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ARTICLES

CODIFYING CASTE: LOUISIANA'S RACIAL CLASSIFICATION SCHEME AND THE FOURTEENTH AMENDMENT

Raymond T. Diamond and Robert J. Cottrol***

The term "caste" is frequently employed by social scientists and others to describe patterns of black-white relations in the United States.¹ While the parallel with the system of social stratification classically found on the Indian subcontinent is not totally satisfactory,² there are sufficient similarities between these two

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1. Among the many works that have made the parallel between the Hindu caste system and black-white relations in the United States are J. DOLLARD, *CASTE AND CLASS IN A SOUTHERN TOWN passim* (1957); D. KATSMAN, *BEFORE THE GHETTO: BLACK DETROIT IN THE NINETEENTH CENTURY* 81-103 (1973); G. MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 667-88 (1962).

2. Although almost every social scientist who has examined race relations in the United States has, to some extent, employed the parallel, we would argue that the parallel is highly problematic because of the very different ideological underpinnings of classical Indian society and American society. While the caste system was an integral part of Hindu theology, the American racial caste system has always been at odds with American egalitarian ideals. As such, American patterns of caste, like discrimination, have always generated protests among white as well as black Americans. For an interesting treatment of the Indian

systems to make the comparison at least compelling, if not completely precise. Like the Hindu caste system, the black-white distinction in the United States has supplied a social hierarchy determined at birth, and arguably immutable, even by subsequent achievement. In the United States, caste-like distinctions between black and white frequently have had their origins in distinctions mandated by law. Judicially and legislatively mandated racial distinctions have played major roles in the American caste system, at times following social trends, but more often helping to shape them.³ Crucial in forming the social underpinnings of the American caste system has been the very definitions of black and white in the American context.

A case of current interest⁴ and of possible practical importance for an undetermined number of Louisianians is *Doe v. Louisiana*,⁵ a case which tells much about the role of social classification and the maintenance of caste in America. The case reveals the lament of Susie Guillory Phipps, a woman of undeniable slave ancestry whose appearance is that of a white person and whose upbringing and experience, she claims, is that of a white person, but whose birth certificate publicly classifies her under law to be black. A trial court judge has ruled that her birth certificate may not be changed, and the case is now on appeal.

Phipps claims to be the victim of Louisiana's racial classifica-

caste system and its weakening among Indians who received British university educations in the early twentieth century, see M. WEBER, *THE RELIGION OF INDIA: THE SOCIOLOGY OF HINDUISM AND BUDDHISM* 3-133 (H. Gerth & G. Martindale trans. 1958).

3. C. Vann Woodward convincingly challenged the idea that the rigid patterns of segregation that prevailed for most of the twentieth century southern history were simply an application of traditional southern mores. His study demonstrated that laws passed in the late nineteenth and early twentieth centuries played a major role in helping to shape patterns of social segregation in the South. See C. WOODWARD, *THE STRANGE CAREER OF JIM CROW passim* (1957).

4. See, e.g., Ruth, *Woman Is Lingering in Gray Area as State Has Yet to Decide Her Race*, Times Picayune, Feb. 6, 1983, § 1 at 19, col. 2; Letter from Paul D. Bond entitled "American race," Times Picayune/States Item, Sept. 23, 1982, § 1 at 12, col. 2; Anderson, *Woman is Fierce in Fight to Right Her Race Record*, Times Picayune/States Item, Sept. 20, 1982, § 1 at 11, col. 1; Anderson, *Experts Doubt Reliability of Family-Tree Chart*, Times Picayune/States Item, Sept. 16, 1982, § 6 at 4, col. 1; Anderson, *La. Woman's Relatives Say They Lived As 'Coloreds'*, Times Picayune/States Item, Sept. 15, 1982, § 1 at 17, col. 1; Anderson, *Parents Raised Her as a 'White Child,' Woman Tells Court*, Times Picayune/States Item, Sept. 14, 1982, § 1 at 9, col. 1; Schlangenstein, *Black or White? Family Challenges La. Guidelines*, Times Picayune/States Item, Sept. 12, 1982, § 1 at e, col. 1; NBC News, Monitor News Broadcast (Mar. 4, 1983).

5. No. 78-9513 consolidated with 81-4201, slip ops. (Orl. Parish, C.D.C., May 18, 1983), appeal docketed, No. CA 1120 (4th Cir. July 27, 1983).

tion scheme, which falls into three parts. First, title 40, section 34(A)(1)(k) of the Louisiana Revised Statutes⁶ mandates that the race or races of parents be entered on an individual's birth certificate. Second, section 267 of title 42⁷ has provided:

In signifying race, a person having one-thirty-second or less of Negro blood shall not be deemed, described, or designated by any public official in the State of Louisiana as "colored," a "mulatto," a "black," a "negro," a "griffe," an "Afro-American," a "quadroon," a "mestizo," a "colored person," or a "person of color."⁸

Since the decision of the trial court, this section has been repealed,⁹ but because the repeal is not clearly retrospective in nature, section 267 is still at issue in the case on appeal. Lastly, Phipps must meet an extraordinary burden of proof to change her racial classification, i.e., leaving "no room for doubt" that her birth certificate designation should be changed from black to white.¹⁰

Currently, new birth certificates in Louisiana are issued as a matter course without racial designations.¹¹ The legislature has prohibited the issuance of new birth certificates with such data, even though the information is in the hands of the state, unless requested on behalf of the individual whose birth is recorded.¹² However, this prohibition does not obtain with respect to earlier issued birth certificates, and whatever discriminatory intent has accompanied Louisiana's racial classification scheme finds full effect with respect to earlier issued certificates.

Aside from the factual question of the extent of her black or Negro heritage, Phipps challenges the constitutionality of sections 40:34(A)(1)(k) and 42:267,¹³ contending that they violate the equal

6. LA. REV. STAT. ANN. § 40:34(a)(1)(k) (West Supp. 1983).

7. *Id.* § 42:267(West 1983).

8. *Id.* Louisiana also mandates that the race of a person be stated on death certificates. LA. REV. STAT. ANN. § 40:34(A)(2)(c) (West Supp. 1983). But racially labeling the deceased has much less effect than racially labeling the living. Race designations on death certificates are not the subject of *Doe v. Louisiana* and are not the subject of this article. Another classic identification device, the driver's license, no longer carries a racial designation in Louisiana.

9. 1983 La. Acts 441. To repeal R.S. 42:267, relative to the criterion for signification of race by public officials in Louisiana, and otherwise to provide with respect thereto. Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 42:267 is hereby repealed in its entirety.

10. *State ex rel. Plaia v. Louisiana State Bd. of Health*, 296 So.2d 809, 810 (La. 1974).

11. LA. REV. STAT. ANN. § 40:39(B)(West Supp. 1983).

12. *Id.*

13. Whether LA. REV. STAT. ANN. § 42:267 is so vague as to violate due process require-

protection clause of the fourteenth amendment to the Constitution of the United States.¹⁴ It is the question of equal protection that this article treats, the question whether Louisiana's scheme of racial definition, categorization, and classification has evinced racially discriminatory purpose and effect, i.e., the maintenance of social caste based on race.

I. RACE AND CASTE IN THE UNITED STATES

Racial castes in America had their origins in the earliest period of colonization. To properly examine the existence of racial castes in this nation one must examine the historical record to find the hows and whys of racial distinctions. Louisiana's own racial castes have been modified in their development by something akin to characteristics of Latin American acceptance of caste without color determination,¹⁵ but nonetheless bear close resemblance to those of the nation as a whole. Especially given such Latin American characteristics involving mobility across caste lines regardless of color, Louisiana's racial classification scheme holds the phenotypically white, but classified as black person at the mercies of those who otherwise would impose the private sanctions that accompany public identification with inferior caste.

A. Racial Castes — An American Tradition

Of necessary importance in evaluating Louisiana's racial classification statutes is an examination of the historical and cultural milieu in which the statutes were legislated and in which those affected must live. An inquiry as to this milieu reveals a damning history, one that renders the purposes underlying the racial classification statutes extremely questionable and suggests that the ef-

ments, and is therefore unenforceable, is a legitimate question, and has been considered by Louisiana courts. See *Plaia*, 296 So.2d 809. See also *Thomas v. Louisiana State Bd. of Health*, 278 So.2d 915 (La. App. 4th Cir. 1973). This issue, however, is not the subject of this article.

14. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
U.S. CONST. amend. XIV, § 1.

15. See *infra* notes 55-75 and accompanying text.

fects of such classifications are constitutionally objectionable.

The common and legal definitions of the term "Negro" in the United States traditionally have been broad enough to include many individuals who, like Susie Phipps, appear white, would be classified as white in most of the nations of the world, and are of predominately European ancestry.¹⁶ The genealogical rigor of such definitions had its origins in the efforts of American law to enforce racially based slavery and discrimination. The origins of such laws resemble efforts elsewhere to develop legally mandated caste systems based on ethnicity or race, but stand in marked contrast to the approach in other multi-ethnic societies where group prejudices exist, but without reinforcement by the State erecting a hermetic seal of laws differentiating between racial or ethnic categories.

