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NOTES

Racial Intermarriage—A Constitutional Problem

INTRODUCTION

. . . [I]t was dictated by wise statesmanship, and has a broad and solid foundation in enlightened policy, sustained by sound reason and common sense. . . .¹

Such was the attitude of the Georgia Supreme Court, sitting in Atlanta in 1869, toward the state's anti-miscegenation law. The tradition of similar legislation prohibiting or discouraging marriage between whites and negroes is nearly 300 years old in America. The General Assembly of Maryland passed the first statute in 1664 which declared that the issue of a marriage between an English woman and a negro slave were slaves, and the white woman was bound to serve her husband's master during coverture.² The principle spread to Massachusetts in 1705, North Carolina in 1715, and Pennsylvania in 1725.³ A total of thirty-eight states have, in the past, enacted prohibitions, and twenty-four states still have them.⁴ Six of the southern states have seen fit to embody the principle in their constitutions.⁵ Today, Illinois, Ohio, Michigan, and New York are the only states with large negro populations that do not have anti-miscegenation laws. All of the statutes prohibit negro-white marriages, but some have been extended to include Malaysians,⁶ Mon-

1. *Scott v. State*, 39 Ga. 321, 323 (1869).

2. 10 ENCYC. SOC. SCI. 532 (1933).

3. REUTER, RACE MIXTURE 81 (1931).

4. ALA. CONST. art. IV, § 102; ALA. CODE tit. 14, § 360 (1940); ARIZ. REV. STAT. ANN. § 25-101 (1956); ARK. STAT. § 55-104 (1947); DEL. CODE ANN. tit. 13, § 101 (1953); FLA. CONST. art. 16, § 24; FLA. STAT. § 741.11 (1955); GA. CODE ANN. § 53-106 (1935); IDAHO CODE ANN. § 32-206 (1948); IND. ANN. STAT. § 44-104 (1952); KY. REV. STAT. ANN. § 402.020 (1955); LA. CIV. CODE ANN. art. 94 (West 1952); MD. ANN. CODE art. 27, § 398 (1957); MISS. CONST. art. 14, § 263; MISS. CODE ANN. § 459 (1942); MO. REV. STAT. § 451.020 (1949); NEB. REV. STAT. § 42-103 (1943); NEV. REV. STAT. § 122.180 (1957); N.C. CONST. art. XIV, § 8; N.C. GEN. STAT. § 51-3 (1950), as amended (1953); OKLA. STAT. tit. 43, § 12 (1951); S.C. CONST. art. 3, § 33; S.C. CODE § 20-7 (1952); TENN. CONST. art. 11, § 14; TENN. CODE ANN. § 36-402 (1956); TEX. REV. CIV. STAT. art. 4607 (1925); UTAH CODE ANN. § 30-1-2 (1953); VA. CODE ANN. § 20-54 (1950); W. VA. CODE ANN. § 4701 (1) (1955); WYO. COMP. STAT. ANN. § 50-108 (1945). The validity of the Nevada statute is doubtful. See *Time*, Dec. 22, 1958, p. 17.

5. Alabama, Florida, Mississippi, North Carolina, South Carolina, and Tennessee.

6. Arizona, Maryland, Nevada, Utah, and Wyoming.

golians,⁷ American Indians,⁸ Chinese,⁹ Japanese,¹⁰ Hindus,¹¹ mestizos,¹² half-breeds,¹³ and the brown race.¹⁴

These various prohibitions create three distinct problems. First is the question of the constitutionality of the measures. Second is the choice of law problem, for some states which prohibit miscegenetic marriages will not recognize them even if they are legal where solemnized. Third is the problem of defining who is a member of what race. It should be noted that a person can be a negro by one state's definition and not by another's. This is a result of either no definition, or different definitions in the various statutes.¹⁵

The scope of this note is limited to the constitutional problem created by the negro-white relations of today.

