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# Principled Expediency: Eugenics, *Naim v. Naim*, and the Supreme Court

by GREGORY MICHAEL DORR\*

In March 1956, the Supreme Court refused to hear *Naim v. Naim*, a suit contesting the constitutionality of Virginia's antimiscegenation statute, the Racial Integrity Act of 1924. The Court's two *per curiam* decisions in this case sparked a debate surrounding Supreme Court adjudication. Did the Court act on legal "principle," or in response to political "expediency," in refusing to find a properly presented federal question in *Naim*? Examination of the available evidence shows that the court was not unanimous in avoiding *Naim*. Ultimately, Felix Frankfurter's intra-court politicking preventing the Court from deciding *Naim*. Frankfurter convinced the brethren that avoiding *Naim* was possible, despite the fact that its appellate status tapped the Court's "obligatory jurisdiction." To understand the "principle" that undergirded Frankfurter's "expedient" action, one must consider the background of Virginia's Racial Integrity Act. Eugenical theory provided the state with a colorably rational basis for racial restrictions in Virginia's marriage law. As counsel never directly challenged the reasonableness of the racial classifications—never challenged the eugenical precepts supporting the law—Frankfurter was able to convince his colleagues that the Court could not consider the constitutional issue in "clean cut and concrete form unclouded." Then, following the Virginia Supreme Court of Appeal's defiance of the Supreme Court's remand order, Frankfurter urged that the Court could defer the case for lack of "a properly presented federal question." In so doing, Frankfurter extended the life of miscegenation statutes eleven years—until the Court struck them down in *Loving v. Virginia*.

It is unlikely that Chinese sailor Ham Say Naim ever heard the word miscegenation before he jumped ship in 1942. Eleven years later Naim, still a Chinese national, sat in Judge Floyd E. Kellam's Portsmouth, Virginia Circuit Courtroom. His wife of twenty months, Ruby Elaine Naim, a white woman, sought a divorce on the grounds of adultery. Choosing not to rule on the divorce action, Kellam granted Ruby Elaine Naim an annulment under part of the Virginia Code entitled, "An ACT to Preserve Racial Integrity."<sup>1</sup> These statutes decreed interracial marriage—because of its result, miscegenation or racial intermixture—illegal and "void without decree" in Virginia. Ham Say Naim's counsel appealed the case, through the Virginia Supreme Court of Appeals, to the United States Supreme Court in the October Term of 1955. In a surprising series of events, the case bounced between the Supreme Court and Virginia's high-

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1. Sections 20-54 through 20-57 of the Virginia Code of 1950.

est court. The case ended in March 1956 when the Supreme Court, in a cryptic memorandum decision, ruled, "The decision of the Supreme Court of Appeals of Virginia [reaffirming their support of Judge Kellam's decision] leaves the case devoid of a properly presented federal question."<sup>2</sup> With this action, the United States Supreme Court effectively upheld a state's right to restrict marriage between the races. A decade passed before the Court again considered racial classifications in marriage law. In *Loving v. Virginia*,<sup>3</sup> another challenge to Virginia's Racial Integrity Act, the Court struck down antisegregation statutes, removing the last legally-enforced barrier facing Americans of color.

June 12, 1997 marked the thirtieth anniversary of the Supreme Court's landmark decision in *Loving*. As scholars commemorate *Loving*, it seems appropriate to reconsider *Naim* to understand the longevity of antisegregation statutes. *Naim v. Naim* represents more than a historical footnote to *Loving*: *Naim* reveals the complex interplay of eugenical ideology, constitutional jurisprudence, the internal politics of the Supreme Court, and the Court's relationship to American society. Indeed, *Naim* illustrates that the line between "principle and expediency" in Supreme Court adjudication was less sharply defined and more hotly contested than many commentators have imagined. Both contemporary and subsequent historical treatments ascribe particular importance to *Naim* only in so far as its disposition appeared to reflect the Justices' concern that any action on interracial marriage would exacerbate tensions created by the *Brown* decisions.<sup>4</sup>

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2. *Naim v. Naim*, 350 U.S. 985 (1956).

3. *Loving v. Virginia*, 388 U.S. 1 (1967).

4. Contemporary observers recognized the Supreme Court's actions as dodging the bullet of interracial marriage which was a cipher for legitimated interracial sexuality. See, "The Supreme Court, 1955 Term," *Harvard Law Review* 70 (1956):98-104; and, "Recent Decisions," *Notre Dame Lawyers* 30 (1956): 714. Alexander Bickel and Gerald Gunther questioned whether the Court's action was based on legal "principle" or political "expediency." Bickel, *The Least Dangerous Branch: the Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962) and Gunther, "The Subtle Vices of 'Passive Virtues': A Comment on Principle and Expediency in Judicial Review," *Columbia Law Review* 64 (1964). The most recent survey of Virginia's antisegregation laws attributes the Court's avoidance of *Naim* to consideration for *Brown*. See, Peter Wallenstein, "Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s - 1960s," *Chicago Kent Law Review* 70 (1994): 371-437. Wallenstein relies on Chang M. Sohn's dissertation which notes a loose connection between eugenics and antisegregation laws, but fails to note the relevance of eugenical ideology in *Naim*'s outcome. Sohn ascribes *Naim*'s failure to the counsel's inability to bring key political interest group pressure to bear on the Court. Chang M. Sohn, "Principle and Expediency in Judicial Review: Miscegenation Cases in the Supreme Court" (unpublished Ph.D. dissertation, Columbia University, 1970). David H. Fowler, *Northern Attitudes Towards Interracial Marriage: Legislation and Public Opinion in the Middle Atlantic and the States of the Old Northwest, 1780 - 1930* (Garland Publishing, Inc. 1987), xii-xiv, contains perhaps the most glaring misinterpretation claiming, "Until *Loving v. Virginia* no challenge of intermarriage laws had ever come before the Supreme Court." Fowler fails to mention *Naim*'s brief appearance before the court, citing only the denial of *Jackson v. State* in 1954. Peggy Pascoe and Eva Saks correctly identify *Naim v. Naim* as a eugenics case. Saks focuses on a discourse theory analysis of miscegenation law. Eva Saks, "Representing Miscegenation Law," *Raritan* 8 (1988): 46.

This paper, however, argues for a reassessment of *Naim v. Naim*'s significance on two grounds. First, digging beneath surface impressions one sees that *Naim*, while sharing a kinship with other antimiscegenation cases, belongs also within the rarefied family of eugenics case law that began with *Buck v. Bell* and appeared to end with *Skinner v. Oklahoma*.<sup>5</sup> Earlier antimiscegenation laws in Virginia, like many that persisted in other states, based their strictures not upon a "science" of racial improvement, but on the splenetic racism and negrophobia of the Redemption Era. Virginia eugenicists, however, promoted the Racial Integrity Act in the name of scientifically-validated social engineering. The Racial Integrity Act's enactment as a scientific measure to preserve the state's "health" supplied the legal justifications that upheld the statute in *Naim*. Eugenics provided the state with a "rational basis" for the exercise of its police power in restricting interracial marriage.<sup>6</sup> Ultimately, eugenical social policy used science to garner legal imprimatur for the deep-seated southern cultural taboo against interracial sexuality.<sup>7</sup> This certification formed a bond between statutory social control and the law that proved difficult to break.

Legal debates concerning the confluence of judicial review and social policy suggest a second reason *Naim* should be reconsidered. Probing the records of various Supreme Court justices, it becomes apparent that their actions in disposing of *Naim* did not represent simply a col-

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5. *Buck v. Bell*, 274 U.S. 200 (1927), established the constitutionality of state mandated compulsory sterilization with Justice Holmes's infamous proclamation, "three generations of imbeciles are enough." *Skinner v. Oklahoma*, 316 U.S. 535 (1941), came closest to overturning the right of a state to sterilize for eugenic purposes. *Skinner* only disallowed the sterilization of habitual criminals, however, and only if the "law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other." In the Court's opinion, Justice Douglas never passed judgment on the validity of eugenics as a reasonable goal for police power action. Indeed, the language of *Skinner* tacitly endorses eugenical theory. Justice Jackson, in a concurring opinion, felt compelled to state, "There are limits to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority define as crimes." Nevertheless, Jackson reserved judgement on this issue. Jackson's exposure, at the Nuremberg trials, to the horror of eugenics run amok would substantiate the prescience of his remark. It would take *Loving v. Virginia* to repudiate eugenics as a justification for state police power action. Yet, as Philip Reilly notes in his survey of eugenical sterilization, "Although legal scholars assert that *Buck v. Bell* is no longer 'good' law, it has never been overturned, and the few courts that have considered the constitutionality of involuntary sterilization statutes have upheld them." Phillip R. Reilly, *The Surgical Solution: A History of Involuntary Sterilization in the United States* (Baltimore: Johns Hopkins University Press, 1991), 152.

6. Indeed, the state would rely on the precedent established in *Purity Extract & Co. v. Lynch*, 226 U.S. 192 (1912). For a discussion of the principle of "minimum rationality" see, Laurence H. Tribe, *American Constitutional Law* (Mineola, NY: The Foundation Press, 1978), 994-996. On page 1019, Tribe also discusses the evolution of rationality, particularly in light of *Naim* and *Loving*.

7. Saks, "Representing Miscegenation Law," 40, 43, 45-46. See also Lisa J. Lindquist Dorr, "Arm in Arm: Gender and the Racial Integrity Act of 1924," forthcoming in *The Journal of Women's History*.

lective dodge. Behind closed doors, the justices waged a pitched battle. Ultimately the issue was resolved not only in light of political considerations, but also as a result of the swirling jurisprudential debate over what Morton J. Horwitz terms “the central ideological question before the Supreme Court” in the twenty years after World War II: the debate between judicial activism and judicial restraint.<sup>8</sup> In this intra-court battle, the personality and beliefs of Justice Felix Frankfurter take center stage. Examining the synergy between the Racial Integrity Act’s eugenical rationale and jurisprudential debates trammeling the Supreme Court helps explain why it took another eleven years to strike down antimiscegenation statutes.

This reconsideration of *Naim v. Naim* proceeds in four parts. First, a brief history of eugenics and the elite Virginians who integrated eugenical precepts into the legal, medical, and educational infrastructures of Virginia provides *Naim*’s background. Parts II and III focus on the progress of *Naim* through the Portsmouth Circuit Court and the Virginia Supreme Court of Appeals, respectively. These sections develop the social and cultural history of *Naim v. Naim*, elucidating the ways in which southern sentiment regarding issues of class, race, and gender aligned with thirty year-old eugenical precepts and the law to determine the case.<sup>9</sup> Special attention is given to how eugenical arguments cropped up explicitly in the statements of counsel, the state attorney general, and the opinion of the courts. Part IV takes up the battle over *Naim* within the United States Supreme Court, revealing the intra-court politics that decided the case. The paper concludes with a brief consideration of *Naim v. Naim*’s role as precedent for the lower court decisions in *Loving v. Virginia*. The conclusion assesses how the Racial Integrity Act failed only when two conditions were met: 1) counsel directly challenged the “rational basis” of the eugenical underpinnings of the Racial Integrity Act; and, 2) the doctrinal/theoretical debate among the Supreme Court justices was resolved, in part as a result of Felix Frankfurter’s retirement, in favor of judicial activism for civil rights. The fulfillment of these two conditions set the stage for the recalibration of legal and cultural scales.

## PART I: EUGENICS AND VIRGINIA

### A. Eugenics: the science of being well-born

Sir Frances Galton, English scientist and cousin of Charles Darwin,

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8. Morton J. Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 252.

9. Peggy Pascoe, describes a study such as mine as, “the story of the cultural production of hegemonic definitions of racial and sexual difference embedded in legal discourse.” Peggy Pascoe, “Race, Gender, and Intercultural Relations: The Case of Interracial Marriage” *Frontiers* 12 (1991): 13. By “thirty year old eugenical precepts” I am indicating the age not of American or international eugenic thought (which is much older), but rather of the distinctive eugenics promoted to support the Racial Integrity Act.

founded the science of eugenics, a word he coined from the Greek root meaning “well-born,” in 1883.<sup>10</sup> Galton combined his observation that “genius” tended to run in families with his cousin’s theory of natural selection, positing a system to improve the human race. Through careful mating, humans might breed out “undesirable” hereditary traits, resulting in a more efficient “artificial” (human-controlled) selection rather than a Darwinian, “natural” selection.<sup>11</sup> British theorists argued for a “positive eugenics,” facilitating the procreation of the best human “stock,” with little attention to the so-called “lower class of people.” American biologists would advocate positive eugenics, but they would also champion “negative” eugenics—improving society by eliminating the “unfit,” lower orders.<sup>12</sup>

American biologists flocked to the study of heredity and eugenics after 1900, following the resurgence of Mendelian genetics.<sup>13</sup> A shotgun marriage between Mendelian genetics and newly developed intelligence testing resulted in the so-called Army Alpha and Army Beta IQ tests during World War I. These tests convinced American eugenicists that heredity produced empirical, qualitative differences among and between races. This race-based explanation of the social order whipped Progressive Era Americans’ growing nativism and racism. Eugenics joined the panoply of other pioneering efforts at social reform and social engineering through

10. Galton published his first study relating heredity and genius in 1869, but did not coin the term eugenics until 1883. Daniel J. Kevles, *In the Name of Eugenics: Genetics and the Uses of Human Heredity* (New York: Alfred A. Knopf, 1985) and Allen Chase, *The Legacy of Malthus: The Social Costs of the New Scientific Racism* (Chicago: University of Illinois Press, 1980) present the most comprehensive portraits of the eugenics movement. See also, Mark Haller, *Eugenics: Hereditarian Attitudes in American Thought* (New Brunswick: Rutgers University Press, 1963) and Donald K. Pickens, *Eugenics and the Progressives* (Nashville: Vanderbilt University Press, 1968).

11. Although Darwin initially objected to the application of his theory to human evolution, Galton’s work swayed him. He wrote to Galton, “You have made a convert of an opponent in one sense, for I have always maintained that excepting fools, men did not differ much in intellect, only in zeal and hard work.” Darwin cited Galton authoritatively in, *The Descent of Man*. “We now know, through the admirable labours of Mr. Galton, that genius . . . tends to be inherited.” In Kevles, *In the Name of Eugenics*, 20.

12. Indeed, Harvard educated biologist Charles B. Davenport and Princeton’s Harry H. Laughlin founded and sustained the American eugenics movement with grants from the Carnegie Institution and the widow of railroad tycoon E.H. Harriman. Laughlin would receive an honorary degree from Adolf Hitler for his contributions to “the science of race cleansing.” The Nazis, like Virginia in 1924, based their 1934 forced sterilization law on a prototypical “Model Sterilization Law” drafted by Laughlin. See Paul A. Lombardo, “Three Generations, No Imbeciles: New Light on *Buck v. Bell*,” *New York University Law Review* 60 (1985): 31 note 8, 50 notes 108 and 109; Paul A. Lombardo, “Miscegenation, Eugenics, and Racism: Historical Footnotes to *Loving v. Virginia*,” *University of California, Davis Law Review* 21 (1988): 451 notes 40; and, Kevles, *In the Name of Eugenics*, 347 note 21.

