IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 395

RICHARD PERRY LOVING, ET UX.,

Appellants,

v.

VIRGINIA,

Appellee.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF FOR APPELLANTS

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Preliminary Statement

This important case presents the question whether the United States Constitution invalidates those laws of Virginia which prohibit and penalize the marriage of a man and a woman and their subsequent living together simply because one of the couple is Negro and the other is white. It gives this Court an appropriate opportunity to strike down the last remnants of legalized slavery in our country—the anti-miscegenation laws of Virginia and sixteen other states which ban Negro-white marriages. This Court has never ruled on the constitutionality of the anti-misce-

genation laws. No other civilized country in the world has such laws except the Union of South Africa.

Citation to Opinions Below

The opinion of the Circuit Court of Caroline County, Virginia (R. 8) is not officially reported. The opinion of the Supreme Court of Appeals of Virginia is reported at 206 Va. 924, 147 S. E. 2d 78 (1966) (R. 19-27).

Jurisdiction

On January 6, 1959, appellants, who were represented by counsel, pleaded guilty and were convicted in the Circuit Court of Caroline County of violating Virginia's anti-miscegenation* statutes. The specific charge in the indictment (R. 5-6) was that they left Virginia and contracted a miscegenetic marriage in the District of Columbia with the intention of returning to and actually returning and cohabiting as man and wife in Virginia in violation of Va. Code § 20-58. They were each sentenced to one year in jail but their sentences were suspended by Judge Leon M. Bazile for a period of twenty-five years, upon the condition that they immediately leave Caroline County and the State of Virginia and not return together or at the

* The term "miscegenation", derived from the Latin "miscere" (to mix) and "genus" (race), was coined in an anonymously published political pamphlet, "Miscegenation: The Theory of the Blending of the Races, Applied to the American White Man and Negro". It was written by Democrats David Goodman Croly and George Wakeman, primarily in order to use the race issue in the 1864 Presidential election by attributing the pamphlet's favorable views on racial intermixing to the Republicans. BLOCH, MISCEGENATION, MELALEUKATION AND MR. LINCOLN'S DOG 37-42 (Schaum Publ. Co., N. Y. 1958); S. Kaplan, "Miscegenation Issue in the Election of 1864", XXXIV *Journal of Negro History* 277 (July, 1949).

same time to the county or state for twenty-five years (R. 6).

On November 6, 1963, appellants filed a Motion to Vacate Judgment and Set Aside Sentence (R. 7) in the Circuit Court of Caroline County which was denied by an Order of Judge Bazile on January 22, 1965 (R. 17).

Appellants then appealed to the Supreme Court of Appeals of Virginia which heard the case on the merits. On March 7, 1966, the Supreme Court of Appeals of Virginia affirmed the convictions of appellants, set aside their sentences,* and remanded for further sentencing not inconsistent with its opinion (R. 28). However, on March 28, 1966, the Supreme Court of Appeals of Virginia issued an Order staying execution of its judgment of March 7, 1966, so that appellants "may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for appeal to review the judgment of this Court" (R. 28) (Omitted in printing).

Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Appeals of Virginia on May 31, 1966 (R. 29). Jurisdiction of this Court rests upon 28 U. S. C. § 1257 (2). *Williams* v. *Bruffy,* 96 U. S. 176 (1877); *Largent* v. *Texas,* 318 U. S. 418 (1943); *Griswold* v. *Connecticut,* 381 U. S. 479 (1965). Probable jurisdiction was noted December 12, 1966 (R. 32).

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* The highest Virginia court held that the condition imposed by Judge Bazile in suspending the sentences was unreasonable since cohabitation in Virginia by the Lovings, as man and wife, which the highest Virginia court termed "the real gravamen of the offense charged" against them, could be prohibited without preventing appellants from returning together to the State.

Constitutional and Statutory Provisions Involved

1. Petitioners were convicted of violating VA. CODE ANN. § 20-58 (1950) (Vol. 4, p. 491), which provides:

> § 20-58. *Leaving State to evade law.*—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.

2. This case also involves:

(i) VA. CODE ANN. § 20-59 (1950) (Vol. 4, p. 492), which provides:

> § 20-59. *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.

(ii) VA. CODE ANN. § 20-57 (1950) (Vol. 4, p. 491), which provides:

> § 20-57. *Marriages void without decree.*—All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process.

(iii) VA. CODE ANN. § 20-54 (1950) (Vol. 4, p. 489), which provides:

> § 20-54. *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 regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter.

(iv) VA. CODE ANN. § 1-14 (Supp. 1964) (Vol. 1, p. 12), which provides:

> § 1-14. *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.

3. This case also involves the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

Questions Presented

1. Do the Virginia anti-miscegenation laws violate the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution?

2. Can a State, either by its criminal or civil law, constitutionally prohibit and penalize a marriage between and cohabitation by two of its residents because one of them is Negro and the other is white?

Statement of the Case

On or about June 2, 1958, Mildred Jeter, a Negro female, and Richard Perry Loving, a white male, were lawfully married in the District of Columbia pursuant to its laws. There is no dispute here that Mrs. Loving is a "colored person" and Mr. Loving is a "white person" within the definitions of those terms in the Virginia Code or that, at all times relevant to this litigation, the Lovings were residents of Virginia (R. 20).

Shortly after their marriage, appellants returned to Virginia and established their marital abode in Caroline County. On July 11, 1958, warrants were issued charging them with attempting to evade the Virginia ban on interracial marriages (R. 2). Thereafter, a grand jury of Caroline County indicted them in the following manner:

> The said Richard Perry Loving, being a white person, and the said Mildred Delores Jeter, being a colored person, did unlawfully and feloniously go out of the State of Virginia, for the purpose of being married, and with the intention of returning to the State of

> Virginia and were married out of the State of Virginia, to-wit, in the District of Columbia on June 2, 1958, and afterwards returned to and resided in the County of Caroline, State of Virginia, cohabiting as man and wife against the peace and dignity of the Commonwealth (R. 5-6).

On January 6, 1959, the Lovings entered pleas of guilty, and they were each sentenced to one year in jail but their sentences were suspended, as previously explained, on the condition that they leave Virginia and not return together for twenty-five years.

After their convictions and until the summer of 1963, the Lovings took up residence in the District of Columbia. Subsequently, they retained counsel who have represented them in their attempts to reverse the judgment and set aside the sentences of the Circuit Court of Caroline County so that they may live peacefully and without fear of legal prosecution in their home state.

