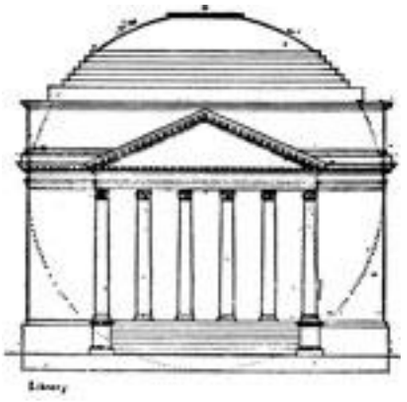

THE *LOVING* CASE: VIRGINIA'S ANTI-MISCEGENATION STATUTE IN HISTORICAL PERSPECTIVE

*Walter Wadlington**

IT may seem surprising that a state which regularly recalls with glowing sentiment the story of how one of her early white sons married an Indian princess[1] today maintains one of the strictest legal codes against racial intermarriage.[2] Only this year, however, the Virginia Supreme Court of Appeals reaffirmed the validity of the state's broad anti-miscegenation law in a cause styled with symbolic irony.[3] This case may well provide a vehicle for reconsideration by the United States Supreme Court of the constitutionality of such restrictive marriage legislation. Eleven years ago the Court turned away without definitive action a case which challenged the Virginia statute,[4] but recent developments indicate that it may be ready to consider fully

* Professor of Law, University of Virginia. A.B., 1951, Duke University; LL.B., 1954, Tulane University.

1 If John Rolfe and Pocahontas were to be married in Virginia today, they would probably be guilty of a felony. See VA. CODE ANN. §§ 20-54 & 20-59 (1960); notes 92-95 *infra* and accompanying text. Moreover, their children might be unable to marry white persons. *Ibid.* It is also possible that their children would be considered illegitimate. See notes 64-68 *infra* and accompanying text. *But see* notes 119-22 *infra* and accompanying text.

2 VA. CODE ANN. §§ 20-54, -57, -58, -59, & -60 (1960). Virginia is only one of seventeen states which retains a ban against racial intermarriage. See note 8 *infra*. Moreover, Virginia's miscegenation law is especially severe in several respects. For example, in Virginia a white person is prohibited from marrying anyone with any "trace whatever of any blood other than Caucasian," VA. CODE ANN. § 20-54 (1960), with one exception, see notes 92-95 *infra* and accompanying text, whereas in some other states the ban is only on marriages between white persons and persons with a specific degree of Negro blood, typically one-eighth or more. See, *e.g.*, FLA. STAT. ANN. § 1.01(6) (1961) & § 741.11 (1964); N.C. GEN. STAT. § 14-181 (1950). Moreover, Virginia declares miscegenous marriages to be void, VA. CODE ANN. § 20-57 (1960), while her neighboring state, West Virginia, declares them to be only voidable, W. VA. CODE ANN. § 4701 (1961). It should also be noted that in Greenhow v. James' Ex'r, 80 Va. 636 (1885), the Virginia court held that the state's legitimating statute does not apply to children of miscegenous marriages, whereas in at least one state with a ban against miscegenous marriages, the children of such a marriage are considered to be legitimate. See *In re* Atkins' Estate, 151 Okla. 294, 3 P.2d 682 (1931).

3 Loving v. Commonwealth, 206 Va. 924, 147 S.E.2d 78 (1966), *appeal docketed*, 35 U.S.L. WEEK 3059 (U.S. Aug. 2, 1966) (No. 395). The style of the case was even more ironic at the trial level.

4 Naim v. Naim, 197 Va. 80, 87 S.E.2d 749, *vacated and remanded*, 350 U.S. 891 (1955), *aff'd*, 197 Va. 734, 90 S.E.2d 849, *appeal dismissed*, 350 U.S. 985 (1956).

the next such case which comes before it. In *McLaughlin v. Florida*[5] it invalidated a Florida statute punishing interracial cohabitation; however, it did not consider the constitutionality of the state's anti-miscegenation law, as it was urged to do.[6] The facts in *McLaughlin* did not present the question of this law's validity clearly, and the Court disposed of the case on grounds which rendered consideration of the miscegenation statute irrelevant. At any rate, it seems appropriate at this time to examine Virginia's miscegenation laws in historical context, together with the problems which this legislation has created and left unresolved. Such "re-looks" have led to the repeal of similar laws in a substantial number of states,[7] and Virginia now belongs to a shrinking minority of jurisdictions which retain proscriptions against interracial marriage.[8]

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5 379 U.S. 184 (1964).

6 It is interesting to note that both parties in *McLaughlin* made arguments which brought the Florida miscegenation statute into question. The appellants contended that the Court should invalidate the statute on the ground that their common-law marriage would constitute a defense to the indictment brought against them but that they were precluded from marrying one another by the miscegenation ban. Although the Court noted this argument, 379 U.S. at 187 n.6, it did not reach the question of the validity of Florida's miscegenation statute since it invalidated the cohabitation statute itself under the equal protection clause on the ground that the statute did not punish cohabitation between unmarried persons of the same race as well as between unmarried persons of different races. Florida contended that the validity of her cohabitation statute should turn upon the validity of her miscegenation statute since "it is ancillary to and serves the same purpose as the miscegenation law itself." 379 U.S. at 195. The Court did not view the issue in these terms, however, and did not feel bound to consider the constitutionality of the miscegenation statute. It reasoned that, assuming arguendo the constitutionality of the miscegenation statute, the cohabitation statute would still violate the equal protection clause since it involved "invidious official discrimination based on race" and was not necessary to the accomplishment of the state policy enunciated in the state's miscegenation law. 379 U.S. at 196. The *McLaughlin* case is discussed more fully in the text accompanying notes 177-85 *infra*.

7 See, *e.g.*, Ind. Acts 1965, ch. 17, § 1, at 25; Neb. Laws 1963, ch. 243, § 1, at 736; Wyo. Laws 1965, ch. 4, § 1, at 3.

8 In its first decision in Naim v. Naim, 197 Va. 80, 85, 87 S.E.2d 749, 753 (1955), the Virginia Supreme Court of Appeals was able to state that "more than half of the States of the Union have miscegenation statutes." Today, however, only seventeen states, or slightly more than one-third, have miscegenation statutes. The miscegenation statutes currently in force are: ALA. CODE tit. 14, § 360 (1958); ARK. STAT. ANN. §§ 55-104 & -105 (1947); DEL. CODE ANN. tit. 13, §§ 101 & 102 (1953); FLA. STAT. ANN. §§ 741.11 & .12 (1964); GA. CODE ANN. §§ 53-106, -214, -312 & -9903 (1961); KY. REV. STAT. ANN. § 402.020 (Supp. 1966), §§ 402.040 & .990 (1963); LA. REV. STAT. ANN. § 9.201 (Supp. 1965), §§ 9:221, & 14:79 (1950); MD. ANN. CODE art. 27, § 398 (1957); MISS. CODE ANN. § 2000 (Supp. 1964), §§ 459 & 2002 (1956); MO. REV. STAT. § 451.020 (Supp. 1964), § 563.240 (1959); N.C. GEN. STAT. §§ 14-181 (1950), § 51-3 (Supp. 1965); OKLA. STAT. tit. 43, §§ 12 & 13 (1951); S.C. CODE ANN. §§ 20-7 & -8 (1962); TENN. CODE ANN. §§ 36-402 & -403 (1955); TEX. REV. CIV. STAT. art. 4607 (1960);

Historical Background

The Colonial Period

Legal restraints on miscegenation[9] in Virginia date from early in the colonial period. It is generally accepted that the first Negroes were imported into Virginia in 1619,[10] twelve years after the first settlement at Jamestown. In 1630 there appeared a notation in the minutes of the proceedings of the governor and council that one Hugh Davis was "to be soundly whipped before an assembly of Negroes and others for abusing himself to the dishonor of God and shame of Christians by defiling his body in lying with a negro; which fault he is to acknowledge next Sabbath day."[11] Ten years later the records indicate that a similar problem was dealt with somewhat differently, as one Robert Sweet was required "to do penance in church according to laws of England, for getting a negroe woman with child and the woman whipt."[12]

In 1661 general statutory sanctions against fornication were enacted, with certain provisions which were applicable in case either of the parties was a servant.[13] The following year the fine imposed for a violation of the act was doubled if one of the offending parties was a "christian" and the other a Negro.[14] The 1662 Act further declared that:

> WHEREAS some doubts have arrisen whether children got by any Englishman upon a negro woman should be slave or free, *Be it therefore enacted* . . . that all children borne in this country shalbe held bond or free only according to the condition of the mother . . . .[15]

In 1691 what appears to have been the first general statutory proscription against miscegenous marriage in the colony was included in

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Tex. Pen. Code arts. 492 & 493 (1952); Va. Code Ann. §§ 20-54, -56, -57, -58, -59 & -60 (1960); W. Va. Code Ann. §§ 4695, 4697, 4698 & 4701 (1961). In some of these states a provision banning miscegenous marriages is included in the constitution. See Ala. Const. art. IV, § 102; Fla. Const. art. XVI, § 24; Miss. Const. art. 14, § 263; N.C. Const. art. XIV, § 8; S.C. Const. art. III, § 33; Tenn. Const. art. XI, § 14.

9 The term "miscegenation" can refer either to racial interbreeding or to racial intermarriage. Both of these will be discussed in this Article, and the meaning with which the term is being used will be clarified where necessary.

10 See 4 Donnan, Documents Illustrative of the History of the Slave Trade to America 2-7 (1935); 1 Morton, Colonial Virginia 56-57 (1960).

11 1 Laws of Va. 146 (Hening 1823).

12 1 Laws of Va. 552 (Hening 1823).

13 2 Laws of Va. 114-15 (Hening 1823).

14 2 Laws of Va. 170 (Hening 1823).

