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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 395

RICHARD PERRY LOVING AND
MILDRED DELORES JETER LOVING, *Appellants*

v.

COMMONWEALTH OF VIRGINIA, *Appellee*

On Appeal from the Supreme Court of Appeals of Virginia

BRIEF AMICUS CURIAE, URGING REVERSAL, ON BEHALF OF—

JOHN J. RUSSELL, Bishop of Richmond;
LAWRENCE CARDINAL SHEHAN, Archbishop of Baltimore;
PAUL A. HALLINAN, Archbishop of Atlanta;
PHILIP M. HANNAN, Archbishop of New Orleans;
ROBERT E. LUCEY, Archbishop of San Antonio;
JOSEPH B. BRUNINI, Apostolic Administrator of Natchez-Jackson;
LAWRENCE M. DEFALCO, Bishop of Amarillo;
JOSEPH A. DIRICK, Apostolic Administrator of Nashville;
THOMAS K. GORMAN, Bishop of Dallas-Ft. Worth;
JOSEPH H. HODGES, Bishop of Wheeling;
JOHN L. MORKOVSKY, Apostolic Administrator of Galveston-Houston;
VICTOR J. REED, Bishop of Oklahoma City and Tulsa;
L. J. REICHER, Bishop of Austin;
THOMAS TSCHOEPE, Bishop of San Angelo;
ERNEST L. UNTERKOEFLER, Bishop of Charleston;
VINCENT S. WATERS, Bishop of Raleigh;
THE NATIONAL CATHOLIC CONFERENCE FOR INTERRACIAL JUSTICE; and
THE NATIONAL CATHOLIC SOCIAL ACTION CONFERENCE

(See inside cover for counsel)

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[1] Pursuant to Rule 42, paragraph 2, there have been lodged with the Clerk the written consents of Appellants' counsel and of the Attorney General of the Commonwealth of Virginia to the filing of this Brief Amicus Curiae.

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of The National Catholic Conference for Interracial Justice, The National Catholic Social Action Conference, and ~~the following~~ Roman Catholic bishops:

John J. Russell, Bishop of Richmond, Virginia;

Lawrence Cardinal Shehan, Archbishop of Baltimore, Maryland;

Paul A. Hallinan, Archbishop of Atlanta, Georgia;

Philip M. Hannan, Archbishop of New Orleans, Louisiana;

Robert E. Lucey, Archbishop of San Antonio, Texas;

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L. J. Reicher, Bishop of Austin, Texas;

Thomas Tschoepe, Bishop of San Angelo, Texas;

Ernest L. Unterkoefler, Bishop of Charleston, South Carolina; and

Vincent S. Waters, Bishop of Raleigh, North Carolina.

These bishops, as pastors of their respective dioceses, are committed to the proposition that "with regard to the fundamental rights of the person, every type of discrimination, whether social or cultural, whether based on sex, race, color, social condition, language or religion, is to be overcome and eradicated as contrary to God's intent." (Vatican Council II, *Pastoral Constitution on the Church in the Modern World.*)

The National Catholic Conference for Interracial Justice, a non-profit corporation, was organized in 1960, as an agency which serves nearly 150 Catholic human relations organizations throughout the United States, 26 of them in the south. The Conference works to end racial discrimination and prejudice, and to foster interracial justice in all areas of life.

The National Catholic Social Action Conference, founded in 1957, is a non-profit association of approximately 500 individuals and 30 organizations interested in Christian social action. Its membership is composed chiefly of members and leaders of social action groups throughout the nation, variously drawn from labor, management, and industrial relations groups; Roman Catholic diocesan social action groups; rural life and urban life groups; interracial groups, and cooperatives. The Conference is interested in this case, as amicus curiae, due to the serious issues of personal liberty which it presents.

The individuals and organizations submitting this brief believe that they may serve this honorable Court in its determination of this case by bringing to the attention of the Court two questions which they believe are involved herein, each of which poses an important issue relating to the personal liberties of citizens of the United States.