13. Mendel published his findings in 1865, six years after Darwin’s *Origin of Species*. Mendel’s work, hailed by later scientific generations, went completely unnoticed by contemporary scientists. Chase, *The Legacy of Malthus*, 228–229; Kevles, *In the Name of Eugenics*, 41–43, 77–84; Pickens, *Eugenics and the Progressives*, 47; Haller, *Eugenics*, 13, 33, 65.



the rational application of “new” scientific knowledge.<sup>14</sup>

### B. Elite Virginians and the Science of Social Control

American eugenicists generally, and Virginians particularly, argued for the scientific defense of civilization through racial purity, using their theories about race mixing to shape public policy. Only by maintaining the purest, most vigorous strains of each race, according to eugenicists, could humans prevent societal declension.<sup>15</sup> Any increase in the interbreeding of superior and inferior strains must be avoided. Otherwise, social chaos—the inevitable result of intermixture—would ensue. If such disasters resulted from the mixing of inferior and superior strains of *white* blood, eugenicists blanched at the thought of crossing the blood of “Nordics” with that of either Asians or blacks, characterized as the bottom two rungs of the evolutionary ladder. Eugenicists lobbied effectively for the federal 1924 Immigration Restriction Act, arguing explicitly along these lines.<sup>16</sup>

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14. For a discussion of the Army Alpha and Army Beta tests, which “proved” African Americans and Jews intellectually inferior to whites, see, Stephen J. Gould, *The Mismeasure of Man* (New York: W.W. Norton and Company, 1981) 192-233; and, Kevles, *In the Name of Eugenics*, 80-85, 94-95. For the relationship between eugenics and Progressive Era social thought see Pickens, *Eugenics and the Progressives*, passim. John Higham points out the connections between Mendelism, intelligence testing, and eugenics. John Higham, *Strangers in the Land: Patterns in American Nativism 1800-1925* (Westport: Greenwood Press Publishers, 1965), 150-151, 275.

15. The intellectual structure of eugenics melded anthropology, biology, history, psychology, and early sociology to explain social phenomena as an outgrowth of hereditary determinism. The historical observation that Greece and Rome fell after contact with African and Asian cultures “proved” the eugenical contention that intermixture with inferior cultures led to social and cultural demise. These arguments appear in various college eugenics textbooks. The archetype for these is Paul Popenoe and Roswell Johnson, *Applied Eugenics* (New York: The MacMillan Company, 1918). This book went through many editions and was still being used at the University of Virginia in 1953. The University of Virginia, the flagship institution educating elite Virginians, remained in intimate contact with hard-line eugenicists through the 1960s. See Gregory M. Dorr, “Assuring American’s Place in the Sun: Ivey F. Lewis and the Teaching of Eugenics at the University of Virginia 1915-1953” (paper presented before the Society for the Social Study of Science/Society for the History of Technology Conference, October 19, 1996). For other examples of these arguments, see generally, Madison Grant, *The Passing of the Great Race: or The Racial Basis of European History* 4th ed. (New York: Charles Scribner’s Sons, 1921); Lothrop Stoddard, *The Rising Tide of Color Against White World-Supremacy* (New York: Charles Scribner’s Sons, 1921) and *Revolt Against Civilization: The Menace of the Under-Man* (New York: Charles Scribner’s Sons, 1922); and the work of Virginian Earnest Sevier Cox, *White America* (Richmond: White American Society, 1923).

16. Harry H. Laughlin of the Eugenics Record Office, appointed the House Immigration Committee’s “expert eugenics agent” in 1920, presented studies showing that the new immigrants contained “a disproportionate percentage of inborn socially inadequate qualities.” See, Higham, *Strangers in the Land*, 313-314; and, Frances Hassencahl, “Harry Laughlin, Expert Eugenics Agent for the House Committee on Immigration and Naturalization, 1921-1931” (unpublished Ph.D. dissertation, Case Western Reserve University, 1970). Kevles, *In the Name of Eugenics*, 97, 101-104.

Given the racial character of these notions, it is not mere historical coincidence that Virginia successfully passed both its compulsory sterilization law and the Racial Integrity Act in the same year the immigration quotas became national policy. Both of Virginia's eugenical measures resonated with dominant cultural themes of southern living. The compulsory sterilization and antimiscegenation statutes served to reinforce and codify distinctively southern race, class, and gender hierarchies that rested on a foundation of patriarchal paternalism, white supremacy, and elite social and political control.<sup>17</sup>

Scholars studying the interplay of race, class, and gender in the South have commented that taboos against interracial sex delineated not only southern mores but also the balances of southern social and political power. Tocqueville noted the paradoxical nature of interracial sexuality in America. "To debauch a Negro girl hardly injures an American's reputation; to marry her dishonors him."<sup>18</sup> Gunnar Myrdal captured white southerners' phobia of interracial marriage and sexuality in his landmark study, *An American Dilemma*. When Myrdal asked white southerners to list what they felt African Americans most desired, creating the "white man's rank order of discrimination," the number-one response was "Intermarriage and sexual intercourse with whites."<sup>19</sup> The strength and persistence of this visceral response to interracial marriage accounts, in part, for the number and durability of antimiscegenation laws in America.<sup>20</sup> Virginia enacted

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17. For an analysis of the Racial Integrity Act in terms of class, race, and gender see Lindquist Dorr, "Arm in Arm," and Saks, "representing Miscegenation Law," 50, 63-65. Paul A. Lombardo's history of *Loving* reconstructs the attempt at social control made by the elite coterie of eugenics promoters. Lombardo, "Miscegenation, Eugenics, and Racism," 421-452. Jack M. Bloom's *Class, Race and the Civil Rights Movement: The Changing Political Economy of Southern Racism* (Bloomington: Indiana University Press, 1987) provides a comprehensive examination of the class-based motivations for social control through the use of white supremacy and paternalism in the South. C. Vann Woodward and Edward L. Ayers have explored these issues as broad cultural and political themes in the post-bellum South. C. Van Woodward, *Origins of the New South 1877-1913* (Baton Rouge: Louisiana State University Press, 1951) and Edward L. Ayers, *Promise of the New South: Life After Reconstruction* (New York: Oxford University Press, 1992).

18. Quoted in Saks, "Representing Miscegenation Law," 43.

19. Gunnar Myrdal, *An American Dilemma*, (New York: Harper and Row Publishers, 1944), 60-61. Whites listed economic advancement as the lowest ranked item; African Americans answering Myrdal's question reproduced a precisely inverse list, with economic advancement rated highest and social equality rated lowest. Sister Annella Lynn's dissertation on intermarriage, submitted the year *Naim* first went to court, began, "There is probably no subject so highly charged with emotionalism as is the subject of interracial marriage. This holds particularly true in regard to the marriage of whites and Negroes." Sister Annella Lynn, *Interracial Intermarriage in Washington, D.C., 1940-47*, (Washington: Catholic University of America Press, 1953), 1. See also, Phil Brown, "Black-White Interracial Marriages a Historical Analysis," 15 *Journal of Intergroup Relations* (Fall/Winter 1989-90), 26-36; Albert I. Gordon, *Intermarriage: Interfaith—Interracial—Interethnic* (Boston: Beacon Press, 1964), 220-232; Joseph R. Washington, Jr. *Marriage in Black and White* (Boston: Beacon Press, 1970), *passim*.

20. The taboos against interracial marriage crossed regional boundaries. States with miscegenation statutes—which may have banned interracial sex, marriage or both—at the time



her own antimiscegenation law in 1691, and “there never was a time—from the 1690s to the 1960s—that a marriage across racial lines involving someone defined as a white person did not carry severe penalties.”<sup>21</sup> Despite this continuity of penal status, the enactment of the 1924 Racial Integrity Act represents a shift in the justification for antimiscegenation law.

The men responsible for the passage of the Racial Integrity Act mobilized support through appeals to traditional white supremacy and through self-conscious manipulation of Virginia’s well-established progressive ethos. The cultural currents of Progressive Era “reform Darwinism”—characterized by belief in the rational, positivist advance of man; belief in the improvement of society by scientific and technological reform; and nativist, nationalist, and racist beliefs—all formed important strands in eugenic thought and Virginia social culture.<sup>22</sup> As with all ideologies, there existed both those who utilized eugenics as a mask for other goals and those who truly believed in the scientific veracity of eugenical precepts. Eugenics scholarship still betrays an overzealous, at times millennial, tone.<sup>23</sup> Arthur H. Estabrook and Ivan Eugene McDougale’s *Mongrel Virginians: The Win Tribe*, became the linchpin study in Virginia eugenicists’ attempt to eliminate the loop-holes in the 1924 law, thereby legalizing only “lily-white” marriages.<sup>24</sup> An incredible circularity and reciprocity characterized the eugenics community, both on the national level and within Virginia. Eugenics authorities buttressed each other’s

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of *Naim v. Naim* included: Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. *Perez v. Sharpe sub. nom. Lippold* 32 P. 2d 17 (1948) invalidated California’s statute. Racism was, and is, hardly a phenomenon limited to the South. Nevertheless, the preponderance of scholarly and lay opinion has remarked upon southerners’ particularly strong resistance to racial intermarriage.

21. Wallenstein, “Race, Marriage, and the Law of Freedom,” 389. The earliest antimiscegenation law in America appears to have been passed in Maryland in 1663. Washington, *Marriage in Black and White*, 45.

22. Robert Wiebe explains the Progressive Era’s penchant for rational control in *The Search for Order 1877-1920* (New York: Hill and Wang, 1967). For accounts of southern progressivism see, Woodward, *Origins of the New South*, and Ayers, *Promise of the New South*.

23. See note 15, above. Mark Haller dubbed these men propagandists. Haller, *Eugenics*, 147.

24. Estabrook was a field worker from the Carnegie Institution’s Department of Genetics and McDougale was a sociologist from Virginia’s Sweetbriar College. The study purported to demonstrate, genealogically, that all Virginia Indians’ blood was so tainted by admixture with African Americans that they must be classified black. The “Win” tribe’s name was itself an acronym describing the White-Indian-Negro miscegenation Estabrook and McDougale “discovered.” The study also related interbreeding and the high incidence of criminality, feeble-mindedness, and illegitimacy, thereby reaffirming hereditary influences on society and necessitating eugenical intervention. Author Howard Estabrook and Ivan Eugene McDougale, *Mongrel Virginians: The Win Tribe*, (Baltimore: The William Wilkins Company, 1926); Lombardo, “Miscegenation, Eugenics, and Racism,” 446.

scholarship and served as expert witnesses during lobbying efforts to pass and uphold eugenical statutes.<sup>25</sup>

Virginia provided ideologically prepared soil for the spreading of eugenical seed. In addition to the resonance between southern culture and eugenics, the collusion between the legal and medical establishment in creating the sterilization law,<sup>26</sup> and the presence of eugenical propagandist Earnest Sevier Cox, the University of Virginia proved a clearinghouse of eugenical doctrine.<sup>27</sup> Professors in the departments of medicine, biology, psychology, education, sociology, and law all taught eugenics to the future leaders of Virginia. Pianist and lecturer in the university's music department, John Leslie Powell, led the charge for the Racial Integrity Act. Powell founded the white Anglo-Saxon Clubs of America (ASCOA) in 1923.<sup>28</sup> The ASCOA operated as a lobbying group for the Racial Integrity Act. Powell, Ernest Sevier Cox, and Dr. Walter A. Plecker, a physician and Registrar of the Bureau of Vital Statistics, shepherded the Racial Integrity Act through the state legislature, bringing "expert" testimony to bear on the "racial threat" posed by miscegenation.<sup>29</sup> ASCOA lobbyists rapidly won converts to their "progressive" and "scientific" measure, but not without meeting resistance.

Political considerations forced Powell and Plecker to amend their iron-clad, white-supremacy law that defined as white only a person with no trace of non-white blood. Some of the leading families of Virginia, who took pride in claiming descent from John Rolfe and Pocahontas, took umbrage at being classified as inferior non-whites. This concern led to the

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25. Lombardo demonstrates that *Buck v. Bell* was a collusive effort among Virginia lawyers and doctors to create a sustainable test case that would establish the constitutionality of eugenic sterilization. H.H. Laughlin provided the model upon which the Virginia sterilization law was drafted and a deposition that was entered into the record. Arthur Estabrook testified to the necessity of eugenical sterilization at the Supreme Court hearing over *Buck v. Bell*. Lombardo, "Three Generations, No Imbeciles," 50 note 109, 59-60.

26. See note 15, above.

27. Indeed, when the Carnegie Institute finally pulled funding from the quest for the eugenical grail, Laughlin and Lewis sought to establish a national eugenics institute at Virginia. See Dorr, "Assuring American's Place in the Sun," 24, note 64.

28. The ASCOA was open to "All native-born, white, male Americans, over the age of eighteen years . . . who are qualified voters or who will pledge themselves to qualify at the earliest opportunity." The image created was one of the upper-class-white-male, shouldering the "white man's burden" with an ingratiating sense of *noblesse oblige*, that masks the attempt at creating political and cultural hegemony. See, "Constitution of the Anglo Saxon Clubs of America," Racial Integrity Material, (restricted papers) John Powell Collection, accession number 7284, box 56, Special Collections, Alderman Library, University of Virginia, Charlottesville. [Hereinafter referred to as: Powell Papers (restricted)] The author would like to thank Professor Ernest Mead, literary executor of the John Powell Estate, for permission to access the restricted portions of the collection.

29. Affidavits of support came from major figures in the eugenics movement. Letter, Lothrop Stoddard to John Powell (February 1, 1924); Letter, Madison Grant to John Powell (February 1, 1924); Letter, Franklin Giddings to John Powell (February 5, 1924) Powell Papers (restricted). Lombardo, "Miscegenation, Eugenics, and Racism," 431-432, and *passim*.

creation of the “Pocahontas clause” which classified as white those individuals with no other non-caucasian blood than one-sixteenth or less the blood of the American Indian.<sup>30</sup> Following this amendment, the bill sailed through the legislature.<sup>31</sup> Thus, once all “historically-white”, upper-class Virginians were protected, the law gained tremendous support. Racism, science, and social control interacted to mediate the law’s provisions. The law would remain in effect, unchanged, for 43 years. Throughout that time it would be enforced by vigilant county court clerks and local vital statistics registrars. As late as 1945, Plecker lobbied a lawyer to push for a conviction under the miscegenation statute: “We attach great importance to this case, and we hope that you will fight it to a finish in the effort to secure an annulment for miscegenation, not for desertion or any other cause.”<sup>32</sup> Plecker sought validation of the law through strict racial classification and a mass of successful precedent-setting prosecutions.

Paul Lombardo notes that, “the true motive behind the Racial Integrity Act of 1924 was the maintenance of white supremacy and black economic and social inferiority—racism, pure and simple.”<sup>33</sup> Certainly, racism played a part in shaping the desire for the Racial Integrity Act, but so did issues of class and sexual control. The Racial Integrity Act simultaneously reinforced sexual mores and class boundaries within white society. Protecting society from race mixture implicitly controlled individual sexuality—limiting with whom one procreated. Additionally, eugenics created biological hierarchies within white society that identified certain tendencies—including pauperism and the proclivity to interracial marriage—as markers of hereditary inferiority. Stigmatizing poverty and legally criminalizing interracial marriage, eugenics and the law circumscribed individual autonomy, promoting a white, middle- to upper-class behavioral norm. The Racial Integrity Act legally controlled the creation of new property holding units (families) and the redistribution of wealth (through marriage and inheritance); constraining individual liberty within racial parameters set by a rarefied group of upper-class

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30. Lombardo, “Miscegenation, Eugenics, and Racism,” 433-435, particularly note 60.

