RACIAL DESIGNATION IN LOUISIANA: ONE DROP OF BLACK BLOOD MAKES A NEGRO!

*By Kenneth A. Davis**

> Negro blood is sure powerful—because just *one* drop of black blood makes a colored man. *One* drop—you are a Negro!
>
> Langston Hughes[1]

Introduction

The year is 1976. A child is born visually white. Yet the registrar of vital statistics for the state board of health classifies the child as negro after having traced the child's genealogical lines back to a great, great, great grandparent who was designated as "colored" or "mulatto." Such a designation, made prior to the Civil War, is used today in Louisiana to determine the child's fraction of negro blood. If the child has more than 1/32 negro blood, he or she is classified negro.[2]

For many years states have classified their black populations, usually by such terms as negro, mulatto, colored or black. The definitions have been used in conjunction with various racially restrictive statutes regulating such things as miscegenation, adoption, integration of schools, transportation, sale of property and naturalization.[3] However, the Supreme Court of the United States has held that racial classification is "constitutionally suspect,"[4] and therefore subject to strict judicial scrutiny.[5] The Court has found these classifications deny the equal protection of the law under the Fourteenth Amendment,[6] and has

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* Member, third year class.

1. *Simple Takes a Wife* (1953).

2. The author recognizes contemporary preference for the designation of persons of the negro race as black. However, it is necessary in some instances for purposes of clarity in this note to adopt explicitly the phrases and designations formerly used by the various legislatures and courts.

3. *See* R. Sickles, Race, Marriage, and the Law (1972); States' Laws on Race and Color (P. Murray ed. 1950); G. Stephenson, Race Distinctions in American Law (1910); Reference, *Legal Definition of Race*, 3 Race Rel. L. Rep. 571 (1958).

4. McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

5. Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Korematsu v. United States, 323 U.S. 214, 216 (1944).

6. Hirabayashi v. United States, 320 U.S. 81, 100 (1943); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886). *See* Anderson v. Martin, 375 U.S. 399 (1964).

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sustained them only when necessary to the accomplishment of a compelling state interest.[7] Today the Court enunciates its equal protection policy in terms of protecting persons against invidious discrimination.[8]

Almost all states have repealed their racially-restrictive statutes. For example, Louisiana's anti-miscegenation statute prohibiting marriages between white persons and persons of color was repealed in 1972.[9] However, in 1970 the Louisiana state legislature enacted Act 46 of 1970 entitled, "Designation of race by public officials." It provides:

> 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."[10]

The registrar of vital statistics for the Louisiana State Board of Health has used Act 46 since its adoption as a guideline for classifying a person according to race on his or her birth certificate. Since 1970 three mandamus proceedings seeking to change the registrar's determination that the litigant was negro under Act 46 have reached the appellate level.[11] In order to have the racial designation changed on a birth certificate the litigant must show that there is "no doubt at all" as to his or her racial status, a burden of proof firmly established in Louisiana.[12]

In the most recent of these actions, the Supreme Court of Louis-

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7. *Cf.* Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960).

8. Alexander v. Louisiana, 405 U.S. 625, 631-32 (1972); Turner v. Fouche, 396 U.S. 346, 362 (1970); McLaughlin v. Florida, 379 U.S. 184, 192-93 (1964); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). *See* Cox, *The Supreme Court, 1965 Term—Foreward: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV. L. REV. 91 (1966); *Forum: Equal Protection and the Burger Court,* 2 HAST. CONST. L. Q. 645 (1975); Karst, *Invidious Discrimination: Justice Douglas and the Return to the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A.L. REV. 716 (1969); Note, *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969). *See also* Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949). *But cf.* Gunther, *The Supreme Court 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972).

9. LA. CIV. CODE ANN. art. 94 (Supp. 1, 1975), *formerly* La. Act No. 54 of 1894, LA. CIV. CODE ANN. art. 94 (1958). *But see* LA. REV. STAT. ANN. § 9:201 (1965) (prohibiting marriages between Indians and persons of the colored and black race). On the operation of art. 94 before its amendment, *see* Comment, *Louisiana Law on the Nullity of Marriage,* 20 LA. L. REV. 563, 572-74 (1960); Comment, *The Annulment of Marriages in Louisiana,* 24 TUL. L. REV. 217, 224-25 (1949).

10. LA. REV. STAT. ANN. § 42:267 (Supp. 23A, 1975).

11. See text accompanying notes 19-27 *infra.*

12. See note 70 *infra.*

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iana in *State ex rel. Plaia v. Louisiana State Board of Health*[13] affirmed the court of appeal[14] in voiding the registrar's determination as to appellant's race. However, it reversed the lower court's finding that Act 46 is unconstitutionally vague. The court stated that the act is neither so vague that it cannot be administered nor void because of invidious racial discrimination stemming from its application. The court construed the act as merely definitional, not proscriptive.

Act 46 of 1970 expressly establishes a racial classification. However, it is not the author's purpose to suggest that all racial classifications are invalid. As the Court stated in *Ferguson v. Skrupa*: "Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution."[15] Racial classifications are used for many valid governmental purposes: achieving racial balance in schools; the collection and maintenance of proper census and employment statistics; and the administration of aid programs to minority groups.[16] It is difficult to accomplish these purposes without accurate information on the racial composition of the population.[17]

Although the state may have a valid interest in classifying its citizens according to race, certain questions remain unanswered concerning the application of Act 46. Does the statute provide a clear, specific formula for racial classification? Is the classification arbitrary or unreasonable? Is there actual harm under such a classification? Moreover, what potential harms are raised through the use of such a classification?

The focal point of this note is whether Louisiana's Act 46 of 1970

13. 296 So. 2d 809 (La. 1974).

14. State *ex rel.* Plaia v. Louisiana Bd. of Health, 275 So. 2d 201 (La. App. 1973).

15. 372 U.S. 726, 732 (1963). Similarly, the Court held in Carrington v. Rash, 380 U.S. 89, 92 (1965) that mere classification does not of itself deprive a group of equal protection.

16. *See* Tancil v. Woolls and Virginia Bd. of Elections v. Hamm, 379 U.S. 19 (1964) (per curiam), *aff'g* 230 F. Supp. 156 (E.D. Va. 1964). The district court noted that the designation of race may in certain records serve a useful purpose, and the procurement and compilation of such information by state authorities cannot be outlawed per se: "For example, the securing and chronicling of racial data for identification or statistical use violates no constitutional privilege. If the purpose is legitimate, the reason justifiable, then no infringement results." 230 F. Supp. at 158.

17. In Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970), the court upheld the use of information regarding teachers' races by a school board in its program to make the faculty more racially integrated: "State action based partly on considerations of color, when color is not used per se, and in furtherance of a proper governmental objective, is not necessarily a violation of the Fourteenth Amendment." *Id.* at 1257. *But see* Pedersen v. Burton, 400 F. Supp. 960 (D.D.C. 1975) (statute requiring disclosure of race on marriage license applications found unconstitutional under equal protection clause upon failure to show a compelling governmental interest).

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violates the due process and equal protection clauses of the Constitution of the United States.[18] The 1/32 test embodied in Act 46, it is argued, is arbitrary and vague as currently applied, presenting tangible harms to those subject to its application. Furthermore, this note demonstrates the potential harm of such a statute; the 1/32 test of Act 46 may be used to circumvent various federal programs which place blacks in a preferred position. An underlying issue is whether a state may constitutionally establish an arbitrary racial classification which limits or dilutes the class of persons intended to benefit under federally created rights.

I. Operation of Act 46: The Case of Elizabeth Maria Plaia

Three mandamus proceedings have reached the state appellate level challenging the Louisiana registrar of vital statistics' determination that the litigant was negro. In *Thomas v. Louisiana State Board of Health*,[19] the board of health had changed the racial designation of Ms. Thomas and her children to negro after determining that they had 5/32 and 2.5/32 negro blood, respectively. In *Messina v. Ciaccio*,[20] the registrar determined that the child was 3/32 negro. In *State ex rel. Plaia v. Louisiana State Board of Health*,[21] the parents sought a birth certificate for their child, Elizabeth Maria Plaia, age five, which would reflect her race as white, despite the registrar's determination that the child had 5.75/32 negro blood. This last case well illustrates the use of Act 46.[22]

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18. There may also be deprivations under the Louisiana Constitution. *See* LA. CONST. art. 1. § 2 (due process of law), § 3 (right to individual dignity), § 12 (freedom from discrimination) (adopted 1974). Such state constitutional arguments are not addressed in this note.

19. 278 So. 2d 915 (La. App. 1973).

20. 290 So. 2d 339 (La. App. 1974).

21. 275 So. 2d 201 (La. App. 1973).

22. The textual discussion in this footnote illustrates how the registrar in *Plaia* computed the child Elizabeth's fraction of negro blood. Also included is the genealogical chart which was incorporated into the *Plaia* appellate opinion, 275 So. 2d at 206. All specific references regarding evidence of racial designation on birth records, death records, marriage certificcates, and the board of health's conclusions as to fractions of negro blood are found in Brief for Defendant-Appellee at 5-9, State *ex rel.* Plaia v. Louisiana Bd. of Health, 275 So. 2d 201 (La. App. 1973) and are corroborated in the appellate court's discussion of the case.

To compute the fraction of negro blood the registrar followed the formula: ½ of the father's fraction of negro blood (FNB) was added to ½ of the mother's fraction of negro blood (MNB) to equal the child's fraction of negro blood (CNB). In formula: ½ of (FNB) + ½ of (MNB) = CNB.

The registrar first noted that all evidence indicated the paternal ancestors were white. However, the registrar traced the maternal line back six generations. The

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Upon the birth of Elizabeth Maria Plaia in Jefferson Parish, Louisiana, her mother filed with the registrar of vital statistics a certificate of live birth declaring that Elizabeth's father and mother were white.

