue as dead last in importance behind such issues as schools, jobs, and voting. See Peter Wallenstein, *Race, Marriage and the Law of Freedom: Alabama and Virginia, 1860s-1960s*, 70 CHI.-KENT L. REV. 371, 435-36 (1994) (citing GUNNAR MYRDAL ET AL., *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 60-62 (1944)).

3. 388 U.S. 1 (1967).

4. See *Loving*, 388 U.S. at 6 n.5; Wadlington, *supra* note 2, at 1190 n.8 (listing those states as Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia). Maryland repealed its statute during the course of the *Loving* litigation. In all, 41 states had anti-miscegenation statutes at one time or another. See FOWLER, *supra* note 2, at 7.

5. Indeed one, embodied in Alabama's constitution, is still extant. See Marlon Manuel, *Moot or Not, Interracial Marriage Still an Issue*, THE ATLANTA JOURNAL-CONST., Dec. 20, 1998, at A8. South Carolina left the anti-miscegenation provision of its constitution in place until the November 1998 election, before deleting it as "a bit of

did more than just ban mixed-race marriages; their impact was felt in divorce,<sup>6</sup> illegitimacy,<sup>7</sup> spousal immunity<sup>8</sup> and inheritance cases,<sup>9</sup> as well as in a variety of criminal contexts,<sup>10</sup> including vagrancy.<sup>11</sup> Indeed, scientific racism determined a hierarchy within the White race that placed the Teutonic at the top, the Anglo-Saxon as the heir to the Teuton, and the American as the current leading branch of that line.<sup>12</sup>

housekeeping." Vincent J. Schodolski, *235 Voter Referendums Test Mood of America*, CHI. TRIB., Nov. 2, 1998, at 1.

6. In Virginia, for example, no formal divorce proceedings were required if a marriage was found to be miscegenous. See Wadlington, *supra* note 2, at 1195 (citing Va. Code. Ann. Ch. 109, § 1, vol. I, at 471 (1849)).

7. See, e.g., Hart v. Hoss & Elder, 26 La. Ann. 90, 94 (1874) (holding that children born to a White man and a Black woman before Louisiana's anti-miscegenation laws were repealed could be acknowledged by the father through a marriage that occurred after the law was repealed); Greenhow v. James' Executor, 80 Va. 636 (1885); Stones v. Keeling, 9 Va. (5 Call.) 145 (1804).

8. See, e.g., State v. Pass, 121 P.2d 882 (Ariz. 1942). In *Pass*, Frank Pass was convicted of second-degree murder principally on the testimony of his wife, Ruby Contreras Pass. He objected to her testimony on the grounds that a wife can only testify against her husband with his consent, which had not been given. The state supreme court affirmed the trial court's decision to overrule this objection on the grounds that the marriage was null and void under the miscegenation statute since she was White and he was a mixture of the White, Native American and "Mexican" races. See *id.* at 884.

9. See, e.g., Miller v. Lucks, 36 So.2d 140 (Miss. 1948) (declaring a White man heir at law to property in Mississippi of an African American woman to whom he had legally married in Illinois, stating that because they did not live in Mississippi, the miscegenous marriage did not offend Mississippi's anti-miscegenation policy); *In re Takahashi's Estate v. Jorgensen*, 129 P.2d 217 (Mont. 1942) (refusing to recognize a White woman's marriage to a Japanese-American man for estate administration purposes in Montana, even though the marriage was legally performed in Washington); *In re Paquet's Estate*, 200 P. 911, 914 (Ore. 1921) (stating that although a Native American widow must be removed as administratrix because her miscegenous marriage to the White decedent was null and void, "in the interests of justice, a fair and reasonable settlement should be made," because she had lived as "a good and faithful wife for more than 30 years").

10. For example, at one time Louisiana punished criminal miscegenation with up to five years of prison with hard labor. See *State v. Brown*, 108 S.E.2d 233, 234 (La. 1959). Virginia imposed a sentence of not less than two or more than five years. See *Ex parte Kinney*, 14 F. Cas. 602 (C.C.E.D. Va. 1879) (No. 7825). Lesser penalties might have included a fine. See, e.g., *Dodson v. State*, 31 S.W. 977 (Ark. 1895) (imposing a \$25 fine). Professor Pascoe compiled a database of 227 appeals court cases dating between 1850 and 1970 involving miscegenation; 132 were civil, 95 criminal. See Pascoe, *supra* note 1, at 50 n.15.

11. See *Jackson v. City and County of Denver*, 124 P.2d 240 (Colo. 1942) (holding that because an African American man and White woman's common law marriage was void due to the state's miscegenation statute, their cohabitation fell within the state's vagrancy statute's definition of leading an immoral course of life).

12. Not content to just rank the races, racial theorists ranked the various European sub-groups, generally favoring Northern Europeans. The predominantly Anglo-Saxon United States was seen as the heir to England, which was seen as the heir to the superior

Prior to the Darwinian revolution, two competing scientific theories, monogenism and polygenism, were applied to justify miscegenation statutes. The "monogenists" believed that all men descended from a single ancestor and were of the same species.<sup>13</sup> The theory had the appeal, particularly in the South, of comporting with the Bible and the story of Ham, as interpreted literally by the fundamentalists.<sup>14</sup> This theory has had a particularly long life: consider that *Bob Jones University v. United States*<sup>15</sup> was decided by the Supreme Court in 1983. This single species theory was also of venerable scientific origin, having been espoused by the Swedish naturalist Carolus Linneaus in 1735.<sup>16</sup> To the monogenists, slavery or anti-miscegenation laws based upon a theory of White superiority over a fellow descendent of Adam had to be justified by a theory of specific unity followed by racial degeneration.

Although the proponents of the second theory had an apparently more scientific justification for slavery and anti-miscegenation statutes, it was not well-received in the South because it conflicted with the Bible.<sup>17</sup> The "polygenists" saw Blacks as a separate and inferior species descended from a different "Adam,"<sup>18</sup> and, thus, saw slavery as qualitatively no different from the ownership of a horse, and miscegenation as approaching bestiality. But the polygenists had one major problem: species are generally defined as populations that cannot mate,<sup>19</sup> or populations that if successfully mated produce sterile offspring, such as the mule.<sup>20</sup> Every

Teutonic tribes of modern Germany. See generally REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF RACIAL ANGLO-SAXONISM (1981).

13. See *infra* notes 109–23 and accompanying text.

14. See *infra* notes 75–91 and accompanying text.

15. 461 U.S. 574 (1983) (Private schools based their bans on interracial dating and marriage on fundamentalist interpretation of the story of Ham.).

16. See CAROLUS LINNAEUS, SYSTEMA NATURAE (1758), *microformed on* 10 Landmarks of Science 21–22 (Readex Microprint Corp.) (developing a classification system for all branches of life).

17. See *infra* notes 124–64 and accompanying text.

18. The polygenists could trace their lineage back to Emperor Julian. See William M. Wiecek, *The Origins Of The Law Of Slavery In British North America*, 17 CARDOZO L. REV. 1711, 1728 (1996).

19. The definition of species as a breeding unit was originated by the Comte de Buffon. See HORSMAN, *supra* note 12, at 47.

20. Mulatto, the common term for mixed Black and White persons, is from the Portuguese for mule. (Technically, the term mulatto denominated a first-generation cross between a pure Black and a pure White; the term is often used, however, for mixed-race persons of varying percentages.) Writing in 1918, Edward Byron Reuter noted that although the term strictly designated "the first generation hybridization between the negro and Caucasian races," it was generally used to describe any Black with "a visible admixture of white blood." EDWARD BYRON REUTER, THE MULATTO IN THE UNITED STATES 11–12 (Haskell House 1969) (1918).

admitted child of master and slave stood as evidence against the polygenists' separate species theory. Polygenists were forced to hold fast to the position that these mixed-race individuals were of diminished fertility, even though that was patently false, or else to redefine the term "species" to fit the obvious fact of vigorous interfertility between Whites and Blacks.

Charles Darwin himself predicted that "when the principle of evolution is generally accepted, as it surely will be before long, the dispute between the monogenists and the polygenists will die a silent and unobserved death."<sup>21</sup> Darwin was himself essentially a monogenist—he correctly posited an African Genesis for the human species<sup>22</sup>—but his central invention, evolution, provided the monogenist side with a scientific explanation of the degraded status of the savage races that did not require biblical support. Despite its convenience, many people, particularly in the South, rejected Darwin's theory because of its clash with fundamentalism.<sup>23</sup>

These beliefs and attitudes endured well into the Twentieth Century, supported after 1900 by the eugenics movement.<sup>24</sup> The social sciences had an impact on miscegenation as well, first supporting and later attacking the concept.<sup>25</sup> This article focuses on anti-miscegenation statutes as applied to former slaves and others of African descent, particularly in the South.<sup>26</sup> However, it should be noted that the statutes were aimed,

21. CHARLES DARWIN, *THE DESCENT OF MAN AND SELECTION IN RELATION TO SEX* 188 (Prometheus 1998) (1871).

22. See *infra* note 174.

23. See EDWARD J. LARSON, *SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION* (1997) for an excellent book-length treatment of the fundamentalists' battle over Darwin's theory.

24. Although there is a logical nexus between the scientific racism of the eighteenth and nineteenth centuries and eugenics, this article does not discuss the eugenics movement. For an excellent discussion of eugenics and the law, see Paul A. Lombardo, *Medicine, Eugenics, And The Supreme Court: From Coercive Sterilization To Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1, 20–23 (1996). Professor Lombardo defines eugenics as "[t]he idea that the human race can be gradually improved and social ills simultaneously eliminated through a program of selective procreation." *Id.* at 1. The term eugenics was coined by Francis Galton, Darwin's cousin. See FRANCIS GALTON, *INQUIRIES INTO HUMAN FACULTY AND ITS DEVELOPMENT* 17 n.1 (1907).

25. See Herbert Hovenkamp, *Social Science And Segregation Before Brown*, 1985 DUKE L.J. 624, 627; Pascoe, *supra* note 1, at 47 (arguing that the attack on scientific racism began in the universities in the 1920s with the work of Franz Boas and other social scientists).

26. Compare:

Certainly, color prejudice was not limited to the [American] South, but nowhere else in the hemisphere was marriage between whites and persons of color, slave or free, outlawed. This did not mean that

initially, at Native Americans as well, and, later, particularly in the Pacific states, at Asian immigrants.<sup>27</sup>

This article first examines the miscegenation paradigm in terms of a seven-point conceptual framework that not merely allowed but practically demanded anti-miscegenation laws,<sup>28</sup> then looks at the legal arguments state courts used to justify the constitutionality of such laws through 1967.<sup>29</sup> Next, it analyzes the Biblical argument, which in its own right justified miscegenation, but also had a major influence on the development of the three major strands of scientific racism: monogenism, polygenism and Darwinian theory.<sup>30</sup> It then probes the concept upon which the entire edifice is constructed—race—and discusses the continuing vitality of this construct.<sup>31</sup> Next, this article turns to the three major strands of scientific racism<sup>32</sup> and briefly develops more modern theories that continued the racist tradition well into the Twentieth Century.<sup>33</sup> The article then looks at the effects of scientific racism on the thoughts and actions of the founding fathers<sup>34</sup> and the Reconstruction-era Congress<sup>35</sup> before turning to the long line of state cases upholding miscegenation statutes, in part by relying on scientific racism.<sup>36</sup> Finally, it discusses the handful of cases that question the constitutionality of anti-miscegenation statutes, including *Perez v. Lippold*<sup>37</sup> and *Loving v. Virginia*.<sup>38</sup>

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miscegenation was rare. On the contrary, the emphasis placed on keeping the races sexually separate seems to have been more an inducement than an inhibition to sexual crossing of the color line. In the Southern census of 1860, over half a million people, equivalent to one in eight of the total slave population, were classed as mulattoes.

RONALD SEGAL, *THE BLACK DIASPORA: FIVE CENTURIES OF THE BLACK EXPERIENCE OUTSIDE AFRICA* 58–59 (1995) (describing the dispersion of Africans through the slave trade).

27. See, e.g., James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 97 (1993) (discussing the history of anti-miscegenation laws in the United States).

28. See *infra* notes 39–60 and accompanying text.

29. See *infra* notes 61–74 and accompanying text.

30. See *infra* notes 75–96 and accompanying text.

31. See *infra* notes 97–106 and accompanying text.

32. See *infra* 107–91 notes and accompanying text.

33. See *infra* notes 192–96 and accompanying text.

34. See *infra* notes 197–217 and accompanying text.

35. See *infra* notes 218–59 and accompanying text.

36. See *infra* notes 237–60 and accompanying text; see also Hovenkamp, *supra* note 25, at 664 (“[F]or most of the period [1896–1947] the Court closely tracked prevailing scientific opinion on race. No responsible judge would have believed that the fourteenth amendment required the state to do something manifestly unreasonable or grossly injurious to the public health or welfare.”).

37. 198 P.2d 17 (Cal. 1948). See *infra* notes 311–48 and accompanying text.

38. 388 U.S. 1 (1967). See *infra* notes 349–57 and accompanying text.

## I. THE PARADIGM

A. *The Conceptual Framework*

Whether rooted in science or theology, and regardless of the changes wrought by time, change in circumstance, and new scientific revelations, a consistent paradigm that justified miscegenation in many American states from colonial times to 1967 emerged. First, there is a natural hierarchy of all beings in the universe. Second, humans are part of this chain. Third, "race" is a valid concept. Fourth, the races can be ranked hierarchically: Whites are the superior race, Asians/Indians are second, and Blacks last. Fifth, this ranking of the races is immutable. Sixth, miscegenation, the crossing of the races, produces crosses that are inferior to either parent. Seventh, mixed races have lower fertility. Eighth, mixing of the races brings the better down to the level of the lower, rather than improving the lower.

First, there is a natural hierarchy of all beings in the universe, a "great chain of being."<sup>39</sup> There is a peculiarly Western need to place sets of things in hierarchical order.<sup>40</sup> This propensity for ranking, in and of itself, is certainly not evil, but as applied to groups of people—from Aristotle's men of gold, silver, and bronze on forward<sup>41</sup>—has had unfortunate results.

39. ARTHUR LOVEJOY, *THE GREAT CHAIN OF BEING: A STUDY OF THE HISTORY OF AN IDEA* (1936).

40. See Barbara K. Kopytoff & A. Leon Higginbotham, Jr., *Racial Purity and Interracial Sex In The Law Of Colonial Antebellum Virginia*, 77 *GEO. L.J.* 1967, 1969 (1968) (discussing application of the Great Chain of being concept to Native Americans and Africans in colonial America) (citing W. JORDAN, *WHITE OVER BLACK* 216–24, 481–511 (1969) (discussing development of hierarchical rankings in Europe during the seventeenth and eighteenth centuries and application of racial hierarchical thinking in American attitudes toward race). Stephen Jay Gould stated that:

We now encounter the second fallacy—ranking, or our propensity for ordering complex variation as a gradual ascending scale. Metaphors of progress and gradualism have been among the most pervasive in Western thought—see Lovejoy's classic essay on . . . the great chain of being or Bury's famous treatment . . . of the idea of progress.

STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 24 (1981) (citing LOVEJOY, *supra* note 39; J. B. BURY, *THE IDEA OF PROGRESS* (1920)).

41. Stephen Jay Gould begins his excellent work on the misapplication of intelligence testing with a brief passage from Plato's dialogues of Socrates. Socrates postulates that society should be divided into three classes: rulers, auxiliaries and craftsmen, and that, in the interest of society, people should be made to accept the status assigned them. The people are to be convinced that this hierarchy is proper by means of a myth: God has mixed gold into the beings of the rulers, silver into the auxiliaries and brass and iron into



Further, the chain metaphor describes a series of distinct units, not an infinite series of gradations. Thus, intermediaries between two links, such as mixed-race children, were seen as unnatural.<sup>42</sup> In other words, because God created a link chain of beings rather than a “great ribbon of being,” with one link representing the White race and one link representing the Black race, there is nowhere to place a mulatto on the chain—she simply doesn’t fit into God’s scheme.<sup>43</sup>

*Second*, humans are part of this chain. Although some would top off the chain with angels,<sup>44</sup> humans—that is White humans—were placed at the top of the chain.

*Third*, “race” is a valid concept. The whole edifice of scientific racism collapses without the keystone concept of race.<sup>45</sup> Thus it has been preserved as a popular cultural construct even as it has come under ever-increasing scientific attack.

*Fourth*, the races can be ranked hierarchically: Whites are the superior race, asians/indians (browns/yellows) are second, and Blacks last.<sup>46</sup> This ranking system was generally consistent. The lowest tier in the Black category was typically reserved for Hottentots or Bushman, with the Aborigines of Australia getting an occasional nod, when they were noted at all.

the craftsmen. The “species” will generally be preserved in the children. When asked if the populace can be led to believe this myth, Glaucon doubts that the living generation will do so, but postulates that subsequent generations will. Gould then concludes that this ranking process has always been a part of Western thought. See GOULD, *supra* note 40, at 19–20. Gould states that “[t]he justification for ranking groups by inborn worth has varied with the tides of Western history. Plato relied upon dialectic, the Church upon dogma. For the past two centuries, scientific claims have become the primary agent for validating Plato’s myth.” *Id.* at 20. Ranking lived on in the work of Arthur Jensen, who in 1979 embarked upon a ranking program not merely of races but of all creatures on Earth. See ARTHUR ROBERT JENSEN, *BIAS IN MENTAL TESTING* (1979). Jensen agreed with early studies that found Blacks to be innately inferior to Whites and debunked the argument that the IQ tests had a cultural bias. See *id.* at 535.

