395

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 AND APPENDIX ON BEHALF OF APPELLEE

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PRELIMARY STATEMENT

On January 6, 1959, appellants were convicted in the Circuit Court of Caroline County of leaving the State of Virginia and contracting a miscegenetic marriage in the District of Columbia with the intention of returning to—and actually returning and residing in—Virginia, in violation of Section 20-58 of the Virginia Code. Each appellant was sentenced to serve one year in jail; however these sentences were suspended for a period of twenty-five years upon the provision that appellants would leave Caroline County and

the State of Virginia at once and not return together or at the same time to the county or state within such period. Upon payment of costs, appellants were released from custody and further recognizance.

On November 6, 1963, appellants filed in the Circuit Court of Caroline County a motion to vacate the judgment and set aside the sentence therein contained. Thereafter, the trial court filed an opinion indicating its intention to deny the motion, and an order effectuating such opinion was entered on January 22, 1965. Appellants subsequently appealed from this order to the Supreme Court of Appeals of Virginia, and the cause was heard on the merits. On March 7, 1966, the Supreme Court of Appeals of Virginia entered its opinion and order (1) affirming the order of the trial court with respect to the validity of the challenged statute (2) reversing that portion of the order of the trial court upholding the validity of the sentence imposed upon appellants and (3) remanding the cause for further proceedings not inconsistent with the views expressed by the Court on the latter question. See, *Loving* v. *Commonwealth,* 206 Va. 924, 147 S.E. (2d) 78. The case is now before this Court upon an appeal filed by appellants on July 29, 1966, the Supreme Court of Appeals of Virginia having stayed the execution of its judgment to permit such appeal. Probable jurisdiction was noted by this Court on December 12, 1966. *Loving, et ux.* v. *Virginia,* ..... U.S. ....., 17 L.Ed. (2d) 448.

STATEMENT OF THE CASE

Richard Perry Loving, one of the appellants in this case, is a white, male citizen of the United States who was at all times relevant to this litigation a citizen and resident of the Commonwealth of Virginia. Mildred Jeter Loving,

the additional appellant in this case, is a Negro, female citizen of the United States who was at all times relevant to this litigation a citizen and resident of the Commonwealth of Virginia. Richard Perry Loving is a "white person" within the definition of the Virginia Code, and Mildred Jeter Loving is a "colored person" within the definition of the Virginia Code. (R. 9).

On or about June 2, 1958, appellants went to the District of Columbia and were there married to each other pursuant to the laws of the District of Columbia. Subsequently, they returned to their residence in Caroline County, Virginia, and at the October Term, 1958, of the Circuit Court of Caroline County, an indictment was filed charging that on the 2nd day of June, 1958, "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. 6).

On January 6, 1959, appellants entered pleas of guilty to the charge specified in the indictment, whereupon the court fixed the punishment of each appellant at one year in jail. Thereafter, the court suspended such sentence for a period of twenty-five years upon the provision that both appellants leave Caroline County and the State of Virginia at once and not return together or at the same time to said county and state during the specified period. Upon payment of costs, appellants were released from custody and further recognizance. (R. 6).

THE STATUTES INVOLVED

The statutes under attack in the instant proceedings are Sections 20-58 and 20-59 of the Code of Virginia (1950), which statutes respectively prescribe:

> "§ 20-58—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."
>
> "§ 20-59.—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."

QUESTION PRESENTED

Are Sections 20-58 and 20-59 of the Virginia Code violative of the Fourteenth Amendment to the Constitution of the United States?

SUMMARY OF ARGUMENT

As pointed out by the Supreme Court of Appeals of Virginia in the case at bar (206 Va. at 926, 147 S.E. (2d) at 80):

> "The sole contention of the defendants, with respect to their convictions, is that Virginia's statutes prohibiting the intermarriage of white and colored persons are violative of the Constitution of Virginia and the Constitution of the United States. Such statutes, the

> defendants argue, deny them due process of law and equal protection of the law."

Counsel for appellee submit that the constitutional issue tendered by the instant appeal has been so thoroughly settled against the position of appellants, and settled by such an exhaustive array of judicial authority, as to make it necessary for this Court to rewrite or amend the Fourteenth Amendment to reverse the judgment of the Supreme Court of Appeals of Virginia.

Initially in this connection, an analysis of the legislative history of the Fourteenth Amendment conclusively establishes the clear understanding—both of the legislators who framed and adopted the Amendment and the legislatures which ratified it—that the Fourteenth Amendment had no application whatever to the anti-miscegenation statutes of the various States and did not interfere in any way with the power of the States to adopt such statutes. The precise question was specifically considered by the framers of the Amendment, and a clear intent to exclude such statutes from the scope of the Fourteenth Amendment was repeatedly made manifest.

The propriety of undertaking a study of the legislative history of the Fourteenth Amendment so that it may be read to effectuate the intent and purposes of the Framers is abundantly supported by numerous decisions of this Court. See, *Bell* v. *Maryland,* 378 U.S. 226, 288-289; *Ullman* v. *United States,* 350 U. S. 422, 428; *Adamson* v. *California,* 332 U. S. 46, 72. As this Court has frequently pointed out, the Fourteenth Amendment had its origins in the Civil Rights Act of 1866 and a companion measure, the Freedman's Bureau Bill, and was adopted to provide a firm constitutional basis for the Civil Rights Act of 1866. *Bell* v. *Maryland, supra,* at 292-293, *Adamson* v. *California,*

supra, at 68, 107-108. A review of the debates on the bill which ultimately became the Civil Rights Act of 1866, discloses beyond cavil the intention of the Framers to exclude State anti-miscegenation laws from the terms of that enactment.

Moreover, the intention of the legislatures of the various States which ratified the Fourteenth Amendment was entirely consistent with that of the Framers, as indisputably evidenced by the fact that a majority of the States which ratified the Fourteenth Amendment still maintained and enforced their anti-miscegenation laws as late as 1950. In addition, the decisions of both State and Federal courts contemporaneous with the passage of the Fourteenth Amendment—decisions authored by jurists familiar with the process by which that Amendment became part of the Constitution—clearly indicated that anti-miscegenation laws of the various States are not violative of the Fourteenth Amendment. Since the constitutional duty of this Court is "to construe, not to rewrite or amend" the Constitution—a duty which requires this Court to read the Fourteenth Amendment "to effectuate the intent and purposes of the Framers"—counsel for appellee assert that, *as a matter of law,* the Fourteenth Amendment has no applicability to the anti-miscegenation statutes of the various States and does not circumscribe to any degree the power of the States to prevent interracial marriages. See, *Bell* v. *Maryland, supra,* at 288-289.

Secondly, counsel for appellee submit that to give effect to the legislative history of the Fourteenth Amendment is to obviate inappropriate judicial inquiry into the wisdom or desirability of a State policy preventing interracial alliances. Under well settled constitutional doctrine, such an inquiry into evidence of a scientific nature tending to sup-

port or undermine a legislative determination of the wisdom or desirability of such a policy is clearly impermissible. In this connection, the Supreme Court of Appeals of Virginia correctly pointed out (206 Va. at 929, 147 S.E. (2d) at 82):

> "The defendants also refer us to a number of texts dealing with the sociological, biological and anthropological aspects of the question of interracial marriages to support their argument that the *Naim* decision is erroneous and that such marriages should not be forbidden by law.
>
> "A decision by this court reversing the *Naim* case upon consideration of the opinions of such text writers would be judicial legislation in the rawest sense of that term. Such arguments are properly addressable to the legislature, which enacted the law in the first place, and not to this Court, whose prescribed role in the separated powers of government is to adjudicate, and not to legislate."

If this Court (erroneously, we contend) should undertake such an inquiry, it would quickly find itself mired in a veritable Serbonian bog of conflicting scientific opinion upon the effects of interracial marriage, and the desirability of preventing such alliances, from the physical, biological, genetic, anthropological, cultural, psychological and sociological point of view. The available scientific materials are sufficient to support the validity of the challenged Virginia statutes whether the constitutional standard be deemed to require appellants to demonstrate that those statutes are arbitrary, capricious and unreasonable or to require the State to show a compelling interest in the continuation of its policy prohibiting interracial marriages. In such a situation it is the exclusive province of the Legislature of each State to make the determination for its citizens as to the

desirability of a policy of permitting or preventing such alliances—a province which the judiciary may not constitutionally invade.

ARGUMENT

Sections 20-58 and 20-59 Of The Virginia Code Are Not Violative Of The Fourteenth Amendment To The Constitution Of The United States.

A.

The Precise Statutes Under Attack In This Case

The record discloses that the indictment under which appellants were convicted in the Circuit Court of Caroline County charged that, on June 2, 1958, "Richard Perry Loving being a White person and the said Mildred Dolores 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."

The substantial identity between the language of the indictment quoted above and that contained in Section 20-58 of the Virginia Code (*ante*, p. 4) establishes that appellants were indicted for violation of Section 20-58 of the Virginia Code and that sentence was imposed in accordance with the provisions of Section 20-59 of the Virginia Code as specified in the statute under which the indictment was laid. In this connection, the Supreme Court of Appeals of Virginia pointed out (206 Va. at 925, 147 S.E. (2d) at 79):

> "There is no dispute that Richard Perry Loving is a white person and that Mildred Jeter Loving is a

> colored person within the meaning of Code, § 20-58. Nor is there any dispute that the actions of the defendants, as set forth in the indictment, violated the provisions of Code, § 20-58."

In light of these circumstances, it is manifest that the instant appellants possess the requisite standing to challenge only the provisions of Sections 20-58 and 20-59 of the Virginia Code and that the Supreme Court of Appeals of Virginia passed upon the validity of these statutes only. So far as the instant litigation is concerned, no official of the Commonwealth of Virginia has undertaken to apply or impose any provision of the remaining statutes comprising Chapter 4 of Title 20 of the Virginia Code to the present appellants. Specifically in this connection, no attempt has been made to bring the marital status of the appellants within the ambit of Section 20-54 of the Virginia Code or its collateral statutes (Sections 20-50, 20-51, 20-52, 20-53 and 20-55) which comprise Chapter 371 of the Acts of Assembly (1924) entitled "An Act to preserve racial integrity." See Appendix A, *post*.

B.

History of the Fourteenth Amendment

As a prologue to this portion of our brief, counsel for appellee—at the risk of rehearsing the obvious—wish to set forth certain fundamental canons of constitutional construction which are universally regarded as "first principles" and nowhere questioned. The language in which these rules are couched is that appearing in well known legal compendiums, and the statements in question have been grouped—for the purpose of demonstrating the undeviating uniformity of authoritative expression—into two categories

designated by counsel as *Necessity of Ascertaining and Effectuating Intent of Framers and People* and *Necessity of Uniformity of Construction.*

Necessity of Ascertaining and Effectuating Intent of Framers and People

"The prime effort of fundamental purpose, in construing a constitutional provision, is to ascertain and give effect to the intent of the framers and of the people who adopted it. The court, therefore, should constantly keep in mind the object sought to be accomplished by its adoption, and proper regard should be given to the evils, if any, sought to be prevented or remedied. Effect should be given to the purpose indicated by a fair interpretation of the language used, and that construction which effectuates, rather than that which destroys a plain intent or purpose of a constitutional provision, is not only favored but will be adopted." (16 C.J.S. 72, Constitutional Law: Sec. 16)

* * *

"The fundamental principle of constitutional construction is to give effect to the intent of the framers of the organic law and of the people adopting it.* * *

"It has been very appropriately stated that the polestar in the construction of Constitutions is the intention of the makers and adopters.

"Whereever the purpose of the framers of a Constitution is clearly expressed, it will be followed by the courts. Even where terms of a constitutional provision are not entirely free from doubt, they must be interpreted as nearly as possible in consonance with the objects and purposes in contemplation at the time of their adoption, because in construing a constitutional provision, its general scope and object should be considered.

"It is settled by very high authority that in placing a construction on a Constitution or any clause or part thereof, a court should look to the history of the times and examine the state of things existing when the Constitution was framed and adopted, in order to ascertain the prior law, the mischief, and the remedy. A constitutional provision must be presumed to have been framed and adopted in the light and understanding of prior and existing laws with reference to them. Constitutions, like statutes, are properly to be expounded in the light of conditions existing at the time of their adoption, the general spirit of the times, and the prevailing sentiments among the people. * * *

"Construction based on custom, usage, or the conclusions of the courts must be properly subordinated to the time factor of the creation of the Constitution itself, and later usages cannot override a patent intention expressed at an earlier date. Thus, neither statutes enacted nor judicial opinions rendered since the adoption of a Constitution can impute a different meaning to it than that obviously intended at the time the Constitution was adopted." (11 Am. Jur. 674, Constitutional Law: Secs. 61, 63)

Necessity of Uniformity of Construction

"A cardinal rule in dealing with Constitutions is that they should receive a consistent and uniform interpretation, so that they shall not be taken to mean one thing at one time and another thing at another time, even though the circumstances may have so changed as to make a different rule seem desirable.... Furthermore, Constitutions do not change with the varying tides of public opinion and desire. The will of the people therein recorded is the same inflexible law until changes by their own deliberative action, and therefore the courts should never allow a change in public sentiment to influence them in giving a construction to a written Constitution not warranted by

the intention of its founders." (11 Am. Jur. 659, Constitutional Law: Sec. 50)

* * *

"In view of the rule, . . . that the meaning of a constitution is fixed when it is adopted, the construction given it must be uniform, so that the operation of the instrument will be inflexible, operating at all times alike, and in the same manner with respect to the same subjects; and this is true even though the circumstances may have so changed as to make a different rule seem desirable, since the will of the people as expressed in the organic law is subject to change only in the manner prescribed by them." (16 C.J.S. 117, Constitutional Law: Sec. 37)

* * *

"A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. . . . There is nothing primitive about a state constitution. It is based upon the preexisting laws, rights, habits and modes of thought of the people who ordained it, and the fundamental theory of sovereignty and of government which has been developed under the common law, and it must be construed in the light of this fact.