SUMMARY STATEMENT OF THE CASE

Appellants, Richard Perry Loving and Mildred Jeter Loving, were convicted on January 6, 1959, in the Circuit Court of Caroline County, Virginia, under an indictment charging that "the said Richard Perry Loving being a White person and the said Mildred Delores Jeter [Loving] being a Colored person, did unlawfully and feloniously go out of the State of Virginia, for the purpose of being married and with the intention of returning to the State of Virginia and were married out of the State of Virginia, to-wit, in the District of Columbia on June 2, 1958, and afterwards returned to and resided in the County of Caroline, State of Virginia, cohabiting as man and wife." *Va. Code,* sec. 20-58 (1950).

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

On November 6, 1963, the appellants filed a motion to vacate judgment and set aside sentence on the ground that the statute under which they were convicted was unconstitutional and that the sentences imposed upon them were invalid. This motion was denied on January 22, 1965. On appeal to the Supreme Court of Appeals of Virginia, that court held, on March 7, 1966, that "that portion of the order appealed from upholding the constitutionality of Code, secs. 20-58 and 20-59, and the convictions of the [appellants] thereunder, is affirmed; that portion of said order upholding the validity of the sentences imposed is reversed...."

The appellants appealed from this judgment of March 7, 1966, of the Supreme Court of Appeals of Virginia, to the United States Supreme Court. On December 12, 1966, the United States Supreme Court noted probable jurisdiction.

ADDITIONAL QUESTIONS PRESENTED

The amici curiae submitting this brief concur in the views presented by appellants in this case on the following issues:

That the Virginia anti-miscegenation laws violate the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution;

That a state statute which proscribes marriage between members of different races violates the constitutional right of privacy;

That a state statute which proscribes marriage between members of different races violates a constitutional right of freedom to marry;

That a state statute which makes the color of a person's skin the test of whether his marriage constitutes a criminal offense is invalid under the United States Constitution; and

That the Virginia anti-miscegenation statutes deprive the appellants of the civil rights guaranteed by Title 42 U.S.C. sec. 1981.

Additionally, the amici curiae submitting this brief desire to bring to the attention of the Court the following two questions:

1. Whether the Virginia anti-miscegenation laws (Va. Code, secs. 20-50 et seq. (1950) and Va. Code, secs. 1-14 (Supp. 1964)) constitute an in-

valid restriction on the free exercise of religion guaranteed by the United States Constitution?

2. Whether the Virginia anti-miscegenation laws constitute an invalid restraint on the right to have and to raise children?

ARGUMENT

I. The Anti-Miscegenation Statutes Prohibit the Free Exercise of Religion Guaranteed by the United States Constitution and Are, Therefore, Invalid.

The First Amendment to the United States Constitution states that "Congress shall make no law . . . prohibiting the free exercise" of religion. While this Amendment, by its express terms, places a limitation upon the Congress only, it is made applicable to the states and their legislatures by the Fourteenth Amendment to the Constitution. *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940).

It should be emphasized that we are concerned here with *personal* liberty, *personal* rights. It is the individual's free exercise of religion that is safeguarded by the United States Constitution. *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923), in describing the area of personal liberty protected by the due process clause of the Fourteenth Amendment, speaks of the "right of the individual . . . to marry, establish a home and bring up children, *to worship God according to the dictates of his own conscience.* . . . " (Italics added.)

Religion does not pertain to the mind alone; it involves the whole person. Religion does not encompass belief alone; it involves action. And in wise recognition of this fact, the Constitution not only guarantees "freedom of conscience and freedom to adhere to such religious organization or form of worship as the in-

dividual may choose," but it also "safeguards the free exercise of the chosen form of religion." *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940).

Marriage is a fundamental act of religion, and, because of this, marriage comes within the Constitutionally-protected "free exercise of religion." It is submitted that this proposition that marriage is a fundamental or basic act of religion is not a determination of law, but rather of theology. To understand the religious significance of marriage, recourse must be made to theology. The following remarks on the theology of marriage are presented solely for the purpose of pointing up the importance of marriage as a religious act to the individual person who is committed to one or other of the major religious faiths in the United States.

