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Miscegenation Statutes and the Supreme Court: *A Brief Prediction of What the Court Will Do and Why*

DAVID E. SEIDELSON*

IN *McLaughlin v. Florida*¹ the United States Supreme Court held unconstitutional a statute providing that:

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 12 months, or by fine not exceeding \$500.²

In reaching its determination that this criminal statute violated the equal protection clause of the fourteenth amendment, the Court was able to “posit the constitutionality of the [Florida] ban against the marriage of a Negro and white”;³ hence, the Court was not compelled to determine whether or not Florida’s miscegenation statute was unconstitutional. However, there are indications that such avoidance will not be practical very much longer.

By letter dated January 6, 1965, the Assistant Comptroller General of the United States refused to authorize “payment of arrears of pay and allowances . . . and death gratuity”⁴ to the alleged Negro widow of a deceased white soldier whose purported marriage occurred in Texas where miscegenous marriages are prohibited. In so doing, the Assistant Comptroller General wrote:

While constitutionality of Florida’s laws barring interracial marriage was questioned in the recent case, *McLaughlin et. al. v. State of Florida*, decided by the Supreme Court on December 7, 1964, the Court decided that case on the basis of the criminal statute involved and declined to express any views about the state’s prohibition of interracial marriage.

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¹ 379 U.S. 184 (1964).

² *Ibid.*

³ *Id.* at 195.

⁴ Letter From Frank H. Weitzel, Assistant Comptroller General of the United States, to Lt. Col. P. M. Callinan, Finance and Accounting Officer, Jan. 6, 1965, Dept. of the Army file No. B-155582, p. 1.

In view of this and other recent judicial rulings in the field of race relations, we feel that we should make no determination as to the validity of Private Waters' marriage at the present time. . . .

. . . Accordingly, the matter is too doubtful to warrant payment of the gratuity to Ida Nell Waters as surviving spouse and, since the question of validity of Private Waters' marriage cannot be resolved on the basis of the current judicial decisions, no payment of death gratuity at this time is authorized.⁵

Clearly, this kind of doubt cannot be left unresolved indefinitely; its resolution apparently will require judicial decision.

In June, 1965, the Supreme Court of Virginia granted a writ of error and supersedeas⁶ which resulted in that court's affirmation of the conviction in 1958 of a white man and a Negro woman under Virginia's miscegenation statute.⁷ Pending now is an Oklahoma case involving the refusal to issue a marriage license to one Francine Aline Jones, "of African descent," and Jesse Marquez, "not of African descent."⁸ Moreover, whatever tactical reasons may

⁵ *Id.* at 2-3.

⁶ *Loving v. Virginia*, No. 6163, Va., March 7, 1966. The lower court suspended a one-year sentence for violation of the miscegenation statute, on the condition that the parties leave the state. On appeal petitioner made a direct constitutional challenge of the statute. The Virginia Supreme Court, affirming the conviction, refused to accept the suspended sentence and remanded for resentencing. Addressing itself to the constitutional challenge the court cited precedents sustaining the constitutionality of miscegenation statutes, said that such "sociological" arguments were more properly directed to the state legislature, and stated that striking down the statute would be a gross example of "judicial legislation."

⁷ Intermarriage prohibited; meaning of term "white persons." — It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term "white person" shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect shall apply to marriages prohibited by this chapter. VA. STAT. §20-54 (1924).

Punishment for marriage. — If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.

VA. STAT. §20-59 (1932).

Colored persons and Indians defined. — Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one-fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one-fourth or more of Indian blood and less than one-sixteenth of Negro blood shall be deemed tribal Indians.

VA. STAT. §1-14 (1954).

⁸ *Jones and Marquez v. Shaw*, *appeal docketed*, Civil No. 41393, Okla., 1965. The Oklahoma constitution, Art. 23, §11, provides:

Colored race—Negro race—White race.—Whenever in this Constitution and laws of this State, the word or words, "colored" or "colored race," "negro" or "negro race," are used, the same shall be construed to mean or apply to all persons of African descent. The term "white race" shall include all other persons."