The American pattern of racial classification had its origins in American slavery. Because slavery in the United States was based on race, the law had to define the statuses of the two races to make the system function. This necessitated an effort to define membership in the different races. Such a definition could define slavery or freedom as well as other less critical rights and disabilities. Early American law and society responded gradually to the unfolding equation of race and bondage in colonial America. The presumption that Negroes were slaves and whites were free was by no means fixed when black and white first encountered each other in England's North American colonies.¹⁷ Whether or not one accepts the view of an English predisposition toward anti-black prejudice,¹⁸ it seems likely that many of the first blacks brought to the North American colonies in the seventeenth century were servants in bondage for a period of years, not slaves. Early seventeenth century colonial laws reflected the unsettled status of early African laborers in North American colonies.¹⁹

16. C. DEGLER, *NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES* 101-02 (1971).

17. A. HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* 19-22(1978); T. BREEN & S. INNES, *MYNE OWNE GROUND: RACE AND FREEDOM ON VIRGINIA'S EASTERN SHORE, 1640-1676*, at 3-6(1980).

18. W. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812*, at 3-43(1968).

19. Blacks in this early colonial period appear to have suffered under legal and social disabilities not significantly different from those endured by white servants, particularly those who were not English. The law made distinctions between Christian and non-Christian servants, not between black and white. Laws employed the term "servants" instead of "slaves." Ironically, Massachusetts codified the black's slave status before Virginia. It would

By the eighteenth century, the uncertainty was beginning to be resolved as the number of blacks in British North American colonies increased and slavery took on greater economic importance in the southern colonies.²⁰ Slavery's increased importance, coupled with the growth in black population, posed a problem in social control. The lines between black slaves and white indentured servants, at least in the plantation South, became more rigid as planters in southern colonies realized that if the two groups were not separated, they might make common cause, and upset the equilibrium of the emerging plantation social economy.²¹ Race took on heightened importance; the beginnings of a legally mandated racial caste system were under way.²²

Ironically, that caste system was made more formal and more rigid because of the liberal ideals of the American Revolution. The American Revolution significantly expanded the free Negro class.²³ By the end of the eighteenth century, slavery in the North was on the road to extinction.²⁴ Its demise was fueled by Revolutionary idealism and permitted by the marginal economic advantage of northern slavery. Even in the South, numerous manumissions in the late eighteenth century created a large free Negro population, particularly in the upper South.²⁵ While a free black population had existed since the earliest settlements in British North America, the great expansion of the post-Revolutionary era raised new questions about its status.

Initially, there seems to have been a tendency not to legally distinguish the two different groups of free people. All of the northern states and a number of southern states permitted free blacks to vote in the latter part of the eighteenth and the beginning of the nineteenth century.²⁶ The federal Constitution did not

take the laws of the southern colony until the end of the seventeenth century to legislate slave status for blacks, an action that Massachusetts legislators took decades earlier. See A. HIGGINBOTHAM, *supra* note 17, at 21-22, 36-37, 61-62.

20. W. JORDAN, *supra* note 18, at 82.

21. See E. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA passim* (1975).

22. W. JORDAN, *supra* note 18, at 91-98.

23. A. ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH passim* (1967); W. JORDAN, *supra* note 18, at 346-48.

24. A. ZILVERSMIT, *supra* note 23.

25. W. JORDAN, *supra* note 18, at 346-48.

26. States that legally permitted free blacks to vote in the late eighteenth and early nineteenth centuries were Maine, Vermont, New Hampshire, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Maryland, North Carolina, and Ten-

mention race in outlining qualifications for office holders or electors.²⁷ Certainly, some of this may have been oversight, but the failure to make race a specific criterion for exercising the prerogatives of citizenship should be attributed in part to the spirit of the Revolutionary era. It was a time when numerous people, including many who drafted the fundamental charters of federal and state governments, recognized the inconsistency of upholding both the Revolution's liberal postulates and the idea of racial disabilities. The post-Revolutionary era held promise, albeit possibly slim, that the racial caste system that had begun to emerge in the eighteenth century might be curtailed, at least for the emerging free black population.

That promise proved illusory. Whether that initial lack of reference to race in late eighteenth century legislation stemmed from oversight or idealism, by the nineteenth century, efforts were made to insure that the free black population did not escape the strictures of caste. The federal government led the way in this effort. Congress restricted membership in the militia to white men in 1792.²⁸ In the early nineteenth century, employment in the post office was limited to whites.²⁹ State laws enacted in the nineteenth century also reflect the effort to insure a separate and inferior place for all blacks, slave and free. After the War of 1812, most

nessee. As racism became more acute and explicit in the nineteenth century, a number of these states curtailed black voting rights. Blacks were legally disfranchised in New Jersey in 1807, in Maryland in 1810, in Connecticut in 1818, in Rhode Island in 1822, in Tennessee in 1834, in North Carolina in 1835, and in Pennsylvania in 1838. The New York Constitution of 1822 abolished property qualifications for white voters but established a \$250 property requirement for black voters. In 1842, black voting rights were restored in Rhode Island. One ironic feature of the disfranchisement of black voters was that it frequently coincided with the abolition of property requirements for white voters. See R. COTTRILL, *THE AFRO-YANKEES: PROVIDENCE'S BLACK COMMUNITY IN THE ANTEBELLUM ERA* 42-43, 76-77(1982); J. FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICAN* 162 (5th ed. 1980); Wright, *Negro Suffrage in New Jersey, 1776-1875*, 33 *J. OF NEGRO HIST.* 168(1948).

27. That portion of article I, section 2, discussing membership in the House of Representatives that counted the slave population as three-fifths of the rest of the population for representation purposes has commonly been misinterpreted as an indication that the framers of the Constitution believed that blacks were three-fifths human. Two points should be stressed: The first is that article I, section 2, accorded full representation for a state's free black as well as free white population; the second is that the three-fifths clause was a compromise between northern delegates to the Constitutional Convention, who argued that southern states should not get additional representatives based on their slave populations, and southern delegates who wanted the slave population counted to boost their states' representation. See W. JORDAN, *supra* note 18, at 322.

28. L. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860*, at 31-32 (1961).

29. *Id.* at 31.

states restricted the ballot to white men, disfranchising a number of black men who previously had enjoyed, and in some cases exercised, the right to vote.³⁰ Legal discriminations in schooling, access to public accommodations, the right to redress through the courts, even the right to reside in certain states as a free person, all began to solidify in the nineteenth century. There was, of course, a range of discrimination in the different states. Legal discrimination in New England remained relatively mild, while it grew progressively more strident in the South.³¹ The early nineteenth century period which saw the expansion of the cotton kingdom was also a time of expanding democratic rights for the white population. This egalitarianism of what has been loosely termed the "Jacksonian era" stood in stark contrast to the entrenchment of slavery in the South and the erosion of the rights of free Negroes throughout the country. Antebellum America was becoming more democratic and egalitarian for whites, and increasingly oppressive for blacks.³²

The way to resolve the paradox of bondage in a free society was to proclaim blacks different, the peculiar exception to the democratic order in the new republic.³³ Once that argument was advanced, slavery and racial discrimination were made sensible. Blacks, inherently inferior, dependent, and childlike, were deemed unfit to govern their own lives, much less participate in the emerging democratic order. Slavery's apologists argued that there was no

30. See *supra* note 26.

31. This reinvigoration of a legal basis for a caste system was related to two developments, the expansion of the American slave system and the expansion of American democracy. Southern statesmen in the late eighteenth century were willing to countenance discussion of abolition and willing to concede slavery's evils. By the nineteenth century, that was changing. The institution was made more robust, more economically vital, by the invention of the cotton gin and the addition of new, cultivatable land in the West. The developing cotton economy rested on a basis of slave labor; new economic imperatives tended to diminish previous discomfort with the owning of human beings. See W. JORDAN, *supra* note 18, at 428-81 (discussing Thomas Jefferson's thoughts on slavery). See also S. RATNER, J. SOLTOW & R. SYLLA, *THE EVOLUTION OF THE AMERICAN ECONOMY: GROWTH, WELFARE, AND DECISION MAKING* 146-48(1979).

