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Love with a Proper Stranger: What Anti-Miscegenation Laws Can Tell Us About the Meaning of Race, Sex, and Marriage

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LOVE WITH A PROPER STRANGER: WHAT ANTI-MISCEGENATION LAWS CAN TELL US ABOUT THE MEANING OF RACE, SEX, AND MARRIAGE

*Rachel F. Moran**

> True love. Is it really necessary?
> Tact and common sense tell us to pass over it in silence,
> like a scandal in Life's highest circles.
> Perfectly good children are born without its help.
> It couldn't populate the planet in a million years,
> it comes along so rarely.
>
> -Wislawa Szymborska[1]

If true love is for the lucky few, then for the rest of us there is the far more mundane institution of marriage. Traditionally, love has sat in an uneasy relationship to marriage, and only in the last century has romantic love emerged as the primary, if not exclusive, justification for a wedding in the United States. In part, the triumph of love reflects a society increasingly committed to an ethic of individualism, including individualism of the romantic variety, so that marriage is no longer presumptively a tool for the State to advance the general welfare. In the quest for individual liberation, women have gained access to education and employment that increasingly emancipates them from dependency on a husband to achieve economic security.

Because marriage has grown to be a matter of personal choice, the number of restrictions on permissible partners has steadily declined.

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* Robert D. and Leslie-Kay Raven Professor of Law, University of California School of Law (Boalt Hall). This talk is based on the much lengthier discussion of the history of anti-miscegenation laws that appears in my recent book. *See* RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE & ROMANCE (2001).

1. WISLAWA SZYMBORSKA, *True Love*, *in* VIEW WITH A GRAIN OF SAND 90 (paperback ed. 1995) (Stanislaw Baranczak & Clare Cavanagh trans., 1995).

Even so, some official regulation persists, and we can learn as much about the meaning of matrimony by looking at who is excluded as by looking at who is eligible. To that end, I want to explore the lessons of anti-miscegenation laws, state statutes that once prohibited interracial marriage. At one time, these statutes were widespread, but they were not identical in their coverage. The laws universally targeted relationships between Blacks and Whites, and a number of the provisions, particularly those in Western states, banned unions between Asians and Whites. A few restricted intermarriage with Native Americans, but none mentioned Latinos. The laws had a remarkable longevity. Even though individuals enjoyed increasing freedom to choose a mate free of state and community interference, these statutes remained valid until 1967 when the United States Supreme Court struck them down as unconstitutional in *Loving v. Virginia*.

Although anti-miscegenation laws generally have been analyzed as racial legislation, they also can tell us a great deal about intimacy. These provisions have certainly been used to define and entrench racial difference, but they are also a means to set the boundaries of sexual decency and marital propriety. Here, I will use the comparative experience of Blacks, Asians, Native Americans, and Latinos to illustrate some of the laws' implications for race and identity. I will then place the statutes in the context of larger developments regarding the regulation of sex and marriage to show how they reflected anxieties about wayward lust and forbidden desire.

I. THE ROLE OF ANTI-MISCEGENATION LAWS IN RACIAL SEPARATION AND STRATIFICATION

In the American mythology of racial segregation, there is an assumption that racial groups have always lived separately and that there is an almost natural inevitability about this arrangement. In fact, in the earliest years of settling the American colonies, Black slaves often worked side by side with White indentured servants. In these close, cooperative arrangements, interracial attraction was by no means a rarity.[2] Relationships across the color line complicated social boundaries between Black and White, slave and free. Whites who, at least as a formal matter, had freely chosen a temporary contract of hard labor did not seem so very different from Blacks who had been sold into

2. *See* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 22, 40-47 (paperback ed. 1980).

servitude. To clarify these distinctions, anti-miscegenation laws prevented race-mixing that undermined both the sanctity of free White labor and the legitimacy of Blacks' status as property.

