A Less than Perfect Union:
Race, Gender, and the Lack of "Perfect Plaintiffs" in *Naim v. Naim*

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Abstract

Restriction of interracial marriage was one of the longest surviving forms of statutory racial segregation in the United States, spanning from 1662 until 1967. Over a decade prior to Loving v. Virginia—the case which decided the unconstitutionality of anti-miscegenation statutes—the Court was faced with a similar case: Naim v. Naim. The appellant of this case, Han Say Naim, was a Chinese immigrant who had married a white woman and had his marriage voided under Virginia's Racial Integrity Act. Political pressures—specifically fear of interrupting school integration after Brown v. Board of Education—kept the Justices from ruling on interracial marriage in 1955. This paper seeks to go further by looking at the historical background of Asian exclusion to demonstrate how Naim exposes a legal preference for litigants that align closest to monogamous, patriarchal, and white American values, delaying resolution of the interracial marriage question despite favorable equal protection jurisprudence at the time of the case.

About the Author

Benjamin Lew is a graduate of Fordham University School of Law, J.D. 2023. He would like to extend his gratitude to the Honorable Denny Chin and Professor Thomas H. Lee for teaching their enlightening seminar tracing the historical relationship of the Asian Pacific American community and the laws of the United States. Both offered valuable guidance and feedback on this paper, and the author is grateful for their support.

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I. Introduction

In 1967, the Supreme Court held anti-miscegenation statutes to be unconstitutional in *Loving v. Virginia*, finding that prohibiting marriage solely on the basis of race "violates the central meaning of the Equal Protection Clause."[1] The plaintiffs, Richard and Mildred Loving, were the model candidates to challenge the constitutionality of Virginia's Racial Integrity Act of 1924 for a multitude of reasons: the couple carried a memorable and fitting name; Richard Loving was a white man; they had been married for years and had three adorable children; and their lifestyle was quintessentially American.[2] This decision was the first time the Supreme Court had ruled on the validity of anti-miscegenation statutes since *Pace v. Alabama* in 1883,[3] and it marked the end of one of the longest eras of segregationist legislation.[4]

Yet the Supreme Court had the opportunity to revisit the constitutionality of anti-miscegenation statutes over a decade prior to *Loving* when, in 1955, *Naim v. Naim* was appealed from Virginia's highest court.[5] The Supreme Court declined to rule on the merits, instead stating that the appeal was "devoid of a properly framed federal question."[6] This case—reviewing the validity of a marriage between a Chinese man and a white

1. Loving v. Virginia, 388 U.S. 1, 12 (1967).
2. *See* Cynthia Godsoe, *Perfect Plaintiffs*, 125 Yale L.J.F. 136, 141 (2015).
3. Pace v. Alabama, 106 U.S. 583, 585 (1883) (holding that Section 4189 of the Code of Alabama, which assigned a greater criminal punishment for interracial sexual relations than for relations between individuals of the same race did not violate the equal protection clause where "punishment of each offending person, whether white or black, is the same").
4. Of all forms of modern statutory racial discrimination, state anti-miscegenation statutes may have spanned the longest period of time, with the first statutes regulating interracial marriage enacted in Virginia as early as 1662 and not repealed until *Loving* in 1967. *See* Hrishi Karthikeyan & Gabriel J. Chin, *Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910–1950*, 9 Asian L.J. 1, 5 (2002).
5. *See* Naim v. Naim, 350 U.S. 985, 985 (1956). The ruling in Virginia ultimately proved a hurdle to the Lovings in state court, as *Naim* was clearly precedent. *See* Loving v. Commonwealth, 147 S.E.2d 78, 80 (1966) (citing Naim v. Naim, 87 S.E.2d 749, *remanded* 350 U.S. 891, *aff'd*. 90 S.E.2d 849, *appeal dismissed* 350 U.S. 985).
6. Naim, 350 U.S. at 985.

woman—has been referred to as "the case that never was,"[7] and studied for the behind-the-scenes politics that prevented the case from being heard.[8] Of primary concern to the justices of the Supreme Court was that any public outrage generated from ruling on the anti-miscegenation issue would potentially undermine the ongoing efforts to integrate schools following *Brown v. Board of Education*.[9]

But was the Court's refusal to rule on the validity of anti-miscegenation statutes the inevitable result of 1950s society and politics, or was the decision impacted by the unlikeliness of the *Naim* case to generate wide public sympathy? Is it informative that the Naims were not "perfect plaintiffs," and thus is resolution of constitutional issues reserved for individuals who are closest to the Court's conception of normal? Han Say Naim's attorney—David Carliner—had intended to appeal the case from the beginning in order to challenge the constitutionality of the miscegenation statutes,[10] but, according to Carliner's correspondence, his peers questioned whether *Naim* was the "ideal case" for such a cause.[11]

In this Article, I will argue that several factors in *Naim* contributed to the Supreme Court's decision to avoid the miscegenation issue: racial biases towards marriages between Chinese men and white women; exclusionary immigration policies towards Asians; and negative attitudes towards interracial marriages involving white women. In determining that the Naims were unlikely to generate public support because of their circumstances, I conclude that this case is important in demonstrating how the political nature of the Court creates a preferential bias towards plaintiffs that align closest to monogamous, patriarchal, and white American values.

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7. *See* Richard Delgado, *Naim v. Naim*, 12 Nev. L.J. 525, 525 (2012).

8. Much has been written on the dilemma that the Supreme Court Justices faced in pondering whether or not to hear argument for *Naim*. The primary concern was whether hearing the case would impede desegregation efforts, and that the South was unprepared for another "bombshell" so soon after *Brown v. Board of Education. See, e.g.*, Gregory M. Dorr, *Principled Expediency: Eugenics,* Naim v. Naim*, and the Supreme Court*, 42 Am. J. Legal Hist. 119, 119 (1998); David Wolitz, *Alexander Bickel and the Demise of Legal Process Jurisprudence*, 29 Cornell J.L. & Pub. Pol'y 153, 184 (2019) (commenting on Alexander Bickel's scholarship praising the Court's reconciliation of principle and expediency in *Naim*); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 Geo. L.J. 1, 61 (1979).

9. In his memo, Justice Frankfurter voiced his preference for judicial restraint as well as his concern for "protecting the Court from political attack, in the moral necessity of defending *Brown*." Dorr, *supra* note 8, at 151. While David Carliner, the attorney for Naim, rallied several civil rights organizations in support of the case, the NAACP was notably absent. *See, e.g.*, *id.* at 147 n. 121 (citing Chang M. Sohn, "Principle and Expedience in Judicial Review," 77–83, 129,133–34, 143–147 (1970) (unpublished Ph.D. dissertation, Columbia University).

10. *See, e.g.*, *id.* at 134–35 (noting that Carliner was "well pleased" with the decision to annul the marriage, allowing him to appeal the case).

11. *See* Stephanie Hinnershitz, Different Shade of Justice: Asian American Civil Rights in the South 147–48 (2017).

II. Historical Background

A. *Asian Exclusion and Anti-Miscegenation*

The first anti-miscegenation laws to target Asians were passed in six Western states between 1861 and 1890, no doubt in response to the influx of Chinese laborers beginning in the 1840s.[12] A delegate to California's 1878 Constitutional Convention articulated his concerns about marriage between whites and Chinese, stating that:

> [w]ere the Chinese to amalgamate at all with our people, it would be the lowest, most vile and degraded of our race, and the result of that amalgamation would be a hybrid of the most despicable, a mongrel of the most detestable [of our race] that has ever afflicted the earth.[13]

While the trend of barring marriages between whites and Asians began in the West, similar laws were soon adopted by states in the Midwest, South, and East.[14]

The inclusion of Asian ethnic groups under anti-miscegenation statutes complicated the assimilation of Asian immigrants into the United States. Anti-miscegenation statutes were just one of many means by which Asian American populations were controlled.[15] Another method was exclusion through immigration control, particularly the exclusion of Chinese women, in the 1875 Page Act and the 1882 Chinese Exclusion Act.[16] Unlike white immigrants, "Asian

12. *See, e.g.*, Deenesh Sohoni, *Unsuitable Suitors: Anti-Miscegenation Laws, Naturalization Laws, and the Construction of Asian Identities*, 41 L. & Soc. Rev. 587, 596 (2007). The six western states to include Asians in anti-miscegenation statutes during this time were Nevada, Idaho, Arizona, Oregon, California, and Utah. *See* Act of Nov. 29, 1861, ch. 32, §§ 1, 3, 1861 Nev. Terr. Laws; Act of Jan. 6, 1864, § 1, 1864 Idaho Terr. Laws; Act of Dec. 30, 1865, ch. 30, §§ 3-5, 1865 Ariz. Terr. Laws; Act of Oct. 24, 1866, §§1-2, 10, 1866 Ore. Gen. Laws; Cal. Code Amend. ch. 41, § 1 (1880) (amending Cal. Civ. Code § 69 (1872)); Act of Mar. 8, 1888 ch. 45, §§ 5, 6 1888 Utah Laws. Most of these states revised the anti-miscegenation statutes further in the 20th Century to bar "Malays" in addition to "Mongolians" or "Chinese," likely in response to the influx of Filipino immigrants. In California, the addition of "Malay" in 1933 was in direct response to the marriage of Solvador Roldan. The California Supreme Court upheld Roldan's marriage after determining that he was not a "Mongolian" and thus the anti-miscegenation statute did not apply to him. *See* Roldan v. Los Angeles, 18 P.2d 706, 709 (1933). When the California legislature revised the statute that year, Roldan's marriage was voided.