In Catholic theology, for example, marriage is a sacrament, and a sacrament is seen as a "divine bestowal of salvation in an outwardly perceptible form which makes the bestowal manifest." Schillebeeckx, *Christ the Sacrament of the Encounter With God,* p. 15. (1963). The Christian sees the man Jesus as the personal visible realization of the divine grace of redemption, as "*the* sacrament, the primordial sacrament, because this man, the Son of God himself, is intended by the Father to be in his humanity" the way to the actuality of redemption. Schillebeeckx, *op. cit. supra,* at 15. (Although differing greatly in his view of sacramental theology, the Protestant theologian Harvey Cox also speaks of Jesus as *the* sacrament of God. Cox, *God's Revolution and Man's Responsibility,* p. 104 (1965).)

Not only does the Catholic Christian believe that Jesus is the primordial sacrament, but he also believes

that the Church is the sacrament of the risen Christ. He, therefore, views the sacraments of the Church (baptism, confirmation, penance, the Eucharist, holy orders, matrimony, and the annointing of the sick) as the personal acts of the risen Christ himself, but realized in the visible form of an act of the Church.

So important are these sacraments, including marriage, in the life of the Catholic Christian, that a Council of the Church would say that "all true justification either begins through the sacraments, or once begun, increases through them, or when lost is regained through them." (Council of Trent, 1545-1563; Denzinger, *Enchiridion symbolorum,* no. 843a (24th ed.).) Through the sacraments, the individual encounters Christ at the decisive moments of the individual's personal history. "The special grace of the sacrament of matrimony consists in the fact that the married couple participate in a specific way in the salvific mystery of Christ and the Church, and conversely, that that perfect and final Covenant which God himself in his gracious clemency has entered into with man, is historically betokened (becomes historically tangible) in marriage." Rahner and Vorgrimler, *Theological Dictionary,* p. 275 (1965).

The foregoing discussion of marriage reflects Catholic theological studies, but a similar importance is accorded marriage as an act or exercise of religion in Protestant and Orthodox Christianity and in Judaism.

One of the leading American theologians of the Orthodox Church has written:

> "In the Eastern church matrimony is a sacrament. . . . [T]he Church calls sacraments those decisive acts of its life in which this transforming grace is confirmed as being given, in which the

> Church through a liturgical act identifies itself with and becomes the very form of that Gift. . . . ." Schmemann, *Sacraments and Orthodoxy,* p. 99 (1965).

Similarly, it is stated in Demetrakopoulos, *Dictionary of Orthodox Theology,* p. 125 (1964), that "marriage is the sacrament by which the union of man and woman is made lawful before God."

The Anglican Church also views matrimony as a sacrament, and in a report from the 1958 Lambeth Conference, it is stated:

> ". . . The Prayer Book, looking back at the deep teaching of the Epistle to the Ephesians, speaks of marriage as the closest thing we can know to the unity which exists 'betwixt Christ and his church.' . . .
>
> The family is the God-given environment within which souls are born, to learn first the lessons of human individuality and dignity, of responsible freedom and redemptive love; the lessons which in due course must be lived out in the wider and deeper associations of humanity in Christ." *The Lambeth Conference 1958: The encyclical letter from the bishops together with the resolutions and reports,* pp. 2.150-2.151 (1958).

Although many of the churches in the Protestant Christian tradition may not adhere to a strictly sacramental view of marriage, it is clear that marriage does have deep religious significance in such churches. Karl Barth has referred to marriage as "the matter of a special divine calling, . . . [which] is wholly subject to the divine command." Barth, *Church Dogmatics,* v. III, part 4, p. 184 (1961). Another prominent Protestant theologian, Emil Brunner, has written:

"From the hand of the Creator do I first receive my partner in marriage as 'mine,' and through this become 'his' or 'hers.' This is the order of creation in marriage; therefore, although not a Sacrament . . . marriage is a sacred thing." Brunner, *The Divine Imperative: A Study in Christian Ethics,* p. 348 (1947).

In Judaism, marriage is viewed as having "profound religious significance." Kahana, *The Theory of Marriage in Jewish Law,* p. 27 (1966). "Judaism . . . considers [marriage] as a sacred trust entered into between the bridegroom and the bride. Jewish marriage is not only a civil relationship; it is not only a social institution; it is a sanctification encompassing an entire philosophy and way of life." Goodman and Goodman, *The Jewish Marriage Anthology,* viii (1965).