OKLA. STAT. tit. 43 §12 (1910) provides:

Miscegenation prohibited.—The marriage of any person of African descent, as defined

have deterred Negro organizations and other groups interested in assuring full civil rights for colored people from attempting to secure a definitive Court ruling in the past have been diminished substantially, if, indeed, they subsist at all. Reportedly, the NAACP is now prepared to support legal attacks on miscegenation statutes, and the American Civil Liberties Union filed an amicus curiae brief with the Oklahoma Supreme Court in the *Jones* case.⁹ In short, the time seems near when the Court will be compelled to determine if statutes prohibiting interracial marriage are constitutional. In this article I shall attempt to predict how the Court will decide and why. I do so with an awareness of the presumptuousness of my undertaking such a chore, but with the hope that the effort may prove helpful, interesting, or at least palatable to others.

Perhaps an appropriate point of beginning is *Perez v. Lippold*¹⁰ the only case decided to date which has held a miscegenation statute unconstitutional. In reaching that conclusion, Justice Traynor utilized or at least paid his respects to several constitutional tenets: free exercise of religion, due process, vagueness and uncertainty, and equal protection. Justice Carter in his concurring opinion invoked *seriatim*: the Declaration of Independence, the Gettysburg Address, the California Constitution, the fifth amendment (due process), the entire fourteenth amendment, the Charter of the United Nations, and the Apostle Paul. In addition, Justice Carter quoted that portion of *Mein Kampf* which advocates preservation of the pure blood, with the obvious connotation that anything Adolf Hitler advocated must be bad¹¹—perhaps not an unsound proposition at that. But even to one with some awareness of the difficulties inherent in attempting to categorize or isolate constitutional issues, the methodology of the court in *Perez* does seem like killing a fly with a load of buckshot. Even assuming the potential virulence of the insect, the ammunition is somewhat hit-or-miss. If possible, it might be revealing to attempt some isolation of the factors that do or do not make a miscegenation statute unconstitutional.

This function may be begun by examining some of the grounds relied on by Justice Traynor. The first of these, freedom of religion, seems to have been imposed upon him by the petitioners, "members of the Roman Catholic

by the Constitution of this State, to any person not of African descent, or the marriage of any person not of African descent to any person of African descent, shall be unlawful and is hereby prohibited within this State.

OKLA. STAT. tit. 43 §13 (1910) provides:

Penalty for miscegenation.—Any person who shall marry in violation of the preceding section, shall be deemed guilty of a felony, and upon conviction thereof shall be fined in any sum not exceeding five hundred dollars, and imprisoned in the penitentiary not less than one nor more than five years.

⁹ See ACLU news release No. 116, Mar. 22, 1965.

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

¹¹ *Id.* at 739, 198 P. 2d at 33-34.

Church . . . [who] maintain[ed] that since the church has no rule forbidding marriages between Negroes and Caucasians, they [were] entitled to receive the sacrament of matrimony."¹² That assertion of the petitioners—what religion permits, secular law cannot prohibit—can hardly avoid calling to mind *Reynolds v. United States*.¹³ There the accused, convicted of bigamy, asserted to the Supreme Court that he was a member of a religious sect (The Church of Jesus Christ of Latter-Day Saints, commonly called the "Mormon Church")¹⁴ which not only permitted but even imposed upon its male members, "circumstances permitting,"¹⁵ the duty of polygamy. The Court affirmed the judgment of conviction. While its attempted distinction between religious beliefs and religious acts invited—and received¹⁶—criticism, the Court's decision in *Reynolds* does indicate that in the United States when religious tenet and secular law conflict, secularism usually predominates. That indication alone casts considerable doubt on the validity of petitioners' assertion in *Perez*. The result in *Reynolds* suggests that the assertion of petitioners in *Perez* constituted a *non sequitur*: to say that a church *does* not prohibit certain conduct, therefore secular law *cannot*, assumes the point at issue, *i.e.*, that the law violates constitutionally protected religious freedom, the very assumption negated by *Reynolds*. As Justice Traynor noted, "If the miscegenation law under attack . . . is directed at a social evil and employs a reasonable means to prevent that evil, it is valid regardless of its incidental effect upon the conduct of particular religious groups."¹⁷

It may be worthwhile to contemplate the potential effects which would have flowed from a judicial decision that the California statute was unconstitutional on the freedom of religion ground asserted by the petitioners. Since their assertion was based upon membership in the Catholic Church, where marriage is a sacrament, presumably their position was that the statute was unconstitutional as applied to them. Suppose the court had so held. Suppose, too, that after such a holding, two atheists, one white and one Negro, sought a marriage license in California and were refused because of the miscegenation statute. If the applicants petitioned the court and if the court stood by its holding and reasoning in the prior case, presumably it would not find the statute unconstitutional as to the two atheists since they were not denied "the sacrament of marriage." Such a decision, following the prior holding, would raise a neat constitutional question in itself. If a court by its

¹² *Supra* note 10, at 713, 198 P. 2d at 18.

