

LOVING V. VIRGINIA
and the Hegemony of “Race”

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When any society says that I cannot marry a certain person, that society has cut off a segment of my freedom.

-- Martin Luther King, Jr., June 25, 1958

Mixed marriages don't solve anything. What are the Black men trying to prove? Such “Toms” really need psychoanalysis.

-- Malcolm X, February 10, 1965

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

-- Richard Perry Loving, June 1967

On September 19, 1958, *U.S. News & World Report* published a ten-page interview with five of the day's leading scholars about the magazine's cover story—“sex fears and integration” in the South. Only one week earlier the United States Supreme Court had issued a formal demand that the Little Rock, Arkansas school board abandon its ongoing efforts to thwart racial desegregation of the city's public schools. In its momentous 1954 *Brown v. Board of Education*

decision, the Supreme Court had already unanimously rejected public school segregation, which thereby overturned the 1896 *Plessy v. Ferguson* “separate but equal” doctrine. Yet by September 1958 it had been not quite a year since President Dwight D. Eisenhower had sent armed Federal troops marching into Little Rock, Arkansas, where to enforce the “prompt and reasonable start toward full compliance” with the Court’s 1954 ruling they escorted nine African-American students into all-white Central High School.¹ In retaliation, Arkansas governor Orval Faubus—who had staked his political career on resisting the *Brown v. Board* decision, and had been thrust into the national spotlight when he called out the Arkansas National Guard to halt integration of Central High—ordered Little Rock’s high schools closed. Those schools remained locked for the following twelve months, while Virginia that year would shut down nine schools in four counties rather than see them integrated. “Why,” *U.S. News & World Report* (hereinafter, the *Report*) asked the five sociologists, “is the South so fearful of having Negroes and whites in the same schools?”

“I think the main fear is the mixed relations between the two races,” answered Dr. Robert M. Maciver, Professor Emeritus of Columbia University, “especially relations that might lead to sex or marriage.” Those apprehensions were, however, added Dr. Maciver, “really greatly exaggerated.” Asked if he thought that integration in the schools would “hasten the process of breaking down barriers” to interracial marriage, Maciver thought it unlikely, since “the mere fact

¹ *Revolution in Civil Rights*, Fourth Edition, Washington, DC: Congressional Quarterly Service, 1968, p. 7. On May 17, 1954, in the *Brown v. Board of Education of Topeka, Kansas* decision, “the Supreme Court held that enforced racial segregation of public education was a denial of the equal protection of the laws guaranteed under the 14th Amendment” (6). In a second *Brown* decision a year later the Court asked “the lower courts to require ‘a prompt and reasonable start toward full compliance’” with the ruling. Though the Supreme Court agreed to grant time for administrative matters to be handled, they “called for solution of these problems ‘with all deliberate speed’” (7).

of coeducation” would not sufficiently remove such barriers “so long as there are strong social feelings and traditions” to uphold them. “People,” said Maciver, “are even more ruled by custom than by law.” For Maciver, the real bar to interracial marriage “is not a question of law at all—it’s purely social constraint, social taboos, social traditions. And that is powerful.”² So powerful that a social culture may be defined (and confined) by those customs, for, writes Kenan Malik, it is “through tradition and rootedness” that the past holds “power over the present,”³ no matter how irrational such nostalgia may appear. Custom becomes the fabric of a culture, woven into its being and fortified by “the greater good, often couched in terms of social order, stability and advancement,” something the Italian Marxist Antonio Gramsci recognized as hegemony, or “domination by consent.”⁴ Consent, however, is not an ever-present phenomenon; individual will oftentimes conflicts with dominant cultural practices, and compliance must then be enforced by more overtly coercive forms of power, such as legal prohibitions against social and sexual integration.

Only one of the five scholars (all of whom were male) interviewed in 1958 by the *Report* was African American, Dr. Preston Valien of Fisk University in Nashville, Tennessee. When asked what part sex plays in the South’s opposition to integrated schools, Dr. Valien agreed with Maciver, whose thoughts were echoed by the other interviewees, that the fear of interracial

² “Leading Sociologists Discuss Sex Fears and Integration,” *U.S. News and World Report*, September 19, 1958, pp. 77-82, 84, 86, 89-90. Dr. McIver’s comments appear on pages 77-78. The other scholars (in the order in which their comments appear) include Dr. Guy B. Johnson (University of North Carolina), Dr. Curt Stern (University of California), Dr. Preston Valien (Fisk University), and Dr. Edgar T. Thompson (Duke University).

³ Kenan Malik, *The Meaning of Race: Race, History and Culture in Western Society*, New York: New York UP, 1996, p. 186.

⁴ Bill Ashcroft, Gareth Griffiths, and Helen Tiffin. *Post-Colonial Studies: The Key Concepts*, London and New York: Routledge, 2000, p. 116.

marriage “is used as the basis for opposition to the desegregation of schools.” However, Valien added, “this may not be the real reason but merely one that is easily understood and useful for the opposition.” In other words, the “interracial sex” argument may mask the more substantive material and economic concerns that feed white segregationists’ fears. “For example,” said Valien,

the white politician may fear the consequences of a wider suffrage for Negroes, or of a better-educated Negro electorate, and a white worker may fear the competition of better-trained and educated Negroes. But it would be self-deprecatory for these reasons to be given. On the other hand, it is usually easier and more effective to make the emotional appeal of fear of intermarriage.

Valien recognized, then, that while the emotional storm that brewed around the issue of interracial marriage might obscure the material concerns of white politicians and white working-class laborers, such responses were not invalid. Yet, Valien continued, “we must also recognize that one’s private fears cannot be legitimately used as a basis for depriving other people of their public rights.”⁵ Of course, this is precisely what private fears oftentimes do—they shape ideology, which in turn shapes policy, which then shapes materiality. For example, to elaborate on Valien’s observation, when working-class whites fear the possibility of labor competition from a better educated working-class black population, whites may seek to delay black workers’ educational progress by demanding policies that prohibit blacks from attending schools with richer socioeconomic resources; and when access for blacks to such resources are denied, the potentiality of converting knowledge to material progress is equally denied.

⁵ “Leading Sociologists Discuss Sex Fears and Integration,” p. 84.

Freedom, though, is not measured only in terms of material accumulation, or the freedom to *have*; it is also measured by the freedom to *choose*. And the freedom to marry “may in some ways be considered more basic, more a part of the individual’s essential freedom, than the right to go to school.”⁶ In an article about the Little Rock episode, published in the winter of 1959, Hannah Arendt, a refugee scholar from Nazi Germany, argued that the right to choose marriage partners is firmly anchored to America’s ideological foundation: “Even political rights, like the right to vote, and nearly all other rights enumerated in the Constitution, are secondary to the inalienable human rights to ‘life, liberty, and the pursuit of happiness’ proclaimed in the Declaration of Independence; and to this category the right to home and marriage unquestionably belongs.”⁷

It was the desire to secure *all* of these rights and more that animated the will to desegregate schools in the South. African Americans were “not seeking merely nonsegregated schools as such,” argued Dr. Valien. What the African American sought was a nonsegregated life, free of “legal restrictions based upon race in every aspect of American life. He may not take advantage of it if he gets it, but that’s another matter.”⁸ This was also Dr. Martin Luther King’s very point when a few months earlier he had declared: “When any society says that I cannot marry a certain

⁶ Stephen L Wasby, Anthony A. D’Amato, and Rosemary Metrailler, *Desegregation from Brown to Alexander: An Exploration of Supreme Court Strategies*, Carbondale and Edwardsville: Southern Illinois UP, 1977, p. 137.

⁷ Hanna Arendt, “Reflections on Little Rock.” From *Dissent* 6.1 (winter 1959): 45-56, in Werner Sollors (ed.) *Interracialism: Black-White Intermarriage in American History, Literature, and Law*, Oxford: Oxford UP, 2000, pp. 492-502.

⁸ “Leading Sociologists Discuss Sex Fears and Integration,” p. 86.

person, that society has cut off a segment of my freedom.”⁹ He and Dr. Valien both recognized that the argument for integration and intermarriage was based upon the freedom to choose, that all Americans desire “to be free to accept or reject participation.”¹⁰

The *Report* concluded its series of interviews by asking Dr. Edgar T. Thompson of Duke University in Durham, North Carolina if integration in the schools would eventually promote racial intermarriage. “So far as the South is concerned,” Dr. Thompson prophetically replied, “State laws would have to be repealed or declared invalid before this could happen.”¹¹ Not likely did Thompson nor any of the other four sociologists know, but just three and a half months before their conversation about sex fears and integration hit the newsstands, a 24-year-old white man and an 18-year-old black woman had driven almost 200 miles from rural Caroline County, Virginia to Washington, DC, where they wed and spent a short honeymoon, and where almost a decade later they would put every one of those State laws to the ultimate test.

⁹ The Papers of Martin Luther King, *Volume 4: Symbol of the Movement, January 1957-December 1958*. Interview by Mike Wallace, 12 November 2002 <http://www.stanford.edu/group/King/publications/papers/vol4/580625-012-Interview_by_Mike_Wallace.htm#top>. After failing to secure King’s appearance on his television show “Night Beat,” Mike Wallace conducted this interview in New York on June 25, 1958 (23 days after the Lovings married in the District of Columbia) for a column he published in the New York Post on July 11, 1958. King commented that America at the time was “moving through the period of desegregation and the physical barriers are being broken down—the legal barriers, that is. Naturally you will have this problem of people going on with this automatically because it is the law but once they are brought together—you see, they hate each other because they fear each other, they fear each other because they don’t know each other.” Noting that “the underlying fear of white Southerners is interracial marriage,” Wallace asked King if integration would result in “mass intermarriage.” King replied: “I don’t think you will have mass intermarriage. That isn’t what the Negro wants basically. The thoroughly integrated society means freedom. When any society says that I cannot marry a certain person, that society has cut off a segment of my freedom. It hasn’t given me the possibility of alternatives. In the final analysis, intermarriage has no relevance to this issue. Races don’t marry, people do. It is an agreement between two people and either party can say no. There will be intermarrying, I am sure. But in societies where you have a good deal of integration, you don’t have a large percentage intermarrying.”

¹⁰ “Leading Sociologists Discuss Sex Fears and Integration,” p. 89.

“ALMIGHTY GOD CREATED THE RACES”

On Wednesday, April 10, 1967, Supreme Court Chief Justice Earl Warren called Number 365, “Richard Perry Loving, et. al., appellants, versus Virginia.” Attorneys Bernard S. Cohen and Philip J. Hirschkop were present to argue the case on behalf of their two clients, Richard and Mildred Loving, who chose not to attend.

“Mr. Chief Justice, Associate Justices,” Mr. Hirschkop began. “You have before you today what we consider the most odious of the segregation laws and the slavery laws.”¹² The laws to which Hirschkop referred were Virginia’s anti-“miscegenation” laws, which prohibited interracial marriages. Explaining why Virginia had passed these laws, and why other states had similar ones on the books, Hirschkop pointed to

a 1662 [Virginia] Act which held that the child of a Negro woman and a white man would be free or slave according to the condition of its mother. It was a slavery law, and it was only concerned with one thing, and it’s an important element in this matter: Negro woman, white man. That’s all they were really concerned with; and it may be all they’re still concerned with. The purity of the white woman, not the purity of the Negro woman.¹³

The young attorney had pierced the psychological heart of the matter—“the purity of the white woman,” a fanciful notion manufactured partly out of moral concerns, “which stemmed from the popular white mythology that blacks descended from the Ham of *Genesis*,” whose “blackness”

¹¹ Ibid.

