

January 1950

Constitutionality of Miscegenetic Marriages

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Recommended Citation

Stuart W. Conner, *Constitutionality of Miscegenetic Marriages*, 11 Mont. L. Rev. (1950).

Available at: <https://scholarship.law.umt.edu/mlr/vol11/iss1/8>

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It conversely appears that the standards for admission might be raised, also to the benefit of the public interest.

Those members who find themselves unable to cope with the other members of the profession must find an outlet for their activities in other spheres of endeavor, thus leaving for the service of the public only those who are best qualified and best fitted to render legal service.

Your president will attend the conference of State Bar Association Presidents in Chicago the latter part of February. This is an innovation of the American Bar Association, and President Gallagher hopes for great things from this conference.

CONSTITUTIONALITY OF MISCEGENETIC MARRIAGES

In October of 1948 the Supreme Court of California handed down a decision that may have far reaching results. The decision was contrary to an unbroken line of precedents and may be the forerunner of a more realistic and objective approach to one of America's great problems, the status of the negro.

The Court in *Perez v. Lippold*¹ held unconstitutional the state statute forbidding miscegenetic marriages. Although about 30 states,² including Montana³, have similar statutes, California is the first to invalidate such legislation by judicial process.⁴ In

¹*Perez v. Lippold*, (1948)Calif....., 198 P.(2d) 17.

²RADIN, *THE LAW AND YOU*, p. 48, cites Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming.

³R.C.M. 1947, §48-106 (5700).

Every marriage hereafter contracted or solemnized between a white person and a negro, or a person of negro blood or in part negro, shall be utterly null and void.

R.C.M. 1947, §48-107 (5701).

Every marriage hereafter contracted or solemnized between a white person and a Chinese person shall be utterly null and void.

R.C.M. 1947, §48-108 (5702).

Every marriage hereafter contracted or solemnized between a white person and a Japanese person shall be utterly null and void. The text of this article is confined largely to a discussion of the Negro-White miscegenation, but it is thought that research will show the effect of Asiatic-Caucasian mixture to be similar biologically and sociologically.

⁴Alabama, Arizona, Arkansas, Colorado, Indiana, Oregon, Tennessee and Texas hold miscegenation statutes valid. Montana and Virginia cases have relied on miscegenation statutes, but the question of constitutionality has not been raised in the latter two states.

Cases upholding the miscegenation statutes:

Green v. State (1877) 58 Ala. 190, 29 Am. Rep. 739.

eight states⁵ the will of the electorate has led to the repeal of this discriminatory regulation.

The California statute, Section 60 of the Civil Code reads,

“All marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void.”

This statute was attacked as a denial of freedom of religion,⁶ due process of law, and equal protection of the laws to the petitioners, a mixed couple wishing to be married.

The due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution guarantee to an individual that his freedom of action will not be hampered except for a legitimate public interest and in a reasonable manner.⁷ They require that states shall make no unreasonable or arbitrary classifications in devising their systems of regulatory legislation⁸ and that classifications be in the furtherance of some legitimate public interest.⁹

In determining the reasonableness of the regulation the

Kirby v. State (1922) 24 Ariz. 9, 206 P. 405.

State v. Pass (1942) 59 Ariz. 16, 121 P.(2d) 882.

Dodson v. State (1895) 61 Ark. 57, 31 S.W. 977.

Jackson v. Denver (1942) 109 Colo. 196, 124 P.(2d) 240.

State v. Gibson, (1871) 36 Ind. 389, 10 Am. Rep. 42.

In re Paquet's Estate (1921) 101 Ore. 393, 200 P. 911.

Doc. Lonas v. State (1871) 50 Tenn. 287.

Frasher v. State (1877) 3 Tex. App. 263, 30 Am. Rep. 131.

The Montana and Virginia citations are:

In re Takahashi's Estate (1942) 113 Mont. 490, 129 P.(2d) 217.

Kinney v. Commonwealth (1878) 30 Grat. 858, 71 Va. 284, 32 Am. Rep. 690.

⁵Massachusetts 1843, Kansas 1859, New Mexico 1866, Washington 1868, Rhode Island 1881, Minnesota 1883, Michigan 1883, Ohio 1887.

⁶It seems doubtful if freedom of religion is a proper justification for this decision. Apparently there were no allegations that the Catholic church viewed favorably miscegenous marriages. In other freedom of religion cases there has been a positive stand by the religious organization of which the petitioner was a member on the controverted point. This does not appear in the Perez case.

