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Constitutionality of State Anti-miscegenation Statutes

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NOTES AND COMMENTS

CONSTITUTIONALITY OF STATE ANTI-MISCEGENATION STATUTES

THE power of a state to prohibit interracial marriage between its citizens by statute, although not exercised by all states, has seldom been doubted, even less frequently questioned by court action, and almost never denied. Indeed, though such statutes have been in effect in this country since the first one was enacted by Maryland in 1661, and are presently in effect in 28 other states, only two decisions have rejected their validity. The first was rendered by the post-Civil War Supreme Court of Alabama[1] and was expressly overruled five years later.[2] The second decision, *Perez v. Lippold*,[3] is very recent and by far the most searching examination of a state's power to enact this type of legislation.

At common law there were no prohibitions on marriages on the basis of race or color,[4] but prior to passage of the Fourteenth Amendment the validity of anti-miscegenation statutes was unquestioned. The police power, under which state legislatures act to protect the health, safety, morals and general welfare of other citizens, was deemed sufficient authority for such statutes. Further, the Negro, at whom they were primarily directed, was in no position to challenge them. But when the "guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the States"[5] was afforded him by the Fourteenth Amendment, attacks were soon made upon these laws. It was, nevertheless, early established by the state courts that anti-mis-

[1] Burns v. State, 48 Ala. 195 (1872).
[2] Green v. State, 58 Ala. 190 (1877).
[3] 32 Cal. 2d 711, 198 P. 2d 17 (1948).
[4] 55 C.J.S., *Marriage*, § 15.
[5] Munn v. Illinois, 94 U.S. 113, 124 (1877).

cegenation laws were not in conflict with the provisions of this Amendment.[6] The Supreme Court of the United States strengthened this view indirectly by holding valid an Alabama statute providing more drastic penalties for adultery or fornication where the parties were mixed Negroes and whites than where both were either whites or Negroes.[7] Although not in issue there, the statute in question contained a prohibition against marriage between the two races. Precedent being established, the state courts uniformly upheld these laws for over half a century until the Supreme Court of California struck down its own statute in the *Perez* case. To date, the exact issue has not been determined by the Supreme Court of the United States.

In most states the anti-miscegenation statutes take the form of a prohibition upon the county clerk to issue a license authorizing the marriage of a white person with a Negro, Indian, mulatto, Mongolian, Malayan, or other person designated by race or color. This prohibition is usually accompanied by a declaration that any such marriage, if performed, is illegal, null and void, and that the parties thereto are guilty of a felony or misdemeanor.[8] Justification for these statutes was originally placed upon two grounds:

(1) Public policy, meaning the desire of a majority of the citizens that the races be kept separate to prevent threats to peace and good order arising from social tension created by mixed marriages and the resulting ostracism of the persons involved.

(2) Biological and physiological theories that mixture of the races results in a lowering of the mental and physical attributes of their offspring, as compared with the children of unmixed couples of either race.

Peace and good order are usually maintained, however, in the

[6] Dodson v. State, 61 Ark. 57, 31 S. W. 977 (1895); State v. Gibson, 36 Ind. 389 (1871); State v. Jackson, 80 Mo. 175 (1883); State v. Hairston, 63 N. C. 451 (1869); Frasher v. State, 3 Tex. App. 263 (1877).

[7] Pace v. Alabama, 106 U.S. 583 (1882).

[8] For a detailed index of state laws see Comment, 58 Yale L. J. 472, 480 (1949).

eighteen states where mixed marriages are now recognized. This is, of course, no guarantee that order could be maintained in the states where the statutes are now in effect if they were repealed because it is in these areas that public sentiment is most strongly opposed to interracial marriage. With regard to the inferiority of offspring, it is probably safe to say that the majority of present-day geneticists deny this theory,[9] although many, and especially the earlier, studies of the subject reached the opposite conclusion.[10] There is evidence that resistance to certain diseases and general intelligence of such children are much higher now than during the nineteenth century. Obviously, environmental factors have strong influence upon these characteristics, and the difficulty to be overcome before tests and surveys on this matter can be considered conclusive lies in obtaining a sufficiently broad cross-section of subjects within comparable environments. Formal schooling, for instance, plays an important part in tests used to measure general intelligence, and where mulatto children are not offered educational facilities equal to those furnished white students of the same locality, the former are under a definite handicap. At least, it is safe to say that the evidence supporting the theory of mental inferiority is not as strong today as when the original decisions regarding these statutes were rendered.