This theological perspective of marriage has been presented in order to show that marriage is much more than a social event or the commencement of a social relationship, that marriage, whether regarded technically as a sacrament or not, is held by the major religious faiths in the United States to be an important act of religion.

It must be emphasized that the teachings or laws of some of the churches or religious bodies in the United States even exclude specifically any restriction on marriage based upon racial considerations. As early as 1843, an American Catholic theologian stated:

> "In some states, marriage between whites and Negroes is prohibited by law and considered invalid. However, they are valid by ecclesiastical law so long as the impediment of servile condition does not occur. If some wish to enter such a marriage, they cannot be forbidden the sacraments be-

cause of a legal prohibition or public opinion since they are exercising a natural right which the Church in no way prohibits." Kenrick, *Theologiae Moralis,* III, p. 334 (1843), quoted in Leonard, *Theology and Race Relations,* p. 157 (1963). See also Doherty, *Moral Problems of Interracial Marriage* (1949).

As recently as January 28, 1967, the Convention of the Episcopal Church of the Diocese of Washington, after stating that matrimony has always been a sacrament of the church, that Christian tradition supports the right of persons to choose their marriage partners, and that there is no theological or biological reason against interracial marriage, went on record in favor of the repeal of all existing laws which seek to control the race of marriage partners and of all laws which forbid interracial marriage. In the course of this resolution, the Convention called attention to Canon 16, section 4, of the Canon law of the Episcopal Church which provides that no member of the Church shall be excluded from the sacraments of the Church because of race, color, or ethnic origin.

One of the committees at the Evanston Assembly of the World Council of Churches urged the Church to "withhold its approval of all discriminatory legislation affecting the educational, occupational, civic or marital opportunities based on race." Duff, *The Social Thought of the World Council of Churches,* p. 243 (1956). And this committee report was reinforced by resolutions adopted by the entire Assembly, one of which declared that "any form of segregation based on race, colour or ethnic origin is contrary to the Gospel, and is incompatible with the Christian doctrine of man and with the nature of the Church of Christ." Duff, *op. cit. supra,* at p. 243.

Since marriage is an important act of religion, it comes within that "free exercise of religion" guaranteed to the individual by the First and Fourteenth Amendments to the United States Constitution.

While it is certainly true, as stated in *Maynard v. Hill,* 125 U.S. 190, 205 (1888), that marriage "has always been subject to the control of the legislature," this does not mean that it is subject to the *unlimited* or *unrestricted* control of the legislature. Marriage is an act, an exercise, of religion, and although the freedom to act, as distinguished from the freedom to believe, is not absolute, *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940), still the First Amendment freedoms, including the free exercise of religion, are "susceptible of restriction only to prevent *grave and immediate danger* to interests which the state may *lawfully* protect." (Italics added.) *Board of Education v. Barnette,* 319 U.S. 624, 639 (1943).

If it is acknowledged that marriage is subject to *some* control by the state legislature, what restrictions then may the state validly impose upon marriage? *Maynard v. Hill,* 125 U.S. 190 (1888), has been cited by various state courts in their discussion of the power of the states over marriage and has been used to justify rulings sustaining anti-miscegenation statutes. See, for example, *Loving v. Commonwealth,* 206 Va. 924, 147 S.E.2d 78, 82 (1966); *Naim v. Naim,* 87 S.E.2d 749, 751 (Va. 1955); *State v. Tutty,* 41 Fed. 753, 758 (S.D. Ga. 1890); *Kirby v. Kirby,* 206 Pac. 405, 406 (Ariz. 1922). But *Maynard v. Hill* actually concerned the power of the Oregon territorial legislature to grant a divorce, and it is not authority for the validity of statutes forbidding interracial marriage. It is well to note that the Court in *Maynard v. Hill,* after stating that mar-

riage is subject to the control of the legislature, then gave the following as examples of those aspects of marriage subject to regulation: the age at which the parties may marry; the procedures or form essential to constitute marriage; the duties and obligations created by marriage; the effect of marriage upon the property rights of the spouses; and the acts that constitute grounds for divorce. While it is not contended that the Court intended this listing of aspects of marriage that may be subjected to regulation to be exclusive, yet it is relevant that none of these aspects said to be subject to regulation bear any resemblance or relation to that aspect of marriage at which anti-miscegenation statutes are aimed.