On October 28, 1964, appellants instituted a class action in the United States District Court for the Eastern District of Virginia, requesting that a three-judge federal court be convened to declare the Virginia anti-miscegenation laws unconstitutional and to enjoin the State officials from enforcing appellants' prior convictions.

On February 11, 1965, the three-judge federal court (Judges Bryan, Butzner and Lewis) entered an interlocutory order continuing the matter so that appellants herein might have a reasonable time to "submit [the] issue [therein] to the state courts for final determination." Since the summer of 1963 and during the pendency of all

court proceedings thereafter and at the present time, the Lovings have continued to reside in Virginia, safe from further arrest and prosecution only because the three-judge federal court's interlocutory order stated that:

> . . . in the event the plaintiffs [Lovings] are taken into custody in the enforcement of the said judgment and sentence, this court, under the provisions of title 28, section 1651, United States Code should grant the plaintiffs bail in a reasonable amount during the pendency of the State proceedings in the State Courts and in the Supreme Court of the United States, if and when the case should be carried there . . . .

Summary of Argument

This case challenges the validity of the entire Virginia statutory scheme prohibiting and penalizing miscegenation. There is no legal argument of any merit which would allow Virginia to punish its residents who enter into miscegenetic marriages within the State and, on the other hand, prohibit Virginia from punishing couples who go out of the State to evade the anti-miscegenation laws. Furthermore, any holding that the particular evasion statute, Section 20-58, under which the Lovings were convicted, is invalid on some limited ground would not do justice to appellants because their marriage under settled Virginia case law would be void. Thus they would be subject to further prosecution for the same acts that have caused the convictions from which they appeal, namely, the interracial nature of their marriage together with their cohabitation as man and wife in Virginia. Also, they would suffer the outrageous civil effects of being parties to a

void miscegenetic marriage: they would not be able to inherit from each other; their three children would be deemed illegitimate; they could lose Social Security benefits, the right to file joint income tax returns and even rights to workmen's compensation benefits—all of which are contingent upon a valid marital relationship.

Accordingly, this case requires a determination whether a State, either by its criminal or civil law, can constitutionally prohibit and penalize a marriage between two competent, consenting adults and their cohabitation within such State solely because one of them is Negro and the other is white.

The Virginia anti-miscegenation laws were originally passed primarily for economic and social reasons as means to foster and implement the institution of slavery. To a lesser extent, they were also the products of the majority white group's racial and religious prejudices and fears of the Negro. The present Virginia statutory scheme as enacted in 1924 both incorporated many past miscegenation laws and expanded the prohibitions on interracial marriage. This legislation, however, was motivated primarily by racial intolerance and antagonism directed against the Negro, and sought to preserve only the integrity of the so-called "White Race" for reasons intellectually analogous to Hitler's goal of creating a Super Race.

In light of the history, symbolic meaning and effects of miscegenation laws, their deleterious social impact on our people, both Negro and white, is immeasurable. So long as they exist they will continue to perpetuate racial bitterness and constitute an open affront to the dignity of the individual Negro American.

A correct appraisal of the legislative history of the Fourteenth Amendment shows that anti-miscegenation laws were not exempted from the application of its broad guarantees of equal protection and due process of law. These guarantees were open-ended and meant to be expounded in light of changing times and circumstances to prohibit racial discrimination.

Virginia's miscegenation laws violate the equal protection and due process clauses of the Fourteenth Amendment. The principle of *Brown* v. *Board of Education,* 347 U. S. 483 (1954)—however it is articulated—controls the constitutionality of these laws and makes clear their invalidity under the equal protection clause. Similarly, there is a constitutionally protected right of marriage which these laws arbitrarily and capriciously infringe in violation of due process of the law. While the States have an interest in and the power to regulate marriages, restrictions on marriage based on race are constitutionally suspect. The State has the burden to show an overriding legislative purpose to justify such restriction. There is no such purpose to justify anti-miscegenation laws.

ARGUMENT

I.

The validity of the entire Virginia statutory scheme prohibiting interracial marriage is at issue in this case.

The "evasion statute", Section 20-58, under which appellants were convicted supplements Virginia's basic prohibition of Negro-white marriages celebrated within Virginia (Va. Code § 20-54); it deals with Virginia residents* who leave the State with the intention of returning in order to marry in a State permitting Negro-white marriages and who then return and cohabit in Virginia as man and wife. By the terms of the evasion statute, a marriage of such a couple "shall be governed by the same law as if it had been solemnized in this State." Accordingly, such couples are (i) subject to the same criminal punishment as Negroes and whites who marry in Virginia, namely, the penalty imposed by Va. Code § 20-59 of imprisonment for not less than one nor more than five years, and (ii) their marriages are considered void under Virginia law. Va. Code § 20-57; *Naim* v. *Naim,* 197 Va. 80, 87 S. E. 2d 749 (1955) (In an annulment action, marriage held void where the Virginia couple had gone to North Carolina to evade the Virginia law). Furthermore, the terms "white person" and "colored person" in the evasion statute are comprehensible, if at

* Unlike the situation in *Naim* v. *Naim,* 197 Va. 80, 87 S. E. 2d 749, *vacated and remanded,* 350 U. S. 891 (1955), *aff'd,* 197 Va. 734, 90 S. E. 2d 849, *appeal dismissed,* 350 U. S. 985 (1956), there is no dispute that appellants were residents of Virginia at the time of their marriage and at all other times relevant to this litigation. Thus, there is no question here of the permissible application of the evasion statute to non-residents of Virginia.

all, only by use of the definitions in other provisions of Virginia's anti-miscegenation laws. (Va. Code § 20-54 defines "white person" and § 1-14 defines "colored person".)

Because appellants' miscegenetic marriage is void under Virginia law, various outrageous civil effects can result: one spouse may be prevented from inheriting from his or her mate by other heirs who prove the forbidden interracial nature of the marriage (see, *e.g., In re Shun Takahashi's Estate,* 113 Mont. 400, 129 P. 2d 217 (1942)); participants in such marriages can lose their marital rights under intestacy and similar statutes, *Stevens* v. *United States,* 146 F. 2d 120 (10th Cir. 1944), and the benefits of Social Security (see 42 U. S. C. § 416(h)(1),* of joint income tax returns, and of workmen's compensation—all of which are contingent upon a marital relationship. *Toler* v. *Oakwood Smokeless Coal Corp.,* 173 Va. 425, 4 S. E. 2d 364 (1939). A husband may desert his mate and their children without the usual legal consequences and apparently free of any obligation of support. See generally GREENBERG, RACE RELATIONS AND AMERICAN LAW 348 (1959). The Lovings' three children may be illegitimate, *Greenhow* v. *James' Executor,* 80 Va. 636 (1885), even though a Virginia statute legitimatizes the issue of void marriages, and they may lose inheritance rights in their parents' estates.