"However, it is a well settled rule, that the meaning of the constitution is fixed, when it is adopted; and it is not different at any subsequent time, when a court has occasion to pass upon it." (4 M. J. 97, Constitutional Law: Sec. 7, 10)

Of course, no particularized citation of decisional authority supportive of these principles is required. Every thought enunciated in the foregoing quotations has been approved and applied by this Court on numerous occasions, and a host of prior decisions could be marshaled to establish, not only the authoritative character of these rules, but the indispensability of their full recognition to the proper

resolution of constitutional questions. Indeed, support for most of these principles is readily available in the decisions of this Court in *Adamson* v. *California,* 332 U.S. 46, 91 L. Ed. 1903; *Ullman* v. *United States,* 350 U.S. 422, 100 L. Ed. 511; and *Bell* v. *Maryland,* 378 U.S. 226, 12 L. Ed. (2d) 822. In his dissenting opinion in the former case, Mr. Justice Black pointed out that (332 U.S. at 72, 91 L. Ed. at 1919):

> "In construing other constitutional provisions, this Court has almost uniformly followed the precept of Ex parte Bain, 121 US 1, 12, 30 L ed 849, 853, 7 S Ct 781, that 'It is never to be forgotten that in the construction of the language of the Constitution . . . as indeed in all other instances where construction becomes necessary, *we are to place ourselves as nearly as possible in the condition of the men who framed that instrument.*' See also *Everson* v. *Board of Education,* 330 US 1, 8, 28, 33, ante, 711, 719, 729, 732, 67 S Ct 504, 168 ALR 1392; *Thornhill* v. *Alabama,* 310 US 88, 95, 102, 84 L ed 1093; 1098, 1102, 60 S Ct 736; *Knowlton* v. *Moore,* 178 US 41, 89, 106, 44 L ed 969, 988, 995, 20 S Ct 747; *Reynolds* v. *United States,* 98 US 145, 162, 25 L ed 244, 249; *Barron* v. *Baltimore, supra* (7 Pet (US) at 250, 251, 8 L ed 675); *Cohens* v. *Virginia,* 6 Wheat (US) 264, 416-420, 5 L ed 257, 294, 295." (Italics supplied.)

Moreover, in the *Ullmann* case, Mr. Justice Frankfurter —speaking for the Court—declared (350 U.S. at 428, 100 L. Ed. at 519):

> *"Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process."* (Italics supplied.)

Finally, in the recent case of *Bell* v. *Maryland, supra,* Mr. Justice Goldberg approached the consideration of an analogous situation with the following admonition (378 U.S. at 288-289, 12 L. Ed. (2d) at 834):

> "Of course, our constitutional duty is 'to construe, not to rewrite or amend, the Constitution.' Post, at 865 (dissenting opinion of Mr. Justice Black). Our sworn duty to construe the Constitution *requires,* however, *that we read it to effectuate the intent and purposes of the Framers.* We must, therefore, consider the history and circumstances indicating what the Civil War Amendments were in fact designed to achieve." (Italics supplied.)

The Fourteenth Amendment grew out of the Civil Rights Act of 1866 and its forerunner, the Freedmen's Bureau Bill. It therefore becomes necessary that the debates in the 1st Session of the 39th Congress (1865-1866) be researched in order to determine the meaning of the pertinent language of the Fourteenth Amendment as understood by its authors and its proponents.

The first material occurrence was the introduction of the supplemental Freedmen's Bureau Bill.[1] This bill was the first reconstruction proposal and was a forerunner of the Fourteenth Amendment. It was introduced as a supplement to the original Freedmen's Bureau Bill enacted in March, 1865. The original protected only those Negroes who had been freed in territory under federal control. The supplemental bill, as reported by the Judiciary Committee of the Senate, contained a number of sections, the first six of which authorized the division of the seceding states into districts, the appointment of commissioners, the reservation

[1] S. 60, 39th Congress, 1st Session (1866).

of land, and the awarding of such lands to loyal refugees and freedmen.

The seventh section contained language which, by way of the Civil Rights Act, subsequently became a part of the Fourteenth Amendment. It provided, in part, that if, because of any state or local law, custom or prejudice:[2]

> "... any of the civil rights of immunities belonging to white persons, including the right to make and enforce contracts ... and to have full and equal benefit of all laws and proceedings for the security of person and estate, are refused or denied to negroes ... on account of race ... it shall be the duty of the President of the United States, through the Commissioner, to extend military protection ... over all cases affecting such persons so discriminated against."

Section 8 made it a misdemeanor for any person to subject any other person on account of color:[3]

> "... to the deprivation of any civil right secured to white persons, or to any different punishment. ..."

Senator Thomas A. Hendricks of Indiana, an opponent of the Bill, expressed the fear in the Senate debates that the "civil rights or immunities" clause in the seventh section would nullify many salutary laws of Indiana, including an Indiana constitutional provision which provided that no Negro man should be allowed to intermarry with a white woman. He then said:[4]

> "Marriage is a civil contract, and to marry according to one's choice is a civil right. Suppose a State shall

[2] Senate Document, 39th Cong., 1st Session, Ex Doc. No. 24, p. 9.
[3] Id. at 10.
[4] Cong. Globe, 39th Cong., 1st Sess. 318 (January 19, 1866).

> deny the right of amalgamation, the right of a negro man to intermarry with a white woman, then that negro may be taken under the military protection of the Government; and what does that mean? . . . Does it mean that this military power shall enforce his civil right, without respect to the prohibition of the local law? In other words, if the law of Indiana, as it does, prohibits under heavy penalty the marriage of a negro with a white woman, may it be said a civil right is denied him which is enjoyed by all white men, to marry according to their choice; and if it is denied, the military protection of the colored gentlemen is assumed, and what is the result of it all? I suppose they are then to be married in the camp of the protecting officer without regard to the State laws. . . .

Senator Lyman Trumbull of Illinois, who had introduced the Bill and was its manager, made it clear that there was no intention to nullify the anti-miscegenation statutes or constitutional requirements of the various states or to restrict such future legislation as to miscegenation. On that point he said:[5]

> ". . . But, says the Senator from Indiana, we have laws in Indiana prohibiting black people from marrying whites, and you are going to disregard these laws? Are our laws enacted for the purpose of preventing amalgamation to be disregarded, and is a man to be punished because he undertakes to enforce them? I beg the Senator from Indiana to read the bill. One of its objects is to secure the same civil rights and subject to the same punishments persons of all races and colors. How does this interfere with the law of Indiana preventing marriages between whites and blacks? Are not both races treated alike by the law

[5] Cong. Globe, 39th Cong., 1st Sess. 322 (January 19, 1866).

> 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. Make the penalty the same on all classes of people for the same offense, and then no one can complain." (Italics supplied.)

A week later Senator Garrett Davis from Kentucky likewise expressed the fear that the language of Section 7 was broad enough to strike down the anti-miscegenation laws of the State of Kentucky.[6]

Senator Trumbull replied:[7]

> "... The Senator says the laws of Kentucky forbid a white man or woman marrying a negro, and that these laws of Kentucky are to exist forever; that severe penalties are imposed in the State of Kentucky against amalgamation between the white and black races.... *"But, sir, it is a misrepresentation of this bill to say that it interferes with those laws.* I answered that argument the other day when it was presented by the Senator from Indiana. The bill provides for dealing out the same punishment to people of every color and every race; and if the law of Kentucky forbids the white man to marry the black woman I presume it equally forbids the black woman to marry the white man, and the punishment is alike upon each. All this bill provides for is that there shall be no discriminations in punishments on account of color; and

[6] Cong. Globe, 39th Cong., 1st Sess., 418.

[7] Cong. Globe, 39th Cong., 1st Sess., 420.

> unless the Senator from Kentucky wants to punish the negro more severely for marrying a white person than a white for marrying a negro, the bill will not interfere with his law." (Italics supplied.)

The supplemental bill passed the Senate on January 25, 1866, by a vote of 37 to 10, three absent.

On the same day the Bill was sent to the House of Representatives, but on the following day Senator Johnson from Maryland made motion to reconsider requesting that the Secretary of the Senate ask for the return of the Bill from the House of Representatives. Senator Johnson's motion was defeated 22 to 18.

While the Bill was under consideration in the House of Representatives, on February 3, 1866, Representative Samuel W. Moulton from Illinois demonstrated the inapplicability of the language of the bill to state laws forbidding miscegenation or interracial marriages. In part he said:[8]

> "My colleague says that . . . it is a civil right for a black man to marry a white woman. . . . I deny that it is a civil right for a white man to marry a black woman or for a black man to marry a white woman. . . . It is a matter of mutual taste, contract, and understanding between the parties. . . . The law, as I understand it, in all the States, applies equally to the white man and the black man, and there being no distinction, it will not operate injuriously against either the white or the black. . . .
>
> "I understand that the civil rights referred to in the bill are not of the fanciful character referred to by the gentleman, but the great fundamental rights that are secured by the Constitution of the United States, and that are defined in the Declaration of

[8] Id. at 632 (Feb. 3, 1866).

Independence, the right to personal liberty, the right to hold and enjoy property, to transmit property, and to make contracts. These are the great civil rights that belong to us all, and are sought to be protected by this bill."

Thereupon, the following colloquy occurred:[9]

"MR. THORNTON. On the point upon which my colleague is now speaking, civil rights, I would ask him if a marriage between a white man and a white woman is a civil right?

"MR. MOULTON. It is not a civil right.

"MR. THORNTON. It is not?

"MR. MOULTON. No, sir, not in my opinion.

"MR. THORNTON. Then what sort of a right is it?

"MR. MOULTON. Marriage is a contract between individuals competent to contract it.

"MR. THORNTON. Is it a political or civil right?

"MR. MOULTON. It is a social right. I understand that a civil right is a right that a party is entitled to and that he can enforce by operation of law.

"MR. THORNTON. I would ask my colleague if marriages are not contracted in all the States of this Union by virtue of provisions of law?

"MR. MOULTON. I think, perhaps, they are to a greater or less extent.

"MR. THORNTON. It is not especially provided for by the law regulating it. The right to marry is a right which cannot be enforced.

"There are a great many things a man can do that are imperfect obligations which cannot be enforced

[9] Id. at 632, 633 (Feb. 3, 1866).

> by law, and hence are not civil rights contemplated by this bill.... The remarks that I made in connection with this matter were made for this purpose: I say that the right to marry is not strictly a right at all, because it rests in contract alone between individuals, and no other person has a right to contract it. It is not a right in any legal or technical sense at all. No one man has any right to marry any woman he pleases. If there was a law making that a civil right, then it might be termed a civil right in the sense in which it is used here. But there being no law in any state to that effect, I insist that marriage is not a civil right, as contemplated by the provisions of this bill...."

On the same day, Hon. L. H. Rousseau of Kentucky, expressed the fear that under the proposal a minister might be arrested for refusing to solemnize marriages between whites and negroes.[10]

He was answered on the same day by Hon. C. E. Phelps of Maryland, even though he himself opposed the bill as written and desired amendments:[11]

> "—Efforts have been made, and very ingeniously, by gentlemen opposed to the bill,—by arguing from the language used in the seventh and eighth sections an inference of a design *to control state laws in respect to the marriage relation. Such a construction is not warranted by the terms employed.*—" (Italics supplied.)

After final passage, the Freedmen's Bureau Bill was vetoed on February 19th, 1866.[12] The veto was sustained February 20, 1866.

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[10] Appendix to the Congressional Globe, 39th Cong., 1st Sess. (p. 69).

[11] Id. at p. 75.

[12] Cong. Globe, 39th Cong., 1st Sess., p. 915.

In a slightly modified form, the Bill was later re-enacted over the veto of the President.[13]

The Senate then proceeded to consider the proposed Civil Rights Act which was under the same management. The first section contained the following language:[14]

> "The inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

It also provided that:[15]

> "—there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery."

Again Senator Johnson expressed his misgivings about the possible effect of this act on the miscegenation statutes of the States. Among other things he said:[16]

> "There is not a State in which these Negroes are to be found where slavery existed until recently, and I am not sure that there is not the same legislation

[13] 14 Statutes 173 (1866).
[14] Id. at 504.
[15] Id. at 505.
[16] Id. at p. 505.

> in some of the States where slavery has long since been abolished, which does not make it criminal for a black man to marry a white woman, or for a white man to marry a black woman; and they do it not for the purpose of denying any right to the black man or to the white man, but for the purpose of preserving the harmony and peace of society. The demonstrations going on now in your free States show that a relation of that description cannot be entered into without producing some disorder. Do you not repeal all that legislation by this bill? I do not know that you intend to repeal it; but it is not clear that all such legislation will be repealed, and that consequently there may be a contract of marriage entered into as between persons of these different races, a white man with a black woman or a black man with a white woman?—"

Thereupon, Senator William Pitt Fessenden, of Maine, asked:[17]

> "Where is the discrimination against color in the law to which the Senator refers?"

The following colloquy then took place.[18]

> "MR. JOHNSON. There is none, that is what I say; that is the very thing I am finding fault with.
>
> "MR. TRUMBULL. This bill would not repeal the law to which the Senator refers, if there is no discrimination made by it.
>
> "MR. JOHNSON. Would it not? We shall see directly. Standing upon this section, it would be admitted that the black man has the same right to enter into a contract of marriage with a white woman as a white man has, that is clear, because marriage is a contract. I was speaking of this without a reference to any State legislation.

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[17] Id. at 505, 506.

[18] Id. at 505, 506.

> "MR. FESSENDEN. He has the same right to make a contract of marriage with a white woman that a white man has with a black woman."

