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Comments and Casenotes

Constitutionality Of Miscegenation Statutes

*McLaughlin v. Florida*¹

The appellants, a Negro man and a white woman, were convicted of violating a Florida statute² which proscribed cohabitation between Negro and white persons who are not married to each other. The Florida Supreme Court upheld the conviction. On appeal to the Supreme Court of the United States, the appellants claimed:³ (1) The statute was invalid as a denial of equal protection of the laws since it applied only to members of certain races, and (2) they were denied due process and equal protection of the laws because a Florida law prohibiting interracial marriage⁴ prevented them from establishing the defense of common law marriage.⁵ The appellants thus hoped to reach the issue of whether the state's prohibition of interracial marriage contravened the fourteenth amendment. The Supreme Court, basing its decision on the single issue of equal protection (appellants' first claim), set aside the conviction and invalidated the cohabitation statute. Finding this claim to be dispositive of the case, the Court refrained from expressing any view as to the constitutionality of the law prohibiting interracial marriages.

The provisions of state statutes banning interracial marriage, often called miscegenation⁶ statutes, vary considerably, but today all states which have such statutes ban Negro-white marriages, and all declare the proscribed interracial marriages void. Most statutes provide criminal penalties, thus making race an element of a crime. The Mary-

1. 85 S.Ct. 283 (1964).

2. FLA. STAT. ANN. § 798.05 (1961). "Any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room shall each be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars."

3. The appellants also claimed that the statutory definition of Negro was unconstitutionally vague. The Court found it unnecessary to consider this claim.

4. FLA. CONST. art. XVI, § 24; FLA. STAT. ANN. § 741.11 (1961).

5. Florida accords a common law marriage the same legal incidents as a formal marriage. *Chaachou v. Chaachou*, 73 So. 2d 830 (Fla. 1954). During the course of the trial, the state had introduced evidence to the effect that each appellant had, prior to his conviction, claimed to be married to another, and therefore they were not hurt by the interracial marriage prohibitions. Brief for Appellee, pp. 4-6, *McLaughlin v. Florida*, 85 S.Ct. 283 (1964).

6. Miscegenation means any interbreeding of races or any sexual relations between individuals of different races. The word is derived from the Latin *miscere*, to mix, plus *genus*, race. WEBSTER, NEW INTERNATIONAL DICTIONARY (3d ed. 1961). In this article, however, the word is used in the narrower sense and means interracial marriage.

land statute, for example, proscribes Negro-white and Malay-white marriages and has a mandatory penitentiary sentence.⁷

At one time or another, over half the states had miscegenation statutes. Although these statutes have been repealed by twenty state legislatures,⁸ they remain in effect in nineteen other states.⁹ Six states have included miscegenation prohibitions in their state constitutions.¹⁰ The highest courts of only two states have held their miscegenation statutes unconstitutional. Alabama declared its statute unconstitutional in 1872¹¹ but reversed itself five years later,¹² California declared its statute unconstitutional in 1948.¹³ State courts¹⁴ and lower federal courts¹⁵ have upheld the constitutionality of such statutes. The Supreme Court of the United States has never ruled on the issue. In two cases reaching that Court in recent years, certiorari was denied in one¹⁶ and the issue bypassed in the other.¹⁷

7. 3 MD. CODE ANN. art. 27, § 398 (1957).

8. States which repealed miscegenation statutes before 1900: Massachusetts, 1843; Iowa, 1851; Kansas, 1857; Washington, 1867; Rhode Island, 1881; Maine, 1883; Michigan, 1883; New Mexico, 1886; Ohio, 1887. States which have repealed since 1900: Oregon, 1951; Montana, 1953; North Dakota, 1955; Colorado, 1957; South Dakota, 1957; California, 1959 (adjudicated unconstitutional in 1948, see note 13 below); Idaho, 1959; Nevada, 1959; Arizona, 1962; Nebraska, 1963; Utah, 1963.