15 *Ibid.*

"An act for suppressing outlying Slaves."[16] The stated purpose of this proscription was to prevent "that abominable mixture and spurious issue which hereafter may encrease in this dominion, as well by negroes, mulattoes, and Indians intermarrying with English, or other white women, as by their unlawfull accompanying with one another."[17] The penalties imposed by the statute were severe. The free white partner of an interracial marriage was to be banished from the colony.[18] Similarly, any English woman who had a bastard by a Negro or mulatto was to pay a fine of fifteen pounds sterling or else be taken by the church wardens and sold for five years.[19] Either the fine or the proceeds of the sale were to be divided equally between the Crown, the parish where the offense was committed and the informer.[20] The bastard child was to be bound out by the church wardens until he reached the age of thirty.[21]

In addition to the statutes specifically forbidding certain relationships between Negroes and whites, there were numerous provisions in the early colonial laws regulating the conduct of indentured servants. Some of these provisions applied to both slave and servant, and the distinction between the two in terms of status was not always made clear.[22] An act passed in 1705 sought to clarify the distinction and imposed certain restrictions solely on the basis of race. Thus it was provided

> that no negros, mulattos, or Indians, although christians, or Jews, Moors, Mahometans, or other infidels, shall, at any time, purchase any christian servant, nor any other, except of their own complexion, or such as are declared slaves by this act . . . .[23]

A servant purchased in violation of the preceding provision was freed

16 3 Laws of Va. 86 (Hening 1823).

17 3 Laws of Va. 86-87 (Hening 1823).

18 3 Laws of Va. 87 (Hening 1823). It is probable that the reason that white indentured servants who entered a miscegenous marriage were not subject to banishment is that they represented a substantial financial investment on the part of their master. Moreover, indentured servants were not allowed to marry without the consent of their master. See 3 Laws of Va. 444 (Hening 1823).

19 3 Laws of Va. 87 (Hening 1823).

20 *Ibid.*

21 *Ibid.*

22 The early Negro imports were in fact considered to be indentured servants although their term of indenture might be for life. It was not until the 1660's that the laws began to speak regularly in terms of slaves as well as of servants. See 1 BRUCE, HISTORY OF VIRGINIA 115, 275 (1924).

23 3 Laws of Va. 449-50 (Hening 1823).

from further service as a result.[24] Furthermore, if any white person having "christian white" servants married someone whom the statute prohibited from purchasing "christian servants," all such servants were acquitted from further service to their master.[25]

The 1705 act also repeated the sanctions to be applied against a white woman, whether servant or free, for having a bastard by a Negro or mulatto.[26] Similarly, it incorporated the 1691 proscription against racial intermarriage, but considerably mitigated the punishment for such a marriage. The free white partner, instead of being banished, was to be committed to prison for six months, without bail or mainprize, and was required to pay "ten pounds current money of Virginia, to the use of the parish . . . ."[27] An added sanction was directed against ministers who performed the prohibited ceremony; their fine was set at ten thousand pounds of tobacco, one half of which was paid to the Crown, and the other half to the informer.[28]

These provisions were reenacted in 1753 in "An Act for the better government of servants and slaves."[29] However, in 1765 the period of indenture for bastards of white women by Negroes or mulattoes was lowered. Under the new law, males were to be bound out only until age twenty-one and females until age eighteen.[30]

From the Beginning of Statehood to the War Between the States

One of the early enactments in the revision of Virginia law which followed the achievement of independence by the colonies was "An act declaring what persons shall be deemed mulattoes."[31] This act became law in 1787, and provided that

> every person of whose grandfathers or grandmothers any one is, or shall have been a negro, although all his other progenitors, except that descending from the negro, shall have been white persons,

24 3 Laws of Va. 450 (Hening 1823).

25 *Ibid.*

26 3 Laws of Va. 453 (Hening 1823). This act raised the age until which the children were to be indentured from thirty to thirty-one.

27 3 Laws of Va. 453-54 (Hening 1823).

28 3 Laws of Va. 454 (Hening 1823).

29 6 Laws of Va. 356, 360-62 (Hening 1819).

30 8 Laws of Va. 134 (Hening 1821).

31 12 Laws of Va. 184 (Hening 1823). This act was one of the several important bills reported by the revisors to the legislature in 1779, and was enacted in 1785. Another of the bills reported and enacted at the same time provided that slaves brought into the commonwealth in the future and remaining there for a year would be free, and that henceforth only those would be slaves "as were so on the first day of this present session of assembly, and the descendants of the females of them." 12 Laws of Va. 182 (Hening 1823).

> shall be deemed a mulatto; and so every person who shall have one-fourth part or more of negro blood, shall, in like manner, be deemed a mulatto.[32]

This definition was carried into the general compilation of revised statutes in 1792,[33] which also contained a newly enacted general provision on marriage.[34] The latter retained the ban against marriages between free whites and Negroes or mulattoes, and set the penalty for the white partner to such a union at six months in jail and a fine of thirty dollars.[35] The earlier sanction against a minister who performed such a ceremony was also retained, and his fine was set at 250 dollars.[36] It should be noted that these punishments were relatively light in comparison to the penalty inflicted upon a person who entered a bigamous marriage—death.[37]

Shortly after 1800 special private legislation dealing with individual instances of miscegenation began to appear. For example, in 1803 the General Assembly dissolved a marriage between two white persons because the wife had acknowledged that a slave was the father of her child.[38] A similar dissolution was effected in 1806 on the ground that the wife had delivered a mulatto child seven months after her marriage and that she had evidently continued to have sexual intercourse with the child's father.[39] In 1814 another legislative dissolution of a marriage was made subject to a jury finding that a child born to the wife during coverture was that of a Negro rather than her white husband.[40]

The Code of 1819 incorporated the provisions of the 1792 compilation, but altered the disposition of certain of the fines collected.[41] A provision punishing the attempted ravishment of a white woman by a

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32 12 Laws of Va. 184 (Hening 1823).

33 1 Laws of Va. 123 (Shepherd 1835). This provision was contained in "An act to reduce into one, the several Acts concerning Slaves, Free Negroes and Mulattoes."

34 1 Laws of Va. 130 (Shepherd 1835).

35 1 Laws of Va. 134-35 (Shepherd 1835).

36 1 Laws of Va. 135 (Shepherd 1835).

37 1 Laws of Va. 133-34 (Shepherd 1835).

38 3 Laws of Va. 26 (Shepherd 1836).

39 3 Laws of Va. 321-22 (Shepherd 1836).

40 Va. Acts of Assembly 1814, ch. XCVIII, at 145.

41 Va. Rev. Code ch. 106, §§ 22 & 23, vol. I, at 401 (1819). The fine levied against the white party to a miscegenous marriage and the half of the fine assessed against the minister performing the ceremony which did not go to the informer were designated to the use of the "Literary Fund." Va. Rev. Code ch. 33, § 1, vol. I, at 82 (1819). Among other things, the Literary Fund helped provide support for the University of Virginia, Va. Rev. Code ch. 33, § 20, vol. I, at 89-90 (1819), which was founded in 1819. See Va. Rev. Code ch. 34, vol. I, at 90 (1819).

slave was also included in the 1819 Code.[42] However, it was the Code of 1849 which placed the regulation of miscegenation within a more comprehensive statutory framework. In the section on divorce, it was specifically provided that any marriage between a white person and a Negro was absolutely void without further legal process.[43] Furthermore, in the section on "Offences Against Morality and Decency" the maximum penalty for marriage between a white person and a Negro was increased to one year in jail and a fine of one hundred dollars.[44] On the other hand, the penalty against the person who performed the marriage ceremony was reduced to 200 dollars.[45] The same provisions were included in the Code of 1860.[46]

The Period From 1866 to 1924

Following the Civil War there was a flurry of legislation dealing with the status of Negroes, including an attempt to ratify many de facto unions between Negro couples which were not considered marriages under prior law.[47] However, there was no change in the key provisions on miscegenation, which ultimately found their way into the Revised Code of 1873.[48] In fact, during the sixty years from emancipation to the enactment of the prototype of today's miscegenation statute in 1924[49] there was essentially no change in the state of the law. However, problems developed in two distinct areas which have shaped the context of modern miscegenation controversies. These problems involved (1) the definition of racial classifications for the purpose of applying

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42 Va. Rev. Code ch. 158, § 4, vol. I, at 585-86 (1819). It had been earlier provided that a slave who attempted to ravish a white woman was to be treated as a felon. 3 Laws of Va. 119 (Shepherd 1836). The 1819 provision cited above added that he could be punished by castration.

43 Va. Code ch. 109, § 1, vol. I, at 471 (1849).

44 Va. Code ch. 196, § 8, vol. I, at 740 (1849).

45 Va. Code ch. 196, § 9, vol. I, at 740 (1849).

46 Va. Code ch. 109, § 1, at 529 & ch. 196, §§ 8 & 9, at 804 (1860). The 1860 Code also contained a provision punishing any free Negro for rape or for "attempt by force or fraud to have carnal knowledge of a white female" either with death or with five to twenty years imprisonment. Va. Code ch. 200, § 1, at 815 (1860).

47 See, *e.g.*, Va. Acts of Assembly 1865-1866, ch. 17, § 3 at 84-85 & ch. 18, § 2, at 85-86. See also Scott v. Raub, 88 Va. 721, 14 S.E. 178 (1891).

48 Va. Code ch. 105, § 1, at 850 (1873), continued the provision that interracial marriages between whites and Negroes were void, and chapter 192, §§ 8 & 9, at 1208 provided the punishment for entering into or performing such a marriage. It is to be noted, however, that despite the fact that slavery had been abolished in 1866 the 1873 Code penalized only the white party to a miscegenous marriage.

49 See Va. Acts of Assembly 1924, ch. 371, at 534-35.

miscegenation statutes, and (2) the civil ramifications of a finding that a particular marriage was miscegenous.

The Problem of Definition

Because interracial breeding began early in the colonial period, there were widely varying degrees of intermixture by the middle of the nineteenth century, and this created problems of definition which were inevitably reflected in the law. Thus, as we have seen, the term "mulatto" was defined by statute in 1787.[50] Furthermore, an 1833 statute recognized that there were some persons of Negro ancestry who were neither Negroes nor mulattoes, and allowed such persons to petition the courts for a certificate that they were neither free Negros nor mulattoes.[51] Also in 1833, the General Assembly declared by special private act that certain persons were neither Negro nor mulatto, but white, even though they were descended from a known Negro ancestor.[52]

In the new legislation of 1866 the term "mulatto" was eliminated from the racial definition section of the Code. The new section provided simply that "every person having one-forth or more of negro blood, shall be deemed a colored person, and every person, not a colored person, having one-fourth or more of Indian blood, shall be deemed an Indian."[53] This remained the definition for purposes of the prohibition against miscegenation until 1910, when the fraction of Negro blood necessary to categorize a person as "colored" was lowered from one-quarter to one-sixteenth.[54]

This "fractional blood count" approach has remained ever since the basis of the statutory definition of race. It has been before the courts on a number of occasions, and one early case provides an example of how its application might make it unnecessary to pass squarely on the validity of the miscegenation statute. Under both the Code of 1860 and the Revised Code of 1873, criminal sanctions were applied

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50 See note 32 *supra* and accompanying text.