1/32 determination rested initially on the alleged union between an unknown Frenchman and one Marie Therese who was racially noted as a native of Africa. The state's evidence consisted of a reproduction of the Clarion Herald Newspaper, June 1970, vol. 8, no. 17, and other publications discussing the history of the Metoyer family, but these were improperly excluded by the trial court. 275 So. 2d at 205.

The registrar assumed that the unknown Frenchman had no negro blood, but that Marie Therese was a full-blooded negro. The calculation for their child, Augustin Metoyer, was as follows: ½ of (0) + ½ of (1) = ½. The registrar determined that Augustin Metoyer had ½ negro blood.

Augustin married a woman of unknown racial background. Their child, Jean Baptiste Metroyer, was born in about 1826. Since the mother's race was unknown, the registrar assumed the mother was white and determined that the child was ¼ negro. Jean Baptiste was listed on one document placed in evidence as a freeman of color and in the 1850 census as mulatto.

Jean Baptiste Metoyer married Suzette Anty whom evidence described as mulatto. The registrar therefore ascribed ½ negro blood to Suzette. From Jean Baptiste (¼) and Suzette (½), the registrar had computed that their child, Marie Julia, had ⅜ negro blood. The 1870 and 1880 census records showed Marie Julia as mulatto, although her death certificate listed her as white.

Marie Julia married Firmin Capello Christophe who was the child of Firmin Christophe and Marie Francesco Mailleur. Firmin's father was described on his death certificate as colored, while the 1850 census listed him and his wife as mulatto. The registrar determined that each was ½ negro, thereby making Firmin Capello ½ negro. The union of Firmin Capello Christophe (½) and Marie Julie Metoyer (⅜) produced a child born about 1863, Florentine Christophe, who was determined to be 7/16 negro.

Florentine married Clothilde Llorens whose father, Clay Llorens, was listed in the 1860, 1870, and 1880 census reports as mulatto. Clothilde's mother, Harriet Prudhomme, appeared as mulatto in the 1850-1880 census reports. The registrar concluded that Clothilde was born of two mulattoes and was ½ negro, despite her death certificate, which described her as white. Therefore, the registrar contended that the offspring of Clothilde (½) and Florentine Christophe (7/16), Atha Lucy Christophe, was 15/32 negro. It is noteworthy that Atha's two sisters gave birth to three children, all of whom were listed in the registrar's office as white.

Atha married Robert Lee Demery (Raphial) who was born out of wedlock to Louise Demery and one Raphial, a German immigrant. Louise Demery appeared on various documents as colored, mulatto, and "no race." Her brothers were also listed as colored. She was the daughter of Alfred Demery and Elizabeth Watts, both of whom were shown in the 1870 census as mulatto. The mulatto designation caused each to be termed ½ negro and Louise, therefore, also to be ½ negro. The union of Raphial (0) who the registrar assumed was white and Louise (½) produced Robert Lee Demery, ¼ negro, although, as in other cases, Robert Lee Demery was designated white on his death certificate. Atha Christophe (15/32) and Robert Lee Demery (¼) had a child, Lucille Grace Raphial (Mrs. F. Plaia, Jr.), who was 11.5/32 negro. Lucille's brothers and sisters were listed in the records of the registrar as colored.

At the end of this genealogical maze, Lucille Grace Raphial (11.5/32) married Frank Joseph Plaia, Jr. (white or 0) and they produced the plaintiff, Elizabeth Maria Plaia. The registrar computed Elizabeth Maria to be 5.75/32 negro.

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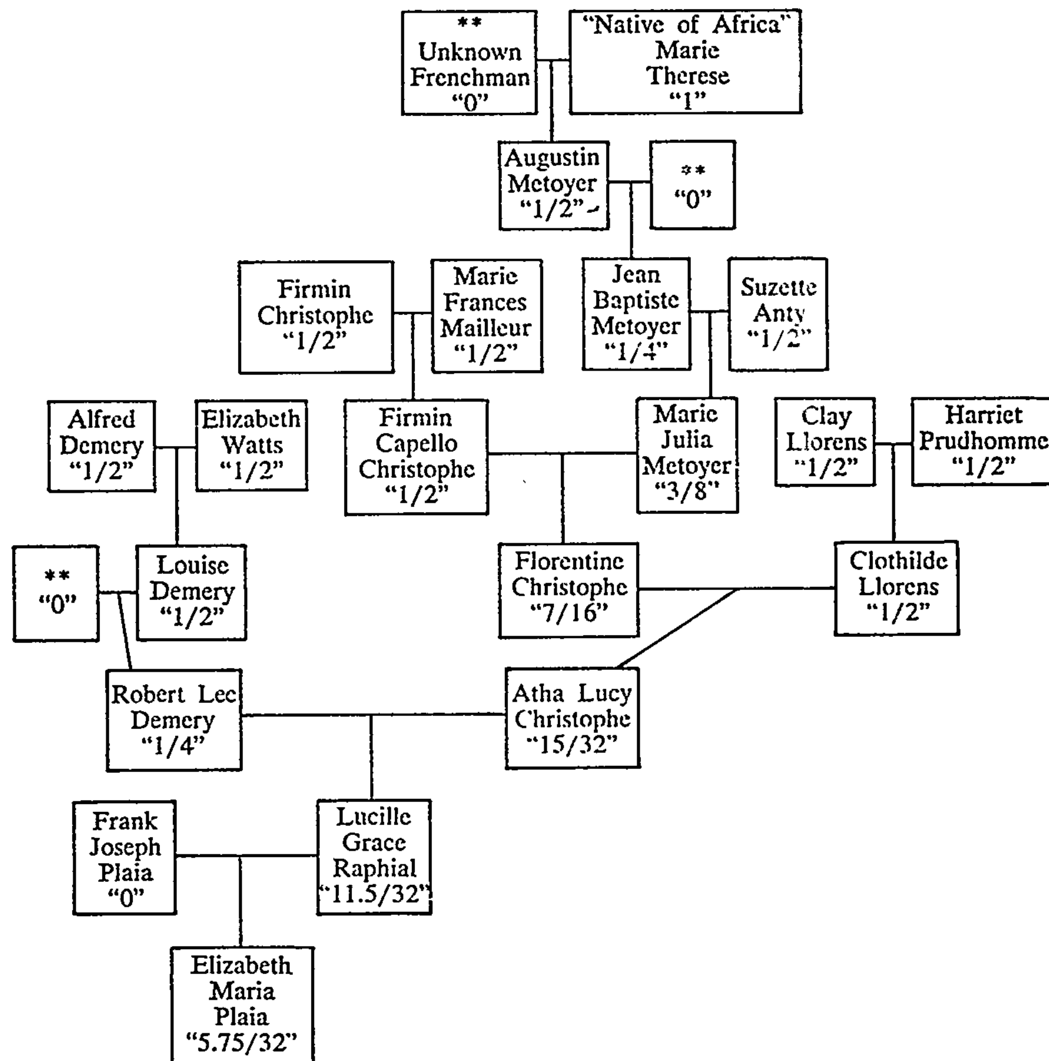
Detecting an error, the registrar flagged the birth certificate.[23] Elizabeth's parents sought a birth certificate showing her as white, but the registrar refused to issue the document because Elizabeth, whose ancestry was nominally 5.75/32 negro, was considered a full negro under Act 46. The plaintiff sought a writ of mandamus to compel the registrar to issue the birth certificate. After the trial court denied the application, the plaintiff appealed. The Louisiana Fourth Circuit Court of Appeal

GENEALOGICAL CHART OF ELIZABETH MARIA PLAIA*



* State *ex rel.* Plaia v. Louisiana Bd. of Health, 275 So. 2d at 206.
** The chart and the record do not identify this person.
Registrar's determination appears at the bottom of each box.

23. No birth certificate was issued pursuant to the state board of health's regulations of July 29, 1966, authorizing the registrar to investigate all errors, irregularities or conflicts which he discovers. Furthermore: "During said investigation [the registrar] shall suspend issuance of any questionable certificate pending its clarification or correction." State *ex rel.* Plaia v. Louisiana Bd. of Health, 275 So. 2d 201, 202, n.2 (La. App. 1973).

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reversed and rejected the determination made by the registrar since Act 46 specifies neither the method of computation nor the meaning of the racial terms used in the act.[24] The court pointed out:

> The Registrar's problem is . . . two-fold. . . . [H]e must undertake to produce a mathematical result by using an equation consisting of many unknowns, namely, the terms used on old documents in his possession classifying the ancestors of the child as "colored," "mulatto," "French," "mixed race," "brown," which terms are uncertain insofar as they call for any specific fractions of Negro blood in the individuals so designated. The other part of the Registrar's problem is that as he tries to prove what each of these various terms means in terms of percentage of Negro blood he is operating within the stringent framework of the *Schlumbrecht* burden of proof.[25]

After this decision the board of health issued Elizabeth a "short form" birth certificate without any racial designation instead of a regular birth certificate. The plaintiff subsequently sought relief before the state supreme court to compel compliance with the judgment of the court of appeal. The supreme court affirmed the appellate court's ruling that the registrar be compelled to issue a birth certificate designating Elizabeth as white, but reversed the court's ruling that Act 46 was unconstitutional. The supreme court rejected the argument that such terms as black, mulatto and griffe, which are used in the statute were vague. After pointing out that the appellate court incorrectly assumed that the act requires the registrar to classify according to the racial terms used in the statute, the supreme court concluded that Act 46 does not require the racial classification of any person. Act 46 merely prohibits the use of such racial terms unless the person described has more than 1/32 negro blood.[26] It reads: "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' . . . ."[27]

By construing Act 46 only as a prohibition, the court ignored the affirmative operation of Act 46 in providing the dividing line between blacks and nonblacks in Louisiana. The court's declaration, in effect, mandates racial classification; by upholding the statute the court impliedly found the 1/32 test to be reasonable. Futhermore, the board of health continues to apply Act 46 in the same manner as it did prior to the *Plaia* decision despite an emerging awareness of the registrar's

24. *Id.* at 203.