¹³ 98 U.S. 145 (1878).

¹⁴ *Id.* at 161.

¹⁵ *Ibid.*

¹⁶ KURLAND, RELIGION AND THE LAW 22 (1962). Demonstrative of the perils of publication, whether judicial decision or legal study, is a critical review of Professor Kurland's book. Freedman, Book Review, 9 How. L. J. 92 (1963). Professor Freedman's review begins: "This is a disappointing book."

¹⁷ *Supra* note 10, at 713, 198 P. 2d at 18.

decisions interpreting a statute permits the interracial marriage of two Catholics (or members of any religious sect recognizing the sacrament of marriage) and prohibits the interracial marriage of atheists, hasn't that court violated the establishment clause of the Constitution?¹⁸ Has not it provided an advantage, and therefore an inducement, to members of organized religious sects which is not available to nonmembers? Of course, the clause designates as the acting body upon which the restriction operates the United States Congress. Judicial opinions have made it clear that the restriction applies equally to state legislative bodies;¹⁹ but does it apply to decisions of state courts? By combining the facts that (1) court action may comprise state action²⁰ and (2) in our hypothetical situation the court action consisted of determining the validity and applicability of legislation, it seems not too far-fetched to conclude that such judicial action might be found to violate the establishment clause. And the atheists denied the right to marry probably would have standing to raise the constitutional question. All in all, petitioners' contention that the California miscegenation statute be deemed violative of the free exercise clause seems to be something less than a perfect ground for decision.

Another ground suggested by Justice Traynor in support of his conclusion that the statute in *Perez* was unconstitutional rested on his determination that it was "too vague and uncertain to constitute a valid regulation."²¹ While vagueness and uncertainty are potential deficiencies usually associated with criminal statutes, Justice Traynor asserted the oppositeness of these deficiencies "to laws governing fundamental rights and liberties."²² Since he found marriage to be "a fundamental right of free men,"²³ Justice Traynor concluded that the California statutory scheme was "too vague and uncertain to be upheld as a valid regulation of the right to marry."²⁴ The language of the California statutes was as follows:

All marriages of white persons with Negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void.²⁵

[No] license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian, or member of the Malay race.²⁶

To determine whether or not words are so vague and uncertain as to pre-

¹⁸ "Congress shall make no law respecting an establishment of religion . . ." U. S. CONST. amend. I.

¹⁹ See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

²⁰ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

²¹ *Supra* note 10, at 728, 198 P. 2d at 27.

²² *Ibid.*

²³ *Supra* note 10, at 714, 198 P. 2d at 19.

²⁴ *Supra* note 10, at 731, 198 P. 2d at 29.

²⁵ Cal. Stat., 1933, c.104, p.561, repealed by Cal. Stat., 1959, c.146, p.2043, §1.

²⁶ Cal. Stat., 1905, c.186, p.182, §1; the quoted portion was omitted by Cal. Stat., 1959, c.146, p.2043, §2.

clude intelligent comprehension, and, therefore, knowledgeable action, it may be appropriate to turn to a good dictionary. Webster's unabridged dictionary offers this definition of Negro: "A person belonging to the black race. . . . *Law*—a person of African descent. In the absence of statutory definition it has been held not to include a mulatto . . . , but statutes define it differently, some even including one having any measurable trace of Negro blood."²⁷ While either of these definitions may seem inadequate or even incorrect to anthropologists, it is a "canon of statutory interpretation" (admittedly a phrase somewhat less potent than the weapon it conjures up) that where a word or phrase is subject to a technical definition different from its ordinary meaning, the ordinary meaning should prevail.²⁸ Webster's unabridged also offers definitions of Mongolians,²⁹ members of the Malay race,³⁰ and mulattoes;³¹ while these, too, may be less than adequate to anthropologists, the canon would indicate that the ordinary meanings are sufficient, even determinative.