In the *Perez* case the county clerk of Los Angeles County refused to issue a marriage license to a white woman and a Negro man because he was forbidden to do so by Section 69 of the *California Civil Code.* Section 60 declared any marriage in violation of the prohibition to be illegal and void. The supreme court of the state declared the statutes unconstitutional and granted a writ of mandamus forcing the clerk to issue the license requested. The case was not appealed within the time allowed, and the clerk

[9] KLINEBERG, RACE DIFFERENCES (1935) 182; Linton, *The Vanishing American Negro,* 64 Am. Mercury 133, 135 (1947); Castle, *Biological and Social Consequences of Race Crossing,* 9 Am. J. of Phys. Anthropology 152 (1926).

[10] GATES, HEREDITY IN MAN (1929) 336; DAVENPORT, CHARACTERS IN MONGREL VS. PURE-BRED INDIVIDUALS (1911).

was instructed by the county counsel to ignore those sections in the future.[11] It is to be regretted that the Supreme Court of the United States was not called upon to decide the matter and to settle an issue which is of great interest to the other states having similar statutes. In a four-to-three decision the majority of the California court held Sections 60 and 69 to be a deprivation of civil liberty contrary to the provisions of the "due process" and "equal protection" clauses of the Fourteenth Amendment. One justice concurred on the ground that petitioners' religious freedom had been abridged in violation of the First Amendment, which was said to be applicable to the states through the operation of the Fourteenth Amendment. Three justices dissented, being of the opinion that the statutes were based upon sound principles substantially related to the health, safety and morals of the citizens and that a presumption of their validity should prevail in the absence of evidence clearly rebutting it. These differing views give rise to the following considerations.

Due Process and Freedom of Religion. In order to find that "due process" has been violated, some protected right must be found to have been restricted. The First Amendment to the Federal Constitution forbids the Congress from making any laws "respecting an establishment of religion or prohibiting the free exercise thereof," and it is settled that this prohibition is made applicable to the legislatures of the various states through the operation of the Fourteenth Amendment.[12] The freedom of religion thus secured to all citizens is one of the so-called "fundamental" rights, along with others such as freedom of speech, press and assembly, which may only be abridged if they are being exercised in such a way as to constitute a "clear and present danger" to one or more of the institutions and rights which the police power is designed to safeguard. This phrase originated in an opinion of the Supreme Court of the United States written by

[11] Note, 34 A. B. A. J. 1129 (1948).

[12] Murdock v. Pennsylvania, 319 U. S. 105, 108 (1942).

Justice Holmes, in which the following test was laid down as to whether or not a restriction of the right of free speech could be justified:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." [13]

As applied to the issue at hand, the question arises, is marriage included in the concept of religion and is it therefore a fundamental right, as stated in the concurring opinion in the *Perez* case? This view is supported by language in a recent decision of the Supreme Court of the United States concerning a state statute calling for the sterilization of habitual criminals:

> "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[14]

On the other hand, a review of the background and circumstances surrounding the passage of the First Amendment in another recent Supreme Court decision indicates that the religious freedom sought to be guaranteed probably did not include the freedom to contract a miscegenetic marriage.[15] It is suggested that the Amendment was intended to protect against certain practices prevalent in the eighteenth century, such as punishment of persons guilty of speaking disrespectfully of the views of ministers of government-established churches, of non-attendance at church, or of failure to pay taxes and tithes to support the church.