25. *Id.* The *Schlumbrecht* burden of proof requires that the evidence leave "no doubt at all" as to racial status before a change in birth registration is justified. State *ex rel.* Schlumbrecht v. Louisiana Bd. of Health, 231 So. 2d 730, 732 (La. App. 1970); see note 70 *infra*.

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

27. LA. REV. STAT. ANN. § 42:267 (Supp. 23A, 1975) (emphasis added).

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inability to determine a person's fractional percentage of negro blood with precision.[28] Even if such a minute computation is realistically possible, the question remains: What legislative purpose is served by classification to the thirty-second degree?[29] In the absence of any legislative history,[30] there is no way to determine the underlying purpose of Act 46. However, based on Act 46 Louisiana may legally designate as black thousands of persons who appear to be white. For example, the plaintiffs in *Thomas, Messina* and *Plaia* who were determined to have 2.5/32, 3/32 and 5.75/32 negro blood, respectively, clearly have nondiscernible portions of negro blood.

II. Louisiana's Racial Designations: Past and Present

While the stated legislative purpose of Act 46 of 1970 is "to define 'colored,' 'mulatto,' 'black' . . . when such terms are used to signify the race of a person by any public official in the state of Louisiana,"[31] the Louisiana Supreme Court in *Plaia* articulated its own view of the legislative purpose of the act:

> 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.[32]

The court's supposition that the purpose of Act 46 was to define a racial term of prior legal significance makes the history of racial designation in Louisiana relevant to an understanding of any contemporary purpose or application of the act. During various periods, a variety of terms have been used to designate persons of mixed racial background. Early judicial determinations regarding these terms may pose great difficulties

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28. The counsel for the Louisiana Board of Health, in response to a letter of inquiry dated Sept. 26, 1975, stated: "The Act is still being used by the Board of Health because it is still state law and the same applies to the regulations of 1970." The counsel further replied: "Act 46 of 1970 has presented an almost impossible situation as far as keeping accurate statistics as to race in the State of Louisiana and it appears that the courts either will not or do not want to understand the unconstitutional structure of Act 46 of 1970, which is vague and indefinite and furnishes no definition or guidelines for the use of the terms contained therein." Letter from James P. Screen, General Counsel, Louisiana Health and Human Resources Administration, to author, Oct. 21, 1975 [hereinafter cited as CORRESPONDENCE] (Letters on file in the offices of the HASTINGS CONSTITUTIONAL LAW QUARTERLY.).

29. Could there be a discriminatory motive behind such a statute? *Cf.* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95.

30. No legislative history to the enactment of Act 46 of 1970 has been found in the legislative counsel's office in Louisiana.

31. LA. REV. STAT. ANN. § 42:267 (Supp. 23A, 1975). This statement appears as the preface to the statute.

32. 296 So. 2d at 810.

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in a present-day determination that an individual is negro under Act 46. Furthermore, the definitional problem is compounded by an evidentiary one in that the early records designating one's race are often confusing, inaccurate or missing altogether.

A. "Colored:" A Mixed Racial Designation

In Louisiana during the late 1800's the word "colored," defined as those persons having "an admixture of negro blood,"[33] was used in the state's "Jim Crow" railroad law which required railroad companies to provide equal, but separate, accomodations for the white and colored races.[34] In *Plessy v. Ferguson*,[35] the Louisiana railroad accomodations law was challenged by a Louisiana resident who was 7/8 caucasian and 1/8 negro. The United States Supreme Court held that the Louisiana law did not violate the Thirteenth and Fourteenth Amendments, and that a statute which created merely a legal distinction between the white and colored races had no tendency to destroy the legal equality of the two races.[36] While the Court asserted that this inherent racial distinction "must always exist so long as white men are distinguished from the other race *by color*,"[37] the Court also questioned the allegation that the plaintiff's portion of negro blood was nondiscernible.[38] Therefore, the racial segregation which the Court upheld was not only that based upon observable physical characteristics but that based upon non-observable genealogical heritage as well.

During this period some courts began to question the practice of ascribing fractions of negro blood to persons. In *State v. Treadaway*,[39] two defendants were accused of violating Lousiana's Act 87 of 1908 which prohibited the cohabitation and concubinage between persons of the caucasian and the negro race.[40] The indictment charged that one of

33. State v. Treadaway, 126 La. 300, 305, 52 So. 500, 502 (1910); Lee v. New Orleans Great Northern Ry., 125 La. 236, 238, 51 So. 182, 183 (1910).

34. La. Act No. 111 of 1890, at 152 (repealed 1972); *see* Plessy v. Ferguson, 163 U.S. 537, 540-41 (1896).

35. 163 U.S. 537 (1896), *aff'g Ex parte* Plessy, 45 La. Ann. 80, 11 So. 948 (1892), *rev'd*, Brown v. Board of Educ., 347 U.S. 483 (1954).

36. 163 U.S. at 543; *accord*, Civil Rights Cases, 109 U.S. 3 (1883). Mr. Justice Bradley stated: "It would be running the slavery argument into the ground, to make it apply to every act of discrimination. . . ." 109 U.S. at 24.

37. 163 U.S. at 543 (emphasis added).

38. *Id.* at 541. The Court did not question whether the plaintiff was colored, but noted: "Under the allegations of his petition it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race." *Id.* at 552. The question remains whether the Supreme Court will always defer to a state's definition of race.

39. 126 La. 300, 52 So. 500 (1910).

40. "Be it enacted by the General Assembly of the state of Louisiana, that concubi-

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the defendants was a caucasian and the other a negro, "to wit, an octoroon."[41] The issue was whether an octoroon or any person having a specific percentage of negro blood was "a person of the negro race" within the meaning of the statute. The contention of the prosecution was that the word "negro" was synonymous with the word "colored." The state supreme court disagreed. According to the court, the word "negro" was never adopted for the purpose of designating persons of mixed blood. On the contrary, it was for the sole purpose of indicating persons of the negro race per se.[42] The court found no authority in which the word "negro" or the term "a person of the negro race" had been given a meaning which would include an octoroon, and, still less, a person of 15/16 white and 1/16 negro blood, or 31/32 white and 1/32 negro blood.[43] The court continued:

> If [we] were to declare that the popular meaning of the word "negro" embraces octoroons, the decision would furnish the one sol-

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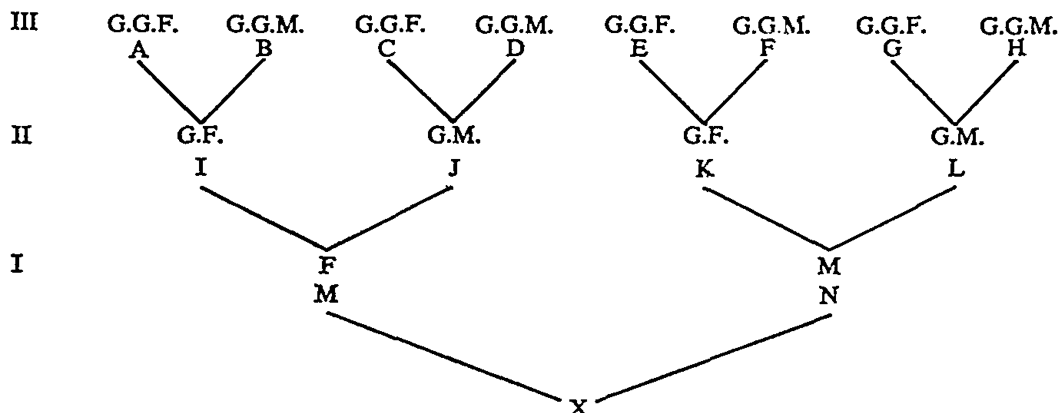
nage between a person of the Caucasian or white race and a person of the negro or black race is hereby made a felony, and whoever shall be convicted thereof in any court of competent jurisdiction shall for each offense be sentenced to imprisonment at the discretion of the court for a term of not less than one month nor more than one year with or without hard labor." La. Act No. 87 of 1908, § 1 (repealed 1942); *see* State v. Treadaway, 126 La. 300, 52 So. 500 (1910).

41. If the word "octoroon" is to be understood in its technical sense, a person with ⅞ white blood in his veins and ⅛ negro blood is ⅞ white and ⅛ negro.

The following diagram will clarify this designation:



Suppose it is desired to ascertain the fraction of negro blood of the son X. The first generation above him is that of his parents, M and N. The second generation is that of his grandparents, I, J, K and L. The third generation is that of his great-grandparents, A, B, C, D, E, F, G and H. If any one of these eight great-grandparents is a negro, X has ⅛ negro blood. Suppose, for instance, the great-grandfather, A, was a negro and all the rest of the great-grandparents were white. The grandfather, I, would be half negro; the father, M, would be ¼ negro; and X would be ⅛ negro. Thus though of the fourteen progenitors of X only three had negro blood, X would nevertheless be ⅛ negro. G. STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 18-19 (1910).

42. 126 La. at 323, 52 So. at 509.

43. *Id.* at 305, 52 So. at 502.