32. See *supra* note 26.

33. For an interesting sampling of pro-slavery thought, see *SLAVERY DEFENDED: THE VIEWS OF THE OLD SOUTH passim* (E. McKittrick ed. 1963). E. Pollard's essay, *Black Diamonds*, *id.* at 162-68, supplies a quintessential example of the viewpoint that blacks were a childlike, dependent people, ideally suited to slavery. An interesting counter example among pro-slavery writers, also found in McKittrick's volume, is that of George Fitzgugh. His *Sociology for the South*, *id.* at 34-50, was less concerned with arguing the case for Negro inferiority than it was with attacking liberalism and capitalism. Fitzgugh's view was that the slave system of the South was a more humane order than the system of free labor existing in the North and Europe. By implication, at least, Fitzgugh's essay made a case for extending an unfree labor system to white workers in the North and Europe.

contradiction between liberal society and their peculiar institution. The former was for whites, the latter for blacks.

The anomalous position of blacks was underscored in 1857 by Chief Justice Roger Taney in *Scott v. Sanford*.³⁴ In delivering the judgment of the Supreme Court, he delivered also the dictum that blacks, owing to their background of slavery, were "not included under the name of citizens . . . and were not in the contemplation of the framers of the Constitution when [the] privileges and immunities were provided for."³⁵ Free blacks posed a threat to the increasingly *Herrenvolk*³⁶ direction that American democracy was taking. Their ability to manage their own lives contradicted one of the fundamental premises used to justify slavery. In the South, they were feared as, at best, bad examples and, at worst, potential allies of slaves.³⁷ Free blacks living in the North were seen as less disturbing to the social equilibrium; however, they too, by and large did not share in the growing democratization of American institutions.³⁸

Throughout the antebellum period, the law's support for the caste system virtually eliminated in all but a handful of states vestiges of black citizenship that had survived the post-Revolutionary era.³⁹ Manumissions became more difficult in southern states.

34. 60 U.S. (19 How.) 393 (1857).

35. *Id.* at 402-03.

36. G. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914*, at 61, 64 (1971); P. VAN DEN BERGHE, *RACE AND RACISM: A COMPARATIVE PERSPECTIVE* 17-18 (1967). Van den Berghe employed the term "*Herrenvolk* Democracy" to describe those societies that are egalitarian and democratic for superordinate groups but undemocratic for subordinate groups. A good modern example of this is the Republic of South Africa.

37. See generally I. BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH passim* (1974).

38. Part of the reason for the exclusion of blacks from participation in democratic institutions that emerged in the antebellum North was political. The Democratic party, which played a major role in a number of egalitarian reforms, including extending the vote to propertyless white men, was often viciously anti-black. This antipathy between the party of the white workingman and blacks existed partly because of the Democratic party's national ties to the slaveholding South and partly because of the tendency of the earliest black voters in the Northeast to vote Federalist. North and South, free blacks found themselves stigmatized by the enhanced caste system, albeit less so than the over ninety percent of the antebellum black population that was enslaved. See R. COTTRILL, *supra* note 26, at 103-04; L. CURRY, *THE FREE BLACK IN URBAN AMERICA, 1800-1850*; L. LITWACK, *supra* note 28, at 80-81.

39. The New England states (except Connecticut) allowed black men to vote on the same basis as white men. New York permitted black men who had \$250 worth of property to vote, while not requiring property for white voters. Legal discrimination against blacks existed in New York and New England (with the possible exceptions of Maine, Vermont,

Many state legislatures forbade the freeing of slaves or the settlement of free blacks absent special legislative approval.⁴⁰ The Fugitive Slave Act of 1850 extended the presumption that blacks were slaves by denying the right of jury trials to alleged fugitives.⁴¹ Chief Justice Taney's dictum in the *Dred Scott* case proclaimed: "The Negro has no rights that the white man is bound to respect."⁴² Legally in the antebellum era, the rigors of caste were made absolute.

The Civil War, emancipation, the thirteenth,⁴³ fourteenth,⁴⁴ and fifteenth⁴⁵ amendments, together with Reconstruction and postbellum civil rights legislation, softened but hardly eliminated the juridical caste system. Legal discrimination persisted during post-war Reconstruction and intensified with the return of white southern rule.⁴⁶ Toward the end of the nineteenth century, legislation in the states of the former Confederacy eviscerated many of the rights won by blacks after the Civil War.⁴⁷ And, as if to add supporting ritual to the American version of caste relations, legislative and private actions, primarily though not exclusively in the South, developed "Jim Crow."

Jim Crow established an etiquette of discrimination.⁴⁸ It was not enough for blacks to be second class citizens, denied the franchise and consigned to inferior schools. Black subordination was reinforced by a racist punctilio dictating separate seating on public accommodations, separate water fountains and restrooms, separate seats in courthouses, and separate Bibles to swear in

and New Hampshire, which had very small black populations). Legally segregated schools, for example, were the rule in New York and New England cities in areas where sizable black populations lived. Massachusetts abolished *de jure* segregation in schools in 1855. In 1843, that state repealed its law against interracial marriage. See J. HORTON & L. HORTON, *BLACK BOSTONIANS: FAMILY LIFE AND COMMUNITY STRUGGLE IN THE ANTEBELLUM NORTH* 70, 92 (1979).

40. E. GENOVESE, *ROLL JORDAN ROLL: THE WORLD THE SLAVES MADE* 398-402 (1974).

41. R. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 175-76 (1975).

42. *Scott*, 60 U.S. (19 How.) at 400.

43. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

44. U.S. CONST. amend. XIV, § 1. See *supra* note 14 for text of the amendment.

45. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

46. C. WOODWARD, *supra* note 3, at 18-47.

47. *Id.*

48. *Id.*

black witnesses about to give testimony before the law. The list of separations was ingenious and endless. Blacks became like a group of American untouchables, ritually separated from the rest of the population. These state actions were abetted by federal indifference and sometimes outright approval.

The Supreme Court of the United States pronounced such separations consonant with the fourteenth amendment in *Plessy v. Ferguson*.⁴⁹ Subsequent courts would even ignore the *de jure* racial egalitarianism behind the authoring of the fourteenth and fifteenth amendments. The federal government even participated in its own versions of Jim Crow, legally segregating at various times black members of the armed forces and the civil service.⁵⁰ Overt legal assistance from both state and federal governments to the American caste system would continue for most of the twentieth century, to be challenged only after the second world war.

After *Plessy*, challenges to such discriminatory laws turned on the question of equality of facilities, as opposed to the constitutional permissibility of separation. This continued until 1954, when the Supreme Court, repudiating the separate but equal doctrine, proclaimed in *Brown v. Board of Education* that "separate . . . facilities are inherently unequal."⁵¹ The assault on segregation then began in earnest, and the massive number of Civil Rights cases that have greeted the federal courts since then bears witness to this fact.

Against this background, the rigidity of American racial classifications becomes somewhat easier to understand. State supported or initiated discrimination required racial definitions. The law could not separate what it failed to categorize. The law's emphasis on race, an emphasis that legislated the most minute detail of an individual's existence, had to be supported by an equally meticulous definition of an individual's race. Haphazard definition based on appearance could satisfy neither the earlier demands of determining who should be slave and who free, nor the elaborate protocol of segregation. A legally mandated caste system needed at a minimum to define caste membership. As the authors of that caste system premised black inferiority and allocated privileges and re-

49. 163 U.S. 537 (1896).

50. J. FRANKLIN, *supra* note 26, at 324-25.

51. 347 U.S. 483, 495 (1954). *Brown's* holding initially was limited to educational facilities, but was later extended to other areas.

strictions based on membership in one caste or the other, tracing black ancestry back as far as possible became a prerequisite to the smooth functioning of the caste system.⁵² Whether law followed custom or custom followed law, the idea that traceable African ancestry made one black, with all the accompanying disabilities of that status, had widespread currency in the United States in both the black and white populations.⁵³

B. Race and Caste in Louisiana: Touched By Latin American Traditions

Most Americans are the heirs of the preceding history of racial caste and firmly believe in the kinds of racial classifications that have developed in American law and custom. It is easy to forget that the experience of African and Afro-American⁵⁴ slavery and racial adjustment in the post-emancipation period was not merely a national experience, but a hemispheric one. Indeed, the bulk of Africans brought to the New World and the majority of their surviving Afro-American descendants have experienced slavery and freedom in Latin America and the Caribbean, not in the United States.⁵⁵ It is important to note, therefore, that very different perceptions of racial group membership developed in Latin America. A proper examination of Louisiana's own heritage in fact mandates an inquiry into Latin American racial caste patterns.

The Latin American concept of racial caste is decidedly different from that in this nation; the idea that any traceable black an-

52. See Note, 34 Cornell L.Q. 246 (1949).

53. This observation is shown by, for example, the dispute in which the plaintiff in *Doe v. Louisiana* is involved. Another indication of this concept is the phenomenon of blond-haired, blue-eyed, and fair-skinned individuals who declare themselves to be black and the occurrence of "passing." An excellent fictional account of this may be found in J. JOHNSON, *THE AUTOBIOGRAPHY OF AN EX-COLOURED MAN* (1927).

