


1-1-1987

Miscegenation, Eugenics, and Racism: Historical Footnotes to *Loving v. Virginia*

Paul A. Lombardo

Georgia State University College of Law, plombardo@gsu.edu

Follow this and additional works at: https://readingroom.law.gsu.edu/faculty_pub

 Part of the [Family Law Commons](#), [Health Law and Policy Commons](#), [Law and Race Commons](#), and the [Legal History Commons](#)

Recommended Citation

Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. Davis L. Rev. 421 (1987-1988).

This Article is brought to you for free and open access by the Faculty Publications at Reading Room. It has been accepted for inclusion in Faculty Publications By Year by an authorized administrator of Reading Room. For more information, please contact mbutler@gsu.edu.

Miscegenation, Eugenics, and Racism: Historical Footnotes to *Loving v. Virginia*

Paul A. Lombardo*

*This Essay explores private correspondence contained in a restricted manuscript collection¹ along with contemporary news accounts and government documents to explain how eugenics — a popular “scientific” movement during the 1920s — was used to bolster the arguments in favor of the Virginia Racial Integrity Act of 1924 that was struck down in *Loving v. Virginia*. The genesis of the Act is described with reference to the private correspondence of the two Virginians who lobbied for its passage. Their involvement with the white supremacist Anglo-Saxon Clubs of America is revealed as an aid to understanding the true motives behind the antimiscegenation law.*

* Attorney at Law, Sacramento, California. A.B., 1971, Rockhurst College; M.A., 1975, Loyola University of Chicago; Ph.D, 1982, and J.D., 1985, University of Virginia.

The author wishes to acknowledge the assistance and encouragement of Professor Walter Wadlington whose premier scholarship on *Loving v. Virginia* is the starting point for this Essay and who generously pointed out the existence of the John Powell Collection upon which it focuses.

¹ The John Powell Collection (#7284) Manuscript Department, University of Virginia Library. The Powell papers are divided into material of professional interest, primarily relating to John Powell's career as a musician; and private interest, including correspondence, speeches, etc. on various political controversies such as the race question. The private material makes up a very small percentage of the collection, and access is restricted. I wish to thank Professor Earnest Mead, literary executor of the Powell estate, for his permission to study the restricted portions of the John Powell Collection [hereafter Powell Collection] (cited portions on file with the *U.C. Davis Law Review*).

INTRODUCTION

Laws against miscegenation² were part of the fabric of discrimination in the United States from the early Colonial Period³ until the 1967 Supreme Court decision in *Loving v. Virginia*.⁴ *Loving* invalidated a Virginia statute⁵ that forbade marriages between white persons and persons of other races. Thus, *Loving* struck down one of the most psychologically and socially sensitive laws upon which the American system of apartheid had rested for over three hundred years.

The demise of Virginia's antimiscegenation law in *Loving* occurred thirteen years after *Brown v. Board of Education*,⁶ clearly the Warren Court's most revolutionary civil rights decision, and only a few years after the passage of laws that opened public accommodations, housing, and the voting booth to black citizens.⁷ *Loving* is cited as a landmark decision of the Warren Court overthrowing racial discrimination and, consequently, may be understood as the official *coup-de-grace* to the parade of Reconstruction era legislation: The "Jim Crow" laws.⁸ Yet, while miscegenation laws undoubtedly were passed with support from the same political factions and with the help of the same arguments that boosted Jim Crow laws into the statute books, the law overturned in *Loving v. Virginia* had a much more complex pedigree. It became part of the Virginia Code in 1924 not simply as another law enforcing a tradition of racism, but was drafted by men who argued for its value in the name of the "science" of eugenics.

² The term "miscegenation" technically refers to relations between people of different races, without regard to whether the parties have the benefit of civil marriage. This Essay uses the term in reference to interracial marriage, since that was the focus of Virginia's 1924 act challenged in *Loving v. Virginia*, 388 U.S. 1 (1967).

³ For a history of miscegenation laws with particular attention to the pattern of law that was enacted in Virginia, see Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189 (1966). Wadlington notes that in 1630 authorities punished a white man "for defiling his body in lying with a negro," see *id.* at 1191, and locates a 1691 Virginia Statute as the Colony's first formal prohibition against interracial marriage. *Id.* at 1191-92.

⁴ 388 U.S. 1 (1967).

⁵ An Act to Preserve Racial Integrity, Act of March 20, 1924, ch. 371, 1924 Va. Acts 534.

⁶ 347 U.S. 483 (1954).

⁷ The Civil Rights Acts of 1960, 1964, and 1968 and the Voting Rights Act of 1965 and their effects are discussed in detail in H. ABRAHAM, *FREEDOM AND THE COURT* (4th ed. 1982).

⁸ "Jim Crow," the South's state-approved system of racial segregation, is explored and analyzed most completely in the classic book, C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d rev. ed. 1974).

The eugenics movement⁹ originated in nineteenth-century Britain and reached a high point during the Progressive Era in America. Eugenicists believed that most human ills are hereditary. They argued that the human race could be perfected by encouraging the mating of successful, healthy, productive stock. Conversely, they discouraged reproduction among the "less fit." These general hereditarian notions often were derived from an uncritical application of the developing fundamentals of genetic theory. However, the eugenicists expanded the hereditarian premise into a pseudo-science that encompassed anthropology, ethnology, and sociology. American eugenicists applied their theory toward a conscious program of social engineering mandated through law.

Eugenicists were successful in promoting restrictive laws at both the state and federal levels. The United States Congress passed the Immigration Restriction Act of 1924¹⁰ after testimony on the dangers of America being flooded by "weak-gened" Europeans. The result of eugenicist lobbying was a dramatic reduction in the immigration quota of southern and eastern Europeans, most notably Italians and Jews.¹¹ While Congress endorsed the eugenic motive for curbing immigration, the Virginia General Assembly followed similar arguments in passing two laws that resulted in landmark United States Supreme Court decisions. The first law, the Racial Integrity Act of 1924, forbade miscegenation on the grounds that racial mixing was scientifically unsound and would "pollute" America with mixed-blood offspring.¹² The Racial Integrity Act remained a valid state statute until *Loving v. Virginia*. The second Virginia statute mandated sexual sterilization of epileptics, the insane, or retarded, and all those generally suffering from "social inadequacy."¹³ That law was upheld in *Buck v. Bell*,¹⁴ which has yet to be

⁹ See generally A. CHASE, *THE LEGACY OF MALTHUS* (1977); M. HALLER, *EUGENICS: HEREDITARIAN ATTITUDES IN AMERICAN THOUGHT* (1984); D. KEVLES, *IN THE NAME OF EUGENICS* (1985); K. LUDMERER, *GENETICS AND AMERICAN SOCIETY* (1972).

¹⁰ Sections 31-32, 43 Stat. 190, 153-64 (1924).

¹¹ Harry Laughlin was the most prominent eugenicist working in the campaign for immigration restriction. On Laughlin's role as lobbyist, see A. CHASE, *supra* note 9, at 291-301. For a more detailed account of Laughlin's role, see F. Hassencahl, *Harry Laughlin, Expert Eugenics Agent for the House Committee on Immigration and Naturalization, 1921-1931* (Case Western Reserve University, 1970) (unpublished Ph.D. dissertation).

¹² VA. CODE ANN. §§ 20-54 (1960 Repl. Vol.).

¹³ Act of Mar. 20, 1924, ch. 394, 1924 Va. Acts 569, 570 *repealed by* Act of Apr. 2, 1974, ch. 296, 1974 Va. Acts 445.

¹⁴ 274 U.S. 200 (1927).

overturned and remains a memorial to the eugenics movement in America.¹⁵

Although eugenic rhetoric clearly influenced the passage of these laws, the role of the eugenicists who lobbied for the Virginia Racial Integrity Act has escaped the general attention of scholars.¹⁶ This Essay explores private correspondence contained in the John Powell Collection, a set of restricted manuscripts, along with contemporary news accounts and government documents. This material explains how two Virginians, John Powell and Walter A. Plecker, used eugenics and their association with the white supremacist Anglo-Saxon Clubs of America (A.S.C.O.A.) to lobby for the passage of Virginia's miscegenation law, the Virginia Racial Integrity Act of 1924 and its subsequent amendments.

Powell, a prominent composer and pianist, founded the A.S.C.O.A., under whose sponsorship the Virginia legislation was originally proposed. Powell's personal papers include correspondence from nationally prominent members of the eugenics movement and others that cata-

¹⁵ For the background of Virginia's Eugenic Sterilization Act, see Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30 (1985).

¹⁶ Mark Haller's broad history of the eugenics movement concludes that the "eugenicists never launched a formal campaign for laws against miscegenation." M. HALLER, *supra* note 9, at 158. D. KEVLES, *supra* note 9, comes closest to describing the actual role played by a number of "eugenical" lobbyists, stating:

Clearly, eugenicists did not single-handedly cause the passage of the large variety of restrictive marriage laws enacted in the first quarter of the century; they were part of a coalition that put the laws on the books, and they provided prior (or, at times, post hoc) biological rationalizations for what other interest groups wanted.

