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MISCEGENATION: THE COURTS AND THE CONSTITUTION

Miscegenation is generally defined as the interbreeding or marriage of persons of different races, but the term will here be used in reference to miscegenetic marriages only. That is, this paper will concern itself only with the aspects of the marriage laws of various states that relate to miscegenation. The purpose of this paper will be to show the antecedents of miscegenation in the American legal system, the methods of constitutional justification of miscegenation statutes in state courts, and the change in regard to their validity given by the federal judiciary.

BACKGROUND

Prohibitions against miscegenation date back to the earliest colonial times, and the first record of sanctions imposed for this act in the Virginia colony appears in Hening's extract from the judicial proceedings of the Governor and Council of Virginia:

September 17th, 1630. Hugh Davis to be soundly whipped, before an assembly of negroes and others for abusing himself to the dishonor of God and shame of Christians, by defiling his body in lying with a negro; which fault he is to acknowledge next Sabbath day.¹

That prohibitions against miscegenation have been widespread in the United States can be seen in the fact that they have appeared in the statutes of some forty states. Of these forty, twenty-three have repealed their statutes,² half of these having been repealed within the last two decades as a result of the movement for Negro equality as well as the publicity occasioned by a 1948 decision of the California Supreme Court which struck down that state's miscegenation statute.³

1. 1 Laws of Virginia 146 (Hening 1823). Other representative miscegenation laws of the American colonies: Maryland, 1692- Acts of Md. 76 (Bisset 1759); North Carolina, 1741- 1 Public Acts 1715-90, at 45-46 (Martin's Revisal of Iredell 1804); South Carolina, 1717- 3 Stat. at Large of S.C., No. 383, at 20 (Cooper 1838).

2. These states and the date when the statute was repealed are: Arizona (1962), California (judicially) (1948), Colorado (1957), Idaho (1959), Indiana (1965), Iowa (1851), Kansas (1857), Maine (1883), Massachusetts (1840), Michigan (1883), Montana (1953), Nebraska (1963), Nevada (1959), New Mexico (1886), North Dakota (1955), Ohio (1887), Oregon (1959), Pennsylvania (1891), Rhode Island (1881), South Dakota (1957), Utah (1963), Washington (1867), Wyoming (1965).

3. *Perez v. Sharp, sub. nom. Perez v. Lippold*, 32 Cal. 2d 711, 198 P. 2d 17 (1948).

Nonetheless, it is indeed surprising that seventeen states still retain their miscegenation statutes.⁴ Of these seventeen states, six make express provisions in their constitutions either forbidding the passage of laws validating such marriages or else making them void ab initio.⁵

Miscegenation is an entirely statutory crime, generally considered to be of the grade of a felony, the penalty for which ranges up to imprisonment for ten years and fines up to \$2,000.

All miscegenation statutes contain general provisions against the intermarriage of Negroes and Caucasians, but others have expanded their scope to include Malays,⁶ American Indians,⁷ Mestizos,⁸ and Half-breeds.⁹ Although these statutes in the main do not prohibit intermarriage between members of races other than white, all prohibit intermarriage between a white person and a member of the designated non-white group or groups.

And just as the groups with which intermarriage is prohibited vary from state to state, so also does the definition of "Negro." One state classifies a Negro as any person of one-eighth or more Negro blood,¹⁰ while others define Negroes as any person of Negro descent to the third generation inclusive.¹¹ Two states include every person in whom there is any ascertainable Negro blood within the prohibited group.¹²

That these statutes are an anomaly in this period of constitutional and social reform is readily apparent. Nevertheless, their antecedents run deep in the American legal system.

