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COMMENTS

INTERRACIAL MARRIAGE: A SURVEY OF STATUTES AND THEIR INTERPRETATIONS

LAWS prohibiting interracial marriages and interpretations of such laws have caused much confusion for lawyers, law students, and sociologists. Most discussion concerning this subject is based purely upon hearsay without reference to statutes or cases. A survey of the statutes prohibiting interracial marriages and decisions interpreting those statutes and a study of the effect of violating such statutes should aid in clarification. Only by understanding the present policy of the states and the reasons for such policy is it possible to make any intelligent speculation as to the future of this phase of the law.

At present there are twenty-nine states which prohibit marriages between white and colored persons[1] and thirteen of these states also prohibit marriage between white and Mongolian persons.[2] Statutes provide that such a marriage is "void,"[3] "null and void,"[4] "illegal and void,"[5] "prohibited,"[6] or "forever prohibited."[7] Six states[8] have constitutional prohibition as well as a statute, whereby it is provided that the marriages are "void"[9] or "prohibited,"[10] or that the legislature shall never pass a law making such marriages legal.[11]

How Race Is Determined.

One of the main problems arising from miscegenation laws is determining the race of an individual. A formula for deciding which race an individual is a member of is usually found either in the miscegenation statute or in a case interpreting the statute. To determine race it is necessary to find, (1) a certain percentage of a certain type of blood, (2) the generation in which the blood is found, or (3) the mere fact that a person does have some blood of a certain race. More states[12] use the percentage-of-blood formula than use any other. This rule specifies that the non-Caucasian "shall have one-eighth or

1. Ala., Ariz., Ark., Colo., Del., Fla., Ga., Ida., 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., Wyo.
2. Ariz., Ga., Ida, Miss., Mo., Mont., Neb., Nev., Ore., S. D., Utah, Va., Wyo.
3. DEL. REV. CODE Sec. 3485 (1935).
4. FLA. STAT. Sec. 42-741.11 (1941).
5. ARK. DIG. STAT. Sec. 55-104 (1937).
6. TENN. CODE Sec. 8409 (1932).
7. N. C. GEN. STAT. ANN. Sec. 14-181 (1943).
8. Ala., Fla., Miss., N. C., S. C., Tenn.
9. S. C. CONST. Art. 3, Sec. 33.
10. TENN. CONST. Art. 11, Sec. 14.
11. ALA. CONST. Art. 4, Sec. 102.
12. Ga., Ida., Ind., La., Miss., Mo., Neb., N. D., S. C.

more Negro (or Mongolian) blood."[13] Some states[14] substitute "one-fourth" for "one-eighth." Another rule states that a Negro is a "person of Negro descent to the third generation."[15] Again a variation is made by some states which use "fourth generation"[16] in the place of "third generation." It is meant by this rule that an ancestor of the third or fourth generation back was Negroid, though one parent of each generation might have been pure white.[17] States which use "one-eighth" as a percentage of blood and those which refer to any blood to the "third generation" as a basis in determining blood reach the same result. The Virginia law provides that a white person is one with no Negro blood and not more than one-sixteenth Indian blood,[18] and that a person with any Negro blood is a Negro, and that a person of one-fourth Indian blood is an Indian.[19] Alabama provides by statute that "the word 'Negro' includes 'mulatto' " and that "mulatto" or "person of color" means "a person of mixed blood descended on the part of the father or mother from Negro ancestors, without reference to or limit of time or number of generations removed."[20] Arkansas reaches the same result by defining a Negro as, "any person who has in his or her veins any Negro blood whatever."[21] Many states fail to ascertain the blood mixture necessary to constitute a member of a certain race.[22] The Supreme Court of Arizona has met difficulty in applying the rule of that state which prohibits marriages between "persons of Caucasian blood, or their descendants, with Negroes, Hindus, Mongolians, members of the Malay race, or Indians and their descendants."[23] The court has said that according to this law a person of ninety-nine per cent Indian blood and one per cent white blood cannot marry an Indian, and a person of ninety-nine per cent white blood and one per cent Indian blood cannot marry a white person. The court concluded, "we mention this and the absurd situations it creates believing and hoping that the legislature will correct it by naming the percentage of Indian and other tabooed blood that will invalidate a marriage."[24]

Proof of Race.