42. See Kopytoff & Higginbotham, *supra* note 40, at 2005 (citing MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO* (1970)).

43. *Id.*

44. Not content with the earthly great chain of being, Jensen went on to place extraterrestrials at the top of his hierarchy! See JENSEN, *supra* note 41, at 248.

45. Obviously, there can be no differentiation or discrimination on the basis of race if the concept does not exist.

46. Blacks were universally denigrated. Georges Cuvier thought of Blacks as “the most degraded of human races.” GEORGES CUVIER, 1 *RECHERCHES SUR LES OSSEMENTS FOSILES* 105 (1812). Sir Charles Lyell, the father of modern geology, compared the brain of a Bushman with that of monkeys. See L. G. WILSON, *SIR CHARLES LYDELL’S SCIENTIFIC JOURNALS ON THE SPECIES QUESTION* 347 (1970). Darwin anticipated that the gap between man and ape would be widened by the anticipated elimination of the intermediary Hottentots. See DARWIN, *supra* note 21, at 201.

*Fifth*, this ranking of the races is immutable. "If the races of man had always thus differed, mentally and physically, how could 'any effort of man,' however noble the motives, 'reverse the law of God, and raise an inferior up to the standard of a superior one?'"<sup>47</sup> Thus, this immutability excuses the lack of any efforts to raise up those races whose cultures are technologically inferior. Evidence showing Black slaves of lighter ancient Egyptians was supposed proof of the antiquity of racial inequality.<sup>48</sup> Despite his belief in evolution, Darwin believed this immutability to be the case.<sup>49</sup>

*Sixth*, miscegenation, the crossing of the races, produces crosses that are inferior in health to either parent.<sup>50</sup> Or, as the former Governor of Mississippi put it as late as 1947, mongrelization does not work anywhere in the animal kingdom; "crossbreed an Irish Setter with a blood hound [and] you have neither bird dog nor man hunter."<sup>51</sup> In some instances it was argued that the addition of White blood to Black might improve the Black,<sup>52</sup> but it was universally agreed that the addition of Black blood to White would degrade the White.<sup>53</sup> Note, however, that other scientists have, from time to time, reached the opposite conclusion, that mixed races are actually physically superior.<sup>54</sup>

47. WILLIAM STANTON, *THE LEOPARD'S SPOTS: SCIENTIFIC ATTITUDES TOWARD RACE IN AMERICA, 1815-1859*, at 148 (1960) (quoting a speech by Josiah Nott). In an updated version, this view is reflected in the opinions of some affirmative action opponents.

48. See *infra* note 134 and accompanying text.

49. See *infra* note 183.

50. See Hovenkamp, *supra* note 25, at 654 (citing the work of anthropologist Fredrick Hoffman and Harvard professor Nathaniel Southgate Shaler); Trosino, *supra* note 27, at 101-02.

51. THEODORE G. BILBO, *TAKE YOUR CHOICE: SEPARATION OR MONGRELIZATION 207* (1947). Bilbo was the two-time Governor of and a three-term United States Senator from Mississippi. Bilbo's text is available online courtesy of the God's Order Affirmed in Love Reference Library, <[http://www.melvig.org/tyc\\_toc.html](http://www.melvig.org/tyc_toc.html)> (visited May 14, 2000). For another canine analogy, see JOHN PINKERTON, *DISSERTATION ON THE ORIGIN OF THE SCYTHIANS OR GOTHs (1787)*, quoted in HORSMAN, *supra* note 12, at 31: "A Tartar, a Negro, [and] an American [Indian] . . . differ as much from a German, as a bull-dog, or lap-dog, or shepherd's cur, from a pointer."

52. See, e.g., THOMAS JEFFERSON, *WRITINGS 267* (Library of America 1984) (observing that Blacks improved both mentally and physically when mixed with White blood).

53. See *Lonas v. State*, 50 Tenn. (1 Heisk.) 287, 298 (1871) (headnote of Attorney General Heiskell for the State) ("It is said [miscegenation statutes are] discrimination against the negro. Really, those laws were intended to repress the white race, not the negro. The negro was not considered as hurt by the intermixture of the white race, but it was the deterioration of the white race that was against policy.").

54. See, e.g., J. W. GREGORY, *THE MENACE OF COLOR: A STUDY OF THE DIFFICULTIES DUE TO THE ASSOCIATION OF WHITE & COLOURED RACES, WITH AN ACCOUNT OF MEASURES PROPOSED FOR THEIR SOLUTION, & SPECIAL REFERENCE TO WHITE COLONIZATION IN THE TROPICS 225-26* (1925).

*Seventh*, mixed races have reduced fertility.<sup>55</sup> This was clearly untrue, and each product of a mixed union demonstrated the fact.<sup>56</sup> Further, these mixed race individuals blurred the lines between the races and, thus, made miscegenation statutes and other race-based statutes difficult to enforce.<sup>57</sup> Rather than simply ignoring the myth of reduced fertility, White Southerners postulated a thesis that was more difficult to disprove: infertility manifested itself in the third generation.<sup>58</sup> But note that in other slave-owning nations the views regarding the products of miscegenation were decidedly different.<sup>59</sup>

*Eighth*, mixing of the races brings the better down to the level of the lower, rather than improving the lower. Since the concern of those adopting miscegenation laws was only the health of the White race, the important point was that the mixing of Black blood into White would reduce the quality of the White. It was, in a sense, inconsequential that the addition of White blood to Black might improve the Black. Nevertheless, for those who accepted the validity of the entire racist paradigm, there is a certain logic to the proposition that the admixture of superior

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55. See, e.g., *State v. Jackson*, 80 Mo. 175, 179 (1883) (upholding conviction of a White woman for marrying a mixed-race man because, inter alia, they cannot have children), discussed *infra* notes 240–45.

56. Samuel Morton provided one possible explanation of the fact that Blacks and Whites could interbreed. Some related species were able to breed in nature, but this fact was hidden by the “natural repugnance” between the species. The close proximities forced by domestication broke down this natural instinct to cross-breed, resulting in hybrids. See STANTON, *supra* note 47, at 115.

57. See Kopytoff & Higginbotham, *supra* note 40, at 1968. This resulted in a new problem in the definition of “White.” In Virginia, the term mulatto was eliminated in 1866 and thereafter anyone with more than one-fourth Black blood was Black. In 1910, the percentage making an individual Black was lowered to one-sixteenth. See Wadlington, *supra* note 2, at 53–54 (citing 1910 Va. Acts ch. 17, § 1, at 84; 1865–1866 Fa. Acts ch. 357, at 581). But in 1924, “An Act to Preserve Racial Integrity,” the law on the books for *Naim v. Naim*, 87 S.E.2d 749, 753 (1955), and *Loving v. Virginia*, 388 U.S. 1 (1967), defined “White” as having “no trace whatsoever of any blood other than Caucasian.” Ch. 371 1924 Va. Acts, quoted in Wadlington, *supra* note 2, at 1200.

58. See Trosino, *supra* note 27, at 101–02.

59. The “Brazilians would come purposefully to proclaim miscegenation as having been a major factor in the making of their national identity.” SEGAL, *supra* note 26, at 73. The shortage of Portuguese women combined with the need for more labor caused the colonists to turn to first Indian and then African women and made miscegenation both “widespread” and “reputable.” *Id.* It has also been argued that miscegenation was more tolerated in America during the pioneer period because of the shortage of White women in the Colonies. See EDWARD BYRON REUTER, *THE AMERICAN RACE PROBLEM: A STUDY OF THE NEGRO* 136 (1938). There was also a high incidence of miscegenation in Jamaica. See SEGAL, *supra* note 26, at 44. In Jamaica, “the relaxed sexual attitudes of a white population with a considerable disparity between the numbers of its women and the appetites of its men” resulted in a population that was, according to the first official census of 1844, 15,776 White, 293,128 Black, and 68,549 “colored.” *Id.* at 172–73.

genes would improve the lesser stock. Indeed, this was Thomas Jefferson's belief.<sup>60</sup>

### B. *The Legal Argument*

Motivated wholly or in part by scientific racism, the courts were able to muster a number of legal arguments to defend their own states' miscegenation statutes and, as often became the case, defend their unwillingness to recognize miscegenous marriages entered into in states where such marriages were legal.<sup>61</sup> First, anti-miscegenation supporters argued, the regulation of marriage was of primary importance and reserved to the states under the Tenth Amendment.<sup>62</sup> Indeed, the *Loving* Court held marriage to be one of the Nation's "basic civil rights," and "fundamental to the very existence and survival of the race."<sup>63</sup> Thus, the regulation of marriage by the various states was an appropriate example of the police power.<sup>64</sup> In that light, regulation of miscegenous marriages is

60. See JEFFERSON, *supra* note 52, at 267. Nott also believed that a "small trace of white blood in the Negro improves his intelligence and moral character." STANTON, *supra* note 47, at 160.

61. See Wadlington, *supra* note 2, at 1213.

62. U.S. CONST. amend. X (1791). See *Plessy v. Ferguson*, 163 U.S. 537, 544-45 (1896) (arguing that the Fourteenth Amendment was not intended to enforce social equality or interaction between Blacks and Whites); *Maynard v. Hill*, 125 U.S. 190, 205 (1888) ("Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to control of the [state] legislature."); *Ex parte Kinney*, 14 F. Cas. 602 (E.D.Va. 1879) ("Congress has made no laws regulating marriage because it lacks the constitutional power to do so.")

63. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)) (internal quotations omitted). Cf. *Stevens v. United States*, 146 F.2d 120, 123 (1944), discussed *infra* notes 278-280 and accompanying text ("[Marriage] is a domestic relation having to do with the morals and civilization of a people. It is an essential institution in every well organized society. It affects in a vital manner public welfare, and its control and regulation is a matter of domestic concern within each state."); see also *Kirby v. Kirby*, 206 P. 405, 406 (Ariz. 1922) (stating that the regulation of marriage, including miscegenation statutes, "is peculiarly a matter of state regulation"); *Takahashi's Estate v. Jorgensen*, 129 P.2d 217, 220 (Mont. 1942) ("The control and regulation of marriage is a matter of domestic concern within each state.")

64. See *Plessy*, 163 U.S. at 545 ("Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet they have been universally recognized as within the police power. . ."); *New York v. Miln*, 36 U.S. 102 (1837), cited in *State v. Gibson*, 36 Ind. 389, 401 (1871) and *Fraser v. State*, 3 Tex. App. 263, 275 (1877) ("The right in the states to regulate and control, to guard, protect, and preserve this God-given, civilizing, and Christianizing institution, is of inestimable importance, and cannot be surrendered, nor can the states suffer or permit any interference therewith."); *State v. Brown*, 108 So.2d 233 (La. 1959) ("[The miscegenation statute] falls squarely within the police power of the state, which has an interest in

akin to regulation of marriages between near relatives or the insane or polygenous marriages.

Second, the anti-miscegenation supporters argued that miscegenation statutes present no Equal Protection problems because both races were treated the same.<sup>65</sup> Between *Plessy v. Ferguson*<sup>66</sup> and *Brown v. Board of Education*,<sup>67</sup> the Supreme Court's position on Equal Protection did not contradict this argument supporting anti-miscegenation statutes. But the argument also retained continued vitality in the period between *Brown* and *Loving* because of the Court's initial reluctance to face miscegenation head on.<sup>68</sup> The courts could also argue with some support that the original intent of drafters of the Fourteenth Amendment was to allow bans on inter-racial marriage after the adoption of the amendment.<sup>69</sup>

Further, the anti-miscegenation supporters argued, although marriage is often referred to as a contract, it is not a "contract" in the sense envisioned by the Contracts Clause.<sup>70</sup> Thus, miscegenation statutes would be rendered worthless if one could avoid them merely by traveling to get married in a state that allowed miscegenous marriages.<sup>71</sup>

Finally, in *Pace v. Alabama*<sup>72</sup> the Supreme Court required little more than a page to set the long-standing precedent that miscegenation statutes do not violate Equal Protection when they apply "the same punishment

maintaining the purity of the races and in preventing the propagation of half-breed children."); see also *Dodson v. State*, 31 S.W. 977 (Ark. 1895) ("[Marriage] is more than [a civil contract.] "It is a social and domestic relation, subject to the exercise of the highest governmental power of the sovereign state, . . . the police power."). But see *Hart v. Hoss & Elder*, 26 La. 90, 94 (1874) (stating that marriage is a civil contract under Louisiana law).

65. See, e.g., *Pace v. Alabama*, 106 U.S. 583, 585 (1882) (Alabama's anti-miscegenation provision does not violate Equal Protection Clause); *Jackson v. Denver*, 124 P.2d 240, 241 (Colo. 1942) ("There is here no question of race discrimination. The statute applies to both white and black."); *Ex parte Kinney*, 14 F. Cas. 602, 604 (E.D.Va. 1879) ("If it forbids a colored person from marrying a white, it equally forbids a white person from marrying a colored.").

66. 163 U.S. 537 (1896).

67. 347 U.S. 483 (1954).

68. See *infra* notes 282-301 and accompanying text.

69. See Alfred Avins, *Anti-miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224, 1253 (1966) (positing that based upon original intent analysis, anti-miscegenation statutes are constitutional); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955) (arguing that according to original intent analysis, the anti-miscegenation statutes were constitutional, but that the Court was right to ignore nineteenth century thinking).

70. See, e.g. *Lonas v. State*, 50 Tenn. (3 Heisk.) 287, 308 (1871) ("[Marriage], therefore, differs essentially from that species of contract contemplated by the Constitution.").

71. See, e.g., *State v. Kennedy*, 76 N.C. 251, 253 (1877) ("A law like this of ours would be very idle if it could be avoided merely stepping over an imaginary line.").

72. 106 U.S. 583 (1883).

to both offenders, the black and the white."<sup>73</sup> The case arose when Tony Pace, an African American man, and Mary Cox, a White woman, were arrested for living together in adultery or fornication and sentenced to two years' imprisonment.<sup>74</sup>

### C. *Because The Bible Tells Me So*

The casual reader needs theological help to gain an understanding of Black inferiority from Genesis.<sup>75</sup> Ten generations after Adam, Noah, at age 500, fathered three sons, Shem, Ham and Japheth.<sup>76</sup> Then follows the familiar story of the ark and the flood, killing all but Noah, his wife, his three sons and their wives.<sup>77</sup> These survivors are then instructed by God to "[b]e fruitful and multiply, and, fill the earth."<sup>78</sup> Believers in the literal interpretation of Genesis accept that all humans descended from Noah's three sons.<sup>79</sup>

After the flood had receded came the event that brands Ham and his progeny as appropriate candidates for slavery. Noah becomes drunk from wine and passes out, naked, in his tent.<sup>80</sup> Ham is then described as "seeing" his father naked,<sup>81</sup> which could be interpreted as implying a sexual act.<sup>82</sup> Then Shem and Japheth, by walking backward to their father with a garment in hand, manage to cover him without seeing him naked.<sup>83</sup> When Noah learns what took place while he slept, he says, "Cursed be Ca'naan; lowest of slaves shall he be to his brothers."<sup>84</sup> Canaan, as the son of Ham, can be seen to denote the children of Ham.

73. *Id.* at 585.

74. *See id.* at 584.

75. *Cf.* Wiecek, *supra* note 18, at 1726 (describing the story as "nontextual but irrepressible," and noting that: "Nowhere in this passage or anywhere else in the Bible is there any allusion to the race of Ham and Canaan, nor did Christian tradition originally supply any racial linkage. But Jewish tradition did, identifying Ham as the father of the black African race") (citing JORDAN, *supra* note 40, at 18).

76. *See Genesis* 5:32.

77. *See Genesis* 7:1–8:22.

78. *Genesis* 9:1.

79. *See Genesis* 9:18 (stating that Noah's three sons survived).

80. *See Genesis* 9:21.

81. *See Genesis* 9:22.

82. Indeed, when God explains to Moses the appropriate degrees of separation required to avoid incest, the phrase "uncover the nakedness of . . ." is used throughout the conversation as a euphemism for sexual relations. *LEVITICUS* 18:6–19.

83. *See Genesis* 9:23.

84. *Genesis* 9:25. Note that Noah, *not* God, curses Canaan. This subtlety was frequently overlooked. For example, in a passage discussing the monogeny/polygeny debate in the context of state legislation banning miscegenation, one state legislator stated, "[I] do

Japheth's descendants are generally described as moving toward the Aegean peninsula, Asia Minor and farther east.<sup>85</sup> The descendants of Ham migrate towards North Africa, Canaan, Egypt and Ethiopia.<sup>86</sup> Canaan, Ham's son, is specifically described as the ancestor of pre-Hebrew peoples around Palestine.<sup>87</sup> Shem is described as the father of all the children of Eber, ancestor of the Hebrews.<sup>88</sup> These beliefs found their way into actions that brought them into contact with the courts.

From this scriptural basis the Goldsboro School's founders<sup>89</sup> and others concluded that Asians and Africans are Hamitic, Hebrews are Shemitic and Whites are Japhethitic.<sup>90</sup> By contrast the California Supreme Court in 1933 agreed that "Americans" were Japhethitic but considered the "Mongolians" Shemitic.<sup>91</sup>

know from Holy Writ that the negro race, whether they belong to the same race as we do or to a higher order of animals, are under the ban of heaven—a curse that was pronounced upon them by Almighty God still remains upon them." REPORT OF DEBATES OF THE REVISION OF THE CONSTITUTION, I at 451 (Ill. 1850), *quoted in* FOWLER, *supra* note 2, at 213.