13. John M. Kang, *Deconstructing the Ideology of White Aesthetics*, 2 Mich. J. Race & L. 283, 325 (1997) (citing John Miller's words at the 1878 California constitutional convention).

14. These states included Mississippi, Missouri, Montana, Nebraska, South Dakota, Wyoming, Virginia, Georgia, and Maryland. *See* Sohoni, *supra* note 12, at 587. *See also id.* at 597 for a comprehensive list of the states and statutes which were passed and revised to include Asian ethnic groups.

15. *See* Miliann Kang, *Reproducing Asian American Studies: Rethinking Asian Exclusion as Reproductive Exclusion*, 46 Amerasia J. 136, 141 (2020). *See also* Sohoni, *supra* note 12, at 588–89 (analyzing how state anti-miscegenation laws classified and incorporated Asian ethnic groups into the greater American population, specifically in how the laws effectively lumped immigrants and U.S.-born Asians into one group).

16. *See* Kang, *supra* note 15, at 139–40; Immigration (Page) Act of 1875, ch. 141, 18

groups were legally constrained from the process of marital assimilation," which perpetuated their status as foreigners.[17] The case of *Roldan v. Los Angeles*, where a Filipino man sought to be granted a marriage certificate for his interracial marriage, illustrates how the white supremacist hierarchy exercised control over Asian Americans through the passage and revision of immigration restrictions and anti-miscegenation statutes[18] Many Filipino men, such as Roldan, migrated to California in the early twentieth century to replace the Chinese laborers that had been barred from immigration by the Chinese Exclusion Act. While the California Supreme Court recognized Roldan's marriage on appeal, finding that the anti-miscegenation statute's use of the word "Mongolian" (which was meant to target the Chinese) did not extend to "Malays" from the Philippines, the Legislature swiftly added "Malays" as a racial category in the revised statute and thus voided Roldan's marriage.[19] Combined with existing exclusion laws, anti-miscegenation statutes demonstrated the interest of the State "in controlling reproduction not just at its borders but within them."[20]

***Illustration 1*: Filipinos with white women in local dance hall, Stockton, California, in the 1930s**[21]

Stat. 477 (repealed 1974); Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943).

17. Sohoni, *supra* note 12, at 612; *see also* Kang, *supra* note 15, at 139 (quoting 13 Cong. Rec. 1483 (1882) (statement of Sen. John Franklin Miller) ("If we continue to permit the introduction of this strange people, with their peculiar civilization, until they form a considerable part of our population, what is to be the effect upon the American people and Anglo-Saxon civilization? . . . Can they meet halfway, and so merge in a mongrel race, half Chines [sic] and half Caucasian, as to produce a civilization half-pagan, half-Christian, semi-Oriental, altogether mixed, and very bad?").

18. *See generally* Roldan v. Los Angeles, 18 P.2d 706 (1933).

19. *See, e.g.*, Peggy Pascoe, *Race, Gender, and Intercultural Relations: The Case of Interracial Marriage*, 12 Frontiers: J. Women Studs. 5, 10–11 (1991).

20. Kang, *supra* note 15, at 141.

21. Photograph of Filipinos with white women in local dance hall, Stockton, CA, 1930s, *in* Vicente L. Rafael, *Colonial Contractions: The Making of the Modern Philippines, 1565–1946*, Oxford Rsch. Encyc. of Asian Hist. (June 25, 2018), https://oxfordre.com/asianhistory/oxford/fullsizeimage?imageUri=/10.1093/acrefore/9780190277727.001.0001/acrefore-9780190277727-e-268-graphic-008-full.jpg&uriChapter=/10.1093/acrefore/9780190277727.001.0001/acrefore-9780190277727-e-268 [https://perma.cc/F7T2-DU6X].

The increasing popularity of the eugenics movement by the turn of the twentieth century shaped public desire for marriage regulation not as a method to control the growth of Asian populations in America, but as a system to protect white racial purity.[22] Hrishi Karthikeyan and Gabriel Chin wrote on the correlation between Asian population size and anti-miscegenation statutes.[23] They argued that previous theories—that anti-miscegenation statutes rose only in response to "populations of Asian Americans 'anything like equal' numbers to whites"—were false based on data showing relatively small populations of Asian Americans.[24] Instead, Karthikeyan and Chin argued that anti-miscegenation statutes arose on two conditions: anti-miscegenation statutes already existed to prevent marriage between Blacks and whites; and Asian American populations were "large enough to constitute a cognizable entity that could be included within the purview of statutes targeted at 'non-whites' as a collective group."[25] Indeed, their study suggests that the anti-miscegenation statutes that included Asians were likely more symbolic than functional given a lack of data suggesting high rates of intermarriage between whites and Asians.[26] In this way, the State's regulation of marriage epitomized "the frenzied obsession to preserve the aesthetic value of the [w]hite race from the exaggeratedly imagined yellow peril,"[27] with many officials "warn[ing] that racial amalgamation between whites and Asians would destroy America because it would destroy Whiteness."[28]

22. *See* Karthikeyan & Chin, *supra* note 4, at 31.

23. *See id.*

24. *See id.* at 2, 29 (challenging the 1910 treatise by Stephenson). Karthikeyan and Chin estimated that by 1910 there were only five states in which Asians made up more than one percent of the total state population: Wyoming, Nevada, Washington, Oregon, and California. *Id.* at 11. California had the largest proportion of Asian Americans, yet they were still only 3.26 percent of the state population. *Id.* at 39.

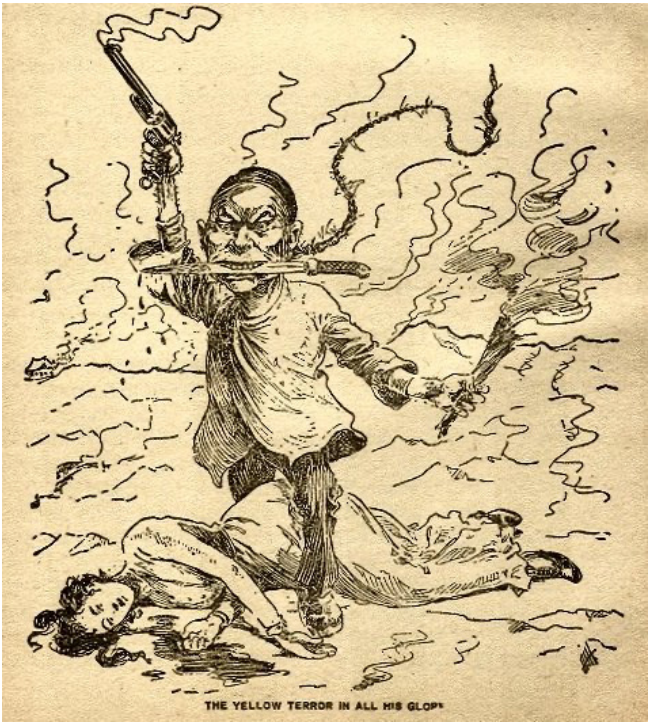
25. *Id.* at 30. The law had long placed Asians into the general category of "non-white." *See, e.g.,* People v. Hall, 4 Cal. 399, 404–05 (1854) (holding that a California law preventing blacks, mulattos, or Indians from testifying against whites in court also barred Chinese from giving testimony). For the next century, courts continued to find ways of construing poorly drafted laws to draw racial categories around whites and non-whites. The distinction proved prominent in the application of the revised naturalization laws, which applied only "to aliens [being free white persons, and to aliens] of African nativity and to persons of African descent." Ozawa v. United States, 260 U.S. 178, 195 (1922). Asian immigrants were found to not be "free white persons," and thus ineligible for naturalization. *See, e.g., id.* at 196–198 (finding a Japanese immigrant was not white because he was not Caucasian); United States v. Thind, 261 U.S. 204, 210, 214–15 (1923) (holding that the word "Caucasian" meant a white person "only as that word is popularly understood," thereby denying citizenship to a Hindu man who was Caucasian and Aryan under the technical meaning of those words).

26. Karthikeyan & Chin, *supra* note 4, at 27 (citing Kang, *supra* note 13, at 326).

27. *Id.*

28. Karthikeyan & Chin, *supra* note 4, at 27 (quoting Ronald Takaki, Strangers from a Different Shore: A History of Asian Americans 330 (1989)).

