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Statutory Prohibited against Interracial Marriages

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is not actionable as a violation of her right of privacy.⁴³ The plaintiff's remedy, if any, is solely for libel. The use of her picture in conjunction with the article implies that she is one indulging in the practices complained of. The court has apparently mistaken plaintiff's remedy, insofar as the right of privacy is concerned, and, in so doing, have unfortunately extended the right of privacy to the detriment of those gathering and publishing matter of public interest and concern.

JACK JONES

STATUTORY PROHIBITIONS AGAINST INTERRACIAL MARRIAGES

Petitioners Andrea Perez, a white person, and Sylvester Davis, a Negro, sought to compel the County Clerk of Los Angeles County to issue them a marriage license. The respondent had refused to issue the license by invoking a California statute¹ which prohibited the issuance of a license authorizing a miscegenous marriage and implemented the California miscegenation statute which provides that "All marriage of white persons with negroes, Mongolians, members of the Malay Race, or mulattoes are illegal and void."² In issuing the peremptory writ the California Supreme Court *held*, three justices dissenting, that not only is the miscegenation statute too vague and uncertain to be an enforceable regulation, but it violates the equal protection of the laws clause of the United States Constitution by impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against racial groups. *Perez v. Lippold*, 198 P. (2d) 17, (Cal., 1948).

At common law there was apparently no prohibition against miscegenous marriages.³ However, beginning early in our history, the states began to enact legislation directed towards that end.⁴ Whatever the reason for this turn to statutory bans on inter-racial marriages, a survey of present codes reveals that some thirty states have laws which in some way restrict the right of a Caucasian to marry a person of another race.⁵ All thirty states with this statutory law of miscegenation bar white and Negro unions.⁶ Again, about half of these states also

43. *Ibid.*

1. Cal. Civ. Code 1941 sec. 69.

2. Cal. Civ. Code 1941 sec. 60.

3. 35 Am. Jur. 268, 55C. J. S. 828.

4. For a note on this development see Reuter, *Race Mixture-Studies in Inter-marriage and Miscegenation* (1931).

5. By the most recent codes and supplements available these are Ala., Ariz., Ark., Col., Colo., Del., Fla., Ga., Idaho, Ind., Ky., La., Md., Miss., Mo., Mont., Neb., Nev., N. C., N. D., Okla., Ore., S. C., S. D., Tenn., Tex., Utah, Va., W. Va., and Wyo. Those states without miscegenation statutes are Conn., Ill., Ia., Kan., Me., Mass., Mich., Minn., N. H., N. J., N. M., N. Y., O., Pa., R. I., Vt., Wash., and Wis. In addition there is no such statutory restraint on marriage in Alaska, Canal Zone, District of Columbia, Hawaii, or Puerto Rico.

6. Ala. Code 1940 sec. 14-360, Ariz. Code Ann. 1939 sec. 63-107, Pope's Dig. of Ark Stat. 1937 sec. 9018-19, Cal. Civ. Code 1941 sec. 60, Colo. Stat. Ann. 1935 sec. 107-2, Del. Rev. Code 1935 sec. 3485, Fla. Stat. 1941 secs. 1.01 and 741.11, Ga. Code 1933 sec. 53-106 (unlawful for a white to marry anyone except a white), Idaho Code Ann. 1932 sec. 31-206, Burn's Ind. Stat. Ann. 1933 sec. 44-205 to 44-208, Ky. Rev. Stat. (Baldwin, 1942) sec. 402.020, La. Rev. Civ. Code 1870 secs. 94 and 95 (void marriage between white person and person of color), (Md.) Flack's Code 1939 Art. 27 sec. 445, Miss. Code

forbid Caucasian-Mongolian marriages.⁷ The American Indian, formerly more conspicuous in miscegenation statutes,⁸ is now barred from marrying a white person in only three states.⁹ Members of the Malay race are expressly disallowed to marry Caucasians in seven states but may be barred in others too.¹⁰ One state, South Dakota, specifically bars white-Korean unions,¹¹ while another, Arizona, inhibits white and Hindu marriages.¹² The Wyoming miscegenation statute is a near duplicate of the California prohibition¹³ and provides that "All marriages of white persons with Negroes, Mulattoes, Mongolians or Malays hereafter contracted in the State of Wyoming are and shall be illegal and void."¹⁴

A statistical rationale for this statutory law of miscegenation, based on Negro concentration (since the Negro represents the largest racial minority group in the