4. ALA. CODE tit. 14, § 360 (1958); ARK. STAT. ANN. §§ 55-104,-105 (1947); DEL. CODE ANN. tit. 13, §§ 101,-102 (1953); FLA. STAT. ANN. §§ 741-11,-12 (1961); GA. CODE §§ 53-106, -214, -312, -9903 (1933); KY. REV. STAT. §§ 402.020, .040, .990 (1962); LA. REV. STAT. §§ 9.201, .221, 14.79 (1950); MD. ANN. CODE art. 27, § 398 (1957); MISS. CODE ANN. §§ 459, 2002, 2234 (1956); MO. REV. STAT. § 451.020 (Supp. 1963), § 563.240 (1959); N.C. GEN. STAT. § 14-181 (1950); OKLA. STAT. tit. 43, §§ 12, 13 (1961); S.C. CODE ANN. §§ 20-7, -8 (1962); TENN. CODE ANN. §§ 36-402,-403 (1955); TEX. REV. CIV. STAT. art. 4607 (Supp. 1960), TEX. PEN. CODE arts. 492-93 (Supp. 1960); VA. CODE ANN. §§ 20-58,-59 (1960); W.VA. CODE ANN. §§ 4695, 4697 (1961).

5. ALA. CONST. art. 4, § 102; FLA. CONST. art. 16, § 24; MISS. CONST. art. 14, § 263; N.C. CONST. art. 14, § 8; S.C. CONST. art. 3, § 33; TENN. CONST. art. 11, § 14.

6. MD. ANN. CODE art. 27, § 398 (1957).

7. S.C. CODE ANN. § 20-7 (1962).

8. *Ibid.*

9. *Ibid.*

10. Florida.

11. *E.g.*, Maryland.

12. Georgia, Virginia.

MISCEGENATION AND THE STATES

The highest courts in some fourteen states have passed upon the question of constitutionality of miscegenation statutes and have uniformly upheld their validity under both state and federal constitutions.¹³ The avenues upon which these statutes have been attacked range from violation of various state constitutional provisions to the Civil Rights Act of 1866.¹⁴ However, the most frequent points upon which the statutes have been challenged are the impairment of contracts,¹⁵ privileges and immunities,¹⁷ due process,¹⁸ and equal protection¹⁹ clauses of the United States Constitution.

The state courts seem to have vindicated their miscegenation statutes on three bases: (1). contract, (2). equal application of a reasonable regulation, and (3). exclusive state institutionality.

The contractual viewpoint seems to be the oldest in point of time and the simplest in its outlook. That is, the courts approached the problem by concluding that these statutes had nothing to do with regulating the social status of the citizen and stood upon the same footing as laws controlling other contracts, but to hold that "(m)arriage is a

13. See *Scott v. Georgia*, 39 Ga. 321 (1869); *State v. Kennedy*, 76 N.C. 232 (1869); *State v. Gibson*, 36 Ind. 389 (1871); *Lonas v. State*, 3 Heiskell (50 Tenn.) 287 (1871); *Frasher v. State*, 3 Tex. App. 263 (1877); *Green v. State*, 58 Ala. 190 (1877); *State v. Jackson*, 80 Mo. 175 (1883); *Dodson v. State*, 61 Ark. 57, 31 S.W. 977 (1895); *In re Paquet's Estate*, 101 Ore. 393, 200 P. 911 (1921); *Kirby v. Kirby*, 24 Ariz. 9, 206 P. 405 (1922); *Eggers v. Olson*, 104 Okla. 296, 231 P. 483 (1924); *In re Atkins*, 151 Okla. 294, 3 P. 2d 682 (1931); *State v. Pass*, 59 Ariz. 16, 121 P. 2d 882 (1942); *In re Shun T. Takahashi's Estate*, 113 Mont. 490, 129 P. 2d 217 (1942); *Jackson v. Denver*, 109 Colo. 196, 124 P. 2d 240 (1942); *Miller v. Lucks*, 203 Miss. 824, 36 So. 2d 140 (1948); *Jackson v. State*, 37 Ala. App. 519, 72 So. 2d 114, 260 Ala. App. 698, 72 So. 2d 116, *cert. den.*, 348 U.S. 888 (1954); *Rogers v. State*, 37 Ala. App. 638, 73 So. 2d 389 (1954); *Naim v. Naim*, 197 Va. 80, 87 S.E. 2d 749, *remanded*, 350 U.S. 891, *aff'd.*, 197 Va. 734, 90 S.E. 2d 849, *appeal dismissed*, 350 U.S. 985 (1955); *State v. Brown*, 236 La. 562, 108 So. 2d 233 (1959); *Loving v. Commonwealth*, 147 S.E. 2d 78 (1966).