Id. at 100. K. LUDMERER, *supra* note 9, explains Immigration Restriction Act lobbying and eugenical sterilization laws in detail, but bypasses the role of eugenic theory in racial integrity laws. R. SICKELS, *RACE, MARRIAGE AND THE LAW* (1972) is the only book-length treatment of *Loving v. Virginia*, but fails to indicate the significance of eugenic lobbyists to the Act's passage. Among the dozens of law review articles that analyze *Loving v. Virginia*, only Wadlington, *supra* note 2, suggests the role of eugenicist Walter A. Plecker, Virginia's Registrar of Vital Statistics, as administrator of the Act. Chief Justice Warren cited Wadlington in his opinion. *Loving*, 388 U.S. at 5-6. Details of lobbying for passage of the miscegenation law are, however, available from two unpublished sources. A master's thesis by F. Arness, *The Evolution of the Virginia Anti-Miscegenation Laws* (Old Dominion University, 1966) (unpublished thesis), explores the public record, noting the involvement of well-known Virginians and nationally prominent eugenicists in lobbying for the miscegenation law. B. Thomson, *Racism and Racial Classification: A Case Study of the Virginia Racial Integrity Legislation* (University of California, Riverside, 1978) (unpublished Ph.D. dissertation), produced an exhaustive sociological analysis of the miscegenation law, using both public records and manuscripts from the Powell Collection.

logue the lobbying efforts preceding the 1924 Act. Walter A. Plecker supported Powell's proposal for a miscegenation law. Plecker was a physician and an administrator in the Virginia Bureau of Vital Statistics. His position provided him with a powerful platform not only to enforce the racial registration provisions of the miscegenation law, but also to stretch the law's commands to require unrelated segregation practices by threatening, harassing, and in some cases, coercing private citizens. Plecker's official correspondence as state registrar also is collected among the Powell papers and supplies a detailed record of more than twenty years of the administration of Virginia miscegenation law.

An investigation of the people who laid the groundwork for Virginia's miscegenation law reveals that the pseudo-science of eugenics was a convenient facade used by men whose personal prejudices on social issues preceded any "scientific theory." Stated more bluntly, 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. It was an accident of history that eugenic theory reached its peak of acceptability in 1924 so as to be available as a respectable veneer with which to cover ancient prejudice. For Powell, Plecker, and their ilk, eugenical ideology was not a *sine qua non* for legislation, but merely a coincidental set of arguments that provided intellectual fuel to the racist fires.

This Essay is divided into four parts. Part I includes an exposition of the public and private "racial purity" propaganda generated by Powell and Plecker. Part II focuses on details of the passage of the Virginia Racial Integrity Act of 1924. It describes the roles that Powell and Plecker played as lobbyists for the Act and details the extensive work Plecker undertook to "educate" the public to the Act's importance after its passage. Part III analyzes the case of Atha Sorrells, the first serious challenge to the 1924 law. This part also discusses responses to Sorrells' challenge, including Powell's newspaper series and Plecker's work as legal administrator. The Essay concludes with the Act's demise in *Loving v. Virginia* and reflections on the effect of "eugenics" in the legal context.

I. PUBLICIZING RACISM: POWELL AND PLECKER AS PROPAGANDISTS

At the time of the passage of Virginia's 1924 Racial Integrity Act, Jim Crow laws were in full bloom in the South and the promotion of white supremacy was as strong and prevalent as it had been during the days of slavery. For almost three hundred years stringent laws prohibit-

ing marriage among the races¹⁷ had been in force in dozens of states and court decisions enforcing those laws took on the tenor of disquisitions on a divine mandate.¹⁸

However, the law was only one avenue through which the folkways

¹⁷ See E. REUTER, *RACE MIXTURE; STUDIES IN INTERMARRIAGE AND MISCEGENATION* 75-100 (1931).

¹⁸ Judicial decisions, in addition to their florid rhetoric on the evils of racial mixture, also reveal some of the misinformation — portrayed as folk wisdom — that appeared in support of miscegenation law. Some examples:

The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race. It is sometimes urged that such marriages should be encouraged, for the purpose of elevating the inferior race. The reply is, that such connections never elevate the inferior race to the position of the superior, but they bring down the superior to that of the inferior. They are productive of evil, and evil only, without any corresponding good.

Scott v. Georgia, 39 Ga. Rep. 321, 324 (1869).

The laws of civilization demand that the races be kept apart in this country. The progress of either does not depend upon an admixture of blood. A sound philanthropy, looking to the public peace and the happiness of both races, would regard any effort to intermerge the individuality of the races as a calamity full of the saddest and gloomiest portent to the generations that are to come after us.

Doc. Lonas v. State, 50 Tenn. 287, 310-11 (1871).

Manifestly, it is for the peace and happiness of the black race, as well as of the white, that such laws should exist. And surely there can not be any tyranny or injustice in requiring both alike, to form this union with those of their own race only, whom God hath joined together by indelible peculiarities, which declare that He has made the two races distinct.

Green v. State, 58 Ala. 190, 195 (1877).

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

Kinney v. Commonwealth, 71 Va. (30 Gratt.) 858, 869 (1878).

And finally,

It is stated as a well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites, laying out of view other sufficient grounds for such enactments.

State v. Jackson, 80 Mo. 175, 179 (1883).

of racism were preserved. Administrative enforcement by minor state bureaucracies also perpetuated the accepted mythologies, especially those involving the miscegenation taboo. In Virginia, Walter Plecker, as head of the Bureau of Vital Statistics for more than thirty years, helped maintain these myths.¹⁹ In 1946, when his service in the Bureau ended, he wrote a letter to his friend John Powell:

June 29, 1946

Dear Mr. Powell:

With today my service as State Registrar of Vital Statistics ends. I am now past 85 years of age and have resigned for that reason. . . .

With this bunch of letters, your receipt of such copies will likewise end. If you have preserved them, you have a pretty good history of the various racial problems which have come before us since we began sending you these. As I do not know who my successor will be and whether he is at all interested in the subject and as this correspondence may ultimately be destroyed or lost, your copies would furnish a pretty good outline of the situation

Very sincerely, your friend,
W. A. Plecker²⁰

The correspondence between Powell and Plecker referred to in the 1946 letter provides a fascinating picture of their twenty-five year effort to promote racially discriminatory laws. Plecker's use of his public ministerial office to advance racist propaganda and his revelations to Powell of the Bureau's confidential business provide a rare insight into the interplay among law, public administration, and private prejudice. The private records that survive in the John Powell Collection, augmented by the Virginia Vital Statistics Reports, newspaper accounts of Powell's political activism, and publications that Plecker authored, yield a fairly complete picture of their roles in the racial politics of the 1920s.

A. The Bureau of Vital Statistics

As a physician within a state health agency, Plecker had several avenues through which to present his views on issues characterized as

¹⁹ Plecker (1861-1947) attended the University of Virginia. Upon graduation from the University of Maryland Medical School he spent 20 years in private medical practice. See P. BRUCE, *HISTORY OF VIRGINIA* 397 (1924). In 1910, at age 49, Plecker became a district hookworm investigator for the Virginia Board of Health, and in 1912 was named Assistant Registrar of Vital Statistics to administer the new Vital Statistics Act. In 1914 Plecker was named Registrar of the Bureau of Vital Statistics, a post he held until 1946, a year before his death.

²⁰ Letter from W.A. Plecker to J. Powell (June 29, 1946) (Powell Collection).

“public health” concerns. His annual Vital Statistics Reports were compendia of data on births, deaths, communicable diseases, and other demographic information. In addition, they contained editorial comments on the causes of health problems. At various times during Plecker’s career he also lectured on the radio and to live audiences and published essays in newspapers and magazines. Many of these opportunities for publicity became occasions for Plecker to propound his most fervent “professional” opinions as a man of medical science. These opinions often focused on questions of race.

Plecker’s first published comments appeared in the *Virginia Health Bulletin*, which included annual reports on vital statistics.²¹ From 1912 to 1915 he concentrated on explaining the workings of the 1912 Vital Statistics Registration Law which required the State Board of Health to register all births and deaths.²² However, in 1915 Plecker began to suggest new reasons for the Vital Statistics Law: It generated the first accurate data “for any American State in which there is so large a negro element.”²³ He made clear that the black population was “so serious a factor in public health”²⁴ that it should receive particular attention in the future. Comments in succeeding years noted the unusually high rates of illegitimacy among the “colored population”²⁵ and the perplexingly low birth rate among “native virile Virginia” whites.²⁶

The impact of the “negro element” on Virginia’s public health became more prominent in Plecker’s reports after 1924. His strongest official rhetoric often coincided, sometimes intentionally, with the appearance of John Powell’s public campaign for “white supremacy” under the banner of the A.S.C.O.A.

B. *The Anglo-Saxon Clubs*

Articles in Richmond newspapers in the summer of 1923 directed the attention of many Virginians to the developing political visibility of the

²¹ The inclusion of Plecker’s editorials on miscegenation in the pages of the *Virginia Health Bulletin* marked a significant change in focus for that publication. Its earliest years were characterized by repetitive features on the prevention of malaria, tuberculosis, and smallpox along with annual, pictorial supplements — “how to” pieces — on building a privy or exterminating rats. See generally VIRGINIA HEALTH BULL. (1907-1925).

²² See Act of March 12, 1912, ch. 181, 1912 Va. Acts 440.

²³ 7 VIRGINIA HEALTH BULL. 48 (1915).

²⁴ *Id.* at 47-48.

²⁵ 13 VIRGINIA HEALTH BULL. 167-68 (1921).

²⁶ 14 VIRGINIA HEALTH BULL. 4 (1922).

A.S.C.O.A. The A.S.C.O.A., founded in Richmond in 1922,²⁷ announced its purpose as "the preservation and maintenance of Anglo-Saxon ideals and civilization in America."²⁸ To achieve this purpose and to retard the "rapid breakdown of the traditional American virtues and principles," the A.S.C.O.A. stated three goals: "first, by the strengthening of Anglo-Saxon instincts, traditions and principles among representatives of our original American stock; second, [the] intelligent selection and exclusion of immigrants; and, third, [the] fundamental and final solutions of our racial problems in general, most especially of the negro problem."²⁹

The third goal, a solution to "the negro problem," prompted the A.S.C.O.A. to advance its first legislative proposal: a bill "for the preservation of the white race."³⁰ This legislation listed four "regulations" that the A.S.C.O.A. hoped to have written into law. The regulations included a registration system that required birth certificates to show the racial background of every citizen; regulations that forbade the issuance of marriage licenses to any person who did not possess a racially keyed birth certificate; a definition of "white persons" that included only those with "no trace whatsoever of any blood other than Caucasian";³¹ and the strict prohibition of a "white person" from marrying anyone other than another "white person."³² The A.S.C.O.A. was quick to insist that these racial policies should be "handled in the most humanitarian and liberal spirit" and that the A.S.C.O.A. was "definitely and explicitly opposed to . . . racial prejudice."³³

As founder of the A.S.C.O.A., John Powell emerged as one of its foremost spokesmen.³⁴ Although professionally Powell was a musician,

²⁷ See *The News Leader*, June 5, 1923, at 18, col. 1. This article, which ran under the banner headline *Post No. 1, Anglo-Saxon Clubs, Has 400 Members* was reprinted in a recruiting pamphlet of the A.S.C.O.A. that is part of the Powell Collection. See also, *The Price of Pollution*, *The News Leader*, June 15, 1923, at 10, col. 2 (editorial supporting the A.S.C.O.A. proposal).