Even after a standard is accepted, the actual proof that a person is a member of a particular race is a difficult task. The defendant's

13. MISS. CODE ANN. Sec. 459 (1942).
14. Ore., Ky.; McGoodwin v. Shelby, 182 Ky. 377, 206 S. W. 625 (1918).
15. Md., N. C., Tenn., Tex.; N. C. GEN. STAT. ANN. Sec. 14-181 (1943).
16. Fla.; FLA. CONST. Art. 16, Sec. 24.
17. State v. Walters, 25 N. C. 455 (1843).
18. VA. CODE ANN. Sec. 5099a (1942).
19. VA. CODE ANN. Sec. 67 (1942).
20. ALA. CODE ANN. Tit. 1, Sec. 2 (1940).
21. ARK. DIG. STAT. Sec. 41-807 (1937).
22. Colo., Del., Mont., Nev., Okla, S. D., W. Va., Wyo.
23. ARIZ. CODE ANN. Sec. 63-107 (1939).
24. State v. Pass, 59 Ariz. 16, 121 P. 2d 882 (1942).

statement that he or she is a member of a different race than his or her spouse is generally accepted.[25] The appearance of the individual is admissible as competent evidence of race,[26] but the fact "She looks like a white woman" has been held insufficient to prove it.[27] Missouri has provided by statute the unscientific method of putting the individual on the stand and letting the jury decide his or her race "from the appearance of such person."[28] The fact that the party associates with members of a certain race,[29] and the party's reputation in the community as being a member of a certain race,[30] often aid in determining whether or not such person is, in fact, a member of that race. One court said that "unscientific statements by ignorant men" do not establish a party's race,[31] and where the action is a criminal one the proof should be "beyond all reasonable doubt."[32]

Effect of Violating Intermarriage Laws.

Although every statute prohibiting interracial marriage makes the marriage void, the courts have not made it clear whether or not the parties to such marriage can ignore the marriage and marry another person without first clearing the first marriage from the records. In 1860 the Supreme Court of Louisiana said: "The law is of that rigorous nature that it will not permit a marriage to exist between persons of the two different races for a moment. No suit is needed to declare the nullity of such a union. Either party may disregard it, and neither can pretend to derive from it any of the consequences of a lawful marriage."[33] The more recent Louisiana statute,[34] however, provides that either of the parties to the marriage or an interested party can impeach the marriage, thus raising the presumption that the legislature intended to require some action to clear the records and make known the exact marital relationship of the parties. The Virginia statute deals with this problem by expressly stating that such marriages are void "without any decree of divorce or other legal process."[35]

Many states do not merely leave the parties where they find them, but punish them by declaring their acts to constitute a misdemeanor or a felony. Florida,[36] Mississippi,[37] and North Carolina[38] have a ten

25. Metcalf v. State, 16 Ala. App. 389, 78 So. 305 (1918).
26. Jones v. State, 156 Ala. 175, 47 So. 100 (1908).
27. Moore v. State, 7 Tex. App. 608 (1880).
28. Mo. Rev. Stat. Sec. 4651 (1939).
29. Hopkins v. Bowers, 111 N. C. 175, 16 S. E. 1 (1892); Bennett v. Bennett, 195 S. C. 1, 10 S. E. 2d 23 (1940).
30. State v. Miller, 224 N. C. 228, 29 S. E. 2d 751 (1944).
31. Bartelle v. United States, 2 Okla. Cr. 84, 100 Pac. 45 (1909).
32. Kieth v. Commonwealth, 165 Va. 705, 181 S. E. 283 (1935); Free v. State, 142 Fla. 233, 194 So. 639 (1940).
33. Succession of Minvielle, 15 La. Ann. 342 (1860).
34. La. Civil Code Ann. Art. 113 (1945).
35. Va. Code Ann. Sec. 4087 (1942).
36. Fla. Stat. Sec. 42-741.11 (1941).
37. Miss. Code Ann. Secs. 459, 2234 (1942).
38. N. C. Gen. Stat. Ann. Sec. 14-181 (1943).

year maximum penalty, Alabama[39] seven years, and Tennessee,[40] Texas,[41] Virginia[42] and Wyoming,[43] five. As a substitute for, or in addition to the punishment, fines are levied in most states having punishment. Florida[44] and Wyoming[45] have a maximum fine of $1,000 and Mississippi,[46] $500. Arkansas[47] law provides that punishment or fine is in the discretion of the judge, or the jury where there is a jury. (In the case of *Dodson v. State*,[48] the Justice of Peace fined the defendant twenty-five dollars.) The party issuing the license or performing the ceremony is also penalized in many states. Often the punishment is the same as that of the parties to the marriage.[49] Virginia[50] provides one year in the penitentiary for any Negro registering as a white under its plan of registration "to ascertain . . . racial composition."