Further, in the nineteenth and much of the twentieth century, novelists and filmmakers have regaled black and white audiences with an extensive fictional genre about "tragic mulattoes," white appearing Negroes who tried to escape their black status only to find themselves despairingly lost between both castes in a society that demanded membership in one caste or the other. See T. CRIPPS, *SLOW FADE TO BLACK: THE NEGRO IN AMERICAN FILM, 1900-1942*, at 301-03 (1977).

54. "Afro-American" is used here to describe persons of African descent throughout the western hemisphere.

55. The United States received less than five percent of the African population brought to the New World. In 1950, approximately thirty percent of Afro-Americans in the Western Hemisphere lived in the United States. See P. CURTIN, *THE ATLANTIC SLAVE TRADE: A CENSUS* 91 (1969).

cestry makes an individual black is alien in most parts of the hemisphere. Indeed, many individuals with visibly black racial characteristics in parts of Latin America are considered white.⁵⁶ A variety of explanations can be advanced to account for this significantly different perception of race. An older generation of scholars argued that this difference could be attributed to the absence of racism in Iberian culture,⁵⁷ but contemporary students of comparative slavery and race relations in the western hemisphere have found much to dispute in this view.⁵⁸

In colonial Latin America, laws mandated different privileges for whites and blacks.⁵⁹ The newly independent former colonies of Spain and Portugal often established separate military units for blacks and whites in the nineteenth century.⁶⁰ The twentieth century did not bring an end to the legal disabilities of persons of African descent living in parts of Latin America. In fact, a number of Latin American nations, while welcoming European immigration, severely curtailed or prohibited the immigration of Africans and Afro-Americans.⁶¹ Brazilian president Getulia Vargas restricted the commissioning of blacks in the Brazilian army in the 1930's and 40's. The Brazilian navy possessed a tradition of being all white.⁶² Legal discrimination and racial prejudice were thus by

56. C. DEGLER, *supra* note 16, at 101-06.

57. See generally F. TANNENBAUM, *SLAVE AND CITIZEN: THE NEGRO IN THE AMERICAS passim* (1947).

58. The bibliography on comparative slavery and race relations is extensive, growing, and too long to discuss here. One essay that provides a valuable focus for the debate is by Eugene D. Genovese, *The Treatment of Slaves in Different Countries: Problems in the Application of the Comparative Method*, found in *SLAVERY IN THE NEW WORLD: A READER IN COMPARATIVE HISTORY* 202-10 (L. Foner & E. Genovese ed. 1969).

Note should be made of the fact that Spanish and Portugese settlers in the Americas did not come to the New World innocent of anti-black prejudice. They had had extensive experience with African slavery on the Iberian penninsula and had developed codes mandating an inferior status for blacks, slave and free, before they embarked upon the conquest of New World territories. See D. DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 53, 103 (1966).

59. F. BOWSER, *THE AFRICAN SLAVE IN COLONIAL PERU, 1524-1650*, at 149-53 (1974). See also Sater, *The Black Experience in Chile*, in *SLAVERY AND RACE RELATIONS IN LATIN AMERICA* 3, 28-35 (R. Toplin ed. 1974); Sharp, *Manumission, Libres and Black Resistance: The Columbian Choco*, *id.* at 89, 96-97.

60. C. DEGLER, *supra* note 16, at 79-80; G. ANDREWS, *THE AFRO-ARGENTINES OF BUENOS AIRES, 1800-1900*, at 113-37 (1980).

61. See Corwin, *Afro-Brazilians: Myths and Realities*, in R. Toplin, *supra* note 59, at 385-402; and Wright, *Elitist Attitudes Toward Race in Twentieth Century Venezuela*, in R. Toplin, *supra* note 59, at 325, 336-37.

62. While the color bar in the Brazilian navy was never absolute, early in the twentieth century, Brazil, in an effort to promote an image abroad that it was a predominately

no means unknown in Latin America.

The pronounced differences between racial classifications in the United States and Latin America warrant some attempt at explanation. One example of these differences is the different status accorded the mulatto in most of Latin America. People in the United States distinguish between blacks and mulattos, but except in Louisiana, that distinction has been unsystematic. While informal distinctions between blacks and mulattos in the United States certainly have led to important social and economic differences between the two groups, they usually have not permitted the mulatto group to escape the disabilities of the Negro caste; in much of Latin America, however, mulattos are viewed as a group racially distinct from blacks.⁶³ Indeed, the common Latin American pattern of racial classification does not view black and white as discrete racial categories but, rather, treats race as a continuum with fine gradations of intermediate categories between pure black and pure white, somewhat analogous to, although more precise than, the classifications of mulatto, quadroon, and octoroon.⁶⁴

In Latin America, the institution of slavery often had permitted the mulatto a different and higher social standing than that enjoyed by blacks;⁶⁵ freedom continued that trend. The constitu-

white nation, restricted commission in the navy to whites, sent white only crews to foreign nations, and discouraged Afro-Brazilian enlistments in the navy. See T. SKIDMORE, *BLACK INTO WHITE: RACE AND NATIONALITY IN BRAZILIAN THOUGHT* 48 (1974).

63. C. DEGLER, *supra* note 16, *passim*; L. ROUNT, JR., *THE AFRICAN EXPERIENCE IN SPANISH AMERICA 1502 TO THE PRESENT DAY passim* (1976).

64. M. MORNER, *RACE MIXTURE IN THE HISTORY OF LATIN AMERICA* 58-59 (1967).

65. This different Latin American perception historically has been related to two phenomena critical in the evolution of Latin American race relations. First, unlike the pattern in the United States, Latin American slavery took place against a background of a relatively scarce white population. In the United States, plantation slavery usually occurred in areas where the majority of inhabitants were white. In those zones in Latin America where plantation slavery flourished, whites were usually in a distinct minority. Distinguishing mulattoes from blacks became a useful, at times critical, way of insuring the survival of the slave system. Just as early eighteenth century Virginia planters felt the need to make allies of white indentured servants in order to control the slave population and thus insure the survival of their plantation system, planters in the Caribbean and Northeastern Brazil felt a corresponding need to enlist mulattoes to help insure the survival of theirs. But the needs of Latin American planters extended beyond the demands of social control. Slave societies needed an intermediate range of free laborers who would act as artisans, truck farmers, shopkeepers, minor government officials, and the like. In the American South, that role was fulfilled by nonslaveholding whites. In many parts of Latin America, free mulattoes performed these tasks.

Population differences also dictated different attitudes toward miscegenation. Miscegenation occurred, of course, in both the United States and Latin America. The official disapproval of the practice in the United States, however, was related to the presence of a large

tions of independent Latin American nations proclaimed the same liberal values as did their frequent model, the United States Constitution, and the governments established were nominally democratic ones espousing egalitarian ideals.⁶⁶ The nations of Latin America took the democratic-egalitarian ideals of their liberal revolution even further than their North American model, generally developing plans for abolishing slavery as part of their process of achieving independence.⁶⁷ Yet the kind of popular rule and class mobility that would characterize American society did not become commonplace in Latin America; ironically, this helped mute the development of a legally mandated racial caste system in Latin America. The emphasis was on class, not race. Elaborate rituals of restriction were not developed to keep people of African descent subordinate; instead, lower class persons, black, mulatto, and white were all kept from exceeding their stations in life. Racialist theories were not required to explain why blacks were the anomalous exception in an otherwise democratic and egalitarian society. The operative theory was that members of the lower classes should stay at the bottom of the social hierarchy and not challenge what was believed to be the natural order of things.

Those persons of African descent who individually rose in the Latin American social hierarchy posed no threat to the social equilibrium. In Latin America, such persons were disproportionately, though not exclusively, mulattos.⁶⁸ In the absence of the need to have the law shape a racial caste system, race in Latin America became a more fluid concept than in the United States. Latin Americans accepted the view that white was superior to black and that the worth of the intermediate categories depended on how

white female population from the earliest times. An American master's relations with his female slaves had to survive the scrutiny of his white wife. This limited, though by no means eliminated, the natural tendency of a master to take better care of, to perhaps elevate his mulatto children. Frequently, Brazilian and Caribbean slave masters were under no such limitations. The small white population and the attendant frequent absence of white women sometimes allowed more permanence in unions between masters and slaves and a better ability for a master to provide a more secure social footing for mulatto offspring. See C. DEGLER, *supra* note 16, at 44-47, 226-36, 238-39. See also C. BOXER, *THE GOLDEN AGE OF BRAZIL 1695-1750*, at 165-69 (1962); V. MARTINZE-ALIER, *MARRIAGE, CLASS AND COLOUR IN NINETEENTH CENTURY CUBA: A STUDY OF RACIAL ATTITUDES AND SEXUAL VALUES IN A SLAVE SOCIETY* 57-60 (1974).