²⁸ *The News Leader*, June 5, 1923, at 18, col. 1.

²⁹ *Id.* at col. 2.

³⁰ *Id.* at col. 4.

³¹ *Id.*

³² *Id.*

³³ *Id.* at col. 6.

³⁴ Several letters in the Powell Collection indicate that Powell was the founder of the A.S.C.O.A. See letter from Walter Plecker to Louisiana Club for Segregation (Dec. 19, 1924) (Powell Collection) ("Mr. Powell is the father of our Anglo-Saxon Clubs"); letter from Walter Plecker to Wendell White (May 10, 1924) (Powell Collection) (requesting that he "correspond with Mr. Powell in reference to establishing Anglo-Saxon Clubs in South Carolina. He originated that move, which while confined at present to

his speeches and articles in favor of strict antimiscegenation laws and other racially restrictive legislation became a consuming avocation.

The Richmond *Times-Dispatch* editorial writers clearly favored the bill proposed by the A.S.C.O.A. and applauded the light Powell threw on the "menace of Negro amalgamation."³⁵ Plecker soon expressed open approval of the proposed legislation. Without revealing his own involvement with Powell and the A.S.C.O.A.,³⁶ he wrote a short article in response to Powell's legal scheme.³⁷ The article, somewhat disingenuous in its tone, described the "puzzling situation" in which Plecker, as State Registrar, found himself when confronted with registering children of mixed marriages. Plecker explained his own procedure of reporting mixed marriages to the commonwealth's attorney as well as his prodding of local authorities "to unite and decide the status of these [mixed race] people and to firmly refuse to admit them as white if they have even a trace of Negro blood on either side."³⁸ He also noted the role of his agency as "the greatest force in the state today combating this condition [mixed racial heritage]."³⁹

The A.S.C.O.A. grew quickly. The recruitment pamphlet that reprinted copies of the newspaper articles of Powell and Plecker listed twelve chartered chapters of the organization; a letter a few months later requesting support for the A.S.C.O.A. legislative petition listed twenty-six posts in Virginia alone.⁴⁰ The A.S.C.O.A. held its first convention in Richmond on October 13, 1923, and adopted a formal constitution. Among the constitution's stated aims was the "preservation of racial integrity."⁴¹

Virginia is intended to be national"); letter from Walter Plecker to L.M. Nance (Dec. 19, 1924) (Powell Collection) (containing similar statements); and letter from Walter Plecker to Stone Deavors (Apr. 15, 1925) (Powell Collection). Powell's leadership of the University of Virginia branch of the A.S.C.O.A. is noted in V. DABNEY, *MR. JEFFERSON'S UNIVERSITY* 66 (1981).

³⁵ See *Racial Integrity*, Richmond Times-Dispatch, July 22, 1923, at 4, col. 1.

³⁶ However, the A.S.C.O.A. published Plecker's letter in their recruiting pamphlet. See *Anglo-Saxon Clubs of America* (Powell Collection).

³⁷ *Bureau of Vital Statistics Finds Solution [to] Puzzle*, The News Leader, Aug. 4, 1923, at 22, col. 5.

³⁸ *Id.* at col. 8.

³⁹ *Id.* at col. 5.

⁴⁰ Letter from Lawrence Price, Chairman of the National Executive Committee and co-founder of the A.S.C.O.A. (undated) (Powell Collection). Neither the recruitment pamphlet nor the letter is dated. The pamphlet probably was printed in late summer and included with the letter in an early fall 1923 mailing.

⁴¹ The 1923 constitution also called for "The supremacy of the white race in the United States of America, without racial prejudice or hatred" and limited the member-

Along with his contacts in the Virginia-based A.S.C.O.A., Powell corresponded with national figures in the eugenics movement and other men of prominence in racial politics. He wrote to Madison Grant, a New York attorney and officer of the American Eugenics Society, whose book, *Passing of the Great Race or The Racial Basis of European History*,⁴² attempted to explain the effect of race on the "decline" of European civilization. Powell also corresponded with Lothrop Stoddard, a disciple of Grant, whose book, *The Rising Tide of Color Against White World-Supremacy*, echoed racist alarms.⁴³ Powell also contacted Franklin Giddings, first professor of sociology at Columbia University.

Powell's letters to Grant, Stoddard, and Giddings explained the theoretical basis of the antimiscegenation bill⁴⁴ and requested statements of support to present to the state legislature in support of the Racial Integrity Act of 1924.

ship to "[a]ll native born, white, male American citizens, over the age of 18 years." (Powell Collection).

⁴² M. GRANT, *PASSING OF THE GREAT RACE OR THE RACIAL BASIS OF EUROPEAN HISTORY* (1916). While Grant's book was historical in character and had little reference to the American situation, he did offer these comments on marriages between different "racial types":

When it becomes thoroughly understood that the children of mixed marriages between contrasted races belong to the lower type, the importance of transmitting in unimpaired purity the blood inheritance of ages will be appreciated at full value, and to bring half-breeds into the world will be regarded as a social and racial crime of the first magnitude. The laws against miscegenation must be greatly extended if the higher races are to be maintained.

Id. at 56. John Higham designates Grant as the man upon whom "[a]ll the trends in race thinking converged." See J. HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* at 155 (1955). Higham credits Grant with relying upon questionable "scientific truth" to summarize a world view that is best characterized as racism. *Id.* at 157.

⁴³ See L. STODDARD, *THE RISING TIDE OF COLOR AGAINST WHITE WORLD-SUPREMACY* (1920). Among other arguments in his book, Stoddard took aim against bolshevism as a dangerous theory that preached universal equality; a message at odds with white supremacy. *Id.* at 219-21.

⁴⁴ Letter from Franklin Giddings to John Powell (Jan. 3, 1924) (Powell Collection) (thanking Powell for sending a copy of Cox's *White America*, but politely disagreeing with some "yet [to be] proven" biological premises upon which Cox's argument rested).

II. PASSAGE OF THE RACIAL INTEGRITY ACT OF 1924

A. *Powell and Plecker as Lobbyists*

When Virginia's General Assembly convened in 1924, Powell's writing campaign had yielded letters of support from all three of his northern contacts. Grant, whom Powell had invited to appear before the legislative committees considering the Bill,⁴⁵ was most thorough in his support. He offered his "unqualified endorsement" for the antimiscegenation Bill and repeated his own conclusions about race and civilization:

It would, of course, be a frightful calamity, not only to the South but to the whole nation — in fact to civilization, itself — if the struggle for the supremacy of the white race were in any degree diminished. It is the insidious increase of mixed breeds in the lower strata of society which has heretofore undermined and ruined many white civilizations.⁴⁶

Stoddard, like his mentor Grant, was equally effusive in his approval of the proposed legislation. It was of "the highest value and greatest necessity" to preserve the white race:

White race-purity is the corner-stone of our civilization. Its mongrelization with non-white blood, particularly with [N]egro blood, would spell the downfall of our civilization. This is a matter of both national and racial life and death, and no efforts should be spared to guard against the greatest of all perils — the peril of miscegenation.⁴⁷

Giddings focused on the need for registration of citizens by race but made no comment on the prohibition of interracial marriages or definition of races contained in the Powell Bill.⁴⁸

Armed with these testimonials, Powell took his case to the state legislature. On February 12, 1924, Powell was invited to speak to the Virginia House of Delegates in support of his "Bill to Preserve the Integrity of the White Race."⁴⁹ By the time Powell spoke, the Bill already had been formally presented and considered in committee. Newspaper reports noted that a "well-filled gallery listened attentively" to the Powell presentation, an address that the press predicted "may become historic."⁵⁰ Powell's speech repeated the arguments of his earlier

⁴⁵ Grant was unable to attend and sent his regrets. Letter from Madison Grant to John Powell (Feb. 1, 1924) (Powell Collection).

⁴⁶ *Id.*

⁴⁷ Letter from Lothrop Stoddard to John Powell (Feb. 1, 1924) (Powell Collection).

⁴⁸ Letter from Franklin Giddings to John Powell (Feb. 5, 1924) (Powell Collection).

⁴⁹ 1924 *Virginia Bills* (House) No. 311.

⁵⁰ See *Powell Asks Law Guarding Racial Purity — Pleads Before House for Statute Dealing with "Mongrelization"*, Richmond Times-Dispatch, Feb. 13, 1924, at 1,

A.S.C.O.A. proposals and those that he had borrowed from Cox, Grant, and other racial propagandists.⁵¹

The alleged litany of horrors that resulted from "race mixture" was recited. Powell explained that interracial marriage would result in the disappearance of the white race and that with it would disappear western civilization and Virginia's traditions of honor. The Racial Integrity Act was a means of forestalling the decline of white supremacy, he claimed, and should command the support of those who treasured their racial heritage. Powell read the letters from Grant, Stoddard, and Giddings in support of the Bill, noting that they were "the greatest authorities on ethnology and sociology in America."⁵² The address was met with the congratulations and support of "several leading members of the House."⁵³

Powell's Bill was presented in the House of Delegates three days after his appearance, but because of its exclusion of persons with Indian heritage and a controversial registration requirement,⁵⁴ it failed to gain support. Substantially the same bill had been introduced in the Senate, where the legislative debate shifted.⁵⁵

Powell's appearance before the legislature was followed by a letter from his friend Dr. Plecker to the measure's chief sponsor in the State Senate. Plecker's letter spoke to "the need of a law such as Senate [B]ill 219, especially for the purpose of defining the colored race, and giving us a strong penalty to aid in its enforcement."⁵⁶ Plecker cited a number of cases in which miscegenation had occurred for generations with the acquiescence of local authorities. He also noted that his office had changed the race on some birth certificates from white to negro "after securing additional information."⁵⁷ Plecker enclosed letters from his office files as evidence to verify the need for the proposed law.