¹² *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law, Volume 64*, Philip B. Kurland and Gerhard Casper (eds.), Arlington, Virginia: University Publications of America, 1975, p. 962.

¹³ Ibid., p. 961-62.

was a punishment for sexual excess.”¹⁴ However, before Virginia’s 1662 Act that defined the free or slave status of children born to African-American women, Maryland passed in 1661 the country’s first miscegenation statute, which criminalized marriage between European-American women and African-American men, and which expresses the material interests for the regulation of interracial unions: the “economic concerns” of a planter-class pigmentocracy¹⁵ wherein, without the manufacture of such fine legal distinctions, writes Eva Saks, “marriage between a white woman and a black slave would produce legally free children, thereby depriving the slaveowner of potential slaves—a reduction in the stream of future earnings capitalized in the black body.”¹⁶

To illustrate the superstitious foundation of Virginia’s antimiscegenation argument, Hirschkop recited a now infamous and often-published opinion aired by the Virginia state trial court judge, who had in 1959 effectively banished Richard and Mildred Loving from the state for twenty-five years, and who six years later stubbornly denied a motion to set aside his ruling. “In the case before you,” said Mr. Hirschkop, to the young white and black couple who had married across state lines, the judge had proclaimed: “‘Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents.’ And I needn’t read the whole quote, but it’s a fundamentally ludicrous quote.”¹⁷

¹⁴ Eva Saks, “Representing Miscegenation Law,” In Werner Sollors (ed.), *Interracialism: Black-White Intermarriage in American History, Literature, and Law*, Oxford and New York: Oxford UP, 2000, p. 64.

¹⁵ Sidney I. Dobrin, “Race and the Public Intellectual: A Conversation with Michael Eric Dyson,” in Gary A. Olson and Lynn Worsham (eds.), *Race, Rhetoric, and the Postcolonial*, New York: State University of New York Press, 1999. Talking about the difference between “pigmintosis” and “pigmintification,” self-titled “Hip-Hop Public Intellectual” Michael Eric Dyson says that “pigmintification means that you get adopted within the larger pigmintocracy, the regime of color that’s associated with white skin” (111).

¹⁶ Saks, p. 64.

With Hirschkop's assessment the Court must have agreed, for beneath the front page headline— "Justices Upset All Bans On Interracial Marriage"—in the Tuesday, June 13, 1967 edition of *The New York Times*, the following article appeared:

WASHINGTON, June 12—The Supreme Court ruled unanimously today that states cannot outlaw marriages between whites and nonwhites.

The opinion by Chief Justice Earl Warren was directed specifically at the antimiscegenation laws of Virginia[.]

However, the wording was sufficiently broad and disapproving to leave no doubt that the antimiscegenation laws of 15 other states are also now void.

"We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race," Chief Justice Warren said.

"There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the [Constitution's] equal protection clause."¹⁸

"Under our Constitution," the justices penned in their landmark ruling, "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. Reversed."¹⁹

As a cultural and historiographic study in the struggle for civil rights in America, where does *Loving v. Virginia* weigh in? Did laws prohibiting heterosexual interracial marriages

¹⁷ *Landmark Briefs*, p. 965.

¹⁸ "Justices Upset All Bans On Interracial Marriage," 13 June 1967, *The New York Times*, p. 1A, 28A.

¹⁹ "*Loving v. Commonwealth of Virginia, 1967*," from *388 U.S. 1; 87 S. Ct. 1817; 1867 U.S.*, in Werner Sollors (ed.), *Interracialism: Black-White Intermarriage in American History, Literature, and Law*, Oxford: Oxford UP, 2000, p. 34.

“constitute a much more flagrant breach of letter and spirit of the Constitution than segregation of schools,” as Hannah Arendt claimed in 1959?²⁰ Or was the Lovings’ nearly ten-year fight that finally overturned all such laws in 1967, while symbolically significant, not as materially substantial as the battle that won, for example, equal access to public education which opened doors to higher occupations and incomes?

Responding to Arendt, American philosopher Sidney Hook argued that African Americans “were ‘profoundly uninterested’ in these [intermarriage] laws; in their eyes, ‘the discriminatory ban against intermarriage and miscegenation is last in their order of priorities.’”²¹ Writing one decade prior to *Brown*, sociologist Gunnar Myrdal similarly argued that the matter of interracial marriage “is of rather distant and doubtful interest” to African Americans, who “are in desperate need of jobs and bread, even more so than of justice in the courts, and of the vote.”²² According to historian Charles F. Robinson II, the American scholar and co-founder of the NAACP, W.E.B. Du Bois, “insisted that blacks did not desire intermarriage,” that “black Americans could not afford to intermarry with a race of people who considered them less than equals,” and that Du Bois therefore “considered intermarriage inexpedient because it interfered with efforts on the part of black Americans to develop and applaud their cultural distinctiveness.”²³ A similar ideology may have informed Malcolm X when ten days before his execution in 1965 he declared: “Mixed marriages don’t solve anything. What are the Black men trying to prove? Such

²⁰ Arendt, p. 492.

²¹ Ibid.

²² Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy*. New York: Harper & Brothers, 1944, p. 61.

²³ Charles Frank Robinson II, *Dangerous Liaisons: Sex and Love in the Segregated South*, Fayetteville, Arkansas:

‘Toms’ really need psychoanalysis”²⁴ Indeed, by the mid-1960s, many other black nationalists who challenged the entire ethic of integration, writes Renee C. Romano,

charged that blacks involved in interracial relationships were “sleeping with the enemy,” and they attacked intermarriage as an attempt to assimilate into the white world and to reject black culture[.] No longer a courageous and symbolic act of racial brotherhood, interracial marriage was defined by nationalists as the conservative choice of ‘Uncle Toms’ who were selling out the race.²⁵

However, for some white civil rights activists—who talked idealistically about “love, brotherhood, and creating a ‘beloved community’” where “respect and value” would be measured by political, legal, and social equality—marriage across racial lines was not a racially conservative compromise, but represented instead “the ultimate expression” of social transformation.²⁶ Perhaps this expression of white liberalism sprouted from the roots of an inverse historiographic legend wherein sexual relations and interracial marriage had always been an issue of “deepest concern to whites in their confrontation of expanding Negro rights and privileges.”²⁷ In fact, the fear of “mongrelization” that would arise from such unions has been

University of Arkansas Press, 2003, p. 120.

²⁴ *February 1965: The Final Speeches—Malcolm X*, Steve Clark (ed.), New York: Pathfinder, 1992, p. 44. In an interview conducted by members of the staff of *Flamingo*, a monthly magazine published in London and aimed at Britain’s growing black population, when asked what he thought of West Indians in England who imitate the English,” Malcolm X answered: “Any Black man who wants to identity with the whites I call an ‘Uncle Tom.’” When asked if mixed marriages promote better human relations, Malcolm X replied: “Mixed marriages don’t solve anything. What are the Black men trying to prove? Such ‘Toms’ really need psychoanalysis.”

²⁵ Renee C. Romano, *Race Mixing: Black-White Marriage in Postwar America*, Cambridge, MA: Harvard UP, 2003, p. 217.

²⁶ *Ibid.*, p. 178.

²⁷ Wasby, et al., p. 137.

“the underlying force in Caucasian opposition to all kinds of desegregation from earliest times. Thus, it has been in areas such as public facilities, housing, and public school desegregation that barriers have been so slow to fall, and then only in the face of bitter opposition, for it was feared that contacts in these areas could lead to miscegenation.”²⁸ According to Robinson, Myrdal found that “the prevention of intermarriage served Southern whites as the foundation and the justification for the maintenance of all segregation and discriminatory measures.”²⁹

The regulation of interracial relationships in America, which structured and perpetuated a “racial hierarchy that privileged whites over blacks,” had its origins in and was a vital component of the American slave system.³⁰ As law professor Randall Kennedy writes:

Legions of legislators, judges, prosecutors, police officers, and other officials have attempted to prevent interracial amalgamation. Between the 1660s and the 1960s, forty-one colonies or states enacted racial laws regulating sex or marriage. [. . .]Over four centuries, authorities offered a range of justifications for antimiscegenation laws, including the supposed obligations to respect nature, to follow God’s directions, to prevent the contamination of whites[.]³¹
[. . .]In his infamous opinion in *Dred Scott v. Sanford* (1857), Chief Justice Roger B. Taney argued that laws prohibiting interracial marriage reflected that the Founding Fathers had never intended for blacks, even those who were free, to become citizens of the United States.³²

²⁸ Ibid., pp. 138-39.

²⁹ Robinson, p. xiii.

³⁰ Romano, p. 4.

³¹ Randall Kennedy, *Interracial Intimacies*, New York: Pantheon Books, 2003, pp. 18-19.

³² Ibid., p. 20.

One might suppose, then, that because the Supreme Court ruling in 1967 brought an end to 300 years of American laws that prohibited racially segregated marriages, *Loving v. Virginia* would be a regularly cited topic in the cannon of civil rights historiography. It would appear, however, that this is not the case. In his recent study of race, marriage, and law in America, *Loving* scholar Peter Wallenstein argues that even though these subjects reach out and affect “a universe of matters, from the inheritance of property to the history of segregation,” many “books on such matters as marriage, family, race, law, property, privacy, civil rights, and immigration do not bring in the subject of” interracial marriage “at all, and few of them give it much prominence.”³³ I heartily agree with Wallenstein’s observation, and add, moreover, that as much as the topics of race, marriage, and law have ignored the subject of interracial marriage, they have ignored the story of *Loving v. Virginia* even more.³⁴ And if these assessments are correct, the question arises: Why?

When the Supreme Court handed down its decision on *Loving* the ruling came in a turbulent year. The war in Vietnam marked its third anniversary, major antiwar demonstrations were taking place, and race riots erupted in Alabama, Detroit, Connecticut, Newark, and the District of Columbia. As previously noted, while it was perhaps high on the agenda of some liberal whites, the right to marry across racial line lines was not assigned by some liberal blacks top priority in the fight for civil rights legislation. And just as some conservative whites rejected

³³ Peter Wallenstein, *Tell the Court I Love My Wife: Race, Marriage, and Law—An American History*, New York: Palgrave Macmillan, 2002, p. 8.

³⁴ While there are a number of scholarly articles and some books that address *Loving v. Virginia*, only two books published to date devote extensive attention to the case. One is Wallenstein’s insightful *Tell the Court I Love My Wife*, and the other is a children’s book written by Karen Alonso, *Loving v. Virginia: Interracial Marriage*, Berkley Heights, NJ: Enslow Publishers, 2000.

interracial marriages that could lead to the professed impurity of their race, some black nationalists rejected interracial marriages as a threat to their intra-racial solidarity. More pressing matters of the day, therefore, determined how much attention the story of *Loving* would receive. But the question as to why *Loving* yet remains relatively obscure more than forty years into its future cannot be answered by gauging only the stream of once-topical currents forty-years past.

