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Race, Marriage, and the Law of Freedom: Alabama and Virginia 1860s-1960 - Freedom: Personal Liberty and Private Law

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RACE, MARRIAGE, AND THE LAW OF FREEDOM: ALABAMA AND VIRGINIA, 1860s-1960s

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INTRODUCTION

In 1966, one hundred years after Congress passed the Fourteenth Amendment and sent it to the states for ratification,[1] Richard and Mildred Loving took a case to the U.S. Supreme Court to challenge their convictions for having violated Virginia's laws against interracial marriage. In the months ahead, the nation's high court would face squarely, for the first time, the question of whether laws like Virginia's violated the Fourteenth Amendment. In June 1967, in a unanimous decision, the Court struck down all laws that made the racial identity of an American citizen a criterion for indictment and conviction for the crime of contracting a marriage.[2]

The most private of relationships proved tightly entwined with public policy in the years after the end of American slavery. Sexual relations across racial lines—whether within marriage or outside it—proved a topic of judicial interest into the 1960s for two reasons. First, many American states enacted and long retained statutes restricting such interracial relations, and second, some people sought to establish and maintain such relations whatever the law.[3] Generalizing about the racial attitudes and behavior of white southerners, Swedish sociologist Gunnar Myrdal noted in the early 1940s that "the closer the association of a type of interracial behavior is to sexual and social in-

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1. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 251-61 (1988).

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

3. For a very detailed history of the subject, see Byron C. Martyn, Racism in the United States: A History of Anti-Miscegenation Legislation and Litigation (1979) (unpublished Ph.D. dissertation, University of Southern California). Focusing on the twentieth century is Deborah L. Kitchen, Interracial Marriage in the United States, 1900-1980 (1993) (unpublished Ph.D. dissertation, University of Minnesota).

tercourse on an equalitarian basis, the higher it ranks among the forbidden things."[4]

This Essay focuses on the most forbidden thing of all: marriage between African Americans and European Americans. The Essay details the origins and application of laws against such marriages, and tracks the history of challenges in the courts to those laws. Two states, Virginia in the Upper South and Alabama in the Deep South, together illustrate how the law related to sex, marriage, and interracial couples. Though the variations on a general theme are intriguing, the two states differed little in the outlines of their legislative or judicial histories on questions of miscegenation. Both states criminalized sexual and marital relations of an interracial nature. In both states, any number of cases developed at the local level, as the courts dealt with indictments for violating the antimiscegenation laws. At the appellate level some defendants brought appeals on constitutional or other grounds. The legal environment in each state was shaped by a decision from the other state.

Four cases, two from Alabama and two from Virginia, went to the U.S. Supreme Court. In 1883, *Pace v. Alabama* supplied a major precedent in favor of the constitutionality of antimiscegenation statutes;[5] Virginia relied on *Pace* into the 1960s to justify its own antimiscegenation laws. In two cases in the 1950s, *Jackson v. Alabama*[6] and *Naim v. Virginia*,[7] the Court skirted the issue and left *Pace* intact. In 1967, in *Loving v. Virginia*, the Supreme Court finally reversed *Pace* and established a new law of race and marriage throughout the nation. Only in the 1960s, a full century after Emancipation, did the Supreme Court declare statutes against interracial marriage unconstitutional. Only then did the law of slavery and racism defer at last to the law of freedom and racial equality.

The law that the Lovings challenged in the 1960s had its origins in the seventeenth century. In Virginia, slavery and antimiscegenation legislation developed together. In Alabama, by contrast, laws restricting interracial marriage originated only in the 1850s. In both states, such laws reached their fullest development in the years between 1865 and 1883, that is, in the generation after the Civil War and Emancipation. Moreover, in both states the legal definitions of white and non-

4. GUNNAR MYRDAL ET AL., AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 61 (1944).

5. Pace v. Alabama, 106 U.S. 583, 585 (1883).

6. 348 U.S. 888 (1954).

7. 350 U.S. 891 (1955); 350 U.S. 985 (1956).

white shifted in the early twentieth century, such that residents with any discernible African ancestry were classified as nonwhite (something not the case in the nineteenth century).

When the Lovings married each other in 1958, no constitutional challenge to antimiscegenation laws had succeeded in any federal court. The American system of marital Apartheid no longer held sway in many states outside the former Confederacy, but in the South it showed no promise of relinquishing its control. That system had its origins, at least in Virginia, as far back as the 1690s. It had grown more powerful as slavery had. It had continued to grow more powerful into the 1920s and 1930s. As late as the 1950s, efforts to challenge the system in state and federal courts alike in both Alabama and Virginia had come to naught. Yet, the Lovings prevailed in their challenge. This Essay tells the history of the system they challenged and outlines the story of that challenge and its aftermath.

I. RACE, MARRIAGE, AND THE LAW: ALABAMA BEFORE EMANCIPATION AND RECONSTRUCTION

Interracial marriages occurred with some frequency in pre-Civil War Alabama. Few marriages took place between whites and full-blooded African Americans, but a number of mixed-race women married white men, and a similar number of white women married mixed-race men.[8]

At no time before Reconstruction did Alabama outlaw such marriages, either by imposing criminal sanctions against them or by declaring them null and void. It was not until 1852 that the Alabama legislature acted to place any impediment to interracial marriages. Before then, Alabama law authorized certain officials to "solemnize the rites of matrimony between any free persons," with restrictions only on age and kinship.[9] After 1852, the law approved marriages "between white persons, or between free persons of color," but not between a member of one of those two groups and a member of the other. The new law declared it a misdemeanor for a minister to per-

8. Gary B. Mills, *Miscegenation and the Free Negro in Antebellum 'Anglo' Alabama: A Reexamination of Southern Race Relations*, 68 J. AM. HIST. 16-34 (1981).