51 Va. Acts of Assembly 1832-1833, ch. 80, at 51.

52 Va. Acts of Assembly 1832-1833, ch. 243, at 198 provided that:

> William Wharton [and four others listed] . . . who were heretofore held in slavery . . . and acquired their freedom since May, eighteen hundred and six, are not negroes or mulattoes, but white persons, although remotely descended from a coloured woman . . . .

The stated purpose of this act was to allow the persons affected thereby to remain in Virginia despite the requirement then in effect that all slaves emancipated after May 1806 leave the commonwealth.

53 Va. Acts of Assembly 1865-1866, ch. 17, § 1, at 84.

54 Va. Acts of Assembly 1910, ch. 357, at 581.

only to the white partner in a miscegenous marriage.[55] However, since the section on divorce declared that such marriages were absolutely void and without effect, it was possible to prosecute both parties for illicit intercourse, lascivious conduct or fornication. In *McPherson v. Commonwealth*[56] a white man and a colored woman were prosecuted for illicit intercourse, and the trial court rejected their defense of marriage on the ground that their purported marriage was void under the statute. The convictions were reversed on appeal, but without undermining the validity of the statute, since the court found that less than one-quarter of the woman's blood was Negro.[57]

In 1878 the definitional problem was complicated somewhat by the enactment of a statute applying criminal sanctions to both parties to a miscegenous marriage. The statute provided that "any white person who shall intermarry with a negro, or any negro who shall intermarry with a white person, shall be confined in the penitentiary not less than two nor more than five years."[58] Not long after the enactment of this provision, a defendant indicted thereunder argued that because the legislature had used the term "negro" rather than "colored person" or "mulatto," only pure-blooded Africans were covered by the statute.[59] Rejecting this argument, the court traced the various usages of the terms "negro" and "colored person" in the statutes and concluded that they had the same meaning insofar as miscegenation was concerned. Thus the court stated: "If he is a man of mixed blood he is not a negro, *unless he has one-fourth at least of negro blood in his veins.* . . ."[60] The court added, however, that this fractional blood content "must be proved by the commonwealth as an essential part of the crime . . . ."[61] and remanded the case because the prosecution had not produced any evidence on this point.

In 1910 the legislature changed the statutory definition of "colored person" to include anyone with one-sixteenth or more of Negro blood.[62] However, the fraction of blood content used for determining who was an Indian remained unchanged at one-quarter.[63]

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55 See notes 46 & 48 *supra* and accompanying text.

56 69 Va. (28 Gratt.) 939 (1877).

57 Accordingly, in Scott v. Commonwealth, 77 Va. 344 (1883), where the white defendant did not contest that his wife was colored, a conviction for lewd and lascivious cohabitation was affirmed.

58 Va. Acts of Assembly 1877-1878, ch. VII, § 8, at 302.

59 See Jones v. Commonwealth, 80 Va. 538 (1885).

60 *Id.* at 544. (Emphasis added.)

61 *Ibid.*

62 Va. Acts of Assembly 1910, ch. 357, § 49, at 581.

63 *Ibid.*

The Problem of Civil Effects

The general marriage and divorce provisions in the Code of 1860 made it clear that marriages between whites and Negroes in Virginia were absolutely void. However, even a void marriage can have limited civil effects, and it might have been inferred from Virginia's historically liberal policy regarding the statutory legitimation of the children of void marriages[64] that the legitimacy of the offspring of miscegenous marriages would have been recognized in the state. Before emancipation there was one instance of judicial speculation on the applicability of the legitimating statute to children of a miscegenous marriage. In *Stones v. Keeling*,[65] the question actually presented was whether the statute legitimated children of a bigamous union. However, it was urged that such an application of the statute would logically dictate that the child of a white man and Negro woman would be legitimate if the parents had been through a formal ceremony. One judge pointed out in reply:

> The answer is easy and evident. The law concerning marriages is to be construed and understood in relation to those persons only to whom that law relates; and not to a class of persons clearly not within the idea of the legislature when contemplating the subjects of marriage and legitimacy.[66]

Although this rationale should no longer have been relevant after the abolition of slavery in 1866, the court in *Greenhow v. James' Executor*,[67] the first case to deal with the problem after the legal status of Negroes had been changed, nevertheless carved out a clear exception to the legitimation statute in the case of children of miscegenous unions. Two of the five members of the court dissented, however, and Justice Richardson pointed out that the logic of applying the statute in the case of bigamy actually supported the similar application of the statute to children of miscegenous marriages after 1866.[68]

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64 Va. Acts of Assembly 1792, ch. XCIII, § XIX provided that
> where a man having by a woman one or more children, shall afterwards intermarry with such woman, such child or children, if recognized by him, shall be thereby legitimated. The issue also in marriages deemed null in law, shall nevertheless be legitimate.

1 Laws of Va. 101 (Shepherd 1835).

65 9 Va. (5 Call.) 143 (1804).

66 *Id.* at 148.

67 80 Va. 636 (1885).

68 *Id.* at 650. Justice Richardson also argued that:
> The law was on the statute book irrespective of the black man, and many years

The *Greenhow* case also raised the question whether Virginia would recognize a marriage performed in a foreign jurisdiction which permitted miscegenous unions. The parents of the parties in *Greenhow* had been married in the District of Columbia in 1875 for the express purpose of legitimating the eleven children of their union of forty years. They subsequently returned to Virginia. Citing the celebrated English case of *Brook v. Brook*,[69] the court held that the law of the domicile governed the capacity to marry, and that a marriage which was not only void but also criminal at the domicile provided an exception to the rule that a marriage valid where celebrated is valid everywhere. Apparently because the practice of marrying in another state in order to avoid the Virginia proscription against interracial marriage had become prevalent by 1878, a special evasion provision was added in that year to the criminal section of the miscegenation laws.[70] Nine years later the civil provisions were similarly augmented to reflect the reasoning of the *Greenhow* decision.[71]

The problem of custody was raised in 1911 in *Moon v. Children's Home Society*.[72] A white woman had legally remarried a man whose blood was mixed, but who was not a colored person according to the statute. Because of this marriage, a court committed the wife's white children by her first marriage to an institution. This action was reversed by the Supreme Court of Appeals, which pointed out that merely because the mother had married "lower in the social scale" and to a man with colored blood, she was not to be deprived of her children unless the new husband was legally classified as a "colored person."[73]

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before the negro attained to his present status. The law has stood still; but in the meantime, the negro has grown into its gracious protection; he has been clothed with citizenship; he is, in the language of the statute, a man, and while the idea of amalgamation is repugnant to the white race, and intermarriage between the races is prohibited under heavy penalties by the law, yet the dominant white race has not yet struck, nor will it likely ever strike at the natural legal rights of unoffending children through the sins of their parents.

Id. at 648.

69 9 H.L.Cas. 193, 11 Eng. Rep. 703 (1861).

70 Va. Acts of Assembly 1877-1878, ch. VII, § 3, at 302. See also Kinney v. Commonwealth, 71 Va. (30 Gratt.) 858 (1878), in which a conviction for lewd cohabitation was affirmed against a Virginia domiciliary who entered a miscegenous marriage in the District of Columbia and then returned to Virginia, despite the fact that his marriage was performed prior to the enactment of the above statute. For an historical discussion of the evasion problem, see WYNES, RACE RELATIONS IN VIRGINIA 92-93 (1961).

71 Va. Code Ann. § 2253 (1887). There had been similar provisions in earlier codes which referred only to incestuous marriages. See Va. Code ch. 109, § 2, at 529-30 (1860); Va. Code ch. 109, § 2, vol. II, at 472 (1849); Va. Rev. Code ch. 106, § 18, vol. I, at 399 (1819).

72 112 Va. 737, 72 S.E. 707 (1911).

73 *Id.* at 742, 72 S.E. at 708.

The Present Miscegenation Laws

Virginia's miscegenation laws were restructured and new limitations were imposed in 1924, when the General Assembly passed "An Act to Preserve Racial Integrity."[74] In some respects the new law repeated earlier proscriptions. Moreover, its sanctions were directed specifically at racial intermarriage, and it lacked special penalties for interracial fornication, such as a number of other jurisdictions adopted.[75] However, a sweeping change in the scope of the law was effected by keying the miscegenation provisions to a new and very narrow definition of a "white person."[76] The central features of the 1924 legislation, all of which remain in force today, were:

(1) A provision forbidding any white person from marrying anyone other than a white person (or a person with no other admixture of blood than white and American Indian). For purposes of this limitation, a white person was redefined as one "who has no trace whatsoever of any blood other than Caucasian . . . ."[77]

(2) A prohibition against issuing a marriage license until the issuing official "has reasonable assurance that the statements as to color of both man and woman are correct."[78] The act also empowered the state registrar of vital statistics to issue certificates of racial composition.[79] The knowing or willful falsification of a racial registration certificate was made a felony.[80]

(3) All statutes relating to racial intermarriage which were then in effect were made applicable to marriages prohibited by the new provisions.[81] Thus the 1924 act carried forward from the Code of 1919 the provision rendering miscegenous marriages absolutely void,[82] the civil and criminal applicability of the evasion provisions (dealing with domiciliaries who left the state to marry and then returned)[83] and

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74 Va. Acts of Assembly 1924, ch. 371.

75 It was a statute of this type which the Supreme Court held to be constitutional in Pace v. Alabama, 106 U.S. 583 (1883). Such a statute would now seem clearly to be invalid, however, in light of the Court's recent invalidation of an interracial cohabitation statute in McLaughlin v. Florida, 379 U.S. 184 (1964).