The Civil Rights Act of 1866 passed the Senate on February 2nd by a vote of 33 to 12.[19] On March 13th with a few minor changes, it passed the House of Representatives by a vote of 111 to 38.[20] The House amendments were adopted in the Senate without debate.[21]

The Act was vetoed by President Johnson on March 27, 1866.[22] The veto was overriden in the Senate, 33 to 15, on April 6, 1866[23] and was overriden in the House 122 to 41 on April 9, 1866.[24]

So far as research discloses, all of the proponents of the supplemental Freedmen's Bureau Bill and the Civil Rights Act of 1866 were of one accord in insisting that there was nothing in those acts that could possibly be construed as nullifying the anti-miscegenation laws of the various states.

The supplemental Freedmen's Bureau Bill and the Civil Rights Act were taken up, debated and passed before the resolution proposing the Fourteenth Amendment came before the Congress for debate, but all had the same management and were a part of the same package. The proposal to amend the Constitution preceded the passage of the Bill and the Act, but the debates on the proposed amendment came after consideration of the two.

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[19] Id. at 606, 607.
[20] Id. at 1367.
[21] Id. at 1413-16.
[22] Id. at 1679.
[23] Id. at 1809.
[24] Id. at 1861.

When the 39th Congress convened in December 1865, Thaddeus Stevens, a Pennsylvania representative, proposed the creation of a joint committee on reconstruction consisting of six senators and nine representatives.[25] This proposal was adopted and the committee of fifteen prepared the resolution that was finally proposed as the Fourteenth Amendment. The debates on the supplemental Freedmen's Bureau Bill and the Civil Rights Act therefore serve to refine and define the language that later went into the Fourteenth Amendment. As is well known, the purpose of the Fourteenth Amendment was to confer power upon the Congress to enact such laws as were embodied in the Bill and the Act. For example, on May 8, 1866, Thaddeus Stevens said that Section 1 of the proposed amendment and its other provisions:[26]

> "—all are asserted, in some form or other, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all.—Some answer, 'Your civil rights bill secures the same things.' That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed—"

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[25] Id. at 6.

[26] Cong. Globe, 39th Cong., 1st Sess., p. 2459.

Representative Thaddeus Stevens thus contended that the purpose of the first section of the amendment was to write the Civil Rights Act into the Constitution without in any wise adding to the rights protected by the Act.

Representative William E. Finck of Ohio then stated that if the first section of the proposed amendment was necessary, the Civil Rights Act was unconstitutional.[27] His colleague from Ohio, Representative James A. Garfield, disagreed, saying that the purpose of the first section of the Amendment was to prevent the repeal of the Civil Rights Act saying:[28]

> "The civil rights bill is now a part of the law of the land. But every gentleman knows it will cease to be a part of the law whenever the sad moment arrives when that gentleman's party comes into power. It is precisely for the reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it. For this reason, and not because I believe the civil rights bill unconstitutional, I am glad to see that first section here."

Representative M. Russell Thayer of Pennsylvania agreed with Mr. Garfield, saying:[29]

> "As I understand it, it is but incorporating in the Constitution of the United States the principle of the civil rights bill which has lately become a law, and that, not as the gentleman from Ohio (Mr. Finck) suggested, because in the estimation of this House

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[27] Cong. Globe, 1st Sess., p. 2460-1.

[28] Id. at 2462.

[29] Id. at 2465.

> that law cannot be sustained as constitutional, but in order, as was justly said by the gentleman from Ohio who last addressed the House, (Mr. Garfield), that that provision so necessary for the equal administration of the law, so just in its operation, so necessary for the protection of the fundamental rights of citizenship, shall be forever incorporated in the Constitution of the United States."

Representative Henry J. Raymond of New York, Publisher of the *New York Times,* had been opposed to the Civil Rights Act because of its doubtful constitutionality. As to the proposed constitutional amendment, he said:[30]

> "And now, although that bill became a law and is now upon our statute-book, it is again proposed so to amend the Constitution as to confer upon Congress the power to pass it."

The foregoing illustrates the view of the framers of the Fourteenth Amendment in the House that the purpose of the first section of the Amendment was to place the provisions of the Civil Rights Act of 1866 beyond the reach of legislative repeal. That is the verdict of history, based on the facts material to the issue.[31]

This verdict was recently re-enunciated by Mr. Justice Goldberg in the *Bell* case, *supra,* in the following language (378 U.S. at 292-293, 12 L. Ed. (2d) at 836):

> "The Fourteenth Amendment was in part designed to provide a firm constitutional basis for the Civil

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[30] Id. at 2502.

[31] Ten Brock, *The Anti-Slavery Origins of the Fourteenth Amendment,* 183 (1951); Flack, *The Adoption of the Fourteenth Amendment,* p. 81, 212 (1909).

Rights Act of 1866, 14 Stat. 27, and to place that legislation beyond the power of congressional repeal. The origins of subsequently proposed amendments and legislation lay in the 1866 bill and in a companion measure, the Freedman's Bureau Bill.[8]

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[8] As Mr. Justice Black pointed out in the Appendix to his dissent in Adamson v. California, 332 US 46, 68, 107-108, 91 L ed 1903, 1917, 1938, 67 S Ct 1672, 171 ALR 1223:

"Both proponents and opponents of § 1 of the [Fourteenth] Amendment spoke of its relation to the Civil Rights Bill which had been previously passed over the President's veto. Some considered that the amendment settled any doubts there might be as to the constitutionality of the Civil Rights Bill. Cong. Globe, [39th Cong., 1st Sess.] 2511, 2896. Others maintained that the Civil Rights Bill would be unconstitutional unless and until the amendment was adopted. Cong. Globe, 2461, 2502, 2506, 2513, 2961. Some thought that amendment was nothing but the Civil Rights [Bill] 'in another shape.' Cong. Globe, 2459, 2462, 2465, 2467, 2498, 2502."

Clearly, both friends and foes of the Fourteenth Amendment, who spoke on the subject, were of the opinion that the purpose of the Amendment was to validate the provisions of the Civil Rights Act and place them beyond the power of the judiciary to nullify or Congress to repeal. Equally manifest is the opinion of those who spoke on behalf of the Civil Rights Act that it had no application to marriage contracts or anti-miscegenation statutes. If "we are to place ourselves as nearly as possible in the condition of the men who framed" the Fourteenth Amendment (*Adamson* v. *California, supra*), we must recognize that nothing in the Fourteenth Amendment, so interpreted, authorizes federal interference with the anti-miscegenation laws of the various States. If "[n]othing new can be put into the Constitution except through the amendatory process" (*Ullman* v. *United States, supra*), the present attack on the Virginia statutes under consideration must fail.

If the intent of the State Legislatures which ratified the Fourteenth Amendment is deemed controlling, then surely the question of whether or not the Fourteenth Amendment forbids enactment of anti-miscegenation statutes by the States must be decided contrary to the contention of appellants, for those States which ratified the Fourteenth Amendment clearly signified their intent by continuation of their anti-miscegenation laws contemporaneously with the ratification of the Fourteenth Amendment. In this connection, a comparison of the States which retained their anti-miscegenation laws as late as 1951 with the list of States which ratified the Fourteenth Amendment reveals that a majority of such States maintained their anti-miscegenation laws in force after ratification of the Fourteenth Amendment. See Murray: States' Laws On Race And Color (1951); U.S.C.A. Const. Amend. XIV. Pertinent in this regard is the observation of Mr. Justice Frankfurter in *Adamson* v. *California, supra,* at 64, 91 L. Ed. at 1915, with respect to an analogous situation involving interpretation of the Fourteenth Amendment:

> "Thus, at the time of the ratification of the Fourteenth Amendment the constitutions of nearly half of the ratifying States did not have the rigorous requirements of the Fifth Amendment for instituting criminal proceedings through a grand jury. It would hardly have occurred to these States that by ratifying the Amendment they uprooted their established methods for prosecuting crime and fastened upon themselves a new prosecutorial system."

In *In re Hobbs* 1 Woods 537 (5 Cir., 1871) a Federal court considering a petition for writ of habeas corpus submitted by one arrested for violation of a State anti-miscegenation law held that the Fourteenth Amendment did not invalidate the provisions of the statute in question.

Moreover, in *Ex parte Kinney,* 3 Hughes 9 (4 Cir., 1879), a Federal court, construing Virginia's anti-miscegenation statute, held that such statute was not violative of the Fourteenth Amendment.

In addition, as will be pointed out later in this brief, numerous decisions of the highest judicial tribunals of various States have sustained anti-miscegenation statutes against attack under the Fourteenth Amendment. Of such decisions, those contemporaneous with the passage of the Fourteenth Amendment are *Scott* v. *Georgia,* 39 Ga. 323 (1869) and *State* v. *Gibson,* 36 Indiana 389 (1871).[32]

In light of the foregoing, it is clear that—contemporaneously with the adoption of the Fourteenth Amendment —the Congress of the United States, the legislatures of various States ratifying the Fourteenth Amendment, Federal courts and State courts clearly indicated that anti-miscegenation statutes of the various States are not violative of the Fourteenth Amendment.

The precise question of the intent and purposes of those who framed, adopted and ratified the Fourteenth Amendment so far as that Amendment was deemed to affect, or not to affect, State anti-miscegenation laws has been the subject of two comprehensive treatises. The analysis set out in the immediately preceding pages of this portion of our brief was subsequently embodied in an exhaustive article by R. Carter Pittman entitled *"The Fourteenth Amend-*

[32] Counsel for Appellee in the case at bar are indebted to R. Carter Pittman, Esq., Dalton, Georgia; Charles J. Block, Esq., Macon, Georgia, James W. Kynes, Attorney General of Florida, and James J. Mahorner, Assistant Attorney General of Florida, for use of their studies from which a large portion of this section of the instant brief has been extracted. In many instances paragraphs of this section of the brief have been transposed, almost verbatim, from the brief filed on behalf of the State of Florida in the recent case of *McLaughlin* v. *Florida,* 379 U.S. 184, decided December 7, 1964.

ment: Its Intended Effect On Anti-miscegenation Laws" published in *The North Carolina Law Review,* Volume 43, No. 1, December, 1964. An equally elaborate study of the same question—containing an analysis of the relevant materials from the anti-slavery debates of 1864 to the debates on the Civil Rights Act of 1875—will be found in an article by Dr. Alfred Avins entitled *"Anti-miscegenation Laws And The Fourteenth Amendment: The Original Intent," Virginia Law Review,* Volume 52, No. 7, November, 1966. In the latter treatise the author asserts (Virginia Law Review, *supra,* at 1266):

> "Some, of course, have argued that the fourteenth amendment is drafted in language so general as to confer on the Supreme Court *carte blanche* to shape it into a tool for the accomplishment of what it conceives to be desirable social ends. But when the amendment is read in light of the prevailing law and conditions of the time, its language is in fact reasonably precise; *at least we can say with safety that it has no reference to anti-miscegenation laws.* Present day attacks on these laws involve no new constitutional principle, *and it cannot be said that they involve any questions to which the framers did not in fact address themselves in 1866."* (Italics supplied).

Counsel for appellee submit that but two courses are available to this Court with respect to the legislative history of the Fourteenth Amendment in the present context—that history may either be (1) ignored or (2) given effect. It is manifest from their brief that counsel for appellants urge adoption of the former alternative, for they make no attempt whatever to establish by independent analysis on behalf of their position that the Fourteenth Amendment *was* intended by the Framers to abolish or infringe the power of the various States to enact anti-miscegenation

statutes. No single instance is cited in which any proponent of the Fourteenth Amendment even suggested that the amendment or its contemporary legislation would have any effect at all upon State anti-miscegenation laws. By contrast, as we have shown, the inviolability of such State enactments under the Civil Rights Act of 1866 and the Fourteenth Amendment was repeatedly proclaimed by the Framers and demonstrably understood by a majority of the State legislatures which ratified the Fourteenth Amendment.

In light of the many assertions by this Court that constitutional provisions must be read to effectuate the intent and purposes of the Framers and that consideration must be given to the circumstances indicating what the Fourteenth Amendment was in fact designed to achieve, counsel for appellee contend that the only course properly open to this Court is that which gives effect to the legislative history of the Fourteenth Amendment. We submit that invalidation of the statutes challenged in the case at bar necessarily entails this Court's ignoring "all the history of the Fourteenth Amendment and the course of judicial decisions which together plainly show that the Equal Protection Clause was not intended to touch state" anti-miscegenation statutes. See, *Carrington* v. *Rash,* 380 U.S. 89, 97 (dissenting opinion). And in this connection we further echo the observation of Mr. Justice Harlan in his dissenting opinion in the *Carrington* case, *supra,* at 97:

> "If that history does not prove what [we] think it does, we are at least entitled to be told why."

C.

Judicial Decisions

Thoroughly consistent with the foregoing analysis of the historical background of the Fourteenth Amendment is the

virtually uninterrupted line of judicial decisions, both Federal and State, in which the constitutional validity of State anti-miscegenation statutes has been sustained against assault under the Fourteenth Amendment. So far as the case at bar is concerned, the very statute currently under attack has been held not violative of the Fourteenth Amendment by a Federal Court of the Fourth Circuit. *Ex parte Kinney,* 3 Hughes 9, 14 Fed. Cases 607. In that case, the United States Circuit Court (now District Court) for the Eastern District of Virginia denied a writ of habeas corpus sought by a Virginia citizen who had been convicted for violation of what is now Section 20-58 of the Virginia Code. The writ was requested upon the ground, *inter alia,* that the challenged enactment violated the Fourteenth Amendment. Rejecting this contention, the Court declared (14 Fed. Cases at 606, 607, 608):

> "Congress has made no law relating to marriage. It has not, simply because it has no constitutional power to make laws affecting the domestic relations and regulating the social intercourse of the citizens of a state. *If it were to make such a law for the states, that law would be unconstitutional, and the federal courts would not hesitate to declare it so.*
>
> * * *
>
> "It was competent for the state of Virginia, *so far as there is anything in the constitution and laws of the United States to prevent,* to enact the law just quoted under which the petitioner was convicted. . . .
>
> * * *
>
> "On the whole, I am of the opinion that the law of Virginia, under which this petitioner is detained in prison by the state, *does not violate the constitution or any law of the United States. . . .*" (Italics supplied.)