The dissent points out that if the petitioners' church did have any view on the point, it was not favorable.

⁷Betty v. City of Sidney (1927) 79 M. 314, 257 P. 1007, 56 A.L.R. 872; State v. Gateway Mortuaries, (1930) 87 M. 225, 237 P. 156, 68 A.L.R. 1512; Plessey v. Ferguson (1896) 163 U.S. 537, 41 L.Ed. 256, 16 S.Ct. 1138; Nashville, C. & St. L. R. Co. (1934) 294 U.S. 405, 79 L.Ed. 949, 55 S.Ct. 486.

⁸ROTTSCHAFFER, CONSTITUTIONAL LAW (1939) §239, p. 454.

⁹American Sugar Refining Co. v. Louisiana, (1900), 179 U.S. 89, 45 L.Ed. 102, 12 S.Ct. 43.

court should compare the extent of the interference with the individual with the extent of the public interest.³⁰

Generalizations have been made by the courts denouncing mixed marriages as "unnatural," "productive of deplorable results," "conducive to a degeneration of the public morals," and detrimental to the "moral and physical development of both races and the highest advancement of civilization."³¹ One would expect that such dogmatic statements would be backed by a mass of uncontroverted evidence, but a great many contemporary authorities assert views contrary to such statements, an examination of which follows.

BIOLOGICAL EFFECT OF RACE MIXTURE

John Gillin, Professor of Anthropology, University of North Carolina, in his anthropology text asked,³²

"What is the genetic effect of outbreeding, this much maligned process which in humans is so often stigmatized as miscegenation, race mixture, and 'tainting the purity of the blood'?"

His answer was,

"On genetic principles the expected results of outbreeding may be summarized as follows . . . so far as physical form and function can be observed, this new heterozygosity will usually result in a phenomenon known as *hybrid vigor* or heterosis. The offspring of the cross will tend to be larger in size, more active, more fertile, and with improved vitality and longevity."

Earl Finch in 1924 commented in his article on the effects of racial miscegenation:³³

³⁰Thomas Reed Powell, *Alien Land Cases in the United States Supreme Court*, 12 CALIF. L. REV. 259, 278, (1924).

³¹Scott v. Georgia, (1869) 39 Ga. 321; Eggers v. Olson (1924) 104 Okla. 279, 231 P. 483, 486; 18 R.C.L. §31, p. 409.

³²GILLIN, THE WAYS OF MEN, (1st Ed., 1941).

³³Earl Finch, *The Effects of Racial Miscegenation*, p. 215 of SOURCEBOOK ON ANTHROPOLOGY by A. L. Kroeber and T. T. Waterman.

The respondent in the Perez case "contends that Negroes and impliedly the other races specified. . . . are inferior mentally to Caucasians." This is an exposition of the Race Superiority theory that flourished in Europe in the nineteenth century. Count Arthur de Gobineau, a French diplomat, formulated the theory which stated that the white race alone in history has shown itself capable of fostering civilization.

Gobineau's philosophy was not well received in France and he went to Germany and acquired quite a following. Gobineau clubs were

"The superiority of the mixed people to the native stock in fertility and vitality is shown by their persistence, sometimes in the very locality in which the native race, in contact with foreigners, has declined or disappeared.

While race blending is not everywhere desirable, yet the crossing of distinct races, especially when it occurs with social sanction, often produces a superior type; certainly such crossing as has occurred tends to prove absurd the conclusion that the dilution of the blood of the so-called higher races by that of the so-called lower races will either set the species on the highway to extinction, or cause a relapse to barbarism."

Ruth Benedict in her book on the interrelationship of race, science and politics stated,"

"Modern instances of the evils of racial mixture do not, however, prove that intermixture is a biologic evil. In the first place, history has shown that such mixed races have flourished and progressed even in those extreme cases where intermixture has been across the color line.

Even in some parts of the modern world mixture of races shows no evil effects. Students have always pointed this out for Hawaii, where the code of racial separatism has been conspicuously lacking. . . . At the Governor's receptions and university dances there is no color line. Cultural development of Hawaii has not suffered."

Specific instances of the demonstration of the biological advantages of miscegenetic marriages include the Hottentot-White

started all over that country. One of his successors, an Englishman named Houston Stewart Chamberlain, was coolly received in England and he too went to Germany for audience where the Kaiser was so well pleased with the race superiority doctrine that he made Chamberlain his court anthropologist.

In the United States the leading proponent was Madison Grant who wrote a book on the subject, "THE PASSING OF A GREAT RACE." (1st Ed., 1916).