85. See Genesis 10:2–5.

86. See Genesis 10:6–14.

87. See Genesis 10:15–20.

88. See Genesis 10:21.

89. See *Goldsboro Christian Schools v. United States*, 436 F. Supp. 1314 (D.S.C. 1977), *aff'd* 644 F.2d 879 (4th Cir. 1981) (denying school tax-exempt status because of racially discriminatory admissions policy). See generally *Racial Exclusion by Religious Schools*, *Brown v. Dade Christian Schools, Inc.* Case Comments, 91 HARV. L. REV. 879 (1978); Comment, *The Tax Exempt Status of Sectarian Educational Institutions That Discriminate on the Basis of Race*, 65 IOWA L. REV. 258 (1979). For an early defense of slavery based on Scripture, see RICHARD NISBET, *SLAVERY NOT FORBIDDEN BY SCRIPTURE OR A DEFENCE OF THE WEST-INDIAS PLANTERS, BY A WEST INDIAN* 21 (1773), *cited in* Fowler, *supra* note 2, at 83 ("On the whole, it seems probable, that [Blacks] are a much inferior race of men to the whites, in every respect.").

90. See *Bob Jones University v. United States*, 461 U.S. 574, 583 n.6 (1982). The Court held that the Christian university did not qualify as a tax-exempt organization because it denied admission to Blacks who favored interracial dating and marriage, because, based on the story of Noah's three sons, Ham, Shem and Japheth, the biological mixing of the races is a violation of God's command. See *id.* at 580–81, 605.

91. See *Roldan v. Los Angeles*, 18 P.2d 706, 708 (Cal. 1933). One of the more illuminating—if not lucid—explanations of the lingering racist view of the story of Ham is found in JNO. R. IRWIN, *THE CRISIS: LET'S KEEP THE UNITED STATES WHITE, -OR- SHALL THE SONS AND DAUGHTERS OF "SHEM" MATE WITH THE SONS AND DAUGHTERS OF "HAM"* (1945). According to Irwin, the sons of Shem, the Whites, are God's chosen people, "the first and foremost in promoting civilization," represented by Jesus and Mary. *Id.* at 13. White colonialism/imperialism is further proof of the superiority of the sons of Shem:

The white people have dominated the world and virtually controlled all of the different races, the yellows and blacks, and they now hold protec-

Of course, if the specific passages were not sufficient, one could rely upon "the overall concept of the teachings of the Scriptures" and upon "God's will."<sup>92</sup> Further, it is not for courts to dismiss these (or any) beliefs merely because they seem unreasonable or even incomprehensible.<sup>93</sup>

The fundamentalists' racial theorizing was further complicated by Archbishop Ussher's grossly inaccurate calculation that Genesis began in 4004 B.C.<sup>94</sup> Since Noah was 500 when he fathered his three sons,<sup>95</sup> this left less than 3,500 years for the various races to achieve their current colors and disperse throughout the world.

torates and concessions over seven-eighths of the population of the earth. They were the first to prohibit slavery and to bring *freedom to mankind*.

*Id.* at 14. He concludes, "[t]he White is a superior race in the family of nations and his superiority is evidenced and shown forth in wonderful achievements." *Id.* Japheth's sons are given grudging praise: "they must be classified as a worthy Brother in the family of the world's nations." *Id.* at 15. Turning to Ham, Irwin reiterates the common mistake of stating that Noah curses Ham (as opposed to his son, Canaan) and states, "[t]his curse apparently has followed this race throughout its existence, in all countries where he has lived." *Id.* at 16. He concludes that the sons of Ham have made no contributions whatsoever to the world or civilization. *See id.*

92. *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310, 320 (5th Cir. 1977) (en banc) (school's racially discriminatory admissions policy was based on social or political reasons, not religious belief). Other theorists documented the belief held by some that the Black race was "the great beast of the Apocalypse," or even the talking serpent from the Garden of Eden. ERIC JOHN DINGWALL, *RACIAL PRIDE AND PREJUDICE* 67 (Greenwood Press 1979) (1948). In addition, Paul's request for the return of the slave Onesimus was, to some, an obvious foreshadowing of the Fugitive Slave law. *See STANTON, supra* note 47, at 194; *see also Nehemiah* 13:27 ("Shall we then hearken unto you to do all this great evil, to transgress against our God in marrying strange wives?"); *Genesis* 24:3-5 ("Thou shalt not," said Abraham, "take a wife unto my son of the daughters of the Canaanites, among whom I dwell; but thou shalt go unto my country, and to my kindred, and take a wife unto my son Isaac.") (emphasis added), *quoted in Lonas v. State*, 50 Tenn. (3 Heisk.) 287, 310 (1871). *But see Acts* 17:26 (Saint Paul stated that God "hath made of one blood all nations of men.").

93. *See United States v. Ballard*, 322 U.S. 78 (1944), *rev'd on other grounds*, 329 U.S. 187 (1946). *See Note, Section 1981 after Runyon v. McCrary: The Free Exercise Right of Private Sectarian Schools to Deny Admission to Blacks on Account of Race*, 1977 DUKE L. REV. 1219, 1238 n.79.

94. *See HORSMAN, supra* note 12, at 45. "If all the varieties of mankind had descended from one pair in less than six thousand years, then it was difficult to write of inherent, wide gulfs separating different races." *Id.*; *see also id.* at n.1 for additional citations. The good Archbishop was off by quite a bit, according to modern thinking. The earth was formed about 4.5 billion years ago, the first life appeared about 4 billion years ago, the first representatives of the hominid line about 7.5 million years ago, and the first *Homo sapiens* about 100,000 years ago. *See RICHARD LEAKEY & ROGER LEWIN, ORIGINS RECONSIDERED, IN SEARCH OF WHAT MAKES US HUMAN* 32-33 (1992).

95. *See Genesis* 5:32.



Throughout the cases discussed below there is a great deal of overlap between Bible-based theorizing and the various scientific theories of the day.<sup>96</sup>

#### D. The Concept of "Race"

Of course, any analysis justifying anti-miscegenation statutes on the basis of White racial superiority assumes the validity of the concept of "race," a term only applied to the human species. As noted, Linneaus assumed the existence of separate races.<sup>97</sup> Racial classifications have varied since then. German physician Johann Friedrich Blumenbach divided mankind into five races: Caucasian or White, Mongolian or yellow, American or red, Malay or brown, and Negro or Black.<sup>98</sup> Blumenbach's

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96. See Hovenkamp, *supra* note 25, at 636 ("Frequently the scientific and religious arguments were so closely intertwined that it was hard to tell where one ended and the other began."). Although not a miscegenation case, *West Chester R.R. Co. v. Miles*, 55 Pa. 209 (1867), most aptly lays out this proposition:

[T]he question is one of difference, not of superiority or inferiority. Why the Creator made one black and the other white, we know not but the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution. . . . The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures. . . . The separation of the white and black races upon the surface of the globe is a fact equally apparent. . . . It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix.

*Id.* at 213. Proponents of this argument were apparently unaware of the irony of their position. It is exemplified by Senator Blair's statement that "[i]t was intended that they should be distinct and separate races, and that different portions of the earth's surface were intended for their occupancy, and they were not intended to be mingled; and whenever you do mingle them, you make a mongrel race, which becomes demoralized and degraded. . . ." CONG. GLOBE, 42d Cong. 2d Sess. 3252 (1872), *quoted in* Steven A. Bank, *Anti-miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875*, 2 U. CHI. L. SCH. ROUNDTABLE 303, 306-07 (1995) (quoting Senator Blair). Senator Blair apparently ignored the fact that the abandonment of God's plan was occasioned by White colonialism and the Black Diaspora caused by slavery.

97. See *infra* notes 113-15.

98. See *Roldan v. Los Angeles County*, 18 P.2d 706, 707 (Cal. 1933). In *Roldan* the court was faced with the problem of penetrating the morass of possible racial classifications when Solvador Roldan, "a Filipino, viz, 'an Illocano, born in the Philippine Islands of Filipino progenitors in whose blood was co-mingled a strain of Spanish,' and not a Mongolian," attempted to wed a White woman and was denied a license. *Id.* Specifically, the problem the court faced was whether the legislature, in prohibiting the marriage of a White and a Mongolian, intended to include Filipinos as Mongolians. As noted, Blumenbach classified the Malaysian race (as well as the Native American) as separate races, but,

highly influential scheme<sup>99</sup> presumed that the four non-White races had degenerated from the original White race. The later merger of the Malay and American races into the Mongolian by, among others, Georges Cuvier,<sup>100</sup> better fitted the Biblical theory of Noah's three sons, creating three distinct racial groups.

The modern trend has been to argue that race is not a biological but a sociological construct. Professor Knepper surveyed twenty-two recent physical anthropology texts and found that only two still classified humans by race.<sup>101</sup> By 1987, the Supreme Court could note that:

Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary and of little use in understanding the variability of human beings. . . . Clear-cut categories do not exist. . . . These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature.<sup>102</sup>

Indeed man's most dangerous myth<sup>103</sup> has been discredited in many circles, with less than half of physical anthropologists now believing there is such a thing as biological race.<sup>104</sup> But race remains a useful concept in

as noted by the court, many recent theorists had included the Malays and Native Americans in the Mongolian race. But, the court concluded, at the time of the adoption of the anti-miscegenation law in question, the legislature still followed Blumenbach's classification scheme, and, thus, Mr. Roldan, a Filipino and, thus, a Malay, was not prohibited from obtaining a license to marry a White woman. *See id.*

99. *See* Paul Knepper, *Race, Racism And Crime Statistics*, 24 S.U. L. Rev. 71, 78 (1996) ("[Blumenbach's] 1795 classification has dominated popular thinking for two centuries.").

100. Cuvier was a French zoologist. *See id.* at 78 n.21.

101. *See id.* at 79.

102. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 610 n.4 (1987). Justice White's footnote also includes a long string cite of social scientists' works arguing against a biological basis for race. *See id.* When Al-Khazraji was denied tenure at St. Francis College, he sued, inter alia, under section 1981 of Title VII of the Civil Rights Act of 1964, a remedy unavailable to him if he were considered Caucasian. *See id.* at 606.

103. *See* MONTAGU, *supra* note 1.

104. *See* James Shreeve, *Terms of Estrangement*, DISCOVER, Nov. 1994, at 57. *Cf.* Kopytoff & Higginbotham, *supra* note 40, at 1981 ("Most anthropologists today reject the notion that the world's races are distinct types and prefer to speak instead of clusterings of physical traits that occur differently in different populations.") (citing THE CONCEPT OF RACE (Ashley Montagu ed., 1964)); UNITED NATIONS EDUCATIONAL SCIENTIFIC & CULTURAL ORGANIZATION (UNESCO), RACE AND SCIENCE (1961); MARK L. WEISS & A. MANN, HUMAN BIOLOGY AND BEHAVIOR: AN ANTHROPOLOGICAL PERSPECTIVE 526, 533 (1975); *see also* Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 6 (1994) ("[O]verwhelming evidence proves that race is not biological. Biological races like Negroid and Caucasoid

reporting data and still has many supporters.<sup>105</sup> The ultimate conclusion must be that race means something; the debate centers on what it actually means.<sup>106</sup>

## II. PRE-DARWINIAN THEORIES OF RACIAL INFERIORITY

Before Darwin provided evolutionary ammunition for a new line of thinking, believers in monogenism recognized the Biblical view that all men derived from Adam, but believed that human racial variation is caused by varying degrees of degeneration since (alternatively) the Fall, the Flood, or the Tower of Babel with, of course, Whites having degenerated the least (if any) and Blacks the most.<sup>107</sup> By contrast, the polygenists saw Blacks as a separate species descended from a different "Adam."<sup>108</sup>

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simply do not exist."); Neil Gotanda, *A Critique of "Our Constitution is Color-blind,"* 44 STAN. L. REV. 1, 2 (1991) (examining definitions of race used by the Supreme Court); Salim Muwakkil, *Evidence Mounting That Africa Is The Origin Of Man*, CHI. TRIB., Nov. 9, 1998, at 13 ("It seems increasingly clear that the concept of race is an insidious fiction that has served primarily to justify exploitation, slavery and imperial conquest."); Cf. C. V. ROMAN, *AMERICAN CIVILIZATION AND THE NEGRO* 327 (F.A. Davis 1921) ("The word race is really inappropriate as a designation of human varieties. The permanent characteristics of mankind are common to all the varieties; and the differences that characterize the varieties are transitory.").

105. See DINESH D'SOUZA, *THE END OF RACISM* 431-37, 447-50 (1995) (arguing in support of the validity of the construct "race"). Richard Herrnstein and Charles Murray have argued that:

There are differences between races, and they are the rule, not the exception. That assertion may seem controversial to some readers, but it verges on tautology: Races are by definition groups of people who differ in characteristic ways. Intellectual fashion has dictated that all differences must be denied except the absolutely undeniable differences in appearance, but nothing in biology says this should be so. On the contrary, race differences are varied and complex—and they make the human species more adaptable and more interesting.

RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 272 (1994).

106. Ironically, one argument against race—that there are no pure and distinct races but rather gradations of infinite variety—results from the interbreeding of races that the anti-miscegenation statutes failed to prevent.

107. See GOULD, *supra* note 40, at 39.

108. See *id.*

A. *The Monogenists*

The monogenist argument, aided and abetted by the story of Ham,<sup>109</sup> was amazingly long-lived.<sup>110</sup> Further, the fact that miscegenation, another long-lived concept, produced fertile progeny argued against the multiple species theory.<sup>111</sup> However, polygeny had the advantage for segregationists and supporters of slavery of being American in origin. According to Gould, "it is obviously not accident that a nation still practicing slavery and expelling its aboriginal inhabitants from their homelands should have provided a base for theories that blacks and Indians are separate species, inferior to whites."<sup>112</sup>

The monogenists could trace their scientific support all the way back to Carolus Linnaeus. The Swedish naturalist categorized all races of men as one species in his *Systema Naturae* in 1735.<sup>113</sup> Linnaeus divided the human species into races. He distinguished the superior *Homo sapiens europaeus* from the inferior *Homo sapiens afer* both physically and in terms of behavior.<sup>114</sup> Europeans were ruled by customs, whereas the Blacks were ruled by caprice. Black women were shameless and lactated profusely; Black men were indolent.<sup>115</sup>

Dr. Samuel Stanhope Smith, President of the College of New Jersey (now Princeton) believed that all mankind descended from a single couple in central Asia and that migrations caused by population pressure caused the now-evident racial variations.<sup>116</sup> Smith was "by far the most influential writer on race in the American scientific community."<sup>117</sup>

The Reverend John Bachman of South Carolina was an amateur scientist, a monogenist and a Creationist.<sup>118</sup> He believed that man had developed into different races through adaptation following migration to the various continents.<sup>119</sup> He saw Whites as having improved from a primal

109. See *supra* notes 76–88 and accompanying text.

110. As discussed *supra* note 89, it was used as justification for race discrimination in the Goldsboro schools as late as 1977.

111. Separate species generally cannot interbreed.

112. GOULD, *supra* note 40, at 42–43.

113. See STANTON, *supra* note 47, at 3.

114. See D'SOUZA, *supra* note 105, at 123. *But cf.* Wiecek, *supra* note 18, at 1733 ("[i]mplicit in his classification of humans . . . was the basis of scientific racism").

115. See LINNAEUS, *supra* note 16.

116. See STANTON, *supra* note 47, at 3–5.

117. HORSMAN, *supra* note 12, at 99. Smith's AN ESSAY ON THE CAUSES OF THE VARIETY OF COMPLEXION AND FIGURE IN THE HUMAN SPECIES (1787) was the "first major American work on racial differences." HORSMAN, *supra* note 12, at 99.

118. See STANTON, *supra* note 47, at 123.

119. See *id.* at 130–36.

type and Blacks as having degenerated from this common ancestor.<sup>120</sup> But, inconsistently, he believed that these adaptations were immutable.<sup>121</sup> He reconciled these two conflicting points by arguing that the adaptations that created the races were, in effect, a one-time adaptation implanted in the races by God, to be triggered upon arrival in the various new climates of the world.<sup>122</sup> This tortured logic had the happy side effect of explaining racial variations without disputing Genesis, yet leaving Blacks permanently on the bottom of the racial hierarchy, and, thus, absolving Whites of any obligation to improve their lot in life. Bachman could justify slavery and anti-miscegenation laws by reference to scripture and by reference to the scientific conclusion that Blacks were an inferior species needing the White protection that the institution of slavery could provide.<sup>123</sup>

### B. The Polygenists

A fitting transitional figure between the mongenists and the polygenists is Lord Kames,<sup>124</sup> who thought that the differences in the races of man were so great that they must be of separate species. He attempted to reconcile his thesis with Genesis by arguing that God had differentiated the races at the time of the Tower of Babel.<sup>125</sup>

Samuel George Morton developed the theory, published in *Crania Americana*,<sup>126</sup> that one could rank the races based on the size and other characteristics of the brain.<sup>127</sup> Naturally, the result of his extensive study of skulls placed Whites at the top, Indians in the middle, and Blacks at the bottom.<sup>128</sup> According to Gould, Morton's results were completely wrong, but not the result of "conscious fraud."<sup>129</sup> But Morton's data was accepted

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120. See *id.* at 136.

121. See *id.* at 131.

122. See *id.* at 130.

123. See GOULD, *supra* note 40, at 70 (noting that Bachman saw Blacks as children in need of White protection).

124. See LORD HENRY HOME KAMES, *SKETCHES OF THE HISTORY OF MAN* (1774).

125. See STANTON, *supra* note 47, at 15–16. Others, like Charles White, English author of *AN ACCOUNT OF THE REGULAR GRADATION IN MAN* (1799), argued that most "rational Christians" believed the account in Genesis to be "allegorical." STANTON, *supra* note 48, at 17.