9. Alabama, Arkansas, Delaware, Florida, Georgia, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia, Wyoming. ALA. CODE tit. 14, § 360 (1958); ARK. STAT. ANN. § 55-104 (1947); DEL. CODE ANN. tit. 13, § 101 (1953); FLA. STAT. ANN. § 741.11 (1961); GA. CODE ANN. § 53-106 (1961); IND. STAT. ANN. § 44-104 (Burns, 1952); KY. REV. STAT. ANN. § 402.020 (1963); LA. CIVIL CODE art. 94 (1952); LA. REV. STAT. ch. 9, art. 201 (1950); MD. CODE ANN. art. 27, § 398 (1957); MISS. CODE ANN. § 459 (1956); MO. STAT. ANN. § 451.020 (1952); N.C. GEN. STAT. § 51-3 (1950); OKLA. STAT. ANN. tit. 43, § 12 (1954); S.C. CODE § 20-7 (1962); TENN. CODE ANN. § 36-402 (1955); TEX. CIV. STAT. ANN. art. 4607 (1960); VA. CODE § 20-54 (1960 Repl. Vol.); W.VA. CODE ANN. § 4697 (1961); WYO. STAT. § 20-18 (1951). Companion statutes exist providing criminal penalties for persons issuing marriage licenses or performing marriage ceremonies in contravention of miscegenation statutes.

10. Alabama, Florida, Mississippi, North Carolina, South Carolina, Tennessee: ALA. CONST. art. 4, § 102; FLA. CONST. art. XVI, § 24; MISS. CONST. art. 14, § 263; N.C. CONST. art. XIV, § 8; S.C. CONST. art. 3, § 33; TENN. CONST. art. 11, § 14.

11. Burns v. State, 48 Ala. 195, 17 Am. Rep. 739 (1872).

12. Green v. State, 58 Ala. 190, 27 Am. Rep. 739 (1877).

13. Perez v. Lippold, 32 Cal. 2d 711, 198 P.2d 17 (1948), often cited as Perez v. Sharp.

14. 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. Denver, 109 Colo. 196, 124 P.2d 240 (1942); Scott v. Georgia, 39 Ga. 321 (1869); State v. Gibson, 36 Ind. 389 (1871); Miller v. Lucks, 203 Miss. 824, 36 So. 2d 140 (1948); State v. Jackson, 80 Mo. 175 (1883); State v. Kennedy, 76 N.C. 251 (1877); Eggers v. Olson, 104 Okla. 297, 231 Pac. 483 (1924); Lonas v. State, 50 Tenn. (3 Heiskell) 287 (1871); Naim v. Naim, 197 Va. 80, 87 S.E.2d 749 (1955).

15. *Ex parte Francois*, 9 Fed. Cas. 699 (No. 5047) (C.C.W.D. Tex. 1879); *In re Hobbs*, 12 Fed. Cas. 262 (No. 6550) (C.C.N.D. Ga. 1871); *Ex parte Kinney*, 14 Fed. Cas. 602 (No. 7825) (C.C.E.D. Va. 1879); State v. Tutty, 41 Fed. 753 (S.D. Ga. 1890); Stevens v. United States, 146 F.2d 120 (10th Cir. 1944).

16. Jackson v. State, 37 Ala. App. 519, 72 So. 2d 114, cert. denied, 348 U.S. 888 (1954). In an earlier case, *In re Monks' Estate*, 48 Cal. App. 2d 603, 120 P.2d 167 (1941), an appeal was dismissed, 317 U.S. 590 (1942), because the record was unclear as to whether the statute of limitations had run; *rehearing denied*, 317 U.S. 711 (1942).

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

No doubt, states may regulate marriage.¹⁸ These regulations, however, may not contravene the fourteenth amendment.¹⁹ The due process clause of the amendment protects the individual's right to marry,²⁰ and the equal protection clause protects the individual from regulations based on arbitrary distinctions.²¹ Distinctions and regulations based on race alone are especially suspect.²² The usual presumption of constitutionality of legislation does not apply; instead the burden is on the state to show that the law is necessary for the protection of the health, safety, or general welfare of the community.²³ Some of the reasons why this should be so were stated in the case of *Perez v. Lippold*²⁴ wherein the California court held that its state's miscegenation statute was unconstitutional.