The people of Germany and the United States seemed more receptive to the doctrine than other Caucasian groups. Modern investigation and analysis has shown that there is no one race, not even Hitler's Nordic clan, that is superior, or that cannot be benefitted by acquiring some of the characteristics of another race.

During the first World War intelligence tests were given to the American Expeditionary Forces and the enormous number of individuals from all over the country made this an ideal sampling. Benedict, *infra*, note 14, summarized the results. Southern whites scored lower than Northern negroes but the average white score was above the average negro score. Benedict attributes this to the fact that the negroes are massed in the South where per capita expenditures for education are low and the standard of living is low.

"BENEDICT, RACE: SCIENCE AND POLITICS, (1st Ed., 1940).

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mixture known as the Rehoboth Bastards of South Africa. This mixture occurred between Boer descendents and Hottentot women. A study of this group was published in 1913 by the German anthropologist, Eugene Fischer. The report stated that the hybrids were on the average taller than either the Hottentots or Europeans. The mixed bloods were extremely fertile with an average offspring of 7.4 per woman and they showed no defects in health or constitution.

Oliver LaFarge's symposium¹⁵ includes an article by Harry L. Shapiro, the Curator of Physical Anthropology of the American Museum of Natural History, in which the eminent anthropologist quotes figures obtained from the 1910 census dealing with full blood and hybrid American Indians. He states that in full blood Indians 10.7% were sterile and in breeds only 6.7%. In full blood families, there was an average of 4.5 children per family and in families of hybrid parents the average was 5.1.

Benedict, Finch and Gillin all mention the unusual incident of the mutineers of the "*Bounty*" in their works. Finch¹⁶ has this to say about it,

"Pitcairn Island was settled in 1790 by nine English mutineers, six Tahitian men, and 15 Tahitian women. In 1808 only white men and eight or nine women and children were left. But the first half breeds grew up, intermarried, and had numerous children. In 1855 the population had increased to 200. After removing to Norfolk Island in 1856 they increased so rapidly that, although 16 returned to Pitcairn Island in 1859, they numbered 300 in 1868; in 1905 the population of Norfolk Island was 1059, a majority of whom were descendants of the mutineers. The present population of Pitcairn Island is flourishing."

Gillin also cites several other examples of mixtures that have shown improvements over the parent stock, specifically the White-Negro mixture in Brazil, and the Indonesian-White mixture on the Timor Archipelago.

With relation to the effect of race mixture on the mental ability of the offspring, M. J. Herskovits in his study,¹⁷ indicates that when mulattoes were classified scientifically as to the percentage of Negro blood, the intelligence tests given them showed the correlation between their intelligence and the percentage of Negro blood to be insignificant.

¹⁵LAFARGE, *THE CHANGING AMERICAN INDIAN*, (1st Ed., 1943).

¹⁶*Supra*, note 13.

¹⁷HERSKOVITS, *ON THE RELATION BETWEEN NEGRO-WHITE MIXTURE AND STANDING ON INTELLIGENCE TESTS*, (1st Ed., 1928).

SOCIOLOGICAL EFFECT OF RACE MIXTURE

Julian Huxley stated in 1936¹⁸ that,

If the alleged inferiority of the half-castes really exists, it is much more likely to be the product of the unfavorable social atmosphere in which they grow up than due to any effect, which would be biologically very unusual, of their mixed heredity.

What then are the results of mixed marriages from the sociological point of view?

The respondent in the *Perez* case suggests that a mixed marriage might foster race tension that could culminate in violence. Idealistically¹⁹ it could be argued, as suggested by the majority of the court, that the abolishment of some of the legally perpetrated discriminations might be of greater ultimate aid in easing the tensions than giving legislative and judicial sanction to a continuation of such laws as call attention to racial animosities. In any event, the danger of violence occurring due to the fact of a mixed marriage is probably exaggerated. The number of mulattoes gives an accurate indication of the extent of miscegenetic relations in this country. Were such relations conducive to violence in any appreciable extent, the country would be plagued with race riots continuously.

The dissent in the *Perez* case states that one purpose of this legislation is the preservation of the race. It seems doubtful if there is any public interest in preserving the race in view of the history and philosophy of government of the United States. The native population of North America is the American Indian. The rest of us descended from immigrants. Little "public interest" can exist in preserving the race in a country where the native "race" has been relegated to reservations and the usurpers are a conglomerate of every race, nationality and creed existent on this planet.