126. SAMUEL MORTON, *CRANIA AMERICANA: OR: A COMPARATIVE VIEW OF THE SKULLS OF VARIOUS ABORIGINAL NATIONS OF NORTH AND SOUTH AMERICA* (1839).

127. See GOULD, *supra* note 40, at 51.

128. See *id.* at 53–54.

129. *Id.* at 54. The exact nature of Morton's many errors is not of concern here. (It appeared that Morton's results simply mimicked his prior convictions.) What is interesting is Gould's assertion that he did not realize his errors—had they been intentional misrep-

at the time, and his theories were warmly embraced as justifications for slavery in the South.<sup>130</sup> Nevertheless, as noted above, the South was troubled by polygeny's apparent contradiction with the literal word of the Bible, and therefore Southerners tended to embrace the monogenist argument and the story of Ham.<sup>131</sup>

Morton did not hesitate to assign moral and intellectual characteristics to the various crania he surveyed, assigning the "highest intellectual endowments" to the White race and holding some tribes of the "Ethiopian" race to be "the lowest grade of humanity."<sup>132</sup> Surveying Blumenbach's five races, he found a hierarchy of brain volume: "Caucasian, Mongolian, Malay, American and Negro."<sup>133</sup>

Morton later turned, with the help of British-born lecturer and Egyptologist George Gliddon, to the crania and artifacts of the ancient Egyptians to show that the Black race was not only ancient and immutable, but also historically fitted for its slave status by the fact that Blacks were slaves to the (White) ancient Egyptian builders of the pyramids.<sup>134</sup> Morton's *Crania Aegyptiaca*<sup>135</sup> attracted worldwide attention, with particular interest in the American South.<sup>136</sup> Following up on Morton's work, Dr. Sanford D. Hunt, working with the bodies of 405 dead Civil War soldiers, "discovered" that the average White person's brain weighed five ounces more than the average Black person's brain.<sup>137</sup>

resentations, he would not have openly displayed his data in a way that allowed Gould to recalculate his numbers. As noted below, Morton's "innocent" miscalculations lead one to wonder about the long-term survival of the analysis of *The Bell Curve*. See *infra* notes 363–72 and accompanying text.

130. See GOULD, *supra* note 40, at 69 (citing STANTON, *supra* note 47, at 144). Perhaps even more popular was polygenist Josiah Nott, who toured the South with his "lectures on niggerology." See *infra* notes 138–143.

131. See GOULD, *supra* note 40, at 70.

132. STANTON, *supra* note 47, at 33.

133. *Id.* at 41.

134. For a critical summary of the Afrocentrist theory of Egypt as a Black civilization, see MARY LEFKOWITZ, NOT OUT OF AFRICA: HOW AFROCENTRISM BECAME AN EXCUSE TO TEACH MYTH AS HISTORY (1996); D'SOUZA, *supra* note 105, at 367–70; Kevin Brown, *Do African Americans Need Immersion Schools?: The Paradoxes Created By Legal Conceptualization Of Race And Public Education*, 78 IOWA L. REV. 813, 854 n.167 (1993) (listing those who hotly dispute the claims of African origin of civilization). For those arguing in support of an African origin of Western Civilization, see MARTIN BERNAL, BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSICAL CIVILIZATION: THE FABRICATION OF ANCIENT GREECE 1785–1985 (1987); Brown, *supra*, at 852–56.

135. See SAMUEL MORTON, CRANIA AEGYPTIACA: OR, OBSERVATIONS OF EGYPTIAN ETHNOGRAPHY DERIVED FROM ANATOMY, HISTORY AND THE MONUMENTS (1844).

136. See HORSMAN, *supra* note 12, at 129.

137. See Hovenkamp, *supra* note 25, at 631–32.

Dr. Josiah Nott of Alabama's contribution to the debate was alarmingly titled, *The Mulatto a Hybrid—Probable Extermination of the Two races If the Whites and Blacks Are Allowed To Intermarry*.<sup>138</sup> Nott believed that Whites and Blacks were of two separate species but did not explain how they came to be that way, suggesting only that God made them that way or changed them at some time.<sup>139</sup> Nott found the account of the Creation in Genesis to be absurd, and, according to Stanton, was probably the first American scientist to put forth the separate creation theory in public.<sup>140</sup> But, in order to call Blacks and Whites separate species he had to finesse the problem of specific infertility. This he did by ignoring the problem and defining species by "peculiarities of structure."<sup>141</sup> Nott later collaborated with Dr. Gliddon to create the two-volume "bible"<sup>142</sup> of the "pluralists" or polygenists, *Types of Mankind and Indigenous Races of the Earth*.<sup>143</sup>

Furthermore, Charles Pickering, a botanist, believed that there were eleven races of man and that they originated in two geographic centers in tropical climes.<sup>144</sup> Oliver Wendell Holmes Jr. was aware of Pickering's work and discussed it with Morton.<sup>145</sup>

The leading American proponent of polygeny was Louis Agassiz, a Swiss-born follower of Cuvier who emigrated to take up a life-long professorship at Harvard and embraced polygeny after his exposure to American Blacks.<sup>146</sup> His belief in Blacks as a separate species arose upon feeling "visceral revulsion" upon meeting a Black servant in 1846, and because of "his sexual fears about miscegenation."<sup>147</sup> He was firmly a part

138. Nott's article was printed in the "ultra-respectable" AMERICAN JOURNAL OF THE MEDICAL SCIENCES. STANTON, *supra* note 47, at 66. Nott was considered "[t]he most important single figure" espousing the extreme racial theories. HORSMAN, *supra* note 12, at 151.

139. See STANTON, *supra* note 47, at 67.

140. See *id.* at 69 (discussing Nott's disdain for the scriptural account of humans' origins).

141. *Id.* at 71 (discussing Nott's unique definition of "species").

142. DINGWALL, *supra* note 92, at 66 (reviewing nineteenth-century racial theorists).

143. J.C. NOTT, M.D. & GEO R. GLIDDON, *INDIGENOUS RACES OF THE EARTH* (1854). Nott and Gliddon appear to have been influenced by Count J.A. de Gobineau, the French racial theorist who was influential in the development of the Nazi's racial beliefs. See DINGWALL, *supra* note 92, at 66–67.

144. See STANTON, *supra* note 47, at 95–96.

145. See *id.* at 96.

146. See GOULD, *supra* note 40, at 43.

147. *Id.* at 44. Agassiz echoed a familiar refrain when he expressed the fear that miscegenation would weaken the White race. See *id.* at 48, 49 (quoting E.D. Cope, *Two Perils of the Indo-European*, in THE OPEN COURT 2054 (1890) as stating that "[t]he highest race of man cannot afford to lose or even compromise the advantages it has acquired by hundreds of centuries of toil and hardship, by mingling its blood with the lowest.").

of the Western hierarchical school, finding a moral imperative in the need to rank the various races.<sup>148</sup> The rankings, which placed Blacks at the bottom, justified the denial of social equality as a “natural impossibility,” but did not justify legal inequality.<sup>149</sup> Thus, he opposed slavery.<sup>150</sup> Agassiz avoided the wrath of the fundamentalists by arguing that the Genesis account described the birth of the White race only.<sup>151</sup>

Peter Browne of Philadelphia used his studies of animal and human hair to demonstrate that Blacks and Whites were of separate species,<sup>152</sup> that the Black species had been the same woolly-headed animal for at least 2000 years,<sup>153</sup> that the Egyptians were White,<sup>154</sup> and, indeed that “[t]he hair of the white man is more perfect than that of the negro,” perhaps even “the perfect hair.”<sup>155</sup>

Paul Broca, whose work followed that of Morton, is the name most associated with the “science” of determining intelligence based on brain size. Broca brought to his analysis a predisposition to find Blacks inferior.<sup>156</sup> Broca also assumed—which, as I have postulated, flowed from his grounding in Western hierarchical thinking—that it would be possible to rank the human races on a linear scale of mental ability.<sup>157</sup> Since he knew the “correct” hierarchy before beginning his analysis, it was a simple matter to select among measurable characteristics until he found one—brain size—that matched (or could be fudged to match) his preconceptions.<sup>158</sup>

148. See Louis Agassiz, *The Diversity of Origin of the Human Races*, 49 CHRISTIAN EXAMINER 110 (1850). Agassiz advocated training Blacks for physical labor and Whites for mental labor. See *id.* at 144–45.

149. GOULD, *supra* note 40, at 48 (noting that legal equality had to be given, but social equality had to be denied to preserve the purity of the White race).

150. See *id.* at 43 (describing Agassiz’s opposition to slavery).

151. See HORSMAN, *supra* note 12, at 149.

152. See STANTON, *supra* note 47, at 151.

153. This assumption was based upon Herodotus’s mention of the woolly hair of Blacks in 413 B.C. See STANTON, *supra* note 47, at 151.

154. This assumption was based upon examination of the hair of an Egyptian mummy. See STANTON, *supra* note 47, at 151–52.

155. *Id.* at 153 (internal quotations omitted).

156. Broca believed that “[a] group with black skin, woolly hair and a prognathous face has never been able to raise itself spontaneously to civilization.” GOULD, *supra* note 40, at 84 (translating and quoting Paul Broca, *Anthropologie*, in DICTIONNAIRE ENCYCLOPEDIQUE DES SCIENCES MEDICALES (1866)). Blacks were traditionally depicted with distorted prognathous faces (faces with a forward-jutting jaw), which visually solidified their position as intermediaries between apes and Whites.

157. See GOULD, *supra* note 40, at 86 (describing Broca’s assumption that the races could be ranked on a linear scale of mental worth).

158. Although outside the scope of this article, it is interesting to note that the fact of women’s brains being smaller than those of men tended to reinforce current thinking as



Although it would ultimately be replaced by intelligence testing, the brain size theory of determining intelligence lingered into the Twentieth Century. Robert Bennett Bean published findings on brain size in 1906 that *proved* Black inferiority yet again.<sup>159</sup> Bean's theories, although they now sound ludicrous,<sup>160</sup> were disseminated in the popular press and used to justify inferior Black schools.<sup>161</sup>

Another theory—perhaps the reader remembers its best known motto, *ontogeny recapitulates phylogeny*, from freshman biology—also developed from evolutionary theory and contributed its own justification for racism. Recapitulation argued, simply, that the adult reached its mature physical form by progressing through a series of stages representing its evolution from primitive life. Thus the gill slits in a human embryo represented an adult fish. By extension, adults of inferior groups were like children of superior groups and, finally, adult Blacks had reached the evolutionary development of White children.<sup>162</sup> Although debunked by the 1920s, the theory, according to Gould, was used to justify colonialism<sup>163</sup> and is manifest in Rudyard Kipling's *apologia* regarding the "white man's burden."<sup>164</sup>

to the relative intelligence of the sexes. Never mind that brain size correlates to physical stature and men tend to be bigger than women (one of the many faults in Broca's analysis).

159. See GOULD, *supra* note 40, at 77 (citing Robert Bennett Bean, *Some Racial Peculiarities of the Negro Brain*, 5 AM. J. OF ANATOMY 353-432 (1906)). Once again, Bean found these differences when he knew the races of the brains he examined. When a suspicious colleague performed the same measurements without knowing the races of the brains examined, the differences vanished. See *id.* at 80.

160. For example, Bean explained away the fact that a portion of the corpus callosum was not smaller in Blacks (as his theory would dictate) by explaining that, in addition to containing fibers for higher intelligence, the genu of the corpus callosum also contained fibers for olfactory ability. Thus, although Whites had more intellectual power packed into that portion of the brain, Blacks' genii nearly equaled Whites' in size because they were packed with the fibers that gave Blacks their superior smelling abilities. See GOULD, *supra* note 40, at 77.

161. Bean had provided "the anatomical basis for the complete failure of the negro schools to impart the higher studies." ALLAN CHASE, *THE LEGACY OF MALTHUS: THE SOCIAL COSTS OF THE NEW SCIENTIFIC RACISM* 179 (1977) (quoting an editorial from *AMERICAN MEDICINE*, April 1907).

162. See GOULD, *supra* note 40, at 113-15.

163. Kidd justified colonial expansion into Africa by stating, "we are dealing with peoples who represent the same stage in the history of the development of the race that the child does in the history of the development of the individual. The tropics will not, therefore, be developed by the natives themselves." BENJAMIN KIDD, *THE CONTROL OF THE TROPICS* 52 (1898).

164. Kipling's poem spoke of the need to serve "Your new-caught sullen peoples/Half devil and half child." Rudyard Kipling, *Take Up the White Man's Burden*, quoted in GOULD, *supra* note 40, at 119.

## III. DARWIN CHANGES THE PLAYING FIELD

In 1859 Darwin rendered the battle between the polygenists and traditional monogenists moot with his evolutionary theory that "satisfied both sides by presenting an even better rationale for their shared racism."<sup>165</sup> Thus, "[e]volution and quantification formed an unholy alliance; in a sense, their union forged the first powerful theory of 'scientific' racism."<sup>166</sup>

Darwin, who had deliberately avoided any discussion of the origins and evolution of man in *On the Origin of Species by Means of Natural Selection*,<sup>167</sup> turned both to the origins of man generally and to the questions raised by the concept of race in particular twelve years later in *The Descent of Man and Selection in Relation to Sex*.<sup>168</sup> Darwin, although he sometimes hedged a bit,<sup>169</sup> was a monogenist: man evolved from one species. Darwin agreed that sterility between the races would be an indicator of there being separate species,<sup>170</sup> and, after reviewing arguments pro and con, Darwin made note of two arguments for monogenism that anti-miscegenation statutes tended to make less evident. First he recognized the "immense mongrel population of Negroes and Portuguese" in Brazil.<sup>171</sup> Second, he noted how the various races graded into each other.<sup>172</sup> He also considered the substitution of the term "sub-species," but concluded that "race" would probably always be the preferred term because

165. GOULD, *supra* note 40, at 72–73. "The resulting intellectual tensions were resolved after 1859 by a comprehensive evolutionism which was at once monogenist and racist, which affirmed human unity even as it relegated the dark-skinned savage to a status very near the ape." *Id.* at 73 (quoting George Stocking, *From Chronology to Ethnology: James Cowles Prichard and British Anthropology 1800–1850*, in JAMES COWLES PRICHARD, *RESEARCHES INTO THE PHYSICAL HISTORY OF MAN* (facsimile 1973) (1812)).

166. GOULD, *supra* note 40, at 74.

167. CHARLES DARWIN, *ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION* (1859).

168. DARWIN, *supra* note 21.

169. See, e.g., *id.* at 30 ("If we consider all the races of man as forming a single species, his range is enormous.") (emphasis added); see also *id.* at 182–99 (discussing the races of man). Darwin disagreed with Blumenbach and Cuvier, who placed men in a separate order from all other animals, and agreed with Linnaeus that man belonged in the primate order with the apes, albeit as a distinct species. See *id.* at 165.

170. Darwin agreed that "[e]ven a slight degree of sterility between any two forms when first crossed, or in their offspring, is generally considered as a decisive test of their specific distinctness . . ." *Id.* at 182.

171. *Id.* at 189. See *infra* note 59 for a discussion of Brazil's mulatto population.

172. See DARWIN, *supra* note 21, at 190. Calling this the "most weighty" of the arguments against polygenism, he noted that the various attempts to classify men into races had resulted in schemes of as many as 63 races. See *id.*

of “long habit.”<sup>173</sup> But even if Darwin sided with the monogenists as to man’s origin from a single stock, his theory of evolution allowed for the changes wrought by the “survival of the fittest” that could result in man branching out into separate species.

But, Darwin believed, from that common origin in some primitive member of the ape family,<sup>174</sup> man had diverged into races that were very different in many ways, including mental ability.<sup>175</sup> Darwin predicted that at “some future period, not very distant as measured by centuries, the civilized races would exterminate the savage races throughout the earth.”<sup>176</sup> Nevertheless, he believed slavery to be a “crime.”<sup>177</sup> Darwin cited or made reference to a number of the authorities discussed above, both monogenist and polygenist, including Galton,<sup>178</sup> Blumenbach,<sup>179</sup> Broca,<sup>180</sup> Cuvier,<sup>181</sup> Huxley,<sup>182</sup> Agassiz,<sup>183</sup> Bachman,<sup>184</sup> Nott,<sup>185</sup> Gliddon,<sup>186</sup> and of course, Linnaeus.<sup>187</sup>

173. *Id.* at 191.

174. Darwin noted that “[w]e may infer that some ancient member of the anthropomorphous sub-group gave birth to man.” *Id.* at 170. Darwin never argued that man had descended from one of the living apes; this was a distortion made by his critics. Despite writing at a time when the only pre-human fossil remains that had been discovered were found in Europe and were less than 200,000 years old, Darwin correctly postulated an African genesis for mankind. *See id.* at 161. It is now believed that human ancestors diverged from the line that led to modern apes about five million years ago. *See* LEAKEY & LEWIN, *supra* note 94, at 206.

175. Darwin stated: “The variability or diversity of the mental faculties in men of the same race, not to mention the greater differences between men of distinct races, is so notorious that not a word need here be said.” DARWIN, *supra* note 21, at 27.

176. *Id.* at 168. In so doing, and in also exterminating the great apes, man would increase the divide between himself and his nearest primate relative. The closest relationship in the primate order would be the Caucasian to the baboon, as opposed to the current closest relationship, the negro or Australian to the gorilla. *See id.* at 198.