The practice of seeking the sanctions of the church and its ministers and the use of such terms as "holy matrimony" and "bonds of holy wedlock" are indicative of the religious connotations of marriage in the minds of most people. The Supreme Court

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[13] Schenck v. U. S., 249 U. S. 47, 52 (1919).

[14] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[15] Everson v. Board of Education of the Township of Ewing, 330 U.S. 1 (1946).

of Indiana has characterized marriage as a "public institution established by God himself,"[16] and in a leading English case the following statement is found:[17]

> "Marriage in its origin is a contract of natural law.... In most civilized countries acting under a sense of the force of sacred obligations, it has had the sanction of religion superadded. It then becomes a religious as well as a natural and civil contract, for it is a great mistake to suppose that, because it is one, therefore it may not likewise be the other."

Nevertheless, the United States Supreme Court has differentiated between religious practice and religious beliefs, holding that while freedom of the latter is absolute, freedom of the former is not and may be subject to restriction.[18] This theory is illustrated in a decision of the Court that bigamous marriages could properly be prohibited, regardless of the religious views of the parties, without violation of the First Amendment:

> "It was never intended or supposed that the Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society.... However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."[19]

In view of the attitude of our highest court that marriage is more a practice than a belief, it would seem that the proper view is that the institution is not to be included in the category of "fundamental" rights and that a statute restricting marriage need not be justified by a showing of "clear and present danger." If this view is accepted, then anti-miscegenation statutes would appear not to be in conflict with the blanket prohibition contained in the guarantee of religious freedom in the First Amendment.

Due Process and Marriage as a Personal Liberty. There still

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[16] State v. Gibson, 36 Ind. 389, 403 (1871).

[17] Dalrymple v. Dalrymple, 2 Hagg. Cons. 54, 63, 17 Eng. Rul. Cas. 10, 17 (1811).

[18] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[19] Davis v. Beason, 133 U. S. 333, 342 (1890).

remains, however, the admonition of the Fourteenth Amendment that a state must not deprive its citizens of life, liberty or property without due process of law. The Supreme Court of the United States has declared that "liberty" under the due process provision denotes the right of any individual "to marry, establish a home, and bring up children. . . ."[20] This view places marriage on a middle ground between the extreme of fundamental rights and mere contractual rights. Although marriage is often referred to as a contract, it is actually more a civil relationship, and though the states may regulate the mode of entering into it, they do not confer the *right* to do so.[21] As one of these personal liberties, marriage is subject to state regulation:

> "Marriage, as creating the most important relation in life, as having more to do with morals and civilization of a people than any other institution, has always been subject to the control of the legislature."[22]

Under the police power, state restrictions upon the right have long been upheld when based upon relationship of the parties, their age, freedom from diseases, mental competency, or suppression of polygamy. The majority in the *Perez* case, however, held that a restriction based on race or color alone, where none of these other objections is present, is an unreasonable restriction and violative of due process. The generally accepted requirement as to what constitutes due process of law was stated in *Home Bldg. & Loan Assn. v. Blaisdell*[23] as being simply "whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." This test of reasonableness, as applied to anti-miscegenation statutes, would require findings (1) that mixed marriages constitute a social evil, *i.e.*, a threat to public health, safety, morals or general welfare, and (2) that forbidding such marriages is a reasonable means of combatting

[20] Meyer v. Nebraska, 262 U. S. 390, 399 (1923).
[21] Meister v. Moore, 96 U.S. 76 (1877).
[22] Maynard v. Hill, 125 U.S. 190, 205 (1888).
[23] 290 U. S. 398, 438 (1934).

the evil. This test is recognized as a less strict requirement than that of "clear and present danger" necessary to justify a restriction of a "fundamental" right. From the standpoint of public policy, it would appear that conditions in certain localities today might well bring the laws in question within the requirement of reasonableness stated in the *Blaisdell* case. The recent Cicero, Illinois, riots are an indication that the public is not so near to acceptance of the principle of complete equality of the races as are the majority of the California court.[24] Undoubtedly, uncontrolled intermarriage would create a threat to good order in many states, of which the constitutions of five expressly prohibit such unions.[25]

In answer to the minority view that the code provisions were entitled to a presumption of validity, the California court cited *Korematsu v. U. S.*, in which the following statement is found:

> "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restictions; racial antagonism never can."[26]

It is submitted that "public necessity" in some localities may be entirely different from what it is in others, and it would seem wise to entrust the legislatures of the various states with the task of interpreting the sentiments of the populace and of harmonizing the laws with their particular ways of life.