As the institution of slavery was consolidated, anti-miscegenation laws assumed another valuable purpose. They defined a racial hierarchy in which Whites were free and Blacks were not. Although many statutes banned both interracial marriage and fornication, White male slaveholders regularly flouted the laws. They could demand sex from their Black female slaves and inflict terrible punishment, including rape and sale on the auction block, if the women resisted. A former Virginia slave remembers the fate of another slave woman named Sukie:

> "Ole Marsa was always tryin' to make Sukie his gal." One day when she was making lye soap and he approached her, "she gave him a shove an' push his hindparts down in de hot pot o' Soap. Soap was near to bilin', an' it burn him near to death. . . Marsa never did bother slave gals no mo'." But a few days later Sukie was sent to the auction block.[3]

In fact, interracial sex was so common that a new dilemma arose: How should the mixed-race offspring be identified? Traditionally, a child's status was based on the father's heritage, but a patrilineal rule would mean that most children of Black and White origin would be White and free. Such a result would once again complicate the line between Black and White, slave and free, as masters who enjoyed their license with female slaves produced emancipated mulattoes, not subject to the control of White owners and potentially loyal to Black mothers still in bondage.[4] The solution was to change the rule of descendible privilege. Instead of determining a child's status based on the father's identity, a matrilineal principle of identity would be applied. Moreover, a one-drop rule evolved to ensure that even remote African ancestry identified a child as Black, not White. The children of sex across the color line would be Black and nearly always slaves. They could be emancipated only if their White father and master chose to do so, and they could never escape their Blackness.[5]

This approach did produce a few anomalies. Perhaps the most famous is the case of Nell Butler or "Irish Nell." Living as an indentured servant in Maryland in 1681, Irish Nell fell in love with and decided to

3. MARILYN YALOM, A HISTORY OF THE WIFE 220 (2001).
4. MORAN, *supra* note *, at 20-21.
5. *See id.* at 21.

marry a Black slave known as "Negro Charles." When Nell went to her master, Lord Baltimore, to tell him of her plans, he warned her that she was condemning herself and her children to a life as slaves. Defying her master's wishes, Nell replied that she would rather marry Charles than Lord Baltimore himself. After becoming Charles' wife, Nell spent the rest of her life working for his masters, probably as an indentured servant, and she reportedly died a "much broken and an old woman." However, Lord Baltimore was wrong about her children. An eighteenth-century Maryland court held that neither Nell nor her sons and daughters were slaves. Later, masters complained of runaway mulatto slaves who insisted that they were "descendants of the famous Nell Butler."[6]

While anti-miscegenation laws were used to define racial difference and create racial hierarchy between Blacks and Whites in colonial America and later the antebellum South, the statutes served a distinct function when applied to Asian immigrants who arrived on the West Coast, particularly California, in the mid- to late 1800s. The Chinese were the first to arrive in substantial numbers in the middle of the nineteenth century when gold was discovered. Under the immigration laws, the Chinese were treated as sojourners, laborers who came temporarily to work and then returned to their home country.[7] This migrant labor force was overwhelmingly male. In 1852, only seven of 11,794 Chinese were female. By 1870, Chinese men outnumbered Chinese women by a margin of 14 to 1.[8] Because the men were here to sweat but not to stay, the United States government made clear that as unassimilable, non-White foreigners, they were ineligible for citizenship. Federal officials discouraged immigration of Chinese women because they did not want the sojourners to put down roots, form families, and produce children who would be Americans by birth.[9]

In light of these stringent immigration laws, anti-miscegenation laws were not really necessary to define Chinese immigrants as non-White. However, large numbers of immigrant men living in bachelor communities created considerable anxiety about debauched and degraded sorties with White women. Strictly enforced bans on intermarriage were deemed critical in communicating the racial

6. MARTHA HODES, WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH-CENTURY SOUTH 19-38 (1997).

7. *See* RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 36-37 (paperback ed. 1989).

8. *See id.* at 121-23.

9. *See* MORAN, *supra* note *, at 32-34.

inferiority of the Chinese by denying them access not only to Chinese females but also White women. Living in segregated Chinatowns and isolated by language and culture, the sojourners seldom crossed the color line to cohabit and procreate. The harshness of the laws left Chinese men emasculated, as they died childless bachelors: "'Permitted neither to procreate nor to intermarry, the Chinese immigrant was told, in effect, to re-emigrate, die out—white America would not be touched by his presence.'"[10]

The Japanese began to come to California in significant numbers in 1890. Restrictions on the Chinese proved so harsh that their numbers had dwindled, and so Japanese migrated from Hawaii as well as their home country to find new economic opportunities on the West Coast.[11] The Japanese immediately sought to distinguish themselves from the racially marginalized Chinese, and they used Japan's clout in the international arena to ensure that both men and women could emigrate to America.[12] Although the Japanese remained ineligible for citizenship as unassimilable non-White foreigners,[13] they were able to build healthy, self-contained, and self-perpetuating communities as the proportion of women immigrants steadily increased. The proportion of Japanese immigrants who were female jumped from a mere "16 percent in 1905-08 to over 50 percent in 1909-14."[14] In 1900, there were nearly five Japanese men for every Japanese woman, but by 1920, the gender ratio was 1.6 to 1 and nearly every adult Japanese female was married.[15]