THE PROBLEM

The general American policy has always been to absorb different groups, but this did not extend to the negro race. From the very beginning of our country a basic anti-amalgamation doctrine has been followed. As a result, numerous problems have arisen. Most of the problem areas, such as education, employment, and landholding affect the entire population. This is not true of the intermarriage problem. It cannot compare with those listed in regard to the number of persons affected. Although so few are affected, it is interesting to note how whites and negroes evaluate their respective positions. Myrdal, in his classic work on the negro problem, lists the following as the "Rank Order of Discriminations" of southern whites. He stated that northerners had the same order only it was more vague.

- 1) Intermarriage and sexual intercourse with white women.
- 2) Dancing, bathing, eating, drinking together, and social intercourse in general.
- 3) Discrimination in schools, churches, and transportation.
- 4) Political disenfranchisement.
- 5) Discrimination by police and law enforcement agencies in general.
- 6) Discrimination in housing, employment, credit, and public relief.¹⁶

7. Arizona, Idaho, Missouri, Nevada, Utah, and Wyoming.

8. North Carolina and South Carolina.

9. Nebraska.

10. Nebraska.

11. Arizona.

12. South Carolina.

13. South Carolina.

14. Nevada.

15. For an interesting discussion of this problem see Note, 11 FLA. L. REV. 235 (1958).

16. 1 MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 60 (1944).

Myrdal noted that the negroes' rank order of objectionable attitudes is just the reverse of the whites'.

Why then is the validity of these statutes important? The negro minority does not seem interested in the subject, and it affects so few persons. It is true that the intermarriage issue will never directly touch most negroes or whites, but the psychological impact on the great majority of Americans is evidenced by the rankings above. A prominent negro writer, Rayford W. Logan, said: "On no aspect of the race problem are most white Americans, North as well as South, so adamant as they are on their opposition to intermarriage."¹⁷

THE JUDICIAL APPROACH

When the validity of an anti-miscegenation statute is questioned, it is usually alleged that it violates the fourteenth amendment, either the due process clause or the equal protection clause, or both. Less frequently it is argued that the statute violates religious freedom as guaranteed by the first amendment. While the volume of litigation in the last 100 years has been slight, the opinions represent many different approaches as to the meaning and place of the Constitution in our federal system of government. The highest courts of only fourteen states have decided the issue.¹⁸ The Supreme Court of the United States has never decided it, although it has had the opportunity to do so. Of the so-called fourteen leading cases, only one has held an anti-miscegenation statute unconstitutional.¹⁹ For many years there appeared to be no doubt about the issue, but the California court in the *Perez* case broke the chain. The declarations of the courts which have upheld the statutes fall generally into three categories:

1) There is no violation of the fourteenth amendment because regulation of marriage is a matter of state concern. The states clearly had the power to regulate marriage before the Constitution was adopted, and nowhere in the Constitution did the states give the federal government this regulatory power. Since this is the case, under the tenth amendment the power is reserved to the states.²⁰ These

17. R. LOGAN, WHAT THE NEGRO WANTS 28 (1944).

18. *Green v. State*, 58 Ala. 190 (1877); *State v. Pass*, 59 Ariz. 16, 121 P.2d 882 (1942); *Dodson v. State*, 61 Ark. 57, 31 S.W. 977 (1895); *Jackson v. City and County of Denver*, 109 Colo. 196, 124 P.2d 240 (1942); *Scott v. State*, 39 Ga. 321 (1869); *State v. Gibson*, 36 Ind. 389 (1871); *State v. Brown*, 236 La. 562, 108 So. 2d 233 (1959); *Miller v. Lucks*, 203 Miss. 824, 36 So. 2d 140 (1948); *State v. Jackson*, 80 Mo. 174 (1883); *State v. Kennedy*, 76 N.C. 251 (1877); *Eggers v. Olson*, 104 Okla. 297, 231 Pac. 483 (1924); *Lonas v. State*, 50 Tenn. 287 (1871); *Naim v. Naim* 197 Va. 80, 87 S.E.2d 749 (1955), *remanded*, 350 U.S. 891 (1955), *aff'd*, 197 Va. 734, 90 S.E.2d 849 (1956), *appeal dismissed*, 350 U.S. 985 (1956); *Perez v. Sharp*, 32 Cal.2d 711, 198 P.2d 17 (1948).