Perhaps part of the answer lies in the possibility that the issue of interracialism remains a barrier which many are yet hesitant to surmount. Indeed, should we really expect otherwise? As Dr. Valien argued in 1958, the fear of interracial marriage was “used as the basis for opposition to the desegregation of schools.”³⁵ This fear had also been used as the ultimate justification to deny African Americans the right to attend “schools equal to those of white people,” to drink “from the same water fountains, relieve themselves in the same toilets, or wash their hands in the same basins used by white people,” to “eat in the same restaurants as white people,” to “sleep in the same motels and hotels; swim in the same pools and beaches as white people,” to sit “next to white people in lecture halls, concerts, or other public auditoriums,” to “sit next to white people on buses or streetcars or other means of public transportation,” to “be born or treated in the same hospitals or buried in the same graveyards as white people,” to “vote or hold public office,” and to expect “to live in the same neighborhoods, hold the same jobs, or attain the same standard of living as white people.”³⁶ As Kennedy writes: “Fears of interracial intimacy, and especially

³⁵ “Leading Sociologists Discuss Sex Fears and Integration,” p. 84.

³⁶ Manning Marable, *The Great Wells of Democracy: The Meaning of Race in American Life*, New York: BasicCivitas Books, 2002, pp. 42-43. Defining the “white supremacist regime under the racial domain of Jim Crow segregation” as “totalitarian in the purest sense of this political term” (42), Marable quotes historian Paul Gaston from whom these examples are drawn. Gaston continues: “The values and beliefs of the white supremacy culture . . . included the belief that black people, not individually but as a race, were genetically inferior to white people, and that this genetic deficiency was responsible for the fact that black people were [. . .] sexually threatening, through

interracial marriage, constituted an emotional and psychological seedbed from which sprouted all manner of efforts to distance blacks and subordinate them.”³⁷

Maybe because the story of *Loving* confronts the hegemony of such long-standing cultural and power hierarchies that perpetuate division by race, it confuses the disciplinarity of racio-historiographic parameters as well. Into which historiographic model does *Loving* fit: United States history, African-American history, constitutional history, civil rights history? To be certain, any silence surrounding *Loving* is not due to a lack of the story’s resonance with America’s legacy of cultural and power hierarchies, the production of knowledge, the boundaries of “whiteness and blackness,” and the hegemony of “race.”

Though Richard and Mildred Loving may not have consciously aligned themselves with the civil rights troops of the 60s, their personal war was, nonetheless, waged concurrently on the same social battlefield. The Lovings’ story, then, should be analyzed in context with the dynamics of their times, in order to consider how those dynamics were shaped by the past, how that past shapes the present, and how present discussions may shape our future.

The founding of America was built upon disparity, division, and the establishment of a system of racialized social dysfunction, which maintains that which, citing Gramsci, historian Manning Marable identifies as “citadels of inequality,” and which denies “full access and democratic rights to citizens who have been marginalized and disadvantaged.”³⁸ Beginning, with

their men, to white women” (43).

³⁷ Kennedy, p. 23

³⁸ Marable, p. xv.

a look at the marriage and subsequent arrest of Mr. and Mrs. Loving, this essay will briefly explore how the fear of interracial sexuality has served as a mirror for American ideologies that conflate blood, race, and nation; and will demonstrate how scholars may identify the oftentimes overlooked story of *Loving* as a study useful to draw attention to certain racio-historiographic and disciplinary parameters that have arisen around the concept of “race.”

“THE PASSING CAPITAL OF AMERICA”

Richard Perry Loving and Mildred Delores Jeter could trace their Caroline County ancestors back for several generations.³⁹ Richard, whose “white” family lived only four miles down the road from Mildred’s “black” family, had known her brothers, who played in a band, nearly his entire life.⁴⁰ Rugged-looking, seventeen-year-old Richard, and eleven-year-old Mildred, so slim that folks called her “Bean,” met at a dance and thereafter began dating.⁴¹ Their families more than got along. Richard’s father, Richard Loving Sr., spent 23 years working as a truck driver on a 400-acre farm owned by P.E. Boyd Byrd (William Byrd’s descendants), one of

³⁹ “The Crime of Being Married,” *Life*, Vol. 60, No. 11, March 18, 1966, pp. 85-91. This article, published one week after the Virginia Supreme Court upheld the constitutionality of the state’s antimiscegenation law, states: “Now their [Richard and Mildred Loving’s] case will return to federal court—where *Loving vs. Virginia* may well become the next big landmark in civil rights” (85). It is of notable interest that the editors of *Life* predicted *Loving* would become a “landmark” case in civil rights history, and that a significant amount of editorial space and extensive use of photographs were devoted to the story.

⁴⁰ Simeon Booker, “The Couple that Rocked the Courts,” *Ebony*, Vol. XXII, No. 11, September 1967, pp. 78-86. This sophisticated article by Booker, who in 1952 integrated the city-reporting beat at the *Washington Post*, and who, in 1955, covered the Emmet Till trial for *Jet* and *Ebony* magazines, explores in detail the practice known as “passing,” an act that demonstrates the sexually permeable barriers of “race.”

⁴¹ Victoria Valentine, “When Love Was a Crime,” *Emerge*, June 1997, pp. 60-62.

the wealthiest African-American farmers in the community known as Central Point. When years later the senior Loving broke his leg in a sawmill accident, he retired to truck farming and moved across the road from the Jeters.⁴² As the son of a European-American man working for an African-American man in 1950s Southern Virginia, Richard Jr. was easily accepted into the county's "creamish-color" society, where his friends were "light skinned Negroes, some more Caucasian looking than he."⁴³

Richard and Mildred rarely ventured outside the isolated hill country around Central Point, "where there had always been an easygoing tolerance on the race question."⁴⁴ It is not surprising that he would tell a reporter for *Ebony* in 1967 that everyone "looked alike to me."⁴⁵ The reporter, Simeon Booker, wrote the following about the racially ambiguous community where Richard and Mildred spent their childhood years together:

Historically, Central Point is the source from which hundreds of young men and women have migrated to cross racial lines, later marrying and working as whites in cities throughout the country. Even before passage of civil rights laws granting

⁴² Booker, p. 79.

⁴³ Robert Pratt, "Crossing the Color Line: A Historical Assessment and Personal Narrative of *Loving v. Virginia*," *Howard Law Journal*, Vol. 41, Winter 1998, pp. 229-244.. Pratt, a University of Georgia professor, whose great-uncle rented living quarters in Essex County, Virginia to Mildred Loving's sister Garnet Hill in the early 1960s, reports that Mildred and Richard, who had been banished from the state since 1959, would secretly meet at Hill's residence during their years of exile. "It was on those occasions," writes Pratt, "that I played with the Loving children, especially Sidney [the Lovings' eldest child] who was exactly my age." Pratt identifies Richard as "part-English and part-Irish," and Mildred as "part-black and part-Cherokee." In a newspaper article ("Is Mildred Loving considered black or Indian? Both, she says," *Fredricksburg Free Lance-Star*, 12 June 1997, A1,A2), reporter Kim Douglass writes that Mildred Loving "thinks of herself as an Indian. Her mother was part Rappahannock Indian, and her father was part Cherokee." Mrs. Loving is "a product of a number of races and ethnic backgrounds, including Portuguese and black." She "doesn't mind being thought of as black, but she wants people to know she is also an Indian." I visited Mrs. Loving On February 19 and 20, 2000, and can confirm that she is strongly connected to her Native-American heritage.

⁴⁴ "The Crime of Being Married," p. 85.

Negroes access to places of public accommodation, Central Point youngsters easily passed as white in nearby towns where they could shop and attend theatres. When members of the families married whites and brought their spouses back for visits, younger brothers and sisters stayed out of school in order that the visiting in-law not be upset. Explains a school official, “These people have infiltrated the white race more than any other group of Negroes. When a student plays hookey from school for a week and says an in-law is visiting the family, we understand. The kids just can’t afford to catch the Negro school bus without giving away the racial identity.”⁴⁶

So even though, inside this culture that natives called “the passing capital of America,” Richard and Mildred had grown up perhaps less racially segregated by some of the more narrow racial distinctions that segregated society at large, no one in the mid-twentieth-century American South was altogether free from white separatist ideologies and practices. Richard attended an all-white high school for a year, and Mildred quit school after reaching the 11th grade at her all-black high. So they were both conscious of and had in the course of their young lives experienced at least some measure of legal and social segregation based upon “race.”

Maybe by 1958, though, Richard and Mildred had been influenced by the *Brown* decision. Perhaps they thought that integration was sweeping the country, that because racial categories were so obviously vague America was ready to desegregate not only the public classroom, but the private bedroom as well. If so, they could not have been more poignantly mistaken.

No matter how optimistic the young couple may have been, however, they probably knew

⁴⁵ Booker, p. 80.

⁴⁶ *Ibid.*, p. 79.

that interracial marriage was illegal and prohibited in Virginia, otherwise there would have been no immediately apparent reason for them to drive nearly 200 miles and over the state line into the nation's capitol to perform such a relatively uncomplicated ceremony.⁴⁷ One Virginia newspaper referred to the Lovings' marriage as an "elopement,"⁴⁸ a word which means, of course, to escape, to run away, to leave one's home to marry a lover. Perhaps because Mildred was eighteen and pregnant with their first child in June 1958, she and Richard—like many other young lovers so often do—wished to keep their private affairs private, and getting married away from home in a place and by someone unfamiliar with their family and friends appealed to them as a convenient way to circumvent objections or publicity they hoped to avoid. But if Richard and Mildred had been unaware of Virginia's antimiscegenation laws, it would not have been necessary for them to travel 200 miles and out of state to keep matters private, when traveling, for example, 100 miles inside state lines would accomplish the same goal.

It has been noted by the small cadre of scholars and journalists who have written about the Lovings that neither Richard nor Mildred sought to become civil rights pioneers; their marriage was not a test of the "system" or a political statement: "We have thought about other people," Richard said in 1966, "but we are not doing it just because somebody had to do it and we wanted to be the ones. We are doing it for *us*."⁴⁹ In other words, the Lovings were not radical

⁴⁷ Pratt, pp. 229-244. Pratt writes that "Mildred did not know that interracial marriage was illegal in Virginia, but Richard did." An article in *The Virginia Pilot* ("Intermarriage Bans Held Unconstitutional," June 13, 1967, A1, A4) claims that both Richard and Mildred "were unaware of the Virginia law banning interracial marriages when they were wed" (A4). Having met the savvy Mrs. Loving, I believe that she and her husband were acutely aware of those laws, but consciously chose postures of ignorance, and, thereby, innocence.

⁴⁸ "Intermarriage Bans Held Unconstitutional," p. A4.

revolutionaries fighting for social justice. As African-American literature scholar Jeffrey B. Leak recognizes, “a person’s choice of spouse, while clearly important and symbolic, does not necessarily coincide with a particular political agenda.” If, then, Richard and Mildred were not motivated to marry one another because of a shared “liberal” consciousness sometimes attributed to lovers who breach racial boundaries, perhaps their motivation was prompted by a more “conservative” and parochial sentiment—that of a couple who found it morally and socially appropriate to raise their child as wedded parents. “*Interracial* relationships, then,” writes Leak, “do not necessarily denote progressive politics, and neither, for that matter, do *intraracial* relationships.”⁵⁰ This hybrid dimension of their personalities—resisting institutional racism in order to conserve the institution of marriage—is one of the many aspects of the Lovings’ relationship that makes their story so compelling, for not only does the story of their union challenge and bring into question racial categories, it challenges and brings into question categories of class, cultural, and political affiliations as well.