9. HARRY TOULMIN, A DIGEST OF THE LAWS OF THE STATE OF ALABAMA 576-79 (1823); Mills, *supra* note 8, at 18 n.10 (quoting JOHN G. AIKEN, A DIGEST OF THE LAWS OF THE STATE OF ALABAMA: CONTAINING ALL THE STATUTES OF A PUBLIC AND GENERAL NATURE, IN FORCE AT THE CLOSE OF THE SESSION OF THE GENERAL ASSEMBLY IN JANUARY, 1833, at 305 (1833)).

form a marriage ceremony "when one of the parties is a negro and the other a white person . . . ."[10]

But who was a "negro"? In 1852, Alabama law specified that the term "negro" should be understood to include "mulatto," which it defined as anyone at least one-eighth black.[11] The urge to define "mulatto" can be traced directly to the Alabama Supreme Court's 1850 decision in *Thurman v. State*.[12] Thurman, a "free mulatto," had been convicted for the rape of a white woman. For such a conviction of a "slave, free negro, or mulatto," the law required that the perpetrator "suffer death."[13] Thurman, claiming to be the son of a white woman and a mixed-race man, challenged his conviction under this law. The court ruled that he could be clearly understood to be a "mulatto" only if he were half black and half white (the child of one white parent and one black), and the legislature had been insufficiently clear that it meant to cast a wider net.

> If the statute against mulattoes is by construction to include quadroons, then where are we to stop? If we take the first step by construction, are we not bound to pursue the line of descendants, so long as there is a drop of negro blood remaining? If not, the point where we should stop can only be ascertained by judicial discretion. This discretion belongs to the Legislature.[14]

Lawmakers hastened to adopt a definition that would include quadroons. Their twentieth century successors would adopt, instead, a definition that the court had pointed toward and rejected, regarding "pursu[ing] the line of descendants, so long as there is a drop of negro blood remaining."[15]

II. Power, Race, and Reconstruction: The Civil Rights Act of 1866 and the Fourteenth Amendment

In the first session after the Civil War, the Alabama legislature—like its counterparts in Virginia and the other southern states—en-

10. Ala. Code § 1956 (1852).

11. Adopting a definition that Virginia had originated in 1705—and had relaxed in 1785 (on the eighteenth-century Virginia laws, see *infra* discussion Part V)—the Alabama Code of 1852 stated: "The term 'negro' within the meaning of this code includes mulatto. The term 'mulatto,' or 'person of color,' within the meaning of this code, is a person of mixed blood, descended on the part of the father or mother, from negro ancestors, to the third generation inclusive, though one ancestor of each generation may have been a white person." Ala. Code § 4 (1852).

12. Thurman v. State, 18 Ala. 276, 278 (1850).

13. *Id.* Regarding the death penalty for nonwhite men convicted of raping white women, see Peter W. Bardaglio, *Rape and the Law in the Old South: 'Calculated to Excite Indignation in Every Heart'*, 60 J. S. Hist. 749 (1994).

14. *Thurman*, 18 Ala. at 279.

15. *See infra* discussion Part VIII.

acted a new Black Code to accommodate the end of slavery. Among the new provisions, as instructed by the Constitutional Convention that met in late 1865, was a statute that outlawed interracial marriage. The Alabama Constitution of 1865 directed the legislature to make interracial marriages between whites and people of African ancestry "null and void *ab initio*, and mak[e] the parties to any such marriage subject to criminal prosecutions."[16] The legislature established a penalty of two to seven years imprisonment for both members of any interracial couple—a white and "any negro, or the descendant of any negro, to the third generation inclusive"—who "intermarry, or live in adultery or fornication with each other. . . ." The law also established penalties for any probate judge who knowingly issued a marriage license to an interracial couple and for any justice of the peace or minister of the gospel who performed a marriage ceremony for such a couple.[17] Behavior that had been previously left up to individuals now became a question of criminal law. In this sense, race had more power to govern private relationships between free people in Alabama after Emancipation than before.[18]

Throughout the years of Reconstruction and beyond, the Alabama courts ruled on various miscegenation cases. The fundamental right of individual citizens to marry, to live together, and to remain out of prison for doing so depended on how the courts ruled. What the law was, whether it was constitutional, and how it affected various individual relationships were questions that generated considerable confusion between the late 1860s and the late 1870s. By the 1880s, there was much less room for question. The rules had hardened, and they would remain frozen in their new pattern until the 1960s. But in the meantime, the courts had to respond to sharp changes in the political, legal, and constitutional environment, and they had to determine

16. ALA. CONST. of 1865, art. IV, § 31.

17. ALA. CODE § 3602 (1867). For evidence relating to interracial sex, marriage, and the law in early post-Civil War Alabama, see PETER KOLCHIN, FIRST FREEDOM: THE RESPONSES OF ALABAMA'S BLACKS TO EMANCIPATION AND RECONSTRUCTION 61-62 (1972). For the misleading statement that, in the aftermath of the 1865 Alabama convention, "[m]arriages between whites and blacks remained prohibited," see John B. Myers, *The Freedman and the Law in Post-Bellum Alabama, 1865-1867*, 23 ALA. L. REV. 59 (1970).