"Marriage 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. . . . Since the essence of the right to marry is freedom to join in marriage with the person of one's choice, a segregation statute for marriage neces-

18. "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the [state] legislature." *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

19. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The supremacy clause of the Constitution states: "This Constitution . . . shall be the supreme Law of the Land. . . ." U.S. CONST. art. VI.

20. "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children. . . ."

Meyer v. Nebraska, 262 U.S. 390, 399 (1923). (Emphasis added.)

21. *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 406 (1928); *Dominion Hotel, Inc. v. Arizona*, 249 U.S. 265, 268 (1919).

22. "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

23. "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), decided the same day and based upon the same reasoning as *Brown v. Board of Education*, 347 U.S. 483 (1954). *Brown v. Board of Education* has been explicitly relied upon in the many per curiam decisions striking down laws based upon racial classification in areas outside education. The Court has also struck down laws discriminatory in their application although innocent on their face, *Reece v. Georgia*, 350 U.S. 85 (1955); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Hill v. Texas*, 316 U.S. 400 (1942). In the much criticized decisions, *Korematsu v. United States*, 323 U.S. 214 (1944), and *Hirabayashi v. United States*, 320 U.S. 81 (1943), the Court held that the restrictions placed upon persons of Japanese ancestry living on the west coast at the beginning of World War II were justified only because of the grave national emergency. These last two cases dealt with the war powers of the federal government and contain significant dicta concerning the presumption against constitutionality of legislative classification by race.

24. 32 Cal. 2d 711, 198 P.2d 17 (1948).

sarily impairs the right to marry. . . . Legislation infringing such rights must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws."²⁵

Two Supreme Court decisions, *Plessy v. Ferguson*²⁶ and *Pace v. Alabama*,²⁷ are usually relied upon as supporting the constitutionality of statutes prohibiting interracial marriage. In *Plessy* a suit was brought as an attack on the constitutionality of a Louisiana statute requiring separate facilities for Negroes and whites on trains. However, the Court addressed itself to the broad issue of the legality of race separation in the light of the fourteenth amendment. By way of support for upholding the statute, the Court cited the prevalent practice of school segregation and the policy against miscegenist marriages. The Court, in dictum, stated, "Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the state."²⁸ The Court has explicitly rejected the portion of *Plessy* referring to public education.²⁹ ICC regulations now prohibit racial segregation in interstate transportation³⁰ and statutes requiring segregation in intrastate transportation are no longer valid.³¹ However, *Plessy* has never been explicitly overruled, possibly because of the dictum concerning interracial marriage.

In *Pace*, the Court upheld a portion of the Alabama miscegenation statute, which provides criminal penalties for interracial marriage, fornication, or cohabitation. The only issue before the Court was whether the statute violated the fourteenth amendment because the penalty was greater for interracial fornication than for intraracial fornication; the facts did not require the Court to examine the marriage or cohabitation portions of the statute. The Court, in upholding the statute, found that there was no discrimination against a person because of his race, and "The punishment of each offending person, whether white or black, is the same."³² In the principal case, the Court re-examined the *Pace* decision and stated that *Pace* presented a limited interpretation of the equal protection clause that has not withstood the test of time. It is not enough, said the Court, that a statute apply equally to all members of the included class; instead the inquiry must be directed to whether there is an arbitrary discrimination between those classes covered and those excluded by the particular statute, and whether the classifications are reasonable in light of the statute's purpose. The principal case numbers among those in the past decade which make it doubtful whether *Pace* and *Plessy* have any remaining vitality.

State and lower federal court decisions generally give three reasons for upholding miscegenation statutes: (1) regulation of marriage

25. *Id.* at 18, 19 and 21. (Emphasis added.)

26. 163 U.S. 537 (1896).

27. 106 U.S. 583 (1882).

28. 163 U.S. at 545.

29. *Brown v. Board of Education*, 347 U.S. 483 (1954).

30. 54 Stat. 902 (1940), 49 U.S.C. § 3(1), § 316(d) (1958).