31. The Senate vote was 24 to 3 and the House vote was 72 to 9. Virginia Senate, *Journal of the Senate* (Richmond: 1925), 476; and Virginia House of Delegates, *Journal of the House of Delegates* (Richmond: 1925), 774.

32. Letter, Dr. Walter A. Plecker to C.S. Minter, esq. (April 11, 1945) Powell Papers (restricted). Plecker also supported unsuccessful attempts in 1926 and 1928 to rescind the Pocahontas clause. Four years after *Naim*, J. Robert Switzer, Clerk of the Rockingham Circuit Court requested an Attorney General’s opinion regarding the issuance of a marriage license for a white man and Vietnamese woman. The Attorney General’s opinion reads, “I am of the opinion that you cannot issue a marriage license in the above situation. This is because a German is of Caucasian race and a Vietnamese is of a non-Caucasian race, and such a marriage is specifically prohibited [by the Racial Integrity Act].” Commonwealth of Virginia, *Opinions of the Attorney General and Report to the Governor of Virginia From July 1, 1959 to June 30, 1960* (Richmond: Commonwealth of Virginia Department of Purchases and Supply, 1960), 226.

33. Lombardo, “Miscegenation, Eugenics, and Racism,” 425.

whites.<sup>34</sup> As Lombardo states, prohibiting racial mixture limited black access to economic advancement through intermarriage. The law also kept poor whites from improving their lot through racial intermarriage—thus buttressing the southern class system within both races.

While racist beliefs may have undermined the salience of eugenical theory as a motive for racial integrity in the short term, they point to the real importance of eugenics in relation to civil liberties in the long term. The apparently rational basis of eugenical conclusions immunized their racism from legal scrutiny. The eugenical precepts used to mask racism in 1924 became in 1954 the supports which justified the Virginia Supreme Court of Appeals action in *Naim v. Naim*, and *Naim* became the precedent on which that same court upheld the Lovings' subsequent miscegenation convictions. The serviceability of eugenical theory in justifying Virginia's racial classifications resulted in the Racial Integrity Act surviving for 11 years after *Naim*.

## PART II: PORTSMOUTH

### A. From Chapel to Courtroom

Ham Say Naim, born in Canton, China, arrived in the United States as a cook aboard a British merchant vessel in 1942. Upon docking, Naim jumped ship in search of the American dream. "I got off English ship and got on American ship to make more money."<sup>35</sup> In 1947, Naim made the National Maritime Union in Norfolk his home port. Ruby Elaine Naim, nee Lamberth, born in Saginaw, Michigan to white parents, arrived in Norfolk, Virginia on April 3, 1952. Sometime between the 15th and 20th of April she met Ham Say Naim. Following a whirlwind courtship, the couple moved in together.<sup>36</sup> Informed that Virginia barred interracial marriage, the two drove to Elizabeth City, North Carolina on June 26, 1952 to be married: consciously attempting to evade the Racial Integrity Act. Ruby Naim noted impetuously, "We were married about 1:55 p.m. It would have been sooner but we had to chase one of the judges around." The couple returned to Norfolk by 4:00 p.m. that afternoon, settling in at 247 West Freemason Avenue.<sup>37</sup>

About a year after she met and married Ham Say Naim, Ruby Elaine Naim wrote her seafaring husband, cook aboard the S.S. Lipari, an eleven

34. Saks, *ibid.*, 50. Saks cites the language of *Green v. State*, 58 AL 190 (1877), "[It] is . . . a fact not always sufficiently felt, that the more humble and helpless families are, the more they need this sort of protection. Their spirits are crushed, or become rebellious, when other ills besides those of poverty are heaped upon them. . . ." Pascoe, "Race, Gender, and Intercultural Relations," 6.

35. Quotation from, "Partial Record, Reporter's Transcript, Portsmouth Case File," Chancery Docket Number 9319: Ended Case Number 452: box 2, page 12. [Hereinafter Portsmouth Case File, box number, page number if applicable]

36. Interview with David Carliner, November 3, 1995. Tape in possession of author.

37. "Partial Record, Reporter's Transcript," 5-7, 14.

page love letter. Her letter evokes the classic image of the mariner's wife:

I do love you, and tho [sic] it has been very hard while your [sic] gone . . . it is still you I love with every breath in me. I won't ever give you up and you know it. . . . Even if you should leave the U.S. there are ways I can bring you back. . . . You and the baby are everything in the world to me. . . . You are mine Darling so never forget it. I would kill any other woman I even caught near you.<sup>38</sup>

The long separations while Ham was on a cruise eventually took their toll.<sup>39</sup> Apparently the devoted wife, Ruby only wished for stability—which they hoped to achieve through Ham's naturalization.

Still a Chinese national, Ham had engaged Immigration attorney David Carliner of Alexandria, Virginia to assist in his naturalization. By September of 1953, the situation looked bleak. Ham's seaman's visa was to expire on the 27th. Ruby visited Ham in New York City around the 19th, stopping by Carliner's office on the way home. She wrote to Ham on the 29th, "Ham, this whole mess is just too much for me to try and contend with. I can't take any more and sincerely feel it best to get completely out of the whole situation. In other words, I would appreciate my freedom."<sup>40</sup> The strains of separation, bureaucratic uncertainty, and financial pressure appear to have propelled an otherwise happy couple to divorce. Trial events shatter this image, indicating ways in which other cultural factors involving class, gender and eugenics influenced the case.

## B. The Creation of a Constitutional Challenge

Serendipity brought David Carliner and Ham Say Naim together. Naim initially retained Carliner as his immigration lawyer. When Ruby Elaine Naim filed for annulment, it was only natural that Ham Say Naim turned to Carliner for counsel. *Naim* presented Carliner with the chance of a lifetime, the opportunity to argue a civil rights issue before the United States Supreme Court. "I had been personally involved in antidiscrimination movements all my adult life," he indicated, "I wanted to win the case as a matter of principle."<sup>41</sup> Besides being a member of the American Civil Liberties Union, Carliner had been involved in civil-liberties activism since his college days at the University of Virginia.<sup>42</sup> Carliner completed

38. Defense Exhibit No. 5, Letter REN to HSN, 17 April 1953, Portsmouth Case File, box 1, 7.

39. From the testimony preserved in various documents in the case file, the couple may have been apart for as many as ten of the sixteen months they were married before Ruby filed for divorce.

40. Defense Exhibit No. 9, Letter REN to HSN, 29 September 1953, Portsmouth Case File, box 1.

41. Carliner Interview, November 3, 1995.

42. Carliner Interview, November 3, 1995. Carliner's radical civil-rights stance created conflicts with Dean of the College and mainline eugenicist Ivey Forman Lewis. One clash resulted in Carliner being denied his final year of legal study. It is one of the finer ironies of Virginia eugenical history that David Carliner should bring the first substantial challenge to the Racial Integrity Act—and then appear "of counsel" on the brief in *Loving*. Lewis characterized Carliner as an "extreme leftist," a communist who agitated the race question. For

his training at National University Law Center (now Georgetown Law Center). Admitted to the bar of the U.S. Supreme Court in 1953, Carliner appealed five cases to the Court, appearing twice, before *Naim v. Naim*.<sup>43</sup> Carliner viewed *Naim* as his chance to enlarge greatly the Fourteenth Amendment's protections.

To establish the constitutional issues and grounds for appeal, Carliner needed to neutralize the divorce claim and allow the court to annul the marriage. Ironically, while eight years earlier Walter A. Plecker had urged pressing for annulments under the miscegenation statute as a way of upholding the Racial Integrity Act, David Carliner needed to "achieve" such a conviction to undermine the act. Carliner pursued a three-pronged strategy designed to result in Kellam's annulment of the marriage, to establish grounds for appeal, and to test various constitutional arguments: first he undercut Ruby Elaine Naim's divorce action; second, he contested the Circuit Court's jurisdiction; and third, he challenged the prayer for annulment.<sup>44</sup>

Ruby Elaine Naim sought to end the marriage either under the aegis of the Racial Integrity Act, or through absolute divorce. The grounds for absolute divorce stemmed from her allegation that Ham Say Naim committed adultery in November of 1952.<sup>45</sup> Ruby, however, appears to have engaged in marital impropriety herself. During August of 1953, Ruby wrote her mother, "I'm going to check on the ship tomorrow with New York and I'll let you know as soon as things are straightened out between us. Please don't worry about it as Stan is still with me and I know he won't let anything or anyone harm me. . . ." <sup>46</sup> She signed the letter, "Love to all, Ruby and Stan." In the letter, Ruby refers to her children—Bonnie and Rita—born out of wedlock and in her mother's care. Rita, the child Ruby mentions in her letters to Ham Say Naim, appears to have been the daughter of the man Ruby took up with during the summer of 1953, Stanley William Bridinharn, Jr.<sup>47</sup> Carliner entered all this information into the record. Satisfied that he had deadlocked the divorce claims, Carliner

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details of Carliner and Lewis's scrapes, see various memos in "President's Papers," RG 2/1/2.491: subseries III: box 1: administrative council folder; and box 5: Dean Lewis folder, 1939; Special Collections, Alderman Library, University of Virginia, Charlottesville.

43. Westlaw Citation Search, David Carliner.

44. Virginia Supreme Court of Appeals, *Records and Briefs*, 197 Virginia Reports 69, 2-4. In fact, Carliner operated on a number of specific legal grounds that can be reduced to these three goals. See note 61, below.

45. The complaint filed before the Supreme Court of Appeals reads. "Your complainant [Ruby Elaine Naim] further alleges that the said defendant [Ham Say Naim] committed adultery on the 7th and 8th days of September, 1952, with "Kay" of Mowbray Arch, in the City of Norfolk, Virginia. . . ." Virginia Supreme Court of Appeals, *Records and Briefs*, 197 Virginia Reports 69, 2.

46. Defense Exhibit No. 1, REN to Mother, 24 August 1953, Portsmouth Case File, box 1.

47. See, "Motion to Vacate Order for Alimony," February 19, 1954, Portsmouth Case File, box 2; and, Defense Exhibits Nos. 1, 2, and 4 (a series of letters between REN and her Mother), Portsmouth Case File, boxes 1 and 2.



turned to the issue of the court's ability to enforce the Racial Integrity Act.

Carliner challenged the Circuit Court's jurisdiction—its ability to decide the matter—by arguing that the court lacked constitutional power to enforce the statute. Carliner claimed that “diversity of citizenship” existed because Ham Say Naim remained a Chinese native and Ruby Elaine Naim's “intermittent and transitory presence” in Virginia prevented her from establishing Virginia residency. Only federal courts have jurisdiction in cases where diversity of citizenship exists; Kellam's ruling on the case would establish grounds for Carliner's appeal. Direct testimony from both sides undercut Carliner's argument. Had Carliner truly believed his jurisdictional contention, he might have sought to remove the cause to the federal circuit court. The federal court, however, would not have annulled the marriage under the Racial Integrity Act—the result Carliner needed to challenge the Act's constitutionality.

Finally, Carliner contested the annulment of the marriage under the “full faith and credit” provision of the Constitution. This clause ordinarily requires each state to regard as valid all actions lawfully performed in other states. With regard to marriage, the time honored doctrine held that a marriage valid where celebrated is valid everywhere.<sup>48</sup> The framers of the Virginia law anticipated this sort of “conflict of laws” challenge. Thus, the Racial Integrity Act went beyond invalidating interracial marriage celebrated in Virginia. The law denied recognition of any interracial marriage, regardless of its legality where performed. The Act also prescribed criminal penalties for parties—like the Naim's—who left the state to avoid the law and marry. It also prohibited interracial couples from living together “as man and wife.” The Act's stringent racial classification and well-developed prohibitions created a seemingly ironclad law.

Carliner never directly contested the right of the state to regulate marriage through racial classification. Moreover, Carliner never contested the “reasonableness” of the classifications—whether these classifications existed upon a “rational basis.” Instead, he attempted to demonstrate that the race of the parties could not be determined with any accuracy. Carliner followed the precedent set by the Virginia Supreme Court of Appeals in *Keith v. Commonwealth*, in which the court set aside a miscegenation conviction, holding that the burden of proof as to race lay with the state.<sup>49</sup> Carliner remembered his examination of Ruby Elaine Naim, “I was trying to make a point, somewhat too cutely, How do we know this woman was all white? Her ancestry was from Indiana, and I asked her if she knew her grandparents and her great-grandparents, just to make cer-

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48. For a contemporaneous study of marriage and the issues surrounding conflict of laws, see, Charles W. Taintor, “Marriage in the Conflict of Laws,” *Vanderbilt Law Review* 9 (1956): 607-632.

49. *Keith v. Commonwealth* 181 S.E. 283 (VA 1935). In *Keith*, the state failed to prove beyond a reasonable doubt that the alleged grandfather of the accused 1) was indeed his grandfather; and, 2) had Negro blood.

tain that she was Caucasian. She turned to me with great hostility and yelled, How do I know that you're not black!" Carliner felt he could not have made the point any better. Judge Kellam did not agree. He allowed Ruby Elaine Naim and her witnesses to testify as to the race of Ruby and Ham, based solely on their visual impressions of the two, over Carliner's exceptions.<sup>50</sup>

Appearances formed the basis for the determination of the case. After a grueling day of testimony, Judge Kellam proved that he "knew an easy case when he saw one."<sup>51</sup> "I hold that the marriage is void. Also, he is liable for counsel fees. So far as alimony, there is no alimony. That is the way I have felt all through this matter."<sup>52</sup> Kellam's final order is equally terse. "It *appearing* to the court that the complainant is a member of the Caucasian race and the defendant not of the white race . . . . It is adjudged ordered and decreed that the marriage of the parties. . . is void." [emphasis added]<sup>53</sup> "Appearing" was an appropriate word for Kellam to use, although "appearance" seems an unscientific way to enforce a "scientifically reasonable" statute. Nevertheless, the concept of "appearances" highlights how the decision squared with the law and with the dominant culture of the time—helping to maintain standards (appearances) of propriety.<sup>54</sup>

Carliner remembered that Judge Kellam belonged to an important Portsmouth family, "They were a powerhouse politically, that is the Kellam family in Portsmouth, they were a political machine."<sup>55</sup> With this background, Kellam undoubtedly understood prevailing Virginia attitudes with regard to interracial marriage. Politically, it would have been inopportune for Kellam to rule in favor of Ham Say Naim. Portentously, the case was docketed on the same day President Eisenhower appointed Earl Warren to the Supreme Court, and Virginia newspapers filled their pages with prognostications as to what this appointment meant for the disposition of the segregation cases. Racial tension blanketed the social landscape.<sup>56</sup> A ruling seen as giving any recognition to the legitimacy of an interracial marriage would have struck the most sensitive nerve in the collective southern consciousness—fear of men of color sleeping with white

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50. "Partial Record, Reporter's Transcript," Portsmouth Case File, box 2, 3-4. Ruby Elaine Naim was born in Michigan, but her parents lived in Indiana at the time of the trial.