18. Joel Williamsom observed that "[i]t is a tremendous irony that the emancipation of Negroes entailed the emancipation of racism. It had been black versus white within the bounds of slavery before; now there were no bounds." JOEL WILLIAMSON, NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES 78 (1980). For elaboration on this point, see MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 126-40 (1985); and Martha E. Hodes, Sex Across the Color Line: White Women and Black Men in the Nineteenth Century American South (1991) (unpublished Ph.D. dissertation, Princeton University).

how the law applied in various situations. In particular, the Fourteenth Amendment, ratified in 1868, led to questions of whether antimiscegenation statutes had come under the ban.

Alabama, like the other states of the former Confederacy, experienced enormous political discontinuity after the Civil War. Emancipation initiated great changes in social relations and the law, but Reconstruction, as it unfolded, brought further change. At first, an all-white electorate continued to select public officials. Thus, only whites voted in the elections to the Alabama Constitutional Convention of 1865, and only whites participated in the elections to the state legislature that followed.[19] When the Alabama legislature, like that of each of its sister states, enacted a Black Code that struck most Republicans in Congress as entirely too restrictive, Congress enacted the Civil Rights Act of 1866. Then, to put the act beyond the reach of a potentially hostile subsequent Congress and ensure that the courts would not declare it unconstitutional, Congress passed the Fourteenth Amendment declaring African Americans citizens and guaranteeing them equal protection of the laws.[20]

When Alabama—together with Virginia and all but one of the other states that had comprised the Confederacy—rejected the Fourteenth Amendment, Congress moved in 1867 to establish new conditions that southern states had to meet before their representatives could take their seats in the House and Senate. While President Andrew Johnson required in 1865 that each former Confederate state call a Constitutional Convention and ratify the Thirteenth Amendment outlawing slavery, Congress required in 1867 that each of the ten states that had rejected the Fourteenth Amendment call a new convention, whose delegates would be chosen by a biracial electorate. Those delegates had to write new constitutions that enfranchised black men; and those states had to ratify the Fourteenth Amendment. Only then, in the view of Congressional Republicans, would it be safe to give the southern states back their seats in the House and Senate; and only then might it be safe to leave black southerners in the hands of southern state governments. Black southerners would have political rights and could thus represent their interests in state politics; they would presumably vote Republican and thus offset the votes of their white neighbors in Congressional and Presidential elections; and, to

19. WALTER L. FLEMING, CIVIL WAR AND RECONSTRUCTION IN ALABAMA 351-52, 372-73 (1905).

20. FONER, *supra* note 1, at 176-260.

protect their rights in the courts, they could rely on the Equal Protection Clause of the Fourteenth Amendment.[21] In Alabama, Republicans controlled the Constitutional Convention that met in 1867 and the state legislature and governorship that were elected the next year under it. Republican control proved short-lived. By 1874, Democrats had retrieved control, and they retained it into the late twentieth century.[22]

III. RACE, SEX, AND THE COURTS IN ALABAMA, 1868-1877

Political change during Reconstruction related directly to changes in personnel on the Alabama Supreme Court. The court always spoke with one voice in miscegenation cases, and personnel changes fully accounted for the discontinuity that the court displayed in its decisions on such matters. Under the Constitution of 1868, the voters elected three state supreme court judges to six-year terms. Beginning in 1869, three white Alabama Republicans sat on the bench. After the 1874 elections, three Democrats did.[23]

The Lee County grand jury indicted Susan Bishop, a white woman, and Thornton Ellis, described as "descended of negro ancestors," for violating Alabama's laws governing sexual relations.[24] Under section 3598 of the Alabama Code of 1867, people convicted of living "together in adultery, or fornication," were "to be fined not less than one hundred dollars," and they could "also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months."[25] A second conviction "with the same person" sub-

21. *Id.* at 260-79.

22. THE ENCYCLOPEDIA OF SOUTHERN HISTORY 24-25, 30 (David C. Roller & Robert W. Twyman eds., 1979).

23. ALA. CONST. of 1868, art. VI, §§ 11-12; SARAH W. WIGGINS, THE SCALAWAG IN ALABAMA POLITICS, 1865-1881, at *passim* (1977). Thus, before and after the interlude that followed the 1868 elections, the men who sat on the Alabama Supreme Court were—in postwar terms—Democrats, whatever their prewar affiliations had been, in much the way that it could be said about Justice Saffold that, "Before the War of Secession he was a Democrat, after the war a Republican." For sketches of Thomas Minott Peters and Benjamin Franklin Saffold, the two associate justices of the Republican era on the court (but not E. Wolsey Peck, the chief justice), see 4 HISTORY OF ALABAMA AND DICTIONARY OF ALABAMA BIOGRAPHY [hereinafter HISTORY OF ALABAMA] 1349, 1486, 1628-29 (Thomas M. Owen ed., 1921); 3 HISTORY OF ALABAMA 214, 951.

24. Ellis v. State, 42 Ala. 525 (1868). Confederate casualties reduced the odds that white women could find white men for partners in postwar Alabama. In 1860, men comprised 51 percent of all white Alabama residents in their twenties and 52 percent of those in their thirties. 2 UNITED STATES CENSUS BUREAU, THE VITAL STATISTICS OF THE UNITED STATES 620 (1872) (from the original returns of the ninth census). In 1870, by contrast, white men in Alabama between the ages of 21 and 44 were in short supply; if fact, among whites between the ages of 25 and 34 and between 40 and 44, men comprised only 43 percent. *Id.* at 612-14.