The most recent decision of a Federal Court on the question of the constitutionality of anti-miscegenation statutes appears to be *Stevens* v. *United States,* 10 Cir., 146 F. (2d) 120. In that case, the Court of Appeals for the Tenth Circuit stated (146 F. (2d) at 123):

> "Section 12, supra, making unlawful marriages between persons of African descent and persons of other races or descents is challenged on the ground that it violates the Fourteenth Amendment. Marriage is a consentient covenant. It is a contract in the sense that it is entered into by agreement of the parties. But it is more than a civil contract between them, subject to their will and pleasure in respect of effects continuance, or dissolution. *It is a domestic relation having to do with the morals and civilization of a people. It is an essential institution in every well organized society. It affects in a vital manner public welfare, and its control and regulation is a matter of domestic concern within each state.* A state has power to prescribe by law the age at which persons may enter into marriage, the procedure essential to constitute a valid marriage, the duties and obligations which it creates, and its effects upon the property rights of both parties. *Maynard* v. *Hill,* 125 U.S. 190, 8 S. Ct. 723, 31 L. Ed. 654. *And within the range of permissible adoption of policies deemed to be promotive of the welfare of society as well as the individual members thereof, a state is empowered to forbid marriages between persons of African descent and persons of other races or descents. Such a statute does not contravene the Fourteenth Amendment.*" (Italics supplied.)

To the same effect are the decisions in a host of cases arising in various jurisdictions, both State and Federal, in which the constitutional validity of State anti-miscegenation statutes has receved judicial approbation. See, *Jack-*

son v. *State,* 37 Ala. App. 519, 72 So. (2d) 114, 260 Ala. 698, 72 So. (2d) 116, *cert. den.* 348 U.S. 888, 99 L. Ed. 698; *Rogers* v. *State,* 37 Ala. App. 638, 73 So. (2d) 389; *State* v. *Pass,* 59 Ariz. 16, 121 P. (2d) 882 (1942); *Dodson* v. *State,* 61 Ark. 57, 31 S.W. 977 (1895); *State* v. *Gibson,* 36 Ind. 389 (1871); *Scott* v. *Georgia,* 39 Ga. 321 (1869); *State* v. *Kennedy,* 76 N.C. 251 (1869); *State* v. *Jackson,* 80 Mo. 175 (1883); *In Re Paquet's Estate,* 101 Ore. 393; 200 P. 911 (1921); *Lonas* v. *State,* 3 Heisell (50 Tenn.) 287 (1871); *Frasher* v. *State,* 3 Tex. App. 263 (1877); *Re Shun T. Takahashi's Estate,* 113 Mont. 490, 129 P. (2d) 217 (1942); *In re Hobbs,* 1 Woods 537, 12 Fed. Cases 262 (5th Cir. 1871); *Ex Parte Francois,* 3 Woods 367, 9 Fed. Cases 699 (5th Cir. 1879).

The most recent decisions of State courts upon the question here under consideration are *State* v. *Brown,* 236 La. 562, 108 So. (2d) 233; *Naim* v. *Naim,* 197 Va. 80, 87 S. E. (2d) 749; *remanded* 350 U. S. 891, *aff'd.* 197 Va. 734, 90 S. E. (2d) 849, *app. dism.* 350 U. S. 985; and *Jackson* v. *State,* 37 Ala. App. 519, 72 So. (2d) 114, 260 Ala. 698, 72 So. (2d) 116, *cert. den.* 348 U. S. 888. With respect to the last mentioned of these recent cases, the Supreme Court of Appeals of Virginia pointed out in its opinion in the case at bar (206 Va. at 927, 147 S. E. (2d) at 81):

> "The United States Supreme Court itself has indicated that the *Brown* decision [*Brown* v. *Board of Education,* 347 U. S. 483] does not have the effect upon miscegenation statutes which the defendants claim for it. The *Brown* decision was announced on May 17, 1954. On November 22, 1954, just six months later, the United States Supreme Court denied certiorari in a case in which Alabama's statute forbidding intermarriage between white and colored persons had been

upheld against the claim that the statute denied the Negro appellant 'her constitutional right and privilege of intermarrying with a white male person,' and that it violated the Privileges and Immunities, the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. *Jackson* v. *State,* 37 Ala. App. 519, 72 So. 2d 114, 260 Ala. 698, 72 So. 2d 116, cert. denied 348 U.S. 888, 99 L. ed. 698, 75 S. St. 210."

The views expressed at length by the Virginia Supreme Court in the *Naim* case were subsequently adopted by the Supreme Court of Louisiana in *State* v. *Brown, supra.* In that case, the Louisiana Supreme Court declared (108 So. (2d) at 234):

"As we view the matter, marriage is a status controlled by the states, and statutes prohibiting intermarriage or cohabitation between persons of different races in no way violate the Equal Protection clauses of the state and federal Constitutions. See 16A C.J.S. Constitutional Law §§ 541, 543, pp. 474, 479-480. A state statute which prohibits intermarriage or cohabitation between members of different races we think falls squarely within the police power of the state, which has an interest in maintaining the purity of the races and in preventing the propagation of half-breed children. Such children have difficulty in being accepted by society, and there is no doubt that children in such a situation are burdened, as has been said in another connection, with 'a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[1]' "

[1] This quotation is from Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S. Ct. 686, 691, 98 L. Ed. 873.

So uniform has been the course of decisions from the earliest cases decided contemporaneously with the adop-

tion of the Fourteenth Amendment to the most recent decisions of Federal and State courts in the *Stevens, Brown, Naim* and *Jackson* cases, *supra,* that the law applicable to the constitutional issue presented in the case at bar is deemed to be no longer open to question. In this connection, the governing rule is well summarized in 36 Am. Jur. 452, Miscegenation: Section 3, in the following language:

> "In accordance with the power of every country to make laws regulating the marriage of its own subjects to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying, *it is considered as well settled that although miscegenation statutes have been persistently attacked on the ground that they are violative of the United States Constitution, they nevertheless constitute a proper exercise of the power of each state to control its own citizens.*" (Italics supplied.)

Research has disclosed only one case opposed to this "solid front" of judicial opinion sustaining the anti-miscegenation statutes of the various States. This is the case of *Perez* v. *Lippold,* 32 Cal. (2d) 711, 198 P. (2d) 17, in which the Supreme Court of California, in a 4-3 decision, invalidated the anti-miscegenation statute of California. Commenting upon this decision in its opinion in the *Naim* case, *supra,* the Supreme Court of Appeals of Virginia declared (197 Va. at 85):

> "The exception is California, where a divided court held to the contrary with three of the seven judges dissenting, in *Perez* v. *Sharp,* 32 Cal. (2d) 711, 198 P. (2d) 17 (sub nom. *Perez* v. *Lippold*). In one of the two concurring opinions it was pointed out that since California recognized a marriage performed in another State between persons of the white and colored races, such marriage could not be considered vitally detri-

mental to public health and morals, and that the California statutes forbidding miscegenetic marriages were distinguished from such statutes in other States in that they were entirely declaratory, while all the others carried with them punishments for violations, indicating an attitude of comparative indifference on the part of the California legislature and the absence of any clearly expressed sentiment or policy. *However that may be, the holding is contrary to the otherwise uninterrupted course of judicial decision, both State and Federal, as pointed out in the dissenting opinion, with which we agree.*" (Italics supplied.)

The above canvassed array of judicial decisions covering a period of almost one hundred years led the Supreme Court of Appeals of Virginia to observe in the instant case (206 Va. at 926, 147 S. E. (2d) at 80):

"The problem here presented is not new to this court nor to other courts, both state and federal, throughout the country. The question was most recently before this court in 1955, in *Naim* v. *Naim,* 197 Va. 80, 87 S. E. 2d 749, remanded 350 U.S. 891, 100 L ed. 784, 76 S. Ct. 151, aff'd. 197 Va. 734, 90 S.E. 2d 849, app. dism. 350 U.S. 985, 100 L. ed. 852, 76 S. Ct. 472.

"In the *Naim* case, the Virginia statutes relating to miscegenatic marriages were fully investigated and their constitutionality was upheld. There, it was pointed out that more than one-half of the states then had miscegenation statutes and that, in spite of numerous attacks in both state and federal courts, no court, save one, had held such statutes unconstitutional. The one exception, it was noted, was the California Supreme Court which declared the California miscegenation statutes unconstitutional in *Perez* v. *Sharp,* 32 Cal. 2d 711, 198 P. 2d 17 (sub nom. *Perez* v. *Lippold*).

"The *Naim* opinion, written for the court by Mr. Justice Buchanan, contains an exhaustive survey and

> citation of authorities, both case and text from both state and federal sources, upon the subject of miscegenation statutes. It is not necessary to repeat all those citations in this opinion because the defendants concede that the *Naim* case, if given effect here, is controlling of the question before us."

In light of the foregoing, counsel for appellee submit it is manifest that Sections 20-58 and 20-59 of the Virginia Code are not violative of the Fourteenth Amendment to the Constitution of the United States.

D.

Wisdom of Statutory Policy

The historical background of the Fourteenth Amendment and the judicial exposition of the Fourteenth Amendment canvassed in Section B and Section C, respectively, of this brief conclusively demonstrate that—*as a matter of law*—the Fourteenth Amendment has no applicability to the anti-miscegenation statutes of the various States and does not circumscribe, to any degree, the power of the States to prevent interracial marriages. Under such circumstances, counsel for the Commonwealth assert that any judicial inquiry into the wisdom, propriety or desirability of preventing interracial alliances is completely inappropriate, and any evidence of a scientific nature tending to support or undermine the legislative determination of the propriety or desirability of such a policy would be completely irrelevant and incompetent.

The validity of this position is abundantly supported by authority. In this connection, the governing principles are well stated in 11 Am. Jur. 804, 808-813, Constitutional Law: Section 138, in the following language:

"One of the most firmly established groups of principles which has become *cardinal and elementary in the field of constitutional law* is that the *propriety, wisdom, necessity, utility, and expediency* of legislation are *exclusively matters for legislative determination.* The courts will not invalidate laws otherwise constitutional for any reasons such as these or declare statutes invalid because they may seem to the court to be detrimental to the best interests of the state.

* * *

"This judicial position has given rise to the oft-repeated *mandate* that the courts can have *no concern* as to the *expediency, the wisdom, or the necessity for the enactment of laws.* As has been said, the courts do not sit to review the wisdom of legislative acts. *It is not for the court to decide whether a law is needed and advisable in the general government of the people.* Where the legislative purpose has been declared in plain and unmistakable language, it is not within the province of the court to interpose contrary views of what the public need demands, although as individuals the members of the court may hold convictions contrary to those of the legislature.

"The basic principle already mentioned applies here with full force. The constitutionality of legislative acts is to be determined solely by reference to the limits imposed by the Constitution. The only question for the courts to decide is one of power, not of expediency or wisdom; and statutes will not be declared void simply because, in the opinion of the court, they are unwise. For protection against unwise legislation within the limits of recognized legislative power, the people must look to the polls and not to the courts.

"It is very important to discern constantly that the scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. *Whether an enactment is wise or unwise,* whether it

> is based on sound economic theory, whether it is the best means to achieve the desired results, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner *are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.*" (Italics supplied.)

In addition, the applicable doctrine is summarized in 16 C.J.S. 775-790, Constitutional Law: Section 154, in the following manner:

> "It is for the legislature to determine the justice, wisdom, policy, necessity, or expediency of a law which is within its powers to enact, *and such questions are not open to inquiry by the courts.*
>
> "The rule that the courts will not interfere with the legislative branch of the government by an inquiry into the justice, wisdom, policy, necessity, or expediency of an enactment has been applied in numerous instances and to widely variant subject matter, . . ." (Italics supplied.)

In the Supreme Court of Virginia, counsel for appellee successfully asserted the impropriety of any judicial inquiry into the wisdom of the anti-miscegenation policy reflected in the statutes under attack, or any analysis of scientific treaties or texts. Adopting this view, the Supreme Court of Appeals of Virginia observed (206 Va. at 929, 147 S.E. (2d) at 82):

> "The defendants also refer us to a number of texts dealing with the sociological, biological and anthropological aspects of the question of interracial marriages to support their argument that the *Naim* decision is erroneous and that such marriages should not be forbidden by law.

> "A decision by this court reversing the *Naim* case upon consideration of the opinions of such text writers would be judicial legislation in the rawest sense of that term. Such arguments are properly addressable to the legislature, which enacted the law in the first place, and not to this court, whose prescribed role in the separated powers of government is to adjudicate, and not to legislate."

If this Court (erroneously, we contend) should undertake such an inquiry, it would quickly find itself mired in a veritable Serbonian bog of conflicting scientific opinion upon the effects of interracial marriage, and the desirability of preventing such alliances, from the physical, biological, genetic, anthropological, cultural, psychological and sociological point of view. No better demonstration of the validity of this observation can be found than that presented by the opinion of the four majority and three dissenting Justices of the Supreme Court of California in *Perez* v. *Lippold,* 32 Cal. (2d) 711, 198 P. (2d) 17. Reference to that decision reveals that the Justices on both sides of this question could make wide appeal to a vast body of scientific materials to support their respective positions. The scientific authorities cited in the dissenting opinion in that case, as well as the utilization of such authorities by the dissenting Justices, is of such pertinence to the position taken by the Commonwealth in the case at bar as to merit extended quotation in the body of this brief (198 P. (2d) at 33-45):

> "Text and authorities which constitute the factual basis for the legislative finding involved in the statute here in question indicate only that there is a difference of opinion as to the wisdom of the policy underlying the enactments.
>
> "Some of the factual considerations which the legislature could have taken into consideration are disclosed

by an examination of the sources of information on the biological and sociological phases of the problem and which may be said to form a background for the legislation and support the reasoning found in the decisions of the courts upholding similar statutes. A reference to a few of those sources of information will suffice.