Since it seems probable that the miscegenation case most likely to reach the Supreme Court will involve a white-Negro marriage, let us direct attention to the term "Negro." The California statute prohibits a white person from marrying a Negro or a Mulatto. If Mulatto is taken to mean "the first generation offspring of a pure Negro and a white"³² it would appear to be a reasonable conclusion that the statute prohibits a white person from marrying anyone who is one-half or more Negro. That seems plain enough, bearing in mind that it may ignore the "popular use" of the word mulatto, conceivably contrary to the canon of construction above noted.

In some other states, the word "Negro" as used in miscegenation statutes is defined within the statute.³³ In those cases it may be even more difficult to hold the word unconstitutionally vague and uncertain, putting aside the difficulties of proof of the necessary amount of "Negro blood." In short, vagueness and uncertainty may leave something to be desired as the foundation supporting a decision that a miscegenation statute is unconstitutional.

How about due process? Does that offer an appropriate basis for holding a miscegenation statute unconstitutional? Justice Traynor wrote: "The due process clause . . . protects an area of personal liberty not yet wholly delimit-

²⁷ WEBSTER'S NEW INTERNATIONAL DICTIONARY 1638 (2d ed. 1939). A portion of the entire definition is quoted.

²⁸ *Nix v. Hedden*, 149 U.S. 304 (1893); *Bubar v. Dizdar*, 240 Minn. 26, 60 N.W. 2d 77 (1953).

²⁹ *Supra* note 27, at 1583.

³⁰ *Supra* note 27, at 1488.

³¹ *Supra* note 27, at 1608.

³² *Ibid.* It should be noted, however, that the definition includes the following: ". . . in popular use, any person of mixed Caucasion and Negro blood."

³³ "In five states, the prohibition includes persons with 1/6 or more Negro blood, in six, with 1/8 or more, in one, with 1/14 or more, and in one, with 1/16 or more." HARPER & SKOLNICK, PROBLEMS OF THE FAMILY 100 (rev. ed. 1962).

ited."³⁴ (Just nine years after the adoption of the fourteenth amendment, the Supreme Court prophetically stated that "difficulty may be experienced in giving to those terms [the due process clause] a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden. . . ." Obviously the difficulty persists; it probably is inherent in the nature of the clause.³⁵ That sentence of Justice Traynor's is followed by a two-sentence quotation from the United States Supreme Court's opinion in *Meyer v. Nebraska*,³⁶ an affirmation that marriage "is a fundamental right of free men,"³⁷ and finally: "there can be no prohibition of marriage except for an important social objective and by reasonable means."³⁸ And that ends that paragraph of Justice Traynor's opinion; the next paragraph begins: "No law within the broad areas of state interest may be unreasonably discriminatory or arbitrary."³⁹ That kind of language sounds more like the kind usually employed in a discussion of equal protection, rather than due process. Of course, candor compels recognition of the (legal) fact that the two clauses are intimately connected and, frequently, separable only by the most painful and sometimes artificial kind of excision. After all, both clauses are part of section 1 of the fourteenth amendment. In fact, except for convenience and ease of verbal or written expression, it may even be inappropriate to refer to them as separate clauses. "Although the equal protection clause is the vehicle the Court utilizes when state governments impose invidious racial discriminations, it is evident that the concept of equality enunciated in that clause is increasingly considered to be part of the larger, all-embracing concept of due process."⁴⁰ However, remembering our purpose to be as specific as possible in defining constitutional tests for miscegenation statutes, the "all-embracing concept of due process" probably is not the most definitive test by which to determine the validity of miscegenation statutes.

³⁴ *Supra* note 10, at 714, 198 P. 2d at 18.

³⁵ *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877).

³⁶ 262 U.S. 390 (1923). In *Meyer*, the court held that a statute prohibiting the teaching in school of any modern language other than English to children below the tenth grade was violative of the fourteenth amendment. In discussing the scope of due process protection, the Court noted:

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 contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. *Id.* at 399. (Emphasis added.)

³⁷ *Supra* note 10, at 714, 198 P. 2d at 19.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Miller, *An Affirmative Thrust to Due Process of Law?* 30 GEO. WASH. L. REV. 399, 413 (1962).

That leaves equal protection—the most likely critical battleground for the ultimate determination. Of course, the mere designation of a class less than the whole to be subjected to special or restrictive state action does not violate the equal protection clause. Violation occurs only when the description or designation is unreasonable or the action inappropriate in light of the purpose to be accomplished by the statute. However, where the statute involved embodies a racial classification, there must be demonstrated an “overriding statutory purpose requiring the proscription of the specified conduct when engaged in by a white person and a Negro, but not otherwise.”⁴¹ What are some of the purposes likely to be proffered by those advocating the validity of miscegenation statutes?