25. ALA. CODE § 3598 (1867).

jected the offender to a minimum fine of $300 and a maximum imprisonment of twelve months; a third (or subsequent) conviction, again "with the same person," carried a mandatory sentence of two years either in the penitentiary or at hard labor for the county. Section 3598 covered same- race offenses.[26] Section 3602 of the Code mandated imprisonment, for a term of two to seven years each, of a white person and a "descendant of any negro, to the third generation," if they "intermarry or live in adultery or fornication with each other."[27] A jury found Bishop and Ellis guilty of violating section 3602—and imposed a $100 fine on each of them, as though they had been convicted under section 3598.[28]

They appealed their convictions. The Alabama Supreme Court upheld the conviction but reversed the penalty. The court expressed the notion that the trial judge had probably believed section 3602 violated the Civil Rights Act of 1866, and it rejected that premise. The federal law, Chief Justice A. J. Walker wrote, "does not prohibit the making of race and color a constituent of an offense, provided it does not lead to a discrimination in punishment."[29] As for section 3602, it "creates an offense, of which a participation by persons of different race is an element. To constitute the offense, there must be not only criminal intercourse, but it must be by persons of different race."[30] Walker argued that, because "[a]dultery between persons of different races is the same crime as to white persons and negroes, and subject to the same punishment," the Alabama statute did not contravene the Civil Rights Act.[31]

Thus, the state supreme court upheld the Alabama law and sustained the convictions, but it reversed the sentences and remanded the case. What Thornton Ellis and Susan Bishop each gained from their appeal was at least two years imprisonment rather than a fine. Ellis and Bishop would have fared better if they had not appealed their convictions. They might have fared still better if their case had come to the Alabama Supreme Court on appeal just one term later. The June term in 1868 was the last one before a new court was elected. During that term, the two associate justices had served since the beginning of 1866,[32] and Chief Justice A. J. Walker had served on the

26. *Id.*
27. ALA. CODE § 3602 (1867).
28. *Ellis*, 42 Ala. at 526.
29. *Id.*
30. *Id.*
31. *Id.* at 527.
32. *See* 39 Ala. v (1868); 42 Ala. iii (1870).

court since 1856[33] and as chief justice since 1859.[34] The new Republican court began its work in 1869.[35] By that time, too, the Fourteenth Amendment had been ratified.

The next miscegenation case to reach the Alabama Supreme Court developed in 1872 after Justice of the Peace Burns was indicted for having presided in Mobile over a wedding of an interracial couple. When Burns appealed his conviction, Justice Benjamin F. Saffold spoke for a court that viewed the miscegenation laws in a very different light than the court four years earlier. The court now found that section 3602 violated both the state and federal constitutions.[36]

"Marriage is a civil contract," Justice Saffold wrote.

> The same right to make a contract as is enjoyed by white citizens, means the right to make any contract which a white citizen may make. The law intended to destroy the distinctions of race and color in respect to the rights secured by it. It did not aim to create merely an equality of the races in reference to each other. If so, laws prohibiting the races from suing each other, giving evidence for or against, or dealing with one another, would be permissible.[37]

The Republican judge relied on the U.S. Supreme Court's 1857 *Dred Scott* decision to bolster his interpretation of the law of freedom as it contrasted with the law of slavery. He noted that Chief Justice Roger B. Taney had stressed state laws banning marriage between blacks and whites to support the conclusion that blacks were not citizens.[38] As the Alabama judge stated, "an inhabitant of a country, proscribed by its laws, approaches equality with the more favored population in proportion as the proscription is removed."[39] He applied that notion to the statute at hand:

> Dred Scott was not allowed to sue a citizen because he was not himself a citizen. One of the rights conferred by citizenship, therefore, is that of suing any other citizen. The civil rights bill now confers this right upon the negro in express terms, as also the right to make and enforce contracts, amongst which is that of marriage with any citizen capable of entering into that relation.[40]

Whatever the congressional authority to pass the Civil Rights Act in 1866, the Fourteenth Amendment enshrined "its cardinal principle" in

33. *See* 28 Ala. iii (1856).
34. *See* 33 Ala. v (1859).
35. *See* 43 Ala. v (1870).
36. Burns v. State, 48 Ala. 195, 198-99 (1872).
37. *Id.* at 197.
38. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 408 (1857).
39. *Burns*, 48 Ala. at 197.
40. *Id.* at 198.

the federal constitution.[41] The second section of Article One of the Alabama constitution, Justice Saffold continued, had "the same effect."[42] Mr. Burns was ordered freed.

Between 1868 and 1872, the Alabama Supreme Court reversed direction on the state's miscegenation laws; it did so again in the years that followed. By 1875, the Republican interlude of Reconstruction had ended in Alabama, and the state supreme court was again under the control of Democrats. In a series of cases, between 1875 and 1878, the court perfected a new interpretation of the law of freedom. The new interpretation, much more restrictive than the rule in *Burns*, endured for nearly another hundred years.

The cases that rose to Alabama's highest court—no doubt the tip of the iceberg—demonstrated that some citizens of Alabama crossed racial boundaries to find marriage partners. These cases also reflected the uncertain legal environment for such inclinations in the years after Emancipation.