19. *Perez v. Sharp*, 32 Cal.2d 711, 198 P.2d 17 (1948). *Burns v. State*, 48 Ala. 195 (1872) held the Alabama law unconstitutional but it was overruled 5 years later by *Green v. State*, 58 Ala. 190 (1877).

20. *Lonas v. State*, 50 Tenn. 287 (1871); *State v. Gibson*, 36 Ind. 389 (1871); *State v. Jackson*, 80 Mo. 175 (1883).

courts talk in terms of the police power and the fourteenth amendment being mutually exclusive. Also, the states may have such an interest in the contract of marriage that permits them to so legislate.²¹ A more recent case held that the Oklahoma law did not violate the Constitution because marriage is a consentient covenant so closely related to morals and civilization that its control is a matter of state concern.²²

2) There is no question of race discrimination because the statute applies to both white and negro.²³

3) The preservation of racial purity is a legitimate objective because amalgamation is against "natural law," for the races are not meant to mix,²⁴ or the purpose of the statute is to prevent "deplorable results" and the dragging down of the "superior" race.²⁵

The most recent case of note is *Naim v. Naim* decided by the Supreme Court of Appeals of Virginia in 1955.²⁶ The plaintiff, a white person, brought suit to annul her marriage to a Chinese. They left Virginia to be married in North Carolina and immediately returned to Virginia where they lived as husband and wife. It was conceded that they left Virginia to evade the law which forbade their marriage. The high court of Virginia held that the statute did not violate the fourteenth amendment, and thus, the marriage was void. The United States Supreme Court accepted jurisdiction, but remanded the case to the trial court for the taking of additional testimony concerning the domicile of the parties.²⁷ The Supreme Court of Appeals of Virginia thereupon refused to send it back to the trial court on the grounds that neither the rules of the court nor statutes of the Commonwealth provided for such a procedure. Then, in an unusual move, the court affirmed its own decision.²⁸ Upon appellant's second application to the Supreme Court for either oral argument on the merits, or withdrawal of the order to remand, the Court held that the case was devoid of a federal question and refused to hear it.²⁹

The Virginia court used all available arguments to uphold the statute. Starting with the proposition stated by the Supreme Court in *Maynard v. Hill*³⁰ that marriage is subject to the state's control,

21. *Eggers v. Olson*, 104 Okla. 297, 231 Pac. 483 (1924).

22. *Stevens v. United States*, 146 F.2d 120 (10th Cir. 1944).

23. *Jackson v. City and County of Denver*, 109 Colo. 196, 124 P.2d 240 (1942); *Stevens v. United States*, 146 F.2d 120 (10th Cir. 1944); *State v. Jackson*, 80 Mo. 175 (1883).

24. *Green v. State*, 58 Ala. 190 (1877); *State v. Pass*, 59 Ariz. 16, 121 P.2d 882 (1942).

25. *Scott v. State*, 39 Ga. 321 (1869).

26. 197 Va. 80, 87 S.E.2d 749 (1955), *remanded*, 350 U.S. 891 (1955), *aff'd*, 197 Va. 734, 90 S.E.2d 849 (1956), *appeal dismissed*, 350 U.S. 985 (1956).

27. 350 U.S. 891 (1955).

28. 197 Va. 734, 90 S.E.2d 849 (1956).

29. 350 U.S. 985 (1956).

30. 125 U.S. 190 (1888).

the court declared that the unquestioned policy of the state was to preserve racial integrity. To do this was not unconstitutional for two reasons. First, the court used the traditional argument that the tenth amendment reserved this power to the state; therefore, since the purpose of the statute was in the interest of public morals and welfare, it was valid. The second line of reasoning presented a distinction between social rights on the one hand and property and civil rights on the other. To point up this distinction, the court noted the difference between the right involved in the case before it and those in *Buchanan v. Warley*³¹ and *Shelley v. Kraemer*.³² The Supreme Court, in the *Buchanan* case, declared that the thirteenth and fourteenth amendments did not deal with the social rights of men, but rather with their property rights. Similarly, in the *Shelley* case, the Court held that the primary purpose of the fourteenth amendment was to protect basic civil and political rights. The Virginia court also pointed out that the underlying idea of *Brown v. Board of Education*³³ was the fact that "the very foundation of good citizenship" was education, and that no such claim for racial intermarriage could be made. Therefore, since the preservation of racial integrity was permissible, classification by race was not arbitrary for it was the only way to accomplish the legislative purpose.