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> itary instance in legal or any other literature where the word had been given that meaning. The judges of this court do not know that the word has that meaning.[44]

Reversing the defendants' convictions, the court concluded that mulattoes, quadroons and octoroons were not included in the term "negro." Statutes expressly using the word "negro" did not include persons of mixed blood who were properly labeled colored. Furthermore, the terms mulatto and colored did not imply any specific percentage of negro blood.[45]

The *Treadaway* court's reasoning presents a bizarre twist to the enactment of Act 46 of 1970. Ironically, the author of the 1908 anti-cohabitation statute included the following clause in his original draft: "[A] person who is as much as one thirty-second part negro shall be, for the purpose of this act, a person of the negro race."[46] However, the 1908 legislature struck out the clause before the act was passed. The *Treadaway* court considered the legislature's intent behind the deletion:

> If the act was intended to [apply to mulattoes or quadroons or octoroons] certainly the clause could do no harm. *The negro blood is barely traceable beyond the 1/16, and certainly not beyond the 1/32.* The reason for striking out this clause could not, then, have been for the purpose of extending its application to persons having less than 1/32 part of negro blood. And, if the object of striking out that clause was not to extend the application of the act, what could it have been, if not to restrict its application?[47]

Thus, in 1910 the word "negro" in its ordinary acceptance and by court interpretation did not include persons of mixed blood. While it is clear that ancestral lines were traced to determine an individual's race, the court and by implication the legislature recognized the practical limitations in tracing an individual's genealogy.

B. "Person of Color:" Not Always a Reference to Negro Blood

Around 1930 some courts began to apply the term "person of color," defined as those persons having "a traceable amount of negro blood," to delimit Louisiana's anti-miscegenation statutes.[48] The traceable amount test continued to be used throughout the sixties in interpreting Louisiana's birth registration statutes.[49] As used, "traceable amount" referred to any ascertainable portion of negro blood.

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44. *Id.*

45. *Id.* at 32-5, 52 So. at 501-02; *accord,* State *ex rel.* Plaia v. Louisiana Bd. of Health, 275 So. 2d 201, 203 (La. App. 1973).

46. 126 La. at 329, 52 So. at 510.

47. *Id.* at 329-30, 52 So. at 510 (emphasis added).

48. Sunseri v. Cassagne, 191 La. 209, 211, 185 So. 1, 2 (1938).

49. State *ex rel.* Lytell v. Louisiana Bd. of Health, 153 So. 2d 498 (La. App. 1963).

HeinOnline -- 3 Hastings. Const. L.Q. 209 1975-1976

However, the term "person of color" has not always been defined to mean a traceable amount of negro blood. In 1938, in *Sunseri v. Cassagne,*[50] the plaintiff husband, a caucasian, brought suit to annul his marriage on the ground that his wife was a person of color having a traceable amount of negro blood and that such marriage was prohibited under Article 94 of the Louisiana Civil Code.[51] The trial judge found that since the defendant had 1/16 negro blood her marriage to the white plaintiff was null and void, because the law did not permit marriage between persons of the white race and persons having a trace of negro blood. The trial court's finding was based on evidence in the notarial records in which the defendant's great, great, grandmother was described as "F.C.L." meaning "Femme Couleur Libre" and "F.W.C." meaning "Free Woman of Color." The defendant insisted that the certificates were incorrect, claiming that she was of Indian descent.

The state supreme court reversed the trial court's decision, finding that the description "Free Woman of Color" in 1847 and 1857 did not preclude the possibility that the defendant's ancestor was of the Indian race. The court cited as authority a statement made by the court in 1910 in *Lee v. New Orleans Great Northern Railway*:

> One hundred years ago in the territory of Orleans, the term "persons of color" was used to designate people who were neither white nor black. In *Adelle v. Beauregard* . . . decided in 1810, the Superior Court said: "Persons of color may have descended from Indians on both sides, from a white parent, or mulatto parents in possession of freedom."[52]

The term "person of color," up to the time of the Civil War, was applied to all persons who were not of the white race. The court remanded the case, holding that the defendant should be given an opportunity to show the incorrectness of the records, since her marriage should not be annulled on such grounds unless the evidence leaves no room for doubt.[53]

Apparently it was easier for courts to construe statutory terms by determining those persons who were excluded rather than those were included. Thus, courts found that the term "negro" did not include those who had a specific percentage of negro blood and that the term

50. 191 La. 209, 185 So. 1 (1938), *aff'd mem.*, 195 La. 19, 196 So. 7 (1940).

51. "Marriage between white persons and persons of color is prohibited, and the celebration of all such marriages is forbidden and such celebration carries with it no effect and is null and void." La. Act. No. 54 of 1894, *as amended* LA. CIV. CODE ANN. art. 94 (Supp. 1975).

52. Sunseri v. Cassagne, 191 La. 209, 217-18, 185 So. 1, 4 (1938); Lee v. Great Northern Ry., 125 La. 236, 51 So. 182 (1910); Adelle v. Beauregard, 1 La. 99 (1810).

53. After the evidence was taken on remand, the case was again argued and the court held that the certificate reflected the true state of facts, which showed that the defendant had a traceable amount of negro blood. 195 La. at 27, 196 So. at 9.

HeinOnline -- 3 Hastings. Const. L.Q. 210 1975-1976

"person of color" was not conclusive proof that one had a traceable amount of negro blood.

C. More Than One Thirty-second Negro Blood

Unlike the admixture and traceable amount tests, Act 46 has not been used to determine those persons who are *not* negro, although expressly required by the terms of the statute and despite the court's assertion in *Plaia*. Rather, officials have used it affirmatively to classify as negro those persons with more than 1/32 negro blood.[54] A cursory analysis of Act 46 suggests three problems: 1) the statute does not apply to all races; 2) there is no scientific or political basis for such a definition; and 3) the designation of one as negro who appears to be white is inherently unreasonable.

First, Act 46 is discriminatory since it applies only to the negro race. Although Act 46 merely excludes from the definition of negro all those persons having less than 1/32 negro blood, by implication all those persons having more than 1/32 negro blood are included in the definition. But the act does not establish a precise mathematical formula for all races, nor does any comparable Louisiana statute exist requiring the racial classification of caucasians or asians to be established to a mathematical certainty. This may violate the equal protection clause of the United States Constitution.[55] Act 46 may also be invidiously discriminatory because it implies racial inferiority. Given the history of racial discrimination in Louisiana, the rule that 1.5/32's will control 30.5/32's can only be understood as an official statement that negro ancestry is a taint which must be traced.

Second, the statutory definition of negro used in Act 46 does not correspond to any scientific or political definition. Though anthropologists, biologists and population geneticists may differ in their categorization, none have sought to classify according to ancestral designation.[56]

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54. See note 28 *supra*.

55. This is essentially the argument espoused by Justice Barham in his dissenting opinion in *Plaia*: "Any formula which is discriminatory in determining the race for the purpose of a birth certificate is in contravention of the Fourteenth Amendment to the United States Constitution. The jurisprudential 'traceable amount' formula applied only to the Negro race is equally as repugnant as is the act which we consider." 296 So. 2d at 812-13.

56. *See generally*, R. BENEDICT, RACE: SCIENCE AND POLITICS (rev. ed. 1959); L. CAVALLI-SFORZA AND W. BODMER, THE GENETICS OF HUMAN POPULATIONS (1971); S. COLE, RACES OF MAN (2d ed. 1965); O. COX, CASTE, CLASS, & RACE (1948); S. GARN, HUMAN RACES (2d ed. 1965); T. GOSSETT, RACE (1963); P. ROSE, THEY AND WE (1964); SCIENCE AND THE CONCEPT OF RACE (M. Mead, T. Dobzhansky, E. Tobach, and R. Light eds. 1968); THIS IS RACE (E. Count ed. 1950); Lundsgaarde, *Racial and Ethnic Classifications: An Appraisal of the Rule of Anthropology in the Lawmaking Process*, 10 HOUST. L. REV. 641 nn.22-25 (1973); Osborne, *The History and Nature of*

HeinOnline -- 3 Hastings. Const. L.Q. 211 1975-1976

Political entities have, of course, used fictional "blood lines" to define race, but have done so to a limited measure, usually not reaching more than the 1/8 fraction.[57] Even the stringent definition along ancestral lines enacted in Germany prior to World War II was not carried to the thirty-second degree.[58]

Third, Act 46 may be termed inherently unreasonable.[59] What valid state purpose is served by designating a person as negro under Act 46 who visually appears to be white? Classification to the 1/32 degree could have a valid purpose if it would aid in the determination of whether that individual had a propensity towards sickle cell anemia and should therefore be required to take a sickle cell anemia test. Absent such a purpose or absent an equal concern with ethno-specific diseases, it is absurd to designate a person as negro where visually he or she appears to be caucasian.

On the other hand, it is the function of the legislature to draw lines and make definitions. If, for example, the legislature deems a chair to be an "apple," what harm has been done? It is merely a change in description without a change in status. The change in description does not alter the reality of the chair. Thus, if the legislature deems one who

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Race Classification, in THE BIOLOGICAL AND SOCIAL MEANING OF RACE 163 (R. Osborne ed. 1971).

57. See notes 3 & 41 *supra*.

58. Adolph Hitler's regime passed the Law for the Protection of German Blood and Honor, enacted on Sept. 15, 1935, prohibiting marriages and sexual intercourse between Jews and citizens of German or related blood under the age of 45. It further provided that only persons of German or related blood could be citizens. None of the terms used were defined in the decree.

The First Regulation under the Reich Citizenship Law went into effect on Nov. 14, 1935. Under the regulations a Jew was anyone who (1) was descended from at least three Jewish grandparents (full Jews and three-quarter Jews), or (2) descended from two Jewish grandparents (half-Jews) and (a) belonged to the Jewish religious community on Sept. 15, 1935, or joined the community on a subsequent date, *or* (b) was married to a Jewish person on Sept. 15, 1935, or married one on a subsequent date, or (c) was the offspring of a marriage contracted with a three-quarter or a full Jew after the Law for the Protection of German Blood and Honor had come into force (Sept. 15, 1935), *or* (d) was the offspring of an extramarital relationship with a three-quarter or a full Jew, and was born out of wedlock after July 31, 1936. For the determination of the status of the grandparents, a presumption arose that the grandparent was Jewish if he or she belonged to the Jewish religious community. R. HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 46-48 (1961).