1942 sec. 459, Mo. Rev. Stat. 1939 sec. 3361, Mont. Rev. Code 1935 sec. 5700, Neb. Rev. Stat. 1943 sec. 42-103, Nev. Comp. Stat. (Hillyer, 1929) sec. 10197 (marriage of white and Ethiopian prohibited), Gen. Stat. N. C. 1943 sec. 51-3, N. D. Rev. Code 1943 sec. 14-0304, Okla. Stat. 1941 secs. 43-12 and 43-13 (void marriage between those of African descent and persons not of such descent), Ore. Comp. Laws. Ann. 1940 sec. 63-102, S. C. Code 1942 sec. 8571, S. D. Code 1939 sec. 14.0106, Tenn. Code 1938 sec. 8409, Vernons Tex. Stat. 1936 Art. 4607, Utah Code Ann. 1943 secs. 40-1-2, Va. Code Ann. 1936 sec. 4546 (marriage of white and negro a felony), Michie's W. Va. Code Ann. 1943 sec. 48-1-19 (marriage of negro and white a misdemeanor), Wyo. Comp. Stat. 1945 sec. 50-108. In 13 of these states the prohibition is only against Negro and white or mulatto and white marriages: Ala., Ark., Colo., Del., Fla., Ind., Ky., N. D., Okla., Tenn., Tex., Va., and W. Va. Mulattoes (Bouv. Law Dic. 3d Ed.—Properly a mulatto is a person one of whose parents is wholly black and the other wholly white; but the word does not always, though perhaps it does generally, require so exactly even a mixture of blood, nor is its significance alike in all the states.) are expressly mentioned in some statutes or are effectively included in others by various statutory phrases: Ind., N. D., and Neb. include $\frac{1}{8}$ Negro blood in their bans; S. C. speaks of half-breeds; Tenn. and Md. include Negro descendants to the third generation; Ariz. and Ala. include Negroes and their descendants; Ore. includes those with $\frac{1}{4}$ or more Negro blood.

7. Ariz., Cal., Idaho, Miss., Mo., Mont., Neb., Nev., Ore., S. D., Utah, Va., and Wyo. In addition to these states, the provisions in Ga. and La. (cited supra note 6) may raise the total to 15 states.
8. Vernier, American Family Laws sec. 44 (1931).
9. The 3 states opposed to Indian-white unions are N. C., S. C., and Va. Again, the unique provisions of the Ga. statute (unlawful for a white to marry anyone except a white) and the La. law (marriages between whites and persons of color void) may raise the total to 5 states. For sources see supra note 6. Arizona until recently had such an express ban against Indian-white unions but the First Special Session in 1942 removed it from the state's miscegenation statutes; (Ariz. Laws 1942, c. 12, sec. 1).
10. The 7 states opposed to Malay-Caucasian marriages are Ariz. (added to the miscegenation statute in 1931), Cal., Md., Nev., S. D., Utah, and Wyo. Here again, the total may be raised by the over-all provisions included in the Ga. and La. statutes cited supra note 6. For all sources see supra note 6.
11. S. D. Code 1939 sec. 14.0106.
12. Ariz. Code Ann. 1939 sec. 63-107. The prohibition against Hindus was added in 1931.
13. Cal. Civ. Code 1941 sec. 60: "All marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void."
14. Wyo. Comp. Stat. 1945 sec. 50-108. In addition, Wyo. Comp. Stat. 1945 sec. 50-109 provides a penalty for violation: "Whosoever shall knowingly contract marriage in fact contrary to the prohibitions in the preceding section, and whosoever shall knowingly solemnize any such marriage shall be deemed guilty of a misdemeanor, and upon being convicted thereof, shall be punished by a fine of not less than one hundred dollars (\$100), nor more than one thousand dollars (\$1000), or imprisonment of not less than one year nor more than five (5) years, or both, at the discretion of the court which shall try the cause."