The immigrants who arrived in America had been carefully screened by the Japanese government to preserve its international image. As a result, the newcomers generally had higher rates of literacy and more resources than their European counterparts.[16] A number of Japanese became successful farmers and small businessmen, who lived with their families in thriving, prosperous communities. Because of the relative autonomy and success of the Japanese, one might think that anti-

10. Megumi Dick Osumi, *Asians and California's Anti-Miscegenation Laws*, in ASIAN AND PACIFIC AMERICAN EXPERIENCES: WOMEN'S PERSPECTIVES 8 (Nobuya Tsuchida ed., 1982).

11. *See id.* at 9; TAKAKI, *supra* note 7, at 180-81; Sil Dong Kim, Interracially Married Korean Women Immigrants: A Study in Marginality 59-60 (Ph.D. dissertation 1979).

12. *See* TAKAKI, *supra* note 7, at 197-98.

13. *See* Ozawa v. United States, 260 U.S. 178, 197-98 (1922) (declaring the Japanese like the Chinese ineligible for citizenship because they did not qualify as "free white persons").

14. PAUL SPICKARD, MIXED BLOOD: INTERMARRIAGE AND ETHNIC IDENTITY IN TWENTIETH-CENTURY AMERICA 27 (1989).

15. *See id.* at 29.

16. *See* TAKAKI, *supra* note 7, at 45.

miscegenation laws were unimportant in regulating their sexual and marital conduct. In fact, however, a new set of racial fears arose at the prospect of an independent community of foreigners on American soil. Some Californians believed that Japanese men would convert their financial gains into a claim on White women. In the early 1920s, a farmer described a Japanese who lived on

> an eighty-acre tract of as fine land as there is in California. . . . With that Japanese lives a white woman. In that woman's arms is a baby. What is that baby? It isn't Japanese. It isn't White. I'll tell you what that baby is. It is a germ of the mightiest problem that ever faced this state; a problem that will make the black problem of the South look white.[17]

At the same time, there were deep-seated suspicions that interracial mixing was as distasteful to the Japanese newcomers as to White natives:

> [W]ith great pride of race, they have no idea of assimilating in the sense of amalgamation. They do not come to this country with any desire or any intent to lose their racial or national identity. They come here specifically and professedly for the purpose of colonizing and establishing here permanently the proud Yamato race. They never cease to be Japanese. They have as little desire to intermarry as have the whites, and there can be no proper amalgamation, you will agree, without intermarriage. In Hawaii, where there is every incentive for intermarriage, the Japanese have preserved practical racial purity . . . .[18]

Ironically, then, when California applied anti-miscegenation laws to the Japanese, they were placed in a curious double bind. They were officially unfit to mingle with Whites across the color line, yet their prosperity made the significance of their segregation ambiguous. Perhaps, they desired Whites as a further mark of their success, and only the statutes stood in the way of a dilemma that would "make the black problem of the South look white." Yet, they might very well be uninterested in Whites, manifesting a racial pride that turned the tables on White supremacy. If so, anti-miscegenation laws could be entirely congenial to the settlers because they preserved Japanese superiority! Rather than clearly demarcating a racial hierarchy, the independence and

17. *Senate Committee on Immigration, Japanese Immigration Legislation: Hearings on S. 2576*, 68th Cong., 1st Sess. 5 (1924) (statement of V.S. McClatchy of Sacramento, California).

18. *Id.*

prosperity of the "proud Yamato race" made bans on intermarriage seem as much a welcome principle of endogamy as a criminal penalty for exogamy.