***Illustration 2*: The Yellow Terror in all His Glory (1899)[29]**



In *Pace v. Alabama*, the Supreme Court affirmed the right of the states to pass anti-miscegenation statutes despite the recently adopted Fourteenth Amendment.[30] Like *Plessy*, the Supreme Court in *Pace* found that anti-miscegenation laws applied equally to whites and non-whites, and therefore did not contravene the Equal Protection Clause.[31] Following *Pace*, courts continued to rely on eugenics theory to support state regulation of marriage between the races.[32] For states with anti-miscegenation statutes on their books, such regulation was akin to preventing marriage between "first cousins and other blood relations."[33] By the early twentieth century, Virginia had doubled down on existing anti-miscegenation legislation with the Racial Integrity Act of 1924 by making it "unlawful for any white person in this State to marry any save

29. *The Yellow Terror in all His Glory* (illustration), *in The Yellow Terror in All His Glory (1899)*, The World Hist. Archive & Compendium (Apr. 13, 2021), https://worldhistoryarchive.wordpress.com/2021/04/13/the-yellow-terror-in-all-his-glory-1899 [https://perma.cc/5J3H-QHKH].

30. *See* Pace v. Alabama, 106 U.S. 583, 584 (1883). The regulation of marriage at the state level had already been confirmed by the United States Supreme Court in *Maynard v. Hill*, 125 U.S. 190 (1888) on the basis that marriage was a social institution rather than a solely private contract. *See, e.g.*, Sohoni, *supra* note 12, at 609.

31. Pace, 106 U.S. at 585.

32. Karthikeyan & Chin, *supra* note 4, at 22.

33. *Id.* (citing State v. Jackson, 80 Mo. 175, 176 (1883)).

a white person, or a person with no other admixture of blood than white and American Indian."[34]

B. *Social Biases and Gender Hierarchies*

Social biases towards interracial couples perpetuated support of anti-miscegenation statutes. Advocates for the separation of the races argued that "miscegenation occurs among the 'dregs of society,' and that the progeny, therefore, are likely to become a burden on the community."[35] The social bias towards interracial couples was also imposed more heavily against relationships between white women and non-white men.

Disparate focus on interracial relations involving white women can be observed in the language of one of the earliest anti-miscegenation statutes, passed in Maryland in 1664, that prohibited marriages specifically between white women and Black men.[36] New Mexico followed this gendered framework as late as 1857.[37] While the majority of anti-miscegenation statutes were eventually written as gender-neutral, in practice, society viewed interracial relationships involving white women differently than those involving white men.[38] Indeed, in the South, "white women's sexuality [was] firmly controlled even as white men were allowed a great deal of informal sexual access to [B]lack women."[39] Peggy Pascoe's research indicates that, in the West, anti-miscegenation laws were most stringently enforced against "Chinese, Japanese, and Filipinos, whose men were thought likely to marry white women," and enforced least strictly against Native Americans and Hispanics, "whose women were more likely to marry white men."[40] Asian men were perceived as desiring white women not only for sexual reasons but for financial and social domination.[41] Part of this belief is attributable to a conviction that Asians were unable to assimilate into the American population and would instead overrun Western civilization as a hostile force.[42] Nothing epitomizes

34. *See, e.g.*, Robert Tsai, Practical Equality 32 (2019). The exception for individuals of part Native American and part white ancestry is the so called "Pocahontas-clause" was added to protect prominent Virginian families who proudly traced their ancestry to Pocahontas and John Rolfe and refused to pass a bill that would categorize them as "inferior non-whites." *See* Dorr, *supra* note 8, at 127–28.

35. *Constitutionality of Anti-Miscegenation Statutes*, 58 Yale L.J., 472, 477–78 (1949) (citing Holmes, The Negro's Struggle for Survival 174 (1937)). Despite the commentary of proponents, contemporary evidence suggested that interracial marriage occurred most frequently among the well-educated, and additionally applies equally to any non-white unions regardless of social class. *Id.*

36. *See* Pascoe, *supra* note 19, at 7.

37. *See id.*

38. *See id.*

39. *Id. See also* I. Bennet Capers, *The Crime of Loving:* Loving, Lawrence, *and Beyond*, *in* Loving v. Virginia in a Post-Racial World: Rethinking Race, Sex, and Marriage 121 (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012).

40. Pascoe, *supra* note 19, at 7.

41. *See* Hinnershitz, *supra* note 11, at 124.

42. There was an "ambition on the part of the Japanese to win by intermarriage if they are denied their present plan to overcome by occupancy." *See* Paul R. Spickard,

this conviction quite like Justice Harlan's dissent in *Plessy v. Ferguson*: "[t]here is a race so different from our own that we do not permit those belonging to it to become citizens of the United States . . . I allude to the Chinese race."[43]

The media of the early twentieth century also helped to shape the perception that Asian men would corrupt traditional American values. Three main roles were created for Asian males in film; chief among these was the malevolent "Fu Manchu" who embodied the yellow peril and destruction of Western civilization and the ruination of white womanhood.[44] Newspapers popularized the story that "a woman who entered into a sexual relationship or marriage with an Asian American man usually ended in poverty, prostitution, adultery, or a realization that interracial marriage had driven her away from her disapproving friends and family and soiled her reputation."[45] For example, the *San Francisco Chronicle* warned that Japanese men were raised to desire American girls but "American womanhood is by far too sacred to be subjected to such degeneracy."[46]

By comparison, Asian women "enjoyed a much more attractive public image" throughout most of the twentieth century.[47] This statement should be taken with a heavy grain of salt, given that this public image was historically one of exotic sexuality seeded in Orientalism and the experience of American G.I.'s in Japan and Vietnam.[48] The sexualization of Asian women manifested in the United States as early as 1875, when anti-Chinese legislators successfully passed the Page Act which barred Chinese women suspected of being sex workers from entering the United States.[49] White Americans persistently viewed Asian women as "either prostitutes or faceless drudges" at

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Mixed Blood: Intermarriage and Ethnic Identity in Twentieth-Century America, 36 (1989) (quoting Marshall DeMotte).

43. Plessy v. Ferguson, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).

44. Spickard, *supra* note 42, at 37. Hollywood heartthrob Sessue Hayakawa was the rare case of a Japanese man taking major acting roles throughout the 1910s and 1920s. His roles helped to shape the later "Fu Manchu" typecast, a sexually dominant villain who threatened to seduce and corrupt white women, particularly in his role in the 1915 film *The Cheat*. Despite his early fame, racial tensions forced Hayakawa to leave American cinema for more favorable markets in Europe. In addition to the "Fu Manchu" character, others include the "suffering peasant"—often a loyal support role to a more heroic white lead—as well as the "emasculated Charlie Chan." These portrayals of Asian men dominated American cinema from the 1930s through the 1970s. *See id.* at 36–38.

45. Hinnershitz, *supra* note 11, at 124.

46. Spickard, *supra* note 42, at 36.

47. *Id.* at 38.

48. *Id.* at 38–39. *See generally* Edward Said, Orientalism (1978) (for extensive criticism of how Western studies of the "Orient" created false cultural understandings of Asia—but specifically the Middle East). *See also* Stewart Chang, *Feminism in Yellowface*, 38 Harv. J.L. & Gender 235, 239 (2015) (tracing the origins of American stereotypes towards Asian women and discussing how these views perpetuate harmful immigration laws that "exclude aliens deemed to possess illegitimate sexualities").

49. *See, e.g.*, Kang, *supra* note 15, at 139. *See also* Immigration Act, ch. 141, 18 Stat. 477 (1875) (repealed 1943) (the "Page Act").

least through the 1930s.[50] Early twentieth century cinema reinforced the sexualization of Asian women by portraying them as seductress or victim.[51] And in the 1940s and '50s, the suitability of Asian women as desirable sexual partners was largely shaped by stories told by American soldiers occupying Japan and the Philippines.[52] Some white soldiers even stated that they married Japanese women because they were more "feminine" than white women.[53] These harmful stereotypes continue to pervade media even today.[54] Some activists also believe the hypersexualization of Asian women has been responsible for acts of racially motivated violence, such as the shooting spree at three Atlanta spas that killed six Asian women.[55]

50. *See* Spickard, *supra* note 42, at 38.

51. *See, e.g.*, Celine Parreñas Shimizu, the Hypersexuality of Race: Performing Asian/American Women on Screen and Scene (2007) (recounting the role of performance media in the sexualization of Asian women, while advocating for women of color to nevertheless lay claim to their sexuality rather than reject it).