14. See, e.g., *Scott v. Georgia*, *supra* note 13.

15. Civil Rights Bill of April 9, 1866, ch. 31, § 1, 14 Stat. 27, 42 U.S.C. § 1981 (1964). See *Lonas v. State*, *supra* note 13; *Green v. State*, *supra* note 13; *Dodson v. State*, *supra* note 13.

16. U.S. CONST. art. I, § 10. See *State v. Gibson*, *supra* note 13; *Lonas v. State*, *supra* note 13.

17. U.S. CONST. amend. XIV, § 1. See *Lonas v. State*, *supra* note 13; *State v. Jackson*, *supra* note 13; *Dodson v. State*, *supra* note 13.

18. U.S. CONST. amend. XIV, § 1. See *Jackson v. Denver*, *supra* note 13; *Naim v. Naim*, *supra* note 13.

19. U.S. CONST. amend. XIV, § 1. See *State v. Gibson*, *supra* note 13; see generally *State v. Brown*, *supra* note 13; *Naim v. Naim*, *supra* note 13; *Loving v. Commonwealth*, *supra* note 13.

civil contract, regulated by law . . . ,”²⁰ left the states open to appeal to the federal courts on the ground of impairment of contract, and thus this avenue of approach was soon discarded.

Another rather simplistic attempt to resolve the problem was for the court to assume *arguendo* that prohibition of miscegenetic marriages was a reasonable regulation and then to justify the statute on the ground that it applied equally to both races.²¹ This *arguendo* approach to the problem saved several courts from the tenacious ground of Brandeisian jurisprudence as illustrated by the following judicial observation:

It is stated as a well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny. . . .²²

The argument most frequently applied in the defense of miscegenation was that marriage is a civil status²³ and as such is subject to the exclusive power of state regulation.²⁴ The most cogent statement of this viewpoint is found in the following from *State v. Gibson*:

The right in the states, to regulate and control, to guard, protect, and preserve this God-given, civilizing, and Christianizing institution is of inestimable importance and cannot be surrendered. . . .²⁵

This argument approached its penultimate in *Naim v. Naim*, in which the court held that state regulation of the marriage relation was “safeguarded by that bastion of State’s rights, somewhat battered perhaps but still a sturdy fortress in our fundamental law, the tenth section of the Bill of Rights.”²⁶ To hold that marriage is such that it can be defined as a power reserved to the states by the Tenth Amendment²⁷ is a very logical capstone to this particular line of reasoning. Yet it is an extremely weak argument as will be illustrated subsequently.

20. *State v. Georgia*, 39 Ga. 321, 328 (1869); *accord*, *State v. Kennedy*, 76 N.C. 232 (1869).

21. See *Dodson v. State*, 61 Ark. 57, 31 S.W. 977 (1895); *Jackson v. Denver*, 109 Colo. 196, 124 P. 2d 240 (1942); *State v. Brown*, 236 La. 562, 108 So. 2d 233 (1959).

22. *State v. Jackson*, 80 Mo. 175, 177 (1883).

23. See *Frasher v. State*, 3 Tex. App. 263 (1877); *Green v. State*, 58 Ala. 190 (1877).

24. See *Lonas v. State*, 3 Heiskell (50 Tenn.) 287 (1871); *Loving v. Commonwealth*, 147 S.E. 2d 78 (1966); *accord*, *Kirby v. Kirby*, 24 Ariz. 9, 206 P. 405 (1922); *In re Shun T. Takahashi’s Estate*, 113 Mont. 490, 129 P. 2d 217 (1942).

25. 36 Ind. 389, 402 (1871).