But while their desire to marry was likely spurred by custom more than by social ideology, this does not mean, however, that Richard and Mildred lived in a cultural vacuum devoid of socio-racial influences. Indeed, it was quite the opposite, as the fact that residents referred to Central Point as “the passing capital of America” illustrates. *Passing*—the act whereby those whose “phenotype or physical appearance” permit them to “transgress the boundaries of race”⁵¹

⁴⁹ “The Crime of Being Married,” p. 91.

⁵⁰ Jeffrey B. Leak (ed.), *Rac[e]ing to the Right: Selected Essays of George S. Schuyler*, Knoxville, TN: The University of Tennessee Press, 2001, p. xxvi.

and thereby enjoy the privileges associated with whiteness—is, by definition, a socio-racial concept. In a community where “passing” was part of its unofficial motto, Richard and Mildred would have been monumentally aware of the many legal barricades erected to prohibit public and private racial integration. To classify their choice to leave the state in order to marry as little more than an innocent whim, therefore, seems to diminish their intelligence, their strength, their sacrifice, and the significance of their contribution to society.

Richard and Mildred lived among many who would have agreed with one prominent Carolina County leader who told Simeon Booker: “We have a community of our own. Our mores apply only here. We’ve done more integrating than in other part of the U.S.” Black and white couples who loved and lived together in Central Point were not, then, cultural outcasts. “Richard isn’t the first white person in our family,” said Mildred’s cousin, William Jeter, “and he won’t be the last.”⁵² He was, however, the first white person to *marry* into the family and set up residence in Virginia. And if state officials could have it their way, he would also be the last.

“WHO IS THIS WOMAN YOU’RE SLEEPING WITH?”

After Richard and Mildred wed on June 2, 1958 and enjoyed a short honeymoon in the District of Columbia, they returned to Central Point to live with Mildred’s parents.⁵³ Richard’s family may have had some initial reservations about the union. “At first I didn’t feel too good

⁵¹ Marable, p. 26.

⁵² Booker, p. 79.

⁵³ Pratt, pp. 229-244.

about it,” his mother said in 1966. “Then I made up my mind if Richard wanted to, it was fine.” After all, the newlyweds’ parents had been friends and neighbors since the two were kids; and, a licensed midwife, Richard’s mother would eventually deliver all three of Mildred’s children.⁵⁴ So the marriage that “stirred little fuss” in the community seems to have stirred little fuss with Richard’s and Mildred’s families as well.⁵⁵

Five weeks later on July 11, 1958, the couple’s short-lived happiness was ruptured when during the earliest hours of morning the Caroline County sheriff and two other officers stormed into the Lovings’ bedroom. Behind flashlights stinging their eyes, a threatening voice demanded an answer: “Who is this woman you’re sleeping with?” “I’m his *wife*,” said Mrs. Loving.⁵⁶ Apparently “acting on an anonymous tip,” the officers knew just where and when to find the law-breaking couple.⁵⁷ Richard pointed to his and Mildred’s DC marriage certificate hung proudly on their bedroom wall. “That’s no good here,” said Sheriff R. Garnett Brooks.⁵⁸ The Lovings were immediately arrested and hauled away to the county jail in Bowling Green. At the Lovings’ hearing on January 6, 1959, Caroline County Circuit Court Judge Leon M. Bazile sentenced the Lovings to one year in jail, suspended on the condition that Richard and Mildred leave the state, not to return for twenty-five years. The Lovings fled to Washington, DC, where

⁵⁴ “The Crime of Being Married,” p. 87.

⁵⁵ *Ibid.*, 85.

⁵⁶ Telephone interview with Leslie Houser, 10 March 2000.

⁵⁷ Pratt, pp. 229-244. In a personal interview with Mildred Loving (19-20 Feb. 2000), Mrs. Loving informed me that the answer to how their marriage was discovered remained a mystery to her and Richard. In a personal interview with the Lovings’ grandson, Donald Loving, Jr. (20 Feb. 2000), when queried about Richard’s and Mildred’s arrest he replied: “There was somebody down in Sparta who didn’t like my grandparents. I think there were other interracial relationships around here, but nobody told on them.”

⁵⁸ Pratt, pp. 229-244.

in 1963 the couple sent a plea for help to U.S. Attorney General Robert F. Kennedy, who helped the Lovings get in touch with the American Civil Liberties Union. When Washington attorney Bernard S. Cohen responded to their request, the Lovings launched a fight for freedom that in 1967 ascended to the final arbiter, the U.S. Supreme Court.

If the couple had been aware in 1958 that it was illegal for them to marry in Virginia, it does seem unlikely that they also knew everything about the state's evasion provision, which prohibited marrying across state lines to evade Virginia's antimiscegenation laws, and which depended "upon cohabitation within the state to establish the state contact necessary for prosecution."⁵⁹ Perhaps Richard and Mildred thought that by marrying in the District of Columbia, where "interracial" marriage was permitted, they had found an easy way around Virginia's legal restrictions, and that once married no law in Virginia nor anywhere else could break their union. In fact, because the arrest had to Richard seemed "really drastic," as years later his friend and co-worker Jim Novotny would recall, Novotny wondered if Richard's "family had somehow irritated the sheriff," and speculated that Richard "might have thought that a white man marrying a black woman would have been overlooked."⁶⁰

Regardless of what *they* knew, however, it seems apparent that the time and place of the Lovings' arrest had been carefully orchestrated by Caroline County authorities, for in order for the arrest to be valid, "cohabitation" had to be confirmed. As law professor Walter Wadlington

⁵⁹ Walter Wadlington, "The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective," *Virginia Law Review*, v. 52, 1966, pp. 1189-1223.

⁶⁰ Telephone interview with Jim Novotny, 7 July 2000. Regarding the Lovings' arrest, Novotny, who worked with Richard for about a year and a half in the early 1970s, stressed that it "just had to be that he [Richard] ticked somebody off." In a personal interview with *Ebony* magazine's Washington Bureau Chief Simeon Booker (4 Nov. 2003), who was a reporter for *Ebony* when he interviewed the Lovings at their home in 1967 (see above), Mr. Booker also speculated that Richard may have had previous run-ins with law-enforcement officials who thereafter

wrote about the case in 1966, “it was their cohabitation *as man and wife* which was said to be the gravamen of the Lovings’ offence.” Thus “the Virginia miscegenation provisions are designed to punish the act of interracial marriage itself and—where necessary to establish sufficient state contact—interracial marital cohabitation, rather than fornication or illicit cohabitation in general.⁶¹ Indeed interracial “fornication” could hardly be prosecuted, for in Virginia in 1958, such had been standard practice dating back nearly 340 years.

Caroline County was created in 1728, but, of course, the area had prior occupants. According to *A History of Caroline County, Virginia*, when “the English settled at Jamestown in 1607 seven Indian Tribes held land in territory that is now Caroline County.”⁶² Those tribes “who lived at least in part of Caroline did not give the area to be the country of a large Indian population.” Estimates placed “the total number of inhabitants in the area to become the county” at “under two thousand in 1607,” most of whom were “ruled by the great chief Powhatan,”⁶³ and which included the Rappahannocks, Mildred Loving’s ancestors.

The first “white man to reach the territory that became Caroline County”⁶⁴ was Captain John Smith, who, in 1607, “was a prisoner of the [Youngtamund] Indians,”⁶⁵ Powhatan’s peoples. Pocahontas (or Matoaka), the daughter of Powhatan, who, in an act staged to demonstrate the chief’s power, threw herself on Smith to save him as “warriors prepared to

kept him under watchful eye.

⁶¹ Wadlington, p. 1221.

⁶² T.E. Campbell, *A History of Caroline County, Virginia*, Richmond: The Dietz Press, 1954, p. 3.

⁶³ *Ibid.*, p. 4.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, p. 6.

deliver the death blows,”⁶⁶ became thereafter “a kind of ambassador from her father to the struggling Jamestown Colony.”⁶⁷ In 1613, seventeen-year-old Pocahontas and twenty-nine-year-old Englishman John Rolfe met and “fell in love.”⁶⁸ Their wedding, on April 5, 1614, has been characterized by Gary B. Nash as “the first recorded interracial union in North American history.”⁶⁹ In fact, writes Nash, in “the early seventeenth century, negative ideas about “miscegenation”—the marriage of partners from different racial stocks—hardly existed.” So while “interracial marriages were rare between white Virginians and Indians, the notion that they might be distasteful was a late development.”⁷⁰

Legal prohibitions in the American colonies against interracial mixing began in the mid-seventeenth century, because colonists, write Nash and Richard Weiss “had come to plant white civilization as well as money crops, and interracial sex, given the strong prejudice that had developed against the Negro, was seen as a danger to individual morality, family life, and cultural integrity.”⁷¹ However, when we consider the professed dangers that whites attributed to interracial sexuality, and more closely “examine how whites have actually responded to interracial sex,” as Robinson observes, “we find something very different from social

⁶⁶ Gary B. Nash, *Forbidden Love: The Secret History of Mixed-Race America*, New York: Henry Holt and Company, 1999, p. 5.

⁶⁷ *Ibid.*, p. 4.

⁶⁸ *Ibid.*, p. 5.

⁶⁹ *Ibid.*, p. 3.

⁷⁰ *Ibid.*, pp. 8-9.

⁷¹ Gary B. Nash and Richard Weiss, *The Great Fear: Race in the Mind of America*, New York: Holt, Rinehart and Winston, 1970, p. 19.

repugnance.”⁷² According to John Hope Franklin and Alfred A. Moss, Jr.,

The extensive miscegenation that went on was largely the result of people living and working together at common tasks and the subjection of slave women to the whims and desires of white men. Some race mixture resulted from the association of black men and white women, but this was only a small percent of the total. Despite all the laws against the intermingling of the races, the practice continued, and its persistence is another example of the refusal of the members of the dominant group to abide by the laws that they themselves enacted.⁷³

Moreover, while English settlers “erected laws to enforce the sexual ideas they had embraced” prior to American colonization, “they viewed carnal desire as good as long as it encouraged reproduction and was confined to the institution of marriage.”⁷⁴ It is thus important to recognize that when the Virginia colonial assembly passed in 1662 its first prohibition against interracial copulation, which required “children born of interracial sexual liaisons to follow the [slave or free] conditions of their mothers,”⁷⁵ crucial ideologically socio-racial and materially racio-economic class and cultural categories were established that would for centuries thereafter leave an indelible mark on human relationships in America. For the law was passed not primarily because of racio-mythological fears such as, as Winthrop Jordan observes, because “the English considered blacks ‘savagely’ sexual,” or imagined “black women possessed ‘hot and lascivious’

⁷² Robinson, p. 1.

⁷³ John Hope Franklin and Alfred A. Moss, Jr., *From Slavery to Freedom: A History of African Americans*, Forth Edition, New York: Alfred A. Knopf, 2000, pp. 157-158.