Equal Protection of the Laws. Section 1 of the Fourteenth Amendment also provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. "The equal protection of the laws is a pledge of the protection of equal

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[24] *Cicero Nightmare*, The Nation, July 28, 1951, p. 64; *Defeat in Chicago*, 68 The Christian Century 862 (July 25, 1951); *New Disgrace for Cicero*, Life, July 23, 1951, p. 22.

[25] Alabama, Florida, North and South Carolina and Tennessee.

[26] 323 U.S. 214, 216 (1944).

laws."[27] In support of the argument that anti-miscegenation laws do not violate this principle of the Constitution, it has been said that since the law and punishment for its violation apply equally to both parties, and each is free to marry within his own race, there is no arbitrary discrimination.[28] This position would seem untenable, however, in view of the pronouncement of the Supreme Court of the United States that individual rights, not those of races, are the object of the protective measures in the Fourteenth Amendment.[29] Not all classifications of its citizens by the legislature of a state are unconstitutional, however, as revealed in the following quotation:

> "It is unnecessary to say that the 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the States from resorting to classification for the purposes of legislation.... But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[30]

Of course, it is not enough that the statute being tested meets these requirements on its face if it is not administered fairly and justly by the officers whose duty it is to apply the law.[31] The courts will examine the practical effects of these statutes to determine if unjust and illegal discriminations are being made. No valid claim can be made that equal justice is being observed when it is realized that the State of California recognizes interracial marriages of the very type forbidden by its statute so long as they are performed in another state. This is true whether the persons were citizens of another state at the time the marriage was performed and subsequently moved to California, or whether California citizens of different races travel to another state or to

[27] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

[28] Cases cited *supra* note 6.

[29] Shelley v. Kraemer, 334 U.S. 1 (1948).

[30] Royster Guano Co. v. Virginia, 253 U. S. 412, 415 (1920).

[31] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

Mexico for a so-called "carfare" marriage and return and live together.

Conclusion. It is evident that the Supreme Court of the United States is striving zealously to protect the rights and liberties of racial minorities, and any arbitrary denial of these rights and liberties by a state, based solely upon race or color, is subjected to rigid examination in the light of the due process and equal protection clauses of the Fourteenth Amendment. The ends sought must be legitimate, and the means adopted must have a reasonable relation to those ends. Comparatively, a restriction upon the scope of a person's choice of his marriage partner seems equally as much a deprivation of liberty and denial of equal protection as restrictions against owning property, living in a certain neighborhood, going to certain schools, following one's chosen profession, voting, or serving on juries, all of which have been declared unconstitutional when based upon race or color alone.[32] It is also probable that more courts will be inclined, when passing on the validity of anti-miscegenation statutes, to give less weight to the presumption of their constitutionality, since the decisions upon which this presumption are based were founded to some extent upon race prejudice and inconclusive data. Inasmuch as the express purpose of the Fourteenth Amendment was to prevent state legislation designed to perpetrate discrimination on the basis of race or color, the opposite presumption should prevail, and it would appear that the validity of anti-miscegenation statutes is in serious question.

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[32] Sweatt v. Painter, 339 U. S. 629 (1950); Shelley v. Kraemer, 334 U. S. 1 (1948); Oyama v. California, 332 U. S. 633 (1948); U. S. v. Classic, 313 U. S. 299 (1941); Meyer v. Nebraska, 262 U. S. 390 (1923); Strander v. West Virginia, 100 U. S. 303 (1879).

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