It is conceivable (but, hopefully, unlikely) that one ground may be an alleged mental inferiority of colored people. Certainly, a state has a right to prohibit or impose restrictions upon the right of mentally defective persons to marry. But is a prohibition of interracial marriage a reasonable means of accomplishing that end? The answer seems to be patently negative. The appropriate way to avoid the supposed evil consequences of a mentally defective person entering into marriage is to prohibit marriage to those individuals falling below the acceptable mental level.⁴² Conceivably (but again, hopefully, unlikely), another ground which may be asserted in support of miscegenation statutes is an alleged higher incidence among Negroes of certain loathsome, contagious diseases which may be passed on to spouse or offspring. Again, a state has a right to prohibit or impose restrictions upon the right of persons with such diseases to marry. But is the prohibition of interracial marriage a reasonable means of accomplishing that end? Again, the answer seems to be patently negative. The appropriate way to avoid the supposed evils of such persons entering into marriage is to prohibit marriage to those having such diseases.⁴³ In each of these instances, the description or

⁴¹ *McLaughlin v. Florida*, *supra* note 1, at 192.

⁴² For example, N. Y. DOM RELS. LAW §7 provides:

A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto: . . . Is incapable of consenting to a marriage for want of understanding. . . .

PA. STAT. ANN. tit. 48, §§ 1-5 (1953) provides:

No license to marry shall be issued by any clerk. . . if either of the applicants for a license is weak minded, insane, of unsound mind, or is under guardianship as a person of unsound mind.

⁴³ WIS. STAT. ANN. § 245.06 (1917) provides:

All persons making application for license to marry shall submit to an examination for the presence of any venereal disease. . . [A] certificate of negative finding as to each of the parties . . . shall be filed with the county clerk at the time application for a license to marry is made. . . .

Only three states, North Carolina, North Dakota, and Washington, prohibit the marriage of persons having tuberculosis “in the infectious stages” (North Carolina), or “in its advanced stages” (North Dakota and Washington). . . . Delaware prohibits the marriage of a party who has any “communicable disease the nature of which is unknown to the other party;” Indiana prohibits the marriage of any person who is “afflicted with a

designation of the class in terms of race is patently too broad for, or more likely, totally unrelated to the alleged purpose to be accomplished. In other words, the designation of the class is unreasonable, hence violative of equal protection. Regardless of any statistics which might be offered to "prove" an alleged mental inferiority or abnormal incidence of certain diseases on the part of Negroes, the vast number of Negroes with average or higher than average mental ability and without such diseases, coupled with the relative ease of prohibiting marriage specifically to those persons afflicted with mental weakness or designated diseases, makes it clearly unreasonable to bottom miscegenation statutes on a legislative purpose to preclude mental defectives or diseased individuals from marrying. The Court probably will not, and undoubtedly should not, waste much time or energy in disposing of both of these grounds.

Those urging the validity of miscegenation statutes may assert that the statutes are intended to protect the parties to such a marriage from economic sanctions likely to be imposed by the community, or some part of the community. That such economic penalties may be inflicted upon those entering a racially mixed marriage seems to be recognized even by the parties to the marriage. "[T]hey are fearful of losing their jobs and usually conceal the fact of the marriage to one of another race."⁴⁴ It may be argued that there is a legitimate state interest in prohibiting such marriages for the purpose of eliminating such economic sanctions and thereby reducing the number of potential indigents the state may be required to support or to assist financially.

There would seem to be at least a couple of appropriate responses to such an argument. First, it would be somewhat unusual if the state had the power to protect presumably competent individuals from their own actions. If two people of different races, otherwise competent to intermarry, decide to do so regardless of potential economic sanctions, it should require an overwhelming state interest to justify prohibition of the marriage on economic grounds. After all, competent adults generally are considered capable of deciding whether or not to act—even where the act might waive some constitutional right. For example, an accused in a criminal proceeding may waive his fifth amendment protection and testify; presumably one may submit to an illegal search and seizure and, by not objecting, permit the fruit of such a search to be admitted in evidence against him; and an accused may waive his right to a speedy trial—perhaps by mere failure to demand it. Similarly, it would seem that two competent adults should be deemed capable of intermarrying with knowledge that the marriage may affect adversely their economic positions.

transmissible disease;" and in Pennsylvania there is, indirectly, such a prohibition in the form of a requirement that upon application for a license the parties must declare that they do not have any transmissible disease.