⁷⁴ Robinson, p. 2.

temperaments that they directed primarily toward white men.”⁷⁶ Instead, the central issue of the law related to the status of “biracial” children, and, Wallenstein argues,

[had] to do with whether the mother was white or black as much as whether she was free or slave. Most black women were slaves, so most children of black women would be slaves, although nonslave, nonwhite mothers would still bear nonslave children. If the mother was white, the answer [to the question of the child’s racial identity] depended on the racial identity of the father.

The legislature had, as its primary object, seeing that white men retained exclusive sexual access to scarce white women. It also had, as a significant secondary object, propelling the mixed-race children of a white mother out of the privileged white category and into a [“mulatto”] racial category that carried fewer rights, and marrying out of the group born free and into long-term servitude to a white person.⁷⁷

The law also meant that, because “most interracial sexual relations involved intercourse between white masters and slave women,” the “vast majority of biracial children would remain slaves.” Any confusion, then, that may have existed concerning “the social stations” of biracial children before 1662 was eliminated by the statute. Moreover, white men “could now be certain that their sexual behavior across the color line would not threaten the institution of slavery.”⁷⁸

We can see, then, upon examination of how whites actually participated in and responded to interracial sexual relationships, that the first American statutes regulating racio-sexual

⁷⁵ Ibid., p. 3.

⁷⁶ Ibid., p. 2.

⁷⁷ Wallenstein, p. 17.

integration were carefully designed to further clarify and support white racio-sexual and racio-social supremacy, which guaranteed white racio-economic supremacy. The defining structure of such statutes also supports the words of Preston Valien who argued in 1958 that the “interracial sex” argument mounted by white segregationists in opposition to racially integrated schools in the South masked the more “real” material and economic concerns that fed their racialized fears.

“THE PURITY OF RACIAL BLOOD”

Human sexuality was the site at which economic, political, and social advantages converged. Miscegenation laws were consciously designed to regulate those advantages which could be converted into material assets, and served to designate in racio-legal terms those who could or could not have access to such advantages. Consequently, this “policing of sexual boundaries,” writes Matthew Frye Jacobson, “is precisely what keeps a racial group a racial group.”⁷⁹ Moreover, racial groups were typically but inconsistently identified by the measure of supposedly inheritable blood. In Eva Saks’s words, antimiscegenation laws, which “created an autonomous legal regime of ‘blood,’” the fluid through which “race” was imagined to inheritably flow, used “the metaphor of blood to signify race.”⁸⁰ Saks writes into the discourse of interracial sexuality a pragmatically direct narrative: “Miscegenation rhetoric attempted to stabilize property in race by investing white blood with value and arresting its circulation in the body

⁷⁸ Robinson, p. 3.

⁷⁹ Matthew Frye Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race*, Cambridge, MA: Harvard UP, 1998, p. 3.

⁸⁰ Eva Saks, “Representing Miscegenation Law,” *Raritan* 8.2 (fall 1988): 39-69, in Werner Sollors (ed.), *Interracialism: Black-White Intermarriage in American History, Literature, and Law*, Oxford: Oxford UP, 2000, p.

politic.”⁸¹

The idea that blood was the biological source of lineal kinship can be traced back to Aristotle, whom, according to Elise Lemire, wrote that “the essence of life,” referring to that which today we know is the male reproductive cell spermatozoa, “is made from the purest part of the blood.” Up until the seventeenth century, when the invention of the microscope made it possible for the human eye to see capillaries, “the body was not envisioned as a composite of separate systems, as it is today.” Children were thus thought of as the biological product of their parents’ blood, and semen as blood’s “foam.” After the discovery of the egg and sperm cell in the seventeenth century, those “interested in creating a science of race generated complex equations based on this idea that race is an amount of blood inherited through lineal kinship and thus linked directly to reproduction.”⁸² It became widely accepted that “reproduction was the means by which race was made,” that “each parent,” writes Lemire, “contributed his or her race through the act of procreation.”⁸³ When in 1705 Virginia legislators chose ancestry as the central criterion by which race was legally defined, the idea that race was transmitted via sexual reproduction was joined with the hegemonic supremacy of blood to become the most popular and enduring expression of biological lineal kinship. This piece of legislation, writes Joshua D. Rothman, “was designed to address the problem of free individuals with at least one African ancestor but a majority of European ancestry by codifying at what point, if at all, African

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⁸¹ Ibid., p. 68.

⁸² Elise Lemire, “*Miscegenation*”—*Making Race in America*, Philadelphia: University of Pennsylvania Press, 2002, p. 36.

⁸³ Ibid., p. 38.

ancestry ceased mattering enough to consign such people to inferior status.”⁸⁴ Because laws based on widely varying physical characteristics such as skin pigmentation or hair texture would have made racial labeling a project subject to individual perception and thus impossible criteria for establishing universally accepted racial signifiers, phenotypic difference was not the legal standard by which race was defined. In other words, laws based principally upon physical appearance, writes Rothman,

were bound to yield wrangling over who looked like what to whom. The legislature’s job with respect to race in the early eighteenth century was not to bring subjectivity into the courts but to bring order out of the potential chaos wrought by intermixture and to find what legislators believed to be a reliable, simple, and objective legal mechanism for distinguishing black from white. Ancestry may have been deceptive in its apparent simplicity, but it was laughably easy compared with the prospects of fixing appearance in law.⁸⁵

The colonial color line was thus expressed in mathematically authoritative terms: one-eighth African “blood” was the fraction whereby the offspring of African and European ancestors were racially segregated as “black,” even when the offspring’s skin color was visibly “white.”⁸⁶

In 1743, thirty-eight years after the state manufactured its first blood-specific enumeration

⁸⁴ Joshua D. Rothman, *Notorious in the Neighborhood: Sex and Families across the Color Line in Virginia, 1787-1861*, Chapel Hill, NC: The University of North Carolina Press, 2003, p. 207.

⁸⁵ *Ibid.* pp. 207-208.

⁸⁶ *Ibid.*, p. 208. Rothman argues that marking the color line at one-half “would have made a vast number of slaves legally white and thus challenged the developing racial rationale for slavery.” It would also have classified as “white” many whose African ancestry was visibly evident. “Conversely, using one-sixteenth (or less) as a guideline would have proved relatively useless at the time, because in 1705 few Europeans or Africans could have been in Virginia for more than four generations.”

of “race,” Thomas Jefferson was born west of Caroline in Albemarle County, Virginia. While serving as Virginia’s governor (1779-1781), and prior to having an “interracial” sexual relationship with Sally Hemings, the enslaved half sister of his wife Martha who died in 1782, Jefferson began writing his *Notes on the State of Virginia (Notes)*, his only full-length book. In 1787, when Jefferson approved the official release of *Notes*—the same year when at the Federal Constitutional Convention in Philadelphia northern and southern delegates defined enslaved African Americans as three-fifths persons, and when Hemings arrived in Paris where Jefferson was serving as Ambassador to France—many antislavery reformers were insisting, “as the Book of Genesis held,” that humankind descended from a common origin “and that all human variation arose from climate, upbringing, or external circumstances.”⁸⁷ Indeed, this monotheistic belief in lineal ancestral descent, heredity, and the notion of “blood’s life-sustaining role were so powerful that the Christian faith was built on the idea that a savior redeemed the world by shedding his blood” not for the few, but “for all.”⁸⁸ Jefferson’s interpretation of race and blood was not so egalitarian. It was his belief “that the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowment both of body and mind,”⁸⁹ and that this “unfortunate difference of colour, and perhaps of faculty, is a powerful obstacle to the emancipation of these [black] people.”⁹⁰ Though Jefferson thought that racial intermixture with whites resulted in the “improvement of the blacks in body and mind,” which, he argued, “proved that their inferiority is not the effect merely of their condition of their

⁸⁷ Nash, p. 71.

⁸⁸ Lemire, p. 38.

⁸⁹ Thomas Jefferson, *Notes on the State of Virginia* (1785), New York: Penguin Books, 1999, p. 150.

life,”⁹¹ even this imagined evolutionary racial ascent via intermixture would not merit racial-social integration. “Deep rooted prejudices entertained by the whites;” wrote Jefferson,

ten thousand recollections, by the blacks, or the injuries they have sustained; new provocations; the real distinctions which nature had made; and many other had, as circumstances, will divide us into parties, and produce convulsions which will probably never end but in the extermination of the one or the other race.⁹²

Because of these perceived inherent biological differences and learned animosities, if and when freed from slavery, African Americans were to be colonized, “removed beyond the reach of mixture.”⁹³ As America was shaping its national identity, Jefferson persuaded himself and others that blacks were fundamentally unfit for freedom among whites. By introducing into the equation of blood and race the factor of *nation*, Jefferson helped ensure that racial disparity would remain a distinctly American feature conditioned by the inheritance of blood.

On September 22, 1862, five days after the Union army’s victory at Antietam and seventeen months into the Civil War, President Abraham Lincoln issued a preliminary proclamation, which declared that “all persons held as slaves within any State, or designated part of a State” still in rebellion on January 1, 1863, “shall be then, thenceforward and forever free.”⁹⁴ In the year before the election of 1864, which returned Lincoln to the White House to begin his

⁹⁰ Ibid., p. 151.

⁹¹ Ibid., p. 148.

⁹² Ibid., p. 147.

⁹³ Ibid., p. 151.

⁹⁴ Franklin and Moss, p. 231.

second term, some Northern publicists sympathetic to the South and who hoped to thwart the president's bid for reelection characterized the Emancipation Proclamation as evidence that the Civil War had become a Republican crusade to establish "compulsory intermarriage of white and black."⁹⁵ Distributed by Democrats in 1863 and dripping with sarcasm, a "Black Republican Prayer" invoked the

Spirit of amalgamation [to] shine forth in all its splendor and glory, that we may become a regenerated nation of half-breeds and mongrels, and the distinction of color be forever consigned to oblivion, and that we may live in bonds of fraternal love, union and equality with the Almighty Nigger, henceforward, now and forever. Amen.⁹⁶

According to the professed abolitionist author of a pamphlet published that year, the word *amalgamation* used in reference to the production of so-called "half-breeds and mongrels" was, however, a "poor word," because it more accurately referred to the "union of metals with quicksilver."⁹⁷ Thus, to express the idea of the union of the white and black races, a more scholarly appealing word was coined by the pamphleteer. From the Latin *miscere*, to mix, and *genus*, race, the author gave birth to *miscegenation*.

⁹⁵ Sidney Kaplan, "The Miscegenation Issue in the Election of 1864," in Werner Sollors (ed.), *Interracialism: Black-White Intermarriage in American History, Literature, and Law*, Oxford and New York: Oxford UP, 2000, p. 220.

⁹⁶ *Ibid.*, 221.

⁹⁷ David Goodman Croly, *Miscegenation: The Theory of the Blending of the Races, Applied to the American White Man, and Negro* (1864), Unionville, NY: Royal Fireworks Printing, 1995. Ironically, the editors of this Royal Firework reprinting of *Miscegenation*, who did not credit George Wakeman as its coauthor, believed that Goodman produced the pamphlet "to support the re-election bid of Abraham Lincoln," and to plea "for tolerance of our fellow human beings" (back cover).

