The Story of the Hard-Fought Legal Battle to Protect One of the Most Fundamental Rights: Marriage

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I. Introduction

a. In 1967, the Supreme Court issued the landmark civil rights decision of *Loving v. Virginia,* 388 U.S. 1 (1967). For the first time, the Court held that laws banning interracial marriage constituted a violation of both the Equal Protection and Due Process Clauses of the 14th Amendment to the U.S. Constitution. One of the two attorneys who argued the case in front of the Supreme Court was Bernard S. Cohen, father of Gentry Locke's Karen Cohen. This presentation explores the story behind this seminal case and provides a behind the scenes look at the fight to protect a fundamental human right.

II. Attachments

a. The following items are attached as reference materials:

   i. Circuit Court of Caroline County Opinion (January 22, 1965).

   ii. Interlocutory Order from the United States District Court for the Eastern District of Virginia (February 11, 1965).

   iii. Supreme Court of Virginia Opinion (March 7, 1966).

   iv. United States Supreme Court Opinion (June 12, 1967).

III. Virginia's Miscegenation Statutes

a. Virginia's 1924 Racial Integrity Act criminalized all marriages between "white" people and those who were "colored"—meaning anyone "with a drop of non-white blood."

b. Va. Code § 20-54 (1960): "It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be

deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter."

c. Va. Code § 20-57 (1960): "All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process."

d. Va. Code § 20-58 (1960): "If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."

e. Va. Code § 20-59 (1960): "If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."

IV. History of the Case

a. Initial Arrest

i. June 2, 1958: Richard and Mildred Loving married in Washington, DC where it was legal. Shortly after, they returned to their home in Caroline County, Virginia.

ii. July 11, 1958: Judge Robert W. Farmer issued a warrant for their arrest.

iii. July 17, 1958: Sheriff Brooks arrested Richard and Mildred Loving.

iv. October 1958: The Circuit Court of Caroline County Grand Jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages.

b. Sentencing

i. On January 6, 1959, the Lovings were arraigned in the Circuit Court of Caroline County.

ii. The trial court sentenced them to one year each in jail and suspended the sentences "for a period of twenty-five years upon the provision that both accused leave Caroline County and the state of Virginia at once and do not return together or at the same time to said county and state for a period of twenty-five years."

1. Initially, the Lovings pleaded "not guilty" and after the court heard the evidence and argument of counsel, the accused "change[d] their plea from 'not guilty' to 'guilty'".

iii. Subsequently, the Lovings moved away from their friends and family to live with one of Mildred Loving's cousins in Washington, DC. However, the Lovings yearned to be able to return to their home and families in Caroline County.

c. Return to Virginia and Subsequent Arrest

i. On March 28, 1959, a Warrant for Violating Parole was issued.

ii. While visiting family in Virginia in 1963, they were arrested again for traveling together.

d. The ACLU of the National Capital Region Takes the Lovings' Case

i. In June 1963, the Lovings wrote a letter to Attorney General Robert F. Kennedy asking for help. Their case was then referred to the American Civil Liberties Union. The ACLU assigned the case to a volunteer attorney licensed to practice in Virginia. That attorney was Bernard S. Cohen.

1. Mrs. Loving's handwritten letter to Attorney General Kennedy was poignant: "We know we can't live there, but we would like to go back once in a while to visit our families and friends."

V. The Long Road to the Supreme Court

a. Motion to Vacate the Judgment and Set Aside the Sentence

i. Cohen moved to have the 1959 judgment convicting the Lovings of violating Va. Code § 20-58 vacated and the suspended sentence set aside in November 1963.

ii. In the Motion, Cohen listed six enumerated grounds for vacating the judgement and setting aside the sentence, including that the statute was unconstitutional on its face.

1. The sentence "is improper because it is based on a statute which is unconstitutional on its face, in that it denies the defendants the equal protection of the laws and denies the right of marriage which is a fundamental right of free men, in violation of Section 1 of the Virginia Constitution, and the 14th Amendment of the Federal Constitution."

iii. The trial judge took the motion under advisement but issued no ruling.

b. July 1964

i. In the summer of 1964, Cohen, a 1960 graduate of Georgetown Law, requested a meeting with his former constitutional law professor, Chester Antieau. Philip J. Hirschkop (Georgetown '64) was with the professor in the faculty lounge and Prof. Antieau recommended Cohen consult with Hirschkop, who had been active in civil rights.

c. The Federal Court Action

i. October 28, 1964: Hirschkop and Cohen file suit in the United States District Court for the Eastern District of Virginia, "as a 'class action' to have the court declare that the Virginia statutes, designated as §§ 20-50 to 20-60 inclusive, Code of Virginia, 1950, prohibiting the intermarriage of white and colored persons, are invalid as in violation of the Fourteenth Amendment, and to restrain the enforcement of these statutes generally but particularly against the [Lovings] . . . ." *Loving v. Virginia*, 243 F. Supp. 231, 233 (E.D. Va. 1965) (interlocutory order).

ii. November 16, 1964: Argued before the three judges (Bryan, Butzner and Lewis) in Richmond who took the matter under advisement.

iii. February 11, 1965: The federal district court entered an interlocutory order continuing the case to allow the state court to address the Loving's claims, while expressly leaving the door open to come back to federal court if the state failed to address the validity of the statutes under which the Lovings were sentenced:

1. "[I]n view of the immediate pendency in the Circuit Court of Caroline County of the said criminal proceeding, comity requires that this court accede to the request of the defendant State officials to stay this suit for a reasonable time to allow the Commonwealth of Virginia and the plaintiffs herein to have the State courts determine in the said criminal proceeding the enforceability of the said judgment and sentence, and thus decide the issue of the validity of said statutes[.]" *Id.* at 233-34.

2. The federal court ordered that "the further hearing of this suit be continued until the parties have a reasonable time to have the said issue decided in the said [state] criminal proceeding, but the continuance is subject to the right of the [Lovings] to again apply to this court to hear and determine said issue if, through no fault of theirs, the State courts for any reason rule they cannot or should not decide said issue; . . . ." *Id.* at 234.

d. Circuit Court of Caroline County Ruling

i. The trial court finally ruled on Cohen's motion to vacate on January 22, 1965—more than a year after the initial filing.

1. This opinion, written by Judge Bazile, is a ruling on the "motion to vacate the judgment and set aside the sentence" (which had been filed on November 6, 1963).

ii. The trial court denied the motion to vacate and reaffirmed the Lovings' prior convictions for violating Va. Code § 20-58.

iii. Judge Bazile, writing for the court, said: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

e. On to the State High Court

i. March 3, 1965: Lovings filed a Notice of Appeal and Assignments of Error in the Virginia Supreme Court.

1. This appeal was of "a final order entered in the Circuit Court of Caroline County on the 22nd day of January, 1965, denying defendant's motion of November 6, 1963 to vacate the Circuit Court's January 6, 1959 order and to set aside the sentence for conviction of violating the State's anti-miscegenation statutes."

2. The Notice of Appeal and Assignments of Error assigned the following errors:

a. The Court erred in holding that the anti-miscegenation statutes did not violate the due process and equal protection clauses of Section 1 of the Constitution of Virginia and the fourteenth amendment of the Federal Constitution.

b. The Court erred in holding that the sentence and suspension was not a violation of due process of law.

ii. June 15, 1965: Virginia Supreme Court issues writ (but no discharge from custody if in custody, no bond if on bail).

iii. November 4, 1965: Lovings' Petition for Writ of Error (Appeal) filed in Virginia Supreme Court.

f. Virginia Supreme Court Decision

i. March 7, 1966: Virginia Supreme Court affirms convictions for leaving the state to get married, returning to the state, and cohabitating as man and wife. The Court reversed the sentence that had required the Lovings to leave Virginia and not return for 25 years, finding that Code § 20-59 instead required the couple to be imprisoned. *Loving v. Commonwealth*, 206 Va. 924, 930 (1966) (Carrico, J.).

ii. In the opinion, the Court considered defendants' call to reverse the decision in *Naim v. Naim*, 197 Va. 80 (1955), which found Virginia miscegenetic marriage statutes to be constitutional.