See I VERNIER, *AMERICAN FAMILY LAWS* 199 (1931).

⁴⁴ HARPER & SKOLNICK, *supra* note 33, at 103.

Of course, one might assert that when the adverse economic effects result in an additional tax burden for the state, the state has a right to act. Perhaps. But what kind of action may it take? Here lies the second response to the argument. Since the portended economic restrictions would be imposed by others than the parties to the marriage (and remembering that marriage is a “fundamental right”), perhaps appropriate state action would be a statutory prohibition of imposing economic sanctions based on the race of a spouse, rather than prohibition of the marriage. Even recognizing that a “remedy” or “preventive” need not be the best possible in order to pass an equal protection test, weighing a statutory prohibition of marriage against a statutory prohibition of economic penalties imposed because of the marriage strikes such an uneven balance that the former method (“device” almost crept in) of preventing an additional state tax burden would seem to be so unreasonable as to violate the equal protection clause. The potential indignity of the parties to racially mixed marriages seems inadequate justification for miscegenation statutes.

What, then, of the adverse social effects likely to be visited upon the parties to such a marriage? Do these provide an appropriate basis for prohibiting the marriage? It may be fair to assume that a racially mixed marriage will engender a certain degree of adverse social reaction. “The white person usually cuts all connections with former friends and the Negro also runs into criticism from members of his own race, as well as intensified hostility from white people.”⁴⁵ Should this ostracism, criticism, and hostility be deemed ample justification for prohibiting such marriages in order to “protect” the parties? Just as competent adults should be deemed capable of deciding whether or not to act in the face of potential economic burdens, so too should they be permitted to act in the face of adverse social reaction. Indeed, if adverse social reaction is to be considered a sufficient basis for restrictive legislation, bow ties and mustaches may be on the way out—legally as well as sartorially. After all, many people dislike either or both. Some people “don’t trust a man with a mustache,” and some feel bow ties are an affectation. Imagine the hostile reaction a mustachioed man with a bow tie could engender.⁴⁶ To the rather obvious absurdity of legislation prohibiting lip and neck wear—and its probable invalidity—should be added another thought: the right to marry may be a bit more fundamental and important than the right to wear a mustache or a bow tie.

Suppose, however, the social hostility aroused by a racially mixed marriage is sufficiently great to threaten peace and good order. Is there not, then, sufficient justification for state action? By all means. However, appropriate

⁴⁵ *Ibid.*

⁴⁶ As a demonstration of objectivity, the author wishes to note that he wears neither mustache nor bow ties.

state action should consist of enforcement of existing laws aimed at maintaining tranquility and, if necessary, additional laws imposing sanctions upon those who would threaten or actually commit harmful or disorderly acts as a result of a racially mixed marriage. Statutory prohibition of such marriages as a mode of preserving tranquility makes no more sense than (and, bearing in mind the “fundamental right” of marriage, even less sense than) statutory prohibition of bow ties and mustaches.

In short, as to the parties to a racially mixed marriage, social hostility would appear to be inadequate justification for state action, unless and until the hostility threatened good order. Appropriate state action should be aimed at those threatening good order; prohibition of racially mixed marriages seems an inappropriate and unreasonable manner of avoiding disorderly conduct.

We have noted that economic burdens and social reactions growing out of racially mixed marriages conceivably could become sufficiently serious to justify state action aimed at those who would impose the burdens or threaten the peace. Adverse economic and social reactions of less magnitude would seem not to justify state action; rather they are potentials to be considered by the parties contemplating such a marriage, and, if the parties are willing to risk or endure them, as competent persons they need no state “protection” in the form of miscegenation statutes.

But what of the children of racially mixed marriages? Here lies what probably will be the strongest area of argument for those asserting the validity of miscegenation statutes. First we must put aside such nonsense as this

It is . . . a well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those which forbid the intermarriage of blacks and whites. . . .⁴⁷

as being unworthy of comment, except to note that scientifically there seems to be no fear that children of racially mixed marriages will be unable to procreate—although one can hardly help but wonder why that thought should have caused concern to the author of the language quoted above.