51. Wallenstein, "Race, Marriage, and the Law of Freedom," 416. A.A. Bangel, Ruby Elaine Naim's lawyer complained, "The case lasted until 6 o'clock that night." A.A. Bangel to Judge Floyd E. Kellam, 9 April 1954, Portsmouth Case File, Box 1.

52. "Partial Record, Reporter's Transcript," Portsmouth Case File, box 2, 14.

53. Chancery Order Book 23 December 1953 - June 1954, Portsmouth Circuit Courthouse, Portsmouth. Also Virginia Supreme Court of Appeals, *Records and Briefs*, 197 Virginia Reports 69, 5.

54. Eva Saks uses discourse theory to understand the logic of appearances in miscegenation law. Saks, "Representing Miscegenation Law," 58.

55. Carliner Interview, November 3, 1995.

56. See, for example, the front and editorial pages of *The Richmond Time-Dispatch* and *The Norfolk Virginian Pilot*, October 3, 1953.

women. Granting a divorce would signal such tacit acceptance of the marriage's validity.<sup>57</sup> The law dictated annulment; the social environment buttressed that decision.

Beyond the political/legal context surrounding this case, issues of class and gender complemented the racial appearances of the couple, increasing the likelihood of an annulment for miscegenation. Ham Say Naim's occupation as a cook reinforced his presumed racial inferiority—eugenically and socially. Testimony depicted Ruby Elaine Naim as a poor woman of questionable morals—she had two children born out of wedlock; she was an adulteress; and she appeared impetuous and quick tempered. At a time when divorces were hard to come by under the best of circumstances, Ruby Elaine Naim proved a poor supplicant for the court's favor. Indeed, she and Ham Say Naim perfectly fit the stereotype of candidates for eugenic reform. Their miscegenous marriage threatened racial purity with the specter of "mongrelized" children. But more importantly, the low-class status of the couple reinforced eugenical beliefs that only the socially "unfit" engaged in interracial marriage. Ruby's children born out of wedlock bespoke a moral laxity, a "moral delinquency" for which the state of Virginia had routinely committed and sterilized individuals.<sup>58</sup> Eugenics offered permanent solutions to illegitimacy through controls on gender and sexuality. The children, and Ruby's inability to care for them herself, raised the issue of welfare—both in terms of the children's well being, and with regard to state provision of charitable support for the family. Eugenicists had argued for the Racial Integrity Act and Virginia's sterilization law to avoid this social encumbrance; society should not be burdened, according to men like Powell, Plecker, Cox, and Lewis, with caring for the sub-standard progeny of unfit parents.

Carliner pronounced himself "well pleased" that Judge Kellam

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57. Examination of the newspaper coverage of the case revealed an interesting dichotomy. The white press reported the case in all its phases—from Kellam's decision through the U.S. Supreme Court's final denial. The African-American press, however, barely mentioned the case. They only commented when the Virginia Supreme Court of Appeals ignored the U.S. Supreme Court's order to return the case to the Portsmouth court. This rebellious act alarmed African Americans; it was clearly a harbinger of rising southern "Massive Resistance" to school integration. One might speculate that the imbalance in coverage reveals the relative white paranoia and black indifference toward interracial marriage and sexuality. The African-American press may have intentionally ignored the case, proactively undermining any attempt by whites to claim that sexual equality was the true goal of *Brown*.

58. Paul A. Lombardo, "Three Generations, No Imbeciles," 30-62. The term "moral delinquent" described the feeble-minded during *Buck v. Bell*, but in practice it became a label under which virtually any (particularly lower-class female) person might be committed and sterilized as, "sterilization was usually performed upon persons thought capable of being discharged from the institution to the community." Sterilization removed the threat of unwanted pregnancy at the source; one no longer needed to reform an individual's moral sense to control reproduction. Virginia sterilized 5,380 individuals between 1924 and 1949, an average of 207 individuals per year. In the fifties this rate was maintained, being 228, 201, 152, 176, 195 for 1950-1954—the years when *Naim* was in the Virginia Courts. Phillip R. Reilly, *The Surgical Solution: A History of Involuntary Sterilization in the United States* (Baltimore: Johns Hopkins University Press, 1991), 158.

“appropriately granted an annulment rather than a divorce.”<sup>59</sup> This outcome allowed him to pursue his appeal to the Virginia Supreme Court of Appeals, a body he was certain would affirm the decision of the lower court.<sup>60</sup> In the Virginia Supreme Court of Appeals, the state of Virginia relied on eugenics to uphold Kellam’s decision.

### PART III: THE VIRGINIA SUPREME COURT OF APPEALS

Carliner refined his strategy in the transition to the Supreme Court of Appeals. He decreased his objections from seven to two.<sup>61</sup> Carliner carried forward a jurisdictional challenge to the lower court’s right to decide the case and a Fourteenth Amendment challenge to the Racial Integrity Act itself. In effect, Carliner attempted to prove first, “that the courts are without the power to set aside the marriage of the parties here because of their races,” and secondly that, “if the preceding is true, it is obviously no less true that the legislature is incompetent to enact such annulments.”<sup>62</sup> Carliner had no doubt that Virginia’s high court would affirm Kellam’s decision. Thus, the hearing provided him with a dry run of the strategy he hoped to use before the U.S. Supreme Court. The Court asked State Attorney General, J. Lindsay Almond, Jr. (who subsequently would become infamous as the Massive Resistance governor of Virginia) to file an *amicus curiae* brief. The state’s brief, as it turned out, hinged upon state rights and eugenical arguments—reasoning the court would adopt in its opinion.

#### A. State Power Versus Marriage as a Universal Right

Carliner contended, in a tortuous portion of his petition, that the Circuit Court lacked jurisdiction to hear the case for a number of reasons. He disputed the Circuit Court’s jurisdiction over “the precise question which its judgment assumes to decide.”<sup>63</sup> Relying on the precedents in the *Civil Rights Cases*<sup>64</sup> and particularly in *Shelley v. Kraemer*,<sup>65</sup> Carliner sought to convince Virginia’s justices that only federal courts had jurisdiction over cases involving racial classifications, and that federal courts

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59. Carliner Interview, November 3, 1995.

60. Ibid.

61. Carliner abandoned assignments of error based on conflict of laws (three), limits to the police power, and failure to prove Ruby Elaine Naim’s whiteness. “Assignments of Error” (March 10, 1954), “Record,” and “Petition for Appeal” (June 7, 1954) in Supreme Court of Virginia, *Records and Briefs* 197 Virginia Report 69.

62. David Carliner, “Petition for Appeal,” in *Records and Briefs*, 197 Virginia Reports 69, 11.

63. Passage from *Black’s Judgments*, quoted in the Virginia Supreme Court decision in *Linkous v. Stevens*, 116 VA 898 (1914).

64. *Civil Rights Cases*, 109 U.S. 3 (1883).

65. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

would strike them down as repugnant to the Fourteenth Amendment. "It is, of course, axiomatic that denial of jurisdiction to the State's tribunals is encompassed within prohibitions of the Fourteenth Amendment."<sup>66</sup> If the state courts lacked the power to enforce restrictive covenants, which affected a property contract based upon race, then they could not enforce regulation of the marriage relation, another form of contract, based upon race. "It can no longer be gainsaid that these clauses deny to the states the power to inhibit or to regulate the exercise of any civil or political rights of persons based upon the sole consideration of their race or color."<sup>67</sup> Carliner favored the broadest possible construction of the Fourteenth Amendment limiting state courts' and legislatures' control over personal liberty. Carliner effectively elevated the marriage contract to a more sacrosanct position.<sup>68</sup> States did not, in Carliner's view, have the power to retard personal liberty in *any* area of civil life on the basis of racial classifications.<sup>69</sup>

Relying on the language in *Meyer v. Nebraska*,<sup>70</sup> Carliner attacked the relationship between the state's police power and the racial classifications upon which the Racial Integrity Act stood. Quoting liberally from Justice McReynold's 1923 opinion, Carliner asserted that the Fourteenth Amendment assured,

the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry . . . and generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. The established doctrine is that this liberty may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary or without *reasonable relation* to some purpose within the competency of the state to effect. [emphasis mine.]<sup>71</sup>

One reading of *Meyer* places marriage among the guaranteed liberties. Another reading holds that *Meyer* establishes the grounds upon which marriage may be regulated. Using *Meyer*, Carliner conceded that marriage was subject to the control of the states, but he sought to distinguish

66. Carliner, "Petition for Appeal," in *Records and Briefs*, 197 Virginia Reports 69, 7.

67. Carliner, *Ibid.*, 8.

68. Other contemporary commentators recognized this dimension of the case. The first editorial note in the first edition of the *Howard Law Journal* concerned the appeal of *Naim* to the Virginia Supreme Court of Appeals. "The case . . . goes to the heart of the matter of racial segregation and poses a question which [in light of the *Brown* and *Bolling v. Sharpe* decisions] . . . demands a more searching inquiry into the legal grounds generally used to sustain these miscegenation statutes." PLD, "The Constitutionality of Miscegenation Statutes," 1 *Howard Law Journal* (1955): 87. The note asserts, "It is submitted that miscegenation statutes deprive the parties against whom they operate of liberty without due process of law," expanding the definition of liberty to include the right to marry and raise children, PLD, *Ibid.*, 92.

69. David Carliner, "Reply Brief," in *Records and Briefs*, 197 Virginia Reports 69, 12-19, particularly 18.

70. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

71. *Meyer v. Nebraska*, 262 U.S. 390 (1923): 399, quoted in Carliner, "Petition for Appeal," in *Records and Briefs*, 197 Virginia Reports 69, 9.

between reasonable and unreasonable grounds for regulation. "But the power of the State, through the trial court below, to set aside the marriage of the parties here [in *Naim*], as the Supreme Court has said repeatedly, may not be arbitrary, must have a proper governmental objective, and must have a reasonable relation to some purpose within the competency of the state to effect."<sup>72</sup> In Carliner's view, the Racial Integrity Act passed none of these tests.

Carliner claimed that the Racial Integrity Act was unconstitutional on its face. Carliner tried to undercut the eugenical rationale of the Act by building an analogy between residential segregation and racial purity. Despite the contention that segregation assured the peace and fell under the police power, Carliner asserted that:

although the maintenance of racial purity was only an incidental purpose of the [housing] ordinance . . . , the basic arguments invoked in its support . . . were that the ordinances were a reasonable exercise of the police power to promote the health, peace, morals, and order of the public, that segregation did not constitute a deprivation of liberty or property without due process of law, and that the ordinances applied equally to affected persons.<sup>73</sup>

Carliner argued two propositions. First, by relating failed segregation cases to the police power, he attempted to undermine the justification of the Racial Integrity Act as a reasonable exercise of the state's power to promote social order. Second, he endeavored to refute the logic of *Pace v. Alabama*, where the Court held that when penalties applied equally to both the black and the white parties, they were not discriminatory.<sup>74</sup> When the state made this argument in its *amicus curiae* brief, Carliner retorted that in determining a person's right to marry, "the question cannot be whether the law is a 'prohibition upon both races alike and equally.' It must be whether *his* marriage is accorded that same protection afforded other marriages and if there is a distinction, whether that distinction is based solely upon a racial test."<sup>75</sup> Concluding that the appellant's marriage was indeed subjected to a racial test in determining annulment, Carliner challenged the constitutionality of the Racial Integrity Act on its face.

Carliner attempted to lift marriage largely beyond the purview of state regulation by extension of other civil rights decisions—not by ques-

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72. Carliner, *Ibid.*, 9.

73. Carliner, *Ibid.*, 12.

74. *Pace v. Alabama* 106 U.S. 583 (1882). In *Pace*, an Alabama miscegenation case, the Court held that since the penalties for interracial fornication were equivalent for the white and black convicted, there was no unequal application of the law—even though the penalty for intraracial fornication (black/black or white/white unmarried sexual congress) was less severe. Carliner tried to undermine *Pace* using the Court's decision in *Shelley v. Kraemer*, "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual . . . . It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities [among groups]." *Shelley v. Kraemer*, 334 U.S. 1 (1948), 22.

75. Carliner, "Reply Brief," in *Records and Briefs*, 197 Virginia Reports 69, 7.



tioning eugenical theory.<sup>76</sup> He contended that the Fourteenth Amendment inherently limited states' and state courts' power to make rights contingent upon race. Carliner implied the invalidity of the eugenical underpinnings to the Racial Integrity Act, but he had abandoned any challenge to the reasonableness of eugenically based classifications. He merely asserted that, "It is settled that such a purpose [the preservation of racial integrity] whether sound or wholesome, since the adoption of the Fourteenth Amendment has been neither a proper governmental objective nor within the competency of the state to effect."<sup>77</sup> Carliner broadly construed the Fourteenth Amendment, making any infringement upon personal liberty unconstitutional if based upon race.<sup>78</sup>

Carliner's approach required a sympathetic court to be successful. Even his due process argument would require a hostile court to agree that, "however desirable 'racial integrity' may be to the Virginia legislature, the Fourteenth Amendment prohibits it from interfering with a person's right to choose whom he would marry, if the intrusion is based upon criteria of race or color." In Carliner's mind, "The Virginia legislature, perforce, must leave such questions to what is perhaps a more fundamental law, the law of natural selectivity."<sup>79</sup> Had he raised a challenge to the "scientific" justification of Racial Integrity Act, Carliner might have forced the court to face directly the reasonableness of scientifically justified white supremacy. Carliner, however, had tied his own hands regarding Ham Say and Ruby Elaine Naim's racial classifications. Carliner submitted a statement of facts, rather than a complete transcript, concerning the Portsmouth hearing to the higher court.<sup>80</sup> Since the statement of facts stipulated the litigants' race, the Supreme Court of Appeals did not have to take notice of the original debate over the litigants' racial "appearances." By failing to address the eugenic underpinnings of the racial classifications, Carliner left open the loophole through which the state, and the miscegenation law, would escape.

## B. The State and Eugenics

### The *amicus curiae* brief filed by Attorney General J. Lindsay

76. The contemporaneous *Howard Law Journal* note makes the same argument. PLD. "The Constitutionality of Miscegenation Statutes," 93-95. The argument in the *Howard* piece, however, goes on to assert that since many of the miscegenation laws enforce their restrictions without formal trials, they are effectively bills of attainder and therefore unconstitutional. PLD, *Ibid.*, 95-97.

77. Carliner, *Ibid.*, 9.

78. These contentions come out most clearly in Carliner, *Ibid.*, *passim*.

79. Carliner, "Petition for Appeal," in Records and Briefs, 197 Virginia Reports 69, 13.

80. "I believe the few facts which are germane to the issues raised on appeal . . . the testimony regarding the races of the parties—are not in dispute, and that a statement of facts would adequately protect the interests of both parties. Under these circumstances . . . a transcript of the testimony is not warranted." Carliner to Judge Floyd E. Kellam, 8 April 1954, Portsmouth Case File, box 1. See also, A.A. Bangel to Judge Kellam, 9 April 1954; and, Carliner to Kellam, 13 April 1954, Portsmouth Case File, box 1.