177. *See id.* at 132–33. Darwin believed that slavery had been beneficial in ancient times and that it had been tolerated because the slaves were generally of different races from the masters. *See id.*

178. *See id.* at 44.

179. *See id.*

180. Broca was cited for the proposition that there is a close relation between brain size and intelligence and that this difference was manifest in the brains of the “skulls of savage and civilized races.” *Id.* at 70.

181. *See id.* at 73.

182. *See id.* at 166. Professor Huxley was Darwin’s greatest propagandist.

183. *See id.* at 184. Darwin stated that “negroes, apparently identical with existing negroes, [existed] 4000 years ago [in Egypt].” *Id.*

184. *See id.* at 187.

185. *See id.* at 184.

186. *See id.*

187. *See id.* at 165.

Although Darwin was wrong to suggest that his new theory of evolution would render the monogenist/polygenist argument moot,<sup>188</sup> modern genetic (including mitochondrial DNA) analysis, biochemistry and paleoanthropology strongly argue that Darwin was correct about monogenism and an African Genesis.<sup>189</sup> The theory, ironically named the Noah's Ark hypothesis or Garden of Eden Theory, posits an African origin of *Homo sapiens sapiens* a "mere" 150,000–200,000 years ago. The superficial differences that we insist on calling "race" evolved after this second African diaspora<sup>190</sup> in response to environmental conditions, with divergent racial evolution beginning between 180,000 and 90,000 years ago.<sup>191</sup>

#### IV. THE MODERN ERA: IQ TESTING

Not surprisingly, "modern" IQ testing, which began with large-scale testing on military recruits in World War One, placed Blacks at the

188. See *supra* note 21 and accompanying text.

189. See, e.g., ROBERT ARDREY, *AFRICAN GENESIS: A PERSONAL INVESTIGATION INTO THE ANIMAL ORIGINS AND NATURE OF MAN* 9, 29–30, 33–58 (1961) (stating that many human behaviors, such as violence and territoriality, can be explained by their evolution from killer ape forebears in Africa).

190. The first African diaspora occurred about one million years ago in the form of *Homo erectus*, who apparently exhibited divergent evolution in a number of regions of the globe before being replaced by, or else evolving into, *Homo sapiens*. If, as some suggest, modern humans evolved from *Homo erectus* in various loci—a counter-argument to the Noah's Ark theory, also known as the Candelabra theory—a much stronger argument can be made for significant, long-established genetic differences between races. See BRIAN M. FAGAN, *THE JOURNEY FROM EDEN: THE PEOPLING OF OUR WORLD* 20–22 (1990) (stating that modern humans evolved from a single African source).

191. Leakey and Lewin agreed with the African origin theory, as did William Howells, Gould, Douglas Wallace and others. See LEAKEY & LEWIN, *supra* note 94, at 203–36. Alternate theories posit an Asian origin for mankind or, alternatively, evolution from *Homo erectus* to *Homo sapiens*, in a variety of loci. Fagan concludes his book with the following:

It is astounding just how recently we have evolved, and how shallow our genetic roots go back into the past. This very shallowness serves to remind us that we are all "products of a recent African twig." And such reminders of our common biological and cultural heritage, of our recent common ancestry, are needed in a world where racism is commonplace and altruism in short supply.

FAGAN, *supra* note 190, at 236; see also Muwakkil, *supra* note 104, at 13 (arguing that race is a concept invented to justify racism, imperialism and slavery). But anthropologist Milford Wolpoff and others argue for a multi-regional model that would push the origin of the races back as far as one million years. See D'SOUZA, *supra* note 105, at 467–68. Obviously, this would allow for a far greater degree of differentiation between the races.

bottom of the intelligence scale.<sup>192</sup> The eugenicists argued that the mixing of Black blood through miscegenation was a threat to the American IQ, already weakened from the Nordic high by the influx of Slavs and southern Europeans.<sup>193</sup> The testing program had many flaws, though, most notably failing to adjust for illiteracy and requiring knowledge common to mainstream American (read: White) culture but not necessarily known to Blacks and immigrants.<sup>194</sup>

Following this inauspicious beginning, IQ testing continued to serve as a tool for segregationists and opponents of Black admissions into higher education. In a 1922 *Atlantic Monthly* article, Cornelia James Cannon, after noting that eighty-nine percent of Blacks test as morons, argued that “the education of whites and colored in separate schools may have justification other than that created by race prejudice.”<sup>195</sup> Henry Fairfield Osborn, trustee of Columbia University and President of the American Museum of Natural History opined that, thanks to World War One IQ testing, “[w]e have learned once and for all that the negro is not like us.”<sup>196</sup>

#### V. MISCEGENATION AND THE LAW

With both scientific and Biblical support, prohibitions against miscegenation became the norm throughout the states, even though the concept of anti-miscegenation had no grounding in the common law. At one time or another thirty-eight states had anti-miscegenation statutes.<sup>197</sup> At the time of the first Virginia *Naim v. Naim* decision in 1955, more than half of the states still had anti-miscegenation statutes.<sup>198</sup> By the time of *Loving v. Virginia* in 1967, the number had been reduced to seventeen.<sup>199</sup>

The cultural context of the Founding Fathers was one in which racial hierarchies were an accepted norm, with Whites clearly at the top,

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192. See GOULD, *supra* note 40, at 197. It is outside the scope of this article, but IQ test results also were used to argue in favor of immigration restrictions. See *id.* at 230.

193. See *id.* at 196–97.

194. See *id.* at 199–200.

195. CHASE, *supra* note 161, at 263 (quoting the 1922 ATLANTIC MONTHLY article).

196. GOULD, *supra* note 40, at 231. Osborn also took comfort in the fact that the test debunked myths about higher Jewish IQs. See *id.*

197. See Trosino, *supra* note 27, at 98.

198. See *Naim v. Naim*, 87 S.E.2d 749, 753 (1955); Wadlington, *supra* note 2, at 1190 n.8.

199. See *supra* note 4 and accompanying text.

Native Americans below and Blacks firmly embedded at the bottom.<sup>200</sup> This section examines the beliefs of the Founding Fathers and the Reconstruction Congress regarding scientific racism to demonstrate why neither the Constitution and Bill of Rights nor the Reconstruction Amendments clearly prohibited bans on miscegenation, and, thus, why miscegenation remained constitutional for so long.

A. *Jefferson: The Darker Side of the Sphinx*<sup>201</sup>

Thomas Jefferson, who stated that “all men are created equal,” owned an average of 200 slaves throughout his life and died owning 130 in 1826.<sup>202</sup> It is true that Jefferson’s writings consistently reflect the belief that slavery was a moral wrong, but it is equally clear that he believed in the racial inferiority of Blacks. Jefferson believed that emancipation must

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200. See GOULD, *supra* note 40, at 31. Gould divides the thinkers of the time into “hard-liners,” who believed that racial inferiority justified slavery and colonialism, and “soft-liners,” who believed in racial inferiority but felt that rights and freedom did not hinge on racial superiority or inferiority. *Id.* at 31–32. Gould placed Jefferson in the latter group. See *id.*

201. Perhaps it seems unfair to single out Jefferson as illustrative of the Founding Fathers’ views on race. In addition to Jefferson, those Presidents known to have owned slaves included George Washington, James Madison, James Monroe, Andrew Jackson, John Tyler, James Polk, Zachary Taylor and Andrew Johnson. Benjamin Franklin saw Black inferiority as cultural and, therefore, curable; nevertheless, he was of the opinion that Blacks should be excluded from America to make it a purely White nation. See *id.* at 32 (citing BENJAMIN FRANKLIN, OBSERVATIONS ON THE INCREASE OF MANKIND (1751)). Lincoln’s view of the races was made clear in 1858 in the Lincoln–Douglas debates; like Jefferson, he did not believe that the wisdom or morality (or expediency) of freeing the slaves in any way meant that Blacks were to be freed from the fetters of racial hierarchy. Lincoln stated:

There is a physical difference between the white and black races which I believe will forever forbid the two races living together on terms of social and political equality. And inasmuch as they cannot so live, while they do remain together there must be the position of superior and inferior, and I as much as any other man am in favor of having the superior position assigned to the white race.

THE LINCOLN–DOUGLAS DEBATES: THE FIRST COMPLETE, UNEXPURGATED TEXT 283 (Harold Holzer ed., 1993) (quoting the sixth joint debate at Quincy, Ill., Oct. 13, 1858).

202. See JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 144, 290 (1997). For critiques of Jefferson’s views on race, see LEONARD LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE (1963) (describing Jefferson’s record on civil liberties issues as very poor) and WINTHROP JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812 (1968) (arguing that Anglo-Americans saw White as representing purity and Black as denoting evil and applied these attitudes to skin color).

be linked to exportation and that miscegenation would be detrimental to the White race.

It is hard to see how these views can be subject to debate, since his words on the subject are unambiguous over four decades. In his "Notes On The State of Virginia," written in 1787, Jefferson spoke in favor of emancipation, but linked freedom to removal and colonization "to such place as the circumstances of the time should render most proper."<sup>203</sup> Freed slaves could not have been incorporated into the state because to have done so would be to "produce convulsions which will probably never end but in the extermination of the one or the other race."<sup>204</sup> Jefferson described the Black race as inferior in physical beauty to the White (such that it is "the preference of the Oranootan [orangutan] for the black women over those of his own species"),<sup>205</sup> as possessing "a very strong and disagreeable odour,"<sup>206</sup> as being "more ardent after the female"<sup>207</sup> (an ironic statement in light of the recent Hemings revelation),<sup>208</sup> and as mentally inferior, lacking even elementary skills in the arts.<sup>209</sup>

Jefferson, like many in his time, believed that the addition of White blood improved the Blacks in mind and body.<sup>210</sup> Likewise, he believed the addition of Black blood degraded the White race.<sup>211</sup> The solution to this conundrum was to declare any mixed race child to be Black and thus to deny a paternity that may have been obvious at the time.

Jefferson's views remained consistent. In an 1814 letter to Edward Coles he spoke about emancipation and exportation, assigning the task of solving the nation's racial problems to the next generation.<sup>212</sup> In his "Autobiography" of 1821, he insisted that the slaves must be freed, but he continued to link emancipation to deportation.<sup>213</sup> By 1824 he had arrived at a suitable location for deportation—St. Domingo—and postulated a

203. JEFFERSON, *supra* note 52, at 264 (arguing that freed slaves should be deported and provided with means of sustenance).

204. *Id.* at 264.

205. *Id.* at 265.

206. *Id.*

207. *Id.*

208. The "revelation" was that Jefferson fathered at least one child by Sally Hemings, a slave whom he owned who was 28 years his junior. See Herman "Skip" Mason Jr., *Black Identity "Revelation" Was Merely Affirmation*, ATLANTA JOURNAL-CONST., Nov. 8, 1998, at G1.

209. See JEFFERSON, *supra* note 52, at 266.

210. See *id.* at 267.

211. See *id.* at 270.

212. See *id.* at 1343-46.

213. See *id.* at 44.

twenty-five-year deportation plan that would take into account the slaves' value as the property of their former masters.<sup>214</sup>

These writings certainly were never inscribed on the Jefferson Monument, but they are far from obscure. It is hard to understand why there is any debate as to whether Jefferson believed the "men" in "all men are created equal," referred to Blacks as well as Whites. To the extent that Jefferson believed that ownership of slaves was morally wrong, he did nothing to end his personal guilt in the matter (inherited debt and the financial realities of owning a Virginia plantation proved to be stronger forces than morality), and his attempts to end slavery were ineffectual and half-hearted at best.

In "Notes On The State Of Virginia," Jefferson finessed the monogenist versus polygenist question, noting that "the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of body and mind."<sup>215</sup> Whether based on monogenism or polygenism, American icons from Jefferson to the Reconstruction Congress (which drafted the Fourteenth Amendment's Equal Protection Clause in the same session in which it funded segregated schools for the District of Columbia)<sup>216</sup> to Abraham Lincoln, who made his views of White superiority clear in the Lincoln-Douglas debates,<sup>217</sup> believed in a hierarchical ranking of the races that was ill-served by the presence of those of mixed race.

#### B. *Miscegenation and the Equal Protection Congress*<sup>218</sup>

The debates over the Reconstruction amendments not only indicated concern over the danger that race mixing would result from equality, but also featured scientific proof of Black racial inferiority.<sup>219</sup>

I have argued elsewhere that with the introduction of the Thirteenth,<sup>220</sup> Fourteenth<sup>221</sup> and Fifteenth Amendments,<sup>222</sup> Congress had the opportunity to make the Constitution truly color-blind and could have

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214. See *id.* at 1484–86.

215. *Id.* at 270.

216. See Act of July 28, 1866, ch. 308, 14 Stat. 343 (granting city lots for use as school grounds for "colored" children); Act of July 23, 1866, ch. 217, 14 Stat. 216 (guaranteeing school funds to "colored schools").

217. See *supra* note 201.

218. See Avins, *supra* note 69.

219. See Trosino, *supra* note 27, at 98–99.

220. U.S. CONST. amend. XIII (1865).

221. U.S. CONST. amend. XIV (1868).

222. U.S. CONST. amend. XV (1870).



put an end to miscegenation statutes, but that it chose not to do so.<sup>223</sup> The language of total non-discrimination was offered to Congress and rejected,<sup>224</sup> and the language that was used, Congressman Bingham's "equal protection," insured the continuation of anti-miscegenation laws through 1967. In *Loving*, Virginia argued that the Framers did not intend the Fourteenth Amendment to end miscegenation laws,<sup>225</sup> which was essentially correct.<sup>226</sup>

Writing one year before the Court decided *Loving*, Professor Avins was able to demonstrate that if legislative history, as demonstrative of original intent, was the sole factor to be considered, the Fourteenth Amendment could never be applied to ban anti-miscegenation statutes.<sup>227</sup> Avins argued that no one seriously believed that the Fourteenth Amendment would affect state miscegenation laws; rather the Democrats used this spectre as a political smokescreen in their efforts to block it.<sup>228</sup> Through extensive citation to the legislative history contained in the Congressional Globe, Avins demonstrated that supporters of the Fourteenth Amendment, such as Senators Lane<sup>229</sup> and

223. See Keith E. Sealing, *The Myth of a Color-blind Constitution*, 54 WASH. U. J. URB. & CONTEMP. L. 157, 198 (1998). For extensive treatment of the intent of the drafters of the Reconstruction Amendments, see ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 53-88 (1992).

224. Thaddeus Stevens proposed the following language (based on the original ideas of Wendell Phillips): "All national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race or color." KULL, *supra* note 223, at 73. But Congressman Bingham's counterproposal of "equal protection" carried the day. See *id.* at 87.

225. See *Loving*, 388 U.S. at 9-10.

226. Compare:

[W]e know, with as much certainty as such matters ever permit, that the Framers of the Fourteenth Amendment did not think "equal protection of the laws" made *all* racial distinctions in law unconstitutional; they did not intend, for example, to outlaw racially segregated public schools.

Laurence H. Tribe, *In What Vision of the Constitution Must the Law Be Color-Blind?* 20 J. MARSHALL L. REV. 201, 204 (1986) (citing Bickel, *supra* note 69, at 56). Just a few weeks after the passage of the Fourteenth Amendment, Congress passed laws guaranteeing funds to "colored schools," and granting city lots for their use. See *supra* note 216. Similarly, Justice Marshall pointed out that the same Congress that passed the Fourteenth Amendment passed the Freedman's Bureau Act, ch. 200, 14 Stat. 173 (1866), which was clearly intended to provide race-conscious relief to former slaves. *Regents of the University of California v. Bakke*, 438 U.S. 256, 396-97 (1978).

227. See Avins, *supra* note 69, at 1224.

228. See *id.* at 1253.

229. Senator James H. Lane (R. Kan.) apparently agreed with the scientific racism of the era when he stated, "I . . . am now opposed to the amalgamation of the two races, believing, as I do, that the product is inferior to either race." *Id.* at 1228 (quoting CONG.

Trumbull,<sup>230</sup> opposed amalgamation and supported bans on miscegenation, or at least stated that the amendment would not make existing anti-miscegenation laws unconstitutional. Senator Garrett Davis of Kentucky “treated the Senate to a lengthy pseudo-scientific and anthropological discourse on Negroes.”<sup>231</sup>

Speaking after the passage of the Fourteenth Amendment, Wisconsin conservative James R. Doolittle echoed the scientific racism theory. He stated that mulattoes could not continue to reproduce indefinitely and said, “[i]t is the fiat of the Almighty which is stamped upon this very idea of forcing an amalgamation of the races against nature and against the laws of God.”<sup>232</sup>

These Congressional problems continued with the introduction of the Civil Rights Act of 1875,<sup>233</sup> which contained no anti-miscegenation provision, although it sought to end many of the racial divisions of slavery.<sup>234</sup> Opponents of the legislation invoked the religious mandate argument and the symmetry argument, i.e., that the Black race was equally interested in preserving its racial integrity,<sup>235</sup> as well as the scientific argument that miscegenation “brings decay and death.”<sup>236</sup>

GLOBE, 38th Cong., 1st Sess., pt. 1, at 841 (1864)). Lane favored colonization of freed slaves, as did other Republicans, including Senator James R. Doolittle (R. Wisc.). *See id.* at 1228 n.10 (citing CONG. GLOBE, 37th Cong., 2nd Sess. 84 (1863)). (These comments preceded the Fourteenth Amendment debates.)