Mississippi has gone further than any other state in providing punishment for those it fears might bring about an amalgamation of the races. In addition to punishing the parties to the marriage, Mississippi punishes persons or corporations "urging or presenting for public acceptance or general information, arguments or suggestions in favor of social equality or of intermarriage between whites and Negroes."[51] Although it would seem such a law is in contravention of that part of the state constitution which provides that "freedom of speech and of the press shall be held sacred,"[52] the constitutionality of the law has never been questioned.

The Northern states east of the Mississippi River have a much smaller proportion of Negroes to the entire population than is present in the deep South.[53] These Northern states do not, in general, have miscegenation statutes,[54] but the absence of such laws has not caused the amalgamation of the races to proceed much differently than in other sections. Gunnar Myrdal observed, "even in the Northern states where, for the most part, intermarriage is not barred by the force of law, the social sanctions blocking its way are serious.

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39. ALA. CODE ANN. Tit. 14, Sec. 360 (1940).
40. TENN. CODE Sec. 8410 (1932).
41. TEX. STAT., PENAL CODE Art. 492 (1936).
42. VA. CODE ANN. Sec. 4546 (1942).
43. WYO. COMP. STAT. Sec. 50-109 (1945).
44. *See* note 36, *supra*.
45. *See* note 43, *supra*.
46. *See* note 37, *supra*.
47. ARK. DIG. STAT. Sec. 55-105 (1937).
48. Dodson v. State, 61 Ark. 57, 31 S. W. 977 (1895).
49. S. C. CODE ANN. Sec. 1438 (1942).
50. VA. CODE ANN. Sec. 5099a (1942).
51. MISS. CODE ANN. Sec. 2339 (1942).
52. MISS. CONST. Art. 3, Sec. 13.
53. Negroes constitute 4½% of the population of N. Y., 3½% in Ind., 49% in Miss., and 34 2/3% in Ga. INFORMATION PLEASE ALMANAC, 1949, pp. 217, 218.
54. Indiana is the only exception, IND. ANN. STAT. Sec. 9862 (Burns 1933); Michigan is the only state that expressly makes mixed marriages valid, MICH. COMP. LAWS Sec. 55.6 (1948).

Mixed couples are punished by nearly complete social ostracism."[55]

Though social forces in America operate tenaciously to prevent interracial marriages, and the laws of most states support society's attitude, the fact remains, that many children are born yearly of mixed parents, as a result of either interracial marriage or illicit intercourse between members of the different races. The state has not always taken a very understanding view toward the real victim of a marriage cursed by conventional society. The Florida statute provides that, "the issue, if any, of such surreptitious marriage shall be regarded as bastard and incapable of having or receiving any estate . . ."[56] Some statutes provide that though the marriage is void, the issue of such marriage "shall nevertheless be legitimate."[57] It was held, however, in a leading California case that the offspring of a mixed marriage cannot inherit despite a statute making him legitimate.[58]

If the parties to a mixed marriage go outside the state for the purpose of avoiding a miscegenation law, it is uniformly held by decision or provided by statute that such marriage is not valid.[59] The real problem that faces courts arises where the parties move into the state after having married in a state not having a miscegenation law. Some states have statutes that say if the marriage is "valid where contracted it is valid here."[60] In refusing to disturb a mixed marriage performed in a state permitting intermarriage, a Tennessee court said, "The Turk or Mohammed, with his numerous wives, may establish his harem at the doors of the capitol, and we are without remedy."[61] Some courts have indicated, however, that they would rule a mixed marriage void regardless of where it was contracted.[62] States having miscegenation laws will usually recognize property rights arising from marriages contracted where there was no miscegenation law.[63]

Future of Intermarriage Laws.