"On the biological phase there is authority for the conclusion that the crossing of the primary races leads gradually to retrogression and to eventual extinction of the resultant type unless it is fortified by reunion with the parent stock. (W. A. Dixon, M.D., Journal of American Medical Association, Vol. 20, p. 1 (1893); Frederick L. Hoffman, statistician, Prudential Life Insurance Co. of America, American Economics Association, Vol. II (1896) 'Race Traits and Tendencies of the American Negro'; C. E. Woodruff, 'The Expansion of Races' (1909).) In September, 1927, in an article entitled, 'Race Mixture,' which appeared in 'Science,' Vol. 66, page X, Dr. Charles B. Davenport of the Carnegie Foundation of Washington, Department of Experimental Evolution, said: 'In the absence of any uniform rule as to consequences of race crosses, it is well to discourage it except in those cases where, as in the Hawaiian-Chinese crosses, it clearly produces superior progeny,' and that the Negro-white and Filpino-European crosses do not seem to fall within the exception.

"In Volume 19 of the Encyclopedia Americana (1924), page 275, it is said: 'The results of racial intermarriage have been exceedingly variable. Sometimes it has produced a better race. This is the case when the crossing has been between different but closely allied stocks. * * *' Prof. U. G. Weatherly writes: 'It is an unquestionable fact that the yellow, as well as the negroid peoples possess many desirable qualities in which the whites are deficient. From this it has been argued that it would be advantageous if all races were blended into a universal type embodying the excellencies of each. But scientific breeders have long ago

demonstrated that the most desirable results are secured by specializing types rather than by merging them.

" 'The color line is evidence of an attempt, based on instinctive choice, to preserve those distinctive values which a racial group has come to regard as of the highest moment to itself.'

"In an address before the Commonwealth Club of California on July 9, 1948, Mr. William Gemmill, South African delegate to the International Labor Organization and one well acquainted with social conditions and sociological manifestations in that continent, made the statement that in South Africa, where the European population is greatly outnumbered by the natives, both classes are adamant in opposition to intermarriage and that the free mixing of all the races could in fact only lower the general level.

"A collection of data and references on the result of miscegenation is found in 'The Menace of Color' (1925) by J. W. Gregory (F.R.S., D.Sc., Professor of Geology in the University of Glasgow.) On page 227 he says that the intermixtures which have been beneficial to the progress of mankind have been between nearly related peoples and that the results of a mixture of widely divergent stock serve to warn against the miscegenation of distinct races. Dr. J. A. Mjoen of the Winderen Laboratory, Norway, is credited by Professor Gregory (at p. 229) with the conclusion from special studies that the evidence is sufficient to call for immediate action against the intermarriage of widely distinct races. Gregory states that where two such races are in contact the inferior qualities are not bred out, but may be emphasized in the progeny, a principle widely expressed in modern eugenic literature. Similar views asserting the unfortunate results of crossings between dissimilar races, including the American Negro-White, are ascribed by the author to Prof. H. Lundborg (1922); E. D. Cope, American Geologist; Elwang (1904); Prof. N. S. Shaler (1904); Emile Gaboriau and Gustav Le Bon, France; E. L. Hoffman of the

Prudential Insurance Co. of America (1923); Prof. A. E. Jenks; and Herbert Spencer (1892).

"In March, 1926, the Carnegie Institution of Washington, D. C., accepted a gift from one who expressed his interest in the problem of race crossing with special reference to its significance for the future of any country containing a mixed population. The work was undertaken by the Department of Genetics, Carnegie Institution. An advisory committee was organized consisting of W. V. Bingham, Charles B. Davenport, E. L. Thorndike, and Clark Wissler. Mr. Morris Steggerda was selected as field investigator. Mr. Steggerda had had excellent training in genetics and psychology, and had shown a marked fitness for the study and analysis of the individual. The main project was carried out in Jamaica, B. W. I., by studying in detail and comparatively, 100 each of adults of full-blooded Negroes (Blacks), Europeans (Whites), and White-Black mixtures of all degrees (Browns). Half of the hundred were of each sex. In addition to the main project some 1200 children of school and pre-school age were observed and measured. Finally in 1929, an extensive report was published by the Carnegie Institution, in book form entitled 'Race Crossing in Jamaica', by B. C. Davenport and Morris Steggerda, in collaboration with others. The results of their investigation indicated that the crossing of distinct races is biologically undesirable and should be discouraged.

"W. E. Castle, Bussey Institution, Harvard University, in an article entitled 'Biological and Social Consequences of Race Crossing' printed in Volume 9, American Journal of Physical Anthropology (April, 1926), stated on page 152: 'If all inheritance of human traits were simple Mendelian inheritance, and natural selections were unlimited in its action among human populations, then unrestricted racial intercrossing might be recommended. But in the light of our present knowledge, few would recommend it. For, in the first place, much that is best in human existence is

a matter of social inheritance, not of biological inheritance. Race crossings disturb social inheritance. That is one of its worst features.' This then leads to a consideration of the sociological phase.

"The writings of Father John LaFarge, S.J., are typical of many who have considered the subject of race-crosses from a sociological standpoint. Reference has been made to his work. 'The Race Question and the Negro' (1943). Under the heading 'The Moral Aspect,' he writes: '[T]here are grave reasons against any general practice of intermarriage between the members of different racial groups. These reasons, where clearly verified, amount to a moral prohibition of such a practice.

" 'These arise from the great difference of condition which is usually experienced by the members of the respective groups. It is not merely a difference of poverty or riches, of lesser or greater political power, but the fact that identification with the given group is far-reaching and affects innumerable aspects of ordinary daily life. * * *

" 'Where marriage is contracted by entire solitaries, such an interracial tension is more easily borne, but few persons matrimonially inclined are solitaries. They bring with them into the orbit of married life their parents and brothers and sisters and uncles and aunts and the entire social circle in which they revolve. All of these are affected by the social tension, which in turn reacts upon the peace and unity of the marriage bond.

" 'When children enter the scene the difficulty is further complicated unless a complete and entirely self-sacrificing understanding has been reached beforehand. And even then the social effects may be beyond their control. * * *

" 'In point of facts as the Negro group becomes culturally advanced, there appears no corresponding tendency to seek intermarriage with other races.'

"The foregoing excerpts from scientific articles and legal authorities make it clear that there is not only

some but a great deal of evidence to support the legislative determination (last made by our Legislature in 1933) that intermarriage between Negroes and white persons is incompatible with the general welfare and therefore a proper subject for regulation under the police power. There may be some who maintain that there does not exist adequate data on a sufficiently large scale to enable a decision to be made as to the effects of the original admixture of white and Negro blood. However, legislators are not required to wait upon the completion of scientific research to determine whether the underlying facts carry sufficient weight to more fully sustain the regulation.

"A review of the subject indicates that the statutory classification was determined by the Legislature in the light of all the circumstances and requirements (see also *California Physicians' Service* v. *Garrison,* 28 Cal. 2d 790, 802, 172 P. 2d 4, 167 A.L.R. 306; *Livingston* v. *Robinson,* 10 Cal. 2d 730, 76 P. 2d 1192); that under our tripartite system of government this court may not substitute its judgment for that of the Legislature as to the necessity for the enactment where it was, as here, based upon existing conditions and scientific data and belief; that even in the field of fundamental rights it has always been recognized that where the Legislature has appraised a particular situation and found a specific condition sufficiently important to justify regulation, such determination is given great weight when the law is challenged on constitutional grounds.

"Those favoring present day amalgamation of these distinct races irrespective of scientific data of a cautionary nature based upon the experience of others, or who feel that a supposed infrequency of interracial unions will minimize undesirable consequences to the point that would justify lifting the prohibition upon such unions, should direct their efforts to the Legislature in order to effect the change in state policy which they espouse—as was done in Massachusetts in 1843,

Kansas in 1859, New Mexico in 1866, Washington in 1868, Rhode Island in 1881, Minnesota and Michigan in 1883, and Ohio in 1887."

Moreover, it appears that there has been no diminution in the flood of scientific materials on this subject. See, Gates: Heredity in Man (1929); Gates: *Genetics, Taxonomy, and the Races of Man,* 68 *Journal of the Elisha Mitchell Scientific Society* No. 2, (1952); Keith: *A New Theory of Human Evolution* (1949); Darlington: *The Facts of Life* (1956); Mayr: *Animal Species and Evolution* (1963); Coon: *The Origin of Races* (1962); *The Race Concept: Results of an Inquiry* (UNESCO, 1952); Ingle: *Race Differences and the Future,* Science, Vol. 146. No. 3642, (1964); Ingle: *Race, Science, and Social Policy,* Science, Vol. 146, No. 3651 (1964). So far as counsel for the Commonwealth have been able to ascertain the most recent scientific treatise upon the propriety or desirability of interracial marriages from the psychological and sociological point of view is that of Dr. Albert I. Gordon, entitled *Intermarriage—Interfaith Interracial, Interethnic* published in 1964. This work has been characterized as the "definitive book on intermarriage" by Dr. Gordon W. Allport, Professor of Psychology at Harvard University, and as "the most careful, up-to-date, methodologically sound study of intermarriage in North America that exists . . ." by Dr. Herbert Gezork, President of the Andover Newton Theological School.

Typical of the findings, observations and conclusions set forth in this most recent treatise upon the subject of interracial marriages are the following:

[PP. 334-335]

"Inasmuch as we have already noted the higher rate of divorce among the intermarried, it is not proper to

ask, 'Shall we then add to the number of children who become the victims of their intermarried parents?' If there is any possibility that this is likely to occur—and the evidence certainly points in that direction—it would seem that our obligation to children should tend to reduce the number of such marriages.

* * *

[P. 357]

"The argument that persons who oppose intermarriage—religious or racial—are per se 'prejudiced,' may be true of some persons; true, in degree, about others; and yet be completely untrue about still others. The desire to perpetuate one's own religion or to prevent its assimilation is understandable and reasonable. If it were necessary to 'prove' that each of us is entitled to life only because we possess some demonstrably unique or special talent or gift of mind or body, our society would be decimated in short order. Just as no individual needs to explain his desire to live, so it would seem to me that neither races of man nor religious or ethnic groups need offer apologies for their desire to perpetuate themselves. I believe that the tendency to classify all persons who oppose intermarriage as 'prejudiced' is, in itself, a prejudice.

* * *

[PP. 367-368]

"It is my conviction that intermarriage is definitely inadvisable. It places a greater stress and strain upon marriage than is ordinarily true when persons of similar religious views are married. We need not guess about this. In every case of interfaith marriage that we have examined, the facts about the greater strains involved have come to the fore. The fact that divorce and separation rates are higher in these interfaith marriages serves also to support this view.

* * *

"Intermarriages are wrong too because they are often based on the mistaken premise that, in this way, universalism and human brotherhood is assured. Not only has this theory not been proved—it has rather,

been exploded. Two nothings are still nothing. A plus and a minus simply cancel each other out. Nothing of any significance is gained by such a marriage. If all humans on a given day gave up all their differences (an utterly fantastic idea) we might have half a chance. But in the world as we know it such an idea is impracticable if not absurd.

* * *

"As I view it, intermarriage constitutes a threat to society and is not necessarily a promise of a brighter day to come.

* * *

[P. 370]

"Intermarriage, as I view it, holds no promise for a bright and happy future for individuals or for mankind. The evidence, as I view it, is clear on this point. The facts speak for themselves.

* * *

[PP. 372-373]

"The statistical evidence incorporated in this study makes it clear that the 'odds' do not favor intermarriages, in that almost two to four times as many intermarriages as intramarriages end in divorce, separation or annulment. This is a highly significant fact. It is objective and utterly free from emotion-inducing factors. It ought, therefore, to be considered and weighed most carefully.

* * *

"I lay no claim to omniscience or infallibility; hence, I can not claim that the views expressed here are correct in every detail and meet every situation. Both years of study of intermarriage as a concern of the social scientist, and years of intimate personal contact with people who have come to me asking for counsel and assistance with marital problems, make me feel that I may be of assistance to others who contemplate intermarriage. Perhaps our society will change so radically in its views and attitudes within the next decade that my views, too, will change. However, I doubt that such a condition is likely to occur. So for

the present these views are, I think, worthy of careful consideration and study."

These materials and others which we have set forth in the appendix to this brief, as well as still others which have been cited by counsel for the appellants, clearly demonstrate the conflicting views of eminent scientific authorities upon the wisdom or desirability of interracial marriages and the prevention of such alliances. See, Appendices B, C, D, E and F, *post,* App. 3-28. The scope and details of a State's anti-miscegenation statute may depend upon the nature and size of its population classifications and the character of the problem which certain types of interracial marriages may produce. In this connection, substantially all of Virginia's population falls within one of two categories—white and Negro. Statistics of the United States Bureau of the Census establish that over 99% of Virginia's residents are so classified—whites constituting 79+% of the population and Negroes constituting 20+% of the population. Residents belonging to all other racial classifications combined constitute less than one-fourth of 1% of Virginia's population. See, Appendix G, *post,* App 29. Of course, the population classification statistics of other States differ materially from those of Virginia.

In such a situation, it is the exclusive province of the legislature of each State to make the determination for its citizens as to the desirability, character and scope of a policy of permitting or preventing such alliances—a province which the judiciary may not, under well settled constitutional doctrine, invade. Counsel for the Commonwealth submit, therefore, that such scientific evidence is irrelevant to any proper area of judicial inquiry in the instant case, and that the determination of the General Assembly of Virginia upon this matter should be left undisturbed by this Court.