United States)¹⁵ is impossible. While the few states with the very large Negro populations uniformly have such racial intermarriage prohibitions,¹⁶ the states outside the "Deep South" afford no basis for any pattern. Michigan, with approximately a four per cent Negro population, and New York, with nearly a four and a half per cent Negro population, have no miscegenation statutes.¹⁷ Wyoming, with a four-tenths of one per cent Negro concentration, and Idaho, with one-tenth of one per cent Negroes, have such statutory bans against miscegenous marriages.¹⁸

Similarly, geography affords no over-all rationale. While all the southern states forbid miscegenous unions,¹⁹ and all the north-east coast states have no such legal prohibitions,²⁰ on the Pacific coast, California and Oregon have miscegenation statutes while their neighbor Washington does not.²¹ Again, in the midwest, Nebraska has a law of this type while Iowa does not.²² In the south-west, New Mexico is a state without an interracial marriage ban among such miscegenation-conscious states as Arizona, Oklahoma, Colorado and Texas.²³ Clearly, if there is a pattern to explain the presence or absence of these statutes it is not revealed by an examination of racial concentration or geographical situation.

While Wyoming courts have never been called upon to determine the validity of our miscegenation statute, elsewhere laws of the type under consideration have uniformly been held to express the state's public policy and their validity, from a constitutional viewpoint, was never denied until the present California decision. Miscegenation statutes have been held not to impair the obligation of contract,²⁴ not to deny persons the equal protection of the laws,²⁵ and not to discriminate

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15. The 1940 reports for the U. S. Bureau of the Census indicate that there are more than 12,865,000 Negroes in the U. S. All other races totaled less than 600,000 persons.
 16. The percentage of Negroes to total population is naturally greatest in the south: Ala. 35%; Miss. 49%; S. C. 43%; La. 36%; Ga. 35%; Ark. 25%. Source: U. S. Bureau of Census, reports for the 1940 census. All these states have miscegenation statutes cited supra note 6.
 17. Statistics based on reports of the U. S. Bureau of Census for 1940.
 18. *Ibid* and note 6 supra.
 19. See supra note 6.
 20. See supra note 5.
 21. See supra note 6.
 22. *Ibid*.
 23. *Ibid*.
 24. Under the obligations of contract clause (U. S. Const. Art. 1, sec. 10, "No state shall . . . pass any . . . law impairing the obligation of a contract.") held in *Re Hobbs*, 12 Fed. Cas. 6,550 (1871), that the marriage contract was not included within this prohibition. This view was later sustained in *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654 (1887), and in a lower federal court in *State v. Tutty*, 41 Fed. 753, 7 L. R. A. 50 (1890). In *Dobson v. State*, 61 Ark. 57, 31 S. W. 977 (1895), the court, per Bunn, C. J., said ". . . it is not true that marriage is only a civil contract. It is more than that. It is a social and domestic relation, subject to the exercise of the highest governmental power of the sovereign state—the police power."
 25. Under the equal protection of the laws clause (U. S. Const. Amend. XIV, sec. 1, ". . . No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.") held in *Green v. State*, 58 Ala. 190, 29 Am. St. Rep. 739 (1877), that both whites and Negroes were equally affected. This reasoning was approved by the Supreme Court in *Pace v. Ala.*, 106 U. S. 583, 1 Sup. Ct. 637, 27 L. Ed. 207 (1883), though the issue there concerned the validity of a statute prescribing more severe punishment for extra-marital relations between

against the colored race.²⁶ In brief, wherever and whenever the issue of constitutionality has been raised it has been found in favor of the miscegenation statute.²⁷ A recent decision of the United States Court of Appeals for the Tenth Circuit²⁸ vigorously reaffirmed what had gone before and hence the principal case is certainly *contra* to "well settled law."²⁹

In overruling all previous authority, the California Supreme Court in the instant case not only seems to have handed down a valid legal decision but one which is also in accord with the more scientific views of miscegenation.³⁰ The majority held the statute void for vagueness and uncertainty because nowhere is there a description or definition of precisely what a "white person", "Mongolian", "Malay", or "mulatto" is. Again, taking judicial notice of the fact that the systems of racial classification vary from three to thirty-four, and even if one of these systems could be said to have been prescribed, the legislature nowhere has made provision for applying the statute to persons of mixed ancestry.³¹ In addition, the statute was held to be repugnant to the equal protection of the laws clause of the United States Constitution since it impairs the right of individuals to marry

Negro and white than for the same offense committed by whites alone. State decisions have squarely held that the miscegenation statute does not deprive a person of the equal protection of the laws: *State v. Gibson*, 36 Ind. 389, 10 Am. St. Rep. 42 (1871), *State v. Jackson*, 80 Mo. 175, 50 Am. St. Rep. 499 (1880).