In contrast to Blacks and Asians, anti-miscegenation laws were seldom applied to Native Americans and never mentioned Latinos. The reasons for the lenient treatment of Latinos and Native Americans are quite similar. In both cases, these groups first came into contact with Whites when frontiers were being settled. At the outset, Whites had much to gain by forming friendly alliances with Indian tribes or Mexican natives. On occasion, these alliances could be cemented through intermarriage.[19] Consider, for example, the Anglo settlers who arrived in northern Mexico to make their fortunes in the early to mid-1800s. Mexico, newly freed from Spanish rule, hoped to capitalize on the sparsely populated furthermost reaches of its territory by attracting foreign investors. However, Mexican officials did not want Anglos simply to come to their country, exploit the land, and leave with their fortunes. Instead, the government wanted to encourage permanent settlement, and an excellent way to do this was to reward those who put down roots there. As a result, Mexico offered naturalization opportunities and corresponding trade advantages to Anglos who married Mexican women.[20] Indeed, the expectation was that Anglo settlers would be loyal to Mexican wives, not manipulate or abandon them after using them to personal advantage. In a diary of his Western travels, Matt Field, a journalist for the *New Orleans Picayune*, made these expectations clear to his readers when he described the sad tale of Maria Romero, who fell in love with a charming but dissolute Anglo adventurer who deserted her and her child by him. As Field wrote, "when subsequently she heard that [her lover] had designedly abandoned her, and had gone forever back to the United States, her reason failed, and poor Maria, the beauty of Taos, became a lunatic."[21] Maria had clearly expected marriage, not betrayal. In keeping with the commitment to permanent settlement in Mexico, the children of mixed marriages often spoke Spanish, observed Mexican cultural traditions, and Hispanicized their non-Spanish surnames.[22]

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19. *See* MORAN, *supra* note *, at 48-50.

20. *See* REBECCA MCDOWELL CRAVER, THE IMPACT OF INTIMACY: MEXICAN-ANGLO INTERMARRIAGE IN NEW MEXICO, 1821-1846 at 27-29 (1982).

21. MATTHEW C. FIELD, MATT FIELD ON THE SANTA FE TRAIL 179 (John E. Sunder ed., 1960).

22. *See* CRAVER, *supra* note 20, at 46-47.

After the United States conquered the northern part of Mexico, these patterns changed. Intermarriage became less common, although some daughters of prominent Mexican families married Anglo men to protect their families' status in the new American regime. In addition, women of mixed Mexican and Anglo ancestry continued to marry Anglo men as well.[23] In light of these new power relations, intermarriage became a strategy for absorption into an American identity. As a result, the children of mixed marriages now tended to speak English, observe American customs, and use a non-Spanish surname.[24] By treaty, former Mexican citizens enjoyed the full privileges of American citizenship, so anti-miscegenation laws never formally prohibited mixed marriages with Anglos. Yet, the subordinated status of Mexicans in their new home country led to a steep drop in the number of intermarriages.[25] Moreover, whatever the law, registrars often informally denied marriage licenses to Mexicans who looked too dark to marry a White person.[26]

As these historical accounts suggest, anti-miscegenation laws served distinct racial functions for different groups at different times. During colonial times, the statutes provided a way to define racial difference by drawing a bright line between white indentured servants and Black slaves. So vast was the difference that intimacy between the two groups was a deeply antisocial, criminal act. Later, even when racial distinctions were entrenched, the laws offered a way to reinforce racial hierarchy by making clear that some groups were unfit for marriage to Whites. Although the provisions typically were silent about Native Americans and Latinos, patterns of segregation and discrimination made these subordinated racial groups largely unthinkable partners for Whites. The imagery of miscegenation, legally mandated and popularly embraced, had bounded America's romantic imagination.

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23. *See id.* at 47; JUAN GOMEZ-QUINONES, ROOTS OF CHICANO POLITICS, 1600-1940 at 243-45 (paperback ed. 1994).

24. *See* GOMEZ-QUINONES, *supra* note 23, at 244-45.

25. MORAN, *supra* note *, at 52.

26. *See id.* at 57-59 (describing how registrars used skin color of Mexican brides to identify them as White or non-White, regardless of their formal status under the law).

II. THE ROLE OF ANTI-MISCEGENATION LAWS IN POLICING SEXUAL DECENCY AND MARITAL PROPRIETY

I owe a lot
to those I don't love.

Relieved to acknowledge
they are closer to someone else.
. . . .

With them I am at peace,
with them I'm free,
and this love can neither give
nor knows how to take.
. . . .

They themselves don't know
how much they carry empty-handed.

'I owe them nothing'
love would have commented
on this open subject.