230. Senator Lyman Trumbull (R. Ill.), Chairman of the Senate Judiciary Committee, specifically stated that the Fourteenth Amendment would not make Indiana’s anti-miscegenation statute unconstitutional. *See id.* at 1232 (citing CONG. GLOBE, 39th Cong., 1st Sess., pt. 1, at 322 (1866)).

231. *Id.* at 1231 (citing CONG. GLOBE, 39th Cong., 1st Sess., pt. 1, at 245–51 (1866)). Similar sentiments were later voiced by Congressman James Brooks (D. N.Y.) at the opening of the 40th Congress, *see id.* at 1238 (citing CONG. GLOBE, 40th Cong., 1st Sess., pt. 1, at 69–73 (1867)) and by Representative Mungen, *see id.* at 1238 (citing CONG. GLOBE, 40th Cong., 1st Sess., pt. 1, at 519–22 (1867)).

232. *Id.* at 1239 (citing CONG. GLOBE, 40th Cong., 3rd Sess., pt. 2, at 1010 (1869)).

233. *See* ch. 114, 18 Stat. 335 (1875) (struck down by the Civil Rights Cases, 109 U.S. 3, 25 (1883)).

234. *See generally* Bank, *supra* note 96 (discussing the overlap between scientific and religious arguments).

235. *See id.* at 306–07.

236. *Id.* at 309 (quoting Congressman John Atkins of Tennessee). Senator Augustus S. Merriman (D. N.C.) argued that the bill would “contravene the natural law of races itself, in the end hybridize the races, and produce to a material degree, degeneracy and extinction of race. The uniform experience of the human race goes to show that the Almighty curses . . . people who defy the course of nature.” Avins, *supra* note 69, at 1249 (citing 2 CONG. REC 315 (1874)).

## VI. MISCEGENATION AND THE COURTS

This section discusses the application of scientific racism theories to the problem of miscegenation statutes by the various courts that considered the issue. The cases highlighted are those in which the language of the court reflected scientific racism, creationism, or some combination of the two. There are far more cases that upheld anti-miscegenation statutes solely by reference to the legal arguments outlined above.<sup>237</sup> It would be

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237. For other cases in which anti-miscegenation statutes or constitutional provisions were upheld, but without overt references to scientific racism (and that are not cited elsewhere herein), see *Stevens v. U.S.*, 146 F.2d 120 (10th Cir. 1944); *Ex parte Francois*, 9 F. Cas. 699 (C.C.W.D. Tex. 1879) (No. 5047) (upholding application of a recently repealed statute inflicting a penalty on a White person who married a "negro," while not inflicting any penalty on the "negro"); *Ex parte Kinney*, 14 F. Cas. 602 (C.C.E.D. Va. 1879) (No. 7825); *State v. Pass*, 121 P.2d 882 (Ariz. 1942) (finding that the marriage of a White woman to a man of mixed race was null and void, therefore determining that the defense of spousal immunity to her testimony was unavailable to the criminal defendant in a murder case); *Kirby v. Kirby*, 206 P. 405, 406 (Ariz. 1922) (stating that the regulation of marriage, including a miscegenation statute, "is peculiarly a matter of state regulation"); *In re Walker's Estate*, 46 P. 67 (Ariz. 1896); *Dodson v. State*, 31 S.W. 977 (Ark. 1895) (upholding a \$25 fine for miscegenation as valid exercise of police power); *Whittington v. McCaskill*, 61 So. 236 (Fla. 1913) (For purposes of laws of interstate succession, a miscegenous marriage validly contracted in another state will be recognized in Florida.); *Moore v. Moore*, 98 S.W. 1027 (Ky. 1907) (For purposes of intestate succession, the illegal marriage of a Black man and a White woman will not be recognized, and White women and mulatto children cannot inherit land.); *State v. Gibson*, 36 Ind. 389 (1871); *State v. Brown*, 108 So.2d 233 (La. 1959) (overturning a criminal conviction for miscegenation due to lack of proof of sexual intercourse, but upholding the constitutionality of the statute); *Inhabitants of Medway v. Inhabitants of Needham*, 16 Mass. 157 (1819) (holding that miscegenous marriages legally entered into elsewhere will be legal in Massachusetts); *Inhabitants of Medway v. Inhabitants of Natick*, 7 Mass. 88 (1810) (stating that since a mulatto is defined as mix of pure White and pure Black, marriage of White person to the progeny of White and mulatto parents is not barred by a Massachusetts statute that prohibits marriage between Whites and Blacks or mulattoes); *People v. Brown*, 34 Mich. 339 (1876) (finding that even though a second marriage is void because miscegenous, it is counted as a second marriage for purposes of bigamy statute); *Knight v. State*, 42 So.2d 747 (Miss. 1949) (overturning criminal conviction for unlawful miscegenation due to a failure to prove defendant had one-eighth or more Negro blood); *Miller v. Lucks*, 36 So.2d 140 (Miss. 1948) (declaring a White man heir at law to property in Mississippi of an African American woman to whom he was legally married in Illinois; because they did not live in Mississippi, the miscegenous marriage did not offend Mississippi's anti-miscegenation policy); *Keen v. Keen*, 83 S.W. 526 (Mo. 1904) (finding that when a former slave and her master continued to live together as husband and wife, no presumption of common law marriage was created because of ban on miscegenous marriages); *Takahashi's Estate v. Jorgensen*, 129 P.2d 217 (Mont. 1942) (refusing to recognize White woman's marriage to Japanese-American man for estate administration purposes in Montana, even though legally performed in Washington); *State v. Hand*, 126 N.W. 1002 (Neb. 1910) (holding that a miscegenous marriage entered into where legal is not illegal in Nebraska); *State v. Hairston*, 63 N.C. 451 (1869) (finding an anti-miscegenation statute does not violate

speculation to suggest the degree to which scientific racism influenced the jurists in those cases. However, it can be safely stated that scientific racism was not just the stuff of scientists and the academy, but rather was widely disseminated to the general public.<sup>238</sup>

### A. Miscegenation Upheld

Whether their decisions were based on monogenism and the Bible or polygenism and the scientists, the courts prior to 1967 almost always<sup>239</sup> upheld the legitimacy and constitutionality of anti-miscegenation statutes.

In *State v. Jackson*,<sup>240</sup> the court upheld the conviction of the defendant, a White woman, for marrying a man with "more than one-eighth part of negro blood," over arguments that the statute upon which the indictment was based violated the Missouri and federal Constitutions.<sup>241</sup> The court relied upon the justifications that the state's regulation of marriage between the races is equivalent to its regulation of first cousins and other blood relations,<sup>242</sup> that the law applies equally to both races,<sup>243</sup> and

Fourteenth Amendment; marriage not a contract within meaning of Civil Rights Act of 1866); *State v. Reinhardt*, 63 N.C. 547 (1869) (holding statute does not violate Fourteenth Amendment); *State v. Kennedy*, 76 N.C. 251 (1877) (analogizing a contract made contrary to religion, morality, or a state's fundamental institutions to the violation of North Carolina's anti-miscegenation statute); *Tucker v. Blease*, 81 S.E. 668 (S.C. 1914) (upholding a school board decision to expel three mixed-race students that could "pass" for White, noting that, in the case of racially ambiguous persons, "it 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"); *Lonas v. State*, 50 Tenn. 287 (1871) (upholding a statute prohibiting "intermarriage of white persons with negroes, mulattoes or persons of mixed blood" against constitutional attack); *Frasher v. State*, 3 Tex. Ct. App. 263 (1877).

238. See, e.g., HORSMAN, *supra* note 12, at 157 (claiming that scientific racism commonly appeared in American newspapers and schoolbooks).

239. There were a few exceptions. Alabama's Supreme Court actually gets credit for being the first to overturn an anti-miscegenation statute after the enactment of the Fourteenth Amendment. See *Burns v. State*, 48 Ala. 195 (1872). However, that case was quickly overruled. See *Green v. State*, 58 Ala. 190 (1877). Also, in an unreported case, the criminal court of Maryland declared the Maryland anti-miscegenation statute unconstitutional. See *State v. Howard*, THE DAILY RECORD, Apr. 22, 1957, at 3 (holding that Maryland's anti-miscegenation statute violated the Fourteenth Amendment because it "prescribe[d] different punishments or penalties for the same type of conduct when engaged in by persons of different race or color"). The major break came in California with *Perez v. Lippold*, 198 P.2d. 17 (1948), discussed *infra* notes 311-48 and accompanying text.

240. 80 Mo. 175 (1883).

241. See *id.* at 175.

242. See *id.* at 176. "Under the Jewish dispensation persons nearly related by ties in blood intermarried, but in no Christian land are such marriages tolerated." See *id.* at 179.

243. See *id.* at 177.

that the right to regulate marriage generally is reserved to the state.<sup>244</sup> The court ultimately turned to scientific racism unquestioningly for support:

It is stated as a well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites . . . .<sup>245</sup>

In *Scott v. State*,<sup>246</sup> the Georgia Supreme Court upheld African American Charlotte Scott's conviction for cohabiting and having sexual intercourse with a White man, Leopold Daniels.<sup>247</sup> The lower court refused a jury charge that they must acquit her if they found the two to be married; to the contrary, the court charged the jury that any marriage between the two was null and void.<sup>248</sup> The only issue on appeal was the right of an African American to marry a White, a right denied by the Georgia Code.<sup>249</sup> In upholding the law, Chief Justice Joseph Brown<sup>250</sup> recited the scientific theory of the day:

The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race. It is sometimes urged that such marriages should be encouraged, for the purpose of elevating the inferior race. The reply is, that such connections never elevate the inferior race to the position of the superior, but they bring down the superior to that of the inferior. They are productive of evil, and evil only, without any corresponding good.<sup>251</sup>

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244. See *id.* at 178.

245. *Id.* at 179.

246. 39 Ga. 321 (1869).

247. See *id.* at 322.

248. See *id.*

249. See § 1708, Code of Georgia 296 (2d. ed. 1873) ("Amalgamation prohibited. The marriage relation between white persons and persons of African descent is forever prohibited, and such marriage shall be null and void.").

250. Brown had been Georgia's governor during the Confederacy. See Van Tassel, *supra* note 1, at 910.

251. *Scott*, 39 Ga. at 323.

Thus, legislative prohibitions of miscegenation stand on the same footing as prohibitions against marriage within the Levitical degrees<sup>252</sup> or between idiots,<sup>253</sup> according to Justice Brown.<sup>254</sup> Further, Justice Brown, with reference to Georgia's status as a recently conquered people, asserted that the law, as imposed, created legal equality, but:

it does not create . . . moral or social equality between the different races or citizens of the State. Such equality does not in fact exist, and never can. The God of nature made it otherwise, and no human law can produce it, and no human tribunal can enforce it. There are gradations and classes throughout the universe. From the tallest arch angel in Heaven, down to the meanest reptile on earth, moral and social inequalities exist, and must continue to exist through all eternity.<sup>255</sup>

Justice Brown's opinion on the biological degeneration caused by miscegenation was cited with favor by a federal court twenty-one years later in *State v. Tutty*.<sup>256</sup> There, faced with a fact pattern almost identical to *Loving*,<sup>257</sup> the court upheld Georgia's anti-miscegenation statute<sup>258</sup> primarily against challenges that the marriage "contract" was subject to protection under the Contracts Clause.<sup>259</sup> Although generally concluding that the marriage contract is not subject to Contracts Clause protection,<sup>260</sup> the court nevertheless went on to compare miscegenation to polygamy and incest as evils that could be prohibited by the public policy of one state in derogation of a marriage entered into in another state.<sup>261</sup>

The federal judge declined to consider the merits of scientific racism. Tutty argued that "the intermarriages of whites and blacks do not

252. See *Leviticus* 18:6–18.

253. Compare Holmes' famous admonition in *Buck v. Bell*, 274 U.S. 200, 207 (1927) that "[t]hree generations of imbeciles are enough."

254. See *Scott*, 39 Ga. at 324.

255. *Id.* at 326.

256. 41 F. 753 (C.C.S.D. Ga. 1890).

257. Charles Tutty, a White man, and Rose Ward, an African American woman, were indicted in 1889 on charges of fornication. See *id.* at 754. They were married in the District of Columbia and asserted their marriage contract as a defense to the fornication charges. See *id.* at 754; *Loving*, 388 U.S. at 2.

258. See *Tutty*, 41 F. at 763.

259. U.S. CONST. art I, § 10.

260. See *Tutty*, 41 F. at 757–59.

261. See *id.* at 760 (citing JOSEPH STORY, *CONFLICT OF LAWS* ¶ 113a (1852)). (Story spoke only to polygamy and incest, not miscegenation.) Thus, the *lex loci domicilli* rather than the *lex loci contractus* determined the validity of a marriage contract.

constitute an evil or injury against which the state should protect itself,<sup>262</sup> but the court deferred consideration of this argument to the legislature.<sup>263</sup>

In Georgia, little had changed by 1907. In *Wolfe v. Georgia Ry. & Electric Co.*,<sup>264</sup> the court was faced with a tort suit by a White man who had allegedly suffered insult and humiliation when a street car conductor had mistaken him for a Black and asked him to move from the Whites-only front of the car, where he had sat with his sister, to the back.<sup>265</sup> In finding that accusing a White of being a Black “constitutes an actionable wrong,”<sup>266</sup> the court reiterated many of the themes expressed earlier. First, “[i]t is a matter of common knowledge that, viewed from a social standpoint, the negro race is in mind and morals inferior to the Caucasian.”<sup>267</sup> Second, this inequality “is recognized in Holy Writ.”<sup>268</sup> Third, citing the above-referenced passage from *Scott v. State*,<sup>269</sup> mixed-race offspring are physically inferior.<sup>270</sup>

262. *Id.* at 762.

263. *See id.*

264. 58 S.E. 899 (Ga. Ct. App. 1907).

265. *See id.* at 899.

266. *Id.* at 901. The court found support in *Flood v. News & Courier Co.*, 50 S.E. 637 (S.C. 1905) (holding that it is libelous per se to publish in a newspaper that a White man is Black), *Upton v. Times-Democrat Pub. Co.*, 28 So. 970 (La. 1900) (affirming award to “victim” of \$50 in actual damages and order for a retraction and an apology when newspaper accidentally referred to a White man as a “negro”), and *Southern Ry. v. Thurman*, 90 S.W. 240 (Ky. 1906). Note, however, that the court’s reliance on *Thurman* was somewhat misplaced. In *Thurman*, a jury awarded \$4,000 to Louella Thurman because she was shunted from the White car to the colored car by a brakeman in the mistaken view that she was not White. The Court of Appeals reversed and stated:

What race a person belongs to cannot always be determined infallibly from appearances, and mistakes must inevitably be made. When a mistake is made, the carrier is not liable in damages simply because a white person was taken for a negro, or vice versa. *It is not a legal injury for a white person to be taken for a negro.*

*Thurman*, 90 S.W. at 241 (emphasis added). Note that this problem of misidentification was, in large part, a result of the racial ambiguity of the progeny of miscegenous unions.

267. *Wolfe*, 58 S.E. at 901.

268. *Id.*

269. *See infra* note 251 and accompanying text.

270. *See Wolfe*, 58 S.E. at 902–03. The court invoked the decision in *Scott v. State* by the roundabout logic that charging a White man, even though of darkish skin tones, with being Black is to accuse him of illegitimacy, since intermarriage has been forbidden in the state, and thus, mixed-race individuals must be illegitimate. The court apparently never considered the fact that he could have been born legally in another state (or some other country, for that matter) that allowed miscegenous marriages. *See Scott v. State*, 39 Ga. 321 (1869).

In *Eggers v. Olson*,<sup>271</sup> the Oklahoma court was faced with a suit to quiet a real estate title that was clouded by the fact of the marriage between a Choctaw Indian, Emily Lewis, and an African American, William Yates, a marriage that took place in Arkansas.<sup>272</sup> The court considered a statute that not only made miscegenation a felony, but defined miscegenation in such a way that a person "of African descent" could not marry a person of any other race. The statute did so by including all races except African in the term "white race."<sup>273</sup> Thus, the clear intent of this scheme was to "prohibit marriage of the descendents of the African race with any other race in this state."<sup>274</sup> The law would not have prohibited the marriage of a White to a Native American, but apparently did prohibit the marriage of an African American to a Native American. In upholding the law, the court once again touched upon the familiar themes. First, the biological: "[t]he amalgamation of the races is not only unnatural, but always productive of deplorable results."<sup>275</sup> Second, the authority of the states to regulate marriage.<sup>276</sup> Third, the relationship between prohibitions on miscegenation and incest.<sup>277</sup>

Twenty years later, in *Stevens v. United States*,<sup>278</sup> the Tenth Circuit, faced with a similar fact pattern,<sup>279</sup> found no violation of the Fourteenth Amendment in Oklahoma's statutory law.<sup>280</sup> The Alabama courts agreed that anti-miscegenation laws were constitutional as recently as 1954.<sup>281</sup>

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271. 231 P. 483 (Okla. 1924).

272. *See id.* at 483-84.

273. *Id.* at 484 (citing OKLA. STAT. §§ 7499, 7500 (1921)).

274. *Id.*

275. *Id.*

276. *See id.* at 484-85.

277. *See id.* at 485-86.

278. 146 F.2d 120 (10th Cir. 1944).

279. The case arose in the context of the probate of the will of Stella Sands, a Creek Indian, and William Stevens, "a Creek Freedman" but of African descent. Stevens claimed that his marriage to Sands revoked her prior will, under which he took nothing, and claimed a share of her estate under the laws of intestate succession. Stevens' argument would succeed if the marriage were valid, but would fail if the marriage was void as being between a person of African descent (Stevens) and a White person (Sands, as defined by the Oklahoma Constitution, OKLA. CONST. art. XXIII, § 11). *See id.* at 122.