59. Act 46 resembles one of Professor Schwartz's examples of an inherently unreasonable classification. Schwartz hypothesizes a statute which applies to red-haired makers of margarine. A classification which turns upon hair color would be ruled contrary to equal protection. Red things may logically be associated in a separate class for certain purposes, but the classification would be bad if it failed to have a reasonable relation to the purpose of the particular law. Such classification would be found to be inherently unreasonable. B. SCHWARTZ, CONSTITUTIONAL LAW 292-93 (1972).

HeinOnline -- 3 Hastings. Const. L.Q. 212 1975-1976

is visually white to be a negro, no harm should result from this change in terminology.[60]

This reasoning is faulty in two respects. First, the 1/32 classification belies reality. The Louisiana legislature does not act in a vacuum, but within a national and world community that generally defines things as they are commonly perceived. It is unreasonable to designate a chair as an "apple" where it is known to others throughout the community as a chair. Second, Act 46 does not label chairs or apples, but people. Such an unrealistic classification of persons can have serious adverse cultural and social effects.

Despite the manifest absurdity of the 1/32 test embodied in Act 46, as long as the act remains merely definitional it may survive constitutional attack. A potential litigant would find it difficult to demonstrate an injury which resulted solely from being classified as "negro" under the act. But is Act 46 merely used to classify?

III. Act 46 Plus . . .

The Louisiana Board of Health has used Act 46 since its passage in 1970 to designate race on birth certificates. While the state supreme court in *Plaia* concluded that the board of health was not required to take action based on terms used in Act 46, positive action has been required under other statutes and regulations. Like the former standards defining race, Act 46 is utilized when a public official must comply with a statute which requires racial classification.[61] In the seventies the 1/32 test operates under the following statutory scheme. The state registrar must maintain birth certificates.[62] A certificate must be filed recording the births of persons born in the state of Louisiana,[63] and one must be classified according to race.[64] The birth registration must also bear the racial designation of both parents.[65]

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60. *See, e.g.*, San Francisco Chronicle, Nov. 10, 1975, at 1, col. 6, entitled, "Dog Turned into Cat":

> Oxford England
>
> The Dean of Worcester College has found an unusual way of getting around ancient rules that bar dogs from his college.
>
> The governing body voted last week that his dog, Flint, is a cat.

61. La. Act No. 151, § 4 of 1914, *as amended*, LA. REV. STAT. ANN. § 9:224 (repealed 1972); *cf.* La. Act No. 54 of 1894, *as amended* LA. CIV. CODE ANN. art. 94 (1952) (Supp. 1, 1975). See text accompanying notes 33-53 *supra*.

62. LA. REV. STAT. ANN. § 40:149 (1965). *See also* LA. REV. STAT. ANN. § 40:151-53 (1965) (regarding duties of local registrars).

63. LA. REV. STAT. ANN. § 40:302 (1965).

64. LA. REV. STAT. ANN. § 40:244(11) (1965); *cf.* LA. REV. STAT. ANN. § 40:246(3) (1965) (death certificates); LA. REV. STAT. ANN. § 40:306(4) (1965) (registration of foundlings); *cf.* LA. REV. STAT. ANN. § 9:261(2) (1965) (marriage licenses).

65. LA. REV. STAT. ANN. § 40:244(11) (1965).

HeinOnline -- 3 Hastings. Const. L.Q. 213 1975-1976

The registrar does not make the initial determination as to the facts on the certificate. The physician, midwife or person acting as midwife files the birth certificate with the local registrar.[66] However, the registrar has a duty to make a diligent inquiry regarding the information called for on the certificate. It is his duty to secure such information as will enable him to prepare an accurate birth certificate.[67] The registrar is also aided by office records of genealogy. By statute persons in possession of any records of births or deaths in the parish of Orleans may file such records with the local registrar.[68] At its completion and upon its filing, the birth certificate constitutes prima facie evidence of the facts stated therein[69] and cannot be changed unless the plaintiff shows that there is "no doubt at all" as to his racial status.[70]

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66. LA. REV. STAT. ANN. § 40:304 (1965).

67. LA. REV. STAT. ANN. § 40:260 (1965); *see* LA. REV. STAT. ANN. § 40:267 (1965) (A penalty is imposed against any individual who fails to furnish correctly vital information requested by the registrar).

68. LA. REV. STAT. ANN. § 40:260 (1965).

69. LA. REV. STAT. ANN. § 40:159 (1965).

70. The evolution of this principal began with Sunseri v. Cassagne, 191 La. 209, 185 So. 1 (1938), where it was asserted that a marriage should not be annulled because one of the parties was a negro, unless the evidence left "no room for doubt" that such was the case. Subsequently, in State *ex rel.* Treadaway v. Louisiana Bd. of Health, 56 So. 2d 249 (La. App. 1952), the court stated that vital statistics cannot be changed unless the proof leaves "no doubt at all." On appeal, the Louisiana Supreme Court, affirmed the ruling and unequivocally stated its policy regarding the inviolability of official birth records: "[T]he records kept by the Registrar are vital to the general public welfare. The registration of a birthright must be given as much sanctity in the law as the registration of a property right." 221 La. 1047, 1059, 61 So. 2d 735, 739 (1952). *See, e.g.,* State *ex rel.* Schlumbrecht v. Louisiana Bd. of Health, 231 So. 2d 730 (La. App. 1970); State *ex rel.* Pritchard v. Louisiana Bd. of Health, 198 So. 2d 490 (La. App. 1967); State *ex rel.* Cousin v. Louisiana Bd. of Health, 138 So. 2d 829 (La. App. 1962); Green v. City of New Orleans, 88 So. 2d 76 (La. App. 1956).

Under this rule, records are almost conclusively presumed correct. Professor Pugh points out that in order for the relator to have his racial classification changed, he must establish his case by not merely a preponderance of the evidence, nor even beyond a reasonable doubt (the test required in criminal cases), but rather he must establish it beyond any doubt at all. Pugh suggests that the Louisiana courts have consistently misapplied the language of the cases which purportedly established the "no doubt at all" precedent: "With deference, it is submitted that to accord these Public Health records such an august and sacrosanct position is unwarranted, and not in keeping with the legislation [LA. REV. STAT. ANN. § 40:159 (1965), that certificates on file are prima facie evidence of the facts stated] and the jurisprudence taken in its entirety. To give such an administrative classification as to race, arrived at without notice and hearing, the status of practically a rule of law seems an undue obeisance to bureaucratic records—one which might well be in violation of the due process of law requirements of the fourteenth amendment." Pugh, *Evidence, Burden of Proof: "No Doubt at All,"* 29 LA. L. REV. 310, 311 (1969).

HeinOnline -- 3 Hastings. Const. L.Q. 214 1975-1976

A. Tracing Genealogical Lines

The registrar traces an individual's genealogical lines and ascribes percentages to prior racial designations.[71] Evidence of the registrant's racial lineage is found in succession records, suit records, various decennial census records, birth, baptismal, marriage and death records spanning six or more generations and dating back more than one hundred years.[72] The registrar's determination of the proportion of negro blood is based on traditional racial percentage classifications which are rather imprecise. The assumptions underlying these classifications are that a person who was designated as negro is in all cases 100 percent negro, that a person designated as mulatto is ½ negro, and that a person designated as quadroom is ¼ negro.[73] Act 46 nonetheless requires exactness in the calculation.[74]

Although the statute sets forth the specific mathematical fraction defining who is to be classified as negro, nowhere does it provide the state registrar with a means to arrive at that fraction. Also, it provides no guidance concerning the fraction applicable to the ancestor of an individual whose race is described by one of the terms mentioned in the statute.[75] By linking all of the racial designations together, the statute appears to imply that all such terms are synonymous with the term "negro." However, as seen from the language of *Treadaway*,[76] mulatto and negro have different meanings. Furthermore, the term "person of color" is not a reliable indication that the person had negro ancestors.[77] If Act 46 did purport to include non-negro ancestors, the contemporary determination that a person is negro would be completely irrational.

In *Thomas* the court found that the board of health did not utilize predetermined guidelines in ascribing racial percentages to persons.[78]

71. Messina v. Ciaccio, 290 So. 2d 339, 341-42 (La. App. 1974).

72. Thomas v. Louisiana Bd. of Health, 278 So. 2d 915, 916 (La. App. 1973).

73. Messina v. Ciaccio, 290 So. 2d 339, 341 (La. App. 1974).

74. *Id.* Under the traceable amount test used prior to the 1/32 test there was an unstated "more or less" which was a part of the definition. Such latitude was formerly acceptable in view of the flexibility which the prior test afforded. 290 So. 2d at 341. For example, in State *ex rel.* Lytell v. Louisiana Bd. of Health, 153 So. 2d 498 (La. App. 1963), the court traced the genealogical lines of the relator back to his grandfather and paternal aunt using the federal census of 1870 and 1880 which listed them as mulattoes. It was not necessary to determine that the relator had a specific quantity of negro blood; all that was needed was evidence that the relator had a portion of negro blood which could be traced from his parentage. However, under the test of Act 46, it is necessary that each person in an individual's genealogical line be attributed with a specific fraction of negro blood.