–Wislawa Szymborska[27]

Although anti-miscegenation laws have largely been analyzed as racial legislation, they also say a great deal about norms of sexual decency and marital propriety. These statutes set limits on who might be an appropriate object of lust or love. In legislating these matters, officials demonstrated a belief that "knowing what love isn't might be just as valuable, though infinitely less satisfying, as knowing what it is."[28] At the same time, bans on intermarriage established the parameters of willed indifference to "separate but equal" families. The chasm that separated Whites from non-Whites in the world of intimacy made it

27. WISLAWA SZYMBORSKA, *Thank you, in* PEOPLE ON A BRIDGE 22-23 (paperback ed. 1990) (Adam Czerniawski trans., 1990).

28. SUSAN VREELAND, GIRL IN HYACINTH BLUE 107 (paperback ed. 1999). In a similar vein, Hendrik Hartog has observed that scholars can learn as much about marriage by studying how it ends as how it begins. *See* HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 1 (paperback ed. 2000).

possible to say "I owe them nothing" at the same time that it relieved each group from understanding how much it owed to "those I don't love."

Here, I would first like to focus on a time of great social and sexual ferment in the United States, the period in the late 1800s and early 1900s when America was experiencing rapid industrialization and urbanization. So long as most Americans lived in small, rural communities, neighbors could keep a close eye on sexual liaisons, and wedding banns would give the entire village a chance to reflect on the soundness of a match.[29] As the population shifted to large, impersonal cities, these informal ways of regulating sex and marriage broke down. Suddenly, anonymity gave urban Americans unprecedented opportunities for sexual experimentation and subjected them to unprecedented dangers of sexual predation and marital fraud.[30]

The middle class was not immune from these upheavals in the realm of intimacy. Affluent White men could now venture into red-light districts to sample the sexual pleasures offered by prostitutes.[31] As one gentleman explained: "Perhaps I was wrong to go [to a prostitute] but 'a stiff prick has no conscience' as the proverb says, & I believe I would have gone crazy almost if I had not gone to her or some other similar lady."[32] Fearful that men would not be able to control their "sexual muscle," middle-class White women led crusades for purity that exhorted males to curb their "animal instincts" and cleanse themselves by seeking mutuality and companionship with the kind of "nice girl" who could become a worthy wife.[33]

While even the middle class was imperiled by the scourge of unrestrained sexual impulses, reformers were especially concerned about the large numbers of immigrants from southern and eastern Europe who were arriving to work in America's labor-hungry factories. The newly arrived often crowded into tenements, and single male boarders lived in close proximity to young wives and daughters in the same household. Immigrant women often went out to work themselves, and their unsupervised contact with men at home and in the street led to fears that

29. *See* JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 29-30 (1988).

30. *See* Lawrence M. Friedman, *Crimes of Mobility*, 43 STAN. L. REV. 637, 645-50 (1991).

31. *See* D'EMILIO & FREEDMAN, *supra* note 29, at 130-38.

32. *Id.* at 110.

33. *See* ELLEN K. ROTHMAN, HANDS AND HEARTS: A HISTORY OF COURTSHIP IN AMERICA 186-88, 202, 246-47, 284 (1984).

they would succumb to the seductions of sexually predatory males.[34] Social hygienists preached the importance of responsible conduct, and they offered up abject examples of young women whose lives were ruined when they were lured into prostitution by promises of marriage or a glamorous lifestyle. Tales of "white slavery" with their images of naive, starry-eyed girls falling irrevocably from grace captured the American imagination.[35]

These sexual anxieties were further complicated when Blacks began their great migration from the rural South to work in northern cities during the 1920s. Suddenly, the perils of prostitution were multiplied by the possibility of sex across the color line. Now, White men could experience interracial dancing and sex in Black and Tan clubs, and Black male migrants, for whom White women had been taboo in the South, could have sex with a White prostitute for as little as five or six dollars.[36] New sexual anxieties emerged as the clearcut distinction between respectable intraracial sex and degraded interracial relationships blurred in red-light districts that catered to a range of forbidden desires.

Interracial sex had to be subordinated to intraracial sex, even in the seamy sex districts of urban America. In Chicago, commissions to stamp out vice declared that interracial clubs were especially debauched, so degraded that "'no printable account could come within a mile of telling the depravity to which performers and patrons sank.'"[37] The sex trade itself reflected racial hierarchy in the structuring of fees and services. Black prostitutes were not able to charge as much as White ones, and dark-skinned Black women earned less than light-skinned women. Black women in the sex trade were more likely than White women to work on the streets rather than in brothels, and Blacks were less able to limit the sexual services that they offered than Whites were.[38]

In addition, White dance hall hostesses explicitly limited their contact with non-White clients to preserve their racial superiority, their

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34. *See* D'EMILIO AND FREEDMAN, *supra* note 29, at 183-84, 194-201; KATHY PEISS, CHEAP AMUSEMENTS: WORKING WOMEN AND LEISURE IN TURN-OF-THE-CENTURY NEW YORK 50-51 (1986).