280. *See id.* at 123 (citing *Pace v. Alabama*, 106 U.S. 583 (1883)). The court invoked the concept of the importance of marriage as a state-regulated institution: "It is a domestic relation having to do with the morals and civilization of a people. It is an essential institution in every well organized society. It affects in a vital manner public welfare, and its control and regulation is a matter of domestic concern within each state." *Id.*

281. *See Jackson v. State*, 72 So.2d 114, 116 (Ala. Ct. App. 1954).



B. *The Court Dodges The Question*

The Supreme Court, which had previously denied certiorari in *Jackson v. State*,<sup>282</sup> criminally convicting an African American woman under the Alabama anti-miscegenation statute,<sup>283</sup> narrowly invalidated a statute making interracial cohabitation criminal in *McLaughlin v. Florida*.<sup>284</sup> Even though presented with the question of the constitutionality of Florida's anti-miscegenation statute,<sup>285</sup> the Court did not address this issue. Instead, it rested its holding on the argument that the law violated the Equal Protection Clause because it did not punish same-race cohabitation in the same manner as interracial cohabitation.<sup>286</sup> In a very brief concurring opinion, Justice Stewart, joined by Justice Douglas, did go a bit further: "I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense."<sup>287</sup>

In *Naim v. Naim*,<sup>288</sup> the Virginia Supreme Court continued to rely on natural law and divine intent to uphold the constitutionality of the state's anti-miscegenation statute ("An Act to preserve racial integrity")<sup>289</sup> against Due Process and Equal Protection challenges.<sup>290</sup> The court did so despite the fact that the statute was clearly aimed solely at White racial purity.<sup>291</sup> The court stated that "the natural law which forbids their inter-

282. *Id.* at 114 (holding that an Alabama miscegenation statute does not violate the Fifth or Fourteenth Amendments).

283. *See id.* at 115–16.

284. *See* 379 U.S. 184 (1964). The Court stated, "We reject this argument [that the statute is valid because it is ancillary to and serves the same purpose as the miscegenation law], without reaching the question of the validity of the State's prohibition against interracial marriage or the soundness of the arguments rooted in the history of the [Fourteenth] Amendment [Equal Protection Clause]." *Id.* at 195.

285. *See id.* at 187 n.6.

286. *See id.* at 196.

287. *Id.* at 198 (Stewart, J., concurring).

288. 87 S.E.2d 749 (1955).

289. *Id.* at 750 (citing Va. Code Ann. § 20–54 (1955)).

290. *See id.* at 751.

291. The statute, which in the instant case was applied to the North Carolina marriage of a White Virginia domiciliary and a Chinese woman who was a non-resident at the time of the marriage, forbade the marriage of a White person to anyone other than a White person. White person was defined as anyone having no trace of any blood other than Caucasian, subject only to the "Pocahantas exception." *See* Wadlington, *supra* note 2, at 1202–03 (discussing the exception to Virginia's anti-miscegenation statute based on the historical marriage of John Rolfe and Pocahantas) However, the statute would not, for example, have prohibited Mrs. Naim from marrying an African American. *See Naim*, 87 S.E.2d at 750–51. The court made it clear that "the preservation of racial integrity is the unquestioned policy of this State, and that it is sound and wholesome, cannot be

marriage and the social amalgamation which leads to a corruption of races is as clearly divine as that which imparted to them different natures."<sup>292</sup> The court also noted that marriage was more than a mere civil contract, and its regulation by the states had been upheld by the Supreme Court;<sup>293</sup> that the Supreme Court had upheld miscegenation in *Pace v. Alabama*;<sup>294</sup> that more than half the states had miscegenation statutes; that most state courts facing the question had upheld their statutes;<sup>295</sup> that the sole exception, *Perez v. Lippold*,<sup>296</sup> was the product of a divided court and, nevertheless, distinguishable;<sup>297</sup> and that, as recently as 1954 the Supreme Court had declined certiorari in *Jackson v. State*.<sup>298</sup>

On first receiving *Naim*, the Supreme Court declined to consider the constitutional issues due to "the inadequacy of the record," and it vacated and remanded.<sup>299</sup> On remand, the Virginia Court tersely reiterated its former position and affirmed the lower court's decision holding the marriage void.<sup>300</sup> Given a second chance, the Supreme Court found

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gainsaid." *Id.* at 752 (quoting *Wood v. Commonwealth*, 166 S.E. 477, 479 (1932)). Further, "[t]here can be no question of the public policy of Virginia with reference to miscegenation." *Id.* at 752 (quoting *Toler v. Oakwood Smokeless Coal Corp.*, 4 S.E.2d 364, 368 (1939)).

292. *Id.* at 752.

293. *See id.* at 753 (citing *Maynard v. Hill*, 125 U.S. 190 (1888)). The court added:

The institution of marriage has from time immemorial been considered a proper subject for State regulation in the interest of the public health, morals and welfare, to the end that family life, a regulation basic and vital to the permanence of the State, may be maintained in accordance with established tradition and culture and in furtherance of the physical, moral and spiritual well-being of its citizens.

*Id.* at 756.

294. *See id.* at 754 (citing *Pace v. Alabama*, 106 U.S. 583 (1883)).

295. *See id.* at 753 (citing cases from Arizona, Arkansas, Colorado, Georgia, Missouri, North Carolina, Montana, Oregon, Tennessee and Texas).

296. 198 P.2d 17 (Cal. 1948), discussed *infra* notes 311-48 and accompanying text.

297. *See Naim*, 87 S.E. 2d at 753. *Perez* was a seven-three decision. Further, unlike Virginia, California recognized miscegenous marriages entered into outside the state. Thus, although they could not be married in California, miscegenous couples could legally live in California and procreate mixed-race children. Since California tolerated these couples and children, California, unlike Virginia, could not logically argue that such marriages were detrimental to the health and safety of the state's domiciliaries. In addition, California's statute did not carry a punishment for miscegenation but was merely declaratory that the marriage was void, whereas those of Virginia and other states imposed penalties.

298. *See id.* at 755 (citing *Jackson v. State*, 72 So. 2d 114 (Ala. Ct. App. 1954)).

299. *See Naim*, 350 U.S. 891, 891 (1955).

300. *See Naim v. Naim*, 90 S.E.2d 849, 850 (Va. 1956).

the case to be “devoid of a properly presented federal question,” and it declined to rule on the merits.<sup>301</sup>

### C. The Edifice Cracks

In *Burns v. State*,<sup>302</sup> an Alabama court invalidated its state miscegenation law based on the Civil Rights Bill of 1866.<sup>303</sup> However, *Burns* was overruled five years later in *Green v. State*,<sup>304</sup> which described the holding as “a very narrow and an illogical view of the subject.”<sup>305</sup> One federal judge sitting in Texas held in 1877 that the abolition of slavery had *sub silentio* overruled Texas’ miscegenation statute,<sup>306</sup> but corrected himself two years later.<sup>307</sup> Judge Duval, who believed that “[m]arriage between the two races is wholly abhorrent to my sense of fitness and propriety”<sup>308</sup> did posit an Equal Protection problem with the statute, but only because the statute imposed a penalty only on the White member of the miscegenous union.<sup>309</sup> An 1874 Louisiana case held that the Civil Rights Act of 1866 and the Fourteenth Amendment abrogated the Louisiana miscegenation statute, but did so under the theory that in Louisiana marriage was nothing more than a civil contract.<sup>310</sup>

301. *Naim*, 350 U.S. at 985. The Court’s refusal to address the issue drew strong negative reactions. See Wadlington, *supra* note 2, at 1209. Chief Justice Earl Warren considered the Court’s handling of *Naim v. Naim* “total bullshit,” according to one of his law clerks. ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 451 (1997) (“*Naim v. Naim* came at an awkward time. Still hoping the South would rally behind the school desegregation decisions, the justices were reluctant to provoke resistance by striking down miscegenation laws.”) See also Kopytoff & Higginbotham, *supra* note 40, at 2026 n.242 (discussing the Supreme Court’s “prudent avoidance” of the miscegenation issue in *Naim*).

302. 48 Ala. 195 (1872).

303. Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

304. 58 Ala. 190 (1877).

305. *Green*, 58 Ala. at 192. The court did magnanimously add dicta to the effect that since the Greens had married in reliance on *Burns v. State*, the Governor should pardon them. See *id.* at 197. See Wallenstein, *supra* note 2, at 377–87 for a discussion of how the Alabama Supreme Court’s change in composition—from White Republicans from Washington imposed upon the southern court during Reconstruction to White locally elected Democrats after 1875—contributed to the court’s inconsistent decisions.

306. See *Ex parte Brown* (W.D. Tex. 1877) (*Brown* is unreported, but is set out in full in *Ex parte Francois*, 9 F. Cas. 699, 701 (C.C.W.D. Tex. 1879) (No. 5047)).

307. See *Ex parte Francois*.

308. See *Ex parte Brown*, cited in *Ex parte Francois*, 9 F. Cas. at 699.

309. Duval explained the disparate treatment as being based on the fact that White people, with their superior intelligence and education, were “mainly to blame” for the miscegenous union. *Ex parte Francois*, 9 F. Cas. at 701.

310. See *Hart v. Hoss & Elder*, 26 La. Ann. 90, 94 (1874). As discussed, other courts rejected the idea that the marriage contract was the kind of contract subject to Contracts Clause regulation. See *supra* note 64.

The first true crack in the courts' monolithic support for the constitutionality of miscegenation statutes came in California with *Perez v. Lippold*.<sup>311</sup> Justice Traynor held that California's antimiscegenation laws<sup>312</sup> violated the Equal Protection Clause of the Fourteenth Amendment.<sup>313</sup> Justice Traynor first discussed prior case law to the contrary, including *Scott and Jackson*, concluding that "[m]odern experts are agreed that the progeny of marriages between persons of different races are not inferior to both parents."<sup>314</sup> He then noted that the law only acted to prohibit the intermarriage of Whites with non-Whites, but did not prohibit, for example, the marriage of an African American to an Asian American.<sup>315</sup> This, the state conceded, was to protect the White race "from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians."<sup>316</sup> The state also argued that mulattoes had low fertility.<sup>317</sup> Justice Traynor denied the latter claim and as to the former, stated, "[t]here is no scientific proof that one race is superior to another in native ability."<sup>318</sup>

Justice Traynor disputed the state's reliance on *Pace v. Alabama*,<sup>319</sup> *Buck v. Bell*,<sup>320</sup> and the argument that the social inferiority of African Americans was a given and, thus, that the progeny of mixed marriages would be subject to the stigma of such inferiority.<sup>321</sup> Justice Traynor countered that if the state could prohibit mixed race marriages because of the social tensions they caused, it could prohibit mixed religion marriages for the same reason.<sup>322</sup> In addition, recognizing that the legislature had

311. 198 P.2d 17 (Cal. 1948).

312. See CAL. CIV. CODE § 69 (1872) (repealed 1969) ("[N]o license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race."); CAL. CIV. CODE § 60 (1872) (repealed 1959) (such marriages are illegal and void).

313. See *Perez*, 198 P.2d at 18–19.

314. *Id.* at 22 (citing W.E. Castle, *Biological and Sociological Consequences of Race Crossing*, 9 AM. J. OF PHYSICAL ANTHROPOLOGY 145, 152–53 (1926)).

315. See *id.* at 22–23.

316. *Id.* at 23.

317. See *id.* at 24 n.4.

318. *Id.* at 24 (citing MYRDAL ET AL., *supra* note 2, at 147–48).

319. 106 U.S. 583 (1883), discussed *supra* notes 72–74.

320. 274 U.S. 200 (1927). Traynor distinguished *Buck v. Bell* as involving the issue of the inheritability of mental defects, and also noted the more recent Supreme Court case of *Skinner v. Oklahoma*, 316 U.S. 535 (1942). See *Perez*, 198 P.2d at 26.

321. See *id.* (citing *Wolfe v. Georgia Ry. & Elec. Co.*, 58 S.E. 899, 901 (Ga. Ct. App. 1907)).

322. See *id.* at 22. Indeed, Justice Traynor noted, John LaFarge, S.J., had suggested the same thing in JOHN LA FARGE, S.J., *THE RACE QUESTION AND THE NEGRO* 196 (1943). See *id.*

utilized Blumenbach's classification system of five races to determine who could marry whom,<sup>323</sup> Justice Traynor noted that the miscegenation statute failed to address the question of the propriety of marriages between persons who were themselves of mixed race.<sup>324</sup>

In a powerful concurring opinion, Justice Carter found the statute to be contrary to the Declaration of Independence,<sup>325</sup> the Fifth Amendment,<sup>326</sup> the Privileges and Immunities clause, the Due Process and Equal Protection clauses of the Fourteenth Amendment<sup>327</sup> and the Charter of the United Nations.<sup>328</sup> Justice Carter also called upon the Apostle Paul for his statement that can be read to contradict the theory that the three races were derived from the three sons of Noah,<sup>329</sup> as well as Thomas Jefferson, who, in a 1785 letter, suggested that after a few generations of cultivation Blacks might become the equals of Whites in body and mind.<sup>330</sup> Justice Carter also noted that the races have mixed for a long time, although, writing in 1948, his scientific sources were of dubious support.<sup>331</sup>

Although Justice Carter also argued that the various states' miscegenation statutes were never constitutional,<sup>332</sup> he noted that California has

323. See *Perez*, 198 P.2d at 27 (citing *Roldan v. Los Angeles County*, 18 P.2d 706 (Cal. 1933)). See *supra* notes 98–99 for a discussion of Blumenbach's classification system.

324. See *Perez*, 198 P.2d at 27–28. Some interpretations of poorly worded anti-miscegenation statutes made it impossible for mixed-race persons to marry anybody.

325. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

326. U.S. CONST. amend. V (1791). Justice Carter's argument is apparently that miscegenation laws are contrary to the spirit of the Fifth Amendment, not necessarily that the amendment applies to the state statute.

327. U.S. CONST. amend. XIV (1868).

328. U.N. CHARTER art. 1, para. 3.

329. See *Perez*, 198 P.2d at 30 (Carter, J., concurring). Carter quoted Paul as stating "God hath made of one blood all nations of men." *Id.* (citing *Acts of the Apostles* 17:26). See *supra* notes 78–96 for an analysis of the Biblical debate over the races.

330. See *Perez*, 198 P.2d at 30 (Carter, J., concurring). I have argued that Justice Carter's reliance on Jefferson is misplaced. See *supra* notes 201–17.

331. See *id.* at 30 (Carter, J., concurring). Justice Carter cited CEDRICK DOVER, *HALF-CASTE* (1937), in which the author suggests that "our Neanderthal ancestors arose from mixture between apemen of the Ice Age." *Perez*, 198 P.2d at 30. Dover goes on to speculate that such miscegenation has influenced our species for at least ten thousand years. See *id.* Although Justice Carter could not have known it at the time, we now are fairly certain that the Neanderthals were an evolutionary dead end and played no part in the ancestry of *Homo sapiens sapiens*. But see ERIK TRINKAUS & PAT SHIPMAN, *THE NEANDERTHALS* 414 (1992) (stating that Neanderthals probably were our ancestors in certain geographic regions). Further, the time scale Justice Carter cites from Dover is now generally regarded as far too short. See *supra* notes 190–91; *Perez*, 198 P.2d at 30 (Carter, J., concurring) (stating that human evolution had occurred in just 10,000 years).

332. See *Perez*, 198 P.2d at 32 (Carter, J., concurring) (citing Justice Harlan's "color-blind" dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). See generally Sealing, *supra* note 223.

honored the validity of miscegenous marriages entered into in states where they were allowed,<sup>333</sup> and has rejected sociological arguments against miscegenation.<sup>334</sup> Justice Carter's most powerful attack was upon the "medico-eugenic" theorists. Justice Carter first set out the following quotes:

The blood-mixing however, with the lowering of the racial level caused by it, is the sole cause of the dying-off of old cultures;

...

The result of any crossing, in brief, is always the following: (a) lowering of the standard of the higher race, (b) physical and mental regression, and, with it, the beginning of slowly but steadily progressive lingering illness.

....

Every race-crossing leads necessarily sooner or later to the decline of the mixed product.<sup>335</sup>

Leaving the reader a brief moment to speculate as to which eugenic scientist or Nineteenth Century scientific racist penned the words, Justice Carter announces their author: Adolph Hitler.<sup>336</sup>

Justice Edmonds concurred in the judgment because he believed the right to marry, "grounded in the fundamental principles of Christianity," was protected by the constitutional guarantee of religious freedom.<sup>337</sup> In other words, using current terminology, Justice Edmonds based his argument on the fact that because the right to marry was a fundamental right guaranteed by the First Amendment it was subject not to the "rational basis" test imposed by Justices Traynor and Carter, but to strict scrutiny. Justice Edmonds then found that unlike polygamy, which constituted a clear and present danger to the moral fabric of the nation,<sup>338</sup> miscegenation

333. See *Perez*, 198 P.2d at 32 (Carter, J., concurring) (citing *Pearson v. Pearson*, 51 Cal. 120, 125 (1875) (holding that a marriage by a White master to a former slave in Utah, who had been manumitted by the act of marriage to her master, is valid in California because it was valid under Utah law, even though the marriage would have been invalid if entered into in California)).

334. See *id.* at 33.

335. *Id.* at 33-34.

336. See *id.* at 33-34 (citing ADOLF HITLER, *MEIN KAMPF* (trans. 1940)).

337. *Id.* at 30 (Edmonds, J., concurring).