75. Brief for Defendant-Appellee at 3, State *ex rel.* Plaia v. Louisiana Bd. of Health, 296 So. 2d 809 (La. 1974).

76. 126 La. 300, 52 So. 500 (1910). See text accompanying notes 39-47 *supra.*

77. See text accompanying notes 50-53 *supra.*

78. The testimony in *Thomas* of Ms. Mary Mugnier demonstrates that the registrar

HeinOnline -- 3 Hastings. Const. L.Q. 215 1975-1976

Ms. Mary Mugnier, an employee of the board of health who helped formulate the percentages in *Thomas*, also prepared the genealogical chart in *Plaia*.[79] She admitted that the racial designations such as "mulatto" were often incorrect and, in fact, were at times not even used by the board to evaluate race. Furthermore, she conceded that if the determination of full negro, ½ negro or ¼ negro was changed in either direction, the entire calculation would be changed.[80] The percentage of negro blood in an individual's lineage could vary greatly if a distant ancestor, although designated in lay terms as a "Free Person of Color," thereby implying that the person was 100 percent negro under Act 46, was, in fact, a person having less than 100 percent negro blood.[81] Moreover, the statute establishing the 1/32 test makes no provision for persons who are, for example, 15/16 negro or 5/8 negro but nevertheless have been classified as mulatto or quadroon by their own designation or by various public officials, clergymen or census takers.[82]

B. Inaccuracy of Documents

Not only does the registrar have an intractable task in ascribing racial percentages to distant ancestors but doubt has been cast on the validity of the racial terms placed on various documents. In *State ex rel. Schlumbrecht v. Louisiana State Board of Health*,[83] there were numerous instances in which ancestors were designated white, free person of color, mulatto and colored on various records. In some

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customarily made his fractional determinations through the common usage of such terms as "mulatto" and "quadroon" after the passage of Act 46:

Q. I'm talking about the word "mulatto" which I think is French. What is your source to give that percentage? If you say mulatto is one half and quadroon is one quarter, where do you derive this? What is your authority?
A. This is the concenus (sic) of opinion.
Q. Where?
A. General opinion.
Q. At your office?
A. And then, of course, the very term itself. Quadroon is a quarter.

. . . .

Q. Before you said mulatto signified one half.
A. Yes, that is the general understanding of it.
Q. Do you make these determinations from any administrative procedure or rules within your department?
A. Well, together with Mr. Ciccio (sic) and Mr. Screen we usually collaborate on those.

278 So. 2d at 916-17.

79. Brief for Plaintiff-Appellant at 8, State *ex rel.* Plaia v. Louisiana Bd. of Health, 275 So. 2d 201 (La. App. 1973) (citing to the trial record at 48).

80. *Id.* (citing to the trial record at 85-102).

81. Messina v. Ciaccio, 290 So. 2d 339, 341 (La. App. 1974).

82. *Id.*

83. 231 So. 2d 730 (La. App.), *cert. denied,* 256 La. 69, 235 So. 2d 97 (1970).

HeinOnline -- 3 Hastings. Const. L.Q. 216 1975-1976

instances children born of the same parents received differing racial designations. The court stated that such inconsistencies suggest that the terms were "in at least some instances incorrectly used by the person or persons responsible for the racial entries made in the public records."[84]

Moreover, allowing a parent to designate the race of an offspring certainly does not ensure the accuracy of such a determination.[85] Even a term which in its common usage may be thought to define one as having part negro blood may be inaccurate.[86] Not only is the designation subject to error, but persons in the registrar's office tampering with the birth records have created individual inaccuracies as well.[87]

Green v. City of New Orleans[88] best illustrates the problem of inaccurate birth records. Ruby Henley Preuc, a white woman, gave birth to a female child. The child's father was unknown. The mother's sister, who cared for the child until the mother's death, later had the child placed in a negro foster home, stating to the department of welfare that the child was a negro and that she could no longer permit her to remain in her home. The plaintiff, a negro, endeavored to adopt the child who was certified as white. He sought a writ of mandamus to compel the agency to change the child's racial designation so that he could adopt the child.[89] Ms. Emma Smith, an employee of Charity Hospital assigned to birth registration and a key witness in the mandamus proceeding, was asked if she had questioned the mother as to the race of the child's father. Ms. Smith responded, "No, if she is a white mother. We do not ask if her husband is white, we take it for granted he is white."[90] The certificate prepared by Ms. Smith ultimately became the birth record for the department of public health. Even though the validity of the racial designation was doubtful, the court concluded that the evidence was not sufficient to change the birth

84. *Id.* at 732. The court took judicial notice that the designation, "free woman of color," did not necessarily mean that one was a negro. See text accompanying notes 50-53 *supra*.

85. Villa v. Lacoste, 213 La. 654, 35 So. 2d 419 (1948) (Filipino registering her daughter and granddaughter as colored, under the erroneous belief that persons of Filipino extraction were "colored").

86. State *ex rel.* Cousin v. Louisiana Bd. of Health, 138 So. 2d 829 (La. App. 1962) (person designated "creole" determined to be of Spanish or French lineage).

87. Cline v. City of New Orleans, 207 So. 2d 856 (La. App. 1968) (unauthorized alteration of birth certificate by unknown official held invalid).

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

89. "A single person over the age of twenty-one years, or a married couple jointly, may petition to adopt any child of his or their race." La. Act No. 228, § 2 of 1948, *as amended* LA. REV. STAT. ANN. § 9:422 (Supp. 3, 1976). *See In re* Spraggins, 234 So. 2d 462 (La. App. 1970) (Statutory requirements for adoption must be strictly carried out).

90. 88 So. 2d at 78.

HeinOnline -- 3 Hastings. Const. L.Q. 217 1975-1976

certificate from white to negro, and therefore the child could not be adopted by the plaintiff. The court accepted the determination made by the hospital official founded not on fact but on mere speculation.[91]

C. Inaccuracy of Federal Census Records

The use of federal census records to trace genealogy and to determine an individual's racial background has also been questioned. Reports of a person's race may often conflict from census to census. The census records of 1850 and 1860 had three classifications: white, black and mulatto.[92] For the years 1870 and 1880 there were five classifications: white, black, mulatto, Chinese and Indian.[93] The census records do not specify the percentage of negro blood, nor do they indicate how the terms were applied in the field reports.[94] While census reports have been considered in making the racial determination, they are not in themselves conclusive.[95] The inaccuracy of the census records must be considered in an effort to justly evaluate cases of this nature.[96] The court in *Schlumbrecht* recognized such inconsistencies in the use of former documents: "[T]he confusion and contradiction appear[ing] on the very face of the documents makes the conclusion self-evident that some of these records are obviously incorrect."[97]

It should be noted that it is a violation of federal law to use the federal census to the detriment of the individual to whom such information relates.[98] While copies of census reports cannot, without the consent of the individual concerned, be admitted as evidence in any suit or other judicial or administrative proceeding,[99] the Louisiana Court of Appeal has held that such federal laws do not extend to the use of a census report by the state board of health in defense of its own records.[100] The plaintiff is thus precluded from having the census

91. *Id.* at 81 (Janvier, J., dissenting).

92. POPULATION OF THE UNITED STATES, SEVENTH CENSUS (1853); POPULATION OF THE UNITED STATES, EIGHTH CENSUS (1864).

93. POPULATION OF THE UNITED STATES, NINTH CENSUS (1872); POPULATION OF THE UNITED STATES, TENTH CENSUS (1885).

94. Thomas v. Louisiana Bd. of Health, 278 So. 2d 915, 916 (La. App. 1973).

95. State *ex rel.* Schlumbrecht v. Louisiana Bd. of Health, 231 So. 2d 730, 732 (La. App. 1970); Soulet v. City of New Orleans, 94 So. 2d 108 (La. App. 1957).

96. Thomas v. Louisiana Bd. of Health, 278 So. 2d 915 (La. App. 1973); State *ex rel.* Francis v. Louisiana Bd. of Health, 179 So. 2d 681 (La. App. 1965); Soulet v. City of New Orleans, 94 So. 2d 108, 115 (La. App. 1957).

97. 231 So. 2d 730, 733 (La. App. 1970).

98. 13 U.S.C. § 8(c) (1970).

99. 13 U.S.C. § 9(a) (1970).

100. "We find no Federal decision that such records cannot be used by a sovereign state in defense of its own vital statistics records, when the integrity of the latter is attacked by one claiming immunity under the Federal Statutes." State *ex rel.* Lutell v.

HeinOnline -- 3 Hastings. Const. L.Q. 218 1975-1976

reports declared inadmissible. Although the admittedly inaccurate records are not conclusive, their use by the board of health is still permitted in defending its racial determinations.

Even though no fractions attached to the classifications at the time the data was collected, the registrar subsequently—as late as one hundred years thereafter—attaches a fraction to the racial designation of a person's great, great, great grandparent. It is suggested that this is an improper use of these records under Louisiana law. First, attaching percentages to previous racial designations cannot be squared with the decisions of *Treadaway*[101] and *Sunseri*.[102] Second, since the birth certifiicate cannot be changed unless there is no doubt at all as to the racial designation,[103] the former documents and census records no longer constitute prima facie evidence but become conclusive proof of an individual's ancestry.

It is clear that Act 46 is of no significance unless coupled with other statutes which require positive action. However, the court in *Plaia* failed to note that several statutes and regulations do exist which require racial classification. While the court stated that "required information to be shown on this [birth] certificate is detailed in R.S. 40:244,"[104] it did not enunciate that racial classification is part of that required information. The court has endeavored to skirt the constitutional issue by its strict interpretation of the act and its academic discussion as to whether Act 46 requires positive action. Where Act 46 interacts with birth registration statutes, it may result in arbitrary and unreasonable classifications on a birth certificate.

D. Harms under Act 46

However arbitrary and unreasonable the implementation of Act 46, in order to have standing to challenge the statute a plaintiff must have suffered a legally cognizable harm. Such a harm may result when an individual's birth certificate is withheld under the following procedure. When a discrepancy arises between the facts as stated on the birth registration by the person who filed the certificate and the registrar, the birth certificate is not issued. After presentation of sufficient evidence, the city health authorities must refuse certificates which are known to be incorrect[105] although the registrar may delay issuance of a certificate if

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Louisiana Bd. of Health, 153 So. 2d 498, 500 (La. App. 1963) *accord*, State *ex rel.* Pritchard v. Louisiana Bd. of Health, 198 So. 2d 490, 494 (La. App. 1967).