* For a recent example where a death gratuity usually payable to a widow of a U. S. military serviceman was not paid because the validity of anti-miscegenation laws remains in doubt see the letter of the Assistant Comptroller General of the United States dated January 6, 1965, which refused to authorize payment of arrears of pay and a death gratuity to the Negro widow of a deceased white soldier because the validity of their miscegenetic marriage which occurred in Texas "cannot be resolved on the basis of the current judicial decisions . . . " as quoted in Seidelson, *Miscegenation Statutes and the Supreme Court: A Brief Prediction of What the Court Will Do and Why,* CATHOLIC U. L. REV. 156, 157 (1966).

Even if there were no evasion statute (or if some technical ground could be found to invalidate only the evasion statute and leave the rest of Virginia's anti-miscegenation scheme in effect), appellants' situation would not be significantly changed. Under Virginia law, their marriage is void for both criminal and civil law purposes because Virginia follows the established conflict of laws principle that the state of the domicile of the parties at the time of their marriage will refuse to recognize its validity if the marriage is offensive to such State's public policy. *Kinney* v. *Commonwealth,** 71 Va. 858 (1878); *Greenhow* v. *James' Executor,*** 80 Va. 636 (1885); See generally RESTATEMENT, CONFLICT OF LAWS §§ 133-134 (1934); RESTATEMENT (SECOND) CONFLICT OF LAWS § 132 (Ten. Draft No. 4-1957); Taintor, *Marriage in the Conflict of Laws,* 9 VAND. L. REV.

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* In *Kinney,* the conviction of a Negro spouse of a white woman for illegal cohabitation with her was upheld by Virginia's highest court even though the couple had been married in Washington, D. C. which recognized the validity of the marriage. The first Virginia evasion statute (Va. Acts of Assembly, 1877-78, ch. VII § 3 at p. 302) relating to Negro-white marriages had been enacted but was not in effect with respect to this case. Judge Christian in his opinion said that " . . . without such statute, the marriage was a nullity . . . denounced by the public law of the domicile [Virginia] as unlawful and absolutely void . . . the law of the domicile will govern in such case, and when they return, they will be subject to all penalties, as if such marriage had been celebrated within the state whose public law they have set at defiance . . . connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion." At 865-66, 869.

** In *Greenhow,* a miscegenetic marriage valid where performed in the District of Columbia was deemed void under Virginia law in a case holding the eleven children of such marriage to be illegitimate. This holding with respect to the nullity of such a marriage was incorporated into a statute in 1887 by means of a provision that such marriages of Virginia residents outside of Virginia were to be governed by the same law as if the marriages were solemnized in Virginia. VA. CODE ANN. § 2253 (1887).

607, 627-29 (1956). Thus the same civil effects of the marriage would result and also appellants would be subject to criminal prosecution for illegal cohabitation,* *Kinney* v. *Commonwealth, supra,* § 18.1-193 (VA. CODE ANN. 1950, Vol. 4, p. 253), or fornication, *McPherson* v. *Commonwealth,* 69 Va. 939 (1877), § 18.1-188 (VA. CODE ANN. 1950, Vol. 4, p. 253), or perhaps both.

The reality of Virginia's statutory scheme prohibiting miscegenation is clear. Both the evasion statute (§ 20-58) and the basic prohibition of miscegenetic marriages (§ 20-54) serve and are necessary to effect the same unjustifiable purpose: to prohibit and penalize interracial marriages involving persons who after their marriage reside as man and wife in Virginia. We doubt that the basic prohibition would be invoked against a couple married in Virginia if they did not cohabit there as man and wife. Of course the evasion statute requires cohabitation as an essential element of its proscribed crime. Nevertheless, any technical distinction between the statutes is academic. The constitutionality of the evasion statute, as applied to appellants in light of Virginia's clear public policy against miscegenation and the relevant conflict of laws principle, cannot be determined separately from a determination of the constitutionality of Virginia's civil and criminal bans on interracial marriages celebrated in Virginia. There is no constitutional or other legal argument of substance which would justify allowing Virginia to deny the validity of an interracial marriage, under its civil or criminal law, if such marriage were celebrated in Virginia while pro-

* It should be noted that Virginia has no specific statute prohibiting only interracial fornication or cohabitation. See, *e.g.,* the Florida interracial cohabitation statute invalidated in *McLaughlin* v. *Florida,* 379 U. S. 184 (1964).

hibiting Virginia from penalizing the marriage if the marriage of Virginia residents took place outside of Virginia.

Accordingly, a holding that the evasion statute is invalid, on some limited ground, without reaching the basic question of the validity of Virginia's bans on miscegenetic marriages, would seem disingenuous and incorrect under the circumstances. Of even more importance, such a holding would not do justice to appellants. Their marital life has been in continuous legal jeopardy for over eight and one-half years and their marriage, under settled Virginia law, with or without the evasion statute, is void. Therefore, they would be subject to further prosecution for the same acts that have caused their prior convictions, namely, the interracial nature of their marriage together with their cohabitation as man and wife in Virginia.

II.

The history of the Virginia anti-miscegenation laws shows they are relics of slavery and expressions of racism.

To understand that the Virginia anti-miscegenation laws at issue here are both relics of slavery and expressions of modern day racism which brand Negroes as an inferior race, it is necessary to consider their history.*

As Professor Wadlington has recently noted,** it is surprising that Virginia which prides itself on the story of

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* Counsel wish to thank Mr. Frank F. Arness for the use of his unpublished thesis which deals with the history of these laws and was written in partial fulfillment of the requirements for a master's degree in history at Old Dominion College, Norfolk, Virginia.

** Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective,* 52 VA. L. REV. 1189 (1966). (Hereafter cited as "Wadlington")

how one of her early white sons married an Indian princess* today maintains one of the strictest statutory bans on racial intermarriage. Virginia has enacted a great deal of anti-miscegenation legislation beginning in the seventeenth century and spanning a period of nearly three centuries to 1932 when the last enactment on this subject was passed.