The senatorial sponsors released the text of the Plecker letter to the

col. 1.

⁵¹ See *supra* text accompanying notes 27-33, 42, and *infra* notes 107, 117.

⁵² See Richmond Times-Dispatch, *supra* note 50.

⁵³ *Id.*

⁵⁴ 1924 *Virginia Bills* (House) No. 311.

⁵⁵ House Bill No. 311 was presented February 15, 1924, and reported out of committee February 19, 1924. It failed on a vote for endorsement February 21, 1924. 1924 *Journal of the House of Delegates* (Va.) at 308, 338, 377. Senate Bill No. 219 appeared before the Powell speech, having been presented on February 1, 1924. 1924 *Journal of the Senate* (Va.) 135.

⁵⁶ Letter from Walter Plecker to Sen. M.B. Booker (Feb. 15, 1924) (Powell Collection).

⁵⁷ *Id.*

Richmond *Times-Dispatch* where it was printed under the heading, *Bureau of Vital Statistics Favors Race Integrity Bill*.⁵⁸ The *Times-Dispatch* followed this story with an editorial in support of the Bill. The editorial reflected Powell's influence, stating that "if this bill is passed, it may presage a national movement in behalf of racial integrity."⁵⁹

Several features of the Senate Bill met the same opposition that had surfaced during the legislative debates in the House. The Bill originally included a provision exempting persons with less than one sixty-fourth of American Indian blood from the prohibition of marriage with whites. This fractional exception was increased to one-sixteenth as a means of honoring the descendants of John Rolfe and Pocahontas. Apparently some of the "first families" of Virginia took exception to the use of their distant Indian heritage to exclude them from the white race.⁶⁰

Another provision of the Senate Bill that encountered debate mandated racial registration for every citizen in the State. This feature was publicly ridiculed in one Virginia newspaper as a measure "pestiferous . . . and utterly without value," which would require "racial passports" for the state's population.⁶¹ The debate focused on the administrative difficulty and expense of implementing and maintaining the reg-

⁵⁸ See Richmond *Times-Dispatch*, Feb. 17, 1924, at 6, col. 1.

⁵⁹ *Id.* Feb. 18, 1924, at 6, col. 1. The Powell Collection includes correspondence from a number of newspaper editors and suggests that Powell had contacts around the state with whom he could place timely letters or articles. See, e.g., letter from D.S. Freeman to John Powell (Feb. 14, 1924) (Powell Collection) (asking whether or not to publish a letter critical of the Racial Integrity Act).

⁶⁰ Plecker explained this amendment in an address to the Annual Meeting of the Southern Medical Association, New Orleans, November 24-27, 1924. The address, "Shall America Remain White," was later reprinted in a Plecker pamphlet *The New Family and Racial Improvement* issued by the Bureau of Vital Statistics in 1928:

When the Racial Integrity Act was being enacted, it was the desire of all to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas, and also to protect other white citizens of Virginia who were descendants of members of the civilized tribes of Oklahoma and who were of no other admixture than white and Indian.

To protect these persons, an exception was made admitting as members of the white race all persons of one-sixteenth or less of the blood of American Indians, with no other non-Caucasic blood. It is believed that it was the desire of no one to admit into the white race other families or groups of people who may have been recognized as Indian or who may claim to be such.

Id. at 26.

⁶¹ See *Racial Passports*, Virginia Pilot-News Leader, Feb. 19, 1924, at 4, col. 2.

istration scheme. The Bill faced defeat in the Senate until registration was made optional for persons born before 1912, the date when mandatory registration began under the Vital Statistics Act.⁶²

The amended Senate Bill passed by a vote of 23 to 4 on February 27, 1924.⁶³ The loss of the universal, compulsory racial registration clause was bemoaned in the Richmond press. A *Times-Dispatch* editorial despaired that the Senate had "cut the heart out" of the Bill as the registration provision would have clarified "once and for all who is a Caucasian and who is not."⁶⁴ The *Times-Dispatch* pleaded for the House of Delegates to reconsider the Senate Bill to cure its "deadly defect."⁶⁵ Perhaps because Powell and Plecker did not press for compulsory registration,⁶⁶ the House accepted the Bill without delay. It passed by a vote of 72 to 9,⁶⁷ and the governor signed the Bill on March 20, 1924, as "An Act to Preserve Racial Integrity."⁶⁸

⁶² Plecker complained of the changes in the original bill in a letter to an Ohio legislator who inquired about the genesis of the Virginia Racial Integrity Act:

The bill itself was very much altered and patched up in Committees and on the floor and is very unlike the original bill. In fact, it is not at all symmetrical and has a number of defects.

The chief feature, however, passed through all of its tribulation unscathed, that is the definition of a white person as "one who has no trace whatsoever of any blood other than Caucasian." As long as that definition was untouched, its friends were willing to make any other kind of compromise.

Letter from Walter Plecker to Harry E. Davis (Oct. 4, 1924) (Powell Collection). Other Plecker correspondence suggests his participation in the amendment of Powell's bill and its eventual passage. See, e.g., letter from Walter Plecker to Dr. F.M. Register (Aug. 9, 1924) (Powell Collection) ("Mr. Powell addressed the Legislature itself, with great effect. . . . All of us appeared from time to time before the Committees."); letter from Walter Plecker to Rev. Wendell White (May 10, 1924) (Powell Collection) ("The Legislature was about to vote the whole measure down when we offered it making registration optional."); letter from Walter Plecker to Dr. C.W. Garrison (Jan. 5, 1925) (Powell Collection) ("When the law was about to be lost I erased the word 'shall' in connection with the registration and substituted 'may' which was not objectionable, especially as it contained no appropriation.").

⁶³ 1924 *Journal of the Senate* (Va.) 476.

⁶⁴ *Emasculating a Good Bill*, Richmond Times-Dispatch, Feb. 29, 1924, at 8, col. 2.

⁶⁵ *Id.*

⁶⁶ Plecker apparently felt that the definition of "race" was the critical point of the bill. See *supra* note 60.

⁶⁷ See Mar. 8, 1924 *Journal of the House of Delegates* (Va.) 774.

⁶⁸ See 1924 Va. Acts 534. The Senate amended the title of the law from its original form, "A Bill to Preserve the Integrity of the White Race" only after the vote in favor of passage. See amendment by Mr. Jeffreys, 1924 *Journal of the Senate* (Va.) 477. Plecker's sentiments as to the law's title are clear from a letter he wrote endorsing a

The provisions of the law that survived legislative amendment settled specific powers in the office of the Registrar of Vital Statistics. Plecker was directed to prepare "registration certificates" to record the racial history of any person born before June 1912.⁶⁹ This provision was available to citizens at their discretion if birth certificates or other records confirming race were not currently on file. False registration of race or the completion of a false birth certificate was a felony, punishable by one year in prison. Court clerks were required to have "reasonable assurance" of a couple's race before issuing a marriage license. If clerks found "reasonable cause to disbelieve" that applicants were "of pure white race" when the couple had attested to that fact, licenses could be withheld until "satisfactory proof" was available.⁷⁰ All marriages between whites and nonwhites were prohibited except for marriages between whites and those with "[one-sixteenth] or less of the blood of the American Indian and . . . no other non-Caucasic blood."⁷¹ The Act was funded by fees collected from local registrars and clerks. As both Powell and Plecker had desired, the Act implemented the most important objectives of the A.S.C.O.A.'s legislative petition, specifically, the definition of "white persons" that excluded anyone with "a single drop of Negro blood," and the absolute prohibition of miscegenation.⁷²

Passage of the Racial Integrity Act brought public attention to Powell and Plecker. Congratulations from the Act's early supporters arrived⁷³ and inquiries from around the country provided names of like-minded officials and possible members for the A.S.C.O.A. Plecker and Powell visited regularly to share correspondence and coordinate their contacts with sympathizers. They also worked with E. Lee Trinkle, then governor of Virginia, in a campaign to pass miscegenation laws in other states.⁷⁴

miscegenation bill for the District of Columbia. That bill focused upon "the integrity of the white race," which, as Plecker agreed was "preferable, as it is the protection of the white race that is aimed at, and not the others." See letter from Walter Plecker to Sen. Morris Shephard (Mar. 12, 1925) (Powell Collection).

⁶⁹ 1924 Va. Acts 534.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ See letter from Lothrop Stoddard to John Powell (Apr. 8, 1924) (Powell Collection).

⁷⁴ For example, a copy of one letter noting Trinkle's out-of-state lobbying was sent to Powell with the notation: "When you come to Richmond you will probably be interested in looking over the Government letters in our office. Send Mr. White Anglo-Saxon literature." See letter from Walter Plecker to Rev. Wendell White, *supra* note 62. Among the states Plecker contacted were South Carolina, see letter to Rev. White

The correspondence of Powell and Plecker reveals that both men were highly active in promoting antimiscegenation laws and in distributing literature advancing the objectives of the A.S.C.O.A.⁷⁵ Not all of their contacts wished to publicize the work that went on behind the scenes,⁷⁶ but in general, the passage of Virginia's law provided a legitimacy to racial propaganda that it had lacked earlier.