Marriage comes within the "free exercise of religion" clause, made applicable to the states by the Fourteenth Amendment, and it can be restricted only to prevent "grave and immediate danger to interests which the state may lawfully protect." *Board of Education v. Barnette,* 319 U.S. 624, 639 (1943). The statements in *Maynard v. Hill* concerning the power of the states over marriage must be qualified to reflect this important limitation.

A case involving governmental regulation of marriage wherein it was contended that the regulation unconstitutionally prohibited the "free exercise of religion" was before the United States Supreme Court in *Reynolds v. United States,* 98 U.S. 145 (1878). In *Reynolds v. United States,* the Court upheld a conviction for bigamy against the contention that it was the duty of the defendant, as a male member of the Mormon Church, "circumstances permitting, to practice polygamy." The Court, after noting that "polygamy has always been odious among the northern and

western nations of Europe" and that "at common law, the second marriage was always void," then stated that society is built upon marriage and that "according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests." 98 U.S. at 165-166. The Court cited Professor Lieber as authority for the proposition that "polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy." 98 U.S. at 166.

In view of these statements by the Court, and without inquiring whether the social theory reflected in those statements would be accepted today, it would seem correct to state that the Court held that polygamous marriages could be prohibited, despite the contention that such marriages came within the "free exercise of religion," because it had concluded that polygamous marriages were inherently objectionable as constituting a danger to the "principles on which the government of the people, to a greater or less extent, rests." However, this objection cannot be levied against interracial marriages. Interracial marriages do not constitute a threat to the "principles of government" made manifest in the United States Constitution. This is all the more true when we remember that state anti-miscegenation statutes involve a classification based upon race and that the "central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." *McLaughlin v. Florida,* 379 U.S. 184, 192 (1964). Certainly, the elimination of racial discrimination emanating from governmental sources is now a "principle of government."

Another distinction between polygamous marriages, which may be prohibited, and interracial marriages is that recent anthropological studies indicate that the structure of the family based upon polygamy, *because of its very nature,* may be harmful to the family members. See Hsu, *Psychological Anthropology,* p. 61 (1961); Beattie, *Other Cultures,* pp. 132-135 (1964).

On the other hand, no proof has been offered by scientists that an interracial marriage, *because of the nature of such a marriage,* is likely to engender similar harmful effects. An anthropologist, Clyde Kluckhohn, has written that "nowhere in the 'race' field is mythology more blatant or more absurd than in the beliefs and practices relating to 'miscegenation'." Kluckhohn, *Mirror for Man,* p. 114 (1963). Moreover, "there is no evidence that race mixture is harmful. There is no scientific basis for an overall rating of races on a superiority-inferiority scale." Kluckhohn, *op. cit. supra,* p. 117. The parties to an interracial marriage or their children may suffer, but this is not because of anything inherent in the family structure of the marriage. Rather it is due to the lack of understanding and the race prejudice that an interracial family may encounter. In short, this suffering is due to the reaction of third parties, not to the marriage itself. Thus, a polygamous marriage differs from an interracial marriage in that the former by its very nature may have detrimental effects upon members of the family, while this is not true in the case of the interracial marriage.

In view of these distinctions between a polygamous marriage and an interracial marriage, *Reynolds v. United States* is not authority for the proposition that the state may prohibit an interracial marriage even though the marriage is an "exercise of religion."

It is submitted that the Commonwealth of Virginia and some other states have prohibited interracial marriages, not because such marriages constitute a "grave and immediate danger to interests which the state may *lawfully* protect" (and this is the test as stated in *Board of Education v. Barnette,* 319 U.S. 624, 639 (1943), for measuring restraints upon the "free exercise of religion"), but because interracial marriages constitute an ultimate denial of the principles and philosophy of a racially-segregated society.