Early History

The first Negroes arrived in the colony of Virginia in 1619. Their numbers increased slowly. White indentured servants served as the principal source of manpower in the early colonial period before plantation owners recognized the value of the Negro slave. See generally BRUCE, ECONOMIC HISTORY OF VIRGINIA IN THE SEVENTEENTH CENTURY, Vol. I, Chap. IX (MacMillan & Co. 1896). As late as 1673, white servants still outnumbered Negroes by four to one. REUTER, THE AMERICAN RACE PROBLEM: A STUDY OF THE NEGRO 136 (New York: Thomas Y. Crowell Company, revised ed. 1938) (Hereafter cited as "Reuter").

Generally, indentured white servants came from the lowest social strata in England or elsewhere and the Virginia colonists considered them originally on the same level as the Indian slave or servant and the Negro. A principal difference among persons of the servant class was their tenure of service; the white servant usually served out a seven-year contract while the Negro or Indian might be enslaved for life. As a result of their common status, this class intermixed to a considerable extent both within and outside the banns of marriage. Reuter, 134-138.

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* If John Rolfe and Pocahontas were married in Virginia today, they would be guilty of violating the anti-miscegenation law. VA. CODE ANN. § 20-54.

Some of the earliest actions of the colonial government involving miscegenation reflected religious prejudice against Christian-heathen intermixing. See Bruce, *supra,* Vol. II, pp. 109-110 and Wadlington, 1191. However, with the establishment of Negro slavery, economic reasons for restricting miscegenation became dominant. Slave-owners wanted protection from the loss of their slave property through intermarriage with a free white Christian by laws that all offspring of slaves with whites, whether free or indentured servants, would be deemed slaves.

By the 1660s, illegitimate births from relationships among Negro slaves and white masters presented problems primarily relating to the status of the children. A 1662 Act provided that any child of an "Englishman" and a "negro woman" should be slave or free according to the condition of the mother. 2 Laws of Va. 170 (Hening 1823). This kind of legislation, according to some historians, led to intentional slave breeding by slave-owners.

At the time of the 1662 Act, there was nothing to prevent interracial marriages of whites and Negroes. The colonial society and the church viewed any such marriages in a disparaging manner and in some cases mobs may have acted to apply extralegal punishment to the couples. Reuter, 137.

Apparently social pressure was insufficient to prevent such marriages, for in April of 1691, the Virginia Assembly passed the first law proscribing Negro-white marriages as part of "An Act for Suppressing Outlying Slaves." 3 Laws of Va. 86 (Hening 1823). One stated purpose of this Act was to prevent "that abominable mixture and spurious issue which hereafter may arise" from interracial

unions, demonstrating that racial prejudice as well as economic reasons led to the early miscegenation laws. The free white person marrying a Negro was to be banished from Virginia forever. (Considering the practical banishment of the Lovings in 1959, Virginia's policy has not changed much since 1691.) This same Act* provided that any English white woman who had a bastard by a Negro should pay the church wardens fifteen pounds or, in default of payment, she would be indentured for a term of five years. The child in each instance would be bound out by the church wardens until he or she reached thirty years of age.

In 1705, the Assembly eliminated the banishment penalty for miscegenation and instead imposed a six-month prison sentence, without bail, and a fine. Ministers marrying such persons were also penalized and, to this day, Virginia punishes a minister who performs such a marriage by a fine, one-half of which goes to the informer. VA. CODE ANN. § 20-60 (1960).

By the end of Virginia's colonial period, Negroes with few exceptions were enslaved. Negro children by a white father were free or bond according to the condition of the Negro mother. White women, free or bond, were severely penalized for bearing a child from a miscegenetic

* The primary purpose of this Act was to authorize the capture of "negroes, mulattoes and other slaves" who hide "in obscure places killing hoggs and committing other injuries to the inhabitants" by local sheriffs and their deputies who were specifically authorized, if such slaves "shall resist, run away or refuse to deliver and surrender . . . to kill and destroy such negroes, mulattoes and other slave or slaves by gunn or any otherwaise whatsoever." If any slave were so killed, the owner was to receive "four thousand pounds of tobacco by the publique". At this time, slaves were legally considered to be personal property and treated the same as household goods, horses, cows, oxen and hogs. Bruce, *supra*, Vol. II, pp. 99-100.

union and such child was bound out in prescribed periods of servitude by the parish vestrymen. Finally, the legislature had constructed a law punishing the free white partner of a miscegenetic marriage by both imprisonment and fine.

No change of significance occurred until the Code of 1849 in which it was provided that any marriage between a white person and a Negro was absolutely void without further legal process. VA. CODE ch. 109 § 1, Vol. I at 471 (1849) (now § 20-57).

After the Civil War no essential changes were made in Virginia's anti-miscegenation laws until the enactment of the Racial Integrity Act of 1924.* However, the first evasion statute, the predecessor of Section 20-58 under which the Lovings were convicted, was passed in 1878 to deal with interracial couples leaving the State to marry in a jurisdiction which allowed their marriages and then returning to live in Virginia even though the Virginia courts had treated such marriages as void without a statute. In the same year, for the first time, the penalty imposed on a party to a miscegenetic marriage was made clearly applicable to the Negro spouse. Also, the penalty was enlarged to not less than two nor more than five years in the penitentiary.** Va. Acts of Assembly 1877-1878, ch. VII, § 8 at 302 (now § 20-59).

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* Problems with respect to the definition of racial classifications and to the civil effects of miscegenetic marriages did occur but have no specific relevance here. See Wadlington, 1195-1199.

** The final Virginia statute on this subject passed in 1932 made the crime of interracial marriage a felony but reduced the minimum term of imprisonment to one year. Va. Acts of Assembly 1932, Ch. 78 at 68 (now § 20-59).

Despite the existence of deterrent legislation, interracial sexual relationships continued and increased after the Civil War. Reuter, 141. The rising tide of mulatto offspring and the passing of many of them as whites motivated a tightening of the definition of Negro and enactment of stronger anti-miscegenation legislation. In the slave days, there had been essentially economic motivations for denying Negro slaves the legal right to marry. In fact, as previously indicated, no criminal penalties were imposed on the Negro partner of a miscegenetic marriage until 1878. With the end of slavery, unfortunately, new motivations arose which were purely racist and based on the theory that Negroes and other non-whites are members of inferior races.

Racial Integrity Act of 1924

After World War I, the United States experienced a period of intolerance and racial animosity expressed in the spread of all forms of hate groups and super-patriotic orders with dogmas of "yellow peril", "mongrelization of the white race" and "un-Americanism". In fact, at the time of passage of the Racial Integrity Act of 1924, racists predicted the destruction of the white race if Negro-white miscegenation and the tide of immigrants arriving in the United States each year were not suppressed. Earnest Sevier Cox, in his book entitled WHITE AMERICA (Richmond: White America Society, 1923), posed this alleged threat to America and suggested federally supported colonization and uniform legislation barring the mixing of the races in any form.