To speculate as to the future of the intermarriage laws, it is first necessary to find the original cause or causes of the adoption of such laws and investigate whether or not any factors have since come into play that might bring about a change. Many states maintain that such a law is an integral part of the effort to keep the minority race

55. MYRDAL, AN AMERICAN DILEMMA, p. 55 (9th Ed. 1944).
56. FLA. STAT. Sec. 42-741.11 (1941).
57. TEX. STAT., REV. CIV. Art. 2581 (1936).
58. Estate of Stark, 48 Cal. App. 2d 209, 119 P. 2d 961 (1941).
59. LA. CIVIL CODE ANN. Art. 113 (1945).
60. KY. REV. STAT. Sec. 2101 (1936).
61. State v. Bell, 66 Tenn. 9, 32 Am. Rep. 549 (1872).
62. Succession of Gabisso, 119 La. 704, 44 So. 438 (1907); Dannelli v. Dannelli, 67 Ky. 51 (1868); Eggers v. Olson, 104 Okla. 297, 231 Pac. 483 (1924).
63. Willington v. McCaskill, 65 Fla. 162, 61 So. 236, 44 L. R. A., N. S. 630, Ann. Cas. 1915B, 1001.

in hand where such race constitutes a large proportion of the state's population.[64] In the leading case of *Scott v. State,* the Georgia court said, ". . . the offspring of these unnatural connections are generally sickly and effeminate, and . . . are inferior in physical development and strength to the full blood of either race."[65] A Virginia court said that such laws were necessary for ". . . the highest advancement of our Southern civilization."[66]

Though many states which have miscegenation laws have a large population of members of the race prohibited from marrying whites, there are many states which do not. North Dakota has a statute on its books prohibiting Negroes and whites from marrying despite the fact that there are only two hundred and one Negroes in the entire state.[67] Nebraska has seen fit to have such a law as to marriages between whites and Mongolians where the Chinese and Japanese constitute less than one twenty-fifth of one per cent of the state's population.[68] Mississippi law prevents a white person from marrying a Japanese and with more than a million people in the state there was only one Japanese according to the nineteen forty census.[69] In these and similar cases overpopulation of the minority race is not, of course, the reason for the law. Where the opposite situation does exist, such as the high percentage of Negroes in Southern states, the intermarriage laws will change only as a change in other parts of the social system materializes unless they are affected by a federal ruling.

In upholding the constitutionality of the miscegenation law of Georgia, Justice Brown went into great detail explaining how intermarriage would result in a group of mixed breeds which would be inferior to any other group in America.[70] This belief was used just as strongly to support the miscegenation law in Pennsylvania before its repeal by the legislature.[71] Since this theory was advanced and relied upon, anthropologists have observed that, "the belief in race inequalities is founded in emotion and action and then justified by reasoning."[72] Even the layman who believes the Negro to be inferior often attributes the success of a particular Negro to the belief that the Negro must have some white blood in him. A definite tendency away from the belief that amalgamation produces "a mongrel population and a degraded civilization,"[73] whether the tendency results from scientific

64. Comment, 36 YALE L. J. 858 (1927).
65. Scott v. State, 39 Ga. 321 (1869).
66. Kinney v. Commonwealth, 30 Grat. 858, 32 Am. Rep. 690 (1878).
67. N. D. REV. CODE Sec. 14-0303-5; INFORMATION PLEASE ALMANAC, p. 217 (1949).
68. NEB. REV. STAT. Sec. 42-103 (1943); INFORMATION PLEASE ALMANAC, p. 217 (1949).
69. MISS. CODE ANN. Sec. 459 (1942); INFORMATION PLEASE ALMANAC, p. 217 (1949).
70. Scott v. State, *supra.*
71. Phil. & W. Chester R. R. Co. v. Miles, 2 Am. Law Rev. 358.
72. KROEBER, ANTHROPOLOGY, p. 58 (1923).
73. Pace v. State, 69 Ala. 231 (1881).

fact or not, will have some effect on the future of miscegenation laws. It is more likely, however, that such effect will be a shift of reasons for upholding the law, rather than any change in the law itself.

The right of the state to prohibit a marriage between persons of different races is based upon the police power of the state.[74] By passing such a law the state maintains that it is protecting the "health and morals of the people of the state."[75] According to the 1948 report of the Public Health Service, there were seventeen states that did not require pre-marital blood tests for prospective parties to any marriage, and fourteen of the seventeen were states with miscegenation laws.[76] In other words, the worst offenders of the states failing to protect their citizens with a good health law are the very states which insist they must protect the health of their citizens by prohibiting interracial marriage. Police power can also be exercised for purposes of public safety.[77] It has been contended that miscegenation laws are necessary in that to abolish them would bring about a violence from which the state must protect its people. The argument is analogous to the "clear and present danger"[78] theory as applied to freedom of speech and some courts might reason that the situation warrants the state using its police power in that way.