1. In *Naim*, the opinion quoted from *Plessy v. Ferguson,* 163 U.S. 537 (1896): "laws forbidding the intermarriage of the two races . . . have been universally recognized as within the police power of the state."

2. The *Naim* court concluded that the State's legitimate purposes were "to preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride."

iii. The Court affirmed that laws forbidding the intermarriage of the races were within the state's police power and stated that the state had an overriding interest in the institution of marriage.

1. The Court cited *Maynard v. Hill,* 125 U.S. 190 (1888): "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature."

2. The Court stated reversing *Naim* would constitute "judicial legislation in the rawest sense of that term."

a. "Such arguments are properly addressable to the legislature, which enacted the law in the first place, and not to this court, whose prescribed role in the separated powers of government is to adjudicate, and not to legislate."

iv. The court declined to overrule *Naim* and held that Va. Code §§ 20-58 and 20-59 did not violate the Virginia or the United States Constitutions.

1. The Court held *Brown v. Board of Education,* 347 U.S. 483 (1954), which overruled *Plessy*, did not affect the language quoted from in the *Plessy* opinion.

2. Finding 'no sound reason' to depart from the *Naim* holding, the Court felt bound by *stare decisis* and felt it "binding upon us here and rule[d] that Code, §§ 20-58 and 20-59, under which the defendants were convicted and sentenced, are not violative of the Constitution of Virginia or the Constitution of the United States." *Loving* at 929-930.

v. The Court reversed the defendants' suspended sentences finding the sentences were not in line with the purpose of the statute: "to secure the rehabilitation of the offender, enabling him to repent and reform so that he may be restored to a useful place in society." *Loving* at 931.

1. The Court remanded the case to the trial court with directions to "re-sentence the defendants in accordance with Code, § 20-59." *Loving* at 931.

a. In other words, the Court directed the trial court to impose a prison sentence, as § 20-59 states: "if any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."

g. Stay of Execution of Judgment

i. March 28, 1966: Chief Justice John W. Eggleston, Chief Justice of the Supreme Court of Appeals of Virginia (as then known) entered an order staying execution of the judgment entered on March 7, 1966, "in order that [the Lovings] may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for appeal to review the judgment of this court, ..." The order gave the Lovings until June 4, 1966, to file a notice of appeal to the Supreme Court of the United States.

VI. United States Supreme Court Case

a. December 12, 1966: The United States Supreme Court noted probable jurisdiction.

b. April 10, 1967: Oral Argument

i. *"Mr. Cohen, tell the Court I love my wife and it is just unfair that I can't live with her in Virginia."* – Richard Loving

ii. For the Lovings, the advocates were Bernard S. Cohen and Philip J. Hirschkop.

1. In his opening, Cohen argued that Richard and Mildred Loving have the right "to wake up in the morning or to go to sleep at night

knowing that the sheriff will not be knocking on their door or shining a light in their face in the privacy of their bedroom for illicit co-habitation."

a. "The Lovings have the right to go to sleep at night, knowing that should they not awake in the morning, their children would have the right to inherent from them under intestacy. They have the right to be secure and knowing that if they go to sleep and do not wake in the morning that one of them or survivor of them has the right to social security benefits."

iii. For the State, the advocate was R.D. McIlwaine III.

iv. Also advocating was William M. Marutani for the Japanese American Citizens League, as *amicus curiae*, urging reversal.

1. "Those who would trace their ancestry to the European cultures where over the centuries, there have been invasions, cross-invasions, population shifts with the inevitable cross-breeding which follows, and particularly those same Europeans who have been part of the melting pot of America, I suggest would have a most difficult, if not impossible task of establishing what Virginia's antimiscegenation statutes require. Namely, and I quote, proving that, 'No trace whatever of any blood other than Caucasian.'"

2. "[U]nder these antimiscegenation laws since only white persons are prevented from marrying outside of their race and all other races are free to intermarry…Virginia's laws are exposed for exactly what they are: a concept based upon racial superiority, that of the white race and white race only."

3. "We submit that race as a factor has no proper place in state's laws that govern whom a person by mutual choice may or may not marry."

c. <u>The Landmark Decision: *Loving v. Virginia*, 388 U.S.1 (1967)</u>

i. In a unanimous decision, the Supreme Court overturned the Lovings' convictions and held that laws banning interracial marriage violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the U.S. Constitution.

1. "This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment." *Loving* at 2.

ii. Addressing the Virginia Supreme Court's reliance on *Naim*, the Court stated the enumerated 'legitimate purposes' of the law were "obviously an endorsement of the doctrine of White Supremacy." *Loving* at 7.

iii. The Court rejected the State's argument that the Equal Protection Clause only requires that laws must "apply equally to [both races] in the sense that members of each race are punished to the same degree." *Loving* at 8.

1. The State contended because the statute punished each race to the same degree, the statute does not constitute an invidious discrimination on race despite its reliance on racial classifications.

2. The Court stated: "because we reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose." *Loving* at 10-11.

iv. "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy… There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Loving* at 16-17.

v. "These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving* at 17-18.

vi. **"[T]he freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State."** *Loving* at 18.

VII. The Legacy of Loving and Substantive Due Process

a. <u>*Obergefell v. Hodges,*</u> <u>576 U.S. 644 (2015)</u>

i. In its landmark decision that the Equal Protection Clause and Due Process Clause require states to allow same-sex marriage, the Supreme Court relied heavily on *Loving v. Virginia*.

ii. "[T]he right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause." *Obergefell* at 646.

iii. Quoting *Loving*, marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Obergefell* at 665.

iv. "Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right." *Obergefell* at 672.

b. Challenging Substantive Due Process: *Dobbs v. Jackson Women's Health Org.*, 2022 U.S. Lexis 3057.

i. In the majority opinion, the Court cited *Loving* when discussing their decision to overrule *Planned Parenthood v. Casey,* 505 U.S. 833 (1992):

1. "*Casey* relied on cases involving the right to marry a person of a different race, *Loving* v. *Virginia*, 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967)…These attempts to justify abortion through appeals to a broader right to autonomy and to define one's 'concept of existence' prove too much." *Dobbs* at 52.

ii. In his concurring opinion, Justice Clarence Thomas urged the reconsideration of "all of this Court's substantive due process precedents." *Dobbs* at 150.

iii. While he did not cite *Loving* in his concurrence, Justice Thomas specifically cited to *Obergefell v. Hodges* as a precedent for which we have a "duty to correct the error." *Dobbs* at 151.

1. "After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated." *Dobbs* at 151.

iv. In his concurring opinion, Justice Brett Kavanaugh stated the *Dobbs* decision did not threaten *Loving* or *Obergefell:*

*"*First is the question of how this decision will affect other precedents involving issues such as contraception and marriage—in particular, the decisions in *Griswold v. Connecticut*, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); *Eisenstadt v. Baird*, 405 U. S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); *Loving v. Virginia*, 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); and *Obergefell v. Hodges*, 576 U. S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015). I emphasize what the Court today

states: Overruling *Roe* does not mean the overruling of those precedents, and does not threaten or cast doubt on those precedents." *Dobbs* at 168.

v. The dissenting opinion disagreed with the potential implications the *Dobbs* decision might have for *Loving* and *Obergefell*, stating:

    1. "According to the majority, no liberty interest is present—because (and only because) the law offered no protection to the woman's choice in the 19th century. But here is the rub. The law also did not then (and would not for ages) protect a wealth of other things. It did not protect the rights recognized in *Lawrence* and *Obergefell* to same-sex intimacy and marriage. It did not protect the right recognized in *Loving* to marry across racial lines…So if the majority is right in its legal analysis, all those decisions were wrong, and all those matters properly belong to the States too—whatever the particular state interests involved. And if that is true, it is impossible to understand (as a matter of logic and principle) how the majority can say that its opinion today does not threaten—does not even 'undermine'—any number of other constitutional rights." *Dobbs* at 224-25.