The majority opinions of the *Perez*³⁴ case present a clouded approach to the problem. The supreme court was sitting as a court of first instance to hear a mandamus action brought by a white woman and a negro man to compel defendant to issue a marriage license. The court concluded that the anti-miscegenation statute violated the Constitution; therefore, the writ was issued. The base point of the "majority" opinion, on which only two justices could agree, was that the right to marry is protected by the Constitution,³⁵ and this right is the right to marry "the person of one's choice." The issue was then the propriety of the state's attempt to restrict this choice on the basis of race. By two somewhat different approaches, the court held that racial classification did not meet the test of the fourteenth amendment. Initially, the opinion analogized the question to the one before the United States Supreme Court in the *Hirabayashi* case.³⁶ From the discussion in this case, the California court con-

31. 245 U.S. 60 (1917). The Supreme Court declared unconstitutional an ordinance making it unlawful for colored persons to move into and occupy any house where a greater number of houses in that particular block were occupied by white persons.

32. 334 U.S. 1 (1948). The Supreme Court held that it was a violation of the 14th amendment for a state court to enforce a restrictive covenant.

33. 347 U.S. 483 (1954). The Court held that schools segregated on the basis of race did not meet the standards required by the 14th amendment.

34. *Perez v. Sharp*, 32 Cal.2d 711, 198 P.2d 17 (1948).

35. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

36. *Hirabayashi v. United States*, 320 U.S. 81 (1943). The Court held that it was within the constitutional authority of Congress and the Executive, acting together, to prescribe a cur-

cluded that since the classification was based on race, the statute in question must be designed to meet a clear and present danger. Apparently, the court could find none for it decided that any prohibition based on susceptibility to disease would have to apply to individuals, not races.

Assuming that such a classification can be made in the absence of an emergency, the question then became, did it have a substantial relation to a legitimate legislative objective? Again, the answer was no. The court could find no merit or support for the argument that the negro race is physically and mentally inferior. The second basic contention of appellee on this point was that the progeny of a mixed marriage create serious community problems. The answer to this was that you cannot endeavor to keep the public peace by denying constitutional rights.³⁷ The concurring opinions presented two widely divergent approaches. Judge Carter took the position that the statutes never were constitutional. When enacted they violated the "fundamental law" embodied in the Declaration of Independence and the Constitution; and if this is not enough, they were clearly invalidated by the fourteenth amendment. He said they are opposed to the very principles which we have fought three wars to preserve. Although it would not seem necessary to his basic argument, he pointed out that California does recognize miscegenetic marriages if they are entered into where no prohibition existed. Judge Edmonds defined his position more clearly. Since marriage is a "fundamental right of free men" and grounded "in the fundamental principles" of Christianity, it is protected by the first amendment as applied to state action via the fourteenth under the doctrine of *Cantwell v. Connecticut*.³⁸ This being the case, reasonable classification is not the test; there must be a "clear and present danger." He pointed out that respondent did not contend that there was a clear and present danger, nor could the court find one, so the statutes were invalid.

Such variance in the reasoning of an important opinion holding a law unconstitutional certainly weakens its effect on future litigation in other jurisdictions.

OBSERVATIONS

Anti-amalgamation statutes may be sustained under the fourteenth amendment. It is not necessary that state power be considered unbridled by the United States Constitution. States' rights, however, must be respected. Assume that the right to marry is pro-

few order as an emergency war measure. The order provided that all persons of Japanese ancestry must remain within their residences during certain hours.

37. As a third ground the court held that the code sections were too vague and uncertain to constitute a valid regulation. The dissenting opinion pointed out that this was not an issue, for the petitioners had plainly identified themselves as negro and white.