Performance media created two primary typecasts for Asian actresses. One was the self-sacrificing and naïve "Butterfly," coined from the titular character in John Luther Long's 1898 novel Madame Butterfly, which was brought to opera in 1904 by Giacomo Puccini's Madama Butterfly, and cinema in 1922 as *The Toll of the Sea* with Chinese American actress Anna May Wong playing the lead character. The second typecast was the "Dragon Lady," a mysterious, deceitful, and sexually alluring character. *See also* Kim Brandt, *"There was No East or West when their Lips Met": A Movie Poster for* Japanese War Bride *as Transnational Artifact*, 30 Impressions 119, 120 (2009) for a discussion of how the "Butterfly" trope was extended outwards into post-war media, as seen in the 1952 film "Japanese War Bride."

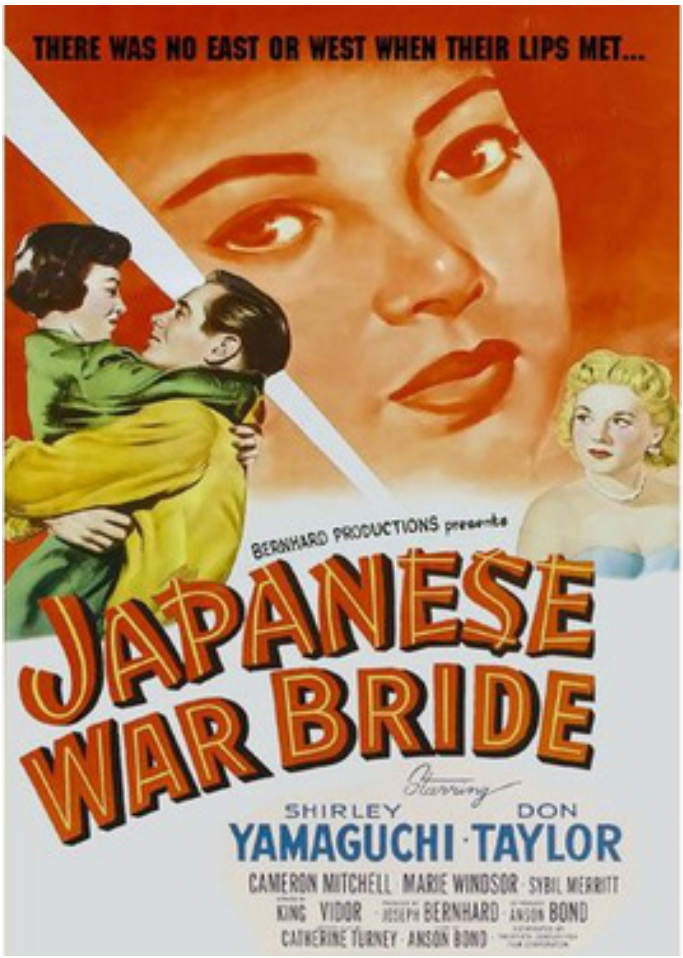
52. *See, e.g.*, Spickard, *supra* note 42, at 125. "Out of these shadowy encounters on the outskirts of American military posts came an image that has endured: the Japanese woman as sexually enthusiastic courtesan . . . . [that] has colored relationships between American men and Asian women ever since." *See also* James Michener, Tales of the South Pacific (1947) (depicting accounts of sexual experiences with women in Asia during the war).

53. *See* Pascoe, *supra* note 19, at 9.

54. *See, e.g.*, Janet Fang, *The Deadly Consequences of Hypersexualizing Asian Women*, Sci. Am. (Apr. 19, 2021), https://www.scientificamerican.com/article/the-deadly-consequences-of-hypersexualizing-asian-women [https://perma.cc/ZL6F-T2QW] (describing how Asian women are either voiceless or sexualized, and how stereotypes are normalized through various media outlets such as comedy and film).

55. *See, e.g.*, Harmeet Kaur, *Fetishized, sexualized and marginalized, Asian women are uniquely vulnerable to violence*, CNN, https://www.cnn.com/2021/03/17/us/asian-women-misogyny-spa-shootings-trnd/index.html [https://perma.cc/H5Q4-7QKQ] (last updated Mar. 17, 2021) ("The way their race intersects with their gender makes Asian and Asian American women uniquely vulnerable to violence" quoting Sung Yeon Choimorrow of the non-profit advocacy group National Asian Pacific American Women's Forum); All Things Considered, *A Sociologist's View On The Hyper-Sexualization Of Asian Women In American Society*, NPR (Mar. 19, 2021), https://www.npr.org/2021/03/19/979340013/a-sociologists-view-on-the-hyper-sexualization-of-asian-women-in-american-societ [https://perma.cc/MD9M-NTQD] (reflecting on the portrayal of Asian women in media in the wake of the Atlanta shooting).

***Illustration 3*: Promotional Release Poster for the Film *Japanese War Bride*, 1952.**[56]



C. *Immigration Controls and The War Brides Act*

While early immigration controls regulated the entry of Chinese immigrants into the United States, exclusion based on national origin began in 1882 with the Chinese Exclusion Act[57], and its reign would not end until the passage of the Immigration and Nationality Act of 1965 (or the "Hart-Celler Act").[58] Many iterations of immigration controls were layered in over the

56. Illustration of *Japanese War Bride* promotional release poster, *in Japanese War Bride*, Wikipedia, https://en.wikipedia.org/wiki/Japanese_War_Bride [https://perma.cc/6YZS-6NEE] (last visited Nov. 10, 2023). *See also* Brandt, *supra* note 51, at 120.

57. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943). *See also* Kenneth M. Holland, *A History of Chinese Immigration in the United States and Canada*, 37 Am. Rev. Can. Stud. 150, 152 (2007) (noting the Act was the first time Congress legislated to exclude a specific racial group and was not repealed until 1943).

58. *See* Holland, *supra* note 57, at 154.

years. One of the strictest was the Immigration Act of 1924 (also known as the "Johnson-Reed Act"), which limited the number of immigrants allowed entry into the United States through a quota system based on nationality and excluded immigrants from Asia entirely.[59] Absolute Chinese exclusion was rolled back in 1943 under the Magnuson Act[60] when China became an ally to the United States against Japan. The Magnuson Act made China an "allowed country" under the 1924 Immigration Act with the quota system permitting the entry of 105 Chinese per year.[61]

The 1940s saw a period of immigration reform with the passage of the War Brides Act.[62] This law relaxed restrictions on white spouses coming from Europe and was later revised in 1947 and 1950 to include spouses who would have otherwise been excluded based on their race.[63] Philip E. Wolgin and Irene Bloemraad examine the significance of the War Brides Act in the timeline of immigration reform, noting that "[t]he combination of wartime service, patriotism, and marriage proved stronger than latent unease about Asian migration."[64] This legislation led to a surge in the number of Asian immigrants into the United States–particularly from China–at a time when immigration was still capped through the quota system based on national origin.[65] Technically speaking, the military took measures to discourage interracial marriages, mandating that "[n]o military personnel on duty in any foreign country or possession may marry without the approval of the commanding officer of the United States Army forces stationed in such foreign country or possession."[66] Commanding officers expressed concern that interracial marriages between white servicemen

59. *Id.* at 153.

60. Magnuson Act, 57 Stat. 600 (1943) (repealed 1965).

61. *See* Holland, *supra* note 57, at 153–54.

62. 60 Stat. 975 (1946).

63. Congress expanded the scope of the statute in 1947 to cover non-white spouses, primarily from Asia. The law was further extended in 1950 specifically to address a large number of spouses from Korea and Japan. *See, e.g.*, Philip E. Wolgin & Irene Bloemraad, *"Our Gratitude to Our Soldiers": Military Spouses, Family Re-Unification, and Postwar Immigration Reform*, 41 J. Interdisc. Hist. 27, 29 (2010). Prior to revision of the War Brides Act, non-white spouses of American soldiers could be denied entry. For example, Helene Emilie Bouiss, a half-Japanese woman who married an American soldier in 1946, was denied entry to the United States despite the new Act ostensibly granting her the legal right of entry and citizenship. *See generally* Rose Cuison Villazor, *The Other Loving: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. Rev. 1361 (2011) (discussing how *Bouiss*, while failing to change the anti-miscegenation landscape to the same degree as *Loving*, marked a turning point in immigration law as the War Brides Act was revised within only a few years). Helene Bouiss was ineligible for naturalization under the current immigration rules due to her half-Japanese ancestry, and thus was detained. *Id.* at 1384–85. Her husband filed a suit on her behalf which was initially successful in district court, citing to the War Brides Act, but the district court's decision was then overturned by the Ninth Circuit, which found that Congress had not explicitly overturned existing exclusionary immigration rules. *Id.* at 1385–87 (citing Bonham v. Bouiss, 161 F.2d 678, 679 (9th Cir. 1947)).

64. Wolgin & Bloemraad, *supra* note 63, at 28.

65. *Id.* at 30, 47; *see also* Magnuson Act, ch. 344, 57 Stat. 600 (1943).