Almond, Jr. made short work of Carliner's overwrought jurisdictional argument. In answer to Carliner's challenge to the jurisdiction of the Portsmouth Circuit Court, Almond relied on the state Constitution. "*Jurisdiction emanates from the Legislature. . . . the power of a court to hear and determine a particular type of controversy and to award a specific mode of relief is entirely a matter of legislative grant.*" [emphasis in the original]<sup>81</sup> For Almond, the first assignment of error was "but another aspect of that framed in the second [error]." If the Virginia statute was unconstitutional, then there was no way that the legislature could grant the courts power: legislative constitutionality preceded legal jurisdiction.

Assuming that the case rested solely on its Fourteenth Amendment challenge, the state proceeded to summarize the appellate rulings—both Virginia and federal—on miscegenation. First citing *Ex Parte Kinney*, the state disavowed any abrogation of equal protection: "If it forbids a colored person from marrying a white, it equally forbids a white person from marrying a colored. In its terms, and, for all I know its spirit, the law is a prohibition put upon both races alike and equally."<sup>82</sup> The state cited *Pace v. Alabama* as "the only case to our knowledge where the Supreme Court of the United States has ruled on an anti-miscegenation statute since the Fourteenth Amendment was ratified." While this was technically correct, in *Pace* the Court ruled on interracial fornication *not* intermarriage. Despite Carliner's argument that, "the power of a state to punish adultery and fornication between persons of different races stands on a different footing than any asserted power to prohibit interracial marriages. The right to marry is admittedly a fundamental liberty; a right to fornicate is not,"<sup>83</sup> the state asserted that, "the Supreme Court of the United States has approved anti-miscegenation statutes."<sup>84</sup> Ultimately the state concluded by stating, "though miscegenation statutes have been persistently attacked on the ground that they violate the Federal Constitution, they have been universally upheld as a proper exercise of the power of each state to control its own citizens."<sup>85</sup> The state finished its brief by slipping through the eugenically supported, police-power loophole.

When *Naim* arrived before the Virginia Supreme Court of Appeals, 29 states maintained miscegenation laws.<sup>86</sup> The sole precedent for the unconstitutionality of a miscegenation statute came in *Perez v. Sharp sub. nom. Lippold*,<sup>87</sup> a four-to-three ruling by the California Supreme Court in

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81. Attorney General, "Brief of the Commonwealth of Virginia Amicus Curiae," in *Records and Briefs*, 197 Virginia Reports 69, 5.

82. *Ex Parte Kinney*, 14 *Federal Cases* (1879): 602-608.

83. Carliner, "Reply Brief," in *Records and Briefs*, 197 Virginia Reports 69, 9.

84. Attorney General, "Amicus Curiae," in *Records and Briefs*, 197 Virginia Reports, 69, 13.

85. Attorney General, *Ibid.*, 16.

86. See note 20, above.

87. *Perez v. Sharp sub nom. Lippold*, 198 P. 2d 17 (1948), 17-47.

1948 overturning California's miscegenation statute. Virginia sought to distinguish between *Naim v. Naim* and *Perez v. Sharp*. In *Perez*, the California court held that because California recognized miscegenous marriages performed in states where such marriages were legal, "it follows that [miscegenous] marriage cannot be considered vitally detrimental to the public health, welfare and morals." Furthermore, the California court held that the California statute was "entirely declaratory, while all others carry with them penalties for violation." The court concluded that such an ambivalent position "indicate[d] an attitude of comparative indifference on the part of the Legislature, and the absence of any clearly expressed public sentiment or policy."<sup>88</sup> The Attorney General argued that the Racial Integrity Act left no such ambiguities in terms of penalties or as a reflection of public sentiment. Furthermore, the state contended that the determining question in *Perez*, the reasonableness of racial classifications, was not present in *Naim v. Naim*.<sup>89</sup>

According to the state, the balance between the legislative power and the judicial power depended upon the discretion the judiciary used in reviewing legislation. "This power [judicial review] is generally regarded as the paramount authority of the judiciary and one which is to be exercised with a caution and a deliberation proportioned to its scope." The state asserted that, "the courts themselves have developed certain well established constitutional principles designed to preserve the appropriate balance between the legislative and judicial departments in such cases."<sup>90</sup> This jurisprudential doctrine would allow the state to uphold the Racial Integrity Act based upon largely discredited eugenical precepts, because Carliner had presented no formal challenge to their reasonableness. Ultimately, for Carliner, the issue was not whether or not the classification was reasonable. Instead, it was whether or not the state had the power to make such racial classifications in the first place.<sup>91</sup>

Citing *American Jurisprudence* as authority, the state reminded the court that:

when the classification in a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. Although the presumption in favor of a classification is not conclusive and is rebuttable, courts may not declare it invalid unless, *viewed in the light of facts made known or generally assumed*, it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators

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88. *Perez v. Sharp sub nom. Lippold*, *Ibid.*, 31, 33.

89. Neither the state, nor ultimately the court, accepted Carliner's argument in the "Reply Brief" that, since the Supreme Court had termed racial distinctions "irrelevant, unjustified, inexcusable, and odious" the Court was in effect "saying that such classifications are arbitrary and unreasonable on their face," and that the state must bear the burden of demonstrating "a pressing public necessity . . . in order for the classifications to be considered reasonable." Carliner, "Reply Brief," in *Records and Briefs*, 197 Virginia Reports 69, 18.

90. Attorney General, "Amicus Curiae," in *Records and Briefs*, 197 Virginia Reports, 69, 20.

91. Carliner, "Reply Brief," in *Records and Briefs*, 197 Virginia Reports 69, 12.

[emphasis in original].<sup>92</sup>

Carliner needed, according to the state, to attack substantively the underlying eugenical assumptions of the system of classification. Quoting again from *American Jurisprudence*, the state argued, "Invalid discrimination must be proved or admitted; it is not presumed. The courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism."<sup>93</sup> Since the statement of fact abandoned Carliner's Portsmouth challenges to racial classifications, the court could accept eugenical classifications as a reasonable basis for the Racial Integrity Act. Thus, for the state, while the California court in *Perez*, "concluded that the force of the presumption of constitutionality is vitiated or the entire presumption inapplicable in situations involving racial classifications, the majority did not indicate . . . that a regulation based upon racial distinctions is presumed to be *invalid*. . . ."<sup>94</sup> In *Perez*, counsel did question the validity of racial classifications, thereby avoiding the difficulty presented by the rational basis test.

*Perez* battered down eugenic theory—reducing it in the eyes of the California justices as a reasonable grounds for racial classification.<sup>95</sup> In *Naim*, "The entire appellate record in the case at bar . . . contains no transcript of any testimony offered at the trial level. Moreover, it does not appear that appellant raised the issue of the reasonableness of the classifications established by the Virginia anti-miscegenation law."<sup>96</sup> Carliner retained an approach emphasizing marriage as a basic right, and asserting that the Racial Integrity Act was unconstitutional on its face. "I don't think if I put it in a more discrete way, 'The classifications are inappropriate,' as if some other classification would be OK . . . I would say that I wouldn't care to have them say 'This classification is no good, but another classification would be OK.' I would think that an unsatisfactory result."<sup>97</sup> The state countered this assertion by contending that without challenging the classifications, Carliner had no grounds for attacking the statute. The fact that over one-half of the states (29) had antimiscegena-

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92. "Presumptions and Burden of Proof," section 521 in *American Jurisprudence* 12:214, quoted in Attorney General, "Amicus Curiae," in *Records and Briefs*, 197 Virginia Reports 69, 21.

93. *American Jurisprudence*, quoted in Attorney General, *Ibid.*, 21.

94. Attorney General, *Ibid.*, 26. On page 27, the state asserted that, "It was only after a full analysis of these authorities (biological, psychological [sic], sociological [sic], etc.) [presented against the statute] that a majority of the Court resolved that the classification was in fact arbitrary and that the regulation predicated upon it could not stand."

95. *Perez v. Sharp sub nom. Lippold*, 198 P. 2d 17 (1948), 17-29. In *Perez*, the logic of eugenics was undercut by direct anthropological and biological testimony calling into question the early eugenical assumptions of "race." *Perez* also cited the failure of *Skinner* to question the validity of eugenics, pointing directly to Justice Jackson's musing about the propriety of "conducting biological experiments at the expense of the dignity and personality and natural powers of a minority." *Perez*, footnote 1.

96. Attorney General, "Amicus Curiae," in *Records and Briefs*, 197 Virginia Reports 69, 27.

97. Carliner Interview, November 3, 1995.

tion laws seemed, to the state, to establish the reasonableness of racial classification, in absence of any substantive challenge from Carliner. The court, it turned out, agreed entirely.

### C. The Decision: States Rights and Eugenics

Forty years later, David Carliner still becomes angry when he thinks of his time before the Virginia Supreme Court of Appeals in 1955. "I recall very vividly—I can't recall any colloquies between myself and the Court—I was never treated with such hostility anywhere as I was by that Court. The fact this was a Chinese-white marriage didn't make any difference; they saw black all over the place. And they treated me as if I were a piece of shit. I was treated very badly."<sup>98</sup> Not surprisingly, the ruling went against Carliner. The language of the ruling is highly evocative—a blend of militant state rights and eugenical theory. Justice Buchanan, writing for the court, cribbed liberally from the state's *amicus curiae* brief, accepting its argument entirely.

First, Buchanan tellingly invoked *Plessy v. Ferguson* to establish the constitutionality of antimiscegenation law.<sup>99</sup> The court did not accept Carliner's argument that, in light of the *Brown* and *Bolling v. Sharpe* decisions, the doctrine of separate but equal "has no applicability to a marriage. Train accommodations may be interchangeable, but spouses are not."<sup>100</sup> The court distinguished between social legislation and the rights the Fourteenth Amendment protected by citing two cases repugnant to southerners. Noting that *Brown* held segregation in schooling unconstitutional because education "[is] the very foundation of good citizenship," the court minced no words in distinguishing interracial marriage from desegregated education:

No such claim for the intermarriage of the races could be supported; by no sort of valid reasoning could it be found to be a foundation of good citizenship or a right which must be made available to all on equal terms. In the opinion of the legislature of more than half the states [the 29 states with active miscegenation laws] it is harmful to good citizenship.<sup>101</sup>

Then, citing *Bolling v. Sharpe*, the court noted that, "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."<sup>102</sup> Stating that, "it is the considered opinion of more than half of the States of the Union that the prohibition against miscegenetic marriages is a proper

98. Carliner Interview, November 3, 1995.

99. *Naim v. Naim*, 197 VA 80 (1955), 87. The court quotes *Plessy*: "Laws forbidding intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the state."

100. David Carliner, "Reply Brief," in *Records and Briefs*, 197 Virginia Reports 69, 9.

101. *Naim v. Naim*, 197 VA 80 (1955), 88.

102. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

governmental objective,” the court established its belief in a reasonableness of eugenic racial classification.

Justice Buchanan’s decision then becomes a self-consciously eugenical text. Citing the U.S. Supreme Court’s *Purity Extract* decision, Buchanan wrote, “It is also well established that, when a state exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary to make its action effective.”<sup>103</sup> As far as Buchanan was concerned, the decision in *Purity* stated the issue squarely: “The inquiry [by the court] must be whether, considering the ends in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat.”<sup>104</sup> The justice then chided Carliner in his approach to the case:

The only way by which the statute could be made effective was by classification of the races. If preservation of the racial integrity is legal [which the court had just asserted it was, under the police powers], then racial classification to effect that end is not presumed to be arbitrary.

It does not appear from this record that the appellant questioned the reasonableness of the classification in the trial court. There is no evidence in the record suggesting that the classification made by the statute is unreasonable or that it is not reasonably related to the purpose intended to be accomplished. In the absence of all evidence to the contrary, the presumption of reasonableness is very strong.

The court seemed to indicate that Carliner’s challenge might have been more substantial had he questioned racial classification directly.<sup>105</sup> While this is unlikely, given Carliner’s recollection of the court’s response to the case, the lack of such a challenge to the eugenical foundations of the Racial Integrity Act allowed the Virginia court to hide the Act behind the shield of legal doctrine.

The court asserted that:

When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.<sup>106</sup>

In failing to question the eugenical underpinnings of the Racial Integrity Act, a challenge that was used in overturning the California miscegenation statute in *Perez v. Sharp*, Carliner allowed the Virginia statute to be reaffirmed, tacitly becoming a precedent for eugenically motivated

103. *Purity Extract & c. Co. v. Lynch*, 226 U.S. 192.

104. *Ibid.*, quoted in *Naim v. Naim*, 197 VA 80 (1955), 89.

105. Recall that Carliner objected to the determination of race by visual and hear-say evidence during the Portsmouth trial, abandoning this objection on appeal, footnote 80 above. Nowhere did Carliner attack the rationale of racial classification: the theories that the races are indeed distinguishable and qualitatively different.

106. *Borden’s Farm Products Co. v. Baldwin*, 293 U.S. 194, quoted in *Naim v. Naim*, 197 VA 80 (1955), 89.



social control.<sup>107</sup>

The tight interweaving of social and cultural issues with eugenical precepts is evidenced in the concluding paragraphs of the Virginia Supreme Court of Appeals decision, which deserve to be quoted at length.

The institution of marriage has from time immemorial been considered a proper subject for State regulation in the interest of the public health, morals and welfare, to the end that family life, a relation basic and vital to the permanence of the State, may be maintained in accordance with established tradition and culture and in furtherance of the physical, moral and spiritual well-being of its citizens.

We are unable to read in the Fourteenth Amendment to the Constitution or in any other provision of that great document any words or intentment which prohibit the State from enacting legislation to preserve the racial integrity of its citizens, or which denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens. We find there no requirement that the State shall not legislate to prevent the obliteration of racial pride, but must permit the corruption of blood even though it weaken or destroy the quality of its citizenship. Both sacred and secular history teach that nations and races have better advanced in human progress when they cultivated their own distinctive characteristics and culture and developed their own peculiar genius.<sup>108</sup>

Buchanan strikes the major chords of eugenic ideology, simultaneously upholding the tradition and culture of southern white supremacy. His appeal to unspecified teachings of history evokes Madison Grant, Lothrop Stoddard, and Earnest Sevier Cox's arguments for racial integrity and separation. Championing "racial integrity" and "racial pride" against the social and cultural solvent of "mongrelization" caused by "corruption of the blood," Buchanan reiterates beliefs from an era before Hitlerian biological determinism. This is perhaps not surprising. Most of the Justices on the Supreme Court of Appeals graduated from law school in the teens and twenties, just when eugenical thought in Virginia reached its apogee. One, Justice Lemuel Smith, actually voted for both the eugenic sterilization and the racial integrity acts as a member of the House of Delegates.<sup>109</sup> The Justices, much more than Carliner, would have been familiar with the history of the Racial Integrity Act.<sup>110</sup>

Justice Buchanan concluded the opinion with a fire-breathing para-

107. At a later stage of the trial when associate counsel Will Maslow suggested a direct assault on the eugenic rationale, "Carliner had deep reservation about the value of such [contra-eugenic] testimony by physical anthropologists. It would not only incur added expenses . . . but also invite counter testimony by state witnesses to the effect that the offspring of interracial marriage were unhappy and had difficulty adjusting to a hostile world." Sohn, "Principle and Expedience in Judicial Review," 90.

108. *Nam v. Naim*, 197 VA 80 (1955), 89-90.