In the Barbour Circuit Court, a white man named Ford and a black woman were tried, under section 3602, on the felony charge of "living together in adultery or fornication." They challenged the constitutionality of that statute, and they pleaded not guilty. Convicted, they were sentenced to at least two years' imprisonment. They appealed, and the Alabama Supreme Court heard their case in the June term of 1875. Their lawyer, relying on the decision in *Burns v. State*, argued that "[t]he legislature had no power to make an act[,] which when committed by persons of the same race is only a misdemeanor, a felony when committed by persons of different races."[43] John W. A. Sanford, the Alabama attorney general in 1875—as he had been in 1868 and 1872,[44] when he argued the state's side in the *Ellis* and *Burns* cases—harkened back to *Ellis v. State*. He insisted that section 3602 contravened neither the state nor the federal constitutions. Moreover, relying on the U.S. Supreme Court's decision in *The Slaughter-House Cases*,[45] he argued that "[e]very State has the right to

41. *Id.*

42. *Id.* Thus, Justice Saffold also introduced state constitutional grounds for invalidating the Alabama statute, for "all persons resident in this State, born in the United States, or naturalized, . . . are hereby declared citizens of the State of Alabama, possessing equal civil and political rights and public privileges." ALA. CONST. of 1868, art. I, § 2.

43. Ford v. State, 53 Ala. 150, 151 (1875).

44. Described as a "States Rights Democrat of the strictest sect," John William Augustine Sanford, Jr., served as attorney general from 1865 through 1868, when he was displaced in Congressional Reconstruction. He was elected in 1870 to a two-year term, and he ran successfully again in 1874 and 1876. 4 HISTORY OF ALABAMA, *supra* note 23, at 1500.

45. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

regulate its domestic affairs, and to adopt a domestic policy most conducive to the interest and welfare of its people."[46] As far as the decision in *Burns v. State* was concerned, he declared that it "should be overruled." [47]

This time the attorney general won a partial victory. In a per curiam decision, the court stated that "[o]n the question involved in this case, we can add nothing to the thorough discussion it received" in the *Ellis* decision.[48] Yet, the court professed to see no "conflict" between *Ellis* and *Burns*.

> The latter case involved only the validity of the statute prohibiting marriage between whites and blacks. The validity of the statute prohibiting such persons from living in adultery was not involved. Marriage may be a natural and civil right, pertaining to all persons. Living in adultery is offensive to all laws human and divine, and human laws must impose punishments adequate to the enormity of the offence and its insult to public decency.[49]

The court spoke in its decision in *Ford v. State* as if the only question were whether "adultery or fornication" should be a criminal offense. It chose to ignore the racial component. It displayed no effort to directly address the difference between a misdemeanor offence, with a $100 fine, and a felony conviction that carried at least two years' imprisonment. By implication, the court ruled that "the enormity of the offence" was greater if the adulterous partners were of different races than if they were of the same race.[50]

In two cases in the December 1877 term, the court completed the counterrevolution that it had begun two years before.[51] Like *Ellis*, but unlike *Ford*, each involved the marriage of a black man and a white woman. Having chosen to distinguish between a statutory ban on interracial marriage (which had been struck down in *Burns*) and a similar ban on interracial adultery or fornication (which it had upheld in *Ford*), the court now abandoned the distinction and upheld the statutes.

Aaron Green married Julia Atkinson in Butler County on July 13, 1876. They were soon indicted for violating section 4189 of the revised Alabama code of 1876, which, like its predecessor section 3602, banned interracial marriages and established greater penalties

46. *Ford*, 53 Ala. at 151.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. Green v. State, 58 Ala. 190 (1878); Hoover v. State, 59 Ala. 57 (1878).

for fornication and adultery in cases of interracial couples than when both partners were of the same race.[52] Julia Green's case reached the Alabama Supreme Court.[53]

Green pleaded not guilty to the charge, but she did not dispute the facts. Judge John K. Henry instructed the jury that "if they believed the evidence, they must find the defendant guilty."[54] Thus, the jury convicted her, and Judge Henry sentenced her to two years in the penitentiary.[55] Citing the *Burns* decision, she appealed. Attorney General Sanford urged that *Burns* be overturned, as he had urged two years earlier in *Ford*. He relied again on the Alabama decision in *Ellis*, together with an Indiana decision, *State v. Gibson*, which determined that the Fourteenth Amendment did not abrogate a statute making it a felony—with penalties of one to ten years in prison and a fine of $1,000 to $5,000—for any white person and anyone at least one-eighth black to marry each other.[56]

Justice Amos R. Manning spoke for the court in a thoroughgoing rejection of the decision made by "our immediate predecessors" in *Burns*. He noted that at the time that the Civil Rights Act of 1866 was passed, many northern states had antimiscegenation laws on the books, and he declared that no mention of such laws had been made in Congressional debates. Returning to the court's line of argument in *Ellis*, he insisted that the Alabama law "no more tolerates" interracial marriage on the part of a "white person" than of a "negro or mulatto"; "each of them is punishable for the offense prohibited, in precisely the same manner and to the same extent. There is no discrimination made in favor of the white person, either in the capacity to enter into such a relation, or in the penalty."[57]

Going farther, the court insisted that "the subject should be regarded with a broader view. Is marriage," Justice Manning demanded, "nothing more than a civil contract?"[58] No, it was much more than that. He cited a Kentucky decision, for example, that stated that "marriage, the most elementary and useful" of all social relations,

> is regulated and controlled by the sovereign power of the state, and can not, like *mere contracts*, be dissolved by the mutual consent only

52. *Green*, 58 Ala. at 191 (citing ALA. CODE § 4189 (1876)).
53. *Id.*
54. *Id.*
55. *Id.*
56. State v. Gibson, 36 Ind. 389, 390 (1871).
57. *Green*, 58 Ala. at 192.
58. *Id.* at 193.

