Sexual Racism*: A Legacy of Slavery

I. INTRODUCTION

Why do people feel so strongly about interracial sex and marriage? Why do interracial couples face hatred, bigotry, and discrimination from society? Why is there so much hostility to the mixing of the races? To answer these questions, one need only research the topics of miscegenation, interracial sex, and interracial marriage. This Note will demonstrate that the negative attitudes that people have regarding interracial sex and marriage are a legacy of American slavery. The anti-miscegenation statutes which made interracial sex and marriage illegal gave legitimacy to the idea of White supremacy and racial purity. Even twenty-five years after the anti-miscegenation statutes were struck down as a violation of the Fourteenth Amendment in *Loving v. Virginia*,[1] strong negative attitudes remain throughout society. These attitudes constitute sexual racism, one of the last barriers to a fully integrated society. Sexual racism is "the sexual rejection of the racial minority, the conscious attempt on the part of the majority to prevent interracial cohabitation."[2] This Author believes that the heart of the racial conflict today is the hostility surrounding interracial sex and marriage and that that hostility creates a barrier to achieving racial harmony.

II. THE HISTORY OF ANTI-MISCEGENATION STATUTES

The word miscegenation comes from the Latin words "miscere" which means to mix and "genus" which means race. The term miscegenation was coined in 1864 by the author of a pamphlet called *Miscegenation: The Theory of the Blending of the Races.*[3] Anti-miscegenation laws prohibited interracial sex and marriage with most of the emphasis placed on the purity of the White race (prohibiting Whites from marrying some other racial group).[4] The history of anti-miscegenation statutes dates back over 325 years.[5] Since there was no ban on miscegenation at common law or by statutes in England at the time of the establishment of the American colonies, anti-miscegenation laws originated in this country.[6] Prohibitions against miscegenation date back to the earliest colonial times; the first record of sanctions imposed for interracial sex seems to be in Virginia.

> September 17th 1630. Hugh Davis to be soundly whipped, before an assembly of Negroes and others for abusing himself to the dishonor of God and

---

* This phrase was coined by Charles Stember in his book SEXUAL RACISM: THE EMOTIONAL BARRIER TO AN INTEGRATED SOCIETY ix (1976). I chose Sexual Racism: A Legacy of Slavery as the title of this Note because I believe that sexual racism is a direct result of slavery and the anti-miscegenation statutes which were originally passed to ensure the survival of the slavery system.

1. 388 U.S. 1 (1967).

2. CHARLES HERBERT STEMBER, SEXUAL RACISM: THE EMOTIONAL BARRIER TO AN INTEGRATED SOCIETY ix (1976).

3. Published anonymously in 1864, authorship of the pamphlet has been attributed to David Croly and George Wakeman.

4. Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49 (1964).

5. *Id.*

6. *Id.* at 50.

> shame of Christians by defiling his body lying with a Negro; which fault he is to acknowledge next Sabbath day.[7]

The first anti-miscegenation statute was passed by the Maryland General Assembly in 1661.[8] Similar statutes followed in Virginia in 1691, Massachusetts in 1705, North Carolina in 1715, and Pennsylvania in 1725.[9] The popularity of the statutes continued so that during the nineteenth century thirty-eight states had anti-miscegenation statutes at one time or another.[10]

The statutes varied widely both in terms of the races that were included and how races were defined.[11] All were phrased so that intermarriage between a White person and a member of the other designated groups was prohibited; the statutes generally did not restrict intermarriage between members of races other than Whites.[12]

A. *The Origins of Anti-Miscegenation Laws*

The early miscegenation laws had two justifications. The first concern was with the maintenance of clear racial boundaries in a society that came to be based on Black slavery. Starting in the late seventeenth century, White Virginians devised statutes to discourage racial intermingling and then statutes to racially classify the mixed-race children born when the earlier statutes were ineffective. These first statutes were aimed only at Whites; they alone were charged with the responsibility for maintaining racial purity. The second concern was with involuntary interracial sex that is, rape. This was manifest primarily in early laws against rape which were applied more harshly to Blacks than to Whites. The laws only punished Black men for interracial rape and later anti-rape statutes were reformulated and directed specifically at Black men.[13]

> Anti-miscegenation and rape laws enacted by the slaveholder class were used to keep White women apart from Black men and, at the same time, to permit and even encourage the sexual abuse of Black women by White men.[14]

Thus, anti-miscegenation laws were an American legal innovation used in the colonies to ensure the sexual separation of White women and Black men.[15]

Anti-miscegenation laws served a number of other important purposes in the colonies. For instance, the laws promoted a belief among Whites in their racial superiority. Also, the legal pronouncements in the statutes that labeled interracial sex as a "disgrace" that would result in "spurious issue", reinforced colonial perceptions that Blacks had a "beastly" sexuality. Addition-

---

7. Cyrus E. Phillips IV, *Miscegenation: The Courts and the Constitution*, 8 WM. & MARY L. REV. 133 (1966).

8. *Id.* See page 7 for an example of an early miscegenation statute. The 1691 Virginia statute is quoted.

9. EDWARD B. REUTER, RACE MIXTURE 81 (1931).

10. *Id.*

11. Phillips, *supra* note 7, at 133.

12. Applebaum, *supra* note 4, at 52. Thus, the White person was able to marry only another member of his race, where the Black person or a member of any other racial group could intermarry with any group except Whites.

13. A. Leon Higginbotham, Jr. & Barbara Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1968 (1989).

14. Karen A. Getman, *Sexual Control in the Slaveholding South: The Implications and Maintenance of a Racial Caste System*, 7 HARV. WOMEN'S L.J. 115 (1984).