26. 197 Va. 80, 90, 87 S.E. 2d 749, 756 (1955).

27. U.S. CONST. amend. X.

It appears, then, that the state judiciary laid the constitutional foundations of miscegenation in accord with a general feeling that racial intermarriage was a socially undesirable practice, the prohibition of which could be accomplished by statute. The fact that this was not a universal solution is indicated in two state cases holding such statutes invalid. The first of these came, surprisingly enough, from Alabama. There the court found that the Alabama statute was in contravention of the Civil Rights Act of 1866 and the first section of the Fourteenth Amendment in that these laws ". . . intended to destroy the distinctions of race and color in respect to the rights secured by (them). (They) did not aim merely to create an equality of the races in reference to each other."²⁸ The authority of the case is questionable, however, as it was later overruled.²⁹

A conclusive result was achieved in *Perez v. Sharp*,³⁰ wherein the California Supreme Court invalidated that state's miscegenation statute by a 4-3 decision. The case arose from a mandamus proceeding in which the appellants had sought to compel the clerk of Los Angeles county to issue them a marriage certificate. In its decision the court at first intimated that the statutes proscribing miscegenetic marriages might have been a restraint on the guarantee of freedom of religion as embodied in the First Amendment of the United States Constitution,³¹ but the ratio decidendi of the majority was that "(m)arriage is thus something more than a civil contract subject to regulation by the state; it is a fundamental right of free men. There can be no prohibition of marriage except for an important social objective and by reasonable means."³² Thus having placed the marital right within the "penumbra" of the Fourteenth Amendment, the court then concluded that it violated the equal protection of the laws clause.³³ *Perez* is thus the only state decision remaining that has challenged the validity of miscegenation, and it received little attention when first decided.

IN THE FEDERAL COURTS

Until recently the miscegenation statutes received about the same treatment in the federal courts as they did in the states. The reasoning

28. *Burns v. State*, 48 Ala. 195, 197 (1872).

29. *Green v. State*, *supra* note 23.

30. *Sub. nom. Perez v. Lippold*, 32 Cal. 2d 711, 198 P. 2d 17 (1948).

31. U.S. CONST. amend. I.

32. 198 P. 2d at 18.

33. *Id.*, at 29.

advanced in the earlier federal decisions proceeded on the accepted ground that "(t)he subject of marriage is one exclusively under the control of each state. Each one may pass such laws as it deems proper regulating the institution."³⁴ Nor did these earlier federal decisions make any attempt to apply the provisions of the Fourteenth Amendment to the questioned statutes:

The Fourteenth Amendment gives no power to Congress to interfere with the right of a state to regulate the domestic relations of its own citizens, and if a state enact such laws . . . , the federal courts must respect them as they stand, without inquiring into the reasons of them.³⁵

The Supreme Court of the United States has passed directly upon the constitutionality of miscegenation laws upon only two occasions. Its earlier decision, *Pace v. Alabama*,³⁶ arose on writ of error from the Supreme Court of Alabama, the appellants contesting their conviction under that state's miscegenetic fornication statute on the ground that it was in conflict with the equal protection clause of the Fourteenth Amendment. The particular statute in question provided a more severe penalty for interracial fornication, but the Court held this to be a separate offense, and "(w)hatever discrimination is made in the punishment prescribed . . . is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same."³⁷ That the Court now considers this to be an extremely narrow view of the equal protection clause will be shown hereafter.

The topic seemed to be well settled even after the decision in *Brown v. Board of Education*,³⁸ as the Supreme Court denied certiorari in one case³⁹ and later refused to hear an appeal from an order of the Supreme Court of Appeals of Virginia ignoring the Court's order remanding

34. *Ex parte Francois*, 9 Fed. Cas. 699, 700 (No. 5,047) (C.C.W.D. Tex. 1879); *accord*, *In re Hobbs*, 12 Fed. Cas. 262 (No. 6,550) (C.C.N.D. Ga. 1871); *State v. Tutty*, 41 Fed. 753 (C.C.S.D. Ga. 1890).