66. K. KARST & K. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA* 43-46 (1975).

67. This was the prevailing pattern in the Spanish speaking nations of the hemisphere.

68. C. DEGLER, *supra* note 16, *passim*.

The term in the Latin America context is used loosely for purposes of this discussion, meaning all persons of societally recognized mixed blood.

close a category was to either of the extremes. Race was socially defined.⁶⁹ Indeed, one student of Latin American race relations has termed this use of a large number of intermediate categories between black and white and the fluid combination of social and phenotypical racial categorization "the mulatto escape hatch."⁷⁰

Louisiana is heir to both the rigid Anglo-American and the fluid Latin American patterns of race classification. Under Spanish and French rule in the eighteenth century, free mulattos held a distinct intermediate position between black slaves and the white population.⁷¹ The advent of American rule in the nineteenth century brought efforts to legally change that situation, to bring the free mulattos of Louisiana firmly within the system of caste disabilities common to free Negroes in the rest of the South. Although legislation was passed in the antebellum period in an attempt to curtail what Anglo-American settlers in Louisiana saw as the alarming liberties of the free mulatto population, such legislation was only marginally successful.⁷²

Free mulattos in Louisiana continued to enjoy considerably more freedom than their free Afro-American counterparts elsewhere in the South. Whites of French extraction regarded them as a group separate from blacks.⁷³ Many in this free mulatto class were wealthy planters and merchants; some were even extensive slave holders. In parts of Louisiana, this group regularly voted in defiance of the law's restriction of the ballot to white men.⁷⁴ In antebellum Louisiana, Latin American patterns of race relations and racial classification managed to survive growing American in-

69. *Id.* at 104-05. Indeed, defining a person's race in Latin America lacked the scientific pretensions of the North American exercise. Rather, defining race in Latin America often was more of an art, a curious alchemy where phenotype and social standing were combined to help determine racial category. "Money bleaches" became a popular saying in many parts of Latin America. It would not do to call a black doctor black; he was some category of mulatto. A dark-skinned mulatto who had become a lawyer or a military officer was of a higher (lighter) category of mulatto. A light-skinned mulatto with significant social standing might be viewed as white. This latter perception was especially important in parts of Latin America where the population of pure European ancestry was a distinct minority. In areas of Northeastern Brazil, for example, where pure whites are still a small minority, many individuals are classified as white who are known to have African ancestry. See M. HARRIS, PATTERNS OF RACE IN THE AMERICAS 59 (1964); and C. DEGLER, *supra* note 16, at 103.

70. See C. DEGLER, *supra* note 16, at 219.

71. I. Berlin, *supra* note 37, at 108-32.

72. *Id.*

73. See generally J. BLASSINGAME, BLACK NEW ORLEANS 1860-1880 (1973).

74. E. GENOVESE, *supra* note 40, at 401.

fluence. Free mulattos managed to retain a *de facto*, though not a *de jure*, status as a group apart from the rest of the black population before the Civil War. Afterwards, that distinct status began to erode. During Reconstruction, the group identified more closely with the rest of the black population and supported a general extension of the franchise to blacks, instead of a limited extension of the vote to their group, as some had advocated.⁷⁵ However, Jim Crow laws were applied to them as well as the rest of the black population in an effort to make them conform to the rigors of the caste system.⁷⁶ Hence, the mulatto escape hatch for Louisianians was closed.

C. Racial Caste As Context

Given the existence of racial castes, any act by a state government intended to label "accurately" an otherwise unidentifiable person has an impact on such a person living in a legally segregated society. Such classifications would have an impact even today, for the inequality of condition and status resulting from differences in color remains, as recognized by courts in approving plans for affirmative action.⁷⁷ This inequality of condition and status has been examined by reported judicial cases, recognized by statutes legislated, and documented by the reports of individuals of one race who have "passed" as members of another.⁷⁸ Empirical reports of governmental and other institutional bodies also demonstrate such inequality.⁷⁹ Such explicit records manifest what Americans have known by intuition and collective experience: that

75. J. BLASSINGAME, *supra* note 73, at 56-57; W. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA, 1860-1880*, at 456-57 (1968).

76. See, e.g., *Plessy*, 163 U.S. at 538, 552. *Plessy*, an octoroon, had insisted that he was not bound by the state law requiring separate passenger coaches for the colored race. *Id.* at 540. *Lee v. New Orleans Great N.R.R. Co.*, 125 La. 236, 51 So. 182 (1910), made it clear that under Louisiana law, any person of Negro descent would be affected by Jim Crow laws. See also R. DESDUNES, *NOS HOMMES ET NOTRE HISTOIRE 182-94* (1911), for a stirring history of the accomplishments of Creoles in New Orleans and a complaint and a plea against the imposition of Jim Crow laws. Politically, the inclusion of Creoles under Louisiana's Jim Crow laws may well have been a result of the group's identification with other blacks during Reconstruction.

77. See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193 (1979); and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

78. See, e.g., J. GRIFFIN, *BLACK LIKE ME* (1961).

79. See, e.g., NATIONAL URBAN LEAGUE, *THE STATE OF BLACK AMERICA, 1978* (1978); H. SHEPPARD, *CIVIL RIGHTS, EMPLOYMENT, AND THE SOCIAL STATUS OF AMERICAN NEGROES* (1966).

achievement and the potential therefor are closely related to race, and that while public discrimination is constitutionally reprobated, private discrimination is no small factor.

It is in this context, then, that Louisiana's racial classification scheme must be examined, a context in which private discrimination and the effects therefrom still exist, and one in which even state sponsored discrimination is still found. The context is one of an existing racial caste system. This, then, is the context in which the effect of the equal protection clause must be explored.

II. THE *MCGLAUGHLIN* TEST AND RACIAL CLASSIFICATION

The equal protection clause of the fourteenth amendment has since its earliest interpretations been understood to have been intended to protect blacks from discriminatory state action.⁸⁰ Whatever the violence done to this intention by the Supreme Court's interpretation in *Plessy v. Ferguson*, no action taken by the Court respecting racial discrimination has been more shocking than its countenance of blatant, undisguised discrimination against people of Japanese ancestry in *Korematsu v. United States*⁸¹ and *Hirabayashi v. United States*.⁸² Ironically, these two cases were instrumental in establishing the rule of strict scrutiny under which racial classifications are viewed.

Part of this nation's conduct in World War II involved the imposition of curfews, relocation, and confinement of Japanese-Americans living on the West Coast.⁸³ This action, "fall[ing] into the ugly abyss of racism,"⁸⁴ prompted the Supreme Court in 1943 to note in *Hirabayashi v. United States* that racial classifications are "not wholly beyond the limits of the Constitution."⁸⁵ Indeed, one year later, in *Korematsu v. United States*, the Court opined that while "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect[, t]hat is not to say that all

80. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1879); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

81. 323 U.S. 214 (1944).

82. 320 U.S. 81 (1943).

83. *Korematsu*, 323 U.S. at 215-21.

84. *Id.* at 233 (Murphy, J. Dissenting).

85. *Hirabayashi*, 320 U.S. at 101. The Court emphasized the perceived necessity of the situation, noting the crisis of war, the threatened invasion, and public safety as important facts and circumstances. *Id.*

such restrictions are unconstitutional.”⁸⁶ In graphic and onerous terms, therefore, the Court served notice that racial classifications, even of the most damaging kind, might well be upheld if “courts [first] subject them to the most rigid scrutiny.”⁸⁷

The lesson to be drawn from *Hirabayashi* and *Korematsu* was that “classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.”⁸⁸ The test to be used to evaluate such classifications was stated in *McLaughlin v. Florida*:⁸⁹

[Where] we deal . . . with a classification based upon the race of the participants, [it] must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications “constitutionally suspect,” . . . subject to the “most rigid scrutiny,” . . . and “in most instances irrelevant” to any constitutionally acceptable legislative purpose.⁹⁰

Thus was enunciated the rule that classifications based on race are suspect, to be subjected to strict scrutiny. Lacking any compelling state interest or “pressing public necessity,”⁹¹ they must fall before the demand of the equal protection clause.

Equally important to whether a racial classification triggers strict scrutiny are whether a racially discriminatory purpose is present and whether the classification has any impact. Assuming the existence of racially discriminatory impact, “[a] purpose to discriminate must be present.”⁹² “Disproportionate impact,” the Supreme Court has said, “is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.”⁹³ The Supreme Court has “not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.”⁹⁴ Thus, in *Washington v. Davis*,⁹⁵ an

86. *Korematsu*, 323 U.S. at 216.

87. *Id.*

88. *Bolling v. Sharpe*, 347 U.S. 497-499 (1954) (footnote omitted).

89. 379 U.S. 184 (1964).

90. *Id.* at 191-92 (citations omitted).

91. *Korematsu*, 323 U.S. at 216.

92. *Akins v. Texas*, 325 U.S. 398, 403 (1945).

93. *Washington v. Davis*, 426 U.S. 229, 242 (1976).

94. *Id.* at 239 (emphasis in original).