More to the point, and much more likely to be argued by those supporting miscegenation statutes, is the likelihood that children of such marriages will suffer economically and socially. Unlike the parties to the marriage, potential offspring are not competent to consider these facts before acting; they may be objects of economic and social adversity without the opportunity of deciding whether or not to risk or endure such adversity. There seems to be some respectable authority for the proposition that such children may face adversity:

⁴⁷ *State v. Jackson*, 80 Mo. 175, 179 (1883).

The children of a mixed marriage have a difficult adjustment to make. In the first place, they are categorized by the white community as Negroes and are therefore subjected to general discriminatory treatment. Furthermore, certain myths have arisen concerning mulattoes which add complexity to their relationship to the white world. And in addition, the child may find that he is unwelcome among his own white relatives.

The status of individuals of mixed blood in the Negro community is more difficult to generalize and is somewhat paradoxical, containing elements of stigma and higher social status. The Negro community attaches some slight stigma to first generation offspring of interracial marriages, but the feeling is not strong, and the child may even become slightly boastful of his mixed parentage, feeling that he can at least say that his white blood was legally acquired. Furthermore, because of the large number of Negroes with white blood, the stigma can only last one generation at the most. On the positive side is the fact that Negroes place lighter individuals in a higher social strata and frequently give them a preferred position in the Negro community.

The child of a mixed marriage shares certain psychological problems with all persons of mixed blood, resulting from the fact that personality is to a significant extent the function of a group status and of the individual's status within the group:

"The mixed blood is an unadjusted person. His immediate group has no respected place in society. In ideals and aspirations he is identified with the culturally dominant group; in social role and cultural participation he is identified with the excluded group. He is, in consequence, a man of divided loyalties. * * * The mixed blood's hysterical and insistent knocking at the white man's door is a familiar sound in every biracial situation."

He tends sentimentally to idealize the culturally dominant group and seek recognition from and admission to it. Yet he is branded socially by his Negroid physical characteristics. This conflict between the mulatto's wishes and the requirements of the social order may lead to compensatory personality characteristics—for example, over-compensation, formalism, bohemianism, egocentrism, or introversion. He can best find a wholesome personality by identifying himself wholly with the Negro group, or by passing, if he is able.⁴⁸

Conceding that potential offspring of a racially mixed marriage (unlike their parents) lack that moment in time which to make a knowledgeable decision on the risks involved, consider the validity of miscegenation statutes as means to "protect" such potential offspring. Insofar as *economic* adversity is concerned—or more specifically, the inability to secure appropriate employment—it would seem that proper state action should be aimed at those who would discriminate against offspring of racially mixed marriages. Legislation to accomplish that purpose seems as practical and wise as existing legislation

⁴⁸ *Supra* note 33, at 104-05. Internal footnotes have been omitted from the quotation.

aimed at barring racially discriminatory employment practices in general. It certainly would appear more reasonable than solution of the problem by eliminating such children—the effect of miscegenation statutes. The latter solution is about as “reasonable” as prohibiting child labor by eliminating children.

Similarly, social adversity, to the extent it may be connected with substandard housing, could be eliminated by enforcement, or enactment and enforcement, of fair housing legislation.

But what of the more subtle, sophisticated, yet probably more invidious psychic effects on the offspring of racially mixed marriages? Assuming such offspring may be “unadjusted” to the extent that undesirable “personality characteristics—for example, overcompensation, formalism, bohemianism, egocentrism, or introversion” may result, are miscegenation statutes a justifiable preventive device? To determine their justification, *i.e.*, reasonableness in an equal protection sense, several factors ought to be considered.

First, the protection of such offspring from these social adversities must be premised on a legislative prediction that the factors which may have caused these evils in the past will continue to exist in the future. In a sense, of course, all legislation is bottomed on a prediction of future conditions. Usually, past experience and existing facts form a reasonably sound basis for such predictions. It may be so with problems confronting the offspring of racially mixed marriages. On the other hand, it may be that comparatively recent advances in assuring rights for colored people have made past experience obsolete and existing facts obsolescent, at least as workable guides for predicting the future in the area of race relations. Assuming this to be so—for the moment, at least—protection of potential offspring of racially mixed marriages from future social adversities may lack a reasonable factual basis, or rest upon a crumbling foundation now too weak to support a prohibition of marriage.