15. *Id.* at 125.

ally, they helped discourage lower class Whites from uniting with Blacks in rebellion against their mutual exploiters—the White slaveholders.[16] Finally, these statutes insured the perpetuation and protection of the slavery system. Once slavery was sanctioned by colonial law and practice, the sexual coupling of Whites with Blacks became threatening because it obscured the racial barriers crucial to a caste-based system of slavery. Sexual relations between these two groups produced a new class, mulattoes—who had no clearly defined role in this slavery system.[17]

The legislature wanted to punish and deter White women from tainting the White race by having mulatto children, which they considered an evil. Consequently, anti-miscegenation laws were directed toward White women because the status of a mulatto child was determined by the mother.[18] Thus, by providing for severe punishment of White women who bore mulatto children, anti-miscegenation statutes attempted to prevent the rise of a free mulatto class.[19] Also, White women were penalized for becoming pregnant by Black or mulatto men, whereas White men suffered no similar penalties for impregnating Black or mulatto women as long as they did not marry them. Furthermore, plantation owners benefitted from Black women having more children who would become slaves.[20] Thus, W.E.B. DuBois has argued that Black women were used for the pleasure of White men and to increase the stock of their slaves.[21] Consequently, there was only concern over the darkening of the White race and not the lightening of the Black race.[22] In addition, White women who did have sexual relations with Black men were seen as bad or low class because they went against the social standards of the society. "As long as there are negro slaves in Virginia and bad White women, we shall have a free mulatto population."[23]

Virginia enacted its first general statutory prohibition against interracial marriage in 1691:

> And for prevention of that abominable mixture and spurious issue which hereafter may increase in this dominion, as well by negroes, mulattoes, and Indians intermarrying with English or other White women by their unlawful accompanying with one another . . . whatsoever English or other White man or woman being free shall intermarry with a negro . . . man or woman bond or free shall . . . be banished and removed from this dominion forever . . . and any English woman being free shall have a bastard child by any negro or mulatto she shall pay the sum of fifteen pounds sterling . . . or be disposed of for five years . . . such bastard shall be bound out as a servant . . . until he or she shall attain the age of thirty years and in case such English woman that shall have bastard child be a servant, she shall be sold by the said church wanders, after her time is expired that she ought by law to serve her master

16. *Id.*

17. *Id.* at 124-25.

18. Higginbotham & Kopytoff, *supra* note 13, at 1971. A Virginia law read: "Whereas some doubts have arisen whether children got by any English man upon a negro woman should be slave or free. Be it therefore enacted and declared by this present grand assembly, that all children borne in this country shall be held bond or free only according to the condition of the mother."

19. Getman, *supra* note 14, at 126.

20. *Id.*

21. W.E.B. DuBois, Black Reconstruction in America 35 (1935).

22. Higginbotham & Kopytoff, *supra* note 13, at 1983.

23. Getman, *supra* note 14, at 133.

> for five years. . . .[24]

These statutes while appearing gender neutral were not enforced equally. White males were punished for marrying Black women just as White women were punished for marrying Black men. However, a double standard existed in the enforcement of the statute relating to interracial sex.

> Always there was the purported concern for White racial integrity, but curiously both in practice and by legislation there was not equal concern about White male integrity. The legal process was tolerant of White male illicit "escapades" involving either White females or Black females, but it was relatively harsh on infractions by White females (even when involving White males) and brutally harsh on infractions between Black males and White females.[25]

White men could force themselves on Black women or just have sex with them without consequence since a Black woman could not testify in court against a White man. However, the White female could not deny having sex with a Black male if she had a mulatto child. Thus, the White women were punished harshly for interracial sex, while White men were not.[26]

B. *Miscegenation During the Nineteenth Century*

The anti-miscegenation statutes remained basically the same until the late nineteenth and early twentieth centuries when states enacted Jim Crow laws. The laws banning interracial sex and marriage were less harsh on Blacks before the Civil War than they were afterwards.[27] This is not to say that the South was less racist and oppressive to Blacks before the Civil War than it was in the late nineteenth and early twentieth centuries, but merely that the legal mechanisms of oppression were somewhat different. Slavery had its own mechanisms for legal control. When it was abolished, White wealthy Southerners developed other mechanisms to preserve the racial hierarchy of the slave era, among them were, new laws regarding racial purity and interracial sex. The laws during this period allowed anyone with less than one-eighth Negro blood to be classified as White.[28] This policy was adopted to prevent embarrassment to supposedly White citizens.

Before the Civil War no statute deemed a person having less than one-eighth of Negro blood to be mulatto. This remained the pattern until the early 1900's when states enacted statutes making one drop of negro blood enough to make a person mulatto.[29] It would have been hard to maintain that slavery was justified by the inferiority of Blacks if the large number of slaves were classified as White under the law.[30]

---

24. *Id.* at 131. Note the bias in the statute in favor of men. The woman could be sold into servitude for having a mulatto baby while a White man was not sold into servitude for fathering a mulatto baby.

25. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS 40-41 (1978).

26. Note in the Virginia statute the punishment for White women having mulatto children; they became indentured servants (losing skin privilege). Note also that there is no punishment for White males having illegitimate mulatto children with Black women. Again, the concern was over White women tainting the White race with Black blood and having free mulatto children because White men could deny that the child was theirs while White women could not.

27. Higginbotham & Kopytoff, *supra* note 13, at 1968.

28. *Id.* at 1978.

29. *Id.* at 1979.

30. *Id.* at 1981.

> The White population was in fact racially mixed but the proportion of non-White ancestry allowable in a White person was so small that is was not very visible. It was so small that White southerners could maintain the myth that it was not there at all.[31]

"Today about four-fifths of the Negro population is thought to have some White blood; perhaps one-fifth of those who regard themselves as White have negro blood."[32] This statistic clearly illustrates that racial purity is a myth. Indeed, most anthropologists today reject the notion that the world's races are distinct types and prefer to speak instead of clustering of physical traits that occur differently in different populations.[33]

In *Kinney v. Commonwealth of Virginia*,[34] the Virginia Court of Appeals held that interracial couples who married outside of Virginia were in violation of the law when they moved to Virginia. The judge wrote:

> The purity of public morals, the moral and physical development of both races, and the highest advancements of our cherished southern civilization under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent—all require that [the races] should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law and be subject to no evasion.[35]

This idea of a natural, divinely sanctioned separation of races was first used to justify segregation in a 1867 Pennsylvania case.[36] "The two distinct races to which the Judge in *Kinney* referred—Black and White—had been mixing for some 250 years, and yet the law still recognized only two distinct races each of which had many members of mixed ancestry."[37] Thus many of the "connections and alliances" between men and women who fell under the same racial classification in the nineteenth century southern law were in fact alliances of people one or both of whom were a product of racial mixing. In this respect some of the alliances between legally White individuals were no different from some of the alliances between individuals the law labeled of different races (White and mulatto), yet it was only the latter alliances that the judge called "so unnatural that God and nature seem to forbid them".[38] The expressed concern over racial purity was merely a ruse for economic and physical exploitation of Blacks.