The tract, *Miscegenation: The Theory of the Blending of the Races, Applied to the American White Man, and Negro*, which asserted that “miscegenetic or mixed races are much superior, mentally, physically, and morally, to those pure or unmixed,”⁹⁸ was not, however, written by an abolitionist at all; it was instead an elaborate hoax conceived by journalists David Goodman Croly and George Wakeman, staff members of a violently anti-abolitionist newspaper, the *New York World*, in order to aggravate the race issue in the 1864 presidential campaign. Though the pamphlet did not reverse the Republican Party’s momentum, miscegenation rhetoric had taken root in the American vernacular. Thus does the adoption of the word “miscegenation,” writes Leslie M. Harris, “into the twentieth century in the United States embody the triumph of racist attitudes toward interracial sex.”⁹⁹

Not long after the turn of the century, in upholding part of a two-year-old statute that prohibited integrated education, the Kentucky Supreme Court spoke in 1906 of such attitudes toward interracial sex as if nature had imbued humankind with “an antipathy to other races” to ensure “the purity of racial blood.” According to the justices, that “which some call race prejudice . . . is nature’s guard to prevent amalgamation of the races.”¹⁰⁰ Therefore, according to the court’s rhetoric, because interracial sexuality constituted racial impurity, racism is nature’s racial-purity protector. Racism, declared the law, is biologically—*scientifically*—natural.

⁹⁸ *Ibid.*, p. 7.

⁹⁹ Leslie M. Harris, “From Abolitionist Amalgamators to ‘Rulers of the Five Points’: The Discourse of Interracial Sex and Reform in Antebellum New York City,” in Martha Hodes (ed.), *Sex, Love, Race: Crossing Boundaries in North American History*, New York: New York UP, 1999, p. 208.

¹⁰⁰ A. Leon Higginbotham and Barbara K. Kopytoff, “Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia,” in Werner Sollors (ed.), *Interracialism: Black-White Intermarriage in American History, Literature, and Law*, Oxford: Oxford UP, 2000, 134.

One decade later, in the year after the release of David Wark Griffith's violently racist film "The Birth of a Nation," Madison Grant's *The Passing of the Great Race or the Racial Basis of European History* was published. Many black men in America, wrote the Yale graduate and Columbia law degree recipient, "have varying amounts of Nordic blood in them, which has in some respects modified their physical structure without transforming them in any way into white men. This miscegenation was, of course, a frightful disgrace to the dominant race." Though his work was accepted by many as legitimately scientific, Grant's race theories were instead grounded in legal precedent. His claim that the infusion of "Negro blood" had negligible effect on the purity of the "dominant" (Nordic) race, because "it was confined to white men crossing with Negro women and did not involve the reverse process, which would, of course, have resulted in the infusion of Negro blood into the American stock,"¹⁰¹ was an opinion influenced not by scientific formulae, but by ancient colonial statutes that privileged European-American men's sexual access to African-American women, and which barred African-American men's sexual access to European-American women. Grant was, therefore, particularly alarmed about laws permitting interracial marriage. "When it becomes thoroughly understood that the children of mixed marriages between contrasted races belong to the lower type," he wrote, "the importance of transmitting in unimpaired purity the blood inheritance of ages will be appreciated at its full value and to bring half-breeds into the world will be regarded as a social and racial crime of the first magnitude. The laws against miscegenation must be greatly extended if the

¹⁰¹ Madison Grant, *The Passing of the Great Race or the Racial Basis of European History*, New York: Charles Scribner's Sons, 1919, p. 82.

higher races are to be maintained.”¹⁰²

Grant’s racial prophesy was a notion based on the ideology of Charles Darwin’s cousin, Francis Galton, who coined the word “eugenics” (from the Greek for “well-born”), as well as, writes Thomas Gossett, “the popular catch-phrase ‘nature and nurture,’ which precipitated so much controversy over the relative importance of heredity and environment.”¹⁰³ In *Hereditary Genius* (1869), Galton theorized that “there are not merely grades of men within each race, but also grades of races. ‘The average intellectual standard of the negro race,’” he declared, “‘is some two grades below our own.’” He believed that the “average of Negro ability . . . was very low and Galton was convinced it would remain low.” Asserting his belief in “the existence of grand human animals, of natures pre-eminently noble, of individuals born to be kings of men,”¹⁰⁴ Galton drew on theories of Aryan superiority outlined in *The Inequality of Human Races* (1853), by the French race philosopher Count Arthur de Gobineau, who, writes Eva Saks, “transposed the idea of ‘race’—which had entered the English language . . . to denote differences *between* species in anthropology and classificatory biology—from a linguistic to a physical group, and added the idea of a pure Aryan race. For the first time, “race” denoted a physical group *within* the human species. Furthermore, individual identity and subjectivity were constituted by fractions of blood.”¹⁰⁵ Thus did theories “of heredity begin to appear in miscegenation jurisprudence in Reconstruction,” continues Saks,

¹⁰² Ibid., p. 60.

¹⁰³ Thomas F. Gossett, *Race: The History of an Idea in America*, New York: Oxford, UP, 1997, p. 155.

¹⁰⁴ Ibid., p. 156.

underwriting the modern institutionalization of blood and race. Social Darwinism, employing biology's survival mechanism to explain and justify social conditions, offered a philosophy of human hierarchy compatible with the general biologization that supported miscegenation laws. From the turn of the twentieth century, xenophobia and racism combined to contribute to the currency of eugenics.¹⁰⁶

Though by the mid-1920s eugenics had begun to lose some of that currency as a scientific discipline, it was precisely during this period when Madison Grant's ideology cultivated its most loyal adherents, a time when the rhetoric of blood, race, and nation together further clarified the Jeffersonian definition of what it meant to be American.

Who was worthy of the title in the early 1920? Jacobson writes that for immigrants who arrived between 1840 and 1924, becoming American was "decisively stamped by their entering an arena where race was the prevailing idiom for discussing citizenship and the relative merits of a given people."¹⁰⁷ He argues that the most significant revision of migration policy, "the Johnson-Reed Act of 1924, was founded upon a racial logic borrowed from biology and eugenics." The 1924 act established a racial quota system proclaiming that North and West Europeans "were of 'higher intelligence' and hence provided 'the best material for American citizenship.'"¹⁰⁸ Consequently, Jacobson writes, "European immigrants' experience was decisively shaped by their entering an arena where European—that is to say, whiteness—was among the most important possessions one could lay claim to. It was their *whiteness* . . . that

¹⁰⁵ Saks, p. 65.

¹⁰⁶ Ibid., p. 66.

¹⁰⁷ Jacobson, p. 9.

opened the Golden Door.”¹⁰⁹ Not surprisingly, the regulatory “formula that was finally written into the Johnson Act,” Jacobson continues, “originally emerged in a Report of the Eugenics Committee of the United States Committee of Selective Immigration, . . . chaired by none other than Madison Grant.”¹¹⁰

“AMALGAMATION IS INEVITABLE”

The year 1924 was indeed a banner one for Grant and other American eugenicists, who, writes Paul A. Lombardo, “were successful in promoting restrictive laws at both the state and federal levels.” Not only had the United States Congress passed the Johnson-Reed Act, but while “congress endorsed the eugenic motive for curbing immigration, the Virginia General assembly followed similar arguments in passing . . . the Racial Integrity Act of 1924, [which] forbade miscegenation on the grounds that racial mixing was scientifically unsound and would ‘pollute’ America with mixed-blood offspring.”¹¹¹

Two years prior to the Act’s passage, John Powell, a noted pianist and composer, along with fellow eugenicists Dr. Water Ashby Plecker and Earnest Cox, founded the Anglo-Saxon Clubs of America, whose goal was “the preservation and maintenance of Anglo-Saxon ideals and civilization in America.” Powell, who was born in Richmond, Virginia in 1882, commented in professional writing and lectures “on black-white miscegenation” and predicted that in America

¹⁰⁸ Ibid., p. 83.

¹⁰⁹ Ibid., p. 8.

¹¹⁰ Ibid., p. 83.

the “‘contamination’ of the races would lead to eventual degeneration of the whole Caucasian race and thereby to the annihilation of white civilization.”¹¹² After close consultation with Madison Grant, Powell presented to the General Assembly of Virginia a signed petition calling for a bill to preserve “racial integrity.” David J. Smith finds that on February 18, 1924, the day the bill was to be considered, the *Richmond Times-Dispatch* published an editorial endorsing it, with a warning:

Unless stringent measures are adopted to keep the races separate in the matter of marriage, amalgamation is inevitable. It will, perhaps, be a long process, but it will be consummated. One race will absorb the other. And history shows the more highly developed strain always is the one to go. America is headed toward mongrelism, only a realization of the seriousness of that fact, and resultant measures to retain racial integrity can save the country from becoming negroid in population.¹¹³

Powell’s partner Walter Plecker was born in 1861, in Augusta County, Virginia. In 1912, Plecker was appointed Richmond’s registrar of the state’s primary guardian of “racial purity,” the Bureau of Vital Statistics. From that year onward, “all babies born in Virginia received birth certificates from the bureau—with the racial designations the midwives sent in.”¹¹⁴ While Cox,

¹¹¹ Paul A Lombardo, “Miscegenation, Eugenics, and Racism: Historical Footnotes to *Loving v. Virginia*,” *University of California, Davis Law Review*, 21 (1988), p. 423.

¹¹² J. David Smith, *The Eugenic Assault on America: Scenes in Red, White, and Black*, Fairfax, Virginia: George Mason UP, 1993, p. 17.

¹¹³ *Ibid.*

¹¹⁴ Helen C. Rountree, *Pocahontas’s People: The Powhatan Indians of Virginia Through Four Centuries*, Oklahoma: University of Oklahoma Press, 1944, p. 291.

Plecker, and Powell each played his part in hatching the Racial Integrity Act, it was Dr. Plecker who most obsessed over Virginia's racial definitions. Reclassifying all Native American Virginians as "colored," Plecker sought to establish only two racial categories in Virginia, writes Helen C. Rountree, "Caucasian and non-Caucasian. And these, he felt, could be and should be strictly segregated in all areas of life."¹¹⁵ The Act carefully recalculated the racial formula established by Virginia legislators who had in 1705 chosen ancestry as the central criterion by which race was legally defined, and who had decreed that one-eighth African blood would be the fraction whereby the offspring of African and European ancestors would be racially segregated as "black." While the Act retained ancestry and human sexuality as the principal racial conduits, "blood," the determining racial liquid which flowed via those conduits from each generation to the next, was assigned a new numerical fraction. The Racial Integrity Act thus redefined the term "white person," writes Rountree,

with the idea that everyone in the state could then be classified once and for all. "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 white persons." That exception was made for a peculiarly Virginian reason: there were still prominent whites in the state who traced their ancestry back to Pocahontas, who was not Caucasian.¹¹⁶

¹¹⁵ Ibid., p. 220.

¹¹⁶ Ibid., p. 221.