76 Va. Acts of Assembly 1924, ch. 371, § 5, at 535 (now Va. Code Ann. § 20-54 (1960)).

77 *Ibid.*

78 Va. Acts of Assembly 1924, ch. 371, § 4, at 534 (now Va. Code Ann. § 20-53 (1960)).

79 Va. Acts of Assembly 1924, ch. 371, § 1, at 534 (now Va. Code Ann. § 20-50 (1960)).

80 Va. Acts of Assembly 1924, ch. 371, § 2, at 534 (now Va. Code Ann. § 20-51 (1960)).

81 Va. Acts of Assembly 1924, ch. 371, § 5, at 535 (now Va. Code Ann. § 20-54 (1960)).

82 Va. Code Ann. § 5087 (1919) (now Va. Code Ann. § 20-57 (1960)).

83 Va. Code Ann. §§ 4540 & 5089 (1919) (now Va. Code Ann. § 20-58 (1960)).

the criminal sanctions to be applied to both parties to a miscegenous marriage[84] and to the person performing the ceremony.[85]

The basic change embodied in the 1924 legislation was the shift of focus from the definition of a colored person to the definition of a white person. Without changing the definition of a colored person (one-sixteenth or more Negro blood) which had been adopted in 1910,[86] it made it unlawful for a white person to marry anyone with any "trace whatsoever of any blood other than Caucasian." This made the prohibition against miscegenation broader than it had been in the past, since previously it had merely been unlawful for a white person to marry someone who met the statutory definition of "colored person."[87] Thus for the first time following statehood the marriage of whites with Asiatics and other non-Negro races—and with persons possessing *some* Negro blood, but less than one-sixteenth—was prohibited. And although the definition of "colored person" was changed in 1930[88] to include persons with any ascertainable Negro blood, the ban on miscegenous marriages remains broader than this definition would suggest.

Problems of Administration and Interpretation

The Certificate of Racial Composition

The first comprehensive statute providing for the regular recordation of vital statistics such as births, deaths, and marriages in Virginia was enacted in 1853.[89] However, before that time there were numerous instances of judicial and legislative action which indicate that records were available to the courts and the legislature which enabled them to trace Negro ancestry in the genealogy of certain families.[90] These records were likewise available to the registrar of vital statistics when he began issuing certificates of racial composition. In the early days of the act he no doubt made full use of them, if we are to judge from his

84 Va. Code Ann. § 4546 (1919). In 1932 this provision was amended to make the offense a felony, but the minimum term of imprisonment was reduced from two years to one year. Va. Acts of Assembly 1932, ch. 78, at 68 (now VA. CODE ANN. § 20-59 (1960)).

85 Va. Code Ann. § 4547 (1919) (now VA. CODE ANN. § 20-60 (1960)).

86 Va. Acts of Assembly 1910, ch. 357, § 49, at 581.

87 See, *e.g.*, Va. Code Ann. §§ 67, 4546 & 5087 (1919); Va. Code Ann. §§ 49, 2252 & 3788 (1887).

88 Va. Acts of Assembly 1930, ch. 85, at 96-97, as amended, VA. CODE ANN. § 1-14 (Supp. 1964).

89 Va. Acts of Assembly 1852-1853, ch. 25, at 40. The act referred only to registration of marriages between white persons. However, it required a notation of race or color as well as of status in the birth and death records.

90 See, *e.g.*, note 32 *supra* and accompanying text.

public pronouncements—some of which were published and distributed as news letters by his office.[91] Even so, the lack of records before 1853 and the fact that much of the racial intermixture occurred through extramarital liaison precluded positive proof of ancestry in a great number of cases, especially those in which the parties arrived in Virginia rather late.

The Pocahontas Exception

There was only one exception to the 1924 act's rule that a white person could not marry anyone with a trace of non-Caucasian blood. The act provided:

> 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 act, the term "white person" shall apply only to the person who has no trace whatsoever 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.[92]

Although it no doubt accomplished the purpose of protecting the descendants of Pocahontas and John Rolfe,[93] this provision is susceptible of several constructions. It might, for example, mean:

(1) Persons with only white blood can marry, in addition to other whites, either full-blooded Indians or persons with Indian and white blood together but no other mixture. The same applies to persons with only white blood plus Indian blood totalling one-sixteenth or less. On the other hand, persons possessing a mixture of only white and Indian blood but with more than one-sixteenth of the latter can marry nonwhites as well as whites; or this construction might be varied to hold that

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91 See, *e.g.*, Plecker, *The New Family and Race Improvement*, 17 VA. HEALTH BULL., Extra No. 12, at 18, 19, 26 (New Family Series No. 5, 1925).

92 Va. Acts of Assembly 1924, ch. 371, § 5, at 535 (now VA. CODE ANN. § 20-54 (1960)).

93 In one of the tracts issued by the Bureau of Vital Statistics, it was pointed out with reference to this section that:

> When the Racial Integrity law was being enacted, it was the desire of all to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas, and to protect also other white citizens of Virginia who are descendants in part of members of the civilized tribes of Oklahoma and who are of no other admixture than white and Indian.

Plecker, *supra* note 91, at 25-26.

(2) White persons can marry Indians only if the latter possess some admixture of white blood, and no admixture of any other blood; or

(3) White persons can only marry those who also fit within the definition of "white," *i.e.*, only those with no non-Caucasian blood or with no non-Caucasian blood other than one-sixteenth or less of Indian blood.

Although some commentators appear to have attached the third construction to the statute,[94] the second seems to be the correct one. However, if the court should adopt either the second or the third construction, John Rolfe and Pocahontas would be in serious trouble if they tried to marry in Virginia today. Because they might be committing a felony as well as jeopardizing the status of their progeny, the couple would no doubt wish to seek a declaratory judgment before marrying. For that matter, a mandamus action might be necessary before a marriage license would be issued anyway.[95]

The "Blood Content" Rule

The present miscegenation statutes speak solely in terms of blood content to determine racial status. Thus it would appear that a child of white blood who is adopted by a nonwhite parent will have his race determined by consanguinity rather than adoption. However, in view of the secrecy of adoption records and the issuance of new birth certificates after adoption it is conceivable that problems could arise, particularly with regard to foreign adoptions.

Use of the "blood content" rule could create other difficulties if carried to its logical and linguistic extreme. For example, in today's medical practice it is easily possible for a member of one race to receive a transfusion of blood from a member of another race. Does a white person who receives a transfusion from a colored person cross the "color line" himself in terms of Virginia's present miscegenation law? In this regard, Faulkner readers will recall the choice faced by Thomas Sutpen in *Absalom, Absalom!*—whether or not to reveal the fact that his daughter's suitor was his own son by a previous miscegenous union in New Orleans.[96] Perhaps the future plot in Virginia will find a white man of rare blood type facing the choice of dying or accepting

[94] See, *e.g.*, REUTER, RACE MIXTURE 97 (1931); Note, *Anti-Miscegenation Laws in the United States*, 1 DUKE B.J. 26, 30-31 (1951).

[95] See VA. CODE ANN. § 20-53 (1960).

[96] One member of Sutpen's family ultimately decided that although incest could be tolerated, miscegenation could not be. The result of his decision was fratricide.

a transfusion from the only available donor, a colored person, knowing that he might no longer be considered white in the eyes of the law following his recovery, and fearing for the racial status of his subsequent children.[97]

Burden of Proof

Since the passage of the 1924 act there has been no change in the rule that the prosecution has the burden of establishing beyond a reasonable doubt the racial status of both parties in a prosecution for miscegenation. *Keith v. Commonwealth*,[98] which reversed a conviction under the miscegenation statute on the ground that the prosecution had not met its burden, demonstrates the weight of this burden when the alleged source of nonwhite blood is an extra-marital union more than a generation in the past.

Seduction and the Miscegenation Laws

Seduction under a promise to marry is a felony in Virginia.[99] The penal statute itself makes no distinction respecting the race of either party, but not long after the 1924 act was passed, the Supreme Court of Appeals determined that the miscegenation provisions could have an effect upon a prosecution for seduction. In *Wood v. Commonwealth*[100] a white man appealed his seduction conviction on the ground that the trial court had refused to receive evidence designed to establish that the prosecutrix was a colored person as defined in the miscegenation statute. The Supreme Court of Appeals reversed his conviction and remanded the case for a new trial with instructions to receive such testimony. The court drew an analogy to the situation in which the man is married at the time of the seduction and this fact is known to the woman. In this situation, the court stated, the man's promise to marry is void, and does not subject him to prosecution for a felony. The court made it clear, however, that on remand the accused

97 In this connection it is interesting to note that in Louisiana a statute prescribes that no human blood can be used for transfusions unless labeled with the donor's race. LA. REV. STAT. § 40:1296.1 (1965). Moreover, the statute requires that the person receiving the transfusion, or his parent or next of kin, must be advised beforehand if it is proposed that a person of a different racial classification is to be the donor. LA. REV. STAT. § 40:1296.2 (1965).

98 165 Va. 705, 181 S.E. 283 (1935).

99 VA. CODE ANN. § 18.1-41 (1960).

100 159 Va. 963, 166 S.E. 477 (1932).

would have the burden of proving that the prosecutrix was aware of "the taint in her lineage" at the time of the seduction.[101]

If a white person were convicted for the seduction of a colored person (or vice versa), a constitutional problem might also be presented. According to Virginia law, a marriage between the seducer and the seducee provides a defense to a criminal action for the seduction.[102] However, such a defense would not be available in Virginia if one of the parties were white and the other nonwhite, because the miscegenation statute would preclude their marriage. A similar argument was recently urged upon the United States Supreme Court in *McLaughlin v. Florida*,[103] but the questioned statute was invalidated by the Court on a ground which made consideration of that particular attack unnecessary.[104]

Recognition of Marriages Performed Outside the State

Already in effect at the time the 1924 legislation was enacted was an "evasion statute" which provided that if a white person and a colored person should leave the state to avoid the miscegenation laws, marry elsewhere, and return to Virginia afterward, they would be subject to penal sanctions and their marriage would be treated just as if the ceremony had taken place within the state.[105] The same result had been reached by the courts even before the enactment of the present statute,[106] but it was under this section that the two most recent major cases challenging the Virginia statute—*Naim*[107] and *Loving*[108]—reached the courts.