In the period after the Civil War, the concept of the "pure" White race as

---

31. *Id.*
32. ROBERT J. SICKELS, RACE, MARRIAGE, AND THE LAW 123 (1972).
33. Higginbotham & Kopytoff, *supra* note 13, at 1981.
34. 71 Va. (30 Gratt.) 284 (1877).
35. *Id.* at 287.
36. Westchester & Philadelphia Railroad Co. v. Miles, 55 Pa. 209 (1867). The court there stated:

> Why the Creator made one race black and the other white, we know not, but the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to His creatures when He intends that they shall not overstep the natural boundaries He has assigned to them. The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of races.

Id. at 213.
37. Higginbotham & Kopytoff, *supra* note 13, at 1983.
38. *Kinney*, 71 Va. at 287.

a category of nature was a myth. However, it was a powerful myth and it was used to support social and legal action as in *Kinney*[39] and to justify the oppression of nonwhites. A pure White race as a legal concept was a vigorous and powerful cultural construct. It gained force in the late nineteenth and early twentieth centuries, the "Jim Crow" era,[40] and was manipulated to justify an even harsher set of repressive legal measures against Blacks.[41]

C. *The Jim Crow Era*

After the Compromise of 1877,[42] with the return of Southern "home-rule", the federal government offered no defense against racial discrimination by Southern states. For example, by the early 1900's the legal definition of White became more exclusive. In the South, the definition of White had been anyone with less than one-eighth Negro blood. However, by the turn of the century mulatto began to be defined as someone having any "portion or perceptible traces of Negro blood".[43] These definitions were changed as a means of further exploiting Blacks. Again, the justification used was maintenance of racial purity, while the actual reason was maintaining White supremacy. In short, the upper class White males wanted to ensure that Blacks remained second class citizens. In order to accomplish this, they had to keep Blacks and Whites from cohabitating because mulattoes (the offspring), who did not fall neatly into their racial categories, were a threat. Therefore, after slavery ended, in order to maintain control,[44] Whites simply wanted anyone with any Negro blood classified as Black.

While miscegenation laws were passed with support from the same political factions and with the help of the same arguments that propelled Jim Crow laws into the statute books, the laws overturned in *Loving*[45] had "a much more complex pedigree."[46] By the late 1920's Jim Crow laws were in full bloom in the South and the promotion of White supremacy was as strong and prevalent as it had been during the days of slavery. In 1916, Madison Grant, a New York attorney and officer of the American Eugenics Society,[47] wrote a book which attempted to explain the effect of racial mixing and the decline of European Civilization:

---

39. *Id.*

40. Jim Crow—the South's state-sponsored system of racial segregation. For a complete discussion see, C. VANN WOODARD, THE STRANGE CAREER OF JIM CROW (1974).

41. Higginbotham & Kopytoff, *supra* note 13, at 1983.

42. The results of the presidential election of 1876 were contested. To resolve the controversy the Democrats allowed the Republican Rutherford B. Hayes to be named as the winner in exchange for an end to reconstruction and a return of "Home Rule" in the South. Federal troops were to be withdrawn and the Southern states would be allowed to govern themselves once again. The Southern states were heavily democratic. Many have argued that the Republicans "sold out" the civil rights of Blacks in exchange for the presidency. "Jim Crow" legislation began to be passed after 1877.

43. Higginbotham & Kopytoff, *supra* note 13, at 1982.

44. During slavery, Blacks were more easily controlled. However, after slavery ended, the men in power needed a better way of controlling Blacks. They made the definition of White more exclusive so they could increase their control over Blacks and further exploit them economically.

45. 388 U.S. 1 (1967).

46. Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. DAVIS L. REV. 421, 422 (1988).

47. *Id.* Eugenicists believed that the human race could best be perfected by encouraging mating of successful, healthy, productive stock. They discouraged Whites from mating with Blacks, the "less fit".

> When it becomes thoroughly understood that the children of mixed marriages between contrasted races belong to the lower type, the importance of transmitting in unimpaired purity the blood inheritance of ages will be appreciated at 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 higher races are to be maintained.[48]

Grant saw preserving White racial purity as the greatest necessity and highest priority:

> White racial purity is the cornerstone of our civilization. Its mongrelization with non-White blood, particularly with Negro blood, would spell the downfall of our civilization. This is a matter of both national and racial life and death, and no efforts should be spared to guard against the greatest of all perils—the peril of miscegenation.[49]

The passage of the Racial Integrity Act of 1924 is an example of the most restrictive miscegenation statutes. This Virginia statute defined a Negro as anyone having a single drop of Negro blood. There was an exception made for someone of one-sixteenth Indian blood as a means of honoring the descendants of John Rolfe and Pocahontas. Apparently, some of the "first families" of Virginia took exception to the use of their distant Indian heritage as a means of excluding them from the White race.[50]

By the early 1900's anti-miscegenation statutes were in full bloom and racial discrimination was at a peak. This discrimination continued on until the 1950's when Blacks began to challenge the notions of White supremacy and the "Jim Crow" laws. The "Jim Crow" Era did not really end until the Court declared anti-miscegenation laws unconstitutional.

III. LEGAL CHALLENGES TO ANTI-MISCEGENATION STATUTES

In *Dred Scott v. Sanford*, Chief Justice Roger Taney cited state miscegenation laws as evidence that Negroes were low in status and unfit for citizenship and other privileges of Whites:

> [The statutes] show that a perpetual and impassable barrier was intended to be erected between the White race and the one which they had reduced to slavery, and governed with absolute and despotic power, and which they looked upon as so far below them in the scale of created beings, that intermarriage between White persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person, who joined them in marriage. And no distinction in this respect was made between the free negro and mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.[51]

The Fourteenth Amendment was intended to provide equal protection under of the laws to Blacks as well as Whites, but the Supreme Court as the final arbiter of the meaning of the constitution has at times reduced the amendment to empty phrases for Blacks. At other times the Supreme Court has used it to combat racial discrimination.[52]

48. Lombardo, *supra* note 46, at 431.
49. *Id.* at 432.
50. *Id.* at 434.
51. Dred Scott v. Sanford, 60 U.S. 393, 409 (1857).
52. SICKELS, *supra* note 32, at 96.