31. See *Gayle v. Browder*, 352 U.S. 903 (1956), *affirming*, 142 F. Supp. 707 (M.D. Ala. 1956).

32. 106 U.S. at 585.

is exclusively a state function,³³ (2) equal protection is achieved because the restraints apply equally to all individuals,³⁴ (3) the statutes are a reasonable means of accomplishing valid legislative objectives.³⁵

1. EXCLUSIVE PREROGATIVE OF THE STATES.

The premise that the fourteenth amendment is not applicable to state regulation of marriage is based upon the congressional debates over the Freedmen's Bureau Bill,³⁶ the Civil Rights Act³⁷ of 1866, and the debates over the amendment itself.³⁸ The debates reveal that the bills were not intended to be applicable to miscegenation statutes.³⁹ But then again a study of the debate also reveals that the statutes were not intended to apply to state education, jury service, or suffrage laws either. Nevertheless these have been considered as within the ambit of the fourteenth amendment.⁴⁰ Therefore the extension of the fourteenth amendment to the area of marriage regulation seems to be a short and reasonable step.

2. EQUAL APPLICATION OF THE LAW.

The requirements of the equal protection clauses were said to have been satisfied so long as all offenders under a statute were given equal punishment.⁴¹ The principle case refers to this concept as a "narrow view"⁴² of the equal protection clause. The inquiry which must be made is whether the statutory classification of offenders is reasonable in light of the statute's purpose.⁴³ No state has ever prohibited *all* interracial marriages;⁴⁴ the miscegenation statutes apply to only certain designated races. Therefore, the validity of these statutes rests upon

33. See, *e.g.*, *Stevens v. United States*, 146 F.2d 120 (10th Cir. 1944).

34. See, *e.g.*, *In re Paquat's Estate*, 101 Ore. 393, 200 Pac. 911 (1921); *State v. Tutty*, 41 Fed. 753 (S.D. Ga. 1890).

35. See, *e.g.*, *Scott v. Georgia*, 39 Ga. 321 (1869).

36. 14 Stat. 173 (1866).

37. 14 Stat. 27 (1866).

38. CONG. GLOBE, 39th Cong., 1st Sess. I (1865). It should be noted that the amendment is more broadly worded than the companion Civil Rights Act. The Civil Rights Act enumerated specific provisions guaranteeing all persons the same "security of person and property, as is enjoyed by white citizens. . ." Civil Rights Act of 1866, 14 Stat. 27, § 1 (Chap. XXXI). The fourteenth amendment contains the sweeping language "equal protection of the laws" instead of the more narrow phrase "equal protection of life, liberty and property rights," and does not attempt to measure the rights thus protected by the rights of any racial group.

39. During the debates sponsors of the proposed bills emphasized that there was no intent to nullify existing state statutes or restrict future miscegenation legislation. CONG. GLOBE, 39th Cong., 1st Sess. 322, 420, 505-06, 632-33 (1865). Twenty-one of the thirty states relied upon for ratification of the fourteenth amendment continued their ban on interracial marriage. See generally, Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

40. See, *e.g.*, *Brown v. Board of Education*, 347 U.S. 483 (1954) (education); *Terry v. Adams*, 345 U.S. 461 (1953) (the right to vote); *Norris v. Alabama*, 294 U.S. 587 (1935) (jury service); *Nixon v. Herndon*, 273 U.S. 536 (1927).

41. *Pace v. Alabama*, 106 U.S. 583 (1882).

42. *McLaughlin v. Florida*, 85 S.Ct. 283, 287 (1964).

43. *Ibid.*

44. Only three states prohibit interracial marriage other than the white- "non-white" category. Maryland prohibits Negro-Malayan marriages, MD. CODE ANN. art. 27, § 398 (1957); North Carolina prohibits Negroes from marrying Cherokee Indians of Robeson County, N.C. GEN. STAT. § 51-3 (1950), and Louisiana prohibits Negro-Indian marriages, LA. CIVIL CODE art. 94 (1952).

the reasonableness of the racial classification. The Maryland statute illustrates this type of classification. The statute restricts the marital freedom of whites, Negroes, and Malaysians but places no racial restrictions on, for example, orientals or American Indians.⁴⁵