95. *Id.* at 229.

otherwise neutral employment testing procedure which had a disproportionately negative effect on black applicants was upheld.

The discriminatory purpose need not be proven to be the sole purpose on which the challenged action rests. Given the conflicting and sometimes complementary concerns of legislative and rulemaking bodies, "[r]arely can it be said that . . . a decision [is] motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."⁹⁶ But a racially discriminatory purpose "is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision . . . judicial deference [to the legislative will] is no longer justified."⁹⁷

How, then, can one prove a racially discriminatory purpose? Of course, such a purpose might be express, appearing on the face of a statute. Lacking such an explicit pronouncement, inquiry may be made into the totality of circumstances of the regulation or classification questioned. Discriminatory impact, though by itself normally not a trigger to the rule of strict scrutiny, is one factor to be considered. Not infrequently, the Supreme Court has said, such impact "may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds."⁹⁸ But while the impact of the state action "may provide an important starting point,"⁹⁹ what is required is "a sensitive inquiry into such circum-

96. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977)(footnote omitted).

Normally, the widest discretion is allowed the legislative judgment in determining whether to attack some, rather than all, of the manifestations of the evil aimed at; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious. . . . But we deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.

McLaughin, 379 U.S. at 191-92 (citations omitted).

97. *Id.* at 265-66 (footnote omitted). Part of the *Arlington Heights* Court's footnote on this point should also be mentioned: "The search for legislative purpose is often elusive enough, . . . without a requirement that primacy be ascertained. Legislation is frequently multipurposed: the removal of even a 'subordinate' purpose may shift altogether the consensus of legislative judgment supporting the statute." 429 U.S. at 265 n. 11 (citations omitted).

98. *Washington v. Davis*, 426 U.S. at 242.

99. *Arlington Heights*, 429 U.S. at 266.

stantial and direct evidence of intent as may be available."¹⁰⁰

The historical background of an action may shed light on the motivations involved.¹⁰¹ In particular, "[a] specific sequence of events leading up to the challenged decision" may prove illuminating.¹⁰² And of course, the legislative or administrative history may be a source of material regarding such racially discriminatory motivation.¹⁰³ Once a racially discriminatory purpose or motivation is ascertained, inquiry as to the discriminatory impact of the challenged rule or classification must be undertaken. For purposes of determining the impact of state regulations which facially merely classify individuals according to race and apply equally to persons of all races, it is important to note that state action, otherwise benign in its effects, which facilitates private discrimination, is constitutionally proscribed.

This rule was clearly enunciated in *Shelley v. Kramer*,¹⁰⁴ a 1948 decision by the Supreme Court, and again in *Reitman v. Mulkey*,¹⁰⁵ decided in 1967. *Shelley* involved judicial enforcement of privately contracted restrictive covenants prohibiting the sale of property to blacks. Recognizing "that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States,"¹⁰⁶ the Court opined that the amendment "erects no shield against merely private conduct, however discriminatory or wrongful."¹⁰⁷ Nonetheless, state action was found in the judicial enforcement of such private discrimination. Finding that "but for the active intervention of the state courts, supported by the full panoply of state power,"¹⁰⁸ the private discrimination would not have been effective, the Supreme Court declared the action of the courts unconstitutional.¹⁰⁹

Reitman v. Mulkey involved the constitutionality of a California constitutional amendment which, by design and intent, would have overturned state open housing laws and established in their

100. *Id.*

101. *Id.* at 267.

102. *Id.* "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of state action . . ." *Id.* at 266 (emphasis added).

103. *Id.* at 268.

104. 334 U.S. 1 (1948).

105. 387 U.S. 369 (1967).

106. *Shelley*, 334 U.S. at 13.

107. *Id.* (footnote omitted).

108. *Id.* at 19.

109. *Id.* at 20.

place "a purported constitutional right to *privately* discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment *should state action* be involved."¹¹⁰ There, the Supreme Court adopted the holding of the California Supreme Court which, "armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of [the amendment], and familiar with the milieu in which that provision would operate, . . . determined that the provision would involve the state in private racial discriminations to an unconstitutional degree."¹¹¹ The California court's reasoning was consistent with holdings of the United States Supreme Court which had found unconstitutional state authorized racial restrictions on the right to participate in a political party¹¹² and the refusal of service to blacks by an operator-lessee of a restaurant located in a building owned by the state, a refusal not authorized or encouraged by the state, but supported by the "power property and prestige"¹¹³ of the state and by the state's failure to halt the refusal of service.¹¹⁴

Similarly, in *NAACP v. Alabama*,¹¹⁵ the Supreme Court in 1958 recognized the "interplay between governmental and private action,"¹¹⁶ and held unconstitutional the governmental action, finding that "after the initial exertion of state power", private action of a racially discriminating nature would take hold.¹¹⁷ The state had claimed an interest in obtaining the Alabama membership list of the NAACP for the purpose of determining whether the organization was conducting intrastate business in violation of the Alabama foreign corporation statute. The court found that "whatever interest"¹¹⁸ the state might have had in obtaining members' names for the stated purpose, it was not sufficient to overcome the constitutional objections.¹¹⁹

The very act of classifying or labeling individuals according to

110. *Reitman*, 387 U.S. at 374 (emphasis in original).

111. *Id.* at 378-79.

112. *Nixon v. Concon*, 286 U.S. 73 (1932).

113. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961).

114. *Id.*

115. 357 U.S. 449 (1958).

116. *Id.* at 463.

117. *Id.*

118. *Id.* at 465. The Court was "unable to perceive that the [requested] disclosure . . . has a substantial bearing" on the issues the state wished to resolve. *Id.* at 464.

119. *Id.* at 465. Also at issue was the right to freedom of association. *Id.* at 466.

race has been held to be violative of the equal protection clause. *Anderson v. Martin*¹²⁰ involved a Louisiana statute requiring that nomination papers and ballots designate the race of all candidates for public office.¹²¹ The Supreme Court concluded that the statute was unconstitutional, stating,

[This case] has to do only with the right of a state to require or encourage its voters to discriminate upon grounds of race. In the abstract, Louisiana imposes no restriction upon anyone's candidacy nor upon an elector's choice in the casting of his ballot. But by placing a racial label on a candidate . . . the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another. This is true because by directing the citizen's attention to the single consideration of race or color, the state indicates that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines. . . . The vice lies not in the resulting inquiry but in the placing of the power of the state behind a racial classification that induces racial prejudice at the polls.¹²²

In recognizing the impetus toward racial discrimination when racially identifying information is supplied, the Supreme Court in effect recognized the existence of racial castes, existing if not in the entire nation, then surely at least in Louisiana, whose state statute was considered in *Anderson*.

Although no "compelling state interest" could be found to validate the racial classification in *Anderson*, such a justification was found in *Hamm v. Virginia State Board of Elections*.¹²³ That case involved three separate Virginia statutes, mandating respectively that racially separate lists of qualified voters be maintained, that racially segregated records be maintained respecting property ownership and tax records, and that the races of spouses be noted on divorce decrees.¹²⁴ In a decision affirmed by the Supreme Court, a three-judge panel struck down the first two requirements, but upheld the third, reasoning that "the designation of race, just as sex or religious denomination, may in certain records serve a useful

120. 375 U.S. 399 (1964).

121. *Id.* at 400.

122. *Id.* at 402.

123. 230 F. Supp. 156 (E.D. Va.), *aff'd per curiam sub nom Tancil v. Woolls*, 379 U.S. 19 (1964).

124. *Hamm*, 230 F. Supp. at 157.

purpose, and the procurement and compilation of such information by State authorities cannot be outlawed per se."¹²⁵ The mere "chronicling of racial data for identification and statistical use," the court found, "violate[d] no constitutional privilege."¹²⁶ The purpose of the statute, the compilation of vital statistics, was thus held legitimate.¹²⁷

Louisiana's racial classification statutes are clearly related to the collection of vital statistics; however, the purpose and motivation behind the statutes, as well as the impact of the statutes on protected racial classes, must be examined closely. Section I of this article illustrated the discriminatory impact of such classification, the identification as members of an inferior racial caste persons who might otherwise be free from discrimination. The following section will discuss the motivation behind Louisiana's racial classification scheme, concluding that it is discriminatory, and thus proscribed by the equal protection clause.

III. LOUISIANA AND RACIAL CLASSIFICATION: THE PURPOSE DISCLOSED

The thrust of state imposed racial categorization or classification in Louisiana is threefold. First, section 40:34(A)(1)(k) of the Louisiana Revised Statutes demands that the race or races of a child's parents be entered on a birth certificate. Second, section 42:267 delineates as white all those with one-thirty-second or less of "Negro blood." Third, Louisiana jurisprudence has established that in order to change the designation of race on a birth certificate, there must be "no room for doubt" that the change is warranted.¹²⁸

The provision demanding registration of parental race on birth certificates, section 40:34(A)(1)(k), is a direct descendant of a law passed in 1918 demanding the same registration.¹²⁹ By itself, this statute bears no need of prolonged scrutiny. Alone, it merely satisfies an ostensibly valid state interest in collecting vital statistics.¹³⁰ However, it must be considered in conjunction with section 42:267

125. *Id.* at 158.