66. Nancy K. Ota, *Flying Buttresses*, 49 DePaul L. Rev. 693, 719 (2000).

and non-white locals would later be invalidated under state anti-miscegenation laws and occasionally used these statutory bars as basis for denying these unions.[67] Substantial numbers of interracial marriages nonetheless occurred, and servicemen successfully brought their non-white wives back to the United States.[68] Despite the multiple expansions of the War Brides Act to include non-whites, one of its effects was the reinforcement of patriarchal, white values in which foreign women were permitted entry to the United States through their marital attachment to American men. In addition, Miliann Kang notes that Asian women brought over as part of the revised War Brides Act were granted immigration rights due to their position as "collateral damage and spoils of war."[69] And, interracial marriages were not always successful and continued to face a myriad of social stigma in the States.[70]

***Illustration 4*: Japanese Women with American Servicemen after World War II[71]**

67. *See id.* at 722.

68. Despite pressures both abroad and domestic, with many relationships failing, mixed marriages between American G.I.s and Japanese women achieved a reasonable amount of success. *See, e.g.*, Spickard, *supra* note 42, at 158; *see also* Kathryn Tolbert, *The Untold Stories of Japanese War Brides*, Wash. Post (Sep. 22, 2016), https://www.washingtonpost.com/sf/national/2016/09/22/from-hiroko-to-susie-the-untold-stories-of-japanese-war-brides [https://perma.cc/L6FX-WVHV].

69. Kang, *supra* note 15, at 142.

70. *See, e.g.*, Sarah Kovner, Occupying Power: Sex Workers and Servicemen in Postwar Japan 66–67 (2012).

71. Photograph of Japanese women with American servicemen after World War II, *in* Kathryn Tolbert, *The Untold Stories of Japanese War Brides*, Wash. Post (Sep. 22, 2016), https://www.washingtonpost.com/sf/national/2016/09/22/from-hiroko-to-susie-the-untold-stories-of-japanese-war-brides [https://perma.cc/L6FX-WVHV].

III. Legal and Political Landscape of Anti-Miscegenation Statutes by 1955

When *Naim v. Naim* was appealed to the Virginia Supreme Court of Appeals in 1955, the legal landscape was already primed to overturn anti-miscegenation statutes on Fourteenth Amendment equal protection grounds.[72] Several years prior, in 1948, California's highest court had held anti-miscegenation statutes to be unconstitutional in *Perez v. Sharp.*[73] Justice Traynor wrote in his opinion that principles of equal protection mandated that marriage could not be denied on the basis of race and that the eugenical science once used to defend racial classifications were now largely unsupported.[74] A Yale Law Journal article published in 1949 shortly after the *Perez* decision concluded that, given recent equal protection jurisprudence, "[o]nly an abrogation of the judicial function can explain failure to follow the California court in striking down such legislative expressions of community prejudice."[75]

In 1954, the Supreme Court unanimously held in *Brown v. Board of Education* that "in the field of public education the doctrine of 'separate but equal' has no place."[76] This unanimous decision by the Court was remarkable given the huge shift in precedent but was characteristic of the Court's decisions during the desegregation era where the appearance of judicial coherence was itself a powerful political tool.[77] While the issue of anti-miscegenation was left unresolved for another decade, some scholars have noted that it was a clearer legal question to address than school segregation; the former issue involves state control over consensual relationships, while the latter involves forced integration.[78] In principle, the Court needed to conduct more legal gymnastics in *Brown* than it needed to reach its holding in *Loving*.

72. *See, e.g.*, *Constitutionality of Anti-Miscegenation Statutes, supra* note 35, at 478; Tsai, *supra* note 34, at 32 (noting that *Naim* "seemed to raise the exact same legal issue" as *Brown*).

73. Perez v. Sharp, 32 Cal. 2d 711, 716 (1948) (finding that a law prohibiting marriage on the basis of race "is not designed to meet a clear and present peril arising out of an emergency" compared to the racial classifications upheld in the Japanese internment cases).

74. Justice Traynor wrote for the California Supreme Court, sitting en banc. 32 Cal. 2d 711 (three justices dissent); *see also Constitutionality of Anti-Miscegenation Statutes*, *supra* note 35, at 473–74 (noting that court invalidated anti-miscegenation statute on equal protection reasoning rather than fundamental right claim that petitioners had advocated for).

75. *Constitutionality of Anti-Miscegenation Statutes*, *supra* note 35, at 479 (reflecting on the recent California case overturning anti-miscegenation statutes, as well as the Supreme Court's decision *Shelley v. Kraemer* that "equal protection of the laws is not achieved through the indiscriminate imposition of inequalities").

76. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

77. *See* Hutchinson, *supra* note 8, at 3 (noting that but for one exception, the Court decided segregation issues with "one voice" between 1954 and 1958).

78. *See, e.g.*, Wolitz, *supra* note 8, at 186 (citing Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 16 (1959)) (criticizing the Supreme Court for dodging on shifty procedural grounds, as well as a case that was easier than

While anti-miscegenation laws appeared unconstitutional in principle, they proved one of the most difficult brands of segregation to untangle. *Korematsu* criticized racial classifications as "immediately suspect" and that any race-based restrictions would be "subject . . . to the most rigid scrutiny,"[79] but courts continued to rest on eugenics as the legitimate state purpose needed to bypass strict scrutiny review.[80] Miscegenation was the ideological bottom of the slippery slope of integration, and the "specter of miscegenation" dominated the discourse of legislators hoping to impede the civil rights movement.[81] Courts were therefore wary of public backlash if they were to approve of interracial marriage,[82] given that it was considered the most emotional and sensitive topic in the preservation of white racial identity.[83] And while the legal groundwork had been laid to undo anti-miscegenation laws, a decision by the Supreme Court with a national effect would have been a huge political pill for the South to swallow in the 1950s.[84]

IV. *Naim v. Naim*

A. *Factual Background*

In 1942, Han Say Naim, a native of Canton, China, arrived in the United States in as a sailor aboard a British merchant vessel.[85] The ship docked in Norfolk, Virginia, and Naim jumped ship to start anew.[86] He met Ruby Elaine Lamberth a decade later, and they quickly fell in love. Because their marriage would be barred in Virginia by the Racial Integrity Act, which made

Brown on its merits). *But see* Sohoni, *supra* note 12, at 590 ("[U]nlike other forms of 'contracts' between individuals, marriage was considered to be a 'public concern,' and thus the domain of the state.").

79. Korematsu v. United States, 323 U.S. 214, 216 (1944).

80. *See* Dorr, *supra* note 8, at 129 (attributing the long survival of the Racial Integrity Act to "[t]he serviceability of eugenical theory in justifying Virginia's racial classifications").

81. *See* Karthikeyan & Chin, *supra* note 4, at 25 (citing James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. Rev. 93, 101 (1993)). "Now, what does all this mean but mixed schools and perfect social equality? It is nothing more or less; and the next step will be that they will demand a law allowing them, without restraint, to visit the parlors and drawing-rooms of the whites, and have free and unrestrained social intercourse with your unmarried sons and daughters . . . " *Id. See also* Wolitz, *supra* note 8, at 180–81 (stating that miscegenation concerns were used as rhetorical devices to push back against desegregation).

82. *See* Dorr, *supra* note 8, at 133 (noting Judge Kellam's choice to grant an annulment to Ruby Naim rather than a divorce in context of racial tensions).

83. *See* Karthikeyan & Chin, *supra* note 4, at 4 (explaining that anti-miscegenation statutes "are perhaps the most venerable forms of racial regulation, and they were among the last to be struck down by the Supreme Court").

84. *See, e.g.*, Dorr, *supra* note 8, at 133–34 ("A ruling seen as giving any recognition to the legitimacy of an interracial marriage would have struck the most sensitive nerve in the collective southern consciousness - fear of men of color sleeping with white women."); Karthikeyan & Chin, *supra* note 4, at 4 (noting that miscegenation statutes were some of the last segregation laws to be overturned by the Supreme Court).

85. *See, e.g.*, Wolitz, *supra* note 8, at 178; Dorr, *supra* note 8, at 129.