It does not seem that the mere existence of an evasion statute applying to domiciliaries is constitutionally objectionable. The Virginia statute, like those in a number of other states, applies to marriages which are prohibited within the state because of a consanguineous

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101 *Id.* at 966, 166 S.E. at 478. The court added that it was reasonable to expect that the girl's mother would have withheld such information from her.

102 VA. CODE ANN. § 18.1-43 (1960).

103 379 U.S. 184, 187 n.6 (1964).

104 See note 6 *supra*, and text accompanying notes 180-83 *infra*.

105 Va. Code Ann. §§ 4540 & 5089 (1919), now VA. CODE ANN. § 20-58 (1960).

106 See Kinney v. Commonwealth, 71 Va. (30 Gratt.) 858 (1878).

107 Naim v. Naim, 197 Va. 80, 87 S.E.2d 749, *vacated and remanded*, 350 U.S. 891 (1955), *aff'd*, 197 Va. 734, 90 S.E.2d 849, *appeal dismissed*, 350 U.S. 985 (1956).

108 Loving v. Commonwealth, 206 Va. 924, 147 S.E.2d 78 (1966), *appeal docketed*, 35 U.S.L. WEEK 3059 (U.S. Aug. 2, 1966) (No. 395).

relationship,[109] insanity or feeblemindedness,[110] or the prior existing marriage of one of the parties,[111] as well as to those which are voided by the miscegenation laws.[112] The question of the validity of such provisions seemingly turns on whether Virginia can properly prohibit such marriages within *her own* territory.[113]

The question whether Virginia may disregard or annul marriages validly effected elsewhere between parties neither resident nor domiciled in Virginia is a different matter. A recent case might have resolved the issue had it not been for the procedural posture in which it reached the appellate court. In *Calma v. Calma*,[114] a husband first brought suit for either a divorce or an annulment in a Virginia court. The couple had married in New Jersey, which does not ban interracial marriage, and had later come to Virginia because of the husband's military orders. At the trial level it was decided that the marriage would not be recognized in Virginia because the husband was a Filipino and the wife was white. The court also enjoined the parties from continued cohabitation within the state. No appeal was taken, but subsequently the wife brought a separate action for either divorce or annulment on a different ground. The trial court in the second suit held that the parties were bound by the earlier decision that Virginia would not recognize their marriage. This ruling was appealed, but the Supreme Court of Appeals held that the doctrine of res judicata precluded consideration of the validity of the earlier application of the statute, since that judgment had become final with no appeal taken from it.

Although some might urge that the second *Calma* case indicates that the Supreme Court of Appeals would be reluctant to recognize a foreign miscegenous marriage valid at the domicile and not designed to evade Virginia's marriage law, this is not really inferable from the

109 VA. CODE ANN. § 20-40 (1960).

110 VA. CODE ANN. § 20-47 (Supp. 1966).

111 VA. CODE ANN. § 20-44 (1960).

112 VA. CODE ANN. § 20-58 (1960).

113 For further discussion of this problem, see Ehrenzweig, *Miscegenation in the Conflict of Laws*, 45 CORNELL L.Q. 659 (1960); Taintor, *Marriage in the Conflict of Laws*, 9 VAND. L. REV. 607 (1956).

114 203 Va. 880, 128 S.E.2d 440 (1962). There were actually two *Calma* cases, as will be seen in the ensuing discussion in the text. The first of these was not officially reported, but was discussed in the opinion of the Supreme Court of Appeals in the second case and in Note, *Jurisdiction to Dissolve the Marital Status*, 48 VA. L. REV. 992, 994 (1962). See also Boyd, *Pleading and Practice, 1962-1963 Annual Survey of Virginia Law*, 49 VA. L. REV. 1621, 1633-34 (1963); Wadlington, *Domestic Relations, 1962-1963 Annual Survey of Virginia Law*, 49 VA. L. REV. 1418, 1419-22 (1963).

opinion. Thus the case is probably best considered as having no stare decisis value with regard to miscegenation.

Two other states with miscegenation bans have specific statutory language to the effect that marriages valid where celebrated will be treated as valid within their own borders.[115] In a state with a transient, cosmopolitan population such as that found in several parts of Virginia today, adherence to such a rule rather than to a rigid nonrecognition policy would no doubt avoid much difficulty and embarrassment, to say the least. In the absence of a judicial extension of the doctrine of full faith and credit to marriage,[116] however, it is unclear whether Virginia could be required to recognize such a foreign marriage offensive to her announced public policy unless the proscription against interracial marriage within the state were itself invalidated.

Civil Effects

The Virginia statute explicitly states that a miscegenous union within the state is void without further judicial process.[117] A bigamous marriage is accorded the same treatment.[118] However, since the restrictions against interracial marriage were tightened by the 1924 act, no appellate case has squarely presented the question whether a miscegenous marriage might have some limited effects, such as the legitimation of the children of the union.

As we have seen, an 1885 decision which has never been overruled took the narrowest view possible with regard to legitimation.[119] However, it is possible that a case raising the issue of legitimation today might meet with different treatment. The logic of the earlier decision still seems incorrect.[120] Moreover, a very important factor which must be taken into account is that the restrictive definition of "white person," which has been imposed since 1885, has served to "color" many persons who were previously considered not to have racial impediments for the purpose of marrying whites.[121] The increased hardship which would result from application of the harsh 1885 rule is

115 ARK. STAT. ANN. § 55-110 (1947); KY. REV. STAT. ANN. § 402.040 (1963).

116 One commentator has suggested that a method be provided whereby a declaratory judgment as to the validity of the marriage could be obtained, this judgment itself being entitled to full faith and credit. Ehrenzeig, *supra* note 113, at 662.

117 VA. CODE ANN. § 20-57 (1960).

118 VA. CODE ANN. § 20-43 (1960); see Toler v. Oakwood Smokeless Coal Corp., 173 Va. 425, 4 S.E.2d 364 (1939).

119 Greenhow v. James' Ex'r, 80 Va. 636 (1885).

120 See notes 67 & 68 *supra* and accompanying text.

121 See notes 76 & 77 *supra* and accompanying text.

clearly in contrast to the humane provision of legitimacy found in the law since 1792.[122]

Virginia has not stated what effect will be given to foreign miscegenous marriages between nondomiciliaries, or between former domiciliaries remaining outside the state, with regard to inheritance rights in property within Virginia. However, two other states possessing a public policy against miscegenation at least as strong as Virginia's have recognized miscegenous marriages between parties no longer domiciled in the state for the purpose of the transmission of property.[123]

Constitutional Tests of the Present Miscegenation Laws

The Several Decisions of Naim v. Naim

Naim v. Naim,[124] the first major test of the constitutionality of Virginia's miscegenation laws after their amendment in 1924, first reached the Supreme Court of Appeals in 1955. The case was not a criminal prosecution, but a suit for annulment. The plaintiff wife was white and her husband, according to the facts found by the court, was Chinese. The plaintiff was domiciled in Virginia when she and the defendant left the state to be married in North Carolina, which had no ban on such an interracial union. The parties returned to live in Virginia as husband and wife. Although the court found that the defendant was not a resident of Virginia at the time of the marriage, the defendant conceded that he and the plaintiff had left Virginia for the express purpose of evading its ban on interracial marriage.

In sustaining the lower court's annulment decree, the Supreme Court of Appeals specifically upheld the validity of the present miscegenation legislation.[125] Replying to the key constitutional attacks based on the due process and equal protection clauses of the fourteenth amendment, the court said that regulation of marriage falls exclusively within the reserved powers of the states.[126] Although the court did indicate that an attack might successfully be made on a miscegenation statute if its classification were arbitrary, it pointed out that since no evidence of unreasonableness appeared in the record, the classification by the legislature would be accorded a strong presumption of validity once it was

122 1 Laws of Va. 101 (Shepherd 1835).

123 See Miller v. Lucks, 203 Miss. 824, 36 So. 2d 140 (1948); Whittington v. McCaskill, 65 Fla. 162, 61 So. 236 (1913).

124 197 Va. 80, 87 S.E.2d 749, *vacated and remanded*, 350 U.S. 891 (1955), *aff'd*, 197 Va. 734, 90 S.E.2d 849, *appeal dismissed*, 350 U.S. 985 (1956).

125 197 Va. 80, 87 S.E.2d 749 (1955).

126 *Id.* at 89-90, 87 S.E.2d at 756.

determined that the purpose of the law was within the purview of state regulation and that the statute bore a reasonable relation to that purpose.[127]

An appeal was taken to the United States Supreme Court, which in a per curiam decision vacated the Virginia court's judgment and remanded the case because of the record's inadequacy "as to the relationship of the parties to the Commonwealth of Virginia at the time of the marriage in North Carolina and upon their return to Virginia . . . ."[128] The Court justified its action on the ground that the constitutional issue was not presented "in clean-cut and concrete form, unclouded" by other problems not clearly appearing but possibly relevant to the disposition of the case.[129] However, the Virginia Supreme Court of Appeals restated on remand what it considered to be the material facts and said that they were sufficient for the annulment ruling under Virginia law. The court then noted that not only was there no Virginia procedure under which the record could be sent back to the trial court for supplementation under the circumstances, but that such a remand would in fact be contrary to existing practice and procedural rules. The court then reaffirmed its original decision upholding the annulment.[130]

When the case reached the United States Supreme Court for the second time, the Virginia court's decision in response to the first order was noted, and the case was dismissed as "devoid of a properly presented federal question."[131]

Much speculation about the meaning of the final dismissal of *Naim* by the Supreme Court has appeared in various legal publications.[132] The Court's original remand seems to have been based upon the view that the application of Virginia's evasion statute to a person who was a nonresident at the time of the suit presented a distinct problem.[133]

127 *Id.* at 88-89, 87 S.E.2d at 755-56.

128 350 U.S. 891 (1955).

129 *Ibid.*

130 197 Va. 734, 90 S.E.2d 849 (1956).

131 350 U.S. 985 (1956).