3. VALID LEGISLATIVE OBJECTIVE.

The right of a state to enact legislation providing for the reasonable regulation of marriage to protect the health, safety, and general welfare of its citizens is universally recognized. The state has a valid interest in controlling the marriage of persons with a disease that might endanger a spouse or future offspring, persons under a certain age, persons within specified degrees of consanguinity or affinity, or feeble-minded or insane persons. But these restraints are imposed on individuals, regardless of race, and have been supported by demonstrable facts that such marriages are contrary to the best interests of society.⁴⁶

Much the same type of argument is proffered in defense of miscegenation statutes. Banning interracial marriage is claimed to be a reasonable means of accomplishing the valid legislative objectives of preserving racial purity,⁴⁷ preventing the birth of mentally and physically inferior offspring,⁴⁸ and promoting the cultural level of society.⁴⁹ However, scientific evidence vitiating the concept of "a pure race"

45. It is interesting to note that in Maryland a mulatto (technically the first generation offspring of a pure Negro and a pure white) is not prohibited from marrying another mulatto. Yet the child of such union has the same proportion of Negro-white blood as does a child of the prohibited Negro-white marriage, if it could be said that racial characteristics are proportionately inheritable.

There have been many attempts to classify mankind into racial groups. One of the earliest classifications and the one which seems to have gained widest acceptance in popular usage is that of Johann Friedrich Blumenbach, who divided mankind into five races: Caucasian, Mongolian, Malayan, Ethiopian, and American, or white, yellow, brown, black and red, respectively. BLUMENBACH, *THE ANTHROPOLOGICAL TREATISES OF JOHANN FRIEDRICH BLUMENBACH* § IV (1885). Most of the miscegenation statutes appear to have been based upon this classification. Blumenbach's classifications are no longer accepted by anthropologists. Darwin, in his revolutionary work, DARWIN, *THE ORIGIN OF THE SPECIES* (1859), introduced the concept of the changing nature of races. The classification most widely accepted by specialists in the field today is that of Garn and Coon, who list eight geographic races: Amerindian, Polynesian, Microesian, Melanesian, Asian, (East) Indian, European, and African; Garn and Coon, *On the Number of Races of Mankind*, 57 *AM. ANTHROPOLOGIST* 966 (1955). Garn later added Australian as a ninth race, but this is disputed. Garn and Coon discarded the old concept of race as a "type" of mankind; they have clarified the term by being more specific as to the exact taxonomic unit under discussion and take into consideration ecological and phenotypic factors as well as the genotypic factors. One noted anthropologist has said that today there are only clines (sub-races), not races; Livingstone, *The Nonexistence of Human Races*, 3 *CURRENT ANTHROPOLOGY* 279 (1962). For a discussion of modern anthropological thinking on the concept of race, see Newman, *Geographic and Microgeographic Races*, 4 *CURRENT ANTHROPOLOGY* 189 (1963). See also ASHLEY-MONTAGUE, *MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE* (4th ed. 1964).

46. See, e.g., *Buck v. Bell*, 274 U.S. 200 (1927).

47. *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749 (1955).

48. "The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observations show us, that the offspring of these unnatural connections are generally sick and effeminate, and that they are inferior in physical development to the fullblood of either race." *Scott v. Georgia*, 39 Ga. 321, 323 (1869).

49. *Eggers v. Olson*, 104 Okla. 297, 231 Pac. 483 (1924). It is axiomatic that culture or the capacity to absorb culture, like religion and language, is not an inheritable trait. BENEDICT, *PATTERNS OF CULTURE* 27 (1934).

and the relationship between race and mental or cultural achievement is overwhelming.

In 1952, twelve distinguished scientists under the sponsorship of the United Nations Education, Scientific, and Cultural Organization (UNESCO) issued a "Statement on the Nature of Race and Race Differences"⁵⁰ which has the following relevant conclusions: (1) "There is no evidence for the existence of so-called 'pure' races. . . . [H]uman hybridization has been going on for an indefinite but considerable time"; (2) There is "no basis for believing that the groups of mankind differ in their innate capacity for intellectual and emotional development"; (3) "[G]enetic differences are of little significance in determining the social and cultural differences between different groups of men."