86. Dorr, *supra* note 8, at 129.

it "unlawful for any white person in this State to marry any save a white person," they eloped to North Carolina and were married on June 26th, 1952.[87] Han Say Naim returned to sea for work in January of the next year, and the marriage began to fall apart.[88] In an eleven page letter to her husband, Ruby wrote:

> I can't live without you so far away from me. I feel so empty inside. I don't see how I can stand many more days like this. It is no longer my body that needs you so bad. It has been so long my nature has turned cold. Now I miss your arms and lips. I miss you most at night. How very much I wish you could be here beside me to hold me while I sleep as you always did.[89]

The physical distance between them was made worse by the stress and uncertainty of getting Han Say Naim naturalized.[90] Later that year, Ruby wrote to her husband: "this whole mess is just too much for me to try and contend with. I can't take any more and sincerely feel it best to get completely out of the whole situation. In other words, I would appreciate my freedom."[91] By the end of 1953, the marriage had completely fallen apart.[92] Ruby sought either an annulment under Virginia's Racial Integrity Act (which would have voided the marriage) or a complete divorce, leveling charges of adultery against her husband.[93] Annulment presented a major issue for Han Say Naim: not only would the marriage go unrecognized, but annulment would also end his chances at naturalization.[94]

B. *Procedural History*

At trial in Norfolk County, Judge Kellam found no evidence of Han's adultery and dismissed Ruby Naim's claim for alimony.[95] Rather than granting a divorce, however, Judge Kellam proceeded with annulment, finding the marriage void under the laws of Virginia.[96] Granting a divorce would have effectively legitimized the marriage contract between Han and Ruby and suggest that Virginia would honor out-of-state marriages that would not have been valid under Virginia's own Racial Integrity Act.[97] Judge Kellam's

87. *See, e.g.*, Tsai, *supra* note 34, at 31–32 (North Carolina's anti-miscegenation statute at the time did not extend to Asians).

88. *See, e.g.*, *id.* at 32.

89. Denise Watson, *Before* Loving v. Virginia, *There Was* Naim v. Naim *in Norfolk to Challenge the State's Race Laws*, Va. Pilot (Dec. 10, 2016), https://www.pilotonline.com/2016/12/10/before-loving-v-virginia-there-was-naim-v-naim-in-norfolk-to-challenge-the-states-race-laws/ [https://perma.cc/VBM6-8F5S].

90. *See* Dorr, *supra* note 8, at 130.

91. *Id.* at 130 (quoting Defense Exhibit No. 9, Letter REN to HSN, 29 September 1953, Portsmouth Case File, box 1).

92. *See, e.g.*, Hinnershitz, *supra* note 11, at 139.

93. Dorr, *supra* note 8, at 131; *See* Hinnershitz, *supra* note 11, at 139.

94. *See* Hinnershitz, *supra* note 11, at 140 (claiming Han Say Naim's legal fight related to his resident status in the country, rather than pure emotional ties).

95. *Id.* at 142.

96. *Id.*

97. *See* Dorr, *supra* note 8, at 132.

decision emphasized that Virginia considered any and all marriages between whites and non-whites to be illegitimate.[98] With the support of his attorney, Han Say Naim appealed.[99]

Eugenical arguments arrived in full force as Han Say Naim's case moved up through the Virginia courts. The state submitted a substantial supplement detailing the science of eugenics in support of Virginia's Racial Integrity Act of 1924,[100] and Justice Buchanan's opinion for the Supreme Court of Appeals is dotted with colorful eugenics rhetoric.[101] Declining to find that the equal protection clause denied a state the right to prevent the creation of "a mongrel breed of citizens," Justice Buchanan found "no requirement that the State shall not legislate to prevent the obliteration of racial pride, but must permit the corruption of blood even though it weaken or destroy the quality of its citizenship."[102] Commenting on the quality of citizenship was a move at distinguishing *Brown*, arguing that while desegregation of education may be necessary for "the very foundation of good citizenship," the same argument could not be extended to interracial marriage.[103] In the Court's view, preventing the mixing of the races remained a valid state objective, and racial classifications were a necessary measure to achieving that end.[104] Han Say Naim's equal protection claim would fail without challenging either the racial

98. "It appearing to the court that the complainant is a member of the Caucasian race and the defendant not of the white race . . . . It is adjudged ordered and decreed that the marriage of the parties . . . is void." *See id.* at 133 (quoting Chancery Order Book 23 December 1953 – June 1954, Portsmouth Circuit Courthouse, Portsmouth). Dorr notes that Judge Kellam's determination that Han Say Naim was not white was purely on visual appearance and comments on an unscientific method for enforcing allegedly scientific eugenic principles. *Id.* *See also* Ozawa v. United States, 260 U.S. 178, 198 (1922) (finding a Japanese immigrant was not white because he was not Caucasian); United States v. Bhagat Singh Thind, 261 U.S. 204, 214–15 (1923) (holding that the word "Caucasian" meant a white person "only as that word is popularly understood," thereby denying citizenship to a Hindu man who was Caucasian and Aryan under the technical meaning of those words). Both cases illustrate the vagueness by which courts had defined "whiteness," often leaving it to popular or common understanding.

99. Tsai, *supra* note 34, at 32.

100. Dorr, *supra* note 8, at 135 (Attorney General, J. Lindsay Almond, Jr. filed an *amicus* brief for the state).

101. *See id.* at 142.

102. Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955).

103. *Id.* at 754–55. *See also* Wolitz, *supra* note 8, at 179 (stating that the Court distinguished *Brown* regarding good citizenship, arguing that more than half the states found interracial marriage "harmful to good citizenship" thus establishing state interest in anti-miscegenation even after *Brown*).

104. *Naim*, 87 S.E.2d at 755 ("If the prevention of miscegenetic marriages is a proper governmental objective . . . which we hold it to be, then § 20–54 of the Code . . . is a valid enactment unless the classification made by the statute is arbitrary and without reasonable relation to the purpose intended to be effected.").

classifications as arbitrary or the state objective as unreasonable.[105] Naim's attorney, David Carliner, brought neither of these arguments directly.[106]

Instead, Carliner challenged the Racial Integrity Act of 1924 as facially invalid, and that regulating marriage on any racial classifications violated the Constitution.[107] Having been involved in discrimination causes for much of his life, Carliner sought to "win the case as a matter of principle."[108] Unsurprised by the treatment of the case in Virginia, Carliner nonetheless hoped for greater success on appeal to the United States Supreme Court.[109]

C. *Pragmatism in the Supreme Court*

Naim was appealed to the Supreme Court of the United States on two occasions.[110] The first time was on direct appeal as a matter of right from the Virginia Supreme Court of Appeals.[111] The direct appeal made *Naim* different from a nearly contemporaneous case coming from Alabama, where Linnie Jackson sought to appeal her criminal case involving her marriage to a white man.[112] While Linnie Jackson's case to the Supreme Court was brought as a certiorari petition, Han Say Naim brought his case as a direct appeal, leaving the justices with no easy way to dismiss his case without addressing the merits.[113] Yet after much deliberation, his case was remanded to Virginia for a rehearing based on "inadequacy of the record."[114] Virginia's highest court was

105. *Id.* at 756 (finding that reasonableness of classifications had not been challenged and that Petitioner carried the "burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary"). Eleven years later, the Lovings would implore the Virginia Supreme Court of Appeals to reverse *Naim* on three grounds: equal application to whites and nonwhites did not insulate the Racial Integrity Act from violating the equal protection clause; *Naim*'s holding had relied on *Plessy*, which was overruled; and the eugenical underpinnings were no longer viable support for state action. *See* Charles Frank Robinson II, Dangerous Liaisons, Sex and Love in the Segregated South, 139–40 (2003).

106. *See* Dorr, *supra* note 8, at 132; Hinnershitz, *supra* note 11, at 145 (Carliner never challenged the racial classifications in his appeal).

107. *See* Dorr, *supra* note 8, at 136.

108. *Id.* at 130 (citing Carliner Interview, November 3, 1995).

109. *See, e.g.*, *id.* at 146–47.

110. Naim v. Naim, 87 S.E.2d. 749 (1955), *remanded* 350 U.S. 891 (1955), *aff'd*. 90 S.E.2d 849 (1956), *app. dism*. 350 U.S. 985 (1956) (*Naim* was appealed again 1956, after Virginia declined to retry the case according to the Court's initial remand).

111. Wolitz, *supra* note 8, at 180 (at the time an appellant could appeal "as a matter of right" rather than the discretionary certiorari process).

112. *See generally* Jackson v. State, 72 So. 2d 114 (Ala. Ct. App. 1954), *cert. denied*, 260 Ala. 698 (Ala. 1954), *cert. denied*, 348 U.S. 888 (1954).

113. *See, e.g.*, Michael Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 Mich. L. Rev. 431, 448 (2005) (noting that if *Naim* had been a petition rather than appeal, Justice Frankfurter would have easily denied it as the court had in *Jackson*).