> of the contracting parties, but may be abrogated by the sovereign will, either with, or without, the consent of *both* parties, whenever the public good, or justice to both, or either of the parties, will be thereby subserved.[59]

Marriages created "homes," wrote Justice Manning, and homes served as "the nurseries of States."[60]

> Who can estimate the evil of introducing into their most intimate relations, elements so heterogeneous that they must naturally cause discord, shame, disruption of family circles and estrangement of kindred? While with their interior administration, the State should interfere but little, it is obviously of the highest public concern that it should, by general laws adapted to the state of things around them, guard them against disturbances from without.[61]

The judge proceeded to discuss "the state of things" to which such laws must be adapted. He conceded that "[i]t depends very much, of course, upon the relative proportions and condition of the two races in any State, whether legislation of the kind in question is necessary there or not."[62] He did not need to remind anyone in Alabama that, with regard to "relative proportions," people in that state who had no African ancestors (or at least none within recent generations) comprised only a small majority (52 percent) of all residents.[63] As to "condition," virtually all of the black citizens of Alabama had only recently been slaves. The implication, perhaps not at all intended, was that as slavery receded into the past, or as the black percentage of Alabama residents declined, or both, the need for such legislation might diminish.

In Alabama in the 1870s, however, and (the court assumed) virtually everywhere else in the nation at that time, the "conviction" prevailed that

> the law should absolutely frustrate and prevent the growth of any desire or idea of such an alliance [as an interracial marriage] . . . by making marriage between the two races, legally impossible, and severely punishing those who perform, and those who, with intent to be married, go through the ceremonies thereof. 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

59. *Green*, 58 Ala. at 193 (quoting Maguire v. Maguire, 37 Ky. (7 Dana) 181, 184 (1838) (emphasis in original)).

60. *Green*, 58 Ala. at 194.

61. *Id.*

62. *Id.* at 194-95.

63. THE ENCYCLOPEDIA OF SOUTHERN HISTORY, *supra* note 22, at 31.

> indelible peculiarities, which declare that He has made the two races distinct.[64]

Logic and law alike, Justice Manning contended, dictated that the court uphold the constitutionality of the Alabama laws. He cited various court decisions elsewhere.[65] And in view of his social commentary, he demanded,

> How, then, can it be maintained that the States of this Union, in adopting amendments which make no allusion to such intermarriages, intended to deprive themselves of the important power of regulating matters of so great consequence and delicacy within their own borders for themselves, as it always was their undoubted right to do.[66]

To the contrary, the court declared that the Reconstruction amendments to the U.S. Constitution were "designed to secure to citizens, without distinction of race, rights of a civil or political kind only—not such as are merely social, much less those of a purely domestic nature."[67] Thus, "[n]o amendment to the Constitution, nor any enactment thereby authorized, is in any degree infringed by the enforcement of the section of the Code, under which the appellant in this cause was convicted and sentenced."[68]

Justice Manning was clear in his conclusion. "In performance of our duty, the judgment of the circuit court must be affirmed."[69] Yet, the court did not see any particular need for the white woman in this case, "Julia Atkinson alias Green," to serve time in prison. She might well have been misled as to the legal force of the Alabama miscegenation laws. The object was that they be upheld. "In view of the decision made by our predecessors" in the *Burns* case, "which is hereby overruled, we trust that the Executive of this State will find just reasons in this case, why appellant should receive a pardon."[70]

Later that term, the court took an additional step in detailing the law of freedom as it applied to interracial sex and marriage. Robert Hoover, a black man, had married Betsey Litsey, a white woman, on March 6, 1875, in Talladega County. The next year the grand jury indicted them for living together in "adultery or fornication." She had not been tried, but he had been. Pointing to his marriage, Hoover had

64. *Green*, 58 Ala. at 195.
65. State v. Gibson, 36 Ind. 389 (1871); State v. Ross, 76 N.C. 224 (1877); State v. Kennedy, 76 N.C. 232 (1877).
66. *Green*, 58 Ala. at 195.
67. *Id.* at 196.
68. *Id.* at 197.
69. *Id.*
70. *Id.*

pled not guilty. Evidence showed that, during the year 1876, the couple had "lived together openly" in "a house containing only one room" in the Talladega area and that "[t]hey represented themselves to be married."[71] The state placed in evidence a marriage license signed by George P. Plowman, judge of probate, with a note affixed from a minister, John Livingston, that he had performed the wedding ceremony the same day. So how was it that the state represented the couple to be living in a sexual relationship outside marriage?

Hoover sought to introduce evidence that before the marriage license had ever been issued, he had asked Judge Plowman for assurance that it was lawful for the two to be married. Advising Hoover that it was legal, Judge Plowman had informed him that the Alabama "Supreme Court had decided the law forbidding such marriages to be unconstitutional."[72] The state objected to the introduction of such evidence, and the trial judge, John Henderson, sustained the objection.