109. Smith graduated from the University of Virginia in 1916 and lived in Charlottesville: home of John Powell and the university eugenicists. *Journal of the House of Delegates of Virginia* (Richmond: Superintendent of Public Printing, 1924) 772, 774-775. *Acts of the General Assembly*, (Richmond: Superintendent of Public Printing, 1924) 834.

110. The newspaper propaganda favoring the Racial Integrity Act was unprecedented. John Powell published an in-depth, thirteen-part editorial colloquium in eugenics under the title "The Last Stand" [against racial declension due to amalgamation] in the *Richmond Times-Dispatch*. See, Richard B. Sherman, "The Last Stand": The Fight for Racial Integrity in Virginia in the 1920s," *Journal of Southern History* 54 (February 1988): 69-92.

graph:

Regulation of the marriage relation is, we think, distinctly one of the rights guaranteed to the States and safeguarded by that bastion of States' rights, somewhat battered perhaps but still a sturdy fortress in our fundamental law, the tenth section of the Bill of Rights, which declares: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."<sup>111</sup>

The court's self-conscious use of *Plessy*, *Brown I*, and *Bolling v. Sharpe* sent the message that the court would not accept civil-rights arguments without a direct attack against the eugenical basis of racial classifications. Although the federal courts seemed to be tending toward a view that privileged civil rights over state rights, David Carliner's approach came too soon, before Virginia's court was ready to view civil rights as somehow privileged over state sovereignty. The justices of the Virginia Supreme Court of Appeals used the shield of eugenic classification, buttressed by the Tenth Amendment, to ward off the threat posed by interpreting marriage as a protected civil-right.

#### IV. THE U.S. SUPREME COURT: PRINCIPLED EXPEDIENCY

Between 8:15 and 8:45 a.m. on Sunday, November 6, 1955, Justice Harold Hitz Burton took his morning constitutional. His ritualized walk was not unusual, but his notation of what he thought about during his half-hour of quiet cogitation was remarkable. In the diary entries during the Court's October 1955 term, Harold Burton rarely noted that he thought about cases pending before the court. Burton spent this time, almost exclusively, thinking about various secular, non-court related material: speeches, articles, or revisions to his favorite piece, "The Unsung Duties of the Supreme Court." On November 6, 1955, however, Burton wrote simply, "(Miscegenation statute—Va case)."<sup>112</sup> It is not surprising that Burton would be considering the disposition of this case. He understood how politically and socially treacherous the issue of interracial marriage was in the south.<sup>113</sup> In the end, the court would face *Naim* twice. Burton would vote with the majority of the court to remand, and then to deny rather than decide, *Naim v. Naim*.

Burton's personal struggle mirrored that among all justices. Memoranda and evidence from their docket books dispels the widely held impression that the Court's *per curiam* decisions in *Naim* reflected una-

111. *Naim v. Naim*, 197 VA 80 (1955), 90.

112. Harold Hitz Burton. Diaries (November 6, 1955). "Harold Hitz Burton Papers" Microfilm, Reel 4. Manuscripts Division, Madison Building, Library of Congress, Washington D.C. [Hereinafter referred to as Burton Papers.]

113. Burton's files on "segregation" contain Virginia eugenicist Earnest Sevier Cox's pamphlet, "Unending Hate: Supreme Court School Decision a Milestone in the Federal Program to Break the Will of the South in its Dedicated Purpose to Remain White," (Richmond: Published by Author, April 1955) Burton Papers, box 405.

nimity.<sup>114</sup> Other documents and impressionistic evidence sketch in the outline of the debate, pointing to an intracourt, doctrinal conflict behind the decisions. In this battle, it appears that Justice Frankfurter, academic dean of the court, led the conservative charge. Justices Douglas, Black, and initially Warren, sought to rally the activists in a classic confrontation over the scope of judicial review and Supreme Court procedure.<sup>115</sup>

### A. The First Appeal to the Court

Carliner's U.S. Supreme Court brief in the appeal of *Naim v. Naim* reiterated his appeal to the Virginia Supreme Court of Appeals. With greater clarity, Carliner set forth his belief that the states, because of the Fourteenth Amendment and the various civil rights decisions, could not enact or enforce any statute that based distinctions upon racial classifications.<sup>116</sup> A.A. Bangel's opposing brief remained a near exact distillation of the Virginia Attorney General's *amicus curiae* brief.<sup>117</sup> More important, and troubling for certain members of the Court, Bangel raised the question of the appropriate dimensions of Supreme Court review:

[T]o overturn the decision of the Supreme Court of Appeals of Virginia—it would be necessary for this Court, in effect, to take judicial notice that interracial marriages are not inimical to the public welfare of the States and thus not subject to legislative control, and that a racial classification designed to serve as a basis for regulations of this character are, *ipso facto*, unconstitutional. Such action by this Court would certainly be at variance with the findings of the Legislatures of a majority of the States, whose laws manifest a determination that interracial marriages are detrimental to the public health, morals, and general welfare. From this circumstance alone, it would appear to be evident that the non-detrimental effect of interracial marriages is *not* a well known fact of common knowledge of which this Court should properly take judicial notice.<sup>118</sup>

Thus, for Bangel and Virginia, the Supreme Court walked the thin line between review and activism.<sup>119</sup> *Naim* arrived as the legal community, in

114. For personal and historical accounts asserting that the entire Court sought to dodge the case, see note 4 above, and; Philip Elman, "The Solicitor Generals Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History Interview by Norman Silber," *Harvard Law Review* 100 (1987): 817-852.

115. An excellent analysis of these doctrinal lines, and the tensions they created, appears in, G. Edward White, "The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change," *Virginia Law Review* 59 (1973): 279-302.

116. David Carliner, "Statement as to Jurisdiction," No. 366, *Naim v. Naim*, Supreme Court of the United States, *Pleadings and Briefs*, 350 U.S. 891 (October 1955), 8-9.

117. Bangel, like Virginia before, defended the reasonableness of the classifications on three counts: 29 states had operative anti-miscegenation laws, the history of antimiscegenation case law supported the statutes, and Carliner had failed to question the reasonableness of the classification on the record. A.A. Bangel, "Statement of Appellee Opposing Jurisdiction and Motion to Dismiss or Affirm," No. 366, *Naim v. Naim*, Supreme Court of the United States, *Pleadings and Briefs*, 350 U.S. 891 (October 1955).

118. Bangel, "Statement of Appellee," 8.

119. Carliner, too, recognized this dimension of the case, and maintains presently that, "That's the interesting part of the case [judicial review vs. judicial activism]. The Fourteenth Amendment part is not very interesting. But the procedural question, the jurisdictional question of the Supreme Court is really of interest." Carliner interview, November 3, 1995.

the wake of the *Brown* decisions, debated the appropriate role of the federal judiciary.<sup>120</sup>

David Carliner felt the case could not have come at a better time. Carliner foresaw neither political nor jurisprudential deterrents to his case, since the Court already had decided *Brown* and *Brown II*. Just in case, Carliner brought the American Civil Liberties Union, the American Jewish Congress, the Association on American Indian Affairs, the Association of Immigration and Nationality Lawyers, and the Japanese-American Citizens league in as counsel on his brief.<sup>121</sup> Carliner approached his friend Philip Elman of the Solicitor General's office, hoping to bring the federal government into the case on his side, too. As Elman recalled, he received a phone call from Carliner in early 1955, alerting him to the fact that Virginia's highest court had upheld the annulment:

It was clearly unconstitutional, and I agreed with Dave that it was. There was no question in my mind that a statute that denied the most fundamental or personal rights, the right to marry, and did so on the ground of race and nothing else, clearly violated the Constitution. I would have held it unconstitutional on due process as well as on equal protection grounds. So I had no quarrel with Carliner on the merits.<sup>122</sup>

Carliner, in a recent interview, agreed.

I thought that they [Solicitor General's Office] would be interested. They often go in as *amicus curiae* in cases which are of interest to the federal government, and this was an easy case for them. . . . I guess I was naive in thinking the Solicitor General's Office would favor it. It's very political in a sense. They want to have their cases without any complications.<sup>123</sup>

The issue seemed clear cut, particularly in light of *Brown*. Carliner, however, neglected the power of political and social context. Elman felt that, politically, it was an inopportune time to bring the case before the Court.

120. For latter day commentary on the meanings of this apparent jurisprudential shift see, David G. Barnum, "The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period," *Journal of Politics* 47 (1985): 652-666.

121. Carliner brought in some of the heaviest hitters in American civil liberties law: Herbert Monte Levy (ACLU), Will Maslow (AJC), Arthur Lazarus and Richard Schifter (AAIA), Jack Wasserman (AINL), and Frank Churman and Edward Ennis (JACL). "I maintained personal relationships with all these people [on brief] so it was easier to get to them." Carliner Interview, November 3, 1995. The National Association for the Advancement of Colored People (NAACP) is absent from the brief. Chang M. Sohn details the NAACP's absence, and cites Thurgood Marshall's displeasure at the timing of the suit. The NAACP feared the effect *Naim* would have on *Brown*'s implementation. Sohn, "Principle and Expedience in Judicial Review," 77-83, 129, 133-134, 143-147. In September of 1955, NAACP Executive Secretary Roy Wilkins stated, "Marriage is a personal matter on which the NAACP takes no position. The only kind of a marriage we are for is the Happy Marriage, the success of which depends on the two individuals involved." Roy Wilkins, "Statement on Interracial Marriage for the Magazine: Behind the Scene," 6 September 1955, "Papers of the National Association for the Advancement of Colored People," Manuscripts Division, Madison Building, Library of Congress, Washington, D.C., Group II, series A, box 496, folder "Publicity, General, 1955 July - September."

122. Elman, "The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation," 845-846.

123. Carliner interview, November 3, 1995.

Opposition in *Brown* was mounting daily and, "The southern governors were talking about interposition. . . . over and over again, the fear was expressed that *Brown* was going to lead to mongrelization of the races. The notion was that little black boys would be sitting next to little white girls in school, and the next thing would be intermarriage and worse."<sup>124</sup> Carliner believed that the government's position avoided the real issue. "Really I think Elman was wrong [in thinking the case too hot to handle], because *Brown I* had been decided and *Brown II* says 'all deliberate speed' so there's no issue here; it's a question of an underlying principle of the law. . . . when [*Naim*] came along it wasn't going to jeopardize anything—certainly not first *Brown*."<sup>125</sup> Elman took the case to Solicitor General Simon Soboleff, portrayed by Elman as an inveterate "civil libertarian" and "racial egalitarian," who agreed with him that the case was too controversial. In light of these reservations, Carliner delayed filing the case until it could be docketed no sooner than the Court's October 1955 term—thus insulating *Naim* from *Brown*'s fallout.<sup>126</sup>

Unbeknownst to Carliner, however, Elman went one step further. He also spoke with Justice Frankfurter, "in almost an offhand way, and he said that of course I was right and that it would be a big mistake to bring the case to the Court at that time. As I recall, I had no further discussions with the Justice about it."<sup>127</sup> Elman's conclusions regarding the case may have shaped subsequent historical interpretation. He remarked that the Court's ground for its first action, sending the case back to the Virginia Supreme Court of Appeals to clarify the constitutional issue, "was a specious ground. The record did present the constitutional issue clearly and squarely, but the Court wanted to duck it. And if the Supreme Court wants to duck, nothing can stop it from ducking."<sup>128</sup> Elman's remark implies that the court was unanimous in its decision to avoid the case, a conclusion all subsequent historians have accepted, a conclusion which the available record does not support.

## B. Memos, Votes, and the Remand of *Naim I*

Carliner confessed his naivete in believing the legal question so compelling because, "you never know for sure what the Justices are going to do. I guess a more intelligent way of doing it would be to frame your

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124. Elman, "The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation," 846.

125. Carliner interview, November 3, 1995.

126. Sohn, "Principle and Expediency in Judicial Review," 82.

127. Elman, "The Solicitor Generals Office, Justice Frankfurter, and Civil Rights Litigation," 846.

128. Elman, *Ibid.*, 846-847. This is also the impression given in Wallenstein, "Race, Marriage and the Law of Freedom," 417-418. I believe Wallenstein incorrectly identifies a memo written by Frankfurter as having been written by John Marshall Harlan. This is discussed in fuller detail, in note 139, below.

arguments to reach particular Justices.”<sup>129</sup> Had Carliner done this, it becomes apparent from various sources that Justice Felix Frankfurter would have presented the hardest sell. The Court had avoided this issue just the year before when it denied *certiorari* to Linnie May Jackson.<sup>130</sup> Gerald Gunther, in his biography of Learned Hand, notes that “Frankfurter twice successfully persuaded his colleagues on the Court to dismiss cases that raised the question of the constitutionality of the miscegenation laws,” and remained particularly uncomfortable with the issues presented by the miscegenation cases.<sup>131</sup> Memos from the Justices’ clerks, Justice Frankfurter, and the docket-book votes themselves reveal something of the dimensions of the debate over *Naim v. Naim*.<sup>132</sup>

Perhaps the best evidence regarding the issues surrounding *Naim v. Naim* exists in the legal briefs prepared for the Justices by their law clerks.<sup>133</sup> These briefs represent the first impressions the Justices may have had of the case. The clerks for Justices Burton, Harlan, and Warren remarked upon the poor political timing of the *Naim* case: “In view of the difficulties engendered by the segregation cases it would be wise judicial policy to duck this question for a time.”<sup>134</sup> In spite of these considerations, the clerks for Burton, Douglas, and Warren recommended that the Court note probable jurisdiction and set the case down for argument. Burton’s clerk wrote, “If cert. were involved our course would be clear. But what to do here?” Because Virginia’s highest court upheld the Racial Integrity Act against a constitutional challenge, “I don’t think we can be honest and say that the claim is insubstantial. Consequently the appellant

129. Carliner interview, November 3, 1995.

130. *Jackson v. Alabama*, 348 U.S. 888 (1954). Wallenstein shows how the timing of Jackson’s appeal to the Supreme Court, between *Brown I* and *Brown II*, first raised the Justices’ fears that miscegenation cases would inflame the political environment in which they sought to implement *Brown*. Wallenstein, “Race, Marriage, and the Law of Freedom,” 414-416.

131. Gerald Gunther, *Learned Hand: The Man and the Judge* (New York: Alfred A. Knopf, 1994), 667.

132. The Justices maintained standardized docket books in which they recorded the votes during conference regarding various cases, other notes, and the ultimate disposition of the case at each stage. Of the six Justices’ papers available to the author (Black, Burton, Douglas, Frankfurter, Harlan, and Warren), only three contained the docket books (Burton, Douglas, and Warren); Papers of Harold H. Burton, Box 279; Papers of William O. Douglas, Box 1162; Papers of Earl Warren, Box 369. Black, Burton, Douglas, Frankfurter, and Warren’s papers are maintained in Manuscript Division, Madison Building, Library of Congress, Washington, D.C. Justice Harlan’s papers reside in the Seely G. Mudd Library, Princeton University, Princeton, New Jersey [Copies in possession of the author]. Hereinafter referred to by name.

133. Four of the six Justices’ papers contained copies of law clerk memoranda on *Naim*: Burton, Douglas, Harlan, and Warren.