126. *Id.*

127. *Id.*

128. *See supra* notes 6-10 and accompanying text.

129. 1918 La. Acts 257, § 14(10) & (16).

130. *Cf. Hamm*, 230 F. Supp at 158 n. 19.

and pertinent Louisiana caselaw.

Section 42:267, defining who is white and who is black, has no statutory historical analogue, and there is no recorded legislative history of the purpose or motivation behind the act as passed. Nonetheless, the Louisiana Supreme Court has stated, "A reasonable explanation of the legislative purpose of the act is that it was a definition, not of the terms indicated in the title, but of the phrase 'traceable amount,' formerly of legal significance in racial designation in this State."¹³¹ Specifically, a person with a traceable amount of Negro blood was considered a Negro.¹³² Section 42:267 was meant to change this definition, limiting the amount of traceable blood considered significant.¹³³

Such definitions of race have been important only to a few. Those of Negro descent who evinced such descent through skin color and other features, as well as those whites with Caucasoid racial characteristics, would not be affected. But for both whites and blacks who exhibited the phenotypic features of the opposite race, such a definition could be crucial.¹³⁴ Such definitions have been necessary to maintain the separation of racial groups that has been endemic to the nation, and especially to the South. A slave state before the Civil War, Louisiana, like other southern states, took full advantage of the freedom to discriminate enunciated by *Plessy v. Ferguson*¹³⁵ to expand upon the Jim Crow laws its legislature had passed following the Civil War and Reconstruction.¹³⁶

131. *Plaia*, 296 So. 2d at 810.

132. *Sunseri v. Cassagne*, 195 La. 19, 196 So. 7 (1940).

133. Act 441 of the 1983 Regular Session repealed section 267 but did not include a new standard to be substituted. Consequently, Louisiana appeal courts deciding *Doe v. Louisiana* are left with little statutory guidance as to the definition of race. While it may be argued that the legislature had no intention to renew the traceable amount standard, the imposition of any other definition by a court would be arbitrary. It might be consistent with the legislative intent for a court to give some weight to the self-designation of an individual such as Suzy Guillory Phipps, but unless such self-designation becomes presumptive, it would be virtually impossible for such a self-designation to overcome the no doubt at all burden of proof.

134. See, e.g., *Messina v. Ciaccio*, 290 So. 2d 339, 340 (La. App. 4th Cir. 1974).

135. See *supra* text accompanying note 37.

136. Some examples of Jim Crow laws which were in effect prior to *Plessy* are 1894 La. Acts 98 (requiring that railway companies provide separate but equal waiting rooms in their depots "for the white and colored races"); 1894 La. Acts 54 (prohibiting marriages between white persons and "persons of color"); 1890 La. Acts 111 (mandating segregation on railroad cars). After *Plessy* was decided in 1896, the Jim Crow laws included 1918 La. Acts 251 (segregating prisons); and 1916 La. Acts 118 (requiring "separate ticket offices and entrances for the accommodation of the different races" at "shows, circuses and tent exhibitions").

Because of its large class of free Negroes, or *gens de couleur libres*, during the era of slavery, and because of certain unique practices respecting miscegenous relationships between white men and light-skinned black women, Louisiana developed a self-perpetuating class of "Creoles," persons who were not white but bore phenotypic features of whites, and developed a preoccupation with skin color.¹³⁷ The preoccupation is evinced by the inclusive list of terms in section 42:267 for persons with less than the threshold amount of Negro blood. It is shown also by the scholarly and prodigious effort of the Louisiana Supreme Court in 1910 to identify and characterize the different classes of blacks and the characteristics thereof.¹³⁸ Following an exhaustive survey of the laws of the states to determine the definition of the term "Negro,"¹³⁹ the court enunciated different definitions to be adhered to in Louisiana:

We do not think there could be any serious denial of the fact that in Louisiana the words "mulatto," "quadroon," and "octoroon" are of as definite meaning as the word "man" or "child," and that, among educated people at least, they are as well and widely known. There is also the less widely known word "griff," which, in this state, has a definite meaning, indicating the issue of negro and a mulatto. The person too black to be a mulatto and too pale in color to be a negro is a griff. The person too dark to be a white, and too bright to be a griff, is a mulatto. The quadroon is distinctly whiter than the mulatto. Between these different shades, we do not believe there is much, if any, difficulty in distinguishing. Nor can there be, we think, any serious denial of the fact that in Louisiana, and, indeed, throughout the United States (except on the Pacific slope), the word "colored," when applied to race, has the definite and well-known meaning of a person having negro blood in his veins. We think, also, that any candid mind must admit that the word "negro" of itself, unqualified, does not necessarily include within its meaning persons possessed of only an admixture of negro blood; notably those whose admixture is so slight that in their case even an expert cannot be positive.¹⁴⁰

137. See, e.g., J. BLASSINGAME, *supra* note 73; G. CABLE, *THE CREOLES OF LOUISIANA* (1901); R. DESDUNES, *supra* note 76; J. HASKINS, *THE CREOLES OF COLOR OF NEW ORLEANS* (1975); G. MILLS, *THE FORGOTTEN PEOPLE: CANE RIVER'S CREOLES OF COLOR* (1977); F. WOODS, *MARGINALITY AND IDENTITY: A COLORED CREOLE FAMILY THROUGH TEN GENERATIONS* (1972).

138. *State v. Treadway*, 126 La. 300, 52 So. 500 (1910).

139. *Id.* at 502-08.

140. *Id.* at 508. Note the similarity to gradations characteristic of Latin American classifications. See *supra* text accompanying note 64.

This last admonition of the court, that there existed those persons of mixed blood who might "pass" for white, was testament to the fruit of Louisiana's Creole or "mulatto" culture. It demonstrated the possibility that one possessed of black blood might escape from the caste to which such blood legally relegated him.¹⁴¹

The legal deprivations of race in Louisiana have been many.¹⁴² Until the assault on racially discriminatory laws following *Brown*, blacks, including mulattos, quadroons, octoroons, and griffs, were subject to a host of discriminatory laws respecting marriage, schooling, and public accommodations.¹⁴³ Given the existence in Louisiana of a class of light-skinned blacks, sometimes hardly distinguishable from whites, the legal definition of race and the classification of individuals as nonwhite was crucial to the maintenance of statutorily mandated racial discrimination.¹⁴⁴ The "traceable amount" standard was meant to ensure, therefore, that even blacks who did not look black were kept in their place. This was the purpose of the law to which section 42:267 is heir.

The cement which holds racial classifications in place is the standard of proof necessary to change a racial classification once legally designated. That standard is that there must be no doubt at all that the original classification is wrong. This standard finds its genesis in *Sunseri v. Cassagne*,¹⁴⁵ in which the Louisiana Supreme Court "held that a person who has been commonly accepted as being of the Caucasian race should not be held to be of the colored race 'unless all the evidence adduced leaves no room for doubt that such is the case.'"¹⁴⁶ In *Green v. City of New Orleans*,¹⁴⁷ the "no

141. This possibility has been recognized in other cultures as well. See, e.g., G. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* 270-71 (1981). Fredrickson makes the point that the South African Nationalist government passed "A Population Registration Act" in 1950 to prevent the colored (mulatto) population from passing as white and thereby thwarting apartheid legislation. *Id.*

142. See the illustrations cited *supra* note 136.

143. *Sunseri* presents a prime example; an apparently phenotypically white woman of Negro heritage was victimized by a Civil Code article prohibiting miscegenous marriages.

144. The necessity of state labeling by race is implied by the words of the Louisiana Supreme Court in *Ex parte Plessy*, 45 La. Ann. 80, 11 So. 948 (1892) *aff'd sub nom Plessy v. Ferguson*, 163 U.S. 537 (1896):

The discretion vested in the officer to decide . . . [the race] to which each passenger . . . belongs, is only that necessary discretion attending every imposition of a duty, to determine whether the occasion exists which calls for its exercise. *It is a discretion to be exercised at his peril, and the peril of his employer.*

Id. at 951 (emphasis added).

145. 191 La. 209, 185 So. 1 (1938), *aff'd on reh'g* 195 La. 19, 196 So. 7 (1940).