After both sides presented their cases, Judge Henderson, refusing the instructions that Hoover wanted, told the jury

> that the marriage shown in this case was forbidden by law, is a nullity, and is no protection to the parties who are guilty as charged in the indictment, if the evidence shows, beyond a reasonable doubt, that Hoover is a negro man and Litsey a white woman, and that they have been cohabiting as husband and wife . . . .[73]

The jury saw no reasonable doubt.

When the case came to the Alabama Supreme Court, the state attorney general, the everlasting Mr. Sanford, cited the recent *Green* decision to argue that the lower court should be sustained. By contrast, Hoover's attorney argued that "[t]here never was a statute of Alabama forbidding marriage between whites and negroes, and declaring it to be void *ab initio* . . . ."[74] Rather, he cited section 4189, which supplied a criminal sanction for such marriages. He argued further that Hoover could not be criminally liable, for his marriage had occurred "nearly three years after" the *Burns* decision, which had, on constitutional grounds, negated the Alabama statute against interracial marriage. Moreover, his marriage had taken place before the court's rulings in both *Ford* and *Green*.[75] The first argument could not have prevented Hoover's indictment, trial, and conviction, but it might have subjected him to a charge of violating the law against his

71. Hoover v. State, 59 Ala. 57, 58 (1878).
72. *Id.*
73. *Id.* at 59.
74. *Id.*
75. *Id.*

marriage rather than the one on adultery. The second argument should have relieved Hoover of his conviction, but, in view of the decision in *Green*, it offered little hope of the couple's continuing to live together in Alabama without prosecution.

Justice George Washington Stone spoke for the court in rejecting Hoover's contentions and in upholding the lower court on every count. The attorney general had his way once again. The court read the decision in *Green* as having declared interracial marriages "void." Since the Hoovers' marriage was absolutely void, the Hoovers "must be treated as unmarried persons, and their sexual cohabitation as fornication within the statute."[76] As the trial judge had instructed the jury, the Hoovers' wedding ceremony offered "no protection" against the charge of living together without benefit of marriage. Nor had the circuit court erred "in refusing to receive testimony that, before the alleged marriage, the probate judge counselled the defendant it was lawful for him to marry a white woman."[77] Ignorance of the law is no excuse, the court insisted, "and the former erroneous ruling of this court furnishes no excuse which we can recognize."[78] In fact, the statute at issue, though outlawed in the *Burns* decision, had been incorporated verbatim when Alabama revised its Code in 1876. Finally, as to Hoover's contention that, "to constitute a crime, there must be both an act and an intent," the court proved equally unyielding.[79] Though agreeing with the point, it saw no application in the case at hand.

> But, in such a case as this, it is enough if the act be knowingly and intentionally committed. The law makes the act the offence, and does not go farther, and require proof that the offenders intended, by the prohibited act, to violate the law. The act being intentionally done, the criminality necessarily follows.[80]

Having come down so uncompromisingly against Hoover, the court nonetheless saw a place for mercy, even if it could not offer such itself.

> There is no error in the record, but we consider this a case for executive clemency, on condition there be given satisfactory assurance of a discontinuance of this very gross offence against morals and decorum. Should the crime be repeated or continued, the law should lay a heavy restraining hand on the offenders.[81]

76. *Id.* at 60.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*

Whatever the fate of Hoover and Litsey, the Alabama Supreme Court had made its views entirely clear on the constitutionality, the propriety, and even the urgent necessity of that state's antimiscegenation laws.

Alabama Attorney General John W. A. Sanford lost one, but only one, of all these cases. In every case that reached the state's high court in the post Civil War years, the trial court had convicted the defendant for violating some provision of the antimiscegenation statutes. In the only case in which the state supreme court overturned the lower court conviction, a white justice of the peace, named Burns, got off after presiding at the wedding of an interracial couple.

The best that can be said about the other cases is that authorities did not seek to hit defendants with the greatest possible penalties. To the contrary, defendants seem to have been routinely sentenced to two years' loss of liberty, rather than a period as great as seven years. In the case of Thornton Ellis and Susan Bishop, the couple had been ordered to forfeit only a fine of $100 each, which, though no small amount to be sure, entailed a loss of property rather than liberty and symbolized a greater distance from slavery's loss of liberty and property alike. Of course, in that case, their appeal had led, one surmises, to a shift to the standard two-year imprisonment.

IV. Tony Pace and the U.S. Supreme Court

It might appear that nothing more needed to be decided. Yet, among the cases appealed from trial courts in late-nineteenth century Alabama, one went on to the U.S. Supreme Court. The nation's high court demonstrated no difficulty in accepting the main lines of argument that supporters of the Alabama antimiscegenation laws had developed from *Ellis* in 1868 to *Hoover* in 1878. Only the aberration of *Burns* remained as an exception and thus a reminder that the course of judicial history on miscegenation was not entirely inevitable.