Chronology of the Loving Case

June 2, 1958: Richard & Mildred Loving married in Washington, D.C.

July 11, 1958: Warrants issued and Lovings arrested on July 17, 1958, by Sheriff Brooks.

October 1958: Circuit Court of Caroline County Grand Jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriage.

January 6, 1959: Lovings arraigned in Circuit Court of Caroline County. They were convicted and sentenced to one year in jail. The sentence was suspended "upon the provision that both accused leave Caroline County and the State of Virginia at once and do not return together at the same time to said County and State for a period of twenty-five years."

March 28, 1959: Warrant issued to Sheriff stating that the Lovings violated parole.

June 20, 1963: Mrs. Loving writes to Attorney General Robert Kennedy seeking help.

June/July 1963: ACLU refers the case to volunteer attorney, Bernard S. Cohen. Cohen accepts representation of the Lovings.

November 6, 1963: Cohen files Motion to Vacate the Judgement and Set Aside the Sentence. Trial judge takes under advisement but does not rule.

July 1964: Cohen and Hirschkop team up on the case and become law partners.

October 28, 1964: Class action filed under Civil Rights Act of 1866 in the Eastern District of Virginia requesting a three-judge federal court be convened to declare sections of the Virginia Code unconstitutional and to enjoin the state officials from enforcing the prior convictions.

November 16, 1964: Argued before the three federal judges (Judges Bryan, Butzner, and Lewis) in Richmond who took the matter under advisement.

January 22, 1965: While the federal suit stood set for hearing on February 3, 1965, the Circuit Court of Caroline County, Judge Leon M. Bazile, entered an order denying the Motion to Vacate the Judgement and Set Aside the Sentence.

January 27, 1965: Commonwealth of Virginia and the Attorney General of Virginia moved to dismiss the federal case; attorneys appeared in Eastern District of Virginia (Richmond).

February 11, 1965: The three-judge federal court entered an interlocutory order continuing the matter and giving the Lovings the opportunity to submit the issue (Appeal to the Virginia Supreme Court) for final determination.

March 3, 1965: Notice of Appeal and Assignments of Error filed in the Virginia Supreme Court.

June 11, 1965: Virginia Supreme Court issued Writ.

November 4, 1965: Petition for Writ of Error (Appeal) filed in the Virginia Supreme Court.

March 7, 1966: Virginia Supreme Court affirms convictions and reverses sentences, finding that the statute required imprisonment.

March 28, 1966: Chief Justice of the Virginia Supreme Court enters Order Staying Execution of Judgment to allow the Lovings to present their case to the United States Supreme Court by the 4th of June, 1966.

June 1966: Appeal filed in the United States Supreme Court.

December 12, 1966: United States Supreme Court notes probable jurisdiction.

April 10, 1967: Case argued in front of the United States Supreme Court.

June 12, 1967: United States Supreme Court ordered reversal of conviction of the Lovings and held laws banning interracial marriage constituted a violation of both the Equal Protection and Due Process Clauses of the 14th Amendment to the U.S. Constitution.

IN THE CIRCUIT COURT OF CAROLINE COUNTY

COMMONWEALTH V. RICHARD PERRY LOVING AND
MILDRED DELORES JETER

BERNARD S. COHEN FOR THE PETITIONER
PEYTON FARMER, COMMONWEALTH ATTORNEY

OPINION

The Petitioners here were indicted in this Court at the October term, 1958, the indictment charging that on the 2nd day of June, 1958, " that Richard Perry Loving being a white man and the said Mildred Delores Jeter being a colored person did unlawfully go out of the State of Virginia for the purpose of being married and with the intention of returning to the State of Virginia, and were married out of the State of Virginia, to-wit in the District of Columbia on the 28th day of June, 1958 and afterwards returned to and resided in the County of Caroline, State of Virginia, co-habiting as man and wife against the peace and dignity of the Commonwealth."

On the 6th day of January, 1959, the accused were arraigned and after pleading not guilty withdrew said plea and pleaded guilty; thereupon the Court fixed their punishment at one year in jail; and then suspended said sentence for twenty-five years " upon the provision that both accused leave Caroline County and the State of Virginia at once and do not return together at the same time to said County and State for a period of twenty-five years. "After they paid the costs they were released from custody and further recognizance.

The Court file contains his birth certificate which shows that he is white and her birth certificate which shows that she is colored.

On the 6th day of November, 1963, they filed a motion to vacate the judgment and set aside the sentence.

1st It is contended the said sentence constitutes a cruel and unusual punishment within Section 9 of the Constitution of Virginia.

Section 9 of George Mason's Bill of Rights made a part of the Constitution of 1776 is in the identical same words as Section 9 of the Bill of Rights to the present Constitution (9 Henrys Statutes 111; Code of 1950, page 443).

In Hart V. Commonwealth, 131 Va., 726, 741, 109 S.E. 582, the Court said: " It has been uniformly held by this Court that the provisions in question which have remained the same as they were originally adopted in the Virginia Bill of Rights of 1776, must be construed to impose no limitation upon the right to determine and prescribe by statute the quantum of punishment deemed adequate by the legislature. That the only limitation so imposed is upon the mode of punishments, such punishments only being prohibited by such constitutional provision as were regarded as cruel and unusual when such provision of the Constitution was adopted in 1776, namely, such bodily punishments as involve torture or lingering death, such as are inhumane and barbarous, as for example, punishment by the rack, by drawing and quartering, leaving the body hung in chains, or on the gibbet, exposed to public view, and the like. Aldridge's case, 2 Va. Cas. 447, 449-450; Wyatt's Case, 6 Rand (27 Va.) 694; Bracey's Case, 119 Va. 867, 862, 89 S.E. 144.

See also Buck V. Bell, 143 Va. 310, 319, 130 S.E. 516 (1925)

In Aldridge's Case (2 Va. Case 447, 448)(1824) a free person of color was convicted of the larcency of bank notes. He was sentenced to be whipped, sold and transported beyond the bounds of the United States. The Court said " as to the ninth section of the Bill of Rights, denouncing cruel and unusual punishments, we have no notion that it has any bearing on this case."

In Wyatt's Case (6 Rand 694) (1825), the law provided " that when any person was convicted of any crime or offense now punishable by im-

prisonment in the penitentiary the Court could sentence such person to be imprisioned not exceeding two years in the jail of the County or Corporation where such conviction shall have taken place, for a period not exceeding six months, nor less than one month and he shall be punished by stripes at the discretion of the Court to be inflicted at one time provided the same do not exceed thirty-nine at any one time."

"The Court said the punishment of offenses by stripes is certainly odious, but cannot be said to be unusual."

The Court said 6 Rand 763 "This Court is of the opinion and doth decide that the motion in arrest of judgment and also the motion for a new trial ought to be overuled and the judgment should be rendered against the defendant of imprisonment and strips according to law.

In Buck V. Bell 143 Va. 310, 130 S.E. 516 (1925) a case in which it had been ordered that Buck be sterilized, it was contended that it violated the Federal Constitution and Sections 9, 11 of the Virginia Constitution and the 11th Amendment to the Federal Constitution. The Court held that the Sterilization Act did not violate any section of the Constitution of Virginia or any sections of the Federal Constitution.

In Re Kemmler, 136 U.S. 436 34 Fed,519 (1889) it was held that punishments are cruel when they involve torture or a lingering death but the punishment of death is not within the meaning of that word in the Constitution.

The Court said that cruel and unusual punishments are "such as burning at the stake, crucifixion, breaking on the wheel or the like." (34 Fed. 524)

And the Supreme Court of the United States has held in Onell V. Vermont that whether a punishment is cruel and unusual within the provisions of a State Constitution does not present a Federal question.