A. *The Early Challenges*

1. Pace v. Alabama

The first challenge to miscegenation laws to reach the Supreme Court came from Alabama. *Pace v. Alabama*[53] arose on a writ of error from the Supreme Court of Alabama, the appellants contesting their conviction under Alabama's interracial fornication statute on the grounds that it was in conflict with the equal protection clause of the Fourteenth Amendment. Alabama provided a more severe penalty for interracial fornication than it did for intraracial fornication.[54] The Court stated: "Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offence designated and not against the person of any particular color or race."[55] The punishment of each offending person whether Black or White was the same. Justice Field reasoned that because the statute treated the Black and White equally it survived constitutional muster. The Court applied a very narrow interpretation of the Fourteenth Amendment which was consistent with the post- Reconstruction Court.[56]

2. Perez v. Lippold

No state or federal court found an anti-miscegenation law unconstitutional until 1948. In that year, in *Perez v. Lippold*,[57] the California Supreme Court struck down a provision of the state's Civil Code as a violation of the guarantee of equal protection of the law. This law read: "All marriages of White persons with Negroes, Mongolians, members of the Malay race or mulattoes are illegal and void."[58] The petitioners were Andrea Perez, a White woman, and Sylvester D., a Black man. They argued that as Roman Catholics they had a right to marry under the constitutional guarantee of the free exercise of religion and that the county clerk, Lippold, should not have denied them a marriage license. The Court accepted their conclusion but supplied its own logic that the law violated the Fourteenth Amendment. "The law violates the equal protection of the laws clause of the United States Constitution by impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups."[59]

State decisions generally upheld miscegenation statutes along three lines of reasoning. First, states contended that marriage is subject to absolute regulation by the state in its police power, since marriage is a social right and not within the view of Fourteenth Amendment liberties. Second, they reasoned that there was no discrimination or denial of equality in the statutes since they apply to both races involved in the marriage. Under this equal application approach (*i.e.*, *Pace v. Alabama*), neither party can complain since both are

53. 106 U.S. 583 (1882).

54. Alabama Code § 4184, the general fornication statute, provided for a fine of $100 dollars and possible imprisonment of not more than six months. However, Alabama Code § 4189, the interracial fornication statute, provided for imprisonment for two to seven years at hard labor. This statute applied to any white person or Negro who intermarried or lived in adultery or fornication. ALA. CODE §§ 4184, 4189 (1876).

55. *Pace*, 106 U.S. at 585.

56. Phillips, *supra* note 7, at 138.

57. 198 P.2d 17 (1948).

58. *Id.* at 18.

59. *Id.* at 29.

treated in an identical manner. Third, they frequently argued that preservation of racial purity was a legitimate state objective relating to public health and welfare. This view implied that even if marriage is a Fourteenth Amendment right, the state legislature could nevertheless restrict this right to prevent the purportedly detrimental biological and social effects of miscegenation.[60]

The California statute at issue in *Perez* dated from 1872. In its original form it referred only to the marriages of Whites with Negroes or mulattoes, but it was amended later to conform to popular bigoted views about "Orientals." The county's argument again was the one asserted in *Pace v. Alabama*: no discrimination because Blacks as well as Whites were subject to the law's prohibition. The court countered that individuals have a right to equal treatment under that law, and if a White man can marry a White woman then a Black man should be able to also. The court stated that in absence of a clear and present danger arising out of an emergency, a state cannot base a law impairing fundamental rights of individuals on general assumptions as to traits of racial groups.[61] The winds of change began to blow when the California Supreme Court became the first state court to strike down anti-miscegenation laws as unconstitutional.[62]

3. Naim v. Naim

The arguments used to justify miscegenation prohibitions in *Perez* were still very much alive in the miscegenation case of *Naim v. Naim*.[63] The Supreme Court of Virginia upheld the statute on the basis that the legislature had complete power to control the vital institution of marriage. The parties in the *Naim* case were a White woman and a Chinese man who had been married in North Carolina which permitted such a marriage. The two returned to Virginia shortly after the marriage, only to have the Virginia courts invalidate their marriage. On appeal to the U.S. Supreme Court, the case provided a perfect opportunity for the Court to rule on the constitutionality of the anti-miscegenation statutes. But the Court avoided the issue. The Court remanded the case back to Virginia courts to determine the domicile of the parties, but the Virginia court refused. On applications to recall the remand, the U.S. Supreme Court dismissed the appeal on the grounds that the second Virginia decision left the case devoid of a substantial federal question.[64]

Because this case came at a time when Southern states were finding the recent *Brown* decision hard to swallow, Court watchers have argued that the Court wanted to delay another controversial decision. Sickels points out that: "The Supreme Court either rejected cases outright or accepted a case for review and disposed of it on sufficiently narrow grounds to avoid the hard question of the constitutionality of a ban on interracial marriage."[65] In fact,

60. Applebaum, *supra* note 4, at 58. The miscegenation statutes received similar treatment in federal courts as they did in the states until the 1960's. The federal courts upheld the statutes on the grounds that the subject of marriage is one exclusively under the control of each state. The federal decisions made no attempts to apply the provisions of the Fourteenth Amendment to marriage regulations.

61. Perez v. Lippold, 198 P.2d 17 (1948).

62. SICKELS, *supra* note 32, at 98.

63. 197 Va. 80 (1954).