B. Public "Education" on the Racial Integrity Act

Following passage of the miscegenation law, Plecker wasted little time institutionalizing his theories about race. As State Registrar he was charged with the Act's administration and took every opportunity to publicize its import. His regular vehicle for publicity was the *Virginia Health Bulletin*, in which his Vital Statistics Reports appeared annually. Two "extra" editions of the *Bulletin* printed in 1924 con-

supra note 62; North Carolina, *see* letter from Walter Plecker to Dr. F. M. Register (Aug. 9, 1924) (Powell Collection); Ohio, *see* letter from Walter Plecker to Harry E. Davis (Oct. 4, 1924) (Powell Collection) and letter from Walter Plecker to George Roberts (Feb. 25, 1925) (Powell Collection); Massachusetts, *see* letter from Walter Plecker to H.W. Urquhart (Mar. 17, 1925) (Powell Collection); and Arkansas, *see* letter from Walter Plecker to Dr. C.W. Garrison (Jan. 5, 1925) (Powell Collection).

⁷⁵ In some cases, Powell and Plecker gave joint presentations on the need for strict enforcement of the miscegenation law. *See* letter from Walter Plecker to Earnest Cox (Aug. 9, 1924) (Powell Collection) (explaining that Powell and Plecker would speak to a meeting of city and county clerks, and that Plecker was holding proceeds from the sale of copies of Cox's book, *White America*). Powell went to personal expense in traveling to Atlanta to speak before the Georgia legislature in favor of a 1925 bill against miscegenation. *See* letter from J.C. Davis to John Powell (May 25, 1925) (Powell Collection) (inviting Powell to speak); letter from John Powell to J.C. Davis (May 30, 1925) (Powell Collection) (accepting the invitation); and letter from J.C. Davis to John Powell (Aug. 22, 1927) (Powell Collection) (noting the passage of the bill Powell had supported); *see also* Small, *Wide Interest Is Aroused in Racial Integrity Bill*, Atlanta Constitution, June 27, 1925, at 6, col. 7 (discussing Powell's speech before the Georgia legislature).

⁷⁶ A letter from A.J. Bowley to John Powell (Feb. 7, 1925) (Powell Collection) suggests some of the controversy that must have remained to impede Powell's proselytizing. Bowley was a Brigadier General and Commanding Officer at Fort Bragg, North Carolina. After accepting with thanks a package of pamphlets Powell had sent, he asked that Powell

be very careful not to mention my name in connection with this propaganda, or under any circumstances to allow my name to be published in print. You will understand that in my official position, I cannot afford to have it known that I have taken any interest in your organization. However, I can do a great deal more good by quiet work on the side than I could in the open.

Id.

tained the Racial Integrity Act's full text and instructions to local Registrars on enforcement of the Act.⁷⁷ Plecker's messages were not the dry directives of a bureaucrat, but contained all the passion, and much of the misinformation masquerading as science that characterized the publications of men like Earnest Cox and Madison Grant.

Plecker declared that the "Bureau of Vital Statistics, [c]lerks who issue marriage licenses, and the school authorities are the barriers placed by this law between the danger and the safety of the Commonwealth."⁷⁸ Noting that the Bureau "has guarded the welfare of the State as far as possible," he predicted that

[u]nless radical measures are used to prevent it, Virginia and other parts of the Nation must surely in time go the way of all other countries in which people of two or more races have lived in close contact. . . . Complete intermarriage or amalgamation is the inevitable result. . . . The intermarriage of the white race with mixed stock must be made impossible. But that is not sufficient, public sentiment must be so aroused that intermixture out of wedlock will cease.

The public must be made to look with scorn and contempt upon the man who will degrade himself and do harm to society by such abhorrent deeds.⁷⁹

The *Racial Integrity Law* became the title of a portion of Plecker's reports that he repeated annually. As he analyzed the statistics on racial composition, Plecker often made dramatic observations. In 1924 he stated that "[n]ot a few white women are giving birth to mulatto children. These women are usually feeble-minded, but in some cases they are simply depraved."⁸⁰ He recommended sexual sterilization as the solution.⁸¹ The rhetoric that surrounded the passage of the 1924 Act became Plecker's hallmark: "Young men must be brought to realize that it is as great a crime against their [s]tate and race to mix their blood with that of another race, out of wedlock, as in it."⁸²

Branching out beyond his role as an administrator, Plecker traveled to conventions and meetings and told the story of Virginia's crusade to prevent race mixture. In October 1924 he spoke to the American Public Health Association on "Virginia's Attempt to Adjust the Color Prob-

⁷⁷ See 16 VIRGINIA HEALTH BULL. 1-3 (Mar. 1924).

⁷⁸ *Id.* at 2 (Extra no. 2).

⁷⁹ *Id.*

⁸⁰ 17 VIRGINIA HEALTH BULL. 9 (1924).

⁸¹ Both the statute allowing sexual sterilization of the "feeble-minded" and the Racial Integrity Act passed in 1924. See *supra* text accompanying notes 13-24. Plecker may have seen the sterilization of women bearing mulattoes as a particularly efficient modern use of eugenical sciences: preventing race mixture and mental defect in one act.

⁸² 17 VIRGINIA HEALTH BULL. 11 (1927).

lem.”⁸³ Quoting at length from Cox’s book, *White America*,⁸⁴ Plecker praised the Virginia Act as “the most perfect expression of the white ideal, and the most important eugenical effort that has been made in 4000 years.”⁸⁵ In all his appearances he repeated the most long-lived of all miscegenation myths — the myth of “reversion to type.” The fable inevitably took the form of apocryphal stories featuring two apparently white parents giving birth to a black child. According to Plecker, all families “tainted” by miscegenation were faced with this possibility and he often referred to “Mendel’s law” as authority.⁸⁶ In fact, Franklin Giddings previously had instructed Plecker and Powell that he and Edward Conklin, a Princeton biologist and mainstream eugenicist, were “skeptical” of this interpretation of Mendel’s theory.⁸⁷ More than ten years earlier Charles Davenport, Director of the Eugenics Record Office, had concluded that the “reversion to type” argument was unfounded.⁸⁸ Similarly, although Plecker continued to issue “eugenical” warnings about the hidden danger of marrying someone with the least trace of black ancestry, the *Eugenical News* published the conclusion of Harvard geneticist W.E. Castle that “[t]he science of eugenics is not yet prepared either to condemn or to commend extensive race crossing.”⁸⁹ Plecker’s arguments for the antimiscegenation law — supposedly based on “eugenical science” — did not comport with orthodox thought even in that theoretically problematic arena.

The publications, however, continued. Plecker’s address was printed in *The American Journal of Public Health* and excerpted in *The Literary Digest* under the caption: *Shall We All Be Mulattoes?*⁹⁰ In Novem-

⁸³ This speech constituted the major portion of the text of *Eugenics in Relation to the New Family and the Law on Racial Integrity* (1924), a pamphlet issued to young mothers under the auspices of the State Board of Health.

⁸⁴ E. COX, *WHITE AMERICA* (1923).

⁸⁵ *Id.* at 24.

⁸⁶ *Id.* at 25.

⁸⁷ See letter from Franklin Giddings to John Powell (Jan. 3, 1924) (Powell Collection).

⁸⁸ See Davenport, *State Laws Limiting Marriage Selection Examined in the Light of Eugenics* in *EUGENICS RECORD OFFICE BULL.* NO. 9 32-36 (1913). Davenport states that:

So far as skin color goes, therefore, a white skinned person with one-eighth Negro blood might be given a license to marry a white person, without fear of reproducing “colored” children. . . . The reasonable conclusion, then, would seem to be this: in legislating, forget skin color and concentrate attention upon matters of real importance to organized society.

⁸⁹ See *Race Mixture*, 9 *EUGENICAL NEWS* 132 (Nov. 1926).

⁹⁰ *THE LITERARY DIGEST* 23 (Mar. 27, 1925).

ber 1924 Plecker traveled to New Orleans to raise the question "Shall America Remain White?" for the edification of the Southern Medical Association. Not surprisingly, his answer was "affirmative today, but if delayed for several generations it may be forever too late."⁹¹ Plecker's September 1925 paper on the dangers of birth control concluded with a woeful glance at "the great black cloud which is threatening to envelope us, Race Amalgamation."⁹² The following month he lectured physicians on "racial improvement," and asserted that "America was claimed by the great Nordic race as its final and chiefest possession."⁹³ The "fatal mistake" made by early Americans, according to Plecker, was to import slaves "many being recently cannibals from the west coast of Africa."⁹⁴

Thus Plecker, in the full flush of victory after passage of Virginia's antimiscegenation Act, flooded state and national publications with his racial evangelism. It was generally repetitive, and relied on the fears purveyed by the likes of racial propagandist Earnest Cox rather than on serious attention to biological data. However, it was in vogue during the Progressive Era to portray reform as the handmaiden of science, and Plecker made full use of his position as a state sponsored "scientist" to broadcast his racist message under the banner of "eugenics."

III. A CHALLENGE TO THE RACIAL INTEGRITY LAW: THE ATHA SORRELLS CASE

Despite the Act's directives for rigid enforcement, the first serious challenge to the Act occurred only a few months after its passage and demonstrated that tracing racial ancestries was a nightmare to clerks and registrars. That distasteful task included invasions of privacy and the infliction of emotional trauma in which many local officials did not care to be involved. In addition, serious questions remained in the minds of some legal officials about the Act's constitutionality.

The challenge to the Act began when Atha Sorrells, whose grandmother's birth records designated her as a "free colored person," attempted to marry Robert Painter, a white man. The clerk rejected the couple's application for a marriage license as their marriage would vio-

⁹¹ Reprinted in THE VIRGINIA BOARD OF HEALTH, THE NEW FAMILY AND RACIAL IMPROVEMENT 14 (1928).

⁹² *Id.* at 14, "Shall America Head for Race Suicide or Race Improvement?" Originally read before the Southside Medical Society, Petersburg, Va., September 8, 1925.

⁹³ See Plecker, *Racial Improvement* in VIRGINIA MEDICAL MONTHLY 486 (Nov. 1925).

⁹⁴ *Id.*

late the Racial Integrity Act. The couple filed an action for mandamus to force the clerk to issue a license. The hearing on the motion for mandamus became an occasion of great moment for Plecker and Powell.⁹⁵

Sorrells contended that the "colored" designation on her family birth records indicated that she was part Indian, not part black. Since "colored" characterized racially mixed persons of both black and Indian heritage, additional evidence was necessary to determine ancestry. The Racial Integrity Act allowed persons with one-sixteenth Indian ancestry to marry whites, therefore Sorrells had a claim in favor of marriage. The case was focused on the question of who had the burden of proving the "purity" of bloodline.