In U.S. Supreme Court Enc. of U.S. Supreme Court Volume 4 p.513, it is said " The provision of the 8th Amendment that excessive fines shall not be imposed nor cruel and unusual punishment inflicted applies to National and not to State legislation.

It is next said that the sentence exceeds a reasonable period of suspension within the meaning of Section 53-273 of the Code of 1950.

The Court has examined this Section with care and it sees nothing in this statute which limits the time that the person may be put on probation.

It is said that the sentence constitutes barnishment and thus is a violation of due process of law.

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

Intermarriage between white and colored persons is prohibited by Section 20-54 of the Code.

Section 20-57 of the Code provides "all marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process."

And Section 20-58 of the Code provides "if any white person and colored person shall go out of this State for the purpose of being married and with the intention of returning and be married out of it, and shall afterwards return to reside in it, cohabiting as man and wife, they shall

be punished as provided in Section 20-20 and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."

These laws were held valid in Kinney V. Commonwealth 30 Gratt, 858 (1878) Judge Christian who wrote the opinion said 30 Gratt 870): "If the parties desire to maintain the relations of man and wife, they must change their domicile and go to some State or Country where the laws recognizes the validity of such marriages."

Their marriage being absolutely void in Virginia they cannot cohabit in Virginia without incurring repeated prosecutions for that cohabitation.

It is next contended that these statutes are unconstitutional in violation of Section 1 of the Virginia Constitution and the 14th Amendment of the U. S. Constitution.

There is nothing in Section 1 of the Constitution of Virginia which relates to this matter, nor is there anything in the 14th Amendment which has anything to do with this subject here under consideration.

Marriage is a subject which belongs to the exclusive control of the States.

In State V. Gibson 16 Ind. 180, 10 Am. Rep. 42 a statute prohibiting the intermarriage of negroes and white persons was held not to violate any provisions of the 14th Amendement or Civil Rights Laws in the course of a well-reasoned and well-supported discussion of the powers retained by and inherent in the States under the Constitution said:

"... In this State marriage is treated as a civil contract, but it is more than a mere civil contract, it is a public institution established by God himself, is recognized in all Christian and Civilized nations and is essential to the peace, happiness, and well being of society...."

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"...The right in the States to control, to guard, protect and preserve this God-giving, civilizing and Christianizing institution is of inestimable importance, and cannot be surrendered, nor can the States suffer or permit any interference therewith. If the Federal Government can determine who may marry in a State, there is no limit to its power.... 35 Ind. at p. 402-3)

In Naim V. Naim, 196 Va. 80, 87 S.E. (2nd) 749 (1953) the Court of Appeals in a well considered opinion held that the Virginia statutes were constitutional and concluded its opinion as follows: "Regulation of the marriage relation is, we think, distinctly one of the rights guaranteed to the States and safeguarded by that bastion of States' rights, somewhat battered perhaps but still a sturdy fortress in our fundamental law, the tenth section of the Bill of Rights, which declares 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' "

In Pace V. Alabama 106 U.S. 583, 1 S.Ct. 637, 27 L. ed. 207, a prosecution for a white person marrying a colored person was upheld. Pace, the negro, contended that the Statute violated the Equal Protection of the 14th Amendment.

In Jackson V. State, 37 Ala. App. 519, 72 So. (2d) 114, as the party had been convicted under the miscegenation statute, the conviction was affirmed against the contentions that the right and privilege of marrying a white person violated the Due Process and Equal Protection clauses of the 14th Amendment the Supreme Court of the United States denied a writ of certiorari (1954).

In Greenhow & Als V. James' Executor 80 Va. 636 (1885) the Court held that the children of a marriage contracted in the District of Columbia

between a white person and a colored person could take under a will of a relative.

Such on marriage the Court said (80 Va. 61) ..." Yet that it can have application to a marriage contract entered into in a foreign country in contravention of the public statutes of the country of their domicile which pronunces a marriage between them not only absolutely void but criminal. In the very nature of things every soverign state must have the power to prescribe what incapacities for contracting marriage shall be established as the law among her own citizens, and it follows therefore that when the state has once pronounced an incapacity on the part of any of its citizens to enter into the marriage relationship with each other that such incapacity attaches itself to the person or parties and although it may not be enforceable during the absence of the parties, it at once revives with all its prohibitive power upon their return to [illegible] of domicile...."

In Toler V. Oakwood Smokeless Coal Corporation 173 Va. 425, 430 the Court speaking through Mr. Justice Spratley said:

"One state, however, cannot force its own marriage laws, or other laws, on any other state, and no state is bound by comity to give effect in its Courts to the marriage laws of another state, repugnant to its own laws and policy. Otherwise, a state would be deprived of the very essence of its sovereignty, the right of supremacy within its own borders. Such effect as may be given by a state to a law of another state is merely because of comity, or because justice and policy may demand recognition of such law. Such recognition is not a matter of obligation. Minor on conflict laws Sec. 4,5,6 and 126."

In 6 Am Eng Enc. of Law 2nd Ed p. 967 it is said " The right to marr is not such a privilege and immunity but a social institution of great

importance subject to state regulation and a statute prohibiting intermarriage between white person and negroes is not a discrimination or unequal law contrary to the terms of the constitutional provisions."

It is next said that the sentence and the statute are unconstitutional as burdens on interstate commerce.

Marriage has nothing to do with interstate commerce. There is nothing more domestic than marriage; and this contentive is without merit.

It is next said such sentence has involved undue hardships upon the defendants by preventing them from together visiting their families from time to time as may be necessary to promote domestice tranquility .

This complaint relates to the terms of the suspension of this sentence which is as follows:

" And the Court doth suspend said sentence for twenty-five years upon the provision that both accused leave Caroline County and the State of Virginia at once and do not return together at the same time to said County and State for a period of twenty-five years."

The Court knew that if they come to Caroline County or to the State of Virginia together that they would be subject to prosecution for unlawful cohabitation and therefore permitted each are to separately visit his or her people, but not together. If it works a hardship on them not to visit their people together it is the law that they cannot cohabit together in Virginia. Each one of them can come to Caroline separately to visit his or her people as often as they please.

Section 53-272 of the Code of Virginia provides in part: "In any case wherein the Court is authorized to suspend the imposition or execution of sentence, such Court may fix the period of suspension for a reasonable time having due regard to the gravity of the offense, without regard to the gravity period for which the prisoner might have been sentenced."

The parties were guilty of a most serious crime. As said by the Court in Kinney's Case 30 Gratt 865: "It was a marriage prohibited and declared absolutely void. It was contrary to the declared public law, founded upon motives of public policy-a public policy affirmed for more than a Century, and one upon which social order, public morality and the best interests of both races depend. This unmistakable policy of the legislature founded, I think, on wisdom and the moral development of both races, has been shown by not only declaring marriages between whites and negroes absolutely void, but by prohibiting and punishing such unnatural alliances with severe penalties. The laws enacted to further and uphold this declared policy would be futile and a dead letter if in fraud of these salutary enactments, both races might, by stepping across any imaginary line bid defiance to the law by immediately returning and insisting that the marriage celebrated in another state or county should be recognized as lawful, though denounced by the public law of the domicile as unlawful and absolutely void."

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

The awfulness of the offense is shown by Section 20-57 which declares "All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process.

Then Section 20-59 of the Code makes the contracting of a marriage between a white person and any colored person a felony.

Conviction of a felony is a serious matter. You lose your political rights; and only the government has the power to restore them (Constituti

Sec. 73.) And as long as you live you will be known as a felon.

"The moving finger writes and moves on
and having writ
Nor all your piety nor all your wit
Can change one line of it."

Leon M. Bazile

(Leon M. Bazile, Judge)

VIRGINIA: IN THE CIRCUIT COURT OF CAROLINE COUNTY

COMMONWEALTH

vs.

RICHARD PERRY LOVING

and

MILDRED DELORES JETER

O R D E R

This day came the defendants, by counsel, and moved the Court to vacate the judgment and set aside the sentence heretofore entered in this cause.