64. Applebaum, *supra* note 4, at 59.

65. SICKELS, *supra* note 32, at 3.

shortly after the *Brown* decision, the Court refused to review a conviction for miscegenation in *Jackson v. Alabama.*[66] In response to the *Naim v. Naim* case, one Justice is reported to have said: "One bombshell at a time's enough".[67] According to Mr. Elman, Justice Frankfurter's clerk during this period, the delay on the miscegenation issue was simply a belief on the part of the Justices that the timing was not right:[68]

> I knew that the last thing in the world the Justices wanted to deal with at the time was the question of interracial marriage. Of course, if they had to, they would unquestionably hold that interracial marriage could not be prohibited consistently with *Brown v. Board of Education*, but they weren't ready to confront that question.[69]

Thus the Supreme Court was really looking for a way to duck the issue at the time shortly after *Brown*. Elman also has said that Justice Frankfurter told him that it was not the right time to challenge the anti-miscegenation statutes.[70] Because of a fear of controversy, the Supreme Court in the *Naim* case refused to take the case on the ground that it failed to properly present a federal question, and that was the end of the *Naim* case.[71]

4. McLaughlin v. Florida

By the early 1960's, after the furor over *Brown* had died down, the Court seemed more willing to confront the miscegenation issue. When it is first posed, a problem such as miscegenation raises dreadful fears in many people that a change in legal tradition will spark a revolution. When approaching such a taboo subject as interracial sex and marriage the Court usually follows a conservative strategy.[72] After a time, when the inevitability of change in law has been intimated by increasing litigation in the lower courts, the Supreme Court becomes more comfortable about issuing the new rule of law.[73]

By 1964, the Supreme Court was ready to take the next step. The Court felt that "the societal myths, fears, and economic concerns that led to the enactment of miscegenation statutes some 300 years before had abated, even though for many such concerns were now so deeply entrenched that they would not likely be altered by rational argument or weakened by further judicial delay".[74] In *McLaughlin v. Florida*,[75] the Supreme Court struck down a Florida law against sexual relations between Whites and Blacks. However, the Supreme Court refused to rule on anti-miscegenation statutes as they applied to interracial marriages.[76] At issue in *McLaughlin* was a Florida statute that prohibited a Black man and White woman from occupying the same room at night.[77] Because this section applied only to a White and a Black it

66. 72 So. 2d 114, *cert. denied*, 348 U.S. 888 (1954).
67. SICKELS, *supra* note 32, at 3.
68. Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 845 (1987).
69. *Id.* at 846.
70. *Id.*
71. *Id.* at 847.
72. SICKELS, *supra* note 32, at 7.
73. *Id.*
74. DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW 58 (2d ed. 1980).
75. 379 U.S. 184 (1964).
76. SICKELS, *supra* note 32, at 100.
77. The statute read: "Any Negro man and white woman, or any white man and Negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same

was challenged under the Fourteenth Amendment Equal Protection clause. Dewey McLaughlin, a Black man, and Connie H., a White woman, were discovered together in a Miami Beach apartment in 1961 after their landlady discovered Mr. McLaughlin early one morning in the bathroom naked and called the police. They had been living together. However, the statute they were convicted under, only required the state to prove that they had spent the night together, and nothing more. They were each sentenced to 30 days in jail and fined $150.[78] The Florida Supreme Court affirmed the convictions solely on the authority of *Pace*.[79] In an opinion by Justice White, the U.S. Supreme Court rejected the *Pace* analysis:

> Judicial inquiry under the Equal Protection clause, therefore, does not end with showing of equal application among members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose—in this case whether there is arbitrary or insidious discrimination between those classes covered by Florida's cohabitation law and those excluded. That question is what *Pace* ignored and what must be faced here.[80]

He found nothing in the suggested legislative purpose which made it essential to punish interracial promiscuity more severely or differently than intraracial promiscuity.[81] Therefore, the Supreme Court struck down the law as a violation of the Fourteenth Amendment Equal Protection clause, but the Court left unanswered the question of interracial marriage. However, the Court left little doubt how it would rule on that subject.[82]

B. *The End of Miscegenation Prohibitions*

By the mid-1960's just prior to the *Loving* decision, fifteen states continued to outlaw interracial marriage either by statutes, state constitutions, or a combination of both.[83] After the *Perez* decision, ten states repealed their statutes.[84] There were even twenty-nine states with the statutes still on the books in 1951.[85] In 1964, nineteen states still had anti-miscegenation laws.[86] By 1967, anti-miscegenation statutes were still being used to criminalize interracial marriage. Interracial couples were harassed, discriminated against, and even banished. Interracial couples were considered fugitives, criminals, and their children were bastards by law.[87]

---

room shall each be punished by imprisonment not exceeding twelve months or by fine not exceeding five hundred dollars." FLA. STAT. § 798.05 (1967). Note that the statute excepts those who are married. However, Florida prohibited interracial marriage until 1967.

78. SICKELS, *supra* note 32, at 100-01.

79. 106 U.S. 583 (1882).

80. *McLaughlin*, 379 U.S. at 191.

81. *Id.* at 193.

82. *Id.* at 196. Justice White stated at the end of his opinion that he expressed no view about interracial marriage, but the implication was that it was only a matter of time before the Court would strike down the laws banning interracial marriage.

83. *Constitutional Law—Domestic Relations-Miscegenation Laws Based Solely Upon Race are a Denial of the Due Process and Equal Protection Clauses of the 14th Amendment*, 13 N.Y.L. FORUM 170, 171 (1967).

84. Applebaum, *supra* note 4, at 50.

85. *Id.*

86. *Id.* at 51.

87. SICKELS, *supra* note 32, at 2.

1. Loving v. Virginia

Three years after the *McLaughlin* case, the Supreme Court finally delivered the death blow to laws prohibiting interracial marriage. In *Loving v. Virginia*,[88] the Supreme Court finally struck down the anti-miscegenation statutes. The Court stated that legislation forbidding marriage solely on account of an individuals's race was a denial of the due process and equal protection rights within the meaning of the Fourteenth Amendment.[89]

The *Loving* case arose in June 1958 when two residents of Virginia, Richard Loving, a White man, and Mildred Jeter, a Black woman, were married in the District of Columbia where their marriage was legal. After they returned to Virginia, they were found guilty of violating the ban on interracial marriage in Caroline County Circuit Court. They pled guilty and each received a one year sentence, which the judge suspended on the condition that they leave Virginia and not return for 25 years. The judge stated in that opinion:

> Almighty God created the races White, Black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[90]

After their conviction in state court the Lovings appealed to the Supreme Court of Virginia. That Court upheld the anti-miscegenation statutes and affirmed the Loving's convictions. The Lovings then appealed to the U.S. Supreme Court.[91]