Traditionally the United States has extended invitations to all people to come and find a haven of justice and security. Only when the economy of the nation could not stand the influx were particular races excluded.²⁰ No exclusion ever occurred merely because some race was not desirable to the conglomerate. There

¹⁸Julian Huxley, *Eugenics and Society*, GALTON LECTURE, Eugenics Society, London (1936).

¹⁹From the practical standpoint it might be impossible to secure the passage of desirable legislation, but invalidating this undesirable legislation by judicial process is a step in the right direction.

²⁰The Chinese Exclusion, 8 U.S.C.A. 261, 8 F.C.A. 136.

can be no basis for preserving the race under these circumstances.

The respondent in the *Perez* case advanced the suggestion that mixed unions might result in ostracism of the couple. It might also place an insuperable obstacle in the path of a successful, lasting union. Certainly these factors are to be considered by the principals of such a marriage. The state too has an interest in preserving the marriages of its citizens but the state is limited in the extent to which it can interfere with the civil rights of individuals.

The individual's interest, the right to equality and thereby his right to select the mate of his own choice, is of vital concern to him. To deny him that right could be to deprive him of the most important asset and enjoyment of his life. Compare this to the public's interest in preserving the peace, and preventing social ostracism of the couple. The result weighs heavily in favor of the individual's interest.

Normally where a classification is attempted by a legislative body the presumption is in favor of the validity of the classification. When the classification is based solely on race, however, this presumption is dissipated. Several cases in the Supreme Court of the United States have held that a classification based solely on race is unconstitutional.²¹ Probably a better rule was laid down in *Korematsu v. United States*.²² Mr. Justice Black speaking for the Supreme Court of the United States stated,

“. . . all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.”

Mr. Justice Carter in his concurring opinion in the *Perez* case comments on Justice Black's remarks,

“That suspicion which attaches to cases involving discrimination is sufficient to overcome the presumption of validity and constitutionality normally present when a statute is attacked as unconstitutional.”

It is submitted that the real reason for these discriminatory

²¹*Yick Wo v. Hopkins* (1888) 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; *Hill v. Texas* (1941) 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559.

²²*Korematsu v. United States* (1944) 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194, 199.

statutes is race prejudice. The "Land of Liberty" is perpetrating a caste system by law. We cannot make colored people socially equal by court decree, but as individuals and citizens they deserve equality in law, in accordance with the intentions of the framers of the Fourteenth Amendment to the United States Constitution.

STUART W. CONNER.

FRAUDULENT CONVEYANCES—NECESSITY OF JUDGMENT TO SET ASIDE

I.

Section 29-209 (8605), Revised Codes of Montana, 1947, declares that "a creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement, by legal process, of his right to property affected by the transfer or obligation." Interpretation of this statute has given rise to the rule that in an action to set aside a conveyance by an insolvent on grounds of intent to hinder, delay, or defraud creditors, the complaint must allege that the creditor has established a lien upon the property sought to be transferred, either by attachment or by judgment with a return *nulla bona*.¹ Several Montana decisions have adhered to this rule without specific reference to the statutory provision.²

In 1945 Montana adopted the Uniform Fraudulent Conveyance Act.³ The question is posed: Does Section 29-209 (8605) conflict with sections 9 and 10 of the Uniform Act?⁴ More specifically, how, if at all, has the adoption of the Act changed the preliminary conditions governing the remedy in equity? Thus far there has been no interpretation by the Supreme Court of Montana of the provisions pertinent to this article. The Act does not explicitly state that a judgment with a return unsatisfied is no longer essential to maintaining a suit in equity to annul a fraudulent conveyance. Certainty would have been promoted if such were the case. However, the Act appears to imply that a creditor can avoid a conveyance fraudulent as to

¹Ferrell v. Elling (1929) 84 Mont. 384, 276 P. 432; First Natl. Bank v. Conner (1929) 85 Mont. 229, 278 P. 143.

²Northern Mont. State Bank v. Collins et al (1923) 67 Mont. 575, 216 P. 330; Missoula Trust and Saving Bank v. Boos (1938) 106 Mont. 294, 77 P. 385; Edenfield v. C. V. Seal Co., Inc., et al (1928) 83 Mont. 49, 270 P. 642; Stone-Ordean Wells Co. v. Strong et al (1933) 94 Mont. 20, 20 P. (2d) 639.

³R.C.M. 1947, §§29-101 to 29-113.

⁴R.C.M. 1947, §§29-109, 29-110.