Justification for miscegenation statutes has also been sought on the ground that the state has the right to protect future children from the adverse psychological effects of being a member of neither race and thereby rejected by both races.⁵¹ If this be true, the state could also prohibit marriage between persons of different religions⁵² or different ethnic backgrounds.⁵³

During the present century, statutory discrimination based on race in the areas of education,⁵⁴ juries,⁵⁵ suffrage,⁵⁶ and residential areas⁵⁷ have been found to violate the constitutional guarantees of due process and equal protection of the laws. The essential result of the recent segregation decisions — that individuals may not be prohibited because of their race from enjoying the same privileges and freedoms at the same time, place and in the same manner as other individuals — when added to the abundant present-day genetic and anthropological data refuting the superiority of one race over another, indicates that the bans on interracial marriage cannot be maintained in light of modern interpretation of due process and equal protection of the laws.

The Court of Appeals of Maryland has never had the opportunity to rule on the constitutionality of Maryland's miscegenation statute⁵⁸ which reads, in part:

"All marriages between a white person and a negro . . . (or) a person of negro descent, to the third generation, inclusive, or between a white person and a member of the Malay race or between a negro . . . (or) a person of negro descent, to the third genera-

50. The full title is "Statement on the Nature of Race and Race Differences — By Physical Anthropologists and Geneticists, September, 1952." The text has been printed in many UNESCO publications and is also reprinted in *ASHLEY-MONTAGUE, MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE* 361 (4th ed. 1964).

51. *Louisiana v. Brown*, 236 La. 562, 108 So. 2d 233 (1959); *McLaughlin v. Florida*, 85 S.Ct. 283 (1964), oral argument in support of Florida's miscegenation prohibitions by appellee before Supreme Court, Oct. 14, 1964, 33 U.S.L. WEEK 3137 (Oct. 20, 1964).

52. See *LAFARGE, THE RACE QUESTION AND THE NEGRO (PERMISSU SUPERIORUM)* 196 (1943), which considers the tensions quite similar.

53. See, *GORDON, INTERMARRIAGE* (1964), which discusses the problems of interfaith, interracial and interethnic marriages.

54. *Brown v. Board of Education*, 347 U.S. 483 (1954).

55. *Strauder v. West Virginia*, 100 U.S. 303 (1879).

56. *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932).

57. *Buchanan v. Warley*, 245 U.S. 60 (1917).

58. Md. CODE ANN. art. 27, § 389 (1957).

tion, inclusive, and a member of the Malay race, are forever prohibited and shall be void; and any person violating the provisions of this section shall be deemed guilty of an infamous crime, and punished by imprisonment in the penitentiary not less than eighteen months nor more than ten years. . . ."

The constitutionality of this statute was recently attacked in *Medagia v. Gill*,⁵⁹ a case heard in the Circuit Court for Baltimore County. The clerk of the court invoked the statute and refused to issue a marriage license to permit the plaintiff, a white woman, to marry a Filipino. The plaintiff, in requesting a writ of mandamus, contended that the statute was unconstitutional. Judge Menchine adroitly side-stepped the constitutional issue by holding that, because the particular Filipino had one white grandmother, he was a person of mixed race; therefore, his marriage to a white woman was not proscribed.

The holding in *Medagia* indicates that the Maryland miscegenation statute, because of its doubtful constitutionality, is unlikely to be enforced. Nevertheless it still remains in effect. The Supreme Court in the principal case, clearly noted that it was reserving its judgment on the constitutionality of miscegenation statutes. However, one might argue that when⁶⁰ the issue does appear directly before the Court in a justiciable controversy, the validity of such patently unconstitutional statutes will be at an end.

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59. Unreported case in the Circuit Court for Baltimore County, decided Feb. 13, 1964. Misc. 7/353/2956.

See also *State v. Howard*, Daily Record, April 22, 1957. Judge Niles, speaking for the Supreme Bench of Baltimore, held a statute, which is now MD. CODE ANN. art. 27, § 416 (1957), providing criminal penalties for a white woman who allows herself to be begotten with a child by a negro, unconstitutional because the Maryland statute penalized only the woman.

60. *Editor's Note*: At the publication of this casenote, the constitutionality of Virginia's miscegenation statute is being challenged in *Loving v. Commonwealth*, a case now pending before the Circuit Court of Caroline County, Virginia.