Upon consideration thereof, for reasons stated in an opinion heretofore filed, it is ADJUDGED and ORDERED that the said motion is hereby denied.

It is further ordered that the Clerk of this Court send an attested copy of this order to Bernard S. Cohen, Lainof, Cohen & Cohen, Attorneys At Law, 1513 King Street, Alexandria, Virginia, and J. Peyton Farmer, Commonwealth's Attorney of Caroline County.

ENTER:

Leon M Bazile, Judge

22 January 1965

Entered in C.L. order Bk 15 p. 173
& certified copies June 1 - 23 - 65.

17

Loving v. Virginia

United States District Court for the Eastern District of Virginia, At Richmond

February 11, 1965

Civ. A. No. 4138

Reporter
243 F. Supp. 231 *; 1965 U.S. Dist. LEXIS 7370 **

Richard Perry LOVING and Mildred Jeter Loving, Plaintiffs, v. The COMMONWEALTH OF VIRGINIA et al., Defendants

Counsel: **[**1]** Lainof, Cohen & Cohen, Bernard S. Cohen and Philip J. Hirschkop, Alexandria, Va., for plaintiffs.

Robert Y. Button, Atty. Gen. of Virginia, R. D. McIllwaine, III and Kenneth C. Patty, Asst. Attys. Gen. of Virginia, Richmond, Va., for defendants.

Judges: Before BRYAN, Circuit Judge, and LEWIS and BUTZNER, District Judges.

Opinion by: PER CURIAM

Opinion

[*232] INTERLOCUTORY ORDER

Upon consideration of the pleadings, the stipulations of the evidence and the arguments of counsel on brief and orally, the Court finds:

1. That Richard Perry Loving, one of the plaintiffs herein, is a white person and a member of the Caucasian race; that Mildred Jeter Loving, born Mildred Jeter, the other plaintiff herein, is a colored person and a member of the Negro race; that the plaintiffs prior to June 2, 1958 resided and were domiciled in the State of Virginia; that on June 2, 1958 they went to the District of Columbia for the purpose of being married and intending to return thereafter to the State of Virginia, to reside and cohabit there as man and wife; that they were married in the District of Columbia on June 2, 1958; and that thereupon they returned to the State of Virginia, and there lived **[**2]** together as man and wife in Caroline County;

2. That on July 11, 1958 the plaintiffs were arrested, and at term of the Circuit Court of Caroline County in the following October they were indicted, for a felony, that is for conduct constituting a violation of § 20-58 of the Code of Virginia, 1950, which reads as follows:

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

3. That on January 6, 1959 the plaintiffs, appearing with counsel, each entered a plea of guilty to the indictment, the Court accepted the pleas and 'fix(ed) the punishment of both accused at one year each in jail', but the Court suspended 'said sentence for a period of twenty-five years upon the provision that both accused leave Caroline County and the State **[**3]** of Virginia at once and do not return together or at the same time to said County and state for a period of twenty-five years'; and that the plaintiffs then were released 'from custody and further recognizance';

[*233] 4. That after their conviction and release as aforesaid, on January 6, 1959, the plaintiffs did not return to the State of Virginia together or at the same time until after the commencement of the present action, but meanwhile on November 6, 1963 they filed a motion in the said criminal proceeding in the Circuit Court of Caroline County to vacate the said judgment of conviction and to set aside the suspended sentence; that in respect to the suspension, the grounds of the motion were that the condition of the suspension imposed a cruel and unusual punishment within the prohibition of § 9 of the Constitution of Virginia, that the period specified in the condition exceeded the limits permitted by the probation statute, § 53-272 of the Code of Virginia of 1950, as amended, and that the condition constituted a banishment in violation of due process of law; and that in respect to the judgment, the motion stated it was based on a statute invalid under the

Fourteenth ***[**4]*** *Amendment of the Constitution of the United States* because the statute denied the plaintiffs the equal protection of the laws and the 'right of marriage' and the sentence worked an undue hardship upon the plaintiffs by 'preventing them from together visiting their families from time to time as may be desirable and necessary';

5. That shortly after its filing the said motion was heard by the Circuit Court of Caroline County; and that in November or December 1963, the Judge of the Circuit Court, the Honorable Leon M. Bazile, who originally passed the judgment and sentence upon the plaintiffs and is a defendant here, rendered a memorandum opinion indicating the intention of the Court to deny the motion;

6. That after the filing of the memorandum opinion the plaintiffs took no further action until October 28, 1964 when they filed the present suit in this court, as a 'class action', to have the court declare that the Virginia statutes, designated *§§ 20-50 to 20-60* inclusive, Code of Virginia, 1950, prohibiting the intermarriage of white and colored persons, are invalid as in violation of the *Fourteenth Amendment*, and to restrain the enforcement of these statutes generally but particularly **[**5]** against the plaintiffs under the said judgment and sentence;

7. That while this suit stood set for hearing on February 3, 1965, an order was entered by the Circuit Court of Caroline County on January 22, 1965 denying the said motion filed therein on November 6, 1963; that the plaintiffs are now residing and cohabiting in Caroline County, Virginia; and that they are immediately threatened with deprivation of their liberty through enforcement of the said judgment and sentence;

8. That in the present suit the Commonwealth of Virginia has moved to be dismissed as a party defendant because it is a sovereign and has not consented to be sued herein, and the Attorney General of Virginia has also moved to be dismissed as a party defendant for the reason that under the State law he does not have the duty of enforcing the said statutes; and

9. That all of the defendants including the Commonwealth's Attorney of Caroline County, who is the State prosecutor, and the Honorable Leon M. Bazile, Circuit Judge as aforesaid, have seasonably and appropriately sought dismissal of this suit on the ground that no such irreparable injury is threatened the plaintiffs as would entitle them to an injunction, **[**6]** because the plaintiffs may, and should be required to, assert the alleged invalidity of the said statutes, judgment and sentence by way of defense to the enforcement of said judgment and sentence in the State courts.

CONCLUSIONS OF THE COURT

On consideration of their motions, the court holds that the Commonwealth of Virginia and Robert Y. Button, Attorney General of Virginia, should be dismissed as defendants herein.

Upon the facts, found as aforesaid, the court is of the opinion that it has jurisdiction of the present suit; that because of the imminent threat of imprisonment, the plaintiffs are entitled to have the issue **[*234]** of the validity of the said statutes, judgment and sentence forthwith decided in the State courts in the said criminal proceeding or by the Federal courts in this suit; that in view of the immediate pendency in the Circuit Court of Caroline County of the said criminal proceeding, comity requires that this court accede to the request of the defendant State officials to stay this suit for a reasonable time to allow the Commonwealth of Virginia and the plaintiffs herein to have the State courts determine in the said criminal proceeding the enforceability **[**7]** of the said judgment and sentence, and thus decide the issue of the validity of said statutes; and that this court should not now award an injunction pendente lite against the enforcement of the judgment and sentence; but that in lieu of such an injunction, in the event the plaintiffs are taken into custody in the enforcement of the said judgment and sentence, this court, under the provisions of *title 28, section 1651, United States Code*, should grant the plaintiffs bail in a reasonable amount during the pendency of the State proceedings in the State courts and in the Supreme Court of the United States, if and when the case should be carried there; and that if the Commonwealth of Virginia fails to submit the said issue of the validity of said statutes, judgment and sentence for decision to the State courts promptly, or if the State courts for any reason rule that they cannot or should not decide such issue, then the plaintiffs may again apply to this court to hear and determine said issue; and that if through fault of the plaintiffs the said issue is not or cannot be decided by the State courts, then the defendants may apply to this court for dismissal of this suit.