338. See *id.* at 35 (citing *Reynolds v. United States*, 98 U.S. 145, 165-66 (1878); *Mormon Church v. United States*, 136 U.S. 1, 49 (1890); *Davis v. Beason*, 133 U.S. 333 (1890)).

did not constitute such a danger.<sup>339</sup> The implication of Justice Edmonds' opinion is that he did believe the law would have survived the rational basis test.

Writing in dissent, Justice Shenk found that miscegenation, "despite the sociogenetic views of some people," was constitutional.<sup>340</sup> Shenk, writing in 1948, pointed out that California was one of thirty states with anti-miscegenation laws.<sup>341</sup> Further, he highlighted the lengthy pedigrees of some of the statutes<sup>342</sup> and the fact that, until *Perez*, no court had found the laws unconstitutional.<sup>343</sup> By selecting different sources from the majority, Justice Shenk was able to find extensive support for the proposition that: "[o]n the biological phase there is ample authority for the conclusion that the crossing of the primary races leads gradually to retrogression and to eventual extinction of the resultant type unless it is fortified by reunion with the parent stock."<sup>344</sup>

Justice Shenk's dissent hit upon all the familiar themes: the assumption of the inferiority of non-White races (with emphasis on the African as occupying the bottom rung of the ladder);<sup>345</sup> the assumption that physical deterioration will occur as a result of miscegenation;<sup>346</sup> and the presumption that racial mixing will result in the regression rather than the

339. *See id.*

340. *See id.* (Shenk, J., dissenting).

341. *See id.* at 38. In addition, six of these states had constitutional prohibitions against the legislative abolition of anti-miscegenation statutes, and several refused to recognize miscegenous marriages entered into in states where they were legal. *See id.* (citing *Eggers v. Olsen*, 231 P. 483 (Okla. 1924); *State v. Kennedy*, 76 N.C. 251 (1877)).

342. *See id.* at 38–39 (Shenk, J., dissenting) (citing Maryland (1663), Massachusetts (1705), Delaware (1721), Virginia (1726), North Carolina (1741) and Louisiana (as decreed by France, 1724)).

343. *See id.* at 39 (citing *In re Monk's Estate*, 120 P.2d 167, 173 (Cal. 1941); *Stevens v. United States*, 146 F.2d 120 (10th Cir. 1944) (holding that Oklahoma's anti-miscegenation statute does not violate the Fourteenth Amendment); *Pace v. Alabama*, discussed *supra* note 72–74 and accompanying text; *State v. Tutty*, 41 F. 753 (S.D. Ga. 1890) discussed *supra* notes 256–263 and accompanying text; *Scott v. State*, discussed *supra* 246–255 and accompanying text; *State v. Jackson*, 80 Mo. 175 (1883); *Eggers v. Olson*, 231 P. 483 (Okla. 1924), *State v. Pass*, 121 P.2d 882 (Ariz. 1942), *Kirby v. Kirby*, 206 P.2d 405 (Ariz. 1922); *Jackson v. City and County of Denver*, 124 P.2d 240 (Colo. 1942); *In re Takahashi's Estate*, 129 P.2d 217 (Mont. 1942) (marriage between White and Japanese individuals); *Green v. State*, 58 Ala. 190 (1877); *Kinney v. Commonwealth*, 32 Am. Rep. 690 (Va. 1878); *State v. Gibson*, 36 Ind. 389 (Ind. 1871); *Dodson v. State*, 31 S.W. 977 (Ark. 1895); *Frasher v. State*, 3 Tex. App. 263 (1877); *Lonas v. State*, 50 Tenn. (3 Heisk.) 287 (1871)).

344. *Id.* at 44 (citing, e.g., W. A. Dixon, M.D., 20 JAMA 1 (1893)).

345. This assumption is often not expressed, but is a necessary predicate to the analysis that always follows.

346. *See Perez*, 198 P.2d at 44 (Shenk, J., dissenting).

improvement of either race.<sup>347</sup> Justice Shenk also found miscegenation to have grave sociological consequences.<sup>348</sup>

Chief Justice Earl Warren, faced with further chiding by Virginia's Supreme Court,<sup>349</sup> and determined to end the Court's refusal to address the miscegenation issue,<sup>350</sup> delivered the unanimous<sup>351</sup> opinion in *Loving v. Virginia*.<sup>352</sup> Warren began dramatically by quoting from the trial judge's opinion, which mixed religious fervor with scientific racism in a familiar manner:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated

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347. See *id.* (citing GREGORY, *supra* note 54, at 227, 229; C.B. DAVENPORT & MORRIS STEGGERDA, *RACE CROSSING IN JAMAICA* (1929)).

348. See *id.* at 45 (citing LAFARGE, *supra* note 322, at 196–97). Justice Shenk also argued that those who would allow miscegenation should direct their energies at the legislature rather than the courts. See *id.* at 46 (Shenk, J., dissenting) (citing repeals of anti-miscegenation statutes in Massachusetts (1843), Kansas (1859), New Mexico (1866), Washington (1868), Rhode Island (1881), Minnesota (1881), Michigan (1883) and Ohio (1887)).

349. In *Loving v. Virginia*, 147 S.E.2d 78 (Va. 1966) Virginia's highest court first made reference to *Naim v. Naim*, *supra* notes 288–301, stating that “[i]n the *Naim* case, the Virginia statutes relating to miscegenic marriages were fully investigated and their constitutionality was upheld.” *Loving*, 147 S.E.2d at 80. Second, it noted that the Court had denied certiorari in *Jackson v. State*, see *Jackson v. Alabama*, 348 U.S. 888 (1954), just six months after its decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), thus (to the Virginia court) signaling that *Brown*'s reversal of *Plessy v. Ferguson*, 163 U.S. 537 (1896), upon which Virginia had relied in *Naim*, did not constitute a reversal of *Naim*. *Loving*, 147 S.E.2d at 80. Third, it pointed to the narrow holding in *McLaughlin v. Florida*, *supra* note 284, which was decided without reaching the question of the constitutionality of Florida's miscegenation statute.

350. See *infra* notes 282–301.

351. Justice Stewart concurred in the judgment because of his belief, stated in a concurrence to *McLaughlin v. Florida*, that any state law that makes the criminality of an act dependent on the race of the actor is unconstitutional. See *Loving*, 388 U.S. at 13 (Stewart, J. concurring) (citing *McLaughlin*, 379 U.S. at 198 (Stewart, J. concurring)). Justice Black joined the opinion only after Chief Justice Warren agreed to delete references to his belief in a fundamental right to marriage, an expansive view of the Due Process Clause that Black rejected. See CRAY, *supra* note 301, at 452–53.

352. In 1958, Richard Loving, a White man, and Mildred Jeter, an African American woman, both Virginia residents, went to the District of Columbia, where miscegenous marriages were legal, and got married. See *Loving*, 388 U.S. at 2. When the couple returned to Virginia to live together as husband and wife, they were criminally charged and convicted. See *id.* at 2–3. The Virginia supreme court modified its sentences but upheld the constitutionality of the anti-miscegenation statute. See *id.* at 3–4 (citing *Loving v. Virginia*, 147 S.E.2d 78 (1966)).



the races shows that he did not intend for the races to mix.<sup>353</sup>

But contained in Warren's opinion is a testament to the staying power of scientific racism. Warren noted that Virginia had argued that "the scientific evidence [demonstrating that miscegenation statutes could survive a rational basis challenge] is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages."<sup>354</sup> Warren avoided the question by holding that *McLaughlin* had, in fact, rejected the "equal application" theory of *Pace*,<sup>355</sup> and that since the statute was designed to maintain "White Supremacy" because it did not prevent miscegenation where neither of the marriage partners were White,<sup>356</sup> the racial classifications the statute created must be subject to "'most rigid scrutiny.'"<sup>357</sup> Thus, although Warren was finally able to bring an end to the miscegenation statutes in 1967, he did so without ever directly repudiating the scientific racism upon which they were, in part, based.

## CONCLUSION

Some ideas die hard.<sup>358</sup> The marriage of scientific racism and the former slaveholders' need for anti-miscegenation laws created long-lived progeny. For instance, ninety-seven years after the adoption of a state constitutional ban on miscegenation<sup>359</sup>—a provision rendered moot by *Loving*—Alabama's legislature is considering whether to send the measure to voters for repeal.<sup>360</sup> A similar bill was killed in committee last year.

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353. *Id.* at 3. Cf. Lombardo, *supra* note 24, at 21 ("The trial judge issued a written opinion which, in its simplicity, remains a monument to the bigotry masquerading as both religion and science.").

354. *Loving*, 388 U.S. at 8. This point had also been raised by the state court. See *Loving*, 147 S.E.2d at 82 ("Such arguments are properly addressable to the legislature . . .").

355. See *Loving*, 388 U.S. at 10.

356. *Id.* at 11-12.

357. *Id.* at 11 (citing *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

358. See ELAZAR BARKAN, *THE RETREAT OF SCIENTIFIC RACISM: CHANGING CONCEPTS OF RACE IN BRITAIN AND THE UNITED STATES BETWEEN THE WORLD WARS* (1992) (discussing the modern scientific and social science attacks on scientific racism); Pascoe, *supra* note 1, at 47 (arguing that the attack on scientific racism began in the 1920s in the universities with the work of Franz Boas and other social scientists).

359. ALA. CONST. art. IV, § 102.

360. See Marlon Manuel, *Moot or Not, Interracial Marriage Still an Issue*, THE ATLANTA JOURNAL-CONST., Dec. 20, 1998, at A8.

South Carolina voters deleted a comparable provision from that state's 1895 constitution in November 1998.<sup>361</sup>

As has been shown above, miscegenation statutes remained in force for such a long time because, in part, their inherent racism was bolstered by the "scientific" evidence provided by scientific racism. The scientific racists of the time did not see their science in quotation marks; they were often the preeminent scientists of their day. They knew what they would find before they began to search for it,<sup>362</sup> and indeed their research revealed an inherent White superiority that must be preserved. The flaws in their thinking and methodologies were only revealed by later scientific investigation.

As a final note, one cannot but wonder if the newly revealed basis for the inherent inferiority of those of African descent described in *The Bell Curve* will appear as flawed to future scientists as the work of Cuvier, Nott and Agassiz does to us today.<sup>363</sup> *The Bell Curve* was published in 1994 amid a great deal of controversy, reissued in paperback in 1996,<sup>364</sup>

361. See Schodolski, *supra* note 5.

362. Cf. LEAKEY & LEWIN, *supra* note 94, at 51 ("People's expectations, their scientific preconceptions, influence their judgments. All scientists work from some kind of theoretical framework and interpret evidence in its light. Weak evidence can often be made to fit such a framework, whatever its form.").

363. See e.g., Yvonna Lincoln, *For Whom The Bell Tolls: A Cognitive or Educated Elite*, in MEASURED LIES: THE BELL CURVE EXAMINED 127, 134 (Joe L. Kincheloe et al. eds., 1996) ("Another generation down the road will regard their work with the same combination of intellectual disgust and fascination as we now hold for the proponents of the racially biased eugenics movement so popular in scientific and educational circles at the turn of the century.") (citing S. Seldon, *Biological Determinism and the Normal School Curriculum: Helen Putnam and the NEA Committee on Racial Well-Being, 1910-1922*, in CONTEMPORARY CURRICULUM DISCOURSES 50-65 (W.F. Pinar ed., 1988)).

Other commentators are concerned that:

[T]he popularity of *The Bell Curve* signals the rewriting of history by omitting the legacy of slavery and racism in the United States. In this case, the history of the eugenics movement and its disparaging attempts to fashion a theory of scientific racism appears to have been lost in the mainstream discussions of *The Bell Curve*. Neither Arthur Jensen's nor Cyril Burt's discredited research has been called into question in popular discussions of the book.

Henry A. Giroux & Susan Searls, *The Bell Curve Debate and the Crisis of Public Intellectuals*, in MEASURED LIES, *supra*, at 71, 79. See also Ladislaus Semali, *In the Name of Science and of Genetics and of The Bell Curve: White Supremacy in American Schools*, in MEASURED LIES, *supra*, at 161, 163 ("[W]hat they purport is but a narrow biological determinism of the worst kind - a kind of genetic fundamentalism related to the nineteenth century imperialist racism, the kind that has prevailed on the African continent since the first colonizers set foot on African soil in the sixteenth century.").

364. RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1996).

and, in an abridged version, as an audiotape in 1999.<sup>365</sup> The counterattacks from scientists, social scientists and others came swiftly and in numbers, and continue to do so.<sup>366</sup>

Under a mantle of scientific authority, Richard Herrnstein and Charles Murray have argued that “dozens of reputable studies” over several decades have demonstrated that African Americans’ IQs are one standard deviation lower than those of Whites, with a median score of 85, versus 100 for Whites.<sup>367</sup> Furthermore, “pure” Africans score even lower: a 75 median.<sup>368</sup> Moreover, they argue that the frequently asserted explanation of test bias has been disproved.<sup>369</sup>

The problems are two-fold however, when viewed in light of the above discussion of scientific racism. First, the authors base their entire work on a number of disputed assumptions: first, the validity of a concept of a measurable single factor for intelligence, generally referred to as “*g*,” second, that *g* is highly heritable; third, that it is generally immutable despite environmental changes; fourth, that *g* does not change in an individual through time; and finally and perhaps most importantly, existing IQ tests measure *g* without racial (or cultural or sexual) bias.<sup>370</sup> Clearly, these assumptions are crucial, because if any one of them is false the entire *Bell Curve* house of cards falls. Second, and perhaps more relevant to this discussion, the authors brought with them the same

365. RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (Audiotape) (1999).

366. See, e.g., *THE BELL CURVE WARS: RACE, INTELLIGENCE, AND THE FUTURE OF AMERICA* (Steve Fraser ed., 1995); CLAUDE S. FISCHER ET AL., *INEQUALITY BY DESIGN: CRACKING THE BELL CURVE MYTH* (1996); *INTELLIGENCE, GENES, AND SUCCESS: SCIENTISTS RESPOND TO THE BELL CURVE* (Bernie Devlin ed., 1996); *MEASURED LIES*, *supra* note 363; MAMADOU CHUNYELU, *DEBUNKING THE BELL CURVE & SCIENTIFIC RACISM* (1996); WILLIAM DICKENS, *DOES THE BELL CURVE RING TRUE?* (1999); RUSSELL JACOBY, *THE BELL CURVE DEBATE: HISTORY, DOCUMENTS, OPINIONS* (1996).

367. HERRNSTEIN & MURRAY, *supra* note 105, at 269, 274.

368. See *id.* at 289.

369. See *id.* at 269. This issue may come to the fore again in the expected appeal of *Cureton v. NCAA*, 37 F. Supp. 687 (E.D. Pa. 1999). In *Cureton*, the court held that the NCAA’s initial eligibility rule for athletes, Proposition 16, which required an SAT score of at minimum one standard deviation to the left of the national average, had an unjustified disparate impact on would-be African American student-athletes in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d). See *id.*

370. See HERRNSTEIN & MURRAY, *supra* note 105, at 1–24. But cf. Phil Francis Carpecken, *The Set-up: Crocodile Tears for the Poor*, in *MEASURED LIES*, *supra* note 363, at 116:

Only if there is such a thing as *g*, only if it can be measured by tests, only if the tests are designed to capture all human capabilities we would wish to include in the concept of intelligence, only if *g* has a strong genetic basis, and only if *g* cannot change during a lifetime will the concept of “cognitive class” make sense.

preconceived notions of what they would find as did their Nineteenth Century scientific racist progenitors, as demonstrated, inter alia, by their motivations for writing the book<sup>371</sup> and by the not-so-hidden agendas of those who funded their work.<sup>372</sup>

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371. See Richard Carey, *IQ as Commodity: The 'New' Economics of Intelligence*, in MEASURED LIES, *supra* note 363, at 137 (arguing that *The Bell Curve* is an attempt to marshal scientific evidence to overturn *Griggs v. Duke Power*, 401 U.S. 424 (1971)).

372. See, e.g., Joe Kincheloe & Shirley Steinberg, *Who Said It Can't Happen Here*, in MEASURED LIES, *supra* note 363, at 4 (noting the book's financial backing by the ultra-conservative Bradley Foundation and Murray's position with the equally conservative American Enterprise Institute). Kincheloe and Steinberg note that the authors relied heavily on the research of White supremacists (including MANKIND QUARTERLY, a White supremacist journal founded by long-time Nazi Robert Gayre and funded by the racist Pioneer Fund), eugenicists, and Philippe Rushton (an internationally infamous racist psychologist), as well as on research funds from the Pioneer Fund. See *id.* at 38–40. In addition, “the writing of *The Bell Curve* was funded by a grant from the Bradley Foundation, which has been described as ‘the nation’s biggest underwriter of conservative intellectual activity’.” Maria R. Vidal, *Genetic Rationalizations and Public Policy: Herrnstein and Murray on Intelligence and Welfare Dependency*, in MEASURED LIES, *supra* note 363, at 225 (quoting Gregg Eastbrook, *Blacktop baseball and The Bell Curve*, in THE BELL CURVE DEBATE 40 (R. Jacoby & N. Glauber eds., 1995)). See also Paulo Freire & Donaldo Macedo, *Scientism as a Form of Racism: A Dialogue*, in MEASURED LIES, *supra* note 363, at 431 (“That a major portion of the data used to provide the basis for the main arguments in *The Bell Curve* was funded by the Pioneer Fund, an organization with a long history of association with Nazi groups[,] should have been a wake-up call.”).