134. AJM (law clerk) to Justice Harold H. Burton, 23 October 1955, Harold H. Burton Papers, box 283, 3. “I have serious doubts whether this question should be decided now, while the problem of enforcement of the segregation cases is still so active.” LML (law clerk) to Justice John Marshall Harlan, undated, Harlan Papers, 1955 file. See note 136 below for the views of Justice Warren’s clerk.



has tapped our obligatory jurisdiction.”<sup>135</sup> Justice Harlan’s clerk captured the crux of the debate, “The psychological factor of the difference between appeal and cert may be the difference here. How can you say there is no substantial federal question in this case?” Despite acknowledging this, Harlan’s clerk recommended dismissal for lack of a substantial federal question.<sup>136</sup> Clearly, the Judiciary Act of 1925 makes appeal an obligatory jurisdiction.<sup>137</sup> While the Justices sought to avoid the case in order to “give the present fire [over *Brown*] a chance to die down,”<sup>138</sup> it appears that concerns over procedural precedents and judicial review also came to the fore in the intracourt debate.

Only one memorandum exists which portrays the views of a Justice as read to the Conference on November 4, 1955.<sup>139</sup> Felix Frankfurter’s

135. AJM (law clerk) to Burton, *Ibid.*, 3.

136. LML (law clerk) to Justice John Marshall Harlan, undated, Harlan Papers, 1955 file. Warren’s clerk wrote, “I imagine that the denial [in *Jackson*] was based on a desire not to impede the effectuation of the Segregation decrees. If this were a cert. petition perhaps, one year later; the same considerations would govern. But this is an appeal. I do not see how the question can be said to be insubstantial, and that appears to be the only method available to avoid decision.” SAS (law clerk) to Chief Justice Earl Warren, undated, Earl Warren Papers, box 4. See also, William A. Norris (law clerk) to Justice William O. Douglas, 24 October 1955, William O. Douglas Papers, box 1164.

137. Many commentators have noted this fact, both at the time and since. Indeed, the Court’s elision of the distinction between *certiorari* and appeal elicited commentary from both sides. See note 4, above.

138. AJM (law clerk) to Justice Harold H. Burton, 23 October 1955, Burton Papers, box 283.

139. Wallenstein attributes this memo to John Marshall Harlan because he found a copy of it among Harlan’s papers in Princeton, New Jersey. See Wallenstein, “Race, Marriage, and the Law of Freedom,” 418. I have located two additional copies of this memo, neither of which Wallenstein acknowledges, that when put in series establish Felix Frankfurter as the author. The shortest text, free of any editorial comment, resides in the Felix Frankfurter Papers, (Harvard Law School Edition), Reel 17, 588-590. Another copy has noted across the top, in Frankfurter’s handwriting, “*Read at Conference on Friday, Nov. 4/55 as my attitude toward No. 366, O.T. 1955 Naim v. Naim*” [underlining in original]. Felix Frankfurter Papers, (Library of Congress Edition), Reel 139, 150-152. This copy also has the handwritten addenda discussed below. The third copy, that which Wallenstein found in Justice Harlan’s papers, represents a final typewritten draft assimilating the addenda and the first draft. I believe, on the basis of the handwritten additions and the didactic tone, that the memo represents Frankfurter lecturing the court. He had the standing to do so: having been 25 years a law professor at Harvard and having served on the Court for 18 years at the time of *Naim*. Harlan had been on the court less than a year when *Naim* arrived, making such pronouncements by him ridiculous. Moreover, whenever Frankfurter discussed the “true functions of the court and the best way to discharge them,” that is, maintaining the separation between politics and the law in judicial review, he displayed his in-depth knowledge of the court and former justices. The copy in Justice Harlan’s file appears to be a final-draft copy of a memo Justice Frankfurter circulated to the others. This interpretation is entirely supported by Melvin Urofsky’s insightful work *Felix Frankfurter: Judicial Restraint and Individual Liberties* (Boston: Twayne Publishers, 1991). Urofsky details Frankfurter’s restrained jurisprudence and notes his penchant for circulating written copies of his conference room opinions, his “academic deanship” of the court, his condescending attitude when addressing the brethren, and his desire to create allies with junior members of the court, particularly Harlan. Thus, it is not surprising that Harlan would have kept a copy of Frankfurter’s memo when the other Justices discarded it. See Urofsky, *Felix Frankfurter*, 45-63; 102-103; 145.

resistance to a latitudinarian view of judicial review is well established, yet as Gerald Gunther has stated, “despite [Frankfurter’s] general avowal of a restrained position on judicial review . . . [he] was given to expediency, discretion, and manipulation in the interests of prudence and avoiding political attacks on the Court.”<sup>140</sup> As Gunther reveals, Frankfurter strained mightily to distinguish the miscegenation cases from *Brown*, all in an attempt to “undercut the claim that the Fourteenth Amendment should be read as an across-the-board prohibition of color lines; since ‘color’ was not explicitly mentioned in the Fourteenth Amendment, consideration of the context of the classifications—marriage rather than education, for example—might be legitimate in equal-protection litigation.”<sup>141</sup> Thus, in his memo on *Naim*, Frankfurter cloaked his deep desires, for both judicial restraint and protecting the Court from political attack, in the moral necessity of defending *Brown*.

Frankfurter started by establishing his pedigree, “So far as I recall, this is the first time since I’ve been here that I am confronted with the task of resolving a conflict between moral and technical legal considerations.” As the second most senior member, and the Court’s most eminent constitutional scholar, such an assertion surely carried weight. Remarking that he would deny the question if it had arrived as a petition for *certiorari* “because due consideration of important public consequences is relevant to the exercise of discretion in passing on such petitions,” he noted the procedural difficulty *Naim* presented because of its appellate status. “If it were the settled practice of the Court, since the Judiciary Act of 1925 came in force, that jurisdiction is to be taken as a matter of course where an appeal formally appears, I would bow to the inevitable.” Frankfurter insisted, however, that such was not the Court’s practice. “I have not made a count of it, but my impression is strong that numerically we do *not* take most of the cases which are formally appeals. Indeed, so strong is this tendency that it has been frequently said, both at the Conference table

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140. Gunther, *Learned Hand*, 668-669.

141. Gunther, *Learned Hand*, 669. In a heated memo to Justice Black in 1943, Frankfurter wrote of his scholarly fixation with the Fourteenth Amendment. In his opinion, as long as the due process clause was given more than a procedural content, “pour[ing] into the generality of the language substantive guarantees, it is to me inconceivable that any kind of definition of the substantive rights of the guaranty will not repeat in the future the history of the past, namely will according to the makeup of the Court give varying scope to the substantive rights that are protected. . . .” As a result, Frankfurter “spent practically my mature lifetime in adding my feeble efforts toward maintaining a conscientious observance by the Court of what I conceive to be the very narrow scope of the Court’s power to strike down political action.” Justice Felix Frankfurter to Justice Hugo Black, 13 November 1943, Frankfurter Papers (Harvard Law School Edition), Reel 2, 1-2. Frankfurter, ironically, aligned himself with members of the legal community who undermined the Progressive impulse in American law, as outlined in Morton J. Horwitz, *The Transformation of American Politics 1870-1960*, 258-265. Gerald Gunther shows the degree to which Frankfurter convinced Learned Hand to accept a limited view of the meaning of the *Brown* decision. This narrow view became the foundation for Hand’s (according to Horwitz) extreme version of judicial restraint later articulated in his Holmes Lectures. Horwitz, *Transformations II*, 264. See Gunther, *Learned Hand*, 666, 669-670.

and by learned commentators, that the Court's practice has assimilated appeals to certiorari."<sup>142</sup> Frankfurter explained that on occasion the Court had denied appeals, only to have the issue later reappear and be resolved.<sup>143</sup> Frankfurter envisioned a similar course for *Naim*.

Frankfurter appealed for judicial restraint, invoking a number of his favorite rhetorical tropes:

I do not imply that the question in this case is obviously insubstantial. I do say that a Court containing Holmes, Brandeis, Hughes, Stone and Cardozo would only the other day have dismissed the appeal as such. And I further say that even as of today, considering the body of legislation involved, both North and South, and the reach of the problem, namely, divers assumptions by legislatures affecting the regulation of marriage, indicate such a momentum of history, deep feeling, moral and psychological presuppositions, that as of today one can say without wrenching his conscience that the issue has not reached that compelling demand for consideration which precludes refusal to consider it.<sup>144</sup>

Frankfurter strained toward the presumption that the Racial Integrity Act had a rational basis.<sup>145</sup> This statement accorded with Frankfurter's estab-

142. Memo, Frankfurter to Conference, 4 November 1955, Frankfurter Papers (Library of Congress Edition), Reel 139, 150.

143. Urofsky notes that, "More often than not, Frankfurter tried to get the Court to avoid deciding cases. Brandeis had once told him that sometimes the most important action the Court could take was to decide not to decide a case. . . . whenever an opportunity arose to decide a case on narrower procedural grounds, they should do so." Urofsky, *Felix Frankfurter*, 126.

144. Memo, Frankfurter to Conference, *Ibid.*, 151. See also note 139, above. This section is classic Frankfurter. In 1943 Frankfurter, after asserting that "for twenty years I was at work on what was to be as comprehensive and as scholarly a book on the Fourteenth Amendment," wrote, "When men who had such background and such relation to so-called property interests as did, for instance, Waite, Bradley, Holmes, Brandeis and Cardozo showed how scrupulously they did not write their private notions of policy into the Constitution. . . ." Memo, Felix Frankfurter to Hugo Black, November 13, 1943, Felix Frankfurter Papers (Harvard Law School Edition), Reel 2. In January of 1956, Frankfurter wrote Earl Warren, "And I had the very great good fortune, after 1911, of knowing the goings-on of the Court . . . thanks to the confidence reposed in me by Holmes and later Brandeis and, still later, Cardozo. It is my deepest conviction that if the Court were composed entirely of men equal to the most intellectually powerful and energetic of those in the past, say, Marshall, Story, Taney, Miller, Bradley, Holmes, Brandeis, Hughes, Cardozo . . . they could not do full justice to the problems . . . of cases . . . the Court must [now] adjudicate." Memo, Felix Frankfurter to Chief Justice Earl Warren, January 26, 1956, Felix Frankfurter Papers (Harvard Law School Edition), Reel 4.

145. It is difficult to know where Frankfurter himself stood on eugenics. Examining his surviving 1927 correspondence with Justice Holmes, when Holmes delivered his famous opinion in the eugenical sterilization case *Buck v. Bell* 274 U.S. 200 (1927), reveals tantalizing clues. Preparing the opinion for *Buck*, Holmes wrote to Frankfurter, "I am glad that you like old Malthus, or at least to infer that you do." Holmes, a Neo-Malthusian, was an advocate of eugenic population control. When Holmes wrote, "I think my cases this term have been of rather a high average of interest e.g., the Virginia Sterilizing Act," inviting Frankfurter to comment on *Buck*, Frankfurter deferred, praising Holmes's other pithy 1927 opinions but studiously avoiding Holmes's "three generations of imbeciles are enough" epigram. Frankfurter's apparent silence regarding *Buck* stems from at least two factors: Frankfurter was engrossed, at the time, by the Sacco-Vanzetti appeal; and, Frankfurter removed many of his letters from Holmes's files shortly after Holmes died. See Robert M. Mennel and Christine L. Compston, eds. *Holmes and Frankfurter: Their Correspondence, 1912-1934* (Hanover: University Press of New England, 1996) xix-xx, 210, 212-213.

lished desire for judicial restraint respecting political issues. In his view, the lack of public desire to change the situation through the legislative process further disqualified the Court from adjudicating the matter. The Court's job did not include "judicial legislation," and his limited view of the applicability of the *Brown* decision reinforced his reluctance to have the Court decide the volatile issue of racial intermarriage.<sup>146</sup> Frankfurter closed his memo with a handwritten addendum indicating that he felt the main issue in the case was not presented "free from subsidiary or preliminary questions."<sup>147</sup> While this phrase may have been an oblique reference to Carliner's call for facial unconstitutionality, it foreshadowed the form the Court's first decision regarding the case would take.

The Justices first discussed *Naim* in conference on November 4, 1955. On the initial vote regarding *Naim*, the Court split; Harlan, Minton, Clark, Burton, and Frankfurter to dismiss, Douglas, Reed, Black, and Warren to note probable jurisdiction and accept the case.<sup>148</sup> The Court took the rare action of voting to hold the case over for one week, so that the Justices could give it fuller consideration.<sup>149</sup> The significance of this action should not go unnoticed. The Court itself, in *Maryland v. Baltimore Radio Show*<sup>150</sup> had stated that denial for *certiorari* merely meant that "fewer than four members of the Court thought it should be granted." Here on an appeal, obligating the Court according to traditional constructions of the Judiciary Act of 1925, the Court still hesitated and split five-four.

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146. Frankfurter, extolling the jurisprudence of Justice Holmes, wrote, "Justices of the Court are not architects of policy. They can nullify the policy of others; they are incapable of fashioning their own solutions for social problems," and, "For it is subtle business to decide, not whether legislation is wise, but whether legislators were reasonable in believing it to be wise." Felix Frankfurter, *Mr. Justice Holmes and the Supreme Court* (Cambridge: Belknap Press, 1961) 56, 60. In a similarly restrained vein, Frankfurter felt that *Brown* was limited to education; every other case involving racial classifications needed to be judged independently by its own test. In a letter to Learned Hand, Frankfurter wrote, "But for the love of Mike don't say anything that lawyers and the cynical, unscrupulous Bill [Justice William O. Douglas] can quote as the clear view of the greatest living judge that the Segregation decision covers miscegenation!!" Quoted in Gunther, *Learned Hand*, 670.

147. Memo, Felix Frankfurter to Conference, 4 November 1955, Frankfurter Papers (Library of Congress Edition) Reel 139, 152. This addendum is in typescript on the final draft in the Harlan papers.

148. This split roughly parallels the vote over *certiorari* in the *Jackson* case the preceding term. Then, the court split Douglas, Black, and Warren to grant, Minton, Clark, Burton, Frankfurter, and Reed to deny. The ailing Justice Jackson did not vote. It is interesting to note that, at least initially in *Naim*, Reed voted with those seeking to hear argument. For the vote on *Jackson* see cover sheet to Memo, Harvey M. Grossman (law clerk) to Justice William O. Douglas, William O. Douglas papers, Box 1156.

149. While no systematic effort was made to quantify exactly how many cases the court held over for reconsideration, the impression one gets is that it occurred only rarely. The sheer volume of work facing the court required speedy, almost ruthless, determination of whether or not to hear any case.