35. *See* D'EMILIO & FREEDMAN, *supra* note 29, at 208-09; RUTH ROSEN, THE LOST SISTERHOOD: PROSTITUTION IN AMERICA, 1900-1918, at 112-36 (1982); MARK THOMAS CONNELLY, THE RESPONSE TO PROSTITUTION IN THE PROGRESSIVE ERA 114-35 (1980).

36. *See* MORAN, *supra* note *, at 63-64.

37. KEVIN J. MUMFORD, INTERZONES: BLACK/WHITE SEX DISTRICTS IN CHICAGO AND NEW YORK IN THE EARLY TWENTIETH CENTURY 31 (paperback ed. 1997) (quoting ANNUAL REPORT OF THE COMMITTEE OF FIFTEEN 12 (1923)).

38. *See id.* at 98-99, 101-06.

moral respectability, and their market advantage. As one woman explained: "'The Flips [Filipinos] are all right for anybody that wants them. But they're not white, that's all. Of course, I'll dance with them at the hall. But I won't go out with them. I'm white, and I intend to stay white.'"[39] A dance hall owner also realized that the women in his club would lose their appeal to "decent" White men and hence their value to him if they fraternized with non-Whites: "'[Y]ou've got to look out for . . . the Chinks. The West-side guys [white ethnics] out there won't come. Once a girl goes with these Chinks they're too low down for any decent American guy to want to dance with.'"[40] Yet another owner observed that any White who would go to a club that allowed Asian men was not "'really white'" and must "'have a little nigger in him to be willing to do that.'"[41]

Unlike same-race liaisons, interracial relationships could not be made respectable through marriage. A White man might exercise his sexual muscle with White prostitutes and still find a "nice girl" to wed. His illicit sexual conduct, far from casting doubt on the uprightness of his marriage, actually enhanced its purity as his wife cleansed him of his misguided, lust-driven profligacy. A Black man who found pleasure with White prostitutes, however, could not ennoble his impulse by marrying a White woman. Instead, these marriages were presumed to replicate all the sexual pathologies of forbidden desire. Perhaps the experience of Jack Johnson, the charismatic Black boxer who bed and wed White women, provides the best example of America's tendency to treat interracial couples, whether married or not, as revelers on an exploitative and degrading sexual holiday. Although Johnson was romantically linked to a string of White women, he was most severely condemned when he married one of them in the early 1900s. Within a year of his marriage, Johnson was prosecuted under the Mann Act for transporting another White woman across state lines for illicit purposes. Johnson had once had a brief affair with the woman, but his audacity in choosing to marry yet a different White woman sealed his fate. An all-White jury convicted him and sentenced him to one year in prison for his sexual predations.[42]

At the turn of the century, the disruption of sexual mores associated with urbanization and industrialization contributed to the belief that

39. *Id.* at 64.
40. *Id.* at 57.
41. *Id.* at 58.
42. *See* D'EMILIO & FREEDMAN, *supra* note 29, at 202-03; MUMFORD, *supra* note 37, at 6-12.

interracial relationships were antisocial and dangerous. Later, however, the upheavals of the sexual revolution would make the differential treatment of sex and marriage across the color line seem increasingly anomalous. During the 1960s and 1970s, America underwent a sexual transformation, the effects of which are still being felt today. The changes were so powerful that they reached the hallowed halls of the United States Supreme Court. Responding to a new ethic of sexual liberty, the Justices expressly recognized that individuals had a right to be free of state interference in decisions about procreation. The Court described marriage as an institution "intimate to the degree of being sacred" and linked its vitality to "privacy and repose."[43] Having acknowledged the importance of keeping the State out of people's bedrooms, the Court extended its holding to unmarried couples seven years later. Whether single or married, individuals had a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[44]

As the victories of the sexual revolution were being consolidated in the Supreme Court, the civil rights movement continued to pursue its quest for racial equality. In striking down official segregation of public institutions and services, ranging from schools and parks to swimming pools and transportation, the Court made clear during the mid-1950s and 1960s that race should be irrelevant to official decisionmaking.[45] So in the late 1960s, with colorblindness and sexual autonomy the emerging constitutional norms, it was ever more inexplicable that anti-miscegenation laws remained a valid exercise of state authority. Ultimately, the inconsistencies proved too much, and the confluence of racial equality and sexual freedom led the Court to strike down the statutes.[46]

In 1964, in *McLaughlin v. Florida*,[47] the Court heard Dewey McLaughlin's appeal from a conviction for cohabiting with Connie Hoffman, a White woman. McLaughlin denied that he was Black, insisting that he was a Honduran who spoke fluent Spanish.[48] The

43. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

44. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

45. *See* MORAN, *supra* note *, at 88.