Plecker and Sorrells presented evidence at the hearing.⁹⁶ Plecker produced one hundred years of tax records, civil war records, and other sources to prove that Atha Sorrells' family was at least partially black. Sorrells presented a family genealogy to prove that her family heritage was part Indian. Although Plecker was adamant that his evidence was superior, Judge Henry Holt ruled in favor of Sorrells and ordered the clerk to issue a license.

Judge Holt's opinion criticized the Racial Integrity Act as constitutionally infirm: "The clerk in refusing [a] license is not required to take evidence and can act without a hearing. Of course, if the statute stopped here we would have want of due process of law."⁹⁷ Since the clerk's decision to withhold a license was binding, the burden of proof rested on the applicants to prove that their bloodlines were racially "pure." The legal problem was submerged in the practical problem of proving a negative case: that a person did not have "mixed blood." Judge Holt found this procedure reminiscent of Alice in Wonderland:

If we apply the statute literally, the relief granted [an action for mandamus when the applicant still bears the burden of proof] is no relief at all. In twenty-five generations one has thirty-two millions of grandfathers, not

⁹⁵ The Sorrells case was covered in a series of articles in the *Richmond News Leader*. See *Woman, Listed Negroid, Wins Right to Be Called "White,"* *The News Leader*, Nov. 18, 1924, at 1, col. 5.

⁹⁶ Details of the Sorrells case were related in a pamphlet by John Powell and published by the A.S.C.O.A. Powell, *The Breach in the Dike: An Analysis of the Sorrells [sic] Case Showing the Danger to Racial Integrity from Inter-marriage of Whites and So-called Indians*, A.S.C.O.A. (draft version available in Powell Collection) [hereafter *Breach in the Dike*].

⁹⁷ The text of Judge Holt's opinion was printed in a *News Leader* article. See *News Leader*, *supra* note 95. A manuscript copy of the opinion with Judge Holt's comments is available in the Powell Collection.

to speak of grandmothers, assuming there is no intermarriage. Half the men who fought at Hastings were my grandfathers. Some of them were probably hanged and some knighted, who can tell? Certainly in some instances there was an alien strain. Beyond peradventure I cannot prove that there was not, and so the relief granted by appeal is no relief at all. . . .

There is no inhibition against the intermarriage of those who are unable to prove absence of a trace of blood of stock prohibited, and since nobody can prove this, we find ourselves where we were in the beginning. Alice herself never got into a deeper tangle.⁹⁸

Judge Holt also declared that "statutes to be valuable must have written into them common sense."⁹⁹ Although he was clearly in favor of the Act's objective, the impossibility of its fair administration led Judge Holt to endorse precisely the types of marriages Plecker and Powell feared most — marriage of a white person and another person of indeterminate racial background. Since large numbers of Virginians had a mixed racial heritage — part black, part white, part Indian — many lighter-skinned people could claim only their Indian background to avoid the miscegenation law. The invisible "pollution" of white bloodlines that the Act's authors abhorred would not be prevented.

Powell and Plecker contacted the state attorney general in an attempt to overturn the precedent they feared as a result of the Sorrells case. They were advised that appeal was dangerous since a loss at the appellate level would set a binding precedent throughout the state. The letter to Powell containing this advice indicated the extent of the political leverage of Powell and Plecker, as it left the question of an appeal by the state open to their discretion.¹⁰⁰

After several months of considering the issues, Powell and Plecker decided not to appeal. Instead Powell wrote a pamphlet, *The Breach in the Dike*,¹⁰¹ explaining the Sorrells case and calling for an amendment

⁹⁸ *News Leader*, *supra* note 95, at 4.

⁹⁹ *Id.*

¹⁰⁰ See letter from Leon M. Bazile, Assistant Attorney General, to John Powell (Nov. 26, 1924) (Powell Collection). Bazile stated: "Of course, if you and Dr. Plecker wish the case to go to the Court of Appeals, this office will take it there. . . . I would be very glad if you would write me your views about this matter, as something has to be done about appealing this case." Bazile later sat as trial judge in *Loving v. Virginia*. See *infra* note 134; see also *May Test Law on Racial Integrity*, Richmond News Leader, Nov. 19, 1924, at 1, col. 5; *State May Appeal from Decision of Judge Henry Holt*, Richmond News Leader, Nov. 20, 1924, at 2, col. 6.

¹⁰¹ See *Breach in the Dyke*, *supra* note 96. Powell in concert with the attorney general and legal counsel for the A.S.C.O.A. decided not to appeal. *Id.* The pamphlet was written specifically to save face for the A.S.C.O.A. and Powell who were concerned that they would appear to be acquiescing in the Sorrells verdict by their failure to pursue an appeal. See letter from John Powell to Judge Holt (Apr. 6, 1925) (Powell

to the Racial Integrity Act that would remove the exception for those of one-sixteenth Indian blood. Powell's pamphlet concluded that the exception in the Act actually was unnecessary since "[a]fter profound analysis of the situation, Dr. Plecker has reached the conclusion that there are at present in Virginia no Indians who do not possess some degree of negro blood."¹⁰²

The loss in the Sorrells case apparently was cause for an alteration of the long-range plans of Powell and the A.S.C.O.A. They revived plans for a "final solution" to remove the threat of "amalgamation." A "back to Africa" movement to deport all American blacks had already commenced, led by black separatist Marcus Garvey. Powell visited Garvey in federal prison during a trip to Atlanta,¹⁰³ and Earnest Cox praised him in a pamphlet "Let My People Go" as a proper leader for the A.S.C.O.A. solution, the exodus of America's blacks.¹⁰⁴ Plecker also supported the Garvey movement and wrote President Coolidge in support of a pardon for Garvey, so that he might "inspire his people . . . and . . . teach them abhorrence of mongrelization."¹⁰⁵

Garvey's movement, and the A.S.C.O.A.'s hopes for it, ultimately

Collection). Powell stated, "I have prepared a paper on this case for publication . . . the purpose of which is to cover our temporary retreat, and to consolidate our position to resist the next attack." Judge Holt responded: "I have no pride of opinion and have done what I could to make an appeal in that case easy. . . . The question is one of law and presents as little field for feeling as does the multiplication table." See letter from Henry Holt to John Powell (Apr. 9, 1925) (Powell Collection).

¹⁰² *Breach in the Dike*, *supra* note 96, at 16. Plecker regularly contended in subsequent publications that all Virginia Indians were also part black. Plecker lobbied continually for a change in the law to close the "Indian route" which he saw as the "chief method . . . of entering the white race." 21 VIRGINIA HEALTH BULLETIN 52 (1928); see letter from Walter Plecker to N. B. Pfeiffer (June 19, 1946) (Powell Collection). Plecker stated, "The Indians of Virginia have disappeared into the negro and white race. The rest have been eliminated by disease, rum and war amongst themselves and with the white people." Despite his efforts, the 1926 legislature turned down an attempt to remove the Indian exception, primarily because it would have affected so many prominent Virginia families including "at least a dozen members of the general assembly." *Integrity Act Affects 20,000 Whites, Claim*, Richmond News Leader, Feb. 8, 1926, at 1, col. 8; see also *The Racial Bills*, *id.*, at 8, col. 1 (editorial); *Bill Brands 63 First Families of Va. as 'Colored,' id.* Feb. 9, 1926, at 1, col. 6.

¹⁰³ Garvey was the founder of the Universal Negro Improvement Association. Powell met Garvey during a trip to lobby for the Georgia miscegenation law. See *supra* note 75.

¹⁰⁴ See *Deportation of Garvey*, Richmond Times-Dispatch, Aug. 10, 1925, at 6, col. 2.

¹⁰⁵ Letter from Walter Plecker to President Coolidge (Mar. 19, 1927) (Powell Collection).

failed. Powell and Plecker were left with their 1924 Act as the last, best hope for a white America. The "breach in the dike" left by the Sorrells case was to become a major focus of their race propaganda.¹⁰⁶

A. *Using the Press to Plug the "Dike"*

Following the Sorrells case, Plecker and Powell combined efforts to produce a series of newspaper articles that would capture public sentiment in favor of amendments to the Racial Integrity Act. Powell's premier public statement on the dangers of miscegenation appeared in 1925 in an article in the *Richmond Times-Dispatch* entitled *Is White America to Become a Negroid Nation?*¹⁰⁷ With this article, the campaign to replace the 1924 Act and its apparent loopholes began in earnest.

The article criticized the state legislature's attention to "nullification of the reconstruction policies of the carpet baggers"¹⁰⁸ as short-sighted. "It is not enough," he emphasized, "to segregate the Negro on railway trains and street cars, in schools and theaters; it is not enough to restrict his exercise of franchise, so long as the possibility remains of the absorption of Negro blood into our white population."¹⁰⁹

Powell noted that the existing law against interracial marriage had been revised several times. The first miscegenation law of 1866 had allowed marriages between whites and people of less than one-fourth "negro blood."¹¹⁰ The percentage of Negro blood allowable for intermarriage was later limited to the "octaroon,"¹¹¹ anyone with one-eighth Negro blood or less. Powell contended that the 1924 Act, which forbade intermarriage between whites and anyone with one-sixteenth or more Negro blood,¹¹² could be traced to "the development of eugenical science."¹¹³ According to Powell, additional studies in the science of heredity required further restrictions to the 1924 Act, as the studies simply

¹⁰⁶ See *Breach in the Dike*, *supra* note 96.

¹⁰⁷ *Richmond Times-Dispatch*, July 22, 1925, at 1, col. 1. Comparison of this article with the *News Leader* article of June 5, 1923, *supra* note 27, suggests that Powell authored both. The earlier article was not signed but appeared under the caption "written for the *News Leader*."

¹⁰⁸ *Times-Dispatch*, July 22, 1925, *supra* note 107.