CONCLUSION

Upon a consideration of the whole matter, the Supreme Court of Appeals of Virginia declared (206 Va. at 929, 147 S. E. (2d) at 82):

> "The defendants direct our attention to numerous federal decisions in the civil rights field in support of their claims that the *Naim* case should be reversed and that the statutes under consideration deny them due process of law and equal protection of the law.
>
> "We have given consideration to these decisions, but it must be pointed out that none of them deals with miscegenation statutes or curtails a legal truth which has always been recognized—that there is an overriding state interest in the institution of marriage.
>
> * * *
>
> "Our one and only function in this instance is to determine whether, for sound judicial considerations, the *Naim* case should be reversed. Today, more than ten years since that decision was handed down by this court, a number of states still have miscegenation statutes and yet there has been no new decision reflecting adversely upon the validity of such statutes. We find no sound judicial reason, therefore, to depart from our holding in the *Naim* case. According that decision all of the weight to which it is entitled under the doctrine of *stare decisis,* we hold it to be binding upon us here and rule that Code, §§ 20-58 and 20-59, under which the defendants were convicted and sentenced, are not violative of the Constitution of Virginia or the Constitution of the United States."

It is difficult to comprehend how any other conclusion could have been reached. "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature." *Maynard* v. *Hill,* 125 U.S. 190, 205. "Upon it society may be said to be built, and out of its fruit spring

social relations and social obligations and duties, with which government is necessarily required to deal." *Reynolds* v. *U.S.*, 98 U.S. 145, 165. Moreover, "under the Constitution the regulation and control of marital and family relationships are reserved to the States . . . [and] . . . the regulation of the incidents of the marital relation involves the exercise by the States of powers of the most vital importance." *Sherrer* v. *Sherrer,* 334 U.S. 343, 354.

The Virginia statutes here under attack reflects a policy which has obtained in this Commonwealth for over two centuries and which still obtains in seventeen states. They have stood—compatably with the Fourteenth Amendment, though expressly attacked thereunder—since that Amendment was adopted. Under such circumstances, it is clear that the challenged enactments infringe no constitutional right of the appellee. Counsel for appellee submit therefore that Sections 20-58 and 20-59 of the Virginia Code are not violative of the Fourteenth Amendment to the Constitution of the United States and that the judgment of the Supreme Court of Appeals of Virginia in the case at bar should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. D. McIlwaine, III, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of counsel for appellee in the above-captioned matter, hereby certify that copies of this Brief And Appendix On Behalf Of Appellee have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office, with first-class postage prepaid, this 17th day of March, 1967, pursuant to the provisions of Rule 33(1) of the Rules of the Supreme Court of the United States, as follows: Bernard S. Cohen, Esq., and Philip J. Hirschkop, Esq., 110 North Royal Street, Alexandria, Virginia; William D. Zabel, Esq., 52 Wall Street, New York, New York; Arthur L. Berney, Esq., 67 Winthrop Road, Brookline, Massachusetts; Marvin M. Karpatkin, Esq., and Melvin L. Wulf, Esq., 156 Fifth Avenue, New York, New York, and David Carliner, Esq., 1424 16th Street, N.W., Washington, D. C., counsel for appellants.

R. D. McIlwaine, III
Assistant Attorney General

APPENDIX

APPENDIX A

§ 20-50.—The State Registrar of Vital Statistics may prepare a form whereon the racial composition of any individual, as Caucasian, Negro, Mongolian, American Indian, Asiatic Indian, Malay, or any mixture thereof, or any other non-Caucasic strains, and if there be any mixture, then, the racial composition of the parents and other ancestors, insofar as ascertainable, so as to show in what generation such mixture occurred, may be certified by such individual, which form shall be known as a registration certificate. The State Registrar of Vital Statistics may supply to each local registrar a sufficient number of such forms for the purpose of this chapter; each local registrar may, personally or by deputy, as soon as possible after receiving the forms, have made thereon in duplicate a certificate of the racial composition, as aforesaid, of each person resident in his district, who so desires, born before June fourteenth, nineteen hundred and twelve, which certificate shall be made over the signature of such person, or in the case of children under fourteen years of age, over the signature of a parent, guardian, or other person standing in loco parentis. One of such certificates for each person thus registering in every district shall be forwarded to the State Registrar of Vital Statistics for his files; the other shall be kept on file by the local registrar.

Every local registrar may, as soon as practicable, have such registration certificate made by or for each person in his district who so desires, born before June fourteenth, nineteen hundred and twelve, for whom he has not on file a registration certificate, or a birth certificate. (1924, p. 534; Michie Code 1942, § 5099a.)

§ 20-51.—It shall be a felony for any person wilfully or knowingly to make a registration certificate false as to color or race. The wilful making of a false registration or birth certificate shall be punished by confinement in the

penitentiary for one year. (1924, p. 534; Michie Code, 1942, § 5099a.)

§ 20-52.—For each registration certificate properly made and returned to the State Registrar of Vital Statistics, the local registrar returning the same shall be entitled to a fee of twenty-five cents, to be paid by the registrant. Application for registration and for transcript may be made direct to the State Registrar, who may retain the fee for expenses of his office. (1924, p. 534; Michie Code 1942, § 5099a.)

§ 20-53.—No marriage license shall be granted until the clerk or deputy clerk has reasonable assurance that the statements as to color of both man and woman are correct.

If there is reasonable cause to disbelieve that applicants are of pure white race, when that fact is stated, the clerk or deputy clerk shall withhold the granting of the license until satisfactory proof is produced that both applicants are "white persons" as provided for in this chapter.

The clerk or deputy clerk shall use the same care to assure himself that both applicants are colored, when that fact is claimed. (1924, p. 534. Michie Code 1942, § 5099a.)

§ 20-54.—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. (1924, p. 535; Michie Code 1942, § 5099a.)

§ 20-55.—For carrying out the purposes of this chapter and to provide the necessary clerical assistance, postage and

other expenses of the State Registrar of Vital Statistics, twenty per cent of the fees received by local registrars under this chapter shall be paid to the State Bureau of Vital Statistics, which may be expended by the Bureau for the purposes of this chapter. (1924, p. 535; Michie Code 1942, § 5099a.)

APPENDIX B

INTERMARRIAGE:

Interfaith, Interracial, Interethnic

By Dr. Albert I. Gordon

(Excerpts—Italics Supplied)

[pp. 334-335]

"Inasmuch as we have already noted *the higher rate of divorce among the intermarried*, is it not proper to ask, 'Shall we then add to the number of children who become the victims of their intermarried parents?' If there is any possibility that this is likely to occur—and the evidence certainly points in that direction—*it would seem that our obligation to children should tend to reduce the number of such marriages.*

* * *

[pp. 348-349]

"Marriage out of one's own faith is, according to the evidence I have examined, almost three times less likely to succeed than ordinary marriages. Whether or not religious differences in these cases is only one of the factors that has resulted in the ultimate dissolution of the marriage, the fact is that interfaith marriages fail in far greater numbers than intrafaith marriages. If I were a betting man, I would certainly not wager against such odds.

"The chances for the success of an interracial marriage are, according to my research, even less than for that of an inter-faith marriage.

* * *

"I believe that the institution of marriage certainly does not require that we make martyrs of ourselves and of our children. Marriages in which the husband and wife have more (rather than less) in common are, according to all the evidence, far more likely to succeed. *And, inasmuch as 'success' in marriage is the desired goal, the information we have acquired about interfaith and interracial marriages ought to be heeded.*

* * *

[P. 352]

"It is important to recognize the fact that no greater abilities—physical, mental or metaphysical—have ever emanated from peoples who have assimilated and given up their own identity, than from those who have maintained their separateness and distinctiveness. Diversity in color, race, or religion, is, then, neither a blessing nor a curse in itself. It may become one or the other, depending entirely upon how diverse peoples use their diversity.

* * *

[P. 354]

"Persons anticipating cross-marriages, however much in love they may be, have an important obligation to unborn children. It is not enough to say that such children will have to solve their own problems 'when the time comes.' Intermarriage frequently produces major psychological problems that are not readily solvable for the children of the intermarried. Living as we do in a world that emphasizes the importance of family and religious affiliations, it is not likely that the child will come through the maize of road blocks without doing some damage to himself.

"I believe that parents who attempt to dissuade their children from intermarrying are not selfish, intolerant people, as their children and others are wont to say. They know, by their own experience, the experiences of others, and even intuitively as well, *that opposites in color or religion are far less likely to be as successful in their marriage as are persons of the same color and religion.*

* * *

[PP. 357, 358, 359, 360]

"The argument that persons who oppose intermarriage —religious or racial—are per se 'prejudiced,' may be true of some persons; true, in degree, about others; and yet be completely untrue about still others. The desire to perpetuate one's own religion or to prevent its assimilation is understandable and reasonable. If it were necessary to 'prove' that each of us is entitled to life only because we possess some demonstrably unique or special talent or gift of mind or body, our society would be decimated in short order. Just as no individual needs to explain his desire to live, so it would seem to me that neither races of man nor religious or ethnic groups need offer apologies for their desire to perpetuate themselves. *I believe that the tendency to classify all persons who oppose intermarriage as 'prejudiced' is, in itself, a prejudice.*

"Those persons who indicate a favorable attitude toward intermarriage may look upon such a course as one important means for the attainment of human brotherhood. They may be impelled by high motivations. In fact, they may be convinced that the quickest and surest way to conquer prejudice between peoples and groups is through such a practical means as intermarriage.

"*Such an argument appears to me to be weak, utterly impracticable and even fallacious.* Assuming that prejudices could, in fact, be utterly eliminated by the act of inter-

marriage, on what day, at what hour, at what minute, would all mankind be of one mind concerning acceptance of such a course of action? Obviously, from a practical point of view, it is not likely to happen.

* * *

"On the basis of group self-pride and self-respect, it does not appear likely that intermarriage will ever be regarded as a basic or major solution for the ills of our age. Universal brotherhood, freedom from prejudice, intolerance and hatred of the unlike will hardly be purchased at the price of the giving up of all group personalities. None of the great prophetic voices out of the past ever proposed that national or religious groups, however different from their own, should cease to exist in order to achieve universal brotherhood.

"*Viewed in terms of the short-time situation with which we are generally confronted, intermarriage appears to the major religious bodies, as well as to national ethnic and racial groups, to constitute a betrayal of the ideals and values which each professes.* It appears, also, to constitute a betrayal of family and group values. A deep hurt is often created in family and friend whose values are spurned. Pride is affected. Families, friends, religions and races, knowing that their 'values' differ from those of others, believe that their unique way of life is somehow endangered when mixed marriage occurs.

* * *

"Some proponents of human brotherhood insist that the biological, cultural and religious intermixtures of humankind would not only improve the human race, but would inevitably assure the ideal state in which brotherhood would become a fact rather than merely a desirable goal. Whether human society as a whole would be physically improved

by such admixtures remains to be proved. At most, all that can be stated with any degree of accuracy is that no one has yet provided any scientific evidence that the human race is physically despoiled by the intermingling of the blood of various races of mankind. Nor is there evidence to support the contention that because of these admixtures, society actually suffers a severe cultural loss. The evidence is not available because no society has wholly given up its own culture and substituted therefor the culture of another people. *Proponents of human brotherhood may believe that 'it would be a good thing' if we were not divided, in many cases arbitrarily into races, nations, cultures or religion, but there is not a single shred of evidence to support such a view.*

"There is, on the other hand, evidence available that we are in fact, separated by color, language, national, cultural, religious and ethnic differences. Those who support the premise that human brotherhood can come about only through the breaking down of racial, national, cultural and religious walls that now separate people from each other, tend to assume (a) that the fact that men are not biologically different from each other implies that cultures and religions, too, do not differ; (b) that there are no higher or lower cultures, no higher or lower religions. There are, in fact, cultures, civilizations and religions obviously more advanced or less primitive than others. Belief in the distinctiveness of a certain culture or religion and the desire on the part of some individual or group of individuals to perpetuate that distinctiveness because of its demonstrable superiority does not, of itself, make any person less a proponent of human brotherhood. It is rather a question of which road to take to reach the desired goal without destroying all other goals that have been or are in the process of being achieved by a particular society.

* * *

"Further, what may prove desirable for the individual may prove wholly undesirable for a group. An individual here or there may find the answer to his or her particular problem through intermarriage, but this seldom, if ever, is true of a group of any large segment of society.

* * *

[P. 362]

"I believe that basic differences will not be eliminated. I believe further that the most we can hope and work for with any degree of moderate success is that we will grow more accustomed to the idea that it is possible for persons of different colors, races, nations and religions to work together in many areas even while retaining their distinctiveness.

"Mixed marriages, in my view, need not necessarily prove harmful to and destructive of our society. *They may, however, dull the impact of that distinctiveness and uniqueness that often gives races and religions meaning and actually contribute to the improvement of our society.*

* * *

[PP. 367-368-369]

"It is my conviction that intermarriage is definitely inadvisable. It places a greater stress and strain upon marriage than is ordinarily true when persons of similar religious views are married. *We need not guess about this.* In every case of interfaith marriage that we have examined, the facts about the greater strains involved have come to the fore. The fact that divorce and separation rates are higher in these interfaith marriages serves also to support this view.

* * *

"Intermarriages are wrong, too, because they are often based on the mistaken premise that, in this way, universalism and human brotherhood is assured. Not only has this theory

not been proved—it has, rather, been exploded. Two nothings are still nothing. A plus and a minus simply cancel each other out. Nothing of any significance is gained by such a marriage. If all humans on a given day gave up all their differences (an utterly fantastic idea) we might have half a chance. But in the world as we know it such an idea is impracticable if not absurd.

"It is the duty of men and women of different faiths, colors and nations to learn to live together in peace and amity while maintaining their differences. Our duty is clear. We must learn how to live together despite differences that almost inevitably exist. It is our duty, further, to perpetuate those values and ideals that we know to be significant in our religious philosophy. Our obligation as humans is to learn to have respect for each other without regard to differences that may separate us in degree from each other. Conformity is not to be mistaken for an unmixed blessing. Blandness is not a virtue. The elimination of all differences in religion or color could only lead to blandness and is, therefore, not to be mistaken for a blessing to mankind *but rather as a serious threat to the welfare of individuals and the society of which they are a part.*

"As I view it, intermarriage constitutes a threat to society and is not necessarily a promise of a brighter day to come.