46. *See id.* at 91-92.

47. 379 U.S. 184 (1964).

48. Transcript of Proceedings, at 23, 26, 36, 41, 46, 82, McLaughlin v. Florida, 379 U.S. 184 (1964) (No. 585) (Oct. Term, 1963) (testimony of Mrs. Dora Goodnick, landlady; Detective Stanley Marcus; Detective Nicholas Valeriani; and Josephine DeCesare, Secretary, City Manager's Office, Miami Beach).

officers based their arrest on McLaughlin's dark-skinned appearance, and the trial court convicted him after hearing the landlady's testimony that she had seen McLaughlin sharing an apartment with Hoffman.[49] Under Florida law, if a same-race couple cohabited, the State had to prove intercourse, but when a mixed-race couple did, they were presumed to be having illicit sex. In addition, the penalties for extramarital sex across the color line were more severe than those for sex with a member of the same race.[50]

McLaughlin challenged the differential treatment under Florida law as a violation of equal protection law. Although he did not contest the state's authority to regulate sexual conduct, he contended that the disparate penalties based on the race of a partner were unconstitutional. The Florida Supreme Court rejected his claims, concluding that Whites and Blacks were treated equally because each was subject to identical penalties for crossing the color line.[51] The state high court made clear that its decision was a "mere way station on the route to the United States Supreme Court" and that "if the new-found concept of 'social justice' has outdated 'the law of the land,' . . . it must be enacted by legislative process or some other court must write it."[52] The United States Supreme Court was willing to wield the pen, and for the first time, the Justices applied strict scrutiny to strike down a legislative classification. Simply put, differential penalties based on race were not necessary to promote a compelling state interest in deterring particularly antisocial forms of sexual conduct.[53]

The Court waited another three years before addressing bans on interracial marriage in *Loving v. Virginia*.[54] Richard Loving, a White man, and Mildred Jeter, a Black woman, had grown up together in Caroline County, Virginia and had known each other since childhood. They married in Washington, D.C. in 1958 and then went back to Virginia to live as husband and wife. Shortly after their return, they were arrested for violating the state's ban on interracial marriage. After pleading guilty, the Lovings were sentenced to one year in prison. The

49. *Id.* at 58 (testimony of Detective Valeriani); ROBERT J. SICKELS, RACE, MARRIAGE, AND THE LAW 101 (1972).

50. *See* McLaughlin v. State, 153 So. 2d 1, 2 (Fla. 1963); SICKELS, *supra* note 49, at 101.

51. *See McLaughlin*, 153 So. 2d at 2. This rationale had previously been upheld in Pace v. Alabama, 106 U.S. 583 (1882), a case that presaged the Court's adoption of a "separate but equal" doctrine and that is described at greater length in my book. *See* MORAN, *supra* note *, at 79-81.

52. *McLaughlin*, 153 So. 2d at 2-3; SICKELS, *supra* note 49, at 101.

53. *See* McLaughlin v. Florida, 379 U.S. 184, 188-90 (1964).

54. 388 U.S. 1 (1967).

sentences were suspended in exchange for a promise to leave Virginia and not come back for 25 years. The Lovings then moved to Washington, D.C.[55]

Homesick for their friends and family, the Lovings sought help from the American Civil Liberties Union (ACLU) in overturning their convictions four years later. The Lovings argued that their sentence was cruel and unusual, violated due process and equal protection, and was a burden on interstate commerce. The Virginia trial court rebuffed all of the Lovings' claims, concluding that their punishments were far too light to be cruel and unusual, that marriage was a domestic arrangement unrelated to interstate commerce, and that the legislature was justified in keeping the races separate as divinely ordained by "Almighty God."[56] After an unsuccessful attempt to seek review by a three-judge panel in federal court, the Lovings appealed to the Virginia high court.[57] The state supreme court once again upheld the anti-miscegenation statute, but the opinion did modify the Lovings' sentences so that they could return to Virginia so long as they did not cohabit.[58]