35. *Ex parte Kinney*, 14 Fed. Cas. 602, 605 (No. 7,825) (C.C.E.D. Va. 1879); *accord*, *Stevens v. U.S.*, 146 F. 2d 120 (10th Cir. 1944).

36. 106 U.S. 583 (1882).

37. *Id.*, at 585.

38. 347 U.S. 483 (1954).

39. *Jackson v. State*, 37 Ala. App. 519, 72 So. 2d 114, 260 Ala. App. 698, 72 So. 2d 116, *cert. den.*, 348 U.S. 888 (1954).

a case to the trial courts so as to make a more complete record on appeal.⁴⁰

Nonetheless, the proposition first given judicial recognition in *Perez*, that prohibition of racial cohabitation cannot be accomplished by statute, gained acceptance in 1964, when the Supreme Court delivered a decision that signaled the end of its tacit acceptance of the tenets of miscegenation. In *McLaughlin v. Florida*,⁴¹ the Court had before it a Florida criminal statute prohibiting an interracial couple from habitually living in and occupying the same room in the nighttime. The factual situation was thus essentially the same as presented in *Pace*, but here the Court held the statute invalid under the equal protection clause. Concerning its decision in *Pace*, the Court pointed out that that case:

represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court. Judicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are *reasonable* (emphasis added) in light of its purpose. . . .⁴²

The Court did not consider, however, the constitutionality of the state's prohibition of miscegenetic marriages;⁴³ but it is submitted that once a proper vehicle is found, it will not hesitate in applying the test set forth in *McLaughlin*, and a recent decision of the Virginia Supreme Court of Appeals, *Loving v. Commonwealth*,⁴⁴ seems to have all the prerequisites.

Loving AND BEYOND

The *Loving* case would involve one single point on appeal—the validity of a conviction for the statutory crime of contracting a miscegenetic marriage. The case came before the Virginia court on a motion

40. *Naim v. Naim*, 197 Va. 80, 87 S.E. 2d 749, *remanded*, 350 U.S. 891, *aff'd.*, 197 Va. 734, 90 S.E. 2d 849, *appeal dismissed*, 350 U.S. 985 (1955). The Virginia Supreme Court of Appeals ignored similar mandates in *Martin v. Hunter's Lessee*, 14 U.S. 304, 353; *William v. Buffrey*, 102 U.S. 248 (1880).

41. 379 U.S. 184 (1964).

42. *Id.*, at 188, 191. This test has been cited with approval by the Court in two later cases involving voting rights; *Carrington v. Rash*, 380 U.S. 89, 93 (1965); *Harper v. Virginia State Board of Elections*, 86 S. Ct. 1079, 1083 (1966).

43. *Id.*, at 196.

44. 147 S.E. 2d 78 (1966).

to vacate the judgment and set aside sentence. The Virginia Attorney General's office relied heavily, in its argument, on the brief filed in behalf of the state of Florida in *McLaughlin*,⁴⁵ the gravamen of that brief being that in the light of its legislative history the framers of the Fourteenth Amendment did not intend it to extend to the miscegenation laws. The Supreme Court rejected this argument in *McLaughlin*,⁴⁶ and the Virginia court made no mention of it, but rather relied on its holding in *Naim*, stating that a decision reversing that case ". . . would be judicial legislation in the rawest sense of that term."⁴⁷ The question that thus presents itself is, if the Supreme Court were to hear the appeal, would it apply the *McLaughlin* precedent?