114. Wolitz, *supra* note 8, at 182 (citing Naim v. Naim, 350 U.S. 891 (1955)). The Supreme Court stated:

[t]he inadequacy of the record as to the relationship of the parties to the Commonwealth of Virginia at the time of the marriage in North Carolina and upon their return to Virginia, and the failure of the parties to bring here all questions relevant to the disposition of the case, prevents the constitutional issue of the validity of the Virginia

quick to issue a "defiant opinion," rejecting the Supreme Court's allegation that the record was inadequate and reaffirming their existing opinion on the matter.[115] Virginia invited the Justices of the Supreme Court to either affirm or reject their legal analysis by asserting that there was no such inadequacy in their original ruling, and so in 1956 Naim's case was appealed to the Supreme Court for the second time.[116] Nevertheless, the Supreme Court declined the invitation to hear the case, issuing an opinion of only two lines;

> [t]he motion to recall the mandate and to set the case down for oral argument upon the merits, or, in the alternative, to recall and amend the mandate is denied. The decision of the Supreme Court of Appeals of Virginia of January 18, 1956 . . . in response to our order of November 14, 1955 . . . leaves the case devoid of a properly presented federal question.[117]

Scholarship by Gregory Dorr analyzes how the "pitched battle" behind closed doors demonstrates that both the initial remand and later dismissal were far from unanimous.[118] His argument centered around an examination of the lingering eugenics movement in the mid-twentieth century as well as the quelling of judicial activism by Justice Frankfurter.[119] Dorr attributed some of the result to Carliner's broad interpretation of the equal protection clause and his failure to attack the racial classifications of the Racial Integrity Act, as had been successfully done in *Perez v. Sharp*.[120]

Nonetheless, Dorr found that while Carliner's arguments were easily dismissed in the Virginia courts, the record reflects a more complicated situation at the Supreme Court. Prior to the first remand, four of the more activist justices—Douglas, Reed, Black, and Warren—voiced their desire to hear the case.[121] Frankfurter argued restraint and patience, believing that the Court could deny appeal and hear a similar case at a later, quieter date after the nation had adjusted to *Brown* mandated integration.[122] To what extent Frankfurter pressured for a specific decision is unknown, but a week later the five-to-four split was broken when Justices Reed and Warren voted to join the others in remanding.[123] When the Virginia court refused to retry

statute on miscegenation tendered here being considered "in clean-cut and concrete form, unclouded" by such problems.

Naim v. Naim, 350 U.S. 891, at 891.

115. Wolitz, *supra* note 8, at 183 (citing Naim v. Naim, 90 S.E.2d 849, 850 (Va. 1956)).

116. *See id.*

117. Naim v. Naim, 350 U.S. 985, 985 (1956). *See also* Wolitz, *supra* note 8, at 186–7 (acknowledging competing views between Alexander Bickel and Herbert Wechsler as to whether the Court was obligated to hear the case as an appeal).

118. *See* Dorr, *supra* note 8, at 122.

119. *See id.*

120. *See id.* at 141–42 (noting the failure to "batter[] down eugenic theory" and adhesion to a facial attack on anti-miscegenation laws resulted in an unsurprising loss at the Virginia Supreme Court of Appeals).

121. *See id.* at 153 (noting that on initial vote, four justices indicated desire to hear the case).

122. *See id.* at 152.

123. The reason the case was remanded rather than fully dismissed is unclear. *See id.*

Naim, and Carliner again appealed to the Supreme Court, the Justices were again split on how to handle the matter.[124] Dorr suggested that the case was finally dismissed "[p]erhaps out of exhaustion."[125] While Justice Warren had his law clerk draft a "strongly worded dissent," *Naim* was again published *per curiam*.[126] Thus, what might have been a substantial challenge to segregation and eugenics "went out not with a bang but a barely audible whimper-smothered under the weight of infighting in the name of keeping the Court apolitical and a neutral arbiter of reasonable law."[127]

David Wolitz's article on the decline of Legal Process highlights *Naim v. Naim* as a case in which the Court was torn between principle and pragmatism.[128] In principle, "a Supreme Court decision validating anti-miscegenation laws was unthinkable;" but in practice, a "decision striking down such statutes would be incredibly incendiary."[129] Principle necessitated a reversal of the Virginia's highest court given the holding in *Brown*, but the Justices were split on the idea of pragmatism; a decision would either generate substantial backlash that would impede desegregation efforts or serve to reinforce existing legal doctrine and buttress civil rights efforts.[130] The former position ultimately proved stronger. Southern taboos of sexual relationships between the races "represented the gravest evil of racial integration."[131] Correspondence behind the scenes of the Supreme Court reveals that fear of political backlash was a significant motivator in tabling the issue of anti-miscegenation.[132] The clerk for Justice Burton advised that "[i]n view of the difficulties engendered by the segregation cases it would be wise judicial policy to duck this question for a time."[133]

In the end, the Court's *per curiam* decision to dismiss *Naim* gives the misleading appearance of an inevitable unwillingness by the Justices to hear and decide a miscegenation issue. But as Dorr and Wolitz demonstrated, the record shows that the Justices heavily deliberated over the practical effects a decision would have, while acknowledging that legal principle required them to claim jurisdiction and hear the case. For more activist Justices, this was an issue that should be heard on the merits, and a refusal to hear it sent the tacit message that the Court would not challenge difficult issues on segregation.[134] By backing down from Virginia's challenge, the Supreme Court

at 154.

124. *See id.* at 156.

125. *Id.* at 158.

126. *Id.* "Since I regard the order of dismissal as completely impermissible in view of this Court's obligatory jurisdiction and its deeply rooted rules of decision, I am constrained to express my dissent." (Earl Warren Papers, box 369.)

127. *Id.*

128. Wolitz, *supra* note 8, at 185.

129. *Id.* at 184.

130. *Id.* at 185.

131. *Id.* at 184.

132. *See, e.g.*, Tsai, *supra* note 34, at 33.

133. *See, e.g.*, Hutchinson, *supra* note 8, at 63.

134. Dorr, *supra* note 8, at 156–57 (noting memos of law clerks commenting on

implicitly announced that there were limits to desegregation and gave the South a rallying cry to push against the desegregation movement.[135] For more conservative Justices, *Naim* was a case that was not worth hearing when considering the substantial political fallout that it would create.[136] Addressing the dismissal, Justice Frankfurter stated that "as of today one can say without wrenching his conscience that the issue has not reached that compelling demand for consideration which precludes refusal to consider it."[137]

If the more restrained Justices were concerned about public perception, might the facts of the case have mattered after all? And could they have been persuaded to hear and decide the miscegenation issue on a case with facts that garnered more public sympathy? In terms of unfavorable circumstances, Han Say Naim's case was loaded with nearly all of them, and he was ultimately unable to receive justice from the Court.

V. Perfect Plaintiffs as Agents of Social Change

In the aftermath of the *Obergefell* opinion, Cynthia Godsoe discussed the concept of "perfect plaintiffs" and the shaping of public perception in landmark decisions such as *Brown, Roe,* and *Loving*.[138] While lawyers have denied that they "cherry-pick appealing plaintiffs," Godsoe cited to research indicating that activist groups such as the NAACP were often driven to select plaintiffs according to a global legal agenda rather than the plights of individuals.[139] Cause lawyers bringing constitutional challenges have "sought to find, and more often package, plaintiffs in the *Loving* mold" who appear to repre-

the obligation to review). For example, a clerk for Justice Douglas wrote "the record is adequate to decide the constitutional question presented . . . It will begin to look obvious if the case is not taken that the Court is trying to run away from its obligation to decide the case." *Id.* (quoting William A. Norris (law clerk) to Justice William O. Douglas, 1 March 1956, William O. Douglas Papers, box 1164). One of Justice Burton's clerks noted "it is very doubtful that the issue is rendered less substantial by the absence of a record on the reasonableness of the legislation" and that the constitutional issue was clear. *Id.* at 157 (quoting AJM to Justice Harold Hitz Burton, 23 October 1955, Harold Hitz Burton papers, box 283, 3).

135. *See, e.g.*, Delgado, *supra* note 7, at 527–28 (suggesting that the Supreme Court dragged out the desegregation movement by failing to signal to the South that all segregation would ultimately end); Erwin Chemerinsky, *Loving v. Virginia: A Triumph and a Failure of the Supreme Court*, 25 Va. J. Soc. Pol'y & L. 260, 266 (2018) (arguing that the Supreme Court's decision in *Loving* was less impactful because of its avoidance of *Naim*); *see also* Wolitz, *supra* note 8, at 186 (noting that the Court "invoked bogus 'procedural grounds . . . wholly without basis in the law'" in declining to rule on the merits of a direct appeal) (citing Wechsler, *supra* note 78, at 34).

136. *See, e.g.*, Delgado, *supra* note 7, at 527; *see also* Hutchinson, *supra* note 8, at 61.

137. Tsai, *supra* note 34, at 33 (claiming that refusing to resolve the issue of interracial marriage was not abhorrent to concept of justice at the time).