White racial superiority, a carry-over in the South from slavery days, formerly had rested primarily on observa-

tions by 19th century scientists and questionable Biblical texts. The authority which the new and popular science of eugenics provided for this concept was eagerly received in Virginia. Originally eugenics had dealt with the breeding of animals and the disclosure of their heredity traits. Race-conscious Americans seized upon immature conclusions of eugenicists and subjected them to an overdose of racial pride embodied in the concept of "Anglo-Saxonism". New Englanders and Southerners alike talked about "mongrelization of the white race" and "race suicide". Racial prejudice increased; "Anglo-Saxon clubs of America" sprang up throughout Virginia and sponsored legislation designed to halt the mixing of the races in Virginia.*

On February 7, 1924, on petition from these organizations, and in response to the racist sentiment of the time, a number of State senators initiated the bill which ultimately became the Racial Integrity Act of 1924, and was originally entitled *"A Bill to Preserve the Integrity of the White Race".*** Members of both houses of the General Assembly displayed a great interest in the bill. The House of Delegates invited John Powell, a renowned Virginia pianist and local racist, to speak before it on the dangers of "racial amalgamation". According to the *Richmond Times Dispatch* of February 18, 1924, the delegates selected Powell because of his knowledge of "ethnological problems and conditions in various parts of the world and

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* *Richmond Times Dispatch,* February 17, 1924, p. 6. At the time of passage of the Racial Integrity Act of 1924, there were Anglo-Saxon clubs in Virginia at the University of Virginia, College of William and Mary, Virginia Military Institute, Washington and Lee College and Randolph Macon College. Clubs could also be found at Richmond and other cities and towns of the State.

** *Journal of the Senate of the Commonwealth of Virginia* (Richmond: Superintendent of Public Printing, 1924), p. 135.

his wide acquaintance among European authorities and statesmen". Powell was very much involved in the national eugenics movement and had, himself, organized many of the Virginia Anglo-Saxon clubs which petitioned the Assembly to take action to preserve the white race. Powell stressed to a "well-filled gallery" the need to preserve the white race from contamination with non-white blood, and observed that when a white race absorbed the Negro through amalgamation its civilization disintegrated. Powell was assisted in his efforts by Dr. W. A. Plecker, the State Registrar of Vital Statistics, who supplied "vital statistics" to show confusion in Virginia concerning racial origins and the necessity for a stronger anti-miscegenation law to preserve racial integrity. *Richmond Times Dispatch,* February 13, 1924, p. 1. In response to Powell's address and the statistics of Dr. Plecker, the House introduced a bill of its own only three days after Powell's address.

Thereafter, apparently without significant debate or controversy between the Senate and the House of Delegates, the Act, technically entitled "An Act to Preserve Racial Integrity" (Va. Acts of Assembly, 1924, ch. 371), passed the Senate on February 27, 1924, and the House on March 8, 1924, and was approved by the Governor on March 20, 1924.

It in part repeated earlier prohibitions on miscegenation but also effected "a sweeping change in the scope of the law . . . by keying the miscegenation provisions to a new and very narrow definition of a 'white person'." Wadlington, 1200. Under this new definition, a white person was forbidden to marry anyone other than another white person defined to be one "who has no trace whatsoever of any

blood other than Caucasian . . . " (now § 20-54).* For the first time, Virginia prohibited the marriage of whites with Mongoloids and other non-Negro races as well as Negroes. Earnest Sevier Cox, in his book, THE SOUTH'S PART IN MONGRELIZING THE NATION (Richmond: White America Society, 1926), called the Virginia law "probably the most perfected expression of the white racial ideal since the institution of caste in India some four thousand years ago". At p. 98.

Other new provisions of the 1924 legislation which remain in force today remind one of the laws of Nazi Germany: The State Registrar of Vital Statistics was empowered to prepare a form so that persons could certify to their "racial composition" to local registrars who could issue duplicate certificates of racial composition, one for the person registering and one for the State Registrar (now § 20-50). The knowing or willful falsification of a registration certificate as to color or race was made a felony punishable by one year in the penitentiary. A marriage license was not to be issued unless the issuing official had "reasonable assurance" that the statements of the parties as to color were correct, and the Act assigned the burden of proof, if a question should arise, to the persons applying for the license (now § 20-53).

All statutes relating to racial intermarriage which were in effect in 1924 were made applicable to marriages prohibited by the new provisions. Thus the 1924 act carried forward the provision making Negro-white marriages void,

* There was an exception to this definition designed apparently to protect the descendants of John Rolfe and Pocahontas which deemed persons "who have one-sixteenth or less of the blood of the American Indian and no other non-Caucasic blood" to be white persons.

the civil and criminal applicability of the evasion provision [Section 20-58], and the criminal penalties applicable to the parties to an interracial marriage and to the minister performing the ceremony.

III.

Anti-miscegenation laws cause immeasurable social harm.

There is still another history to be told; it lurks beneath the surface of the "written" history we have examined. This is the story of what these laws have done to our entire people. Unhappily this is the familiar chronicle of race relations in our nation. Here briefly is some intimation of what the miscegenation laws—born out of oppression and hatred—contribute to our legacy.

The high degree of racial mixture that exists in the United States—estimates of the ratio of Negro Americans with at least one known white forebear run as high as 72 to 83 per cent, PETTIGREW, A PROFILE OF THE NEGRO AMERICAN 68 (1964)—has occurred predominantly in the South under illicit conditions fostered by the miscegenation laws. Of more relevance, this racial mixing was almost entirely in the context of illicit exploitative sexual intercourse; white male of Negro female. MYRDAL, AN AMERICAN DILEMMA, Chapter 5 especially at pp. 1204-1207 (1962) (Hereafter cited as "Myrdal");* CASH, THE MIND OF THE SOUTH 87-88 (1941).

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* Throughout this section, we often utilize this definitive treatise on the Negro problem in America by the eminent Swedish social economist, Gunnar Myrdal.

This history of illicit sex relationships conditions, psychologically and sociologically, the entire pattern of American race relations. Nor can its importance be overemphasized since "[t]o the ordinary white American the caste line between white and Negro is *based upon,* and *defended by,* the anti-amalgamation doctrine", and "[moreover this] . . . doctrine, *more than anything else,* gives the Negro problem its uniqueness among other problems of lower status groups, not only in terms of the intensity of feeling but more fundamentally in the character of the problem." Myrdal, 54 (our emphasis). This socio-psychological taproot of American racial prejudice is nowhere more vividly described than in Lillian Smith's great work, KILLERS OF THE DREAM, in the chapter entitled "Three Ghost Stories" (1961 ed.), and in W. J. Cash's, THE MIND OF THE SOUTH (1941).