The State of Virginia argued that its law was constitutional on four theories:

1) Marriage as a social relationship was a proper subject of the state's legislative control under the police power.
2) The statutes in question did not violate the equal protection or due process clauses of the Fourteenth Amendment in that although they contain an interracial element as part of the offense, the punishment applies equally to both race. (The *Pace* precedent.)
3) The statutes were not a form of invidious discrimination against the petitioners because a rational basis could be shown based upon scientific evidence which justified the state to differentiate in the treatment of interracial marriages as opposed to other marriages.
4) Prior to the passage of the Fourteenth Amendment the debates in Congress over the Civil Rights Act of 1866 and the Freedmen's Bureau Bill clearly indicated that the framers of the Fourteenth Amendment did not intend it to affect the right of a state to outlaw interracial marriages.[92]

Virginia referred to its 1955 *Naim v. Naim*[93] decision concluding that the state's legitimate purposes were "to preserve the racial integrity of its citizens, and to prevent the corruption of the blood, a mongrel breed of citizens, and the obliteration of racial pride." This was an obvious endorsement of White supremacy.

88. 388 U.S. 1 (1967).
89. Note, *supra* note 83, at 172-73.
90. *Loving*, 388 U.S. at 3.
91. *Id.*
92. Note, *supra* note 83, at 175-76.
93. 197 Va. 83 (1955).

In examining the arguments presented by the State of Virginia the Court made it clear that marriage remains a proper subject of state legislative control, but indicated this power is not unlimited. The Court rejected the argument that the Fourteenth Amendment was not intended to prohibit state legislatures from outlawing interracial marriages. The Court stated that the debates in Congress on the Fourteenth Amendment were inconclusive as to the intent of the framers regarding interracial marriage. In addition, the Court flatly rejected the contention that since both races were punished equally no violation of the Fourteenth Amendment had occurred; *Pace* was expressly overruled. The Court also viewed marriage as a fundamental right and thus the statutes also violated due process. The Court did not speak to the rational classification test asserted by Virginia concerning the scientific reasons for treating interracial marriage differently.[94] But had the Court done so, it would have likely dismissed it also because the Court had previously held racial classifications required strict scrutiny. Since the early 1940's studies have indicated that the idea of physical or mental inferiority in the offspring of interracial marriages was a complete fallacy.[95] The Court stated that there was no doubt that Virginia's miscegenation statutes rested solely on racial distinctions. "The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination."[96] The Court invalidated anti-miscegenation statutes with the *Loving* decision and brought a final end to "Jim Crow", but not to sexual racism.

2. *The Impact of* Loving

"There was no massive resistance to *Loving v. Virginia*, but legislatures did not rush to repeal miscegenation statutes, and from time to time a lower court vainly attempted to enforce them."[97] In Alabama, federal courts had to order state officials to stop enforcing Alabama's anti-miscegenation statutes as late as 1972.[98] Likewise, in Mississippi a federal judge had to step in and force state officials to issue a marriage license to an interracial couple in 1970. Mississippi did not repeal its anti-miscegenation laws until April of 1972.[99] In *United States v. Brittain*, the federal district court voided an Alabama statute which a local probate judge had relied on in refusing to grant a marriage license to an interracial couple.[100] Similar cases occurred in Florida and Mississippi. In *Davis v. Ashford*,[101] the Court of Appeals had to force the district court to grant a marriage license. The Court of Appeals stated that the Mississippi anti-miscegenation statute was unconstitutional and that there should not be any delay in granting a marriage license. The Florida Supreme Court had to force a local court to grant a marriage license to a Black man who wanted to marry a White woman in *Hook v. Blanton*.[102] In addition in the

94. *Id.* at 175-77.
95. *Id.* at 177, *citing* Art. 7 UNESCO, The Race Question and Modern Science: The Statement of the Nature of Race and Race Differences (1952).
96. *Loving*, 388 U.S. at 13.
97. BELL, *supra* note 74, at 61.
98. SICKELS, *supra* note 32, at 115.
99. *Id.*
100. United States v. Brittain, 319 F. Supp. 1058 (N.D. Ala. 1970).
101. 2 Race Rel. L. Rep. 152 (S.D. Miss. 1970).
102. 12 Race Rel. L. Rep. 2079 (Fla. 1967).

case of *Pederson v. Burton*,[103] a three-judge court found that the District of Columbia's requirement that couples disclose their race or color on their marriage license applications was unconstitutional because it was not rational and it violated the Fourteenth Amendment. Thus, even though *Loving* ended anti-miscegenation, resistance persisted in some areas.

IV. IMPLICATIONS OF *LOVING*: THE ANTI-MISCEGENATION LEGACY

The broad view of the *Loving* decision is that any legislative bigotry based upon social, economic, political, religious, or historical beliefs about racial supremacy cannot restrict an individual's right to freely choose his or her sexual partners or spouses. (Some authors have argued that there is an analogy between the miscegenation statutes in *Loving* and sodomy laws.[104] In addition, they argue that *Loving* could have implications in the area of sexual orientation law. They have argued that *Loving* should be extended to invalidate sodomy laws and to allow gays and lesbians the right to marry their sexual partners.[105])

As a result of *Loving* miscegenation laws will no longer be a stigma of racial fear and hatred, interracial sex and marriages no longer criminal, and children of such unions no longer illegitimate.[106] The *Loving* decision is only a small part of the story of Black Americans struggling for legal equality, but the *Loving* decision is of major significance. It was a victory not only for Blacks but indeed for all races. Now all people will have the freedom to choose their sexual partners without regard to race. For Blacks, the decision signaled the end of legalized second class citizenship.

A. *Discrimination Against Interracial Couples*

Even though the *Loving* decision was a major step forward, sexual racism has not ended. Discrimination against interracial couples remains a tragic problem. The effects of the miscegenation laws have been tremendous; indeed they have left a sad legacy. These laws have led to the perpetuation of the belief that one race is superior and the other is inferior, that one is good, the other evil, and that it is somehow wrong, sinful, or sick to love the other.