However, the United States Supreme Court has affirmed quite recently that the "strong policy [of the Fourteenth Amendment] renders racial classifications 'constitutionally suspect,' *Bolling v. Sharp,* 347 U.S. 497, 499; and subject to the 'most rigid scrutiny,' *Korematsu v. United States,* 323 U.S. 214, 216; and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose, *Hirabayashi v. United States,* 320 U.S. 81, 100." *McLaughlin v. Florida,* 379 U.S. 184, 192 (1964). In a concurring opinion in *McLaughlin v. Florida,* Mr. Justice Stewart, joined by Mr. Justice Douglas, stated that he could not "conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense." 379 U.S. at 198. And yet that is exactly what the Commonwealth of Virginia has done in declaring the parties to an interracial marriage to be guilty of a felony.

Only to prevent a "grave and immediate danger to interests which the state may *lawfully* protect" may the free exercise of religion, including marriage, be restrained. The preservation of a racially segregated society is not an interest which the state may *lawfully* protect.

To uphold the validity of a statute prohibiting or invalidating marriages simply because of a difference in the race of the spouses would be to permit the racial views of third persons to determine one of the most personal and sensitive of human decisions. In the absence of any grave danger to the lawful interests of the state, this is a decision that belongs solely to the man and woman contemplating marriage. If the Virginia anti-miscegenation statute were to be upheld, then the words of Mr. Justice Traynor of the Supreme Court of California would be most apt:

> ". . . A member of any of these races may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains." *Perez v. Sharp,* 32 Cal. 2d 711, 725, (*sub nom. Perez v. Lippold*) 198 P.2d 17, 25 (1948).

If it is contended that in some areas the marriage of persons of different races may result in tension and that this is "grave and immediate danger" the state is attempting to alleviate by the enactment and enforcement of anti-miscegenation laws, then, again quoting Mr. Justice Traynor, it is "no answer to say that race tension can be eradicated through the perpetuation by law of the prejudices that give rise to the tension." 32 Cal.2d at 725, 198 P.2d at 25. A similar decision was reached in *Cox v. Louisiana,* 379 U.S. 536 (1965), a case involving a civil-rights demonstration, wherein the Court said:

> ". . . Here again, as in *Edwards* [*v. South Carolina,* 372 U.S. 229 (1963)], this evidence 'showed no more than that the opinions which . . . [the

> students] were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection.' *Edwards v. South Carolina, supra,* at 237. Conceding this was so, the 'compelling answer . . . is that constitutional rights may not be denied simply because of hostility to their assertion or exercise.' *Watson v. Memphis,* 373 U.S. 526, 535." *Cox v. Louisiana, supra,* at 551.

The Supreme Court of California, in *Perez v. Sharp,* 32 Cal.2d 711, (*sub nom. Perez v. Lippold*) 198 P.2d 17 (1948), by a four-to-three decision, held that the California anti-miscegenation statute prohibiting marriages of "white persons with negroes, Mongolians, members of the Malay race, or mulattoes" was violative of the United States Constitution and, therefore, invalid. In an opinion in which two other members of the majority concurred, Mr. Justice Traynor stated that if the California anti-miscegenation statute was discriminatory and irrational, it unconstitutionally restricted both religious freedom and the liberty to marry.

In a separate concurring opinion, Mr. Justice Edmonds forcefully asserted his conclusion that

> ". . . marriage is 'something more than a civil contract subject to regulation by the State; it is a fundamental right of free men.' Moreover, it is grounded in the fundamental principles of Christianity. The right to marry, therefore, is protected by the constitutional guarantee of religious freedom. . . .
>
> "Reasonable classification, therefore, is not the test to be applied to a statute which interferes with one of the fundamental liberties which are pro-

tected by the First Amendment. The question is whether there is any 'clear and present danger' justifying such legislation . . ., and the burden of upholding the enactment is upon him who asserts that the acts which are denounced do not infringe upon the freedom of the individual. . . .

"The decisions upholding state statutes prohibiting polygamy come within an entirely different category. In Reynolds v. United States, 98 U.S. 145, . . . marriage was said to be, 'from its very nature a sacred obligation,' but the conviction was sustained upon the ground that polygamy violates 'the principles upon which the government of the people, to a greater or less extent, rests.' Later, the court characterized the practice of polygamy as being 'contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world.' Mormon Church v. United States, 136 U.S. 1 . . .; see Davis v. Beason, 133 U.S. 333. . . . In effect, therefore, these cases rest upon the principle that the conduct which the legislation was designed to prevent constituted a clear and present danger to the well being of the nation and, for that reason, the statute [prohibiting polygamy] did not violate constitutional guarantees." 32 Cal.2d at 741-742, 198 P.2d at 34-35.