Considering such accounts, it is difficult to avoid Myrdal's conclusion that

> [t]he fixation on the purity of white womanhood, and also part of the intensity of emotion surrounding the whole sphere of segregation and discrimination, are to be understood as the backwashes of the sore conscience on the part of white men for their own or their compeers' relations with, or desires for, Negro women. Myrdal, 591.

The Negro participant in this abnormal sex relationship did not escape psychologically unscathed. Although isolating psychogenic factors is difficult, there can be no doubt of the profound adverse effect racial discrimination has had on the individual personality traits of the Negro. See Pettigrew, *supra* at Chapter I, "The Role and Its Burdens" (1964); cf., *Brown* v. *Board of Education,* 347 U. S. 483

(1954). It is a frightful thing, to use one example, if Miss Smith is right when she claims ". . . there is a burning blasting scorn of white men growing in the minds . . . of nearly every woman of the colored race. . . ." Smith, *supra* at 109. Any social construct which can engender such group hatred and personal antagonism is wrong.

Admitting the futility of attempts to expunge the sins of the past, Virginia's anti-miscegenation laws (and those of sixteen Southern and border States) stand as a present day incarnation of an ancient evil. As such, these laws do not simply bar interracial marriage, they perpetuate and foster illicit exploitative sex relationships. Moreover, these laws are explicitly designed to that end. To fail to understand such invidious purpose is to doom the reasonable man to an unrequited search for logic, viz:

> . . . the relative license of white men to have illicit intercourse with Negro women does not extend to formal marriage. The relevant difference between these two types of relations is that the latter, but not the former, does give social status to the Negro woman and does take status away from the white man. These status concerns . . . are functions of the caste apparatus which, in popular theory, is itself explained as a means of preventing intermarriage, *the whole theory* [thus] *becoming largely a logical circle.* Myrdal, 590 (our emphasis).

The relevance of such purpose to our scope of inquiry here—the present day impact of these laws—seems clear.

Cutting through the psychological overlay and rationalizations, Myrdal explains that:

> . . . The great majority of non-liberal white Southerners utilize the dread of 'intermarriage' . . . to justify discriminations which have quite other and wider goals than the purity of the white race. . . . what white people really want is to keep the Negroes in a lower status. Myrdal, 590-91.

And enlarging on the same theme he adds:

> The persistent preoccupation with sex and marriage in the rationalization of social segregation and discrimination against Negroes is . . . an irrational escape on the part of the whites from voicing an open demand for difference in social status between the two groups for its own sake. *Ibid.*

In short, the basis of harm that makes this Court's warrant equal to the ultimate evil of these laws is that they constitute an infliction of indignity upon every person cast among others as not good enough to marry a "white person".

Paradoxical as it may seem that this most blatant ascription of inferior status is the last to be condemned by this Court, it is fitting that the opportunity to make the condemnation universal presents itself. The miscegenation laws, understood as the paradigm of "all of these thousand and one precepts, etiquettes, taboos, and disabilities inflicted upon the Negro [having the] common purpose: to express the subordinate status of the Negro people and the exalted position of the whites," Myrdal, 66, and func-

tioning chiefly as the State's official symbol of a caste system, must be dealt with accordingly.

IV.

The legislative history of the Fourteenth Amendment does not exempt anti-miscegenation laws from its application.

The only substantive argument advanced by the Commonwealth of Virginia in its Statement opposing the noting of jurisdiction by this Court was that the legislative history of the Fourteenth Amendment conclusively establishes that it was not intended to apply to miscegenation laws. Eclectic statements from the debates on the bill which became the Civil Rights Act of 1866 are used to support this thesis, which was also advanced in the School Segregation Cases, and a law review article, Pittman, *The Fourteenth Amendment: Its Intended Effect on Anti-Miscegenation Laws,* 43 N. C. L. Rev. 92 (1964). (A more recent article in support of the same thesis, which was not cited by the Commonwealth, is Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent,* 52 Va. L. Rev. 1224 (1966).)

A close examination of such statements indicates that many legislators who felt the Civil Rights Act of 1866 was not intended to reach miscegenation laws based their views on the now discredited equal application theory (later enunciated as a judicial construction of the equal protection

clause in *Pace* v. *Alabama,* 106 U. S. 583 (1883)). For example, the Commonwealth quotes Senator Trumbull as follows (at p. 8 of its Statement):

> How does this interfere with the law of Indiana preventing marriages between whites and blacks? Are not both races treated alike by the law of Indiana? Does not the law make it just as much a crime for a white man to marry a black woman as for a black woman to marry a white man, and *vice versa? I presume there is no discrimination in this respect, and therefore your law forbidding marriages between whites and blacks operates alike on both races.* This bill does not interfere with it. If the negro is denied the right to marry a white person, the white person is equally denied the right to marry the negro. I see no discrimination against either in this respect that does not apply to both. . . . (our emphasis)

But Senator Trumbull's presumption has proven incorrect; equal application of inequalities based on race is unconstitutional. *McLaughlin* v. *Florida,* 379 U. S. 184, 188 (1964).

If such legislative history—whatever its real meaning assuming one could read the minds of the legislators from the historical record—were determinative of the scope of the Fourteenth Amendment, then it might not have been applicable to school segregation, jury service and other forms of segregation. See, *e.g., Brown* v. *Board of Education,* 347 U. S. 483 (1954); *Strauder* v. *West Virginia,* 100 U. S. 303 (1880); *Norris* v. *Alabama,* 294 U. S. 587 (1935);

Bickel, *The Original Understanding and the Segregation Decision,* 69 HARV. L. REV. 1, 64-65 (1956).

A correct appraisal of the legislative history of the broad guarantees of the Fourteenth Amendment for purposes of constitutional adjudication is that they were open-ended and meant to be expounded in light of changing times and circumstances. See Bickel, *supra,* at 64 ("But the relevant point is that the Radical leadership succeeded in obtaining a provision whose effect was left to future determination".); Kelly, *Clio and the Court: An Illicit Love Affair,* 1965 SUP. CT. REV. 119, 145 (Evidence from the debates indicates that Bingham and others "hoped that the prohibitions on racial discrimination would have an open-ended character, *i.e.,* would grow through judicial interpretation and congressional legislation with the progress of time"); Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 32 (1959) (". . . the words [of the equal protection clause] are general and leave room for expanding content as time passes and conditions change"); *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 722 (1961) ("Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relations which the Amendment was designed to embrace").