101. 126 La. 300, 52 So. 500 (1910).

102. 191 La. 209, 185 So. 1 (1938).

103. See note 70 *supra*.

104. 296 So. 2d at 810.

105. OP. LA. ATT'Y GEN., Aug. 22, 1967 (unpublished); *see* LA. REV. STAT. ANN. § 40:149 (Supp. 23, 1975).

HeinOnline -- 3 Hastings. Const. L.Q. 219 1975-1976

conflicting information exists.[106] However, no certificate or record may be altered except upon submission of documentary or sworn evidence providing a sufficient basis for the alteration.[107] The board of health is empowered to make regulations "necessary to the installation and efficient performance of an adequate system of vital statistics."[108] In order to comply with Act 46, the board adopted certain regulations by which the registrar is permitted to withhold issuance of any birth certificate where the registrant may have "a traceable amount of negro blood."[109]

106. La. Bd. of Health, Regs. of July 29, 1966, *as amended*, REGS. OF JAN. 30, 1971; *see* note 109 *infra*.

107. LA. REV. STAT. ANN. § 40:266 (1965).

108. LA. REV. STAT. ANN. § 40:143 (1965).

109. Regs. for Enforcement of Act 46 of 1970:

"These regulations supplement and amend those adopted by the Board on October 8, 1947 and July 29, 1966 for the efficient administration of the State Vital Statistics Act, and in order to implement the provisions of Act 46 of 1970, all in accordance with the provisions and authority of R.S. 40:143; which regulations were adopted under procedures of the Louisiana Administrative Procedure Act, R.S. 49:951, et seq.

"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 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

HeinOnline -- 3 Hastings. Const. L.Q. 220 1975-1976

The withholding of a birth certificate pending the determination of one's racial status poses a direct injury to those individuals within the class. Without a birth certificate an individual may be denied access to many activities and institutions. For example, in Louisiana a birth certificate is necessary to apply for a marriage license,[110] to register a child in a public school system and to qualify for school athletics.[111] Under federal law a birth certificate provides the necessary information to apply for employment as a minor,[112] to apply for a passport[113] and to obtain certain social security benefits.[114] Persons whose birth certificates have been withheld may be denied enjoyment of these rights and privileges, among others, for as long as it takes the registrar's office to trace their genealogy. This deprivation stems solely from the fact that a child who has been identified as white by the physician or midwife may have a traceable amount of negro blood. This is also in spite of Louisiana law which recognizes an individual's right to receive a birth registration upon request.[115]

Act 46 may be constitutional because it is merely definitional, but that does not necessarily mean that the withholding process established by regulation under the act is also constitutional. Persons whose genealogy has been called into question, the "border-line negroes," may be deprived of those rights and benefits which are contingent upon possession of a birth certificate and thereby denied their constitutional rights to due process and equal protection.[116]

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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." La. Bd. of Health, REGS. OF JAN. 30, 1971. *See* State *ex rel.* Plaia v. Louisiana Bd. of Health, 296 So. 2d 809, 811-12 n.1 (La. 1974).

110. LA. REV. STAT. ANN. § 9:241 (1965).

111. LA. REV. STAT. ANN. § 17:167 (1963). The statute states: "All children . . . shall be required to present a copy of their official birth record to the school principal. Only records from the local or state registrar of vital statistics will be accepted for children born in Louisiana." Note also that the parish and city school boards may require the submission of additional evidence as to age or race, where such is not conclusively established by the birth certificate.

112. 29 C.F.R. § 570.4(a)(1) (1975).

113. 22 C.F.R. § 51.43(a) (1975).

114. 20 C.F.R. § 404.703(b) (1975).

115. LA. REV. STAT. ANN. § 40:156 (1965); *see* LA. REV. STAT. ANN. § 40:158 (1965) (relating to the disclosure of records).

116. As stated by Justice Barham in his dissent in *Plaia*: "The registrar has the power to withhold or change the birth certificate of anyone having a traceable amount of Negro blood. Citizens of other races do not have to endure this administrative procedure." 296 So. 2d at 812.

HeinOnline -- 3 Hastings. Const. L.Q. 221 1975-1976

Another harm, though not necessarily an actionable one, may result when one visually white is classified negro under Act 46. Historically, in Louisiana it has been held to be slander, actionable per se, to say of a white man that he is a negro or akin to a negro. In 1888 in *Spotorno v. Fourichon*, the Supreme Court of Louisiana stated:

> Under the social habits, customs, and prejudices prevailing in Louisiana, it cannot be disputed that charging a white man with being a negro is calculated to inflict injury and damage. We are concerned with these social conditions simply as facts. They exist and, for that reason, we deal with them. No one could make such a charge, knowing it to be false, without understanding that its effect would be injurious, and without intending to injure.[117]

Although *Spotorno* has never been overruled, it is reasonable to assume that a court in this decade would reach a different result. It is also highly unlikely that an action for defamation could be based on state issuance of a birth certificate. All the same, the *Spotorno* precedent stands as a testimonial to the inferior social status that impliedly attaches to the designation "negro." Most likely, the plaintiffs in *Thomas, Messina* and *Plaia* who challenged Act 46 did so not only because each considered his or her birth certificate to be inaccurate but because each viewed the designation "negro" as a "badge of slavery."[118]

When the 1/32 test of Act 46 is compared with its predecessors, it becomes eminently clear that such tests, harmless on their face, have been used in a discriminatory manner. The former tests were used with a measure of sensitivity to the difficulty of tracing a person's genealogy back several generations. Although the former traceable amount test seems harsh, the 1/32 test is even more irrational than those previously adopted, as evidenced by the elimination of the 1/32 test from the early anti-cohabitation statute.[119] Harms may result from the application of Act 46, but they may not be of sufficient legal weight to overturn the act. However, if a *third* set of statutes operates in conjunction with Act 46 and birth registrations, much more serious harm could result.

IV. A Case to Circumvent Preferred Minority Programs

Intuitively, one knows that Act 46 harms persons who are visually black as well as persons who are visually white. However, no actual harm has been demonstrated, except for that caused by the lack of a birth certificate and the inference of racial inferiority. Although a parallel has been drawn between the injuries suffered under Act 46 and

117. 40 La. Ann. 423, 4 So. 71 (1888); *see* G. STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 26-27 (1910).

118. Plessy v. Ferguson, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting).

119. See text accompanying notes 39-47 *supra*.

HeinOnline -- 3 Hastings. Const. L.Q. 222 1975-1976

the active discrimination which attached to the former standards, the statutes which currently interact with Act 46 pose no active discrimination. However, what would the result be if Act 46 and the birth registration statutes were used to circumvent various federal and state programs designed to cure the effects of past discrimination? Act 46 would no longer be passive. The author posits three hypothetical situations in which Act 46 could be used to avoid the legal mandates for effectuation of racial equality.

Employment

Suppose an employer in State X was sued for racially discriminatory employment practices under Title VII of the Civil Rights Act of 1964.[120] In order to settle the lawsuit the employer agrees, *inter alia*, to implement an affirmative action program which includes a minority hiring quota. The legislature of State X recently passed Act 46 of 1970. The racial composition of the state is heterogeneous, but public officials use the statute to classify persons having "more than 1/32 negro blood" as negroes. The employer fills his minority quota with "Act 46 negroes," persons visually white but designated negro on their birth certificates, thereby retaining his all-white work force. Since no definition of negro is set out in the Title VII guidelines,[121] the employer contends that he has fully complied with the minority hiring policy.

120. 42 U.S.C. § 2000e (1971).

121. Employers may acquire racial information necessary for completing Form EEO-1 either by visual surveys of the work force or from past employment records as to the racial or ethnic identity of the employees, 29 C.F.R. § 1602.13 (1975). Employer Information Report EEO-1 and Instructions, Standard Form 100, Appendix, No. 4 Race/Ethnic Identification, states: "The concept of race as used by the Equal Employment Opportunity Commission does NOT denote clearcut scientific definitions of anthropological origins. For the purposes of this report, an employee may be included in the group to which he or she appears to belong, identifies with, *or is regarded in the community as belonging. See* 1 CCH EMPLOY. PRAC. ¶ 2173, at 1655-2 (1975) (emphasis added); *accord* Apprenticeship Information Report EEO-2-E and Instructions, Instructions for Filing, No. 7 Minority Group Identification, 1 CCH EMPLOY. PRAC. ¶ 2179, at 1679 (1974); State and Local Government Information Report EEO-4, Instructions for Filing, Appendix, No. 2 Race/Ethnic Identification, also stating that the category "black" includes persons of African descent as well as those identified as Jamacian, Trinidadian and West Indian, 1 CCH EMPLOY. PRAC. ¶ 2188, at 1691-6 (1974); Elementary-Secondary Staff Information Report EEO-5, Instructions, Appendix, No. 3 Race/Ethnic Identification, also stating that "Black" includes all persons having origins in any of the black racial groups, 1 CCH EMPLOY. PRAC. ¶ 2189, at 1691-19 (1976); Higher Education Staff Information Report EEO-6, Instructions, Appendix, No. 7 Race/National Origin Identification, also stating that "Black" should include persons of black African descent as well as those of the black race identified as Jamacian, Trinidadian, and West Indian, 2 CCH EMPLOY. PRAC. ¶ 5235, at 3451 (1974).