The Lovings then petitioned for United States Supreme Court review. Before the Court, both sides offered evidence regarding the eugenic justifications for anti-miscegenation laws. The ACLU's witnesses testified that the biological dangers of race-mixing were thoroughly discredited, while the state of Virginia introduced non-Southern experts who indicated that these concerns remained a credible basis for outlawing interracial marriages.[59] In addition, Virginia offered expert testimony about the special social and psychological difficulties that mixed-race couples and their children faced. Virginia's counsel urged the Court to defer to the legislature's determination that marriage across the color line posed a threat to the stability of families, the building blocks of public order.[60]

The Court rejected all of Virginia's justifications for the law. Once again, the Justices applied strict scrutiny to conclude that the scientific evidence regarding the harms of race-mixing was too flimsy to support a conclusion that criminalizing intermarriage was necessary to promote a compelling state interest in protecting the general welfare. With the laws

55. *See id.* at 2-3; SICKELS, *supra* note 49, at 78.

56. *See Loving*, 388 U.S. at 3; SICKELS, *supra* note 49, at 79-80.

57. *See Loving*, 388 U.S. at 3; SICKELS, *supra* note 49, at 81.

58. *See* Loving v. Commonwealth, 147 S.E.2d 78, 83 (Va. 1966).

59. *See* SICKELS, *supra* note 49, at 105-07.

60. *See* Appellee's Brief and Appendix at 6-7, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395).

stripped of any pretense of scientific support, the Court concluded that "the racial classifications must stand on their own justification, as measures designed to maintain white supremacy."[61] This official endorsement of racial hierarchy clearly violated equal protection. The Court did not stop there, however. In a brief passage, the *Loving* opinion noted that there was a fundamental right to marry and that Virginia's anti-miscegenation law wrongly invaded that right without due process of law. In characterizing the choice of a marital partner as an individual right "essential to the orderly pursuit of happiness by free men,"[62] the Court built on earlier decisions recognizing procreative liberty. To end three centuries of legal bans on interracial marriage, *Loving* capitalized not just on a changing ideology about race but also on shifting mores about sexual and marital freedom.

Although both *McLaughlin* and *Loving* were designed to undo anti-miscegenation laws, the decisions were not immune from the legacy of centuries of "separate but equal" families. Bans on intermarriage had played a key role in sustaining a system of racial classification, a structure that the Court carefully refrained from deconstructing. The issue of the legitimacy of racial categories had certainly been drawn into question. McLaughlin, for instance, denied that he was Black. Although the Lovings accepted their racial designations, both the National Association for the Advancement of Colored People (NAACP) and the Japanese American Citizens League denounced the classification scheme as vague, unscientific, and insupportable.[63] The Court agreed that there was no expert justification for bans on intermarriage, but the Justices were reluctant to dismantle race itself. Ironically, under a new regime of colorblindness, racial categories were critical in rectifying past discrimination through programs of desegregation. Even the NAACP was sensitive to this dilemma of racial reform. For the first time in *Loving*, it refrained from arguing that racial classifications were inherently invidious or per se unconstitutional, a claim that it had made in *McLaughlin* only three years before.[64] Anti-miscegenation laws that consolidated the concept of race might be gone, but their legacy lingered on.

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61. *Loving*, 388 U.S. at 11.

62. *Id.* at 12.

63. *See* Brief of Amici Curiae National Association for the Advancement of Colored People, at 7-9, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395); Brief of Amici Curiae Japanese American Citizens League, at 17-20, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395).

64. *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 286, 294-95 (2000); ANDREW KULL, THE COLOR-BLIND CONSTITUTION 170 (1992).

CONCLUSION

Anti-miscegenation laws, traditionally understood as racial legislation, also served to regulate norms of sexual and marital decency. By identifying those who could not be loved, the statutes marked some races as inferior and undesirable. At the same time, the regulation of marriage made plain that a wedding was not the result of a heady sexual impulse but marked the beginning of a sobering social responsibility. Bans on intermarriage originally were used to define racial difference, but separate but equal families became such a pervasive part of American life that many thought the divisions both natural and necessary, even divinely ordained. By entrenching social difference, anti-miscegenation laws bolstered racial inequality. Without the empathy born of close contact, Whites could ignore the gross disparities between their own opportunities and privileges and those of non-Whites. Secure in the knowledge that they owed nothing to those whom they did not love, America's racial awakening would be centuries in the making.

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