38. 310 U.S. 296 (1940).

ted by the fourteenth amendment as said by the Supreme Court in *Meyer v. Nebraska*.³⁹ If the right is so protected, just what limitation does this place upon state power? A state may regulate marriage on the basis of consanguinity or disease; however, this is on an individual basis. It must also be noted that in the United States, a person is restricted to one spouse, and many persons feel that racial intermarriage is more offensive than bigamy. The Court had little difficulty in upholding laws enforcing monogamy.⁴⁰ Polygamy is a good example of a social right closely akin to racial intermarriage. With civil or property rights, constitutional considerations may nullify the people's wishes, as they did in Little Rock; with social rights, however, the desire of the majority may overcome vague or tenuous constitutional precepts. The decisions enforcing monogamy concede to the states a tremendous power, for the express purpose of the laws was to suppress a practice among a small, but sincere, minority group. Certainly their freedom of choice was restricted to conform to the wishes of the majority. Note, that there was no question of race involved.

Furthermore, it is not necessary that one state's policy be acceptable to all others. The laws of our states are not uniform, nor need they be for "the customs, habits, and thoughts of the people in one state differ widely from those of the people in another. . . ."⁴¹ Since regulation of marriage is primarily a state function, the courts should give the greatest possible effect to the policy of any state, whether it conflicts with ideas of others or not. At the time the Constitution was adopted, anti-miscegenation statutes were widespread. Similarly, at the time of the war between the states, many northern states had these laws. At mid-nineteenth century, racial intermarriage was not considered as a right in many states, so is it reasonable to say that the fourteenth amendment was intended to invalidate all statutes prohibiting amalgamation? Today, the attitude of the states is clear. Some twenty-four, speaking through their legislatures, have taken a stand against miscegenation, and in general, the practice is not condoned by the great number of persons throughout the country. Spencer Logan, in his book, *A Negro's Faith in America*, said:

Speaking as a Negro, I know that most Negroes do not desire sexual relationships with white women. . . . He asks only that you do not intrude upon his hearthstone if you want the members of his race to honor yours.⁴²

The test of an anti-miscegenation statute is said to be "reasonableness." What is this? Basically, if the purpose of a statute is to burden the members of a race, it is not reasonable. Unquestion-

39. 262 U.S. 390 (1923).

40. *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 133 U.S. 333 (1890).

41. *State v. Gibson*, 36 Ind. 389 (1871).

42. S. LOGAN, *A NEGRO'S FAITH IN AMERICA* 27 (1946).

ably, these anti-amalgamation statutes are not designed to burden one race. They are to aid states in controlling real problems affecting equally all races. A negro-white couple is not accepted into either society, and the offspring of such union is even more of a problem. This attitude is held by both negroes and whites throughout the nation. Reuter, in his work on intermarriage and miscegenation, concluded:

The hybrids produced in such bi-racial situations are marked men. Their distinctive physical appearance gives a point about which sentiment may crystallize; they cannot escape classification and categorical treatment. In the circumstances they form or tend to form a caste or special class in the population.⁴³

Spencer Logan adds:

This feeling of superiority on the part of Negroes of mixed blood has been the cause of much friction and unhappiness within the Negro race.⁴⁴

Racial problems in most states today are tremendous; is it necessary to provide the breeding ground for new ones?

CONCLUSION

Can we say that classification by race is reasonable? It is submitted that merely because it is based on race should not and does not mean that it is unreasonable. Those who say otherwise analogize marriage to education, landholding, working, and transportation. This cannot be accurately done. All that can be said is that marriage is *sui generis*. It is fundamental and basic — the bedrock of our society. In the words of the Supreme Court:

Upon it society must be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. . . .⁴⁵

Because marriage universally occupies a unique position and is basically a state problem, it is submitted that when a legislature, in attempting to resolve a state's social problems, determines that racial mixture is undesirable, such classification as is necessary to effectuate this policy is not unreasonable. The majority opinion in the *Perez* case was careful to point out that the California law, while prohibiting whites from marrying negroes, did not prohibit intermarriage among other races. A more comprehensive statute could nullify this objection.

Finally, consider just what is at stake in this controversy. The number of negroes and whites directly affected by such prohibitions

43. REUTER, RACE MIXTURE 30 (1931).

44. S. LOGAN, A NEGRO'S FAITH IN AMERICA 30 (1946).

45. Reynolds v. United States, 98 U.S. 145, 165 (1878).