The EEOC lists four methods that may be used by unions to obtain data on race, color, national origin and sex. These are 1) *use of existing records;* 2) visual survey

HeinOnline -- 3 Hastings. Const. L.Q. 223 1975-1976

Education

Suppose State X has racially segregated schools. As in *Swann v. Charlotte-Mecklenburg Board of Education*,[122] a district court has imposed a racial balance requirement of 57 percent white to 29 percent black on individual schools and has ordered busing to implement desegregation. The legislature of State X has enacted Act 46 of 1970. Under this statute the previously all-white schools within the region are now significantly balanced due to the change in the racial designation of many students who were formerly classified white.[123] *Eo instante*, the all-white schools achieve racial balance. The district court is stymied when the counsel for the board of education submits statistics to show that racial balance has been achieved without busing. The federal attempt to achieve desegregation within the schools has been circumvented.

Voting

State X is subject to the Voting Rights Act of 1965,[124] passed by Congress to eliminate racial discrimination in voter registration. The legislature of State X has passed Act 46 of 1970. The state registrar of vital statics has determined that a substantial portion of the state's visually white population should be reclassified negro to comply with the racial classification set forth in Act 46. The attorney general of State X goes to the director of the census and to the district court for the District of Columbia and contends that now over fifty percent of the nonwhite

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or "head count;" 3) tally from personal knowledge; and 4) self-identification. EEOC states that if records are available, they should be used. Self-identification is not encouraged. *See* Instructions for Filing Local Union Report EEO-3 and Keeping of Records, No. 14 Methods of Obtaining Information as to Race, Color, National Origin, and Sex, 1 CCH EMPLOY. PRAC. ¶ 2187, at 1689-2 (1973) (emphasis added); *accord*, Instructions for Filing Equal Employment Opportunity Appenticeship Information Report EEO-2 and Keeping of Records, No. 7 Minority Group Identification, 1 CCH EMPLOY. PRAC. ¶ 2176, at 1667 (1974).

122. 402 U.S. 1 (1971). *See* Milliken v. Bradley, 418 U.S. 717 (1974); Keyes v. School Dist., 413 U.S. 189 (1973); United States v. Scotland Neck Bd. of Educ., 407 U.S. 484 (1972); Wright v. Emporia City Council, 407 U.S. 451 (1972).

123. Note the retroactivity problem which Act 46 presents to those birth certificates issued prior to 1970. In response to letter of inquiry dated Sept. 26, 1975, counsel for the Louisiana Board of Health stated: "No attempt is made to reclassify all of the certificates on file. . . ." *See* CORRESPONDENCE, *supra* note 28. When the question was posed as to how many persons would be affected if all whites having more than 1/32 negro blood were reclassified, counsel responded: "[W]e have no way of knowing how many persons are affected." *See* CORRESPONDENCE, *supra* note 28.

124. Voting Rights Act of 1965—Extension, PUB. L. No. 94-73, 7 U.S. CODE CONG. & AD. NEWS at 1458 (Aug. 25, 1975), 89 Stat. 400 (1975); *see* S. REP. No. 295, 94th CONG., 1st SESS. (1975); *see generally* U.S. COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER (Jan. 1975).

HeinOnline -- 3 Hastings. Const. L.Q. 224 1975-1976

population is registered since, by legislative decree, certain whites are now "negro." The director of the census, using state statistics, must come to the same conclusion because birth certificates are prima facie evidence of race.[125] The intended result of the Voting Rights Act has been thwarted.

In the three hypotheticals posed, state law is relied upon to determine who is a negro. These hypotheticals suggest potential harm to visual blacks who are denied the intended benefits of federal law regarding employment, education and voting because visual whites classified "negro" under Act 46 receive the benefits in their place.[126] Act 46, formerly upheld as reasonable for purposes of classification on birth certificates, now has an extra-jurisdictional effect. Was the intended purpose of the federal legislation to alleviate discrimination against "Act 46 negroes"? Can a valid legislative purpose be served where the program includes persons who by common understanding do not fall within the class sought to be protected?

A state such as the hypothetical State X would contend that the 1.5/32 negro, though visually white, is nonetheless a full-blooded negro, and therefore entitled to the protection of federal remedial legislation. However, the foregoing analysis of the 1/32 test in Louisiana suggests that there is no historical or factual basis for finding that persons with as little as 1.5/32 negro blood have been the victims of racial discrimination.

Act 46 in these hypotheticals bears no rational relationship to the governmental purpose sought to be accomplished. In fact, it would defeat that purpose. Where the statute has proven to be vague, unworkable and overtly and covertly discriminatory, it cannot stand. As noted in *Yick Wo v. Hopkins*:

> Though the law be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.[127]

The Louisiana Supreme Court's decision in *Plaia* produces an anomalous result. While the court upheld the constitutionality of Act

125. LA. REV. STAT. ANN. § 40:159 (1965).

126. In letter of inquiry dated Sept. 26, 1975, the author asked the board of health: "Could employers use the "Negro" classification on the birth certificate to employ visually white persons in positions reserved for minorities under the government's affirmative action program, thereby circumventing such government programs in education (busing) employment (affirmative action), and voting (Voting Rights Act of 1965)?" Counsel for the board responded: "The answer to this question is yes and I know of no impediment under the Civil Rights Act." *See* CORRESPONDENCE, *supra* note 28.

127. 118 U.S. 356, 373-74 (1886).

HeinOnline -- 3 Hastings. Const. L.Q. 225 1975-1976

46 it granted the plaintiff's request to have her birth certificate changed. No decision yet has upheld the board of health's determination. However, the fact that the 1/32 determination may be easily overruled only serves to protect Act 46 from consideration on its merits.

V. Racial Designation: Where to Draw the Line

But where is the line to be drawn? All racial designations are not necessarily arbitrary. Yet, to be valuable a scheme of racial classification must meet all or most of the following conditions: 1) the criteria must be objective, that is, the racial designation of a given individual must be the same, or very nearly the same, when he or she is classified by different observers; 2) the traits must be innate and inherited, that is, they must not be influenced so much by the individual's surroundings that his or her innate constitution is masked; 3) the traits must be determined by one, or a small number of genes, for example, those determinating visual characteristics.[128] To establish a system of racial designation, the author suggests four possible methods: 1) visual classification; 2) self-classification; 3) a limited percentage classification; and 4) a hybrid classification using a combination of the first and second methods.

The first method suggested is visual classification according to various physical features such as skin pigmentation. A person is classified according to the way others see him or her. The advantage of such a classification is obvious—the determination is simple, efficient and universal. Such a definition is also more anthropological and taxonomical because one is classified according to the characteristics of the norm. One weakness in this approach is that some persons of mixed racial background are not easily identifiable as being of one race or another. Through visual identification some persons may classify the person as white while others would classify him or her as black.

The second method suggested is that of self-designation: I am what I perceive myself to be. Such a method would alleviate the problem of visual gradations, mentioned above. Where society cannot classify because visual traits are not determinative, the person classifies himself or herself according to his or her own view. Logically, an individual should be classified according to one's own view of racial ancestry.

This approach has two problems. First, there are no readily defined parameters so it is not a universal approach to racial identification. Another problem is that under self-designation one can choose a designation which belies reality. A well-tanned individual could accept all the social advantages of being white yet also rely on a self-designated

128. This is a variation of Boyd, *Critique of Methods of Classifying Mankind*, in THIS IS RACE (E. Count ed. 1950).

HeinOnline -- 3 Hastings. Const. L.Q. 226 1975-1976

minority status to accept the benefits granted to racial minorities. Should such an individual be afforded the special protection extended by the Fourteenth Amendment? In order for self-classification to be a viable method of racial designation, it must rest on a reasonableness standard which would defeat the "chameleon" effect. To protect universality as well as reasonableness, the burden of proof of ancestry should remain on the proponent of the classification.

The third method suggested is classification along ancestral lines to a percentage, but within realistic limits. Classification to the 1/4 degree seems not impossible nor totally impractical since existing birth records afford reasonable accuracy in tracing genealogy to one's grandparents. The author, however, rejects any such method because it relies upon genealogical heritage rather than observable characteristics to make the determination of race, and because it necessarily implies that the race of one ancestor is more important than the race of the other five. Furthermore, this note has shown the inconsistencies and inaccuracies which do exist in birth records even of one's grandparents. Similarly, such a method would make the records of the grandparents' race almost conclusive as to recognized racial status. A percentage system, therefore, does not appear to be the best possible alternative.

The most appealing method of classification is a hybrid comprised of the first and second alternatives. One is classified according to his or her visual characteristics at birth, establishing a rebuttable presumption as to race. One could rebut this presumption by showing that the birth certificate is incorrect according to self-classification. The burden of proof required would be that of reasonableness.

The year is 1976. A child is born visually white. The registrar of vital statistics for the state board of health classifies the baby as white based solely on appearance. When the child grows up, he has less-than-dark skin and could easily be considered caucasian. However, the child develops viewing himself as black since his grandparent was black. Then the child seeks to have his racial status changed to conform to his self-perceived racial identity. He shows that this is reasonable in light of his racial ancestry. There is no need to classify to any specific percentage or to any mathematical certainty. The district court or the administrative agency makes the determination whether or not such a racial designation is reasonable.

Conclusion

An obscure Louisiana statute that classifies according to a minute percentage of negro blood has been held constitutional by the highest court of that state. The act not only creates serious problems of implementation but also suggests potential harms to visual whites and blacks, causing one to reflect on the nature of racial classification. If

HeinOnline -- 3 Hastings. Const. L.Q. 227 1975-1976

racial classification is to be made, it must conform to its intended purpose. Act 46 of 1970 has too many inherent weaknesses to meet all intended purposes. Whatever the method of classification to be adopted, a standard of reasonableness must be applied. In this context the reasonableness standard demands that the interests of society be satisfied without harming the interests of the individual. The interests of society as a whole are not served when a state lends its prestige to the enactment of a statute having invidious overtones.

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