132 See, *e.g.*, Ehrenzweig, *supra* note 113, at 662; Weinberger, *A Reappraisal of the Constitutionality of Miscegenation Statutes*, 42 CORNELL L.Q. 208, 209-10 (1957); *The Supreme Court, 1955 Term*, 70 HARV. L. REV. 83, 103-04 (1956); 31 NOTRE DAME LAW. 714 (1956). Some writers recalled earlier instances in which Virginia's courts had at first refused to obey a Supreme Court mandate, as in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 303 (1816), and in Williams v. Bruffy, 102 U.S. 248 (1880). Others simply expressed the view that the Supreme Court itself had simply avoided the necessity of rendering a decision in *Naim*.

133 For a discussion of this problem, see Ehrenzweig, *supra* note 113.

However, whatever the grounds for the Supreme Court's dismissal may have been, as far as Virginia courts are concerned *Naim* appears to stand for three basic propositions. The first and most obvious of these is that the banning of interracial marriage is not unconstitutional unless the method of classification is arbitrary. Another is that in annulment suits at least the domiciliary connection of only one of the parties with Virginia at the time of the marriage is a sufficient basis for the application of the evasion statute. The third is that the 1924 act bans the marriage of a white with an Oriental as well as with a Negro.

Several years after the *Naim* case had completed its circuitous route through the courts, another case arose which challenged the constitutionality of a miscegenation ban upon the marriage between a white woman and a Filipino man. This was *Calma v. Calma*,[134] discussed previously,[135] which ended with a procedural history almost as complicated as that of *Naim*. Because of the manner in which the case finally reached the Supreme Court of Appeals, however, that court found it unnecessary to consider the constitutional validity of the statute, and no appeal was taken to the United States Supreme Court from the decision.

This was the situation which existed when *Loving v. Commonwealth*,[136] long dormant because the parties had been living outside of Virginia in accordance with a judicial mandate, reached the appellate tribunals.

The Loving Case

In 1959 Richard and Mildred Loving were convicted, on guilty pleas, of the several-step offense of leaving Virginia to evade its miscegenation laws, marrying in the District of Columbia, and returning to Virginia and cohabiting as man and wife. According to the indictment, the husband was white and the wife was colored. Each party was sentenced to a year in jail, but both sentences were suspended "for a period of twenty-five years upon the provision that both accused leave . . . the state of Virginia at once and do not return together or at the same time . . . for a period of twenty-five years."[137]

In late 1963 the Lovings filed a motion which sought to vacate the judgment against them and to have their sentences set aside on the

134 203 Va. 880, 128 S.E.2d 440 (1962).

135 See note 114 *supra* and accompanying text.

136 206 Va. 924, 147 S.E.2d 78 (1966), *appeal docketed*, 35 U.S.L. WEEK 3059 (U.S. Aug. 2, 1966) (No. 395).

137 *Id.* at 925, 147 S.E.2d at 79.

grounds that the statute under which they were convicted was unconstitutional and that the sentences themselves were invalid. This motion was denied in early 1965, and the case then went to the Supreme Court of Appeals on writ of error. In March 1966 that court again declared the miscegenation statute to be constitutional, this time in a criminal case. Relying heavily on its earlier decision in *Naim*, the court pointed out that in the interim there had been no further decision "reflecting adversely on the validity of such statutes."[138] The court also refused to accept the argument that the conditions attached to the suspension of the defendants' sentences were in effect a form of banishment, but did declare them to be "so unreasonable as to render the sentences void."[139] Stating that only the cohabitation of the parties in Virginia—and not their returning to the state either singly or together—is prohibited by the statute, the court remanded the case for an amendment to the sentence consistent with its opinion.[140]

Although it was disappointing to those who believe that the miscegenation laws are violative of fundamental civil liberties, the decision of the Supreme Court of Appeals was neither novel nor surprising. It should not have been expected that the court would overrule its decision in *Naim*, which was rendered little more than a decade ago, on federal constitutional grounds when the United States Supreme Court had been unable to find in *Naim* a clearly presented federal question on what appeared to be a very clear and complete statement of facts. On the other hand, the past decade has seen sweeping legal changes in the civil liberties field generally and in the field of race relations in particular—changes so sweeping in fact that the miscegenation statutes found in seventeen states today constitute the last major category of legally enforced discrimination based solely on race.

The Problem of Constitutionality

It would exceed the scope of this Article to deal in detail with all of the constitutional problems raised by the various miscegenation

138 *Id.* at 929, 147 S.E.2d at 82.

139 *Id.* at 930, 147 S.E.2d at 83.

140 It is to be noted that whereas in *Naim* the Supreme Court of Appeals indicated that it would have considered the reasonableness of the classification of the miscegenation law if the issue had been raised, 197 Va. at 89, 87 S.E.2d at 755, in *Loving* it refused to consider any anthropological, biological, or sociological evidence. 206 Va. at 929, 147 S.E.2d at 82. This change in approach is surprising, especially since the presumption of the reasonableness of the legislative classification, relied upon by the court in *Naim*, today appears to be inverted where a statute involving racial discrimination is challenged. See McLaughlin v. Florida, 379 U.S. 184, 192, 196 (1964).

statutes still extant.[141] However, it is noteworthy that the attrition in the number of miscegenation statutes in the last decade[142] has resulted from legislative rather than judicial action in every instance during this period. In fact, since 1865 appellate courts in only two states—Alabama and California—have invalidated such statutes on the ground that the prohibition of interracial marriages is unconstitutional. Moreover, the Alabama court which invalidated the state's miscegenation law in 1872[143] promptly overruled its decision in 1877.[144] Thus the 1948 California decision in *Perez v. Sharp*[145] is the only appellate decision now in effect in this country which holds that a state is constitutionally precluded from banning interracial marriage.[146]

On the other hand, a sizable number of state appellate courts during the past century have upheld the validity of their state's miscegenation laws.[147] The high courts of Virginia[148] and Oklahoma[149] have been the latest to make such pronouncements. The most recent federal court decision dealing directly with a state ban against interracial marriage was rendered in 1944 when the Tenth Circuit held that an Oklahoma statute forbidding marriage between a full-blooded Indian and a person of "African descent" did not violate either the fourteenth amendment or the Civil Rights Act of 1866.[150]

During the past fifteen years, the United States Supreme Court has

141 For a recent comprehensive study, see Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49 (1964).

142 See note 8 *supra*.

143 Burns v. State, 48 Ala. 195 (1872).

144 Green v. State, 58 Ala. 190 (1877).

145 32 Cal. 2d 711, 198 P.2d 17 (1948).

146 In 1957 the Criminal Court of Baltimore City declared unconstitutional a Maryland statute dating from 1699 which made it an offense for a white woman to "suffer or permit herself to be got with child by a negro or mulatto . . . ." This was held to violate the equal protection clause of the fourteenth amendment even under the standard set by Pace v. Alabama, 106 U.S. 583 (1882). State v. Howard (Crim. Ct. Baltimore, April 1957) in Daily Record, April 22, 1957, p. 3, col. 1. The statute, however, still appears in the Maryland Code. MD. ANN. CODE art. 27, § 416 (1957).

A possible constitutional test of the Mississippi miscegenation statute was averted in 1958 because the statute, obviously through an error in draftsmanship, required that the relationship to be proscribed must be both miscegenous and incestuous. See Ratcliff v. State, 234 Miss. 734, 107 So. 2d 728 (1958). The provision has since been redrafted and appears in revised form in the current Mississippi code. MISS. CODE ANN. § 2000 (Supp. 1964.)

147 For a list of fourteen such cases, see Applebaum, *supra* note 141, at 56 n.66.

148 Loving v. Commonwealth, 206 Va. 924, 147 S.E.2d 78, *appeal docketed*, 35 U.S.L. WEEK 3059 (U.S. Aug. 2, 1966) (No. 395).

149 Jones v. Lorenzen, 36 OKLA. B.A.J. 2237 (1965).

150 Stevens v. United States, 146 F.2d 120 (10th Cir. 1944).

thrice avoided the necessity of ruling on the constitutionality of state prohibitions against racial intermarriage. In addition to the *Naim* case,[151] the Court denied certiorari in 1954 in *Jackson v. State*,[152] a case involving a conviction under the Alabama statute. And in 1964 in *McLaughlin v. Florida*,[153] the majority of the Court found it unnecessary to reach the question of the validity of Florida's miscegenous marriage law in striking down a statute which imposed special punishment upon interracial couples who occupied the same room during the nighttime.

The Court's disposition of the *Jackson* and *Naim* cases seems to be of no particular stare decisis value in regard to the question whether or not miscegenation laws are constitutional. However, the *McLaughlin* decision appears to be of great significance to the resolution of this question for reasons which will be discussed subsequently.

The Arguments Supporting the Constitutionality of Miscegenation Laws

The three principal arguments which have been advanced most frequently in support of the constitutionality of statutes prohibiting miscegenous marriages are: (1) the statutes are not discriminatory because they apply equally to members of each race affected by them; (2) historical debate in connection with the introduction of the fourteenth amendment in Congress indicates that elimination of the prohibition of interracial marriage was not part of the framers' intent; and (3) under the tenth amendment the regulation of marriage is exclusively within the province of the states.

The "Nondiscrimination" Argument

The proposition that if both parties to an interracial marriage are punishable equally there is no discrimination and hence no violation of the fourteenth amendment stems from the Supreme Court decision in *Pace v. Alabama*,[154] which directly involved a statute prohibiting miscegenous cohabitation. Although many constitutional scholars have long considered *Pace* repudiated by more recent cases involving racial discrimination,[155] it has nevertheless been the leading authority cited

151 Naim v. Naim, 197 Va. 80, 87 S.E.2d 749, *vacated and remanded*, 350 U.S. 891 (1955), *aff'd*, 197 Va. 734, 90 S.E.2d 849, *appeal dismissed*, 350 U.S. 985 (1956); see notes 124-33 *supra* and accompanying text.

152 37 Ala. App. 519, 72 So. 2d 114, *cert. denied*, 260 Ala. 698, 72 So. 2d 116, *cert. denied*, 348 U.S. 888 (1954).

153 379 U.S. 184 (1964).

154 106 U.S. 583 (1883).