26. *State v. Gibson*, 36 Ind. 389, 10 Am. St. Rep. 42 (1871); *In Re Paquet's Estate*, 101 Ore. 393, 200 Pac. 911 (1921); *Jackson v. Denver*, 109 Colo. 196, 124 P. (2d) 240 (1942). The most recent case reaffirming that there is no discrimination against the colored race by such a statute, within the purview of the Civil Rights Bill, is *Stevens v. U. S.*, 146 F. (2d) 120 (C. C. A. 10th 1944), in which many of the precedents were again cited.
27. *In Dobson v. State*, 61 Ark. 57, 31 S. W. 977 (1895), the Supreme Court of Arkansas said of the miscegenation statute, "... its validity, from a constitutional viewpoint, is unquestioned." More recent cases have repeatedly reaffirmed this view: *In Re Paquet's Estate*, 101 Ore. 393, 200 Pac. 911 (1921); *Kirby v. Kirby*, 24 Ariz. 9, 206 Pac. 405 (1922); *Stevens v. U. S.*, 146 F. (2d) 120 (C. C. A. 10th 1944).
28. *Stevens v. U. S.* 146 F. (2d) 120 (C. C. A. 10th 1944). The court held that the Oklahoma miscegenation statute does not contravene the Fourteenth Amendment nor does it discriminate against the colored race, within the purview of the Civil Rights Bill (U. S. Rev. Stat. sec. 1977, 8 U. S. C. A. sec. 41).
29. See the dissent by Shenk, J., in the principal case, 198 P. (2d) 17, 35, in which he lists nearly all the previous authority holding miscegenation statutes valid.
30. Throughout the majority opinion in *Perez v. Lippold* appear extensive references to the works of modern sociologists and anthropologists.
31. The majority points out that if the statute were to be applied to persons of mixed ancestry the test of physical appearance would be deceptive. Again, unless there were exacting legislative definitions a genealogical basis would serve no function. The court said that it could not assume that the test was predominance in number of ancestors, "for absurd results would follow from such an assumption. Thus, a person with three-sixteenths Malay ancestry might have many so-called Malay characteristics and yet be considered a white person in terms of his preponderantly white ancestry. Such a person might easily find himself in a dilemma, for if he were regarded as a white person under section 60, he would be forbidden to marry a Malay, and yet his Malay characteristics might effectively preclude his marriage to another white person." Similarly, if there was no ancensoral preponderance the test could not be applied. See 198 P. (2d) 28, 29. Perhaps the search for a test is meaningless at best if one considers the authority cited in the concurring (at page 30) pointing to the thesis that probably there has been no pure race of man for at least ten thousand years.

on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups. The petitioners had contended the statute was unconstitutional on the grounds that it prohibited the free exercise of their religion, petitioners both being members of the Roman Catholic Church. The Church had not forbidden the marriage and they maintained they were entitled to receive the sacrament of matrimony. In holding that there was a denial of equal protection, the court seems to have adequately reconciled the contention of petitioners and the decision handed down. The majority said that in view of the guarantee of religious freedom in the First Amendment, which is encompassed in the concept of liberty in the Fourteenth Amendment, state legislatures are no more competent than Congress to enact a law restricting such freedom. The court recognized that marriage is "something more than a civil contract subject to regulation by the state; it is a fundamental right of free men."³² The states may regulate conduct for the protection of society and insofar as their regulations are directed towards a proper end and are not unreasonably discriminatory, they may indirectly affect religious activity without an infringement of the constitutional guarantee. If a clear and present peril exists, such as disease which may imperil a prospective spouse, the legislature may act and the validity of its action is unquestioned if reasonable means, such as the testing of individuals in accordance with prescribed standards, are employed. But where a classification is made on the basis of race alone there has been an unreasonable and arbitrary exercise of power. Even if it could be admitted, as contended, that one race is innately inferior to another and that thus segregation is desirable for the preservation of the races, the legislature has not expressed this as the policy behind the law. This policy cannot be conceded to be implied since the legislature does not seek to eliminate all racial intermarriages but only some.

Perhaps the entire tenor of the decision is most adequately described by Justice Carter in his concurring opinion: ". . . the statutes here involved . . . are the product of ignorance, prejudice and intolerance, and I am happy to join in the decision of this court holding that they are invalid and unenforceable."³³ Even if no specific reference had been made to the recent "Restrictive Covenant Cases", the decision in the principal case, though in an entirely different legal field, seems in harmony with the liberality of those cases.³⁴ But the court did refer to those decision and the impression made on the majority opinion is clear.³⁵

Whatever the future may hold for this sort of legislation from a constitu-

32. Per Traynor, J., in the principal case at page 18.

33. 198 P. (2d) at page 29.