In short, the applicability in 1967 of the equal protection and due process clauses to miscegenation laws cannot be ascertained by a resort to doubtful legislative history but must be determined by this Court, utilizing all appropriate means of constitutional adjudication and bearing in mind Chief Justice Hughes' admonition:

> If . . . the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—'we must never forget that it is *a constitution* we are expounding' (McCulloch v. Maryland, 4 Wheat. 316, 407) . . . *Home Bldg. & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398, 442-43 (1934).

V.

The Virginia anti-miscegenation laws are racially discriminatory and deny appellants equal protection of the laws.

There can be no doubt that the conviction of the Lovings was because Mrs. Loving is a Negro. But for this fact, and that Richard Loving is a "white person" under Va. Code § 20-54, no crime would have been committed. Except for the difference of color, the state never raised any objection to the marriage. If both had been white or both had been other than white, their marriage would be valid.

In *Brown* v. *Board of Education,* 347 U. S. 483 (1954), this Court struck down segregation in public schools as a violation of equal protection. Whether *Brown* means that (i) the Fourteenth Amendment prohibits the intentional disadvantaging of Negroes as Negroes by any form of legalized segregation (Black, *The Lawfulness of the Segregation Decisions,* 69 YALE L. J. 421 (1960)) or, (ii) there can be no rational basis for a statutory classification which stamps Negroes as inferior (Applebaum, *Miscegenation*

Statutes: A Constitutional and Social Problem, 53 GEO. L. J. 49, 86 (1965)) as the Virginia anti-miscegenation laws do or, (iii) a state statute cannot constitutionally deny Negroes the freedom to associate with whites (Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 34 (1959)), we agree with Professor Bickel that the principle of the *Brown* case should control the constitutionality of miscegenation laws. BICKEL, THE LEAST DANGEROUS BRANCH 71 (1962).

In fact, miscegenation laws seem more clearly unconstitutional than school segregation since (i) the right of two consenting, competent adults to marry each other seems even more fundamental than the right of students to attend an integrated public school, (ii) there clearly is no equal alternative and (iii) both parties to an interracial marriage wish to associate or join together as man and wife, while in *Brown,* arguably, the white students, or some of them, did not wish to associate with the Negro students.

When a Negro is denied the right, solely because he is a Negro, to marry a white woman who wishes to marry him, the law discriminates against him and denies him as well as the woman equal protection of the laws. While miscegenation laws have been upheld in the past by use of the "equal application" theory of *Pace* v. *Alabama,* that these laws do not discriminate because both whites and Negroes are prohibited from intermarrying (see, *e.g., Jackson* v. *City and County of Denver,* 109 Colo. 196, 124 P. 2d 240 (1942)), this theory " . . . represents a limited view of the Equal Protection clause which has not withstood analysis in the subsequent decisions of this Court." *McLaughlin* v. *Florida,* 379 U. S. 184, 188 (1964).

Statutory distinctions based on race alone have been struck down in many cases involving rights much less substantial than the right to marry. See, *e.g., Hamm* v. *Virginia State Board of Elections,* 230 F. Supp. 156 (E. D. Va.), *aff'd per curiam,* 379 U. S. 19 (1964) (designation of race in voting and property records); *Anderson* v. *Martin,* 375 U. S. 399 (1964) (designation of race on nomination papers and ballots); *Watson* v. *City of Memphis,* 373 U. S. 526 (1963) (segregation in public parks and playgrounds); *Oyama* v. *California,* 332 U. S. 633 (1948) (racial restriction involving alienation of land); *Takahashi* v. *Fish & Game Commission,* 334 U. S. 410 (1948) (racial restriction on commercial fishing licenses); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886) (racial restriction on licensing of laundries). And this Court has enunciated as the law of the land that:

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. *Hirabayashi* v. *United States,* 320 U. S. 81, 100 (1943).

In fact, "classification based on race alone is inherently discriminatory". *Dorsey* v. *State Athletic Comm.,* 168 F. Supp. 149, 151 (E. D. La. 1958), *aff'd per curiam,* 359 U. S. 533 (1959).

In *McLaughlin* v. *Florida, supra,* this Court held that there must be "some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by the white person and a Negro, but not otherwise",

379 U. S. at 192, and also stated, in effect, that the burden of demonstrating this overriding purpose is on the State because:

> . . . the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications 'constitutionally suspect' . . . and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose . . . 379 U. S. at 192.

At least two members of this Court have recognized that there can be no such "overriding statutory purpose" to justify a miscegenation law:

> I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense. (Mr. Justice Stewart, joined by Mr. Justice Douglas, concurring in *McLaughlin,* 379 U. S. at 198.)

The Supreme Court of Appeals of Virginia upheld the miscegenation laws in this case (R. 25) by reliance on its earlier decision in *Naim* v. *Naim,* 197 Va. 80, 87 S. E. 2d 749 (1955). In *Naim,* the purposes of these laws were set forth as follows:

> We are unable to read in the Fourteenth Amendment to the Constitution, or in any other provision of that great document, any words or any intendment which prohibit the State from enacting legislation to preserve the racial integrity of its citizens, or which denies the power of the State to regulate the marriage

> relation so that it shall not have a mongrel breed of citizens. We find there no requirement that the State shall not legislate to prevent the obliteration of racial pride, but must permit the corruption of blood even though it weaken or destroy the quality of its citizenship. . . . 87 S. E. 2d at 756.

Of course the maintenance of racial purity or integrity is a meretricious basis for these laws for there is no evidence to support the existence of so-called "pure" races. MONTAGU, MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE (4th ed. 1964); see authorities discussed in Weinberger, *A Reappraisal of the Constitutionality of Miscegenation Statutes,* 42 CORNELL L. Q. 208, 217 (1957). The idea of a pure race is a subterfuge to cloak ignorance of the phenomenon of racial variation.

Even if racial purity were a constitutionally acceptable purpose, the Virginia laws are not reasonably calculated to effect this purpose. The only race kept "pure" is the Caucasian. This is because the Virginia laws are not designed to preserve the purity of races but, as the original name* of Virginia's 1924 Racial Integrity Act indicates and its legislative history affirms, to preserve only the integrity of one group: members of the so-called "White" ** or "Anglo-Saxon Race". A person of Chinese ancestry, for example, is not included within the definition of "colored

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* "A Bill to Preserve the Integrity of the White Race." See p. 21 of this Brief.