155 Thus the Supreme Court stated in *McLaughlin v. Florida:* "In our view . . . *Pace*

in many of the state court decisions upholding the validity of miscegenetic marriage prohibitions.[156] In *McLaughlin* it provided the basis for the decision of the Florida Supreme Court affirming the constitutionality of the state's statute prohibiting interracial cohabitation.[157] Thus, although the majority of the United States Supreme Court found it unnecessary to take the step of ruling on miscegenous marriage statutes when *McLaughlin* came before them, they eliminated one of the key grounds on which state courts had previously relied to uphold interracial marriage bans by delivering the coup de grace to the *Pace* rationale.[158]

The Legislative History Argument

The argument that some (and perhaps many) of those who voted for the passage of the fourteenth amendment did not intend that it should apply to state proscriptions against interracial marriage is discussed in great detail elsewhere in this issue,[159] as well as in other publications.[160] The fallacy of this argument is that it concentrates on only one of the factors which is relevant to constitutional interpretation. The genius of our Constitution lies in its capability to respond to social and economic change while preserving the continuity of the values which we inherit from the past. Although an analysis of the intentions of the framers of the document is proper in explaining the historical setting from which the Constitution and its amendments are derived, it must be recognized that the limitations of outlook which men of all historical periods share may preclude them from seeing the implications of the values which they enunciate. To the extent that succeeding generations find a fuller meaning in the ideals which the language of their forefathers expresses, and rely upon that language in developing their own senses of value, the law must provide them with the freedom to apply the words of the Constitution in a manner consonant with their own understanding.

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represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." 379 U.S. at 188.

156 See, *e.g.*, State v. Brown, 236 La. 562, 108 So. 2d 233 (1959); Jackson v. City & County of Denver, 109 Colo. 196, 124 P.2d 240 (1942).

157 McLaughlin v. State, 153 So. 2d 1, 3 (Fla. 1963).

158 See McLaughlin v. Florida, 379 U.S. 184, 188-91 (1964).

159 Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224 (1966).

160 See, *e.g.*, Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

The "Reserved Powers" Argument

The proposition that regulation of marriage should be left to the states has long been asserted by both state and federal courts in a number of contexts. Probably the leading federal authority is the 1888 United States Supreme Court case of *Maynard v. Hill*,[161] which contained the famous dictum that "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 control of the legislature."[162] Today the regulation of marriage is regarded by some as the last great bulwark of States' rights. Concern is expressed that if the federal constitution can be construed to forbid the states from proscribing interracial marriage, it can also be interpreted to strike down other state regulations on the ground that they involve arbitrary classifications. Thus, it is argued, laws prohibiting marriage between parties related only by affinity or the marriage of epileptics may be held unconstitutional if miscegenation statutes are invalidated. Actually such an argument should be self-defeating if considered solely on a policy basis, because the past practice of leaving the regulation of marriage exclusively within the regulation of the states has led to a morass of conflicting and often anachronistic state legislation which has done more to tear down than to build up this "most important relation in life."

From a constitutional standpoint the question is not whether state marriage regulation has been preempted by federal law, but simply whether state power with regard to the regulation of marriage is subject to limitations established elsewhere in the Constitution. Accordingly, it would not follow from a Supreme Court holding that miscegenous marriage proscriptions are invalid that marriage is no longer predominantly subject to state regulation.[163]

The Arguments Against the Constitutionality of Miscegenation Laws

Attacks on the constitutionality of miscegenation statutes generally have been grounded on the due process and equal protection clauses of the fourteenth amendment. One aspect of the due process argument has been that prohibitions against racial intermarriage impair freedom

161 125 U.S. 190 (1888).

162 *Id.* at 205. This passage was quoted in the *Loving* case. Loving v. Commonwealth, 206 Va. 924, 929, 147 S.E.2d 78, 82 (1966).

163 For a discussion of an analogous problem in the area of state regulation of suffrage, see Note, *Federal Protection of Negro Voting Rights*, 51 VA. L. REV. 1053, 1205-08 (1965).

of religion. This contention won the support of at least one justice in *Perez v. Sharp*,[164] in which the California Supreme Court declared its state's miscegenation law to be unconstitutional. However, it seems unlikely that the religious freedom argument will be decisive unless the legal definition of marriage is revised to emphasize its sacramental nature more than its legal aspect, which can exist totally outside of any religious framework.

The Due Process Argument

It is an axiom of federalism that the due process guarantees of the fourteenth amendment can be invoked only where there has been an infringement of some fundamental right. Thus the validity of miscegenation laws under the due process clause must turn in the first instance on the question whether marriage can be considered a fundamental right under the federal constitution. Although the language of *Maynard v. Hill*[165] indicated the great importance accorded to marriage in our society, the Court did not speak of marriage in terms of a right. However, marriage was specifically so characterized in 1923 in the majority opinion in *Meyer v. Nebraska*.[166] Moreover, in *Skinner v. Oklahoma*,[167] a case involving compulsory sterilization of certain convicted criminals, the majority opinion stated that: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[168]

This recognition of marriage as a right was reaffirmed in 1965 in *Griswold v. Connecticut*,[169] which invalidated a state statute prohibiting the use of contraceptives. The Court said that the Connecticut law violated a fundamental right of marital privacy emanating from the first amendment. To establish the existence of this right, a majority of the Justices—in several opinions[170]—relied heavily on either *Meyer*

164 32 Cal. 2d 711, 740, 198 P.2d 17, 34 (1948) (Edmonds, J., concurring).

165 125 U.S. 190, 205 (1888); see text accompanying note 162 *supra*.

166 262 U.S. 390, 399 (1923).

167 316 U.S. 535 (1942).

168 *Id.* at 541.

169 381 U.S. 479 (1965).

170 Mr. Justice Douglas wrote the opinion of the Court. Mr. Justice Goldberg, in a concurring opinion joined by Chief Justice Warren and Mr. Justice Brennan, reasoned that "the concept of liberty protects those personal rights that are fundamental and is not confined to the specific terms of the Bill of Rights," 381 U.S. at 486, relying on the ninth amendment to support this view. In another concurring opinion Mr. Justice Harlan emphasized that the due process clause "stands . . . on its own bottom," 381 U.S. at

or *Skinner* (or both) to support the proposition that marriage itself is a fundamental right. Moreover, Mr. Justice Douglas' opinion for the Court enunciated a basic right of association, which, it would seem, could be deemed equally relevant to a consideration of the validity of a statute which prohibits marriage across racial lines.

The establishment of marriage as a right is of course only the first step in determining whether miscegenation laws violate the due process clause. It must next be asked whether such laws unconstitutionally infringe this right, for it cannot be seriously contended that the right of marriage is absolute and cannot be infringed under any circumstances. A valid exercise of the state's police power can restrict that right. For example, it seems unlikely that a law prohibiting blood brothers and sisters from intermarrying could be successfully challenged under the due process clause (at least unless the evidence relating to the defective nature of the offspring of incestuous unions should be radically undermined).[171] Similarly, a statute like the one held valid in *Buck v. Bell*,[172] providing for the sterilization of certain mental defectives, does not seem open to constitutional attack, even though it invades the right to procreate through marriage announced by *Skinner v. Oklahoma*. Thus the question becomes whether the enactment of a miscegenation statute is a legitimate exercise of the state's police power in pursuit of a valid state objective.

If the state should contend that the purpose which its miscegenation law is designed to effectuate is simply the preservation of "racial pride,"[173] it seems clear that the enactment of the law is not within the scope of the state's police power. However, it is more likely that the state would contend that the purpose of the statute is to protect against a "corruption of blood" which would "weaken or destroy the quality of its citizenship."[174] This contention would not render a mis-

500, thereby making it clear that he did not find it necessary that a right enumerated by the Bill of Rights be infringed in order to invalidate the Connecticut statute. Mr. Justice White also concurred, stressing that the questioned statute was unnecessarily broad in light of its recited purpose of discouraging *illicit* sexual relationships. Mr. Justice Black and Mr. Justice Stewart both wrote separate dissenting opinions, each joining in the other's, denying the existence of a right of marital privacy protected by the Constitution.

171 Of course, even if scientific evidence showing that the children of incestuous unions are no more likely to possess defects than other children were to be developed, bans against incestuous marriages would not necessarily become unconstitutional. The state may well have a valid interest simply in preserving the integrity of the family unit. Similarly, a law prohibiting marriage between adoptive brothers and sisters would appear to be valid.

172 274 U.S. 200 (1927).

173 See Naim v. Naim, 197 Va. 80, 90, 87 S.E.2d 749, 756 (1955).

174 *Ibid.* The Virginia court's use of the term "corruption of blood" was unfortunate.

cegenation law impervious to constitutional attack. Recent studies have seriously discredited the theory that a person of mixed blood is "inferior" in quality to one of absolute racial purity and is thus less capable of meeting the responsibilities of citizenship.[175] Since state legislation is invalid under the due process clause unless it bears a reasonable relationship to its recited purpose and since courts cannot blind themselves to scientific evidence in passing upon the reasonableness of this relationship, these studies in themselves present a severe challenge to miscegenation laws. Moreover, even if it were assumed that the children of interracial marriages were not of as high a quality as those of racially pure marriages, miscegenation laws would still not be immune from constitutional attack. Although assuring the mental and physical well-being of its citizens is no doubt a valid state interest, there is a clear distinction between protecting against the generation of fundamentally defective offspring, as the statute upheld in *Buck v. Bell* was designed to do, and attempting to prevent by legislative enactment the birth of children who, though healthy, possess characteristics which, upon a subjective standard, may be less than ideal.

Furthermore, where a right protected by the Constitution is invaded by state legislation, the courts have a responsibility to weigh several factors in determining whether this invasion is constitutionally justifiable. They must consider the nature of the harm which the questioned legislation seeks to combat and the probability that the harm will occur in the absence of the legislation, and balance these factors against the severity of the restriction on individual freedom. It is doubtful that a miscegenation law, particularly Virginia's, could stand under such a balancing test. Evidence produced by sociological, biological, and anthropological studies is as relevant to an inquiry into the nature of

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At common law the term was used to describe the consequences of a bill of attainder, *i.e.*, that the person attainted could not inherit "lands or other hereditaments from his ancestor, nor retain those he already had, nor transmit them by descent to any heir." BLACK, LAW DICTIONARY 414 (4th ed. 1957). Bills of attainder are proscribed in the United States by U.S. CONST. art. 3, § 3.