146. State *ex rel.* Treadway v. Louisiana State Bd. of Health, 56 So. 2d 249, 249 (La.

room for doubt" language was extended to provide vital records with a nearly irrebuttable presumption of accuracy respecting race.¹⁴⁸ And since the decision in *Green*, this presumption has been reiterated by other courts, including the Louisiana Supreme Court.¹⁴⁹

The no room for doubt burden of proof therefore makes certain that no person labeled black because of heredity might escape such categorization because of doubts that skin color might engender. Given that this burden is more difficult to carry than the criminal "beyond a reasonable doubt" standard, and the recognized possibility of error among vital records, the implication that the rule is intended to keep phenotypically white blacks within the ambit of societal scorn is most impelling. Especially when considered with section 42:267, the rule must be considered part of a scheme to publicly identify as black those who might otherwise be missed.

State ex rel Plaia v. Board of Health is the only Louisiana Supreme Court decision to construe section 42:267 in conjunction with the stringent no doubt at all standard.¹⁵⁰ In *Plaia*, the court failed to find any invidious racial discrimination, as the statute merely classifies, and does not require action based on the racial designation. The court's decision was rendered over a strenuous dissent¹⁵¹ which argued that administrative regulations promulgated to enforce the statute¹⁵² required "positive action" on behalf

App. Or.) *aff'd* 221 La. 1048, 61 So. 2d 735 (1952). (quoting *Sunseri*, 191 La. at 209, 185 So. at 5).

147. 88 So. 2d 76 (La. App. Or. 1956).

148. One commentator has said that this expansion was a misreading of the Louisiana Supreme Court's earlier language in *Sunseri*. See G. Pugh, *Burden of Proof "No Doubt at All," The Work of the Louisiana Appellate Courts for the 1967-1968 Term*, 29 LA. L. REV. 310, 311, 313 (1969).

149. *Plaia*, 296 So. 2d at 810 ("no room for doubt"). See also *Thomas v. Louisiana State Bd. of Health*, 278 So. 2d 915 (La. App. 4th Cir. 1973) and *State ex rel. Schlumbrecht v. Louisiana State Bd. of Health*, 231 So. 2d 730 (La. App. 4th Cir. 1970).

150. For a thoughtful commentary on *Plaia*, see Comment, *Racial Designation in Louisiana: One Drop of Black Blood Makes a Negro!*, 3 HASTINGS CONST. L.Q. 199 (1976).

151. *Plaia*, 296 So. 2d at 811-13 (Barham, J., dissenting).

152. "1. The State Registrar shall strictly enforce the following rules and regulations throughout the State of Louisiana with respect to all certificates of birth and death filed, or which shall be filed, in his office, in the office of any deputy registrar, and in the office of the Registrar of Vital Statistics of the City of New Orleans.

"2. On the face of each and every certificate of any registrant having a traceable amount of Negro blood, according to available evidence, the State Registrar shall stamp, with a rubber stamp, in red ink, beneath or adjacent to the confidential section of said certificate in bold letters the words: 'Do Not Issue Any Copy Until

of the State¹⁵³ "that leads to a denial of equal protection of the law."¹⁵⁴ In pertinent part, the dissent argued:

The act only applies to one race, the Negro race. Classifications based upon race are inherently suspect and must therefore be subjected to close judicial scrutiny under the equal protection clause of the United States Constitution. The State must show a compelling interest in the statute in order for it to be sustained. Though the State may have a valid interest in ascertaining the race of its citizens for census, voting, educational and other purposes, nonetheless the act in question only applies to the Negro race. No comparable statutes exist for the Caucasian and Mongoloid races. No regulations have been adopted pertaining to those two races requiring the registrar to make an examination of their ancestry. The registrar has the power to withhold or change the birth certificate of anyone having a

Cleared Under Act 46 of 1970 by State Registrar."

"3. When a copy of said certificate is applied for it shall be checked against the evidence in the possession of the State Registrar, or which has been submitted to him, to determine if said evidence is applicable to the registrant or his ancestors.

"4. If said evidence is not applicable it shall be so noted in the confidential section by the State Registrar in red ink and dated and signed with his original signature and no restrictions shall thereafter be applicable to said certificate unless newly discovered evidence is produced.

"5. If, after checking, said evidence appears to be applicable to the registrant, he, or his next of kin in case of death, shall be notified directly, or through his parents if a minor, and notified of a date and time to examine said findings in the office of the State Registrar.

"6. If the registrant or his representative does not examine said findings on the date fixed, or does not dispute or contest them in a court proceeding within 30 days thereafter, the State Registrar shall correct said certificate in accordance with said evidence, and Board regulations, and issue a copy (or copies) of the certificate.

"7. If said certificate qualifies for clearance under Act 46 of 1970 the State Registrar shall, with red ink and rubber stamp, place next to the registrant's name the inscription, 'White', or 'Indian', as the case may be.

"8. If the parents of said registrant as shown on said certificate qualify for clearance under Act 46 of 1970, each shall be indicated as above. If one of the two parents' genealogy is unquestioned it shall be indicated, as filed, or as properly corrected.

"9. If either or both parents do not qualify for clearance under Act 46 of 1970, in accordance with the evidence available, there shall be stamped in red ink on said original certificate opposite the race of the parent or parents the words, 'In question.' This may only be deleted by a judgment of court.

"10. If an applicant who is affected by Act 46 of 1970, or his representative, makes application for a certified copy of a birth certificate or death certificate, he may, at his option, receive a short form Birth Registration Card or Death Registration Card which shall contain all pertinent facts contained on the original long form except the names of parents and facts concerning them."

Plala, 296 So. 2d at 811-12 (quoting the Louisiana State Board of Health, Bureau of Vital Statistics, Regulation for Enforcement of Act 46 of 1970 (Jan. 30, 1971)).

153. *Id.* at 812.

154. *Id.*

traceable amount of Negro blood. Citizens of other races do not have to endure this administrative procedure.¹⁵⁵

The court in rendering the decision in *Plaia* failed to consider the role of private discrimination, for example, in employment and housing, and the question of racial castes in judging whether the state action involved would be constitutionally proscribed. The court failed to consider its own evaluation of the legislature's intent, to define more precisely the traceable amount standard of racial classification, and the effect such classification has had in maintaining racial castes, be they state mandated, à la *Plessy v. Ferguson*, or private in nature.

Inquiry into the development and role of racial castes reveals the Louisiana racial classification scheme as a vehicle to maintain a system, perhaps dimming but nonetheless bright, of social caste based on race. Given the history of racial discrimination, both state imposed and otherwise in Louisiana, a discriminatory purpose is clear. On this basis, the invidiously discriminatory nature of Louisiana's racial classification scheme must be considered to violate the equal protection clause of the fourteenth amendment to the Constitution.

IV. CONCLUSION

The preceding three sections have established that the purpose of Louisiana's racial classification scheme is to publicly identify as black those who might otherwise escape such identification, that the effect of such classification is to subject such persons to the disabilities accompanying inclusion in an inferior racial caste, and that such purpose and effect are racially discriminatory and proscribed by the equal protection clause of the fourteenth amendment. This is not to say that all racial classifications are unconstitutional. Nor is it to say that all racial classifications and labelings intended to identify those who might otherwise be missed are unconstitutional. For example, to double check the effectiveness of an order prohibiting discrimination, racial classifications might well be used to beneficial purpose. Similarly, in order to determine whether discrimination is taking place, or to identify those to be subject to an affirmative action plan, or to ensure that no one ben-

155. *Id.* (footnote omitted).

efits from such a plan who is not intended to do so, racial classifications may be beneficial and effective, perhaps even necessary. But until American racial castes are obliterated, vigilance to overcome the effects of racial castes and of concomitant discrimination must be maintained.

In exercising such vigilance, the courts scrutinizing Louisiana's racial classification scheme, armed with the power to take judicial notice of "the facts of history and the political, social and racial conditions prevailing in this state"¹⁵⁶ and the awareness that "to accord equal protection under the laws of this state to all citizens without regard to race, creed, color or national origin"¹⁵⁷ is the state's public policy, should declare the racial classification scheme of Louisiana unconstitutional under the federal equal protection clause, as well as violative of stated public policy.

The peculiar rigidity of racial classifications in American law has served historically to bolster a shamefully un-American caste system. It will hopefully one day soon be regarded as a grotesque legacy of antiquity. That day will bring us closer to the wisdom exhibited by former NAACP secretary Walter White, himself a blond-haired, fair-skinned man classified as "Negro" when he wrote, "I am white and I am black, and know that there is no difference."¹⁵⁸

156. LA. REV. STAT. ANN. § 15.422(6) (West 1981).

157. 1975 La. Acts 638, § 1. Cf. § 2, relative to aggregate statistics pertaining to race as opposed to specific labeling of individuals: "Statistics pertaining to race, creed, color or national origin may be gathered by the agencies of the state and local governments provided such statistics are not used for the purpose, nor do they have the effect, of fostering unequal treatment or protection under the laws." 1975 La. Acts 638 § 2.

158. W. WHITE, A MAN CALLED WHITE: THE AUTOBIOGRAPHY OF WALTER WHITE 366 (1970).