Accordingly it **[**8]** is now by the court

ORDERED:

(a) That the Commonwealth of Virginia and the Attorney General of Virginia be, and each of them is hereby,

dismissed as defendants to this action;

(b) That the preliminary injunction herein sought by the plaintiffs be, and it is hereby, denied at this time;

(c) That the further hearing of this suit be continued until the parties have a reasonable time to have the said issue decided in the said criminal proceeding, but the continuance is subject to the right of the plaintiffs to again apply to this court to hear and determine said issue if, through no fault of theirs, the State courts for any reason rule they cannot or should not decide said issue; and upon the right of the defendants to again apply to this court for dismissal of the suit upon the failure or refusal of the plaintiffs to timely submit said issue to the State courts for final determination;

(d) That this court retain jurisdiction of this action for the consideration of such matters, and the entry of such orders, as may hereafter be necessary.

Present: All the Justices

RICHARD PERRY LOVING, ET AL.

-v- Record No. 6163

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE HARRY L. CARRICO

Richmond, Virginia, March 7, 1966

FROM THE CIRCUIT COURT OF CAROLINE COUNTY
Leon M. Bazile, Judge

On January 6, 1959, Richard Perry Loving and Mildred Jeter Loving, the defendants, were convicted, upon their pleas of guilty, under an indictment charging that "the said Richard Perry Loving being a White person and the said Mildred Delores Jeter being a Colored person, did unlawfully and feloniously go out of the State of Virginia, for the purpose of being married, and with the intention of returning to the State of Virginia and were married out of the State of Virginia, to-wit, in the District of Columbia on June 2, 1958, and afterwards returned to and resided in the County of Caroline, State of Virginia, cohabiting as man and wife." (Code, § 20-58.)[1]

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[1] "§ 20-58. Leaving State to evade law. - If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."

The trial court fixed "the punishment of both accused at one year each in jail." (Code, § 20-59.)[2] The court suspended the sentences "for a period of twenty-five years upon the provision that both accused leave Caroline County and the state of Virginia at once and do not return together or at the same time to said county and state for a period of twenty-five years."

On November 6, 1963, the defendants filed a "Motion to Vacate Judgment and Set Aside Sentence" alleging that they had complied with the terms of their suspended sentences but asserting that the statute under which they were convicted was unconstitutional and that the sentences imposed upon them were invalid.

The court denied the motion by an order entered on January 22, 1965, and to that order the defendants were granted this writ of error.

There is no dispute that Richard Perry Loving is a white person and that Mildred Jeter Loving is a colored person within the meaning of Code, § 20-58. Nor is there any dispute that the actions of the defendants, as set forth in the indictment,

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[2] "§ 20-59. Punishment for marriage. - If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."

violated the provisions of Code, § 20-58.

The sole contention of the defendants, with respect to their convictions, is that Virginia's statutes prohibiting the intermarriage of white and colored persons are violative of the Constitution of Virginia and the Constitution of the United States. Such statutes, the defendants argue, deny them due process of law and equal protection of the law.

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

In the Naim case, the Virginia statutes relating to miscegenetic marriages were fully investigated and their constitutionality was upheld. There, it was pointed out that more than one-half of the states then had miscegenation statutes and that, in spite of numerous attacks in both state and federal courts, no court, save one, had held such statutes unconstitutional. The lone exception, it was noted, was the California

Supreme Court which declared the California miscegenation statutes unconstitutional in Perez v. Sharp, 32 Cal. 2d 711, 198 P. 2d 17 (sub nom. Perez v. Lippold).

The Naim opinion, written for the court by Mr. Justice Buchanan, contains an exhaustive survey and citation of authorities, both case and text from both state and federal sources, upon the subject of miscegenation statutes. It is not necessary to repeat all those citations in this opinion because the defendants concede that the Naim case, if given effect here, is controlling of the question before us. They urge us, however, to reverse our decision in that case, contending that the decision is wrong because the judicial authority upon which it was based no longer has any validity. Our inquiry must be, therefore, whether a change in the Naim decision is required.

The defendants say that the Naim opinion relied upon Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 S. Ct. 1138, but argue that the United States Supreme Court reversed the Plessy decision in Brown v. Board of Education, 347 U. S. 483, 98 L. ed. 873, 74 S. Ct. 686.

The Plessy case, decided in 1896, involved an attack upon the constitutionality of a Louisiana statute requiring

separate railway carriages for the white and colored races. The statute was upheld by the Supreme Court under the "separate but equal" doctrine there enunciated by the court.

In the Brown case, decided in 1954, the Supreme Court ruled "that in the field of public education the doctrine of 'separate but equal' has no place" and that "Any language in Plessy v. Ferguson contrary to this finding is rejected." 98 L. ed., at p. 881.

The Plessy case was cited in the Naim opinion to show that the United States Supreme Court had made no decision at variance with an earlier holding by the Tenth Circuit Court of Appeals in Stevens v. United States, 146 F. 2d 120, that "a state is empowered to forbid marriages between persons of African descent and persons of other races or descents. Such a statute does not contravene the Fourteenth Amendment."

The Naim opinion contained a quotation from the Plessy case that 'Laws forbidding the intermarriage of the two races . . . have been universally recognized as within the police power of the state." Nothing was said in the Brown case which detracted in any way from the effect of the language quoted from the Plessy opinion. As Mr. Justice Buchanan pointed out in the Naim opinion, the holding in the Brown case, that the

opportunity to acquire an education "is a right which must be made available to all on equal terms," cannot support a claim for the intermarriage of the races or that such intermarriage is a "right which must be made available to all on equal terms."

The United States Supreme Court itself has indicated that the Brown decision does not have the effect upon miscegenation statutes which the defendants claim for it. The Brown decision was announced on May 17, 1954. On November 22, 1954, just six months later, the United States Supreme Court denied certiorari in a case in which Alabama's statute forbidding intermarriage between white and colored persons had been upheld against the claim that the statute denied the Negro appellant "her constitutional right and privilege of intermarrying with a white male person," and that it violated the Privileges and Immunities, the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. Jackson v. State, 37 Ala. App. 519, 72 So. 2d 114, 260 Ala. 698, 72 So. 2d 116, cert. denied 348 U. S. 888, 99 L. ed. 698, 75 S. Ct. 210.

The defendants also say that the Naim opinion relied upon Pace v. Alabama, 106 U. S. 583, 27 L. ed. 207, 1 S. Ct. 637, but contend that the United States Supreme Court overruled the Pace decision in McLaughlin v. Florida, 379 U. S. 184, 13 L. ed.

2d 222, 85 S. Ct. 283.

The Pace case, decided in 1883, involved an attack upon the constitutionality of an Alabama statute imposing a penalty for adultery or fornication between a white person and a Negro. Another statute provided a lesser penalty "If any man and woman live together in adultery or fornication." A white woman and Pace, a Negro, were convicted and sentenced under the first statute "for living together in a state of adultery or fornication." Pace appealed, claiming that the statute under which he had been convicted was violative of the Fourteenth Amendment. The court rejected this claim, holding that "Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race." 27 L. ed., at p. 208.

In the McLaughlin case, decided in 1964, the Supreme Court had under review a Florida statute which made it unlawful for a white person and a Negro, "not married to each other," to "habitually live in and occupy in the night time the same room." The statute in dispute provided for a different burden of proof and a different penalty than were provided by other statutes relating to adultery and fornication generally. Florida sought

to sustain the validity of the statute under the holding in Pace v. Alabama. The court, however, ruled the Florida statute invalid, saying of Pace v. Alabama that it "represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." 13 L. ed. 2d, at p. 226.

The Pace case, like the Plessy case, was cited in the Naim opinion to show that the United States Supreme Court had made no decision at variance with the rule that a state may validly forbid interracial marriages. The McLaughlin decision detracted not one bit from the position asserted in the Naim opinion.