In summary, we respectfully submit that marriage is an exercise of religion protected by the First and Fourteenth Amendments to the United States Constitution; that, as such, marriage can be restrained only upon a showing that it constitutes a grave and immediate danger to interests which the state may lawfully protect; and that interracial marriages do not constitute any danger to any interest which the state may lawfully protect.

II. The Anti-Miscegenation Statutes Are Unconstitutional as Denying the Right To Beget Children.

The Virginia anti-miscegenation statutes, by their prohibition of marriage between persons of different race, are unconstitutional upon their face for the further reason that they deny to such persons the right to beget children. Since the statutes make race the test of whether a man and woman may marry, they therefore bar those who cannot meet this racial test from one of the chief lawful rights in marriage, the having of children. So long as the statutes are deemed valid legislation, the issue of the union contracted by any such persons must be deemed illegitimate. Such persons may have children only if they are willing to pay the penalty of having them legally denominated as bastards.

Whatever may be said of the power of the state directly to deny to individuals the exercise of procreative powers on account of mental deficiency (see, *e.g., Buck v. Bell,* 274 U.S. 200 (1927)) or habitual criminality (see, *e.g., Skinner v. Oklahoma,* 316 U.S. 535 (1942)), the state is without power directly or indirectly to inhibit its citizens in the exercise of such powers solely on account of their race.

The right to beget children is recognized as a fundamental human right. In striking down the California anti-miscegenation statute, the Supreme Court of California stated:

> "The right to marry is as fundamental as the right to send one's child to a particular school or *the right to have offspring.* Indeed, 'We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and sur-

> vival of the race.' (*Skinner v. Oklahoma, supra,* at 541.) . . . .
>
> . . .
>
> ". . . In the absence of an emergency the state clearly cannot base a law impairing fundamental rights of individuals on general assumptions as to traits of racial groups. . . ." *Perez v. Sharp,* 32 Cal.2d 711, 715-716, (*sub. nom. Perez v. Lippold,* 198 P.2d 17, 19-20 (1948)). (Italics added.)

The California Supreme Court did not view interracial marriage as posing any "clear and present danger arising out of an emergency."

The Supreme Court of the United States, in *Skinner v. Oklahoma, supra,* a case involving the constitutionality of an Oklahoma statute providing for the sterilization of habitual criminals, stressed the fundamental nature of the right to beget children. In declaring the statute void (for reasons not germane to the instant discussion), Justice Douglas, speaking for the Court, said:

> "We are dealing here with legislation which involves *one of the basic civil rights of man.* Marriage *and procreation* are *fundamental* to the very existence and survival of the race." (Emphasis supplied). 316 U.S. 535, 541.

In so speaking, the Court made no innovation but merely gave emphasis to its long-settled view of the fundamental character of the right. In *Meyer v. Nebraska,* 262 U.S. 390 (1923), the Court had denominated, as a right included within the "liberty" guaranteed by the Fourteenth Amendment, "the right of the individual . . . to marry, establish a home and bring up children . . ." 262 U.S. 390, 399.

Article 16-1 of the United Nations' Universal Declaration of Human Rights (December 10, 1948) provides international recognition to the right as fundamental in character:

> "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family . . ."

The Virginia anti-miscegenation statutes clearly contravene a fundamental liberty guaranteed by the due process clause of the Fourteenth Amendment. Moreover, since these statutes create an unreasonable classification (one based solely on race) between those who may marry and lawfully beget children and those who may not, the said statutes are also violative of the equal protection clause of the Fourteenth Amendment. *Brown v. Board of Education,* 347 U.S. 483 (1954).

CONCLUSION

It is submitted that the decision of the Supreme Court of Appeals of Virginia upholding the constitutionality of the anti-miscegenation statutes involved was in error and that this Court should reverse the judgment below.

Respectfully submitted,

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