Interracial couples face many forms of hostility resulting from these attitudes that can be called the miscegenation legacy. The couples face not only social ostracism, but can loose their jobs, their children, and even their families. Unfortunately, society's repulsion with interracial sex survived the repeal of the miscegenation laws. The White southern elite's desire to maintain the racially based social, economic, and political hierarchy of their slave society, even after their system of slavery had been outlawed was at the heart of the miscegenation laws. Likewise this same desire by some to maintain the status quo has led to the continuance of these strong bigoted attitudes over interracial sex and marriage.[107]

---

103. 400 F. Supp. 960 (D.D.C. 1975).

104. For a discussion on the analogy between miscegenation and sodomy laws, see Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 Yale L.J. 145 (1988).

105. Sickels also argues this in his book RACE, MARRIAGE, AND THE LAW; *see supra* note 32, at 9.

106. SICKELS, *supra* note 32, at 112.

107. Higginbotham & Kopytoff, *supra* note 13, at 2020.

Interracial couples often have to survive not only their families' shock and disapproval, but the stares and unwelcomed comments of strangers. "They know not to stop in small towns or rural areas when they travel."[108] Some say that even after decades of marriage, they are made to feel as if their relationships are illicit or unseemly. Many suffer indignities like being spat upon or refused service. "And most say they want the one thing society seems not quite ready to give them: acceptance as ordinary couples".[109] Most Whites are simply unwilling to accept them as just another couple.

According to a recent survey, one in five Whites still believe that interracial marriage should be illegal, compared with two in five Whites in 1972.[110] It is amazing that in 1991 twenty percent of White Americans would still believe that miscegenation should be illegal. Further, sixty-six percent of Whites said that they would oppose a relative marrying a Black person. Only four percent said they would favor it. However, only forty-five percent of Whites said that they would oppose a close friend or relative marrying a Hispanic or an Asian, and only fifteen percent said that they would oppose a marriage to a Jew.[111] Blacks, on the other hand, exhibited indifference for the most part to interracial unions. Nearly two-thirds stated that they were indifferent to a close friend's or relative's choice to marry a White person or a person of some other racial group.[112]

Some opposition to interracial couples has dissipated; however, these new appearances of openness often do not translate into acceptance for many interracial couples.[113] The unfair and discriminatory treatment that interracial couples receive is often unbelievable. Teresa Johnson, a White social worker in Chicago has been married to Richard, a Black actor, for seventeen years; they have two teenage children. She told a sad story of how her parents have treated her over the course of her marriage to Richard.

> Her relatives are miles away in Cleveland, and all but the very closest of them know her by her maiden name; they think she is single and childless. To protect this secret, she has not been to a family wedding or funeral since she married, for fear the topic would come up. For years only her parents knew. But they were horrified at the news and dared not let it slip. She didn't even bother to tell them she was pregnant the last time. . . . For years her parents would not let her children enter their house, preferring instead to meet them at the airport or at a pizza parlor in some other neighborhood. Now the parents let the children visit—but only at night so the neighbors won't see.[114]

Mrs. Johnson said she felt caught in a cruel paradox because people could not get past the color of her husband's skin. She said that she had relatives who had children out of wedlock who were juvenile delinquents, but that she was still considered the outcast by her family.[115]

Despite these negative attitudes, the number of interracial couples contin-

108. Isabel Wilkerson, *Interracial Marriage Rises, Acceptance Lags*, N.Y. TIMES, Dec. 2, 1991, at A1.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*

ues to increase. From 1970 to 1977 the number of interracial couples increased 36% from 310,000 to 421,000. By 1981 the number had climbed to 639,000.[116] But the 639,000 interracial couples in 1981 represented only 1.28 percent of the married couples.

When looking at only Black and White interracial marriages there has also been a substantial increase. There were 65,000 Black-White marriages in 1970. By 1990 Census figures showed that Black-White marriages had increased to 211,000. In addition, the 1990 Census figures showed that these marriages were more common on the East and West Coasts than elsewhere, and were far more common in urban than in suburban or rural areas.[117]

Nonetheless, the acceptance level of interracial sex and marriage has not increased significantly since *Loving*, and the issue remains a controversial topic in society.[118] This is not to say that there has been no improvement but rather that there has not been any remarkable improvement. Societal discrimination against interracial couples remains a major problem because they continue to face discrimination in employment, housing, and in child custody arrangements.

1. *Employment Discrimination*

In the employment area, interracial couples have been offered protection by the federal courts. In *Faraca v. Clements*,[119] the Fifth Circuit Court of Appeals held that an employer can not discriminate because of an employee's interracial marriage. There was evidence that Andrew Faraca, a White male was denied a job as an administrator of the Georgia Retardation center because he had a Black wife. The employer cited possible hostile public reaction over the couple's marriage as the reason for denying him the job. The Court replied: "A brief recurrence to school desegregation precedents reminds us that a public official cannot find sanctuary from the consequences of an act of racial discrimination in a fear that public reaction will bring unfavorable results".[120] The Eighth Circuit Court of Appeals, in *Langford*,[121] held that a city had no right to discharge the couple if their interracial associations were a factor in the discharges. "The fact that interracial associations are frowned on by some in a community cannot serve as a justification to discourage or prohibit such associations by public employees."[122] The Court further stated that this was true even if their interracial associations diminished their effectiveness with their employees.[123]

In addition, in *Gutwein v. Easton Publishing Co.*,[124] the Court interrupted Title VII as protecting interracial associations. In *Greshman v. Waffle House*,[125] a federal district court in Georgia held that a White female had a claim under Title VII since she was fired "but for" her marriage to a Black

116. BELL, *supra* note 74, Supp. at 11.
117. Wilkerson, *supra* note 108, at A10.
118. *Id.*
119. 506 F.2d 956 (5th Cir. 1975).
120. *Id.* at 960.
121. 478 F.2d 262 (8th Cir. 1973).
122. Langford v. City of Texarkana, 506 F.2d at 267.
123. *Id.*
124. 325 A.2d 740 (Md. 1974).
125. 586 F. Supp. 1442 (N.D. Ga. 1984).

man.[126] The Michigan Court of Appeals in *Bryant v. Automatic Data Processing*,[127] held that firing an employee because of an interracial marriage was racial discrimination. Mrs. Bryant was fired once the company discovered that her husband was Black. The court stated:

> Discrimination against interracial couples is derived from notions that the races should not mix. We believe that both the broad language of the civil rights act and the policies behind the act should be read to provide protection from discrimination for interracial couples.[128]

These cases all illustrate the discrimination interracial couples face in employment. In this area of employment discrimination against interracial couples, federal and state courts have provided adequate protection.