Both parties to the McLaughlin controversy cited Florida's miscegenation statute, making it unlawful for a white person to marry a Negro. McLaughlin contended that the miscegenation statute was unconstitutional because it prevented him from asserting, against the cohabitation charge, the defense of common law marriage. Florida argued that it was necessary that its cohabitation statute be upheld so as to carry out the purposes of its miscegenation statute which, it contended, was "immune from attack under the Equal Protection Clause." The court ruled

that it was unnecessary to consider McLaughlin's contention in this respect because the court was holding in his favor on the cohabitation statute. As for Florida's contention, the court said that, for purposes of argument, the constitutionality of the miscegenation statute would be assumed and that it was deciding the case "without reaching the question of the validity of the State's prohibition against interracial marriage." 13 L. ed. 2d, at p. 230.

The defendants direct our attention to numerous federal decisions in the civil rights field in support of their claims that the Naim case should be reversed and that the statutes under consideration deny them due process of law and equal protection of the law.

We have given consideration to these decisions, but it must be pointed out that none of them deals with miscegenation statutes or curtails a legal truth which has always been recognized - that there is an overriding state interest in the institution of marriage. None of these decisions takes away from what was said by the United States Supreme Court in Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 657, 8 S. Ct. 723:

> "Marriage, as creating the most important relation in life, as having more to do with the morals and

civilization of a people than any other institution, has always been subject to the control of the Legislature."

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

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

Our one and only function in this instance is to determine whether, for sound judicial considerations, the Naim case should be reversed. Today, more than ten years since that decision was handed down by this court, a number of states still have miscegenation statutes and yet there has been no new decision reflecting adversely upon the validity of such statutes. We find no sound judicial reason, therefore, to depart from our

holding in the Naim case. According that decision all of the weight to which it is entitled under the doctrine of stare decisis, we hold it to be binding upon us here and rule that Code, §§ 20-58 and 20-59, under which the defendants were convicted and sentenced, are not violative of the Constitution of Virginia or the Constitution of the United States.

We turn now to the other contention of the defendants - that the sentences imposed upon them are unreasonable and void.

It will be recalled that the trial court suspended the sentences of the defendants for a period of twenty-five years upon the condition that they leave the county and state "at once and do not return together or at the same time to said county and state for a period of twenty-five years."

The defendants first say that the effect of the sentences was to banish them from the state. They refer us to the case of State v. Doughtie, 237 N.C. 368, 74 S. E. 2d 922, where it was held that "banishment . . . is impliedly prohibited by public policy. . . A sentence of banishment is undoubtedly void."

Although the defendants were, by the terms of the suspended sentences, ordered to leave the state, their sentences did not technically constitute banishment because

they were permitted to return to the state, provided they did not return together or at the same time.

Thus, we do not agree with the defendants' contention that the sentences are void because they constitute banishment. We do agree with their further contention, however, that the conditions of the suspensions are so unreasonable as to render the sentences void.

The trial court acted under the authority of Code, § 53-272 in suspending the sentences of the defendants. The purpose of this statute is to secure the rehabilitation of the offender, enabling him to repent and reform so that he may be restored to a useful place in society. Marshall v. Commonwealth, 202 Va. 217, 219, 116 S. E. 2d 270; Slayton v. Commonwealth, 185 Va. 357, 365-366, 38 S. E. 2d 479; Wilborn v. Saunders, 170 Va. 153, 160-161, 195 S. E. 723.

To effect this statutory purpose, the courts are authorized to impose conditions upon the suspension of execution or imposition of sentence. But such conditions must be reasonable, having due regard to the nature of the offense, the background of the offender and the surrounding circumstances. Dyke v. Commonwealth, 193 Va. 478, 484, 69 S. E. 2d 483.

Here, the real gravamen of the offense charged against the defendants, under Code, § 20-58, was their cohabitation as man and wife in this state, following their departure from the state to evade Virginia law, their marriage in another jurisdiction and their return to Virginia. Without such cohabitation, there would have been no offense for which they could have been tried, notwithstanding their other actions.

When the defendants' sentences were suspended, the purpose which the trial court should reasonably have sought to serve was that the defendants not continue to violate Code, § 20-58. The condition reasonably necessary to achieve that purpose was that the defendants not again cohabit as man and wife in this state. There is nothing in the record concerning the defendants' backgrounds or the circumstances of the case to indicate that anything more was necessary to secure the defendants' rehabilitation and to accomplish the purposes envisioned by Code, § 53-272.

It was, therefore, unreasonable to require that the defendants leave the state and not return thereafter together or at the same time. Such unreasonableness renders the sentences void and they will, accordingly, be vacated and set aside. The case will be remanded to the trial court with

directions to re-sentence the defendants in accordance with Code, § 20-59, attaching to the suspended sentences, to be imposed upon the defendants, conditions not inconsistent with the views expressed in this opinion.

In this connection, although it has not been alluded to by either side to this controversy, it should be noted that Code, § 20-59 provides for a sentence in the penitentiary, and not in jail, as called for in the sentencing order of the trial court.

That portion of the order appealed from upholding the constitutionality of Code, §§ 20-58 and 20-59, and the convictions of the defendants thereunder, is affirmed; that portion of said order upholding the validity of the sentences imposed upon the defendants is reversed, and the case is remanded for further proceedings.

Affirmed in part, reversed in part and remanded.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1966.

LOVING ET UX. *v.* VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 395. Argued April 10, 1967.—Decided June 12, 1967.

Virginia's statutory scheme to prevent marriages between persons solely on the basis of racial classifications *held* to violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Pp. 4–12.

206 Va. 924, 147 S. E. 2d 78, reversed.

Bernard S. Cohen and *Philip J. Hirschkop* argued the cause and filed a brief for appellants. *Mr. Hirschkop* argued *pro hac vice,* by special leave of Court.

R. D. McIlwaine III, Assistant Attorney General of Virginia, argued the cause for appellee. With him on the brief were *Robert Y. Button,* Attorney General, and *Kenneth C. Patty,* Assistant Attorney General.

William M. Marutani, by special leave of Court, argued the cause for the Japanese American Citizens League, as *amicus curiae,* urging reversal.

Briefs of *amici curiae,* urging reversal, were filed by *William M. Lewers* and *William B. Ball* for the National Catholic Conference for Interracial Justice et al.;

by *Robert L. Carter* and *Andrew D. Weinberger* for the National Association for the Advancement of Colored People, and by *Jack Greenberg, James M. Nabrit III* and *Michael Meltsner* for the N. A. A. C. P. Legal Defense & Educational Fund, Inc.

T. W. Bruton, Attorney General, and *Ralph Moody,* Deputy Attorney General, filed a brief for the State of North Carolina, as *amicus curiae,* urging affirmance.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[1] For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment.

In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court

[1] Section 1 of the Fourteenth Amendment provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:

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

After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment. The motion not having been decided by October 28, 1964, the Lovings instituted a class action in the United States District Court for the Eastern District of Virginia requesting that a three-judge court be convened to declare the Virginia antimiscegenation statutes unconstitutional and to enjoin state officials from enforcing their convictions. On January 22, 1965, the state trial judge denied the motion to vacate the sentences, and the Lovings perfected an appeal to the Supreme Court of Appeals of Virginia. On February 11, 1965, the three-judge District Court continued the case to allow the Lovings to present their constitutional claims to the highest state court.

The Supreme Court of Appeals upheld the constitutionality of the antimiscegenation statutes and, after

modifying the sentence, affirmed the convictions.[2] The Lovings appealed this decision, and we noted probable jurisdiction on December 12, 1966, 385 U. S. 986.

The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The Lovings were convicted of violating § 20–58 of the Virginia Code:

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

Section 20–59, which defines the penalty for miscegenation, provides:

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

Other central provisions in the Virginia statutory scheme are § 20–57, which automatically voids all marriages between "a white person and a colored person" without any judicial proceeding,[3] and §§ 20–54 and 1–14 which,

[2] 206 Va. 924, 147 S. E. 2d 78 (1966).