In addition to contending that the purpose of her miscegenation law is to assure the quality of her citizenry, Virginia might also argue that the law is intended to protect against racial tension. However, it is unlikely that the Court would agree since in simplest terms the thrust of this argument is that people's prejudices must be preserved for the sake of social order. See *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 103, 167 (1965).

175 See, *e.g.*, KLINEBERG, CHARACTERISTICS OF THE AMERICAN NEGRO (1944); UNESCO, THE RACE QUESTION AND MODERN SCIENCE: THE STATEMENT ON THE NATURE OF RACE AND RACIAL DIFFERENCES, Article 7 (1952). See also Weinberger, *A Reappraisal of the Constitutionality of Miscegenation Statutes*, 42 CORNELL L.Q. 208 (1957).

the harm sought to be curtailed by miscegenation laws as it is in determining the reasonableness of the relationship between those laws and their recited purpose. Moreover, even if a court did not find these studies to be conclusive, but merely sufficient to shed doubt on the theory that offspring of interracial unions are inferior, it might well invalidate a miscegenation law on the ground that the existence of a hypothetical harm does not justify a drastic invasion of individual liberty. A miscegenation law may put an individual to a cruel choice between marrying the person whom he loves and leaving his home, or denying his affections and remaining in the state. The probability that the law will force an individual to choose between these highly unsatisfactory alternatives is especially great in Virginia because the classifications upon which her miscegenation laws operate are so broad.[176]

The Equal Protection Argument

An analysis of the equal protection argument which can be leveled against miscegenation laws must begin with an examination of the recent Supreme Court case of *McLaughlin v. Florida*.[177] For although the Court specifically refused to reach the question of the constitutionality of Florida's miscegenation law in striking down an interracial cohabitation statute, it did provide the basis upon which an equal protection attack on miscegenation laws should proceed.

The challenged statute in *McLaughlin* specified a punishment for "any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room."[178] This statute was supplementary to other general statutes proscribing lewd cohabitation and fornication, and was distinguishable from them only in that it (1) applied only to interracial couples, and (2) did not require proof of intercourse as an element of the crime. The Supreme Court held that the statute violated the equal protection clause of the fourteenth amendment. The Court reasoned that unless an "overriding statutory purpose" could be found justifying the punishment of a white person and a Negro for conduct which was not punished when engaged in by any other persons, "the racial classification contained in . . . [the statute]

176 See VA. CODE ANN. § 20-54 (1960); notes 86-88 *supra* and accompanying text.

177 379 U.S. 184 (1964).

178 FLA. STAT. ANN. § 798.05 (1961).

is reduced to an invidious discrimination forbidden by the Equal Protection Clause."[179]

Florida first contended that such a purpose could be founded upon the state's interest in preventing "breaches of the basic concept of sexual decency."[180] Although it is clear that this is a valid state interest justifying the exercise of the police power, it is equally clear that this interest could not justify the discriminatory classification found in the cohabitation statute because, as the Court pointed out, there was no suggestion made that an interracial couple is more likely to occupy the same room together—or to engage in sexual intercourse if they do—than an intraracial couple.

Florida's next contention was that the cohabitation statute was ancillary to, and designed to accomplish the same purpose as, the state's miscegenation statute which was itself constitutional. The Court answered this contention without considering the validity of the miscegenation law, on the ground that a statute which involves "indivious official discrimination based on race . . . will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy."[181] The Court reasoned that Florida had not demonstrated that the interracial cohabitation statute was necessary to accomplish the purpose of the miscegenation law, since it punished only extra-marital conduct, which could be reached by the general statutory provisions proscribing fornication and lewd cohabitation.

Since Virginia has statutes proscribing fornication and lewd and lascivious cohabitation and since these statutes might in theory be invoked to punish a party to a miscegenous marriage on the ground that a separate statutory provision renders miscegenous marriages void,[182] it could be argued that *McLaughlin* has already invalidated the Virginia miscegenation law because these statutes make the criminal ban against interracial marriage "unnecessary." This argument might seem to draw support from the Virginia court's assertion in *Loving* that "the real gravamen of the offense charged against the defendants . . . was their *cohabitation* as man and wife,"[183] which arguably suggests that the conduct of the Lovings could have been punished equally effectively under the lascivious cohabitation statute. However, the only

179 379 U.S. at 192-93.

180 *Id.* at 193.

181 *Id.* at 196.

182 See notes 56 & 57 *supra* and accompanying text.

183 Loving v. Commonwealth, 206 Va. 924, 930, 147 S.E.2d 78, 83 (1966). (Emphasis added.)

reason that the court considered cohabitation to be the critical element of the offense in *Loving* was that the parties were prosecuted under Section 20-58 of the Virginia Code, the evasion provision of the miscegenation law, which depends upon cohabitation within the state to establish the state contact necessary for prosecution. Section 20-58 is clearly ancillary to—and in fact derives its criminal sanction from—section 20-59, which punishes the interracial marriage itself. Accordingly, it was their cohabitation *as man and wife* which was said to be the gravamen of the Lovings' offense. Thus it is apparent that the Virginia miscegenation provisions are designed to punish the act of interracial marriage itself and—where necessary to establish sufficient state contact—interracial *marital* cohabitation, rather than fornication or illicit cohabitation in general. On the other hand, the conduct punished by the statute in question in *McLaughlin* was extramarital interracial cohabitation. Therefore, *McLaughlin* does not provide authority for the proposition that Virginia's miscegenation provisions are rendered unnecessary by her fornication and lewd and lascivious cohabitation statutes.

At another level, however, the contention that Virginia's miscegenation law is "unnecessary" may well prove fatal to the constitutionality of that law under the equal protection clause. The Court's analysis in *McLaughlin* suggests a dual inquiry. First, it must be asked whether there is an "overriding statutory purpose" which justifies the discrimination in the questioned statute. Second, if a permissible state purpose is found, it must then be asked if the racially drawn statute is *necessarily* related to the accomplishment of this policy. A negative answer to either of these questions will invalidate the law. Thus Virginia appears poised on the horns of a dilemma in attempting to justify her miscegenation law. If she should argue that the policy which the law is designed to accomplish is simply the preservation of racial purity, she could easily demonstrate that statutory provisions punishing interracial marriage are necessary to the accomplishment of this purpose. However, it is unlikely that the preservation of racial purity in itself can be considered a permissible state purpose justifying the repressive exercise of the police power. That at least two members of the Court would not find an "overriding statutory purpose"—however articulated—justifying a miscegenation law seems to be foreshadowed by the language of Mr. Justice Stewart, joined by Mr. Justice Douglas, concurring in *McLaughlin*: "I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of

a person's skin the test of whether his conduct is a criminal offense."[184] On the other hand, if Virginia should argue that the policy which the miscegenation law is designed to accomplish is the protection against the birth of "inferior" (in an objective sense) offspring—which may be a permissible state purpose—she would then have to prove that the miscegenation law is *necessary* to the accomplishment of this purpose. This would inevitably involve proof of the "inferiority" of children of "interracial" unions, an awkward burden in the second half of the twentieth century.[185]

The Virginia miscegenation law appears to be invalid under the equal protection clause on still another ground. Although entitled "An Act to Preserve Racial Integrity," the statute in fact seeks to preserve only the integrity of one race, the Caucasian. Thus, although whites are precluded from marrying nonwhites (subject to the Pocahontas exception), Orientals may marry Negroes, Melanesians may marry Negritos, and any number of other combinations may be joined conjugally. This distinction renders the statute's classification arbitrary and unreasonable in light of its ostensible factual premise, asserted by the Virginia Supreme Court of Appeals, that "nations and races have better advanced in human progress when they cultivated their own distinctive characteristics and culture and developed their own peculiar genius."[186] Furthermore, the prohibition against Caucasians marrying anyone with any "trace whatever of any blood other than Caucasian"[187] itself appears to be arbitrary and unreasonable even if it is assumed that persons with differing racial characteristics should be precluded from intermarrying.

Conclusion

As this Article has indicated, Virginia has long prohibited interracial marriage to some degree. It is possible that the original miscegenation bans served a legitimate purpose at a time when Negroes were essentially an alien part of the community. However, if we should not fault our forefathers for enacting miscegenation laws under the circumstances confronting them, neither can we justifiably perpetuate those laws under the changed circumstances of our world. For history alone does not provide a justification for a law which is otherwise

184 379 U.S. at 198.

185 See note 175 *supra* and accompanying text.

186 Naim v. Naim, 197 Va. 80, 90, 87 S.E.2d 749, 756 (1955).

187 Va. Code Ann. § 20-54 (1960).

unjustifiable, and prohibitions against interracial marriage now have little else—if anything—to commend them. Furthermore, Virginia's present broad prohibition against racial intermarriage can hardly wrap itself in the mantle of history: it is less than a half-century old. It must also be recognized that Virginia's miscegenation law runs counter to the state's deeply cherished heritage of allowing the individual the maximum freedom possible in making his personal decisions.

Although it would have been preferable if the General Assembly had recognized its responsibility and repealed Virginia's miscegenation law, there has been little movement in this direction in recent years. And it is exceedingly doubtful that such legislative action would occur, at least in the near future, if the Supreme Court were to dispose of the *Loving* case without definitive action this Term. Thus it appears that a constitutional attack in the federal courts is for the present the only avenue remaining open for striking the state's miscegenation law from the statute books.

Under such a constitutional attack, the whole of Virginia's miscegenation machinery should fall. Although only a criminal provision is directly in issue in the *Loving* case, the constitutional arguments reach the very heart of the miscegenation law. The fundamental question is whether a man and his wife—and their children—should suffer at the hands of the law because they choose to marry across racial lines.[188] *Loving v. Commonwealth* thus poses the constitutional issues clearly, and the Supreme Court should now make it clear that bans on interracial marriage have no place in a nation dedicated to the equality of man.[189]

188 Moreover, because of the civil provision voiding miscegenous marriages, merely invalidating VA. CODE ANN. §§ 20-58 & 20-59 would not protect the parties to such a marriage from criminal prosecution since arguably they could still be proceeded against under the fornication and lewd and lascivious cohabitation statutes.

189 The Supreme Court has ordered Virginia to file a reply brief on the issue of jurisdiction in *Loving* by November 19. See Wash. Post, Oct. 21, 1966, B10, col. 3.