¹⁰⁹ *Id.*

¹¹⁰ See Act of Feb. 27, 1866, ch. 17, Sec. 1, 1865-1866 Va. Acts 84.

¹¹¹ See *Times-Dispatch*, July 22, 1925, *supra* note 107, at 18, col. 2. Powell's analysis did not match the legislative record in Virginia, which contains no enactment covering "octaroons" and miscegenation.

¹¹² See Act of March 17, 1910, ch. 357, 1910 Va. Acts 581.

¹¹³ See *Times-Dispatch*, July 22, 1925, *supra* note 107, at col. 2.

underlined the "instinctive Anglo-Saxon conviction that one drop of Negro blood makes the Negro."¹¹⁴ It was this conclusion that justified the birth certificate and marriage provisions of the proposed law. Powell believed that even if intermarriage was not affected, registration would be valuable for the record it would provide indicating "who is and who is not tainted." Registration would separate whites from others "of dubious racial purity."¹¹⁵

Powell's article touched on the "advance of social equality," a bothersome trend to him, and passed delicately over what he considered more scandalous, the "increasing number of hybrids born of white women."¹¹⁶ The remainder of the article repeated the lofty goals of the A.S.C.O.A., which allowed anyone with any "original American stock" to join the organization along with Anglo-Saxons. The clubs were open to all those who wished to preserve "Anglo-Saxon civilization."¹¹⁷

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at col. 4. Powell qualified this trend as "too abhorrent to be discussed in the public press." *Id.*

¹¹⁷ *Id.* at col. 6. Powell's article preceded a lengthy article by Colonel Earnest S. Cox, a self-proclaimed ethnologist and explorer. Cox's publications on the subject of race and civilization were reportedly based on many years of travel throughout the world. His major theoretical work, *White America*, appeared in 1923 and provided a good measure of the doomsday rhetoric drawn upon by Powell and the A.S.C.O.A. in their campaign for the Racial Integrity Act. Cox's thesis on the danger of race mixture appeared in *White America* as three "proven" propositions:

Scientific research has done much toward establishing the following propositions:

- 1) The white race has founded all civilizations;
- 2) The white race, remaining white has not lost civilization;
- 3) The white race becoming hybrid has not retained civilization.

E. COX, *WHITE AMERICA* 23 (1923). Cox's conclusions also included the observation that history had proven the "Teutonic-Nordic" racial strain as the "Master Race." *Id.* at 43. Copies of *White America* were distributed to every member of the United States Congress in 1925 in the campaign for a national law against miscegenation. Cox's later publications included *Teutonic Unity* (1951), a privately published anti-Communist tract that asserted, among other curiosities, that the power of the papacy sprang from the insidious work of "two Jews": Peter and Paul. *Id.* at 284. The thesis of *Teutonic Unity* was that a strong alliance between the United States and "white" democracies of Europe would save the world from Soviet domination. Cox's last book was a biography of his own travels and convictions. E. COX, *BLACK BELT AROUND THE WORLD AT THE HIGH NOON OF COLONIALISM* (1963). Cox died in 1966, three years after his colleague John Powell. The Powell Collection contains a number of pamphlets by Cox. See E. COX, *LINCOLN'S NEGRO POLICY* (1938); E. COX, *LET MY PEOPLE GO* (1955).

Several months later, *The Last Stand*, thirteen articles that ran in the Richmond *Times-Dispatch* under Powell's signature, demonstrated "the necessity for race integrity legislation in Virginia as shown by an ethnological survey of the state."¹¹⁸ With a mass of cases clearly supplied to him from Plecker's files, Powell described the declining racial purity of the Commonwealth. He noted the increasing number of illegitimate mulatto children, described the amount of "passing" by non-whites who successfully hid their racial background, and dredged up the usual stories of "reversion to type" when black children allegedly were born to apparently white parents.

The newspaper articles were timed to appear as the General Assembly was in session. They included proposed amendments to the 1924 Act that would ease administration and close loopholes such as those which the Sorrells case highlighted. The articles emphasized the "scientific" nature of the data from which they were drawn, and also relied on the conclusions of Arthur Estabrook and Ivan McDougale, whose book, *Mongrel Virginians*,¹¹⁹ was offered as the definitive study of the WIN tribe — an acronym concocted as an abbreviation for communities of White-Indian-Negro mixture. The *The Last Stand's* effect on legislation was negligible. However, it was noteworthy because of the degree to which Powell repeated anonymous and apocryphal stories to prove "racial amalgamation and decadence of racial sense."¹²⁰

The most remarkable of Powell's tales was the alleged "comb test." This story concerned a group of persons of mixed racial background who founded a church in rural Virginia. According to Powell's infor-

Powell's own musical work reflected his sympathies with things "Teutonic" and the Powell papers contain notes and articles on the German Hero sagas as well as Powell's orchestral composition, *Sonata Teutonica* (1913) (Powell Collection).

¹¹⁸ *The Last Stand* ran from Feb. 16 to Mar. 2, 1926, and was introduced by a supporting editorial, *Know the Facts* Richmond Times-Dispatch, Feb. 16, 1926, at 6, col. 1.

¹¹⁹ A. ESTABROOK & I. MCDUGLE, *MONGREL VIRGINIANS* (1926) was produced with the help of Plecker's records at the Bureau of Vital Statistics. Its "eugenical" focus included a copy of the 1924 Racial Integrity Act. Estabrook was a field worker from the Department of Genetics of the Carnegie Institution in Washington, and McDougale a sociologist from Sweetbriar College in Virginia. Estabrook spent a number of years in Virginia, and during the study that would culminate in *Mongrel Virginians*, took time off to appear as an expert witness at *Buck v. Bell*, 274 U.S. 200 (1927), the test of Virginia's eugenical sterilization statute. See Lombardo, *supra* note 15.

¹²⁰ This is the caption on the collection of cases from which the *The Last Stand* series was drawn. See Powell, *Citation of Cases Showing Racial Amalgamation and Decadence of Racial Sense* (1926) (unpublished compilation of cases) (Powell Collection).

mant, admission to the church depended upon the result of drawing a comb through the applicant's hair. If the comb passed through the hair, the applicant was admitted as a true Indian; if the comb stuck, the applicant was rejected as black. One elderly applicant, clearly black, was presented for admission by his "Indian" brother, already a member. The comb was retrieved, and the test proceeded:

The comb was inserted into the wool by the chief, where it stuck fast. The mortified Indian brother, with clenched fists and the gestures of a football rooter, was exclaiming, "Pull it through, chief, for Gawd's sake, pull it through!" Chief responded vigorously, but the comb still stuck. The old darky stood all he could, until finally, with streaming eyes and trembling knees, he yelped, "Gawdie-mighty, Marster, take dat comb outer my hyah befo' you pull ev'y stran' off o' my haid!" Whereupon, to the chagrin of his brother, the old man ducked away and fled incontinently from the church.¹²¹

The point of this story, like most of the *The Last Stand* articles, was to ridicule blacks with Uncle Remus humor and Faulknerian horror stories about the shame and the tragedy of miscegenation. Although the articles were touted as a product of Plecker's data and Powell's "scientific" observations, they were nothing more than a collection of the fears and prejudices common to generations of racists.

B. Plecker as Administrator

While the propaganda on race issues revealed the extent to which Powell and the A.S.C.O.A. would go in public, the power of Plecker's office as a tool for racial harassment is most visible through Vital Statistics records.¹²² As administrator of the Bureau of Vital Statistics, Plecker was able to counter the threat posed by the Sorrells case with more direct methods than Powell's articles.

In his capacity in the Bureau, Plecker regularly conducted "investigations" of racially "suspect" Virginians. He boasted of the "many citizens [who] have furnished data upon which to trace groups and fami-

¹²¹ Richmond Times-Dispatch, Feb. 19, 1926, at 9, col. 5.

¹²² In fact, Plecker's public rhetoric cooled somewhat following his partisan appearances in favor of legislation in 1924 and 1926. Letter from Walter Plecker to Augusta Fothergill (Jan. 21, 1928) (Powell Collection) ("I have been advised not to show too much interest in this subject [racial integrity law] in the Legislature as not all are agreed on it and too much activity might reflect on the Health Department."). Plecker also suffered a minor setback when he was called to task by Secretary Davis of the United States Department of Labor, for "using the government franking privilege to spread propaganda derogatory to the negro race." *Plecker Aroused by Blow Aimed at Racial Law*, Richmond Times-Dispatch, March 31, 1925, at 1, col. 6.

lies . . . though they hesitate to testify in court."¹²³ He also instituted a system of notations that appeared unofficially on the back of birth certificates already filed under what he considered the incorrect race. These notations were used to justify refusal of birth certificates to children of the same families, until all were registered properly — inevitably as black.¹²⁴ Vital statistics records were apparently available as proof of race to any citizen who requested them. Plecker was happy to report both annulments of interracial marriages and the prevention "of other similar marriages by giving out the facts to inquiring young people whose suspicions were aroused."¹²⁵

To those who were unfortunate enough to deal directly with Plecker, threats and insults were often forthcoming. To one woman who attempted to be married using a photostatic copy of her birth certificate, Plecker sent this response:

We are returning to you the photostatic copy of your birth certificate. The law makes it my duty to put on the back of certificates containing false records of race a correct statement shown from the records of the racial ancestry of the claimant.

All of the records in your family . . . show them before the war between the states as free negroes. . . . Now many of these women have mixed up with white men out of wedlock so that many of them look almost white . . . and are trying to pass as white. . . .

Your parents started out to make false statements about themselves, and their children are suffering. Giving a false registration as to race, makes the parents, or whoever wrote it down, liable to one year in the penitentiary.

After the war it is possible that some of these cases will come into court. We might try this one. It would make a good one, if you continue to try to be what you are not.¹²⁶

¹²³ 20 VIRGINIA HEALTH BULL. 47 (1928).

¹²⁴ See *id.* at 54. This practice was later codified. See Act of Feb. 22, 1944, ch. 52, 1944 VA. ACTS 51.