Another line of inquiry which may prove helpful is one directed at a statutory remedy or preventive aimed at those who would inflict such social adversity. It was suggested earlier that legislation aimed at those who would inflict economic burdens on the parties to a racially mixed marriage or their offspring would be preferable to legislation prohibiting such marriages; in fact, it was suggested that it would be so clearly preferable that the latter legislation would be unreasonable. Could legislation aimed at those responsible for the social adversities confronted by offspring of racially mixed marriages be enacted? The question is asked from a constitutional rather than a political point of view. If the conduct or conditions responsible for these adversities is subject to legislative remedy or elimination, such legislation is so far preferable to statutes prohibiting marriage (a “fundamental right”), as to make miscegenation statutes unreasonable. There is at least an inkling in

the Supreme Court cases⁴⁹ upholding the validity of Title II of the Civil Rights Act of 1964⁵⁰ that such conduct is an appropriate area for legislative action. While the Court emphasized the power of Congress over commerce, presumably the state legislatures have somewhat similar power over wholly intrastate conduct or conditions; a power usually referred to as "the police power," whatever that amorphous phrase may encompass. Justice Goldberg's concurring opinion comes very close to a flat statement that social discrimination justifies legislative action:

The primary purpose of the Civil Rights Act of 1964, however, as the Court recognizes, and as I would underscore, is the vindication of human dignity and not mere economics. The Senate Commerce Committee made this quite clear:

"The primary purpose of * * * [the Civil Rights Act], then, is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues."⁵¹

This language intimates rather clearly that social or psychological adversity may indeed serve as an appropriate basis for legislative action. Does all this suggest that the psychological harm which may be inflicted upon children of mixed marriages justifies state legislative action in the form of miscegenation statutes? Only by a clear perversion of reasoning. If these psychic evils comprise an appropriate basis for legislative action, that action should be directed at those who would inflict them, rather than at the innocent objects of the evils. Just as legislation imposing sanctions upon those who would discriminate economically against children of mixed marriages is so clearly a more reasonable legislative activity than legislation ultimately preventing the conception of the children, so, too, is legislation imposing sanctions upon those who would inflict psychic harm on such children clearly more reasonable than legislation preventing their conception. Consequently, legislation eliminating such children as a means of eliminating the psychic harm should be deemed violative of the equal protection clause.

What if the conduct and conditions responsible for these social adversities

⁴⁹ *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

⁵⁰ 78 Stat 241, 243, §§201-07 (1964).

⁵¹ *Heart of Atlanta Motel, Inc. v. U.S.*, *supra* note 49, at 291-92.

and psychic injuries are not legitimate objects of legislative action? Suppose they are too personal and too subtle to be regulated practicably or constitutionally by statute. What, if anything, should be done about them? To answer this question, it would be helpful to examine some of the causes and effects of the conduct and conditions. They affect a potential class of persons (offspring of racially mixed marriages) each of whom *may* be subjected to subtle, personal pressures which *may* lead to psychological disorders, and they will be caused by a class of persons which, because of group pressures operating upon its members, will impose social adversity upon the children of racially mixed marriages. In what ways may the two groups be distinguished? The children are the objects of the adversity; the other group is the originator of that adversity. The psychic disorder which may be suffered by the offspring is potential only; it may occur or it may not. If it does, it undoubtedly will affect only a portion of the class, and how substantial that portion is rests primarily on conjecture. As to the group which would impose the evil, the psychic pressure is present. Imposition of social or psychological adversity upon racially mixed offspring is a manifestation of its existence, and, while this latter group may comprise only a portion of the state's total population, each of its members by his conduct manifests the disorder. If one of these groups is to be eliminated, which should it be? Of course, neither should be. Rather, those who would impose psychic injuries upon such offspring should be educated to realize the personal reasons for the hostility. There should be demonstrated to them the lack of factual or reasonable bases for their hostility. Their fears should be mitigated by facts. And if they are not wholly reconciled by such education, demonstration, and mitigation, they should be compelled to live in the world inhabited by most of us: a world with great and many pleasures but not entirely free from irritations and, on occasion, rather painful, abrasive irritations. Removal of one of these irritations by state action which has the effect of prohibiting interracial marriage and thus eliminating an entire class of people is an unreasonable palliative; its patent unreasonableness as a catharsis makes it violative of the equal protection clause.

In brief, I believe the equal protection clause will be the primary battleground when the Court rules on the constitutionality of miscegenation statutes. Moreover, I believe the Court will find them to be unconstitutional for the reasons sketched out above—and without using many more words than there are in this brief article.