34. *Shelly v. Kraener, McGhee v. Sipes*, 334 U. S. 1, 68 Sup. Ct. 836, 92 L. Ed. 845 (1948). For the first time in history, the United States Supreme Court was called on in these cases to consider the question whether the equal protection clause of the Fourteenth Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color. Held, that such covenants, standing alone, do not violate any rights guaranteed by the Fourteenth Amendment. However, action of the states in enforcing these covenants constitutes state action within the Amendment and in granting judicial enforcement of the covenants the states denied Negro purchasers of such property the equal protection of the laws.

35. The majority opinion cited *Shelley v. Kraemer* for the proposition that, "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. It is, therefore, no answer to

tional standpoint,³⁶ an examination of the topic in a broader sense reveals that the miscegenation statutes do not commend themselves. The theory which brought these laws in to being³⁷ has been repudiated by legal writers and scientists.³⁸ Furthermore, if practical results be looked to, the miscegenation statute has actually had little effect in achieving the desired result—the prevention of racial amalgamation.³⁹ What the statutes have done in an affirmative way is to punish most severely those who have committed no greater crime than having been born of a void marriage.⁴⁰ Finally, these statutes have focused attention once again to the self-evident fact that at times our laws may not be in consonance with the proclaimed American spirit of the equality of all men.

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these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.”

36. The vigorous dissent by three justices in the instant case pointing out that the majority opinion is not supported by authority and is in fact contrary to the decisions in California and elsewhere indicates that the reversal in the principal case is not conclusive by any means.
37. If any theory can be conceded to have motivated these statutes it must be the proposition that the races are inherently distinct, with the white race superior to all, and that the only way “white supremacy” can be insured is to prevent the amalgamation of the races. In *Pace and Cox v. State*, 69 Ala. 231 (1881), the court, speaking through Somerville, J., at page 232, gave vent to these conceptions: “Its result may be the amalgamation of the two races, producing a mongrel population and a degraded civilization, the prevention of which is dictated by a sound public policy affecting the highest interests of society and government.”
38. Note, 36 *Yale L. J.* (1927), 858-862, contains a comprehensive note which indicates that any reasons for such legislation are mythical and based on popular prejudice. Scientific writers are cited for the proposition that there is no pure race, that any one race is not innately superior to another, and that after an inter-racial marriage the possibility of reversion in the succeeding offspring to the color of a darker ancestor has never been substantiated. See also Reuter, *Race Mixture-Studies in Inter-marriage and Miscegenation* (1931) and a recent monumental work in this field, Myrdal, *The American Dilemma: The Negro Problem and Modern Democracy* (1944).
39. In the states where there are no miscegenation statutes mixed marriages are rare. Schuyler, *The Caucasian Problem* (1944), at page 290, indicates that there are only some 15,000 such interracial unions in the United States. On the other hand, extramarital lovemaking and extralegal childbearing in the United States has reached the point where nearly three-fourths of the Negroes in America today already shows signs of intermixture. “. . . While we cannot say that existing research permits a definite answer to the question as to how many Negroes have some white blood, the best available evidence and expert opinion point to a figure around 70%.” Myrdal, *The American Dilemma* (1944) 132-3.
40. The couples who consummate such an interracial marriage not only find it void in all thirty states but may also be subject for the same act to certain punitive measures varying from a misdemeanor (Wyo. Comp. Stat. 1945 sec. 50-109) to a felony (Va. Code 1936 Ann. sec. 4546). More important, the offspring of such a miscegenous marriage must find themselves illegitimate if their parents union is void. However, two possible solutions exist: (1) Should persons of different races earnestly desire marriage and yet give their offspring the benefit of law, they may move to a jurisdiction without such a prohibition and contract a valid marriage there. Thereafter, if they wish to return to their former residence, the question then becomes whether that state will recognize the foreign marriage. Wyoming recognizes valid marriage contracts made without the state (Wyo. Comp. Stat. 1945 sec. 50-118). (2) It may also be possible for the father to adopt his illegitimate offspring. An occasional state has such an express provision (Cal. Civ. Code 1941 sec. 230); Wyoming does not.