"On the basis of the evidence presently available it is clear, too, that the chances of happiness in marriage are greatest for those who are culturally, socially, educationally, temperamentally, ethnically, nationally, racially, and religiously more alike than they are different from each other. Opposites may attract, but that does not guarantee that they will stay together. *If one out of every three marriages are known to fail, and if we know that the percentage of these failures increases when differences in race and re-*

ligion are considered as separate factors in these marriages, we must conclude that intermarriage is unwise for most individuals and must, therefore, be regarded as a threat to both personal and group happiness.

"Our personal histories reveal the fact that no parent in a mixed marriage, however intelligent and capable he or she may otherwise be, can assure his children of the security in family and society they both want and need. Psychologically the children of mixed marriages are faced with more numerous emotional problems than we have a right to bequeath to them. *It does not seem reasonable, therefore, to intensify the nature and quantity of the difficulties that mixed marriages and the children thereof are likely to face!*

* * *

[PP. 369-370]

"A rereading of the factual material contained in this study of intermarriage in its various forms, and of its effects on those who intermarry, *leads me to the conclusion that intermarriage is actually a threat to ultimate happiness,* that the problems that result from the major differences in religion and race are so weighty as to require that those who would intermarry be persons of far greater strength and courage than is ordinarily required in marriage. If, in the average marriage, there are differences that must be resolved and adjustments that must be made, and if, even then, the divorce rate is about one in every three marriages, we may expect that the divorce rate for the intermarried will be much greater. We have offered the evidence to support this thesis in that the rate of divorce in cases of intermarriage is two to four times as heavy as the 'normal' rate.

"I believe that intermarriage is also a threat to the children of such a marriage, in that it may tend to make them marginal in their relationships to parents, their faiths or

their races. When we make it difficult and sometimes quite impossible for children to identify with us and our way of life, or our people, *we have created a threat to their welfare and to the welfare of society as well because highly charged emotional experiences often leave such children disturbed, frustrated and unable to believe that they can live normal, happy lives.*

* * *

"In the case of interracial marriages, I have found that the white partner often imagines that his or her child born of such a marriage is really white and the hope appears to be present that such a child though dark in color can 'pass.' Difficult as is the problem of the parent in such a situation, the problems which confront the children of Negro-white marriages appear to be even more complex and emotionally frustrating.

"Intermarriage, as I view it, holds no promise for a bright and happy future for individuals or for mankind. The evidence, as I view it, is clear on this point. The facts speak for themselves.

* * *

[PP. 372-373]

"The statistical evidence incorporated in this study makes it clear that the 'odds' do not favor intermarriages, in that almost two to four times as many intermarriages as intra-marriages end in divorce, separation or annulment. *This is a highly significant fact. It is objective and utterly free from emotion-inducing factors. It ought, therefore, to be considered and weighed most carefully.*

* * *

"I lay no claim to omniscience or infallibility; hence, I can not claim that the views expressed here are correct in every detail and meet every situation. Both years of study of intermarriage as a concern of the social scientist,

and years of intimate personal contact with people who have come to me asking for counsel and assistance with marital problems, make me feel that I may be of assistance to others who contemplate intermarriage. Perhaps our society will change so radically in its views and attitudes within the next decade that my views, too, will change. However, I doubt that such a condition is likely to occur. *So for the present these views are, I think, worthy of careful consideration and study.*"

APPENDIX C

Excerpts From
The Race Concept: Results of an Inquiry
Unesco Paris
(1952)

Physical anthropologists and geneticists throughout the world made so many criticisms of the various UNESCO Statements on Race* that UNESCO published a booklet entitled *The Race Concept: Results of an Inquiry* (1952), containing the objections of some of these scientists. On page 7 of this booklet, it is frankly admitted (in discussing the Statement on Race) that: "Some of its contentions, and some of the terms used, were much criticized, especially by physical anthropologists and geneticists." Speaking of the criticisms published by the scientific journal *Man,* the official journal of the Royal Anthropological Institute, the UNESCO booklet summarized these criticisms as follows:

> "... They considered that the document tended to confuse race as a biological fact and the concept of race as a social phenomenon; they also declined to acknowl-

* Statement on the nature of race and race differences (UNESCO).

> edge as a proved fact that there are no mental differences between racial groups, stressed that there was insufficient evidence to support that view, and urged the need for keeping an open mind on the subject. The statement that 'biological studies lend support to the ethic of universal brotherhood, for man is born with drives towards co-operation' came in for the most frequent criticism."

In the chapter of *The Race Concept* booklet entitled "Observations and Comments on the Statement as a Whole," the UNESCO publication admits that "Darlington, Fisher, Genna and Coon are frankly opposed to the Statement." By way of background it should be noted that Professor C. D. Darlington is Sherardian Professor of Botany at the University of Oxford, and the author of several major works in the field of human genetics; Professor R. R. Fisher was Professor of Genetics at the University of Cambridge, England, and one of the founders of the science of mathematical statistics; Professor Giuseppe Genna is Chairman of the Department of Anthropology at the University of Rome, and the author of an original study of racial differences in brain structure between Italians and Cameroon Negroes; and Professor Carleton Coon is Professor Emeritus of Anthropology at the University of Pennsylvania, and a past president of both the American Association of Physical Anthropology and the American Anthropological Association. Each of these four individuals is an outstanding authority in the field of physical anthropology or human genetics.

Professor Darlington's judgment of the UNESCO Statement on Race included the following comments, (p. 27):

> "... Today we understand very much more about how human society has evolved than Darwin did; but few

> of us know the results of this evolution by our own observations better than he did. Fortunately genetics has given us every reason to agree with him. In *The Descent of Man* he writes: 'The races differ also in constitution, in acclimatization, and in liability to certain diseases. Their mental characteristics are likewise very distinct; chiefly as it would appear in thir emotional, but partly in their intellectual faculties.'
>
> "By trying to prove that races do not differ in these respects we do no service to mankind. We conceal the greatest problem which confronts mankind (and particularly in respect of the organization of Unesco) namely how to use the diverse, the ineradicable diverse, gifts, talents, capacities of each race for the benefit of all races. For if we were all innately the same how should it profit us to work together? And what an empty world it would be."

With regard to the comments on the UNESCO Statement by Sir Ronald Fisher, the UNESCO booklet contains the following (p. 27):

> "Sir Ronald Fisher has one fundamental objection to the Statement, which, as he himself says, destroys the very spirit of the whole document. He believes that human groups differ profoundly 'in their innate capacity for intellectual and emotional development' and concludes from this that the 'practical international problem is that of learning to share the resources of this planet amicably with persons of materially different nature, and that this problem is being obscured by entirely well intentioned efforts to minimize the real differences that exist.' "

Professor Giuseppe Genna made the following comments on the UNESCO Statement (p. 28):

> "It should also be observed that in order to oppose race prejudice there would not seem to be any need

> to prove that human races are equal as regards psychical attributes. . . . Prejudice should be combated even if the psychical qualities of races differed very greatly. Knowledge of the psychological differences between human races is at present fluid and it would seem impossible to deny altogether the existence of these differences—at any rate as regards certain psychological aptitudes of the major groups—unless we are prepared to admit that these differences imply a racial hierarchy. In the absence of more exact information, it does not seem right to regard the problem as settled by a mere negative. . . ."

Professor Carleton Coon criticized the UNESCO Statement on Race as follows (p. 28):

> ". . . *I do not* approve of slanting scientific data to support a social theory, since that is just what the Russians are doing, and what Hitler did."

In addition to the statements received from the above four scientists, comments and criticisms were received from anthropologists and geneticists in many other countries. Professor Fritz Lenz, Professor Emeritus of Genetics at the University of Gottingen, and co-author of the widely used textbook *Human Heredity,* is quoted as criticizing the UNESCO Statement as follows (p. 30):

> "In my opinion one of the dangers of the present Statement is that it disregards not only the enormous hereditary differences between men, but also absence of selection as the decisive cause of the decline of civilization, and it therefore runs counter to the science of eugenics."

Professor Eugen Fischer, Professor Emeritus of Anthropology at the University of Freiburg and former Director of

the Kaiser Wilhelm Institute of Anthropology at the University of Berlin, made the following comments on the UNESCO Statement (p. 32):

> "But the Statement also purports to be an authoritative body of scientific doctrines, and this is quite a different matter. Without touching upon the content of these doctrines, and quite apart from whether or not they meet with my approval, I must register my fundamental opposition to the advancing of scientific theses as such, and protest against it.
>
> "I recall the National Socialists' notorious attempts to establish certain doctrines as the only correct conclusions to be drawn from research on race, and their suppression of any contrary opinion; as well as the Soviet Government's similar claim on behalf of Lysenko's theory of heredity, and its condemnation of Mendel's teaching. The present Statement likewise puts forward certain scientific doctrines as the only correct ones, and quite obviously expects them to receive general endorsement as such. I repeat that, without assuming any attitude towards the substance of the doctrines in the Statement, I am opposed to the principle of advancing them as doctrines. The experiences of the past have strengthened my conviction that freedom of scientific findings or opinions are elevated, by an authoritative body, into the position of doctrines."

Professor Karl Saller, Director of the Anthropological Institute of the University of Munich, and author of the comprehensive three-volume work, *Lehrbuch der Anthropologie,* (1957, 1959, 1962), similarly commented (p. 34):

> "Coming down to more specific details, I feel that there is a certain danger in the Statement, especially in so far as the drafts hitherto evolved have utterly disregarded or even flatly denied the existence of mental

> (psychic) differences between certain groups of peoples. We may or may not give the name of race to such groups of human beings, who differ in their inherited psychic characteristics; but the whole science of eugenics is based on the existence of such hereditary psychic differences. . . ."

Professor Hans Weinert, Director of the Anthropological Institute at the University of Kiel and the author of several important works on the fossil history of man, criticized the UNESCO Statement in the following manner (p. 35):

> "*In regard to Section 9 (b)*, if it is true that all races have the same innate capacity for intellectual development, then why is it that so far only the members of the white race have built up any scientific knowledge?"

In addition to published comments on the UNESCO Statement as a whole, the UNESCO booklet *The Race Concept* published comments and criticisms by numerous scientists on different items in the Statement. The Brief for Appellants (p. 37) makes reference to Section 7 of the UNESCO Statement. On pages 62 to 64 of the UNESCO booklet, this paragraph is criticized sentence by sentence by Professors Darlington, Weinert and Krogman (Professor of Physical Anthropology at the University of Pennsylvania):

> "SECTION 7
> *There is no evidence for the existence of so-called 'pure' races.*
>
> On this point, Darlington writes: 'Here we are back at the beginning again. In an outbreeding organism like man there are not pure races of the same character as in self-fertilized or parthenogentic organisms. Nevertheless in certain racial situations, as in Hawaii, it

would be foolish to overlook the fact that the Japanese, the Hawaians, and even the whites, are so-called pure races as compared with the offspring from crossing these races. It would be foolish to disregard the analogy with the Mendelian experiment in which one distinguishes between so-called F^1, F^2 backcross, and derivative, progeny.'

"*In regard to race mixture, the evidence points to the fact that human hybridization has been going on for an indefinite but considerable time.*

'The evidence', writes Darlington, 'points to the fact that wide crossing has never before taken place on such a scale as during the last 400 years. Sea transport has brought the most extreme human types together for the first time. The hybridization that took place before the invention of navigation was obviously of a very different order from what happens now and anyone who attempted to write human history and neglect this fact might just as well repudiate all biology.'

"*As there is no reliable evidence that disadvantageous effects are produced thereby, no biological justification exists for prohibiting intermarriage between persons of different races.*

Darlington, remarking that this is an example 'of the worst effects of reiterating the negative (presumably in answer to an invisible antagonist),' asks: 'What is the alternative? Disadvantageous with respect to what? To non-breeding? To incest? Or to crossing with an absent number of the same race? And in what circumstances? In the home country of one race? Or of the other? Or of both? When the Fuegians crossed with Europeans there cannot be any doubt that the progeny were superior to both parent races for living in Tierra del Fuego. But we may doubt very much whether the progeny were superior to both for living in Europe. Different kinds of results have arisen from race crossing in all parts of the world. They show reliably and conclusively that the progeny are dif-

ferent in innate capacity from either parent of the so-called pure race and that these differences are sometimes advantageous and sometimes disadvantageous, to one or both in the circumstances obtaining. Simply because the innate capacities of all races of men, as of animals, are different, and are suited to different circumstances and habitats.

'There might therefore be a 'biological justification for prohibiting intermarriage 'between races if intermarriage were not contrary to the habits of all stable communities and therefore in no need of discouragement.'

"Weinert writes about this section: 'Whether there is any 'biological' justification for considering races to differ in value does not alter the fact that human beings themselves attach different values to their races. Consequently, half-castes always try to win recognition as members of a 'higher' race, but this the latter race generally denies them. In defence of prohibiting marriage between persons of different races, I should like to ask which of the gentlemen who signed the Statement would be prepared to marry his daughter to an Australian aboriginal, for example.'

" 'By 'biological,' I assume that 'morphological' is meant,' writes Krogman. 'I think that it should be recognized that there are possible physiological differences which, though not prohibiting intermarriage, may be deleterious. I refer to sickle cell anaemia, Cooley's anaemia, as examples.' "

In addition, each of the five paragraphs in Section 9 of the UNESCO Statement came in for considerable criticism from reputable physical anthropologists and geneticists. These criticisms were published on pages 65 to 70 of the UNESCO booklet, *The Race Concept*. Some of these criticisms are presented below:

"(a) *In matters of race, the only characteristics which anthropologists have so far been able to use effectively as a basis for classification are physical (anatomical and physiological).*

According to Genna, 'if anthropologists do not use psychological differences in their classification of races, that is due not so much to the fact that those differences are lacking as to the difficulty of determining them and to the element of subjectivity inevitable in their evaluation.'