To hold that marriage is a "right" within the due process clause of the Fourteenth Amendment is a rather shaky supposition. While there is good authority that marriage is just such a right,⁴⁸ there is equally good authority to the contrary.⁴⁹ And by the same token, to hold as the state courts have done in *Naim* that the right to regulate marriage is exclusively vested in the states by virtue of a Tenth Amendment argument is also questionable.⁵⁰

The most promising ground of attack seems to be the equal protection clause. Remembering for the moment that the Court of *McLaughlin* held that a valid classification under the equal protection clause must be reasonable, it is clear that legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.⁵¹ This is a result of the fact that although normally the legislature is given wide discretion in making statutory classifica-

45. Brief for Commonwealth, p. 28 (Record No. 6163).

46. *McLaughlin v. Florida*, *supra* note 41, at 195. See generally Pittman, *The Fourteenth Amendment: Its Intended Effect on Anti-miscegenation Laws*, 43 N.C.L. REV. 92 (1964). The Court has consistently ignored this type of approach: ". . . the Equal Protection Clause is not shackled to the political theory of a particular era." Harper v. Virginia State Board of Elections, *supra* note 42 at 1083.

47. *Loving v. Commonwealth*, *supra* note 44, at 82.

48. See *Meyer v. Nebraska*, 262 U. S. 390, 399 (1922); *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1941); *Griswold v. Connecticut*, 85 S. Ct. 1678, 1682 (1965).

49. *E.g.*, *Maynard v. Hill*, 125 U.S. 190 (1887).

50. The amendment was nothing "more than declaratory of the relationship between the national and state governments as it had been established by the Constitution." *U.S. v. Darby*, 312 U.S. 100, 124 (1941); *accord*, *U.S. v. Sprague*, 282 U.S. 716 (1931).

51. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (licensing of laundries); *Buchanan v. Warley*, 245 U.S. 60 (1917) (use and occupation of property); *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1925) (keeping of account books); *Hill v. Texas*, 316 U.S. 400 (1941) (grand jury lists); *Oyama v. California*, 332 U.S. 633 (1948) (alienation of land); *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948) (commercial fishing licenses);

tions,⁵² the Court seems to have shifted this presumption where such classifications are based on race alone, thus casting the burden upon the state to prove a reasonable basis.

Classifications based solely on race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.⁵³

This being the case, the grounds advanced to prove that racial classifications are reasonable in regard to miscegenetic marriages have been three: sociological, scientific, alleviation of racial tension.

Since this discussion is limited to a constitutional analysis of miscegenation, it would be inappropriate to include here a lengthy discussion of the scientific and sociological arguments in regard to miscegenation. It is sufficient to say that the general consensus is that racial distinctions have no place in today's society.⁵⁴

In regard to the ground of alleviation of racial tension, the Court has said that "(d)esirable as this is, and as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."⁵⁵ And again when presented with a breach of the peace conviction for playing basketball in a segregated park, ". . . the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present."⁵⁶

Thus it appears that the solution adopted by the states and the earlier federal courts to the problem of interracial marriage, that is, that its prohibition could be accomplished by statute, will be disregarded by

Anderson v. Martin, 375 U.S. 399 (1964) (nomination papers and ballots); Watson v. City of Memphis, 373 U.S. 526 (1963) (public parks and playgrounds); Hamm v. Virginia State Board of Elections, 230 F. Supp. 156 (E.D. Va. 1969), *aff'd. per curiam*, 379 U.S. 19 (1964) (voting and property records).

52. See, e.g., Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1910); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1958); McGowan v. Maryland, 366 U.S. 420 (1960).

53. Bolling v. Sharpe, 347 U.S. 497, 499 (1954); *accord*, Hirabayashi v. U.S., 320 U.S. 81, 100 (1943) (dictum); Korematsu v. U.S., 323 U.S. 214, 216 (1944) (dictum); Robinson v. Florida, 378 U.S. 153, 156 (1964); Griffin v. School Board, 377 U.S. 218, 231 (1964).

54. See generally *Science and the Race Problem*, 142 SCIENCE 558 (1963); MONTAGUE, MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE (4th ed. 1964); MYRDAL, AN AMERICAN DILEMMA (1944).

55. Buchanan v. Warley, *supra* note 51, at 81.

56. Wright v. Georgia, 373 U.S. 284, 293 (1963).

the Court as it did in *McLaughlin*. No matter how deep their antecedents, the Court could well find that miscegenetic marriage laws violate the mandates of the equal protection clause of the Fourteenth Amendment.

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