The law further strengthened the doctor's influence by making it a felony to falsify one's race on a registration or birth certificate, and would give county clerks the authority to withhold the granting of a marriage license "until satisfactory proof is produced that both applicants are 'white persons' as provided by law."¹¹⁷ In a pamphlet titled "Eugenics in Relation to the New Family," Plecker "exhorted all adults to marry within their own race. Racial mixtures, he proclaimed, made for degraded stock which endangered society; that was why Virginia had 'wisely' passed a law against whites marrying anyone 'containing a trace of any other than white blood.'"¹¹⁸

The "Act to Preserve Racial Integrity" signed into law by Virginia's governor on March 20, 1924 declared: "It shall hereafter be unlawful for any white person in this state to marry any save a white person."¹¹⁹ But in just a few short months after its passage, a significant challenge to the Act "began when Atha Sorrells, whose grandmother's birth records designated her as a 'free colored person,' attempted to marry" a white man. "The clerk rejected the couple's application for a marriage license,"¹²⁰ writes Lombardo, because it would have violated the new statute. When they filed a protest suit, Judge Henry Holt, who presided over the hearing, "ruled in favor of Sorrells and ordered the clerk to issue a license." Alarmed by Holt's ruling, John Powell and Walter Plecker "contacted the state attorney general in an attempt to overturn the precedent they feared as a result of the Sorrells case." They were advised, however, "that appeal was dangerous

¹¹⁷ Ivan McDougle, "The Virginia 'Act to Preserve Racial Integrity' of 1924," *Mongrel Virginians: The Win Tribe*, Baltimore: Williams & Watkins, 1926, pp. 203-205, in Werner Sollors (ed.) *Interracialism: Black-White Intermarriage in American History, Literature, and Law*, Oxford: Oxford UP, 2000, p. 24.

¹¹⁸ Rountree, p. 223.

¹¹⁹ McDougle, p. 24.

since a loss at the appellate level would set a binding precedent throughout the state.”¹²¹ This note of practical advice came not from the state attorney general, however, but from the Assistant Attorney General, Leon M. Bazile, who, addressing “My Dear Mr. Powell,” on November 26, 1924 deferentially wrote:

If you and Dr. Plecker wish the case to go to the Court of Appeals, this office will take it there, but the thought has occurred to me that inasmuch as the law seems to be working all right outside of Judge Holt’s circuit, we would run the risk of losing a great deal on the chance of reversing him in one case.¹²²

In other words, Bazile advised Powell to resist wrangling over that which appeared to be an isolated challenge to the new law, for it was possible that the Court of Appeals would support Holt’s ruling and thus put the Act’s legitimacy in jeopardy state wide. Though the Sorrells case could indeed create, according to Powell, a “breach in the dike,”²⁷ Bazile recognized the necessity of pursuing a less aggressive legal strategy in order to ensure that the Racial Integrity Act would remain intact to prosecute future violators of the law. Moreover, Powell and Plecker had little to concern themselves about, for they had gained an influential ally who would safeguard the state’s newly established racial parameters. It is, therefore, one of the history’s great ironies that thirty-four years later when Bazile—not as the Virginia Assistant Attorney General, but as the Caroline County Trial Court Judge—faced Richard and Mildred Loving for the second time around, his failure to heed his own counsel to Powell in 1924 helped facilitate the Act’s ultimate demise.

¹²⁰ Lombardo, p. 440.

¹²¹ Ibid., p. 442.

On January 22, 1965, Judge Leon M. Bazile denied a motion, filed in Caroline County's trial court by attorneys Bernard Cohen and Philip Hirschkop, to "vacate the judgment and set aside the sentence"¹²³ that Bazile himself had first imposed against Richard and Mildred Loving in 1959. In a court document dated June 11, 1958, Caroline County Justice of the Peace Robert W. Farmer had thus characterized the Lovings' marriage:

Richard Loving (a white person) and in the said County did on the 2nd day of June, 1958, unlawfully and feloniously did go out of this State for the purpose of being married to Mildred Jeter a Negro and with the intention of returning and was married out of State to the said Mildred Jeter, and afterward, returned to and resided in it, cohabiting as man & wife against the peace and dignity of the Commonwealth of Virginia.¹²⁴

The fact that Richard and Mildred Loving had transgressed the antimiscegenation law that Bazile had helped establish must have infuriated the judge, for he expressed with profound moral conviction the reasons why their marriage had usurped not only his but God's sovereign authority. Bazile's often-quoted diatribe at their hearing in 1965 subsequently provided much fodder for the Lovings' defense. Not only did Philip Hirschkop and the NAACP Legal Defense and Educational Fund (LDF) include it in their defense of the Lovings at the U.S. Supreme Court hearing in 1967, but in his opinion in favor of the Lovings even Chief Justice Earl Warren referred to Bazile's infamous declaration:

¹²² Smith, p. 75.

¹²³ *Record No. 6163. In the Supreme Court of Appeals of Virginia at Richmond. Richard Perry Loving and Mildred D. Jeter Loving, Appellants, versus Commonwealth of Virginia, Appellee.* Petition for writ of error, filed 10 Nov. 1965, p. 14.

¹²⁴ *Ibid.*, p. 2.

Almighty God created 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. The awfulness of the offense is shown by the fact . . . [that] 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. 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.”¹²⁵

Law professor Michael Meltsner, who was first assistant counsel to the LDF from 1961 to 1970, and who contributed to the LDF’s *amicus* brief, recalls how “civil rights progress often was made when the most extreme form of racism was expressed.” Bazile’s ridiculous injunction, therefore, helped the defense establish that “the real purpose” of the Racial Integrity Act was “not so much racial purity as white superiority.”¹²⁶ Bazile unknowingly made it easier for to the Court to overthrow that which Peter Wallenstein refers to as the “antimiscegenation regime,” for on June 12, 1967 the ruling in *Loving v. Virginia* finally brought an end to the enforceability of colonial antimiscegenation laws that conflated the ideas of blood, race, and nation, and which at the time of the Lovings’ trial still stood in 16 southern states: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South

¹²⁵ Higginbotham and Kopytoff, p. 133.

¹²⁶ Telephone interview with Michael Meltsner, Matthews Distinguished University Professor of Law at Northeastern University School of Law; and Director of the First Year Lawyering Program at Harvard Law School, 28 November 2003.

Carolina, Tennessee, Texas, Virginia, and West Virginia.¹²⁷

Philip Hirschkop recalled thirty-five years later that when he and Bernard Cohen appealed the Lovings' case in 1965 there were white supremacists inside the court system who hoped to prevent the case from reaching the federal level. There were hopeful whispers that Bazile would back off, for it seemed far too likely that the Warren bench would rule in the Lovings' favor. "But," said Hirschkop, "Bazile just didn't get it."¹²⁸ Had Leon Bazile followed his own advice to his "Dear Mr. Powell" in 1924, "that appeal was dangerous since a loss at the appellate level would set a binding precedent," and kept his own racial obsessions at bay, the history of loving might have taken a decidedly different turn.

"TELL THE COURT I LOVE MY WIFE"

Having considered some of the extraordinary lengths to which politicians, government officials, legislators, judges, prosecutors, law enforcement officers, doctors, legal experts and scholars, to name but a few, have gone to regulate interracial sexual relationships in America, we return now to the question upon which this essay has attempted to direct some light: Why, after the Supreme Court ruling in 1967 brought an end to 300 years of American laws that prohibited racially segregated marriages, is *Loving v. Virginia* an infrequently cited topic in the cannon of civil rights historiography? While there is, of course, no universal answer to a matter this complex, perhaps, as I have suggested, part of the answer lies in the possibility that the issue of

¹²⁷ Wallenstein, pp. 253-254.

¹²⁸ Personal interview with Philip J. Hirschkop at his law offices in Alexandria, Virginia, 27 June 2000.

interracialism remains a barrier which many remain hesitant to cross. Such hesitance, as we have seen, is not merely grounded in some fearful psychological resistance to the threat of racial intermixture, but has been conditioned by material and economic factors that have contributed immeasurably to our American dis-ease about matters that cross racio-cultural, racio-social, racio-economic, and racio-sexual boundaries. Perhaps, then, the question is more about those boundaries, and should thus be reframed: Has our construction of racial boundaries contributed to a scarcity of scholarship about *Loving v. Virginia*, and is this question socially relevant?

Meltsner suggests that one reason why *Loving* is perhaps an infrequent topic in civil rights scholarship is “because by the time this case came up it was kind of anticlimactic.” That is, while “before 1963 and 1964 the Civil Rights movement hung by a thread,”¹²⁹ says Meltsner, by the time the ruling came in *Loving* many of the objectives of the movement, including the Civil Rights Act of 1964 and the Voting Rights Act of 1965, had been achieved. Moreover, as I have noted, when the Supreme Court handed down its decision on *Loving*, the war in Vietnam was in its third year, major antiwar demonstrations were taking place, and race riots occurred in major cities throughout the United States; these matters dominated the public’s attention. And while it was perhaps high on the agenda of some liberal whites, the right to marry across racial line lines was not assigned by some blacks top priority in the fight for civil rights legislation. Indeed, some black nationalists rejected interracial marriage as a threat to their intra-racial solidarity. Meltsner recognizes it as important to stress, however, that most black nationalists did not oppose interracial marriage as a *legal* matter, but as a racio-political matter.[†] As a case in point, Mark D.

¹²⁹ Telephone interview with Michael Meltsner, 28 November 2003.

[†] In a *Jet Magazine* article (29 June, 1967, pp. 18, 24-25), Simeon Booker writes that in response to the U.S.

Naison, who was a white activist with African-American interests at the height of the Civil Rights movement, was involved in a romantic interracial relationship for six years during the 1960s. Similar to Richard Loving's motivation for marrying his childhood sweetheart, when he first met the African-American woman whom would become his partner, Naison was not, he writes, "an activist seeking to defy tradition; I was a young man looking for female companionship."¹³⁰ Naison recalls that when he and "Ruthie" started dating,

almost all of the hostility we experienced came from whites. By the time we broke up six years later, hostility from blacks had become almost as big a problem. This change seemed to have little, if anything, to do with the legislative or constitutional status of interracial marriage. It stemmed from a sea change in the goals and atmosphere in the civil rights movement.¹³¹

The tenor of the times, therefore, affected the amount of attention that the story of *Loving* in 1967 would receive. But as I have argued, gauging only the stream of once-topical currents

Supreme Court decision in favor of the Lovings, Dr. Martin Luther King, Jr. said: "This is the only just, democratic and moral decision (the court) could render. The banning of interracial marriages from the beginning grew out of racism and the doctrine of white supremacy. So this decision was a real attack on racism that has undergirded so much of American society" (24). Student Nonviolent Coordinating Committee officials H. (Rap) Brown and Stokely Carmichael said about the decision: "The prohibiting laws were an example of racism in our society" (25). It must also be noted that while Malcolm X expressed personal and political opposition to interracial marriage, he also recognized "every human being as a human being—neither white, Black, brown or red; and when you are dealing with humanity as a family there's no question of integration or intermarriage. It's just one human being marrying another human being, or one human being living around and with another human being" (*February 1965: The Final Speeches—Malcolm X*. Steve Clark (ed.), New York: Pathfinder, 1992, p. 273).

¹³⁰ Mark D Naison, *White Boy: A Memoir*, Philadelphia: Temple UP, 2002, p. 50.

¹³¹ Electronic mail correspondence from Mark D. Naison, 29 September 2003. Professor Naison writes that he often refers to *Loving v. Virginia* "as a 'benchmark' moment in the history of race in America, along with the Civil Rights Act of 1964, the Voting Rights Act of 1965 and the loosening of immigration restrictions." "Unfortunately," he continues, "I was completely unaware of the [*Loving*] decision at the time that it took place. Not only did I not see references to it in the press or broadcast media, but I never heard it discussed in any of the political groups I was in, or worked closely with, which included Students for a Democratic Society, The Young Lords, [and] the Black Panther Party."

forty-years past will not reveal all of the reasons why *Loving v. Virginia* yet remains relatively obscure today.