[3] Section 20–57 of the Virginia Code provides:

"*Marriages void without decree.*—All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process." Va. Code Ann. § 20–57 (1960 Repl. Vol.).

respectively, define "white persons" and "colored persons and Indians" for purposes of the statutory prohibitions.[4] The Lovings have never disputed in the course of this litigation that Mrs. Loving is a "colored person" or that Mr. Loving is a "white person" within the meanings given those terms by the Virginia statutes.

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[4] Section 20–54 of the Virginia Code provides:

"*Intermarriage prohibited; meaning of term 'white persons.'*—It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter." Va. Code Ann. § 20–54 (1960 Repl. Vol.).

The exception for persons with less than one-sixteenth "of the blood of the American Indian" is apparently accounted for, in the words of a tract issued by the Registrar of the State Bureau of Vital Statistics, by "the desire of all to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas . . . ." Plecker, The New Family and Race Improvement, 17 Va. Health Bull., Extra No. 12, at 25–26 (New Family Series No. 5, 1925), cited in Wadlington, The *Loving* Case: Virginia's Anti-Miscegenation Statute in Historical Perspective, 52 Va. L. Rev. 1189, 1202, n. 93 (1966).

Section 1–14 of the Virginia Code provides:

"*Colored persons and Indians defined.*—Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one fourth or more of Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians." Va. Code Ann. § 1–14 (1960 Repl. Vol.).

Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications.[5] Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period.[6] The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a "white person" marrying other than another "white person," [7] a prohibition against issuing marriage licenses until the issuing official is satisfied that

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[5] After the initiation of this litigation, Maryland repealed its prohibitions against interracial marriage, Md. Laws 1967, c. 6, leaving Virginia and 15 other States with statutes outlawing interracial marriage: Alabama, Ala. Const., Art. 4, § 102, Ala. Code, Tit. 14, § 360 (1958); Arkansas, Ark. Stat. Ann. § 55–104 (1947); Delaware, Del. Code Ann., Tit. 13, § 101 (1953); Florida, Fla. Const., Art. 16, § 24, Fla. Stat. § 741.11 (1965); Georgia, Ga. Code Ann. § 53–106 (1961); Kentucky, Ky. Rev. Stat. Ann. § 402.020 (Supp. 1966); Louisiana, La. Rev. Stat. § 14:79 (1950); Mississippi, Miss. Const., Art. 14, § 263, Miss. Code Ann. § 459 (1956); Missouri, Mo. Rev. Stat. § 451.020 (Supp. 1966); North Carolina, N. C. Const., Art. XIV, § 8, N. C. Gen. Stat. § 14–181 (1953); Oklahoma, Okla. Stat., Tit. 43, § 12 (Supp. 1965); South Carolina, S. C. Const., Art. 3, § 33, S. C. Code Ann. § 20–7 (1962); Tennessee, Tenn. Const., Art. 11, § 14, Tenn. Code Ann. § 36–402 (1955); Texas, Tex. Pen. Code, Art. 492 (1952); West Virginia, W. Va. Code Ann. § 4697 (1961).

Over the past 15 years, 14 States have repealed laws outlawing interracial marriages: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming.

The first state court to recognize that miscegenation statutes violate the Equal Protection Clause was the Supreme Court of California. *Perez* v. *Sharp*, 32 Cal. 2d 711, 198 P. 2d 17 (1948).

[6] For a historical discussion of Virginia's miscegenation statutes, see Wadlington, *supra*, n. 4.

[7] Va. Code Ann. § 20–54 (1960 Repl. Vol.).

the applicants' statements as to their race are correct,[8] certificates of "racial composition" to be kept by both local and state registrars,[9] and the carrying forward of earlier prohibitions against racial intermarriage.[10]

I.

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in *Naim* v. *Naim,* 197 Va. 80, 87 S. E. 2d 749, as stating the reasons supporting the validity of these laws. In *Naim,* the state court concluded that the State's legitimate purposes were "to preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride," obviously an endorsement of the doctrine of White Supremacy. *Id.,* at 90, 87 S. E. 2d, at 756. The court also reasoned that marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment.

While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, *Maynard* v. *Hill,* 125 U. S. 190 (1888), the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so in light of *Meyer* v. *Nebraska,* 262 U. S. 390 (1923), and *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942). Instead, the State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element

[8] Va. Code Ann. § 20–53 (1960 Repl. Vol.).

[9] Va. Code Ann. § 20–50 (1960 Repl. Vol.).

[10] Va. Code Ann. § 20–54 (1960 Repl. Vol.).

as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

Because we reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination where the Equal Protection Clause has been arrayed against a statute discriminating between the kinds of advertising which may be displayed on trucks in New York City, *Railway Express Agency, Inc.* v. *New York,* 336 U. S. 106 (1949), or an exemption in Ohio's ad valorem tax for merchandise owned by a nonresident in a storage warehouse, *Allied Stores of Ohio,*

Inc. v. *Bowers,* 358 U. S. 522 (1959). In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws. Many of the statements alluded to by the State concern the debates over the Freedmen's Bureau Bill, which President Johnson vetoed, and the Civil Rights Act of 1866, 14 Stat. 27, enacted over his veto. While these statements have some relevance to the intention of Congress in submitting the Fourteenth Amendment, it must be understood that they pertained to the passage of specific statutes and not to the broader, organic purpose of a constitutional amendment. As for the various statements directly concerning the Fourteenth Amendment, we have said in connection with a related problem, that although these historical sources "cast some light" they are not sufficient to resolve the problem; "[a]t best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect." *Brown* v. *Board of Education,* 347 U. S. 483, 489 (1954). See also *Strauder*

v. *West Virginia,* 100 U. S. 303, 310 (1880). We have rejected the proposition that the debates in the Thirty-ninth Congress or in the state legislatures which ratified the Fourteenth Amendment supported the theory advanced by the State, that the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense were similarly punished. *McLaughlin* v. *Florida,* 379 U. S. 184 (1964).

The State finds support for its "equal application" theory in the decision of the Court in *Pace* v. *Alabama,* 106 U. S. 583 (1883). In that case, the Court upheld a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro which imposed a greater penalty than that of a statute proscribing similar conduct by members of the same race. The Court reasoned that the statute could not be said to discriminate against Negroes because the punishment for each participant in the offense was the same. However, as recently as the 1964 Term, in rejecting the reasoning of that case, we stated "*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." *McLaughlin* v. *Florida, supra,* at 188. As we there demonstrated, the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States. *Slaughter-House Cases,* 16 Wall. 36, 71 (1873); *Strauder* v. *West Virginia,* 100 U. S. 303, 307–308 (1880); *Ex parte Virginia,* 100 U. S. 339, 344–345 (1880); *Shelley* v. *Kraemer,* 334 U. S. 1 (1948); *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (1961).

There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States,* 320 U. S. 81, 100 (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," *Korematsu* v. *United States,* 323 U. S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they "cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense." *McLaughlin* v. *Florida, supra,* at 198 (STEWART, J., joined by DOUGLAS, J., concurring).

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.[11] We have consistently denied

[11] Appellants point out that the State's concern in these statutes, as expressed in the words of the 1924 Act's title, "An Act to Preserve Racial Integrity," extends only to the integrity of the white race. While Virginia prohibits whites from marrying any nonwhite (subject to the exception for the descendants of Pocahontas), Negroes, Orientals, and any other racial class may intermarry with-

the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

II.

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. *Skinner* v. *Oklahoma,* 316 U. S. 535, 541 (1942). See also *Maynard* v. *Hill,* 125 U. S. 190 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

These convictions must be reversed. *It is so ordered.*

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out statutory interference. Appellants contend that this distinction renders Virginia's miscegenation statutes arbitrary and unreasonable even assuming the constitutional validity of an official purpose to preserve "racial integrity." We need not reach this contention because we find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the "integrity" of all races.

MR. JUSTICE STEWART, concurring.

I have previously expressed the belief that "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." *McLaughlin* v. *Florida,* 379 U. S. 184, 198 (concurring opinion). Because I adhere to that belief, I concur in the judgment of the Court.