** For a persuasive discussion of the fact that there is no white race and never has been one see "A Four-Letter Word That Hurts" by anthropologist, Morton H. Fried, in *Saturday Review,* October 2, 1965.

persons" [Va. Code § 1-14], or "white persons" [Va. Code § 20-54]. Thus the marriage of a Chinese and a "white person" would be unlawful under Va. Code § 20-54, *Naim* v. *Naim,* 197 Va. 80, 87 S. E. 2d 749 (1955). On the other hand, a marriage between a Chinese and a "colored person" would be neither unlawful nor subject to prosecution. Certainly this is not equal protection. In fact, Virginia's concept of "race", based on statutory definitions which are a combination of legal fiction and genetic nonsense, is a social rather than a scientific concept, designed to preserve the social status of Virginia's politically dominant group.

The other articulated legislative purpose is the prevention of "corruption of the blood" from racial intermixing which would "weaken or destroy the quality of its [Virginia's] citizenship". To assume this is a valid legislative purpose—as the highest Virginia court did—which justifies miscegenation laws is not enough to meet the State's burden with respect to laws which on their face discriminate on the basis of race or color. Virginia has not presented, and we submit cannot present, reputable scientific evidence to prove that a person of mixed blood is somehow "inferior" in quality to one of racial purity, assuming *arguendo* that a person of racial purity such as a pure Caucasian exists.* Most serious students of anthropology do not even consider this question a present problem for research, agreeing that the races of the world are essentially equal in native ability and capacity for civilization and that group differences are for the most part cultural and environmental, not heredi-

* Even if reliable scientific evidence could be presented to support an inferior race theory, the State's burden would not be met. The possibility of less superior but healthy progeny of interracial couples would not justify the serious restriction on personal liberty effected by miscegenation laws prohibiting interracial marriages.

tary. See, *e.g.*, THE RACE QUESTION AND MODERN SCIENCE: THE STATEMENT ON THE NATURE OF RACE AND RACE DIFFERENCES, Article 7 (UNESCO, 1952).

As for the progeny of racial intermixing, there is not a single anthropologist teaching at a major university in the United States who subscribes to the theory that Negro-white matings cause biologically deleterious results. See letter to editor from members of Department of Anthropology, Columbia University, *N. Y. Times,* December 15, 1964. On the contrary, some conclude that, because of a certain hybrid vigor, interracial marriage may be desirable and the offspring superior, citing the Hawaiian population, among others, to support this view. See SHAPIRO, RACE MIXTURE (UNESCO, 1965), and the authorities discussed in Cummins & Kane, *Miscegenation, The Constitution and Science,* 38 DICTA 24, 47-49 (1961).

We will not postulate unarticulated legislative purposes.* In the final analysis, these laws are unjustifiable relics of slavery—initially passed to foster that peculiar and distasteful institution, and re-enacted in their present form as part of the surge of racial antagonism and intolerance of the 1920's. They deny Negroes and other nonwhites equal protection of the law and stamp them as inferior citizens.

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* Judge Bazile in his opinion below gave the following religious justification for miscegenation laws which requires no comment:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix (R. 16).

VI.

The Virginia anti-miscegenation laws violate the due process clause of the Fourteenth Amendment.

Marriage is perhaps the most important and most personal of all human relationships. We think it clear that the "liberty" which is protected by the due process clause of the Fourteenth Amendment includes the right to marry. *Meyer* v. *Nebraska,* 262 U. S. 390, 399 (1922) (dictum). Justice Traynor so held in his opinion in *Perez* v. *Sharp,* 32 Cal. 2d 711, 198 P. 2d 17 (1948) (*sub nom. Perez* v. *Lippold*), which invalidated California's anti-miscegenation statute. In *Skinner* v. *Oklahoma,* 316 U. S. 535, 541 (1942), this Court described marriage as "one of the basic civil rights of man". See generally Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem,* 53 Geo. L. J. 49, 67-68 (1964).*

The recent holding in *Griswold* v. *Connecticut,* 381 U. S. 479 (1965), that the privacy of the marital relationship is a constitutionally protected freedom—whether under the rubric of a right of privacy or under the concept of ordered liberty embodied in the due process clause, *Palko* v. *Connecticut,* 302 U. S. 319 (1937)—signifies that the right to marry is itself protected from arbitrary governmental interference by the basic guarantees of our Constitution. Furthermore, the right to marry, regardless of race or color, may appropriately be deemed part of a broader constitutional freedom of association as enun-

* It should be noted that the United States has joined with other members of the General Assembly to vote in the United Nations for the adoption of the Universal Declaration of Human Rights which provides in Article 16.1:

> "Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family."

ciated in *Griswold* by Mr. Justice Douglas and previously recognized to some extent in *NAACP* v. *Alabama,* 357 U. S. 449 (1958), and *NAACP* v. *Button,* 371 U. S. 415, 430-31 (1963).

Of course the right to marry is not an absolute right and a State may restrict it in certain circumstances, for example, by imposing reasonable age and health limitations and prohibiting incestuous or polygamous marriages. The question, however, as in the equal protection area, is whether the anti-miscegenation statute has a legitimate legislative purpose and whether the manner of regulation bears a reasonable relationship to such purpose. See, *e.g., Nebbia* v. *New York,* 291 U. S. 502, 525 (1934); *Bolling* v. *Sharpe,* 347 U. S. 497, 499-500 (1954) ("Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of due process."); *Buchanan* v. *Warley,* 245 U. S. 60 (1917).

The Virginia anti-miscegenation laws have no legitimate governmental objective. Their enforcement deprives appellants of personal liberty—their right to marry—without due process of law just as it also denies them equal protection of the laws.

CONCLUSION

For the foregoing reasons, Sections 20-58 and 20-59 of the Virginia Code should be held unconstitutional, and this Court should make clear that neither Virginia nor any other State can constitutionally prohibit or penalize interracial marriages.

The elaborate legal structure of segregation has been virtually obliterated with the exception of the miscegena-

tion laws. White racists can still point to these laws to support their appeal to the ultimate superstition fostering racial prejudice—the myth that Negroes are innately inferior to whites. There are no laws more symbolic of the Negro's relegation to second-class citizenship. Whether or not this Court has been wise to avoid this issue in the past, the time has come to strike down these laws; they are legalized racial prejudice, unsupported by reason or morals, and should not exist in a good society.

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