¹²⁵ 19 VIRGINIA HEALTH BULL. 157 (1927). One such case is recorded in a letter from Walter Plecker to L. Quibell (Mar. 10, 1934) (Powell Collection) ("We hope that your daughter can see the seriousness of the whole matter and will dismiss this young man without more ado."). Plecker also regularly contacted school officials to alert them to the presence of children whose race might be suspect. See also letter from Walter Plecker to Harry E. Davis (Oct. 4, 1924) (Powell Collection).

¹²⁶ Letter from Walter Plecker to Aileen Hartless (Mar. 9, 1944) (Powell Collection); see also letter from Walter Plecker to Mrs. Robert Cheatham (Apr. 30, 1924) (Powell Collection) ("This is to give you a warning that this is a mulatto child and you cannot pass it off as white. . . . [S]ee that this child is not allowed to mix with white children. It cannot go to white schools and can never marry a white person in Virginia. It is an awful thing."); and letter from Walter Plecker to Mrs. Mary Gildon (Apr. 30, 1924) (Powell Collection) ("This is to notify you that it is a penitentiary offense to

In addition to work that arguably came within his purview in the Bureau of Vital Statistics, Plecker ranged far afield by giving legal advice and general opinions on racial matters to everyone who contacted his office. At various times he interpreted the Racial Integrity Act as setting the same standard for school segregation as for marriage (no one with a trace of nonwhite blood should be allowed in white schools);¹²⁷ forbidding people of mixed race from being buried in white cemeteries;¹²⁸ and segregating the races in the military.¹²⁹ In one case, he used his official position and the threat of personal financial retribution to have a child of "questionable" background removed from a private orphanage.¹³⁰ Another Plecker letter went so far as to lecture a judge about the legal authority of the Bureau of Vital Statistics in "establishing race,"¹³¹ and in yet another, he boasted that the "mass of original information and pedigree charts" on the racial origins of Virginians was so detailed "that Hitler's genealogical study of the Jews is not more complete."¹³²

willfully state that a child is white when it is colored. You have made yourself liable to very serious trouble. What have you got to say about it?"

¹²⁷ See letter from Walter Plecker to David Peters, President, State Teacher's College (Apr. 17, 1940) (Powell Collection) ("This law has generally been interpreted by school authorities to prevent the admittance of any colored races into white schools.").

¹²⁸ See letter from Walter Plecker to Superintendent, Riverview Cemetery (Aug. 1, 1940) (Powell Collection) ("We are under the impression that . . . you are not aware of the fact that . . . this man [already buried] is of negro ancestry. . . . We are giving you this information to take such steps as you may deem necessary."); and letter from Walter Plecker to W.G. Muncy (Aug. 3, 1940) (Powell Collection) ("In the case of burials in the 'Pauper Section,' the question might not be as serious, but to a white owner of a lot, it might prove embarrassing to meet with negroes visiting at one of their graves on the adjoining lot.").

¹²⁹ See letter from Walter Plecker to Selective Service System (Jan. 29, 1943) (Powell Collection).

¹³⁰ See letter from Walter Plecker to Rev. J.J. Murray (Mar. 20, 1944) (Powell Collection) ("I personally desire the racial origin of these children cleared up. . . . I, as a Presbyterian elder, have for many years been interested in the orphanage . . . and have been contemplating including the orphanage in my will."); and letter from Walter Plecker to R.E. Moore (May 18, 1944) (Powell Collection) ("[T]he fact that [the orphan] is illegitimate would be very much in favor of her being of mixed stock and not white.").

¹³¹ See letter from Walter Plecker to Honorable Herbert G. Smith (Apr. 22, 1943) (Powell Collection). Plecker stated: "This responsibility is generally recognized in various parts of the State by school authorities and all others. . . . You are, of course, in better position than myself to answer as to your authority. If any is given in the Code, my attention has never been called to it." *Id.*

¹³² Letter from Walter Plecker to John Collier, Office of Indian Affairs (Apr. 6, 1943) (Powell Collection).

Even after his resignation at age eighty-five, Plecker attempted to maintain his influence by securing a new title — “ethnologist” — that would allow him to continue to work as racial propagandist.¹³³

CONCLUSION

The legacy of Walter Plecker and his friend John Powell remained essentially intact in the Racial Integrity Act's prohibition of miscegenation from its 1924 passage until the Act's demise in *Loving v. Virginia* in 1967. The arguments proposed by the state of Virginia during the *Loving* litigation are, in retrospect, almost comical in attempting to resurrect “eugenical” authorities as the explanation for a law founded upon racism. It was not enough that Judge Leon M. Bazile¹³⁴ would banish Mildred Jeter and Richard Loving from Virginia for twenty-five years, retreating for legal authority to the bigot's last refuge — a specious religious inspiration:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with this arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.¹³⁵

Nor was it enough that the Virginia Supreme Court of Appeals upheld Judge Bazile's outrageous verdict, choosing to affirm the convictions while it voided the twenty-five year suspension of sentence conditioned on banishment, and remanded the case for resentencing.¹³⁶ As if anxious to recall the “scientific” history of the Virginia miscegenation law, when attorneys for the state of Virginia argued before the United States Supreme Court, they defended the Act and the lower court decisions by

¹³³ See Resignation Letter from Walter Plecker to Dr. I.C. Riggan (May 27, 1946) (Powell Collection) (“A plan that occurs to me is to be appointed by the Health Department or yourself for a new position — “ethnologist” — without salary, or at a nominal one.”).

¹³⁴ Judge Bazile of the Caroline County Circuit Court, Virginia, sentenced Richard Loving and Mildred Jeter to one-year terms and then suspended the sentence on the promise that they both leave the state and not return together for twenty-five years. As assistant attorney general in 1924, Bazile had solicited the advice of John Powell and Walter Plecker about appealing the Sorrells case. See *supra* note 100. For a summary of Bazile's career, see W. BRYSON, *LEGAL EDUCATION IN VIRGINIA, 1789-1979* at 83 (1981).

¹³⁵ The Bazile opinion of July 11, 1958, is printed in Va. Briefs and Records, No. 6163 at 14, *Loving v. Commonwealth*.

¹³⁶ See *Loving v. Commonwealth*, 206 Va. 924, 147 S.E. 2d 78 (1966).

citing the dissent in *Perez v. Lippold*,¹³⁷ which overturned California's miscegenation law. The dissent in *Perez* relied upon the same "eugenical" treatises that Powell and Plecker used in support of the 1924 Act.¹³⁸ While the attorneys for Virginia were more timid than the A.S.C.O.A. might have been in insisting on white supremacy, they continued to argue that valid "scientific" evidence existed to support laws against miscegenation.¹³⁹ However, a unanimous Supreme Court disagreed.

Thus, the political crusade of John Powell and Walter Plecker was ultimately discredited, but not until their Act for "racial purity" had been part of the Virginia Code for forty-three years. Their intentions in passing and supporting the Act clearly had much more to do with politics than with science. The zealous racism that is reflected in their private papers and their public propaganda has little to do with a rigorous application of the principles of genetics, even as they were imperfectly understood in 1924. They, like all "successful" eugenicists,¹⁴⁰ were not bound by empiricism, but by ideology. That ideology prompted them to drift far from the mainstream of eugenic orthodoxy in offering legal proposals to ensure their vision of white supremacy and social inequality among the races. Their invocation of "eugenical" arguments in support of discriminatory legislation occurred often enough to convince many in their audiences, and perhaps even themselves,¹⁴¹ that the Ra-

¹³⁷ 32 Cal. 2d 711, 198 P.2d 17 (1948).

¹³⁸ *Id.* at 737-59, 198 P.2d at 47-59. For example, C.B. Davenport of the Eugenics Record Office was quoted, as was W.E. Castle of Harvard and J.W. Gregory, author of the 1925 tract *The Menace of Color*.

¹³⁹ The oral arguments in *Loving* are particularly revealing of the deference Virginia's attorneys paid to the changed climate of public opinion by 1966. The focus of the scientific argument in *Loving* was that racial "superiority" and "inferiority" were not at issue, but that the "differences" between blacks and whites were so great that children of intermarriage were harmed by it. See comment of McElwaine, LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT 987-993 (P. Kurland & G. Casper eds. 1975).

¹⁴⁰ The popular repute of eugenicists did not depend on their willingness to follow theoretical constructs with intellectual rigor. Some, like Alexander Graham Bell, left the eugenics movement when developing trends in genetics made many "hereditarian" assumptions untenable (e.g., that handicaps, morality and criminality were all inherited). Others, like Harry Laughlin, pursued the eugenic creed with an almost rabid fervor, regardless of research findings in other fields. Laughlin eventually found sympathetic colleagues among the Nazis, who awarded him an honorary medical degree in 1936 for his work in "the science of race cleansing." See Hassencahl, *supra* note 11, at 359.

¹⁴¹ It is likely that both Plecker and Powell believed that they had tapped the truths of science for the benefit of civilization. They kept in touch with others who showed an

cial Integrity Act reflected the most critical of scientific truths.

The attitudes of Powell and Plecker, as their private correspondence suggests, were to survive beyond the assertions of "Teutonic superiority" and "Nordic purity" that fell into disrepute with Hitler's defeat. More importantly, the Act for which Powell and Plecker were responsible survived even beyond their deaths as a monument to bigotry and a memorial to the misuse of science.

interest in "eugenical" topics, and no doubt felt that they were on sound theoretical ground in their application of the principles of eugenics. *See* letter from Mary Baughman, M.D. to John Powell (Aug. 20, 1927) (Powell Collection) (discussing a meeting of the American Eugenics Society); letter from Walter Plecker to E.B. Ford of the British Bureau of Human Heredity (Mar. 22, 1939) (Powell Collection) (noting a Plecker paper given before the International Congress of Eugenics); and letter from Walter Plecker to Milton Lehr (Apr. 25, 1939) (Powell Collection) (referring to a letter from "my friend, Dr. Harry H. Laughlin").