2. *Housing Discrimination*

Just as interracial couples have been subject to discrimination in employment, so too have they been subject to discrimination in housing. In *United States v. Johns*,[129] the Fifth Circuit found that the Ku Klux Klan, by firing into the home of an interracial couple, had violated section 3631 of the Fair Housing Act of 1968 because they had interfered with persons exercising federally protected rights. In *Oliver v. Shelley*,[130] racial discrimination against interracial couples was found. The Court held that a landlord had violated both section 1982 of the Civil Rights Act and the Fair Housing Act when he refused to rent an apartment to an interracial couple over, "concern of tension caused by their presence."[131] One can see, that while the *Loving* decision toppled the legal supports of discrimination, it did very little to stop societal discrimination which emanates from over 300 years of sexual racism which was legitimized by law.

3. *Child Custody*

The legacy of miscegenation—sexual racism—has also had an impact on interracial couples in the area of child custody. In several cases courts have taken custody away from mothers once they became involved with Black men. In 1982 in *Blackburn v. Blackburn*,[132] the Georgia Supreme Court overturned a decision of a state court judge taking custody away from a White mother because she had an affair with a Black man. Kathleen Blackburn divorced her husband and had an affair with a Black man which resulted in an illegitimate child. Her former husband's parents sought custody of her child, Nicholas, their grandchild, because they strongly disapproved of her affair with this Black man. The trial court judge awarded the grandparents custody. The judge stated that "this town just isn't ready for that sort of integration."[133] The Georgia Supreme Court reversed his decision.[134]

126. This case was not appealed.
127. 390 N.W. 2d 732 (Mich. 1986).
128. *Id.* at 736.
129. 615 F.2d 672 (5th Cir. 1980).
130. 538 F. Supp. 600 (S.D. Tex. 1982).
131. *Id.* at 602. The court said that even if the other factors had influenced the landlord's decision, there was still a violation. The presence of other factors does not diminish the seriousness of the violation. The court further said that there was no place in the law for partial racial discrimination.
132. 292 S.E.2d 821 (Ga. 1982).
133. Holly Morris, *Blackburn v. Blackburn*, NEWSWEEK, May 17, 1982, at 105.
134. *Blackburn*, 292 S.E.2d at 821.

The leading case in this area is *Palmore v. Sidoti*,[135] a case from Florida. Linda Sidoti, a White woman, was awarded custody of her daughter after she divorced her husband in 1980. When she later married Clarence Palmore, a Black man, Mr. Sidoti, her former husband, sought to alter the custody decree. The Circuit Court in Hillsborough County, Florida, ruled that even though Linda was a fit mother, her new husband's race would bring social stigmatization on the child. The United States Supreme Court stated that racial consideration cannot be the determinative factor in child custody decisions. The Court stated that the Florida court clearly relied on racial grounds in its decision.[136] The Court agreed with the Florida court that the child would likely face some discrimination because racial and ethnic prejudices do exist. However, the Supreme Court unanimously rejected the notion that the social stigmatization that a child might face because of an interracial household was sufficient justification to take a child away from its mother. The Court stated that racial considerations could not be a factor:

> Whatever problems racially mixed households may pose for children in 1984, they can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917.[137] The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.[138]

The message that the Supreme Court sent in *Palmore* was that no longer can custody decisions be based on racial assumptions and an abhorrence of a White child being raised with an African American in the household.

V. CONCLUSION

Twenty-five years after *Loving v. Virginia*, discrimination and hostility confront interracial couples. Sexual racism still exists in this country. Sexual racism is a legacy of slavery. Anti-miscegenation statutes were passed to maintain slavery-like conditions. The laws were justified to the general public as measures which were needed to abide by God's will in avoiding mongrelization of the races. In addition, the idealization of the White woman and the perceived need to protect her from the sexually aggressive Black male was another justification often used.

> Economic exploitation, rather than a real abhorrence of interracial sex was the real basis of miscegenation prohibitions. By asserting that they were protecting the honor and sanctity of White womanhood, White elites provided themselves with both a moving war cry and an excellent smoke screen that furthered and shielded their basic purpose: refusing Blacks the opportunity to become the cultural peers of Whites.[139]

Thus even after slavery had officially ended, the anti-miscegenation prohibitions on interracial sex and marriage were tools used to maintain White

135. 466 U.S. 429 (1984).

136. BELL, *supra* note 74, Supp. 1984, at 16.

137. In Buchanan v. Warley, 245 U.S. 60 (1917), a residential integration case, the Court stated: "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as that is, and as important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Id.* at 81.

138. *Palmore*, 466 U.S. at 434.

139. BELL, *supra* note 74, at 64.

supremacy. The statutes were the very heart of "JIM CROW" laws, for if Whites and Blacks were allowed to be intimate with one another, then the segregation laws would become useless and ineffective. Therefore, anti-miscegenation laws were the very foundation of White supremacy.

When the Supreme Court finally invalidated anti-miscegenation statutes in *Loving*, strong negative feelings resulting from the anti-miscegenation statutes and their justifications had been around for over 300 years. Even though the laws changed with the stroke of a pen, the effect of them lingers on today. While interracial sex and marriage are no longer illegal, interracial couples still face ostracism from society, including discrimination in employment, housing, and child custody.

Today interracial couples face fewer problems than they did in 1967, but the tragedy is that they still face problems. Neither the Black revolution nor the sexual revolution of the 1960's and 1970's has succeeded in overcoming resistance to interracial sex and marriage.[140] Until the complex, irrational, and highly charged emotions surrounding interracial sex and marriage are confronted, understood, and ended we as a society will never achieve racial harmony. Indeed, until sexual racism ceases to exist, the legacy of slavery will haunt our nation.

BY KENNETH JAMES LAY**

140. STEMBER, *supra* note 2, at 8.

** Mr. Lay is a 1992 graduate of The University of Alabama School of Law and is currently working in Gadsden, Alabama, with Alabama Legal Services Corporation.