"(b) *Available scientific knowledge provides no basis for believing that the groups of mankind differ in their innate capacity for intellectual and emotional development.*

... Here is how Fischer would word this point: 'Available scientific knowledge provides a firm basis for believing that the groups of mankind differ in their innate capacity for intellectual and emotional development, seeing that such groups do differ undoubtedly in a very large number of their genes.'

"(c) *Some biological differences between human beings within a single race may be as great as or greater than the same biological differences between races.* (Original text: *The biological differences between human beings within single races may be as great as the biological differences between races.*)

Genna denies the validity of this corollary: 'Although it is true that biological differences between human beings within a single race may be of the same nature as differences between our race and another, it is also true that differences between races are usually greater than those which may exist between individuals of the same race.'

"(d) *Vast social changes have occurred that have not been connected in any way with changes in racial type. Historical and sociological studies thus support the view that genetic differences are of little significance in determining the social and cultural differences between different groups of men.*

Darlington's comment is: 'By this it is meant presumably that a governing class may be displaced by another class of the same race with vast effects. But are we certain that this does not involve great genetic changes, even physical changes readily visible—changes of course in a very small section of society? In all the first seven points the Statement has made use of the existence of class (within-race) differences as a means of casting doubt on between-race differences. Now it implies that class differences are not important. Possibly, of course, the committee imagines that class and caste differences, like race differences, have no serious genetic basis, that we are all in the melting-pot together? Yet if we turn back to the second paragraph, the only one that is based on serious thought, we find that mating barriers (such as occur between social classes) are supposed to be the origin of genetic differentiation.'

"Mather urges circumspection: 'There is at present little evidence of direct effect of genetic differences on social and cultural differences between groups (although see Darlington on the subject of speech preferences). But does this justify the statement that they are insignificant?. . .'

"(e) *There is no evidence that race mixture produces disadvantageous results from a biological point of view. The social results of race mixture, whether for good or ill, can generally be traced to social factors.*

Sturtevant's opinion of this corollary is as follows: 'The consequences of race mixture seem to me to be stated badly. There is a possible confusion between 'biological' and mental properties here. It is the general experience of those who have studied the results (at least beyond the first generation) of crosses between distinctly different strains of many kinds of organisms (including at least one mammal, the dog) that there is a strong tendency towards the production of physiologically inefficient individuals. The geneticist understands why this is so—and that understanding gives no

grounds for expecting man to be an exception to the general rule. It is true that such crosses give the possibility of producing some individuals that are 'better' (in any specified respect) than any to be found in either parental race—but experience and theory are agreed that, after the first generation, these are much less likely to be found than are 'inferior' individuals. The result of these considerations is that, even on a purely physiological level, crosses between quite different races are not free of danger.'

"Kemp makes this comment: '. . . If the races that have existed through several centuries can be supposed to have improved by selection, and therefore have a particularly harmonious and well-balanced constitution, race mixture can in certain cases be expected to lead to production of less harmonious and well-balanced types.' "

Professor A. H. Sturtevant was Professor of Genetics at the California Institute of Technology in Pasadena, California; Professor Kenneth Mather is Professor of Genetics at the University of Birmingham, England; and Professor Tager Kemp was Chairman of the Department of Genetics and Director of the Institute for Human Genetics at the University of Copenhagen, Denmark.

APPENDIX D

*Race Differences and the Future**

DR. DWIGHT J. INGLE
Professor of Physiology
University of Chicago

* * *

Most scientists accept the principle of equal legal and moral rights for the individual regardless of race or religion

* Science: Vol. 146, No. 3642, pp. 375 *et. seq.,* 16 October 1964.

and support the right of each individual to advance according to his abilities, drives, and behavioral standards. But the equality of man is a social, legal, and ethical, rather than a biological concept, for among living things nothing is equal to or identical with anything else. Even if we were to achieve equal civil rights and equal opportunities, complex problems would remain.

Some ethnic groups, the Negroes especially, are handicapped by a sub-standard culture. Centuries of slavery and racial discrimination have left some, though not all, Negroes with a cultural handicap which begins to be transmitted from adult to child in the earliest formative years. Do genetic handicaps occur more frequently among Negroes than among other ethnic groups? Racists claim that the Negro race is genetically inferior to other races in intelligence, while equalitarians claim that all races are equally endowed with intelligence. Both groups support their respective dogmas by spurious argument and emotionalism. Although it is common to speak and write of intelligence as a unitary quality of mind, it is surely complex (1) and is indirectly and imperfectly measured by standardized tests. Both racists and equalitarians claim special knowledge above the relative importance of native endowment and of environment in determining the level of intelligence. The conventional wisdom of the times is that biological differences among races are of no significance from the standpoint of social action. The climate of opinion in our courts, universities, and public press is not favorable either to further inquiry into the question or to debate of the issues. Even those who recognize that the question is unresolved claim that science must stand aside in the struggle for social values.

* * *

Why, then, examine the question of average racial differences in genetic endowment? The question remains im-

portant; first, because of efforts to place individuals in jobs, schools, and housing on the basis of race without regard for their abilities, drives, or behavorial standards; second, because of efforts to extend the concept of equality among races to a point where it conflicts with the rights of individuals to move ahead according to drive and ability in a free competitive society; and third, because of a growing body of opinion that the way to solve racial conflict is by the interbreeding of races. If it is true that there are significant differences between the genetic endowments of the races, this knowledge could and should affect the handling of biological and sociological problems.

* * *

Those who hope for the equality of all men without thought of their biology should be asked, "Shall we aim to make all men sick or all men well? Shall we aim toward universal incompetence or universal competence?" The concept of equality is meaningful only as it relates to civil rights and opportunities. Otherwise, to aim for the complete equality of all men is an affront to basic freedoms and rights of each individual to seek self-fulfillment according to his interests, drives, and abilities. The ideal of letting each individual move ahead in a competitive society according to his drives and abilities will be realized only if the individual is biologically fit for competition and is free from the almost insurmountable handicap of slum environment. This aim suits the United States, which intends to remain a free competitive society. The philosophy which abhors competition and holds that men are born biologically equal or, if they are not, that they should be kept equal by Procrustean methods, would establish mediocrity, not excellence, as a national goal.

APPENDIX E

*Race, Science, and Social Policy**

DR. DWIGHT J. INGLE
Professor of Physiology
University of Chicago

"Several authors of comments on 'Racial differences and the future' objected to the publication of views which disagree with their own. The key points of my essay were: (i) The question as to whether the average differences among the races in test performance, school achievement, and behavior have a genetic as well as environmental basis is unresolved. (ii) The issue is important and should be studied as a means to understanding the causes of social problems and correcting them. (iii) It is time to propose, debate, and test by pilot studies means of preventing social problems, rather than to depend upon palliative methods.

* * *

"I shall answer some specific comments. Jaquith makes the obvious point that there are a variety of positions on race and intelligence. His claim that not all racists maintain that Negroes are genetically inferior surprises me, for I hadn't heard of such. He states that in the absence of firm evidence to the contrary, there is no justification for assuming that racial groups are differentially equipped in respect to genetic potential. I agree that we shouldn't behave as though assumptions are facts, but add that neither is there justification for claiming that races are genetically equal until supported by firm evidence.

* * *

"Fischer and Deakin disagree with my doubts about encouraging interracial marriage. Many integrationists claim

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* Science: Vol. 146, No. 3651, pp. 1528 *et. seq.*, 18 December 1964.

that it is not an issue. It is a real and highly sensitive issue, for inter-breeding is being encouraged as a means of resolving racial problems. What is wrong with interracial marriage between culturally and intellectually compatible Negroes and whites? Too little is known of the biological consequences. The question of race and intelligence is unsettled. Less is known of the inheritance of various drives and behavior traits and their relationship to race. We look in vain for a country which is governed wisely by Negroes. Racial mixing cannot be undone. Let's facilitate Negro advancement by full civil rights and equal opportunity, reward and honor their achievements, prevent human misery of every race, but without accepting the social scientist's assurance that the biological experiment of inter-breeding can be done without risk to civilization.

* * *

"I have a final word on the right of the scientist to dissent against attempts to close systems of knowledge. In science we demand validation of each claim to knowledge by rigorous and critical tests of evidence. Positive claims are not final until there is proof that all alternative propositions are untenable. Science does not abdicate to authority or the tyranny of dogma—nor does it try to shape truth by aims and value judgments."

APPENDIX F

Time Magazine

(February 3, 1967)

GENETICS

Researching Racial Inferiority?

Pursuing scientific inquiry into the applications of solid-state physics, Bell Laboratories Physicist William

Shockley played a major role in the invention of the junction transistor, shared a 1956 Nobel Prize for his efforts, and made a substantial impact on technology and society. Now on the faculty of Stanford University, he is creating yet another stir by advocating a similar approach in a science far afield from his own. In speeches and interviews during the past three years, Shockley has charged that the scientific community has been ignoring or blocking research into possible differences in the genetic makeup of races. He has been accused, in turn, of fostering racial prejudice.

Shockley cites the increasing problems of Negro ghettos and the failure of one out of four youths—a high percentage of them Negroes—to pass the Armed Forces Qualifications Tests. Shockley asks: "Is environment the only cause? Is perhaps some of the cause hereditary?" After searching for answers in scientific literature, the physicist recently told a meeting of the Commonwealth Club of California that he found "only unconvincing assertions that carry no sense of certainty." This "environment-hereditary uncertainty," he says, prevents an intelligent attack on city slum problems and may be contributing to a decline in the overall quality of the U.S. population.

Worries, or Plans. Shockley attributes the uncertainty to "inverted liberalism," which he says has resulted in taboos against research on genetic differences. He charges that such institutions as the Federal Government and the American Anthropological Association have discouraged investigation because they might reach "unpalatable" conclusions. "Our intellectuals," he says, "treat this problem like a frightened person who hides an uncertainty even from himself and does not expose a tumor to a doctor's inspection."

To the genetics faculty of Stanford, which accused him

of seeking "pseudo-scientific justification for class and race prejudice," and to other critics, Shockley says: "Let's ask the questions, do the necessary research, find the facts, discuss them widely—then either worries will evaporate or plans for action will develop."

But many scientists agree with University of California Psychologist David Krech, who insists that it is the difficulty involved in measuring racial differences, rather than any taboo, that is responsible for the lack of evidence that Shockley demands. In any such research, says Krech, there must be the fundamental assumption: "If all other conditions are equal." At present, he adds, there is no such situation between large groups of Negroes and whites in America.

APPENDIX G

U. S. DEPARTMENT OF COMMERCE—BUREAU OF THE CENSUS 48-317

VIRGINIA: U. S. Census of Population, 1960, PC(1), 48D Va., Detailed Characteristics

Table 96.—AGE BY RACE, NATIVITY, AND SEX, FOR THE STATE, 1960 AND 1950, FOR URBAN AND RURAL AREAS, AND FOR STANDARD METROPOLITAN STATISTICAL AREAS AND CITIES OF 100,000 OR MORE AND COUNTIES OF 250,000 OR MORE, 1960

(Median not shown where base is less than 200 for 1960 or 500 for 1950)

AREA, CENSUS YEAR, AND AGE	ALL CLASSES			NATIVE WHITE		FOREIGN-BORN WHITE		NEGRO		OTHER RACES	
	TOTAL	MALE	FEMALE	MALE	FEMALE	MALE	FEMALE	MALE	FEMALE	MALE	FEMALE
THE STATE: 1960											
ALL AGES	3 954 429	1 969 556	1 984 873	1 542 787	1 544 615	19 398	25 203	403 144	410 990	4 227	4 065
UNDER 5 YEARS	456 885	231 662	225 223	174 596	167 930	1 019	1 058	55 366	55 531	681	704
5 TO 9 YEARS	420 201	213 529	206 672	160 365	154 095	1 168	1 131	51 525	50 977	471	469
10 TO 14 YEARS	388 099	196 605	191 494	150 936	146 754	1 042	933	44 284	43 476	343	331
15 TO 19 YEARS	324 236	168 368	155 868	132 425	120 498	587	830	35 113	34 389	243	151
20 TO 24 YEARS	281 849	149 612	132 237	122 225	104 622	1 003	1 630	25 835	25 681	549	304
25 TO 29 YEARS	254 605	126 604	128 001	101 799	100 203	1 064	2 337	23 233	24 903	508	558
30 TO 34 YEARS	273 306	134 569	138 737	108 754	108 617	1 173	3 111	24 267	26 474	375	535
35 TO 39 YEARS	291 161	143 124	148 037	114 559	117 628	1 471	3 039	26 831	27 045	263	325
40 TO 44 YEARS	260 476	129 789	130 687	104 110	104 265	1 182	1 623	24 318	24 648	179	151
45 TO 49 YEARS	233 650	117 253	116 397	93 374	92 667	1 277	1 269	22 472	22 366	130	95
50 TO 54 YEARS	194 093	95 548	98 545	76 360	79 235	1 480	1 302	17 555	17 898	153	110
55 TO 59 YEARS	165 422	79 941	85 481	62 746	67 603	1 640	1 565	15 432	16 171	123	142
60 TO 64 YEARS	128 885	60 234	68 651	47 226	54 366	1 468	1 399	11 472	12 824	68	62
65 TO 69 YEARS	108 543	49 083	59 460	37 127	46 226	1 456	1 369	10 447	11 831	53	34
70 TO 74 YEARS	79 338	35 051	44 287	26 673	35 050	1 163	1 183	7 156	8 005	59	49
75 TO 79 YEARS	51 597	22 188	29 409	16 753	23 875	724	673	4 682	4 831	29	30
80 TO 84 YEARS	26 256	10 440	15 816	8 197	13 035	290	457	1 953	2 317	...	7
85 YEARS AND OVER	15 827	5 956	9 871	4 562	7 946	191	294	1 203	1 623	...	8
MEDIAN AGE	27.1	26.0	28.2	26.5	28.9	45.0	37.6	23.0	24.1	23.4	25.7