The racial boundaries that have been erected around cultural, social, economic, and sexual matters have created racialized intellectual and disciplinary boundaries as well. I have suggested that because the story of *Loving* confuses the hegemony of these long-standing cultural and power hierarchies that perpetuate “race,” it also confuses racio-historiographic parameters. This is not to suggest that “race” as an analytical category cannot be instructive.

In his 1987 study of black British cultures, Paul Gilroy writes that black cultures “have been created from diverse and contradictory elements apprehended through discontinuous histories.” Formed in “a field of force between the poles of under- and overdevelopment, periphery and center,” the resistance character of black cultures reworks and reconstructs white cultural and political hierarchies, challenging and renegotiating the dominant language’s authority over the regulation of group behavior and perceptions of reality. In pursuit of unifying ideologies, black cultures share a common utopic vision: “A vision of a world in which ‘race’ will no longer be a meaningful device for the categorization of human beings, where work will no longer be servitude and law will be dissociated from domination.”¹³²

Gilroy’s study of “race” is useful here, for his analyses of long-standing notions of culture, politics, race, and nation in Great Britain are equally applicable to American institutional conditions. Rejecting the traditional leftist declaration that class struggles are the most meaningful ones for ethnic and minority cultures, Gilroy positions “race” as a more conceptually

¹³² Paul Gilroy, *Three Ain't No Black in the Union Jack: The Cultural Politics of Race and Nation* (1987), Chicago: The University of Chicago Press, 2001, p. 218,

useful category for grouping various and numerous black cultures, “because it refers investigation to the power that collective identities acquire by means of their roots in tradition.” Race, then, is for Gilroy a potential unifier of black themes and traditions. More a verb than a noun, race is a changeable and changing “historically conditioned relation.”¹³³ Focusing on how, like *class*, “‘race’ and racism articulate various forms of action,”¹³⁴ Gilroy’s work provides a corrective to the ethnocentric dimensions of cultural historiographies that may push issues of race and racism outside the margins of Marxist language centered around white working-class identities, experiences, and concerns. Like class, writes Gilroy, “race” for black diasporic cultures is a “political category” which is “subject to the outcomes of struggle.”¹³⁵ It is the shared common history of such struggle from which “racial meanings, solidarity and identities” emerge, and which “provide[s] the basis for action.”¹³⁶ In this context, “race” is an activist category.

Though I have argued that Richard and Mildred Loving were not activists in the conventional sense of the word, their marriage did provide a similarly materially active *inter-racial* “basis for action.” Yet “class” played an equally important role in the Lovings’ struggle, for it is unlikely that law enforcement officers would have burst into the Lovings’ bedroom in the earliest hour of the morning had Richard been a bourgeoisie banker rather than a proletarian bricklayer. Indeed, the inclusion of the provision into the Racial Integrity Act of 1924, which determined that “persons who have one-sixteenth or less of the blood of the American Indian and

¹³³ Ibid., p. 5.

¹³⁴ Ibid., p. 13.

¹³⁵ Ibid., p. 24.

have no other non-Caucasic blood shall be deemed white persons,”¹³⁷ was an exception that responded to issues of “class” more than those of “race,” for there were many prominent “white” Virginians who traced their ancestry back to the *class*-based aristocratic distinction of the historically mythologized and first documented interracial union in America.

Michael Meltsner observes that *Loving* “was an important case, and always will be; but I don’t think that there was the kind of reaction [in 1967] that we would see just this year in affirmative action.”¹³⁸ The issue to which Meltsner refers involved a challenge to the University of Michigan Law School’s policy that considered “race” as an admissions criterion. In its ruling on June 23, 2003, the U.S. Supreme Court upheld the right of universities to consider race in admissions procedures in order to achieve a diverse student body. But unlike the objections voiced by southern whites in opposition to *Brown v. Board* one-half century earlier, none of the challenges to the University of Michigan’s policy expressed the so-called “fear” of interracial sexual intimacy. Does this prove, then, that the Lovings’ fight, which finally overturned all laws regulating interracial heterosexual intimacy, was and is only symbolically significant? Unlike the battle that won equal access to public education, which opened doors to higher occupations and incomes, was the outcome of *Loving v. Virginia* that legalized integrated marriages materially insubstantial?

The answer is: No. Richard and Mildred Loving’s marriage and the obstacles they overcame were not merely incidental gestures subordinate to some of the more material gains of

¹³⁶ Ibid., p. 27.

¹³⁷ Rountree, Helen C., p. 221.

¹³⁸ Telephone interview with Michael Meltsner, 28 November 2003.

the Civil Rights movement. Because the regulation of marriage in America has always addressed the real material privileges that state-recognized marriages confer, the Lovings' union represents the material embodiment of *intra-class/inter-racial* solidarity. The multi-classificatory dimensions of the Lovings' fight for equal rights, therefore, conflate the issues and interests of race and class, thereby challenging institutionalized academic racism that traditionally segregates, for example, the study and teaching of African-American history as if it were a racio-ideological adjunct to the class-based politico-material American experience. Into what historiographic model, I have asked, does *Loving* fit: United States history, African-American history, constitutional history, civil rights history? Like African-American history, it is an essential component of them all.

Examine the agency of Mildred Loving through the lens of, for example, that which academic institutions may traditionally refer to as an "African-American History" perspective. At the height of the Civil Rights movement in 1963, when 200,000 public demonstrators participated in a "March on Washington for Jobs and Freedom," and President John F. Kennedy submitted a new civil rights package to Congress, Mildred grew determined to aggressively challenge a law that defined her and Richard as felons in Virginia. But how could one African-American woman raised in the Virginia countryside even *begin* to combat such overwhelming injustice? Taking out paper and pen, Mildred composed a thoughtful letter wherein she asked the addressee, Attorney General Robert F. Kennedy, "if he thought the [new Civil Rights] bill would help them to return to their home."¹³⁹ It was this one African-American woman's calculated

¹³⁹ "The crime of being married: Caroline woman recalls fight against Virginia law," *Fredricksburg Free Lance-Star*, 1 August 1992, A1,A12.

intervention that became a major contributing factor which forever altered the course of American history.

In her 1997 study of enslaved African-American women who lived and labored on large rice plantations found in antebellum lowcountry South Carolina, Leslie A. Schwalm argues against the notion that enslaved and freed black women were “passive recipients of the liberation of the northern army” during the Civil War, but instead played a vital “role in pushing the Union to accept emancipation as a war goal.”¹⁴⁰ Moreover, the eventual overthrow of slavery “had not defined freedom,”¹⁴¹ for “freedwomen envisioned a different kind of freedom,”¹⁴² challenged “the right of planters and overseers to define their freedom,” and utilized new public strategies “of insubordination and direct confrontation.”¹⁴³ Schwalm writes that an important part of the work of formerly enslaved black women’s definitions of freedom “lay in revealing and transforming the social relations of power authority and domination”¹⁴⁴ that restricted their freedom. Part of those revelations and transformations lay also in the embryonic possibility of reconstituting “familial relationships in ways that made sense to lowcountry African Americans, finally free of white intervention.”¹⁴⁵ On March 2, 1867, “the Reconstruction Act began the

¹⁴⁰ Leslie A Schwalm, *A Hard Fight for We: Women's Transition from Slavery to Freedom in South Carolina*, Champaign, IL: University of Illinois Press, 1997, p. 1.

¹⁴¹ *Ibid.*, p. 154.

¹⁴² *Ibid.*, p. 167.

¹⁴³ *Ibid.*, p. 174.

¹⁴⁴ *Ibid.*, p. 187.

process of establishing the citizenship and civil rights of African Americans in the South.”¹⁴⁶

One hundred years, three months, and ten days later, that long and arduous, not-yet-concluded process of establishing civil rights was readdressed, when on June 12, 1967 the United States Supreme Court ruled in favor of one African-American woman, Mildred J. Loving, whose quest to establish *her* definition of personal freedom helped transform the “social relations of power authority and domination” and reconstituted *her* familial relationships in a way the South had thwarted for more than 300 years.

The date was April 10, 1967 when, following Hirschkop’s oral argument on behalf of their clients, Bernard S. Cohen also addressed the U.S. Supreme Court bench. “It is the right of Richard and Mildred Loving,” said Cohen,

to wake up in the morning, [and] 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 cohabitation.”

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 inherit from them, under intestacy. They have the right to be secure in knowing that if they go to sleep and do not wake in the morning, that one of them, a survivor of them, has the right to Social Security benefits. All of these are denied to them. The enormity of the injustices involved under this statute merely serves as indicia of how the civil liabilities amount to a denial of due process to the individuals involved. As I started to say before, no matter how we articulate this, no matter

¹⁴⁵ Ibid., p. 235.

¹⁴⁶ Ibid., p. 190.

which theory of the due process clause, or which emphasis we attach to it, no one can articulate it better than Richard Loving, when he said to me: “Mr. Cohen, tell the Court I love my wife, and it is just unfair that I can’t live with her in Virginia.” I think this very simple layman has a concept of fundamental fairness, and ordered liberty, that he can articulate as a bricklayer that . . . this Court has set out time and time and time again in its decisions.¹⁴⁷

As Gary Nash observes, in the ten years after the Loving decision “most states repealed or changed all statutes that defined ‘race.’” “Nowhere in the United States, for the first time in 300 years, could a sheriff, county clerk, minister, or judge stand between any woman and any man who wished to spend their lives together as marriage partners.”¹⁴⁸ Moreover, as Bernard Cohen’s argument so clearly demonstrates, the right to inherit property from ones ancestors, and the right to receive the monetary benefits of a departed spouse never constitute simply ideological nor immaterially symbolic gestures.

In her reasoned study in 1997 of the interracial sexual relationship between Sally Hemings and Thomas Jefferson, Annette Gordon-Reed observes how “the union of men and women of different races creates a mingled bloodline that conflicts with the notion that blacks and whites must be kept separate to some degree. The American vision, even today, is of blacks and whites living together in harmony, so long as we don’t live in too much harmony.”¹⁴⁹ If Gordon-Reed’s observation is correct, perhaps Richard and Mildred Loving’s story is too harmonious, and does

¹⁴⁷ Kurland and Casper , p. 971. Those hearing the oral arguments were Chief Justice Earl Warren, and Associate Justices Hugo L. Black, William O. Douglas, Tom C. Clark, John M. Harlan, William J. Brennan, Jr., Potter Stewart, Bryon R. White, and Abe Fortas.

¹⁴⁸ Nash, p. 165.

¹⁴⁹ Annette Gordon-Reed, *Thomas Jefferson and Sally Hemings: An American Controversy* (1997), Charlottesville,

not therefore assimilate well into traditionally segregated racio-historiographical interpretations and narratives.

As stated earlier, if there does exist a silence surrounding *Loving*, it is not due to a lack of the story's resonance with America's legacy of cultural and power hierarchies, the production of knowledge, the boundaries of "whiteness and blackness," and the hegemony of "race."

These resonances alone make *Loving v. Virginia* an important story to consider.