Although the constitutionality of miscegenation laws has never been before the Supreme Court of the United States,[79] state courts have upheld the constitutionality of their own laws.[80] In upholding such laws, state courts have said that the state does not thereby impair any obligation of contract because marriage is more than a contract.[81] It has also been said that the equal protection clause of the fourteenth amendment does not interfere since members of each race are given equal protection where the Negro and white are both punished for the marriage.[82] All state courts have used the police power of the state as the basic reason for upholding its statute.[83]

In speculating as to whether or not the United States Supreme Court could find sufficient grounds for ruling the statutes unconstitutional, it will help to investigate the recent California case of *Perez v. Lippold*.[84] That was the first case in which a state ruled its miscegenation law to be unconstitutional. The court said that the first amendment is encompassed in the fourteenth amendment, so the religious

74. Blake v. Sessions, 94 Okla. 59, 220 Pac. 876 (1923).
75. Blake v. Sessions, *supra*.
76. INFORMATION PLEASE ALMANAC, p. 236 (1949).
77. Jones v. State, 17 Ala. App. 444, 85 So. 839 (1920).
78. Schenk v. United States, 249 U. S. 47, 39 S. Ct. 247 (1919).
79. Perez v. Lippold, 198 P. 2d 17 (Cal. 1948).
80. Green v. State, 58 Ala. 190 (1877); State v. Gibson, 36 Ind. 389, 10 Am. Rep. 42 (1871).
81. State v. Tutty, 41 Fed. 753 (S. D. Ga. 1890).
82. Jackson v. Denver, 109 Colo. 196, 124 P. 2d 240 (1942).
83. Puitt v. Commissioners, 94 N. C. 709 (1886); Lonas v. State, 50 Tenn. 287, 3 Heiskell 247 (1871).
84. Perez v. Lippold, 198 P. 2d 17 (Cal. 1948); Comment, 1 WEST. RES. L. R. 89 (1949).

"right to marry" which is protected against federal action by the first amendment is a personal liberty protected from state action by the "due process" clause of the fourteenth amendment. It also said that marriage is a fundamental right and can be protected only "for social objective and by reasonable means." Since there was no "clear and present danger," the state could not impair the fundamental rights of the individual. As to the "equal protection" clause, the court said that miscegenation statutes ". . . violate 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 certain racial groups." The Declaration of Independence is cited as a part of the law of the United States and references to "racial discrimination" are made in contrast to "racial integrity" and similar terms usually found in cases upholding miscegenation laws. The factual situation in the *Perez* case was very similar to the controversies that arise in other states over interracial marriages and involved a white woman and a Negro man being denied a marriage license.

Considering the California decision along with recent decisions of the United States Supreme Court on such issues as restrictive covenants[85] and white primary laws,[86] one might conclude that if the validity of miscegenation laws were taken to the supreme court, that court might possibly adopt the same view taken by the California court. Much of the fear that arises from this possibility is based upon the false assumption that interracial marriage and racial amalgamation are synonomous terms. Intermarriage has, at most, played a negligible role in the amalgamation of the races.[87] Although it has been estimated that only about one hundred mixed marriages take place each year,[88] the mixing of blood in America has been so great that it was estimated that during a ten year period two hundred and fifty thousand Negroes actually "passed" into the white community.[89] There might, in fact, be fewer mullato children if white men having illicit intercourse with Negro women knew they could no longer rest behind a law which said the woman or offspring can acquire none of the rights ordinarily afforded by the law of domestic relations. It is difficult to speculate as to the effect of any change in the present laws, but if the purpose of the laws surveyed has been to prevent intermixture of blood, it is well to conclude that they have failed to fulfill this purpose.

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85. Shelley v. Kraemer, 68 S. Ct. 836 (1948).
86. Smith v. Allwright, 321 U. S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944).
87. Comment, 36 YALE L. J. 848 (1927).
88. REUTER, THE AMERICAN RACE PROBLEM, p. 133 (1927).
89. HART, SELECTIVE MIGRATION AS A FACTOR IN CHILD WELFARE IN THE UNITED STATES, WITH SPECIAL REFERENCE TO IOWA, pp. 28-29 (1921).