150. *Maryland v. Baltimore Radio Show*, 338 U.S. 912 (1950), 919. The Court stated, "Inasmuch, therefore, as all that a denial of a petition for writ of *certiorari* means is that fewer than four members of the Court thought that it should be granted, this Court has

One week later, on 11 November 1955, the Court voted again. The Justices' docket books indicate that the initial split was identical to the vote on 4 November. Something broke the five-to-four split among the Court, however. It is apparent from the docket books that Justices Reed and Warren joined the five who voted to dismiss the case; the seven then decided to vacate the lower court's decision. This new seven-to-two division carried the day. Why the Justices decided to remand the case rather than simply dismiss it remains unclear. Supplemental memos indicate that Justice Burton "suggested the possibility of an independent state ground," related to the state's right to recognize selected marriages, validating Virginia's decision. Burton's plan involved an ingenious reading of the "full faith and credit" clause of the Constitution. His reasoning clearly confused the law clerks, neither of whom were able to sort out exactly what he proposed. Douglas's clerk wrote tentatively, "As I understand his [Burton's] idea, it is that the Virginia code can be construed as requiring all Virginia domiciliaries to be married in Virginia. Hence Virginia would recognize no out-of-state marriages of its own residents, even though valid if celebrated in Virginia." Ultimately, for the clerks of Justices Douglas and Warren, "it does not seem that any purpose would be served in considering the full faith and credit implications of this case, because, all roads in this case lead directly to the constitutional question of Virginia's miscegenation statute. Failure to decide the case would blur any distinction remaining between certiorari and appeal."<sup>151</sup> Instead of adopting Burton's strategy for disposing of the case, it appears the court borrowed from Frankfurter's initial inspiration regarding the clarity of issues presented.

The court issued its *per curiam* decision, returning the case to the Virginia Supreme Court of Appeals, stating that the record was inadequate "as to the relationship of the parties to the Commonwealth of Virginia at the time of the marriage in North Carolina and upon their return to Virginia. . . ." This inadequacy resulted from "failure of the parties to bring here all questions relevant to the disposition of the case," thereby preventing the constitutional issue of the Racial Integrity Act's validity from, "being considered in clean cut and concrete form, unclouded by such problems."<sup>152</sup> The decision's language recasts Justice Frankfurter's concerns over "subsidiary and preliminary questions"

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rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated." Despite this statement, the Supreme Court's failure to take up *Naim* was regarded as tacit acceptance of the doctrine. See the Virginia Supreme Court of Appeals' decision in *Loving v. Virginia* 206 VA 924 (1966), 927.

151. First quotation is from Supplemental Memo, SAS (law clerk) to Chief Justice Earl Warren, undated, Earl Warren Papers, box 369, 3. Second quotation is from Supplemental Memo, William A. Norris (law clerk) to Justice William O. Douglas, undated, William O. Douglas Papers, box 1164.

152. *Naim v. Naim*, 350 U.S. 891 (1955).

expressed in his initial memo to the conference. The Court directed the high court of Virginia to return the case to the Circuit Court of Portsmouth for further clarification.

Justice Warren's docket book bears two handwritten notes regarding this decision, "Vacated. Hugo would note + hear argument," and, "Hugo and W.O. Douglas dissent."<sup>153</sup> As initially printed for the Justices, the *per curiam* indicates that, "Mr. Justice Black, being of the opinion that this record properly presents a question arising under the United States Constitution, would note jurisdiction and set the case for arguments on that question."<sup>154</sup> Attached to Douglas's copy of this version is a note from his law clerk which perhaps explains why he did not note his dissent. Believing that clarifying the issues "should prove no obstacles to the parties and the state courts," he felt that, "the case probably will be back here in the near future. Under these circumstances, I would agree that this disposition of the case is not serious enough to note your vote. I should think it would be more important to maintain a front of unanimity, for the present at least."<sup>155</sup> Someone or something must also have convinced Justice Black to withdraw his dissent, for it does not appear in the final printed decision.<sup>156</sup> Whether or not Frankfurter openly argued for just such a result is not clear, but it certainly would have assuaged his misgivings concerning the Court's appearing divided over adjudication under the Fourteenth Amendment.<sup>157</sup>

### C. Virginia's Refusal and the Court's Dodge: *Naim II*

Upon receiving *Naim* from the Supreme Court, the Virginia Supreme Court of Appeals issued a memorandum decision of its own. In its new decision, Virginia's high court declared that the record was clear enough for itself and the Portsmouth court. Therefore, "The decree of the trial court and the decree of this court affirming it have become final so far as these courts are concerned." As there existed "no provision either under the rules of practice and procedure of this court or under the statute law of this Commonwealth by which this court may send the cause back to the Circuit Court with directions to re-open the cause so decided," and it would "be contrary to our fixed rules of practice and procedure . . . and our statute law," the Supreme Court of Appeals adhered to its original

153. Earl Warren Papers, "Docket Book, No. 366 *Naim v. Naim*," box 369.

154. This version of the decision appears in a number of the Justices' papers, see, for instance, William O. Douglas Papers, "Legal Memoranda," box 1164, folder 350-399; Felix Frankfurter Papers, (Harvard Law School Edition) Reel 17, 591.

155. William A. Norris (law clerk) to Justice Douglas, undated memo, Douglas Papers, *Ibid*.

156. *Naim v. Naim*, 350 U.S. 891 (1955).

157. Many commentators have remarked upon the consensus forged for *Brown I*, alternatively attributing it to Chief Justice Warren or Frankfurter. Frankfurter considered the appearance of unanimity crucially important regarding *Brown* and the miscegenation cases. For a balanced appraisal see, Urofsky, *Felix Frankfurter*, 137-142.



decision.<sup>158</sup>

In effect, the Virginia Supreme Court of Appeals “nullified” the order of the United States Supreme Court. Newspapers across Virginia trumpeted the action as the first step in the realization of an “Ordinance of Interposition”: legislation Virginia had just passed protesting and vowing to resist the desegregation action mandated by *Brown*.<sup>159</sup> Recognizing Virginia’s refusal to act upon the Supreme Court’s remand as an affront to constitutional law, David Carliner filed a “Motion to Recall the Mandate and the Set the Case down for Oral Argument on the Merits, or in the Alternative, to Recall and Amend Mandate.”<sup>160</sup> In the motion, Carliner noted that, “This represents the third time in its history that the Supreme Court of Appeals has failed to comply with a mandate of the United States Supreme Court.”<sup>161</sup> Carliner felt it was inconceivable that the Supreme Court would not take the case in light of the unconstitutional action of the Virginia court.

The law clerks for Justices Douglas and Warren echoed Carliner’s reaction. William A. Norris advised Justice Douglas against vacating the state judgment summarily because, “this would be intemperate and would unnecessarily increase the friction between this Court and the southern state courts. We are leading from a position of recognized strength; we can afford to be humble and gentle on occasion.”<sup>162</sup> Norris instead recommended that the Court note probable jurisdiction, because “the record is adequate to decide the constitutional question presented. For this reason I find the action of the Virginia Court of Appeals on remand as not surprising. . . . It will begin to look obvious if the case is not taken that the Court is trying to run away from its obligation to decide the case.”<sup>163</sup> Warren’s clerk reacted to the Virginia ruling in similar fashion writing, “I recommend that the mandate be recalled and probable jurisdiction noted. This would be somewhat inconsistent with the remand, which stated that the

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158. *Naim v. Naim*, 197 VA 734 (1956), 735.

159. The Virginia legislature based the ordinance upon James Madison’s doctrine of “interposition,” which had been most fully articulated by John C. Calhoun during the Nullification Crisis of 1831-1832. See particularly the editorial “The Measure of Redress,” *Richmond News Leader*, 19 January 1956, 14. “Yesterday the Virginia Supreme Court of Appeals, in an admirable action, interposed against the Supreme Court of the United States in a miscegenation case.” See also the banner-headline article “Virginia Rejects Order of U.S. Supreme Court,” *Richmond News Leader*, 18 January 1956, 1: “Virginia Bench Rejects Supreme Court’s Order,” *Norfolk Virginian-Pilot*, 19 January 1956, 1; “State’s High Court Spurns U.S. Order,” *Richmond Times-Dispatch*, 19 January 1956, 1.

160. The only copy available of this seven page motion resides in the Portsmouth case file, and it is missing page 6. The motion apparently was not deemed important enough to publish in the Supreme Court’s bound issues of *Pleadings and Briefs*.

161. Carliner, “Motion to Recall Mandate and to Set Case Down for Oral Argument on the Merits, or in the Alternative, to Recall and Amend Mandate,” Portsmouth Case File, box 2, 2.

162. William A. Norris (law clerk) to Justice William O. Douglas, 1 March 1956, William O. Douglas Papers, box 1164.

163. William A. Norris (law clerk) to Justice William O. Douglas, *Ibid*.

incomplete record ‘prevents’ unclouded consideration here. . . . Perhaps adequate answer to any assertion of inconsistency is Emerson’s famous: ‘Foolish consistency is the hob-goblin of little minds.’”<sup>164</sup> Indeed, in his very first brief, Burton’s clerk made the same assertion, “it is very doubtful that the issue is rendered less substantial by the absence of a record on the reasonableness of the legislation.”<sup>165</sup> For all Virginia’s insistence regarding the necessity to challenge the reasonableness of the classifications, at the federal Supreme Court, the constitutional issue seemed clearly and squarely put. Virginia’s defiant high court challenged the Supreme Court to step up and take the case.

There exists at least one other contemporaneous memo revealing Justice Frankfurter’s desire to limit the Court’s power of review.<sup>166</sup> Although Frankfurter set out to write the Chief Justice about his views on “two FLSA [Fair Labor Standards Act] cases,” given its sweeping language and its context, the memo illustrates Frankfurter’s reliance on the rational basis test and his inability to distinguish between economic matters and civil liberties legislation. Despite his reliance on the Court’s ancient Nestors, Brandeis and Holmes, Frankfurter’s memo reveals a flaw commented upon by Melvin Urofsky: “[Holmes and Brandeis] believed that courts should defer to the legislative will in reviewing economic policies but should play a different role when legislatures attempt to restrict individual liberties. Frankfurter never saw this distinction, and his inability to do so may have been at the heart of his failure.”<sup>167</sup> Written just a week after the Virginia Supreme Court of Appeals rejected the Court’s November decision in *Naim*, Frankfurter declared his stance on what types of cases the court should and should not hear. “You have noticed, of course, that I am, in the main, alert against taking cases except those that obviously call for determination by this Court. By ‘obviously’ I mean cases about which there can hardly be a different of opinion around the table.” Clearly, *Naim v. Naim* would not fall into this category.

After establishing his credentials—25 years teaching law at Harvard, being confidant to Holmes, Brandeis, and Cardozo—Frankfurter stated that even the most brilliant jurists “could not do full justice to the problems raised by the range and volume of cases now coming before the Court,” if there existed no way to limit cases accepted. With this overcrowding in mind, Frankfurter asserted that, “This means, as the court has said again and again and again, that we ought not to take cases that really turn on evidence or appraisals of evidence, of issues of fact, broadly speaking.” *Brown* and the *Naim* case fit Frankfurter’s objectionable cate-

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164. SAS to Chief Justice Earl Warren, undated, Earl Warren Papers, box 369.

165. AJM to Justice Harold Hitz Burton, 23 October 1955, Harold Hitz Burton Papers, box 283, 3.

166. Memo, Felix Frankfurter to Chief Justice Earl Warren, 26 January 1956, Frankfurter Papers (Harvard University Edition), Reel 4. All quotations in this and the following paragraph are from this memo unless otherwise noted.

167. Urofsky, *Felix Frankfurter*, xi.

gory. "Therefore the Court ought not to take cases where the interplay between the abstract scope of the statute and the circumstances to which it is applied, really constitute what is essentially a determination of fact or, at best, involves a nicety of judgment in the application of a statute." Once again, while Frankfurter directly referred to the Fair Labor Standards Act cases before Warren, his comments could quite as easily have been directed toward Fourteenth Amendment cases. Frankfurter's assurance that he would object to these types of cases—revealing his inability to distinguish between economics and civil rights—appears to have been played out in the denouement to *Naim v. Naim*.

The votes recorded in the Justices' docket books tell this story. On March 2, 1956 the Justices polled themselves. The votes, as recorded in Harold Burton and William O. Douglas's docket books indicate the court split six-to-three to deny, this time with William O. Douglas in the unlikely position as the swing vote. Harold Burton drew a line from Douglas's vote to the comment, "(but would prefer NPJ [note probable jurisdiction])."<sup>168</sup> Yet, for some indeterminate reason, the Court again held the question over one week. On March 9, 1956, the Court split five-to-four, with Douglas resuming his position in favor of hearing the case. After five months and an impudent rebuff from Virginia's high court, the Supreme Court was back where it started: a standoff between Harlan, Minton, Clark, Burton, and Frankfurter against Douglas, Reed, Black, and Warren. Perhaps out of exhaustion, the Court opted to deny the motion on the grounds that the Virginia Supreme Court of Appeals' affirmation of its previous decision, "leaves the case devoid of a properly presented federal question."<sup>169</sup> Despite a strongly worded dissent Warren had his clerk draft, the opinion went out as another *per curiam* decision, seeming to indicate unanimity.<sup>170</sup> This decision struck the death knell for Carliner's appeal. *Naim v. Naim*, the first substantial constitutional challenge to the eugenic creed ensconced in Virginia's Racial Integrity Act, went out not with a bang but a barely audible whimper—smothered under the weight of infighting in the name of keeping the Court apolitical and a neutral arbiter of reasonable law.

## CONCLUSION

*Naim v. Naim* appeared to be the perfect test case for David Carliner.

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168. Docket Book, Harold Burton Papers, box 279.

169. *Naim v. Naim*, 350 U.S. 985 (1956).

170. "Since I regard the order of dismissal as completely impermissible in view of this Court's obligatory jurisdiction and its deeply rooted rules of decision, I am constrained to express my dissent." He concluded, "Wordsworth accurately called Duty the Stern Daughter of the voice of God. Here, sternness cannot make us shrink from her call. Congress has obliged this Court to decide the substantial constitutional questions which are properly and adequately presented in this appeal. I would NOTE PROBABLE JURISDICTION AND SET THE CASE DOWN FOR ARGUMENT." [emphasis in original] Earl Warren Papers, box 369.

Had the Supreme Court of the United States agreed, he may well have achieved one of the most significant victories for civil liberties recorded in American history—and undermined any legal legitimacy for eugenics. Historical context, legal doctrine, and the weight of southern culture all conspired to thwart his attempt to overturn Virginia's Racial Integrity Act. As a result, the Supreme Court signaled tacit acceptance of the biological determinism espoused by eugenicists. The Virginia Supreme Court of Appeals interpreted the United States Supreme Court's inaction in *Naim* in precisely this way. This allowed them to uphold the conviction under the Racial Integrity Act of Mildred and Richard Loving in January of 1959. It would take the Lovings and their counsel seven years to overturn this decision.

In that time, the balance of the U.S. Supreme Court shifted away from the conservative mindset embodied by Felix Frankfurter.<sup>171</sup> Consistent to the end, Frankfurter would register his last major opinion in 1962 as a dissent in *Baker v. Carr*, the case that finally established the principle of one man, one vote. Two years later, with the passage of the 1964 Voting Rights Act, the privileged position of minority civil liberties within the American legal and legislative consciousness seemed firmly established. The radical restructuring of American political and social mores occurring throughout the 1960s created the ideological room-for-maneuver necessary for a successful constitutional challenge to the Racial Integrity Act. In 1967, Bernard Cohen and Philip J. Hirschkopf successfully appealed the Lovings' case to the Supreme Court. There, they directly challenged the eugenical theories underpinning the Racial Integrity Act. The Supreme Court declared the statute unconstitutional in a unanimous decision. Appropriately, David Carliner appears *Of Counsel* on the briefs in *Loving*, a fitting testimony to the man who first fought for the conception of marriage as too fundamental a right to be circumscribed by race.

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171. See, White, "The Evolution of Reasoned Elaboration," 291-292.