138. Godsoe, *supra* note 2, at 136.

139. *Id.* at 137 (citing Derrick A. Bell, Jr. *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470, 497–502 (1976); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 Yale L.J. 1623, 1652–53, 1632 (1997)).

sent normal, simple people.[140] Litigators have fabricated the image of ideal Americans for their cases regardless of the facts at hand, to varying degrees of success.[141]

The concept of "approachability" and "normalness" is important when considering the Supreme Court's quiet dismissal of *Naim*. On one hand, it is difficult to frame any interracial marriage as "normal" given the social taboos at the time. On the other hand, the Naims were *both* further on the fringes of "ideal" society than the Lovings were. Han Say Naim was not only a Chinese national, but he had also spent most of his marriage to Ruby at sea.[142] Ruby was painted as "a poor woman of questionable morals" with two children out of wedlock.[143] With Ruby's testimony proclaiming her desire to get out of a failing marriage, this case looked awfully similar to the tabloids warning Americans of the social and financial disasters of marrying Asian men. Finally, the Naims were in court to dissolve their marriage—either through divorce or annulment—and hardly represented a bastion of forbidden love fighting against the heavy hand of Southern segregation. To a Court concerned with the public perception of its decisions, the Naims were not a couple that would pull at the heartstrings of the American people and lessen the public fall-out surrounding a decision on anti-miscegenation laws. To the contrary, as demonstrated by Justice Buchanan's opinion, the Naims served as an illustrative example of the sorts of marriages that Virginia's Racial Integrity Act was in place to prevent.[144]

In contrast, Richard and Mildred Loving were all-American but for their race.[145] They were a devoted married couple with three children, who lived in a self-made home and had working class jobs.[146] There was also less of a social taboo against sexual relations between white men and black women than any pairing involving white women.[147] And of course, they had a name – Loving – that was destined for such a case. As Godsoe describes, they were "a cause lawyer's dream."[148]

140. Godsoe, *supra* note 2, at 142.

141. *Id.* at 142–45. Godsoe attributes *Windsor*'s success to the ability to highlight the white, well-educated, and devoted nature of Edith Windsor's marriage, while noting that the litigants in *Roe* and *Lawrence v. Texas* had to be carefully groomed by their lawyers, and ultimately rebelled against them. Important to Godsoe was the role lawyers played in shaping judicial perceptions of queer relationships as "monogamous, committed, and private." *Id.* at 145.

142. *See, e.g.*, Kang, *supra* note 15, at 141.

143. Dorr, *supra* note 8, at 134 (describing court testimony that Ruby was an adulterous and had two children out of wedlock).

144. *See, e.g.*, *id.* (noting that the Naims "perfectly fit the stereotype of candidates for eugenic reform").

145. Godsoe, *supra* note 2, at 141.

146. *Id.*

147. *Id.* (citing Capers, *supra* note 39, at 121).

148. *Id.*

David Carliner had nevertheless viewed *Naim* as the perfect case to appeal to the Supreme Court.[149] His highly principled argument concentrated on using Han Say Naim's status as an immigrant to draw in foreign policy issues in addition to the domestic challenges.[150] However, Carliner's correspondence makes clear that he and the ACLU had considered other cases. One of these was a case from Mississippi of a white woman seeking child support from her Chinese husband. Citing the applicable anti-miscegenation statute, the court voided the woman's marriage with the effect of illegitimating her children and denying her financial support.[151] Despite viewing the case as "very sympathetic," Carliner never appealed the case through the courts.[152]

Carliner was contacted by Sol Rabkin, a lawyer for the Jewish Anti-Defamation League, who voiced his concern that Naim's case would fail to excite public sympathy.[153] In his explanation, Rabkin detailed the ways in which the *Naim* case aligned with unfavorable public stereotypes—namely, a situation where a white woman was seeking to escape the burdens of marriage to a Chinese man.[154] He advised Carliner to focus on a case that could generate public sympathy and support, specifically a hypothetical case of "one of our returning veterans, who married a Japanese or Korean bride, [who] is prosecuted and threatened with a jail sentence."[155] His proposition is supported by evidence that political sentiment towards returning veterans had already been leveraged to liberalize immigration policy years prior, "substitut[ing] a discourse of family for the previous one of race."[156] Soldiers who were successful in their petitions to marry non-white spouses and bring them to the United States ultimately "promoted patriarchal nuclear family values

149. Hinnershitz, *supra* note 11, at 148 (finding that Carliner and ACLU believed *Naim* the perfect case to challenge miscegenation laws as contrary to domestic and foreign policy).

150. *Id.* at 149.

151. *Id.* at 147.

152. *Id.*

153. *Id.*

154. *See id.* at 148; *see also* Dorr, *supra* note 8, at 134 (stating that the Naims "perfectly fit the stereotype of candidates for eugenic reform").

155. Hinnershitz, *supra* note 11, at 148. Hinnershitz does not point to any actual cases that existed at the time, and it is possible that state law enforcement was unwilling to bring a case to invalidate the marriage between a World War II veteran and his wife because of the terrible optics such a case would bring.

156. Wolgin & Bloemraad, *supra* note 63, at 29 ("Legislators continually widened quota exemptions, extending them to Asian spouses at a time when racial hierarchies still dominated immigration policy. War-brides legislation also created a new language about migration, harnessing favorable sentiment toward American soldiers to gradually substitute a discourse of family for the previous one of race."). This is not to say, however, that marriage between American soldiers and Asian women was condoned. While sexual fraternization was not prevented—and may have been encouraged at times—the military created substantial roadblocks to the development of more formal relationships like marriage. Spickard, *supra* note 42, at 132–34.

and assured the continuation of the dominance of an American identity as white, heterosexual, male, and Christian."[157]

Having outlined the history of miscegenation regulation and the stereotypes towards mixed-race couples, it is possible to understand Rabkin's concern over selecting an "ideal case."[158] The ability of a returning veteran and his Asian "War Bride" to gather some public support then raises the question—was *Naim* a problematic case for a Court already apprehensive to take on big issues? Rather than a criminal issue involving two star-crossed lovers who had been thrown in jail, *Naim* involved a civil matter brought by a white woman *fleeing* her marriage to an Asian husband.[159] And of course, the sanctity of white womanhood—a central element in the rhetoric of anti-miscegenation—was at stake in this case.[160]

Despite praising the compelling stories of the individuals behind *Loving* and *Windsor*—and extolling the lawyers for their successful litigation strategies—Cynthia Godsoe questions what effects choosing "Perfect Plaintiffs" has on reinforcing traditional family norms to the detriment of underrepresented communities, such as LGBTQ families.[161] The success of cases like *Loving* compared to the failure of *Naim* suggests that while adopting curated, "perfect" stories may have the consequence of strengthening conservative values, the opposite approach—taking cases as they appear—is less likely to be successful before the Supreme Court.

VI. Conclusion

Naim v. Naim has been considered in retrospect to be among the worst Supreme Court decisions and has been heavily criticized for prolonging an important constitutional issue. While acknowledging that public attitudes towards mixed marriages were negative in 1955, Robert Tsai stated that there are "undeniable costs to waiting until a consensus organically arises before entertaining a claim of injustice."[162] Ultimately anti-miscegenation statutes were held to be unconstitutional in *Loving*, and the Asian American community played a hand in the case by presenting an amicus brief in support of the Loving's, submitted by the Japanese American Citizens League.[163] Yet

157. Ota, *supra* note 66, at 726. These couples were hardly welcomed with open arms. History reveals that these couples faced substantial obstacles in gaining acceptance among both racial populations. Nevertheless, many of these couples were successful over time. *See id.* For a detailed discussion of the obstacles mixed-race couples faced both overseas and on their acclimation state-side, see Spickard, *supra* note 42, at 132–47.

158. Hinnershitz, *supra* note 11, at 148.

159. *See, e.g.*, *id.* at 147–48 (noting it would be difficult to sell a case of "a civil proceeding in which a white woman is escaping from a marriage to a Chinese man").

160. *See* Godsoe, *supra* note 2, at 141 (*citing* Capers, *supra* note 39, at 121).

161. *Id.* at 141.

162. Tsai, *supra* note 34, at 34.

163. In a rare move for the Court, the third party was permitted speaking time to present the arguments in its amicus brief. Lawyer and future judge William Marutani presented to the Court. Marutani was a Japanese American who had faced injustice as a young man when he was forced into the internment camps during World War II, and he

the *Loving* decision came over a decade later. In waiting for the temperature around *Brown* to cool, the Court allowed itself to be ruled by public perception, and not by the fairness of law.

Could the anti-miscegenation question have been answered in 1955 with a different case? It is hard to make a speculative claim with any degree of certainty, but there are compelling reasons to believe Han Say Naim's situation made it more difficult for the Supreme Court to take his appeal. Does that imply that the ability to make change is reserved for those closer to traditional norms of social values? And in times when courts are concerned about the optics of a constitutional issue, is it necessary for an appellant to have a compelling story in order to create change? I do not have the answer to these questions, but they are important to consider when looking at the role of Asian Americans—and their historic relegation to foreigner status—have played in the development of American legal history.

was a voice for civil rights throughout his life. He became the first Asian American judge in Pennsylvania. *See* David Muto, *An Unsung Hero in the Story of Interracial Marriage*, New Yorker (Nov. 17, 2016) https://www.newyorker.com/culture/cultural-comment/an-unsung-hero-in-the-story-of-interracial-marriage [https://perma.cc/U72Z-76UM].