In November 1881, a Clarke County jury convicted a black man, Tony Pace, and a white woman, Mary Jane Cox, under section 4189 on charges of "liv[ing] together in a state of adultery or fornication."[82] Each received the shortest sentence that the law permitted, two years in the state penitentiary. When they appealed, the Alabama Supreme Court upheld the convictions. Each defendant's punishment, the court observed, "white and black," was "precisely the same."[83] The

82. Pace v. State, 69 Ala. 231, 231 (1881).
83. *Id.* at 232.

differential punishment for interracial cohabitation was directed not "against the person of any particular color or race, but against the offense, the nature of which is determined by the opposite color of the cohabiting parties," an offense whose "evil tendency" was greater than if both parties were of the same race, as it might lead to "a mongrel population and a degraded civilization."[84]

Pace appealed to the U.S. Supreme Court.[85] Writing for a unanimous court, Justice Stephen J. Field rejected the argument that the Fourteenth Amendment's Equal Protection Clause offered a shield. Rather, he adopted the Alabama court's line of reasoning. Viewing the two sections of the Alabama law, Justice Field found them "entirely consistent" and in no way racially discriminatory.[86] Each, he insisted in all earnestness, dealt with a different offense. Section 4189, he wrote,

> prescribes a punishment for an offense which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race. Section 4184 equally includes the offense when the persons of the two sexes are both white and when they are both black. Section 4189 applies the same punishment to both offenders, the white and the black. Indeed, the offense against which this latter section is aimed cannot be committed without involving persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race.[87]

The decision was understood, from that time to the 1960s, as reflecting a validation of state antimiscegenation laws. But the Supreme Court had not confronted the question of whether, given that Pace and Cox could not become husband and wife, they would inevitably be liable to prosecution for "adultery or fornication" if they lived as such. Only by implication had the ban against interracial marriage been addressed. Moreover, only by indirection did the Court address the question of whether, since it was a first offense, the sentence should have been for no more than six months. In any event, the Court had upheld the Alabama laws, and no southern state, for the next eight decades, displayed any inclination to repeal such laws. Certainly Alabama did not. The Supreme Court's decision in *Pace v. Alabama* would prove to have an even more durable career in the

84. *Id.*
85. Pace v. Alabama, 106 U.S. 583 (1883).
86. *Id.* at 585.
87. *Id.* For further analysis see DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 387-90 (1985).

American law of interracial sex and, by extension, marriage than *Plessy v. Ferguson* would have on segregated transportation and, by extension, education.[88]

V. SEX, MARRIAGE, FAMILY, AND THE LAW OF RACE: VIRGINIA BEFORE EMANCIPATION AND RECONSTRUCTION

Virginia acted as early as 1691 to outlaw marriages between whites and nonwhites. Under the law, there never was a time—from the 1690s to the 1960s—that a marriage across racial lines involving someone defined as a white person did not carry severe penalties.[89]

In 1662, the colonial assembly first faced the question of the status of the children of interracial couples.[90] The question before the legislators was whether "children got by any Englishman upon a negro woman should be slave or ffree." The new law supplied a solution: "all children borne in this country shalbe held bond or free only according to the condition of the mother."[91] Thus, if the nonwhite woman was free, her mixed-race child would be too. But if she was a slave, then any child she had, even with a white father, would be a slave. The father's identity did not matter, so neither could his race or his status. It all depended on whether the woman—whatever her race—was slave or free.

88. Plessy v. Ferguson, 163 U.S. 537 (1896). For some fascinating contemporary statements about the legal situation in Louisiana, which permitted interracial marriages but barred whites from sitting as equals with nonwhites in railway cars, see CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 46, 50, 56 (1987).

89. Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2081-87 (1993).

90. The mixed-race children who gave rise to the 1662 law reflected, on the one hand, the difference in power between white men who owned slaves and black women who were slaves and, on the other, the skewed sex ratio in Virginia. At the time of the new law's enactment, white men recognized a severe shortage of white women. According to one set of figures, the largest number of white immigrants to Virginia to date arrived in 1653—probably at least three-fourths of them men—and many more arrived in the next few years. WESLEY F. CRAVEN, WHITE, RED, AND BLACK: THE SEVENTEENTH-CENTURY VIRGINIAN 15, 26-27 (1971). Meantime, the largest number to date of black newcomers to Virginia arrived in 1656, and another new high was recorded in 1661. *Id.* at 85-86. A large majority of these new black Virginians, like their white counterparts, were men (probably about two out of three), but, from the perspective of white men bereft of white women, the black women might offset some of the shortfall in white women. *Id.* at 99.

91. Act of Dec. 1662, No. 12, 1662 Va. Acts 170; Finkelman, *supra* note 89, at 2082-85. Two other surveys of Virginia's miscegenation statutes are Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189 (1966), and Frank F. Arness, The Evolution of the Virginia Antimiscegenation Laws (1966) (unpublished M.A. thesis, Old Dominion College). Both were used in 1966-67 by the Lovings' lawyers to recount that history. Brief for Appellants at 15, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395), *reprinted in* 64 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 741, 763 (Philip B. Kurland & Gerhard Casper eds., 1967) [hereinafter LANDMARK BRIEFS].

The 1662 Act assumed that the child was born to an unmarried couple. It did not address the question of interracial marriage itself. A successor act in 1691 faced the question of marriage. It is an amazing law, couched in language at once confused and hysterical, designed "for [the] prevention of that abominable mixture and spurious issue which hereafter may encrease in this dominion, as well by negroes, mulattoes, and Indians intermarrying with English, or other white woman, as by their unlawfull accompanying with one another."[92] Mixed race children, that is, "that abominable mixture and spurious issue," troubled the assembly if their mothers were white, not if they were black. The old rule continued to operate for the mixed-race children of white fathers, but a new rule targeted the problem of mixed-race children of white mothers.[93]

When the 1691 law turned to implementing a solution to the problem it had just articulated, the first thing it did was to outlaw interracial marriage for white men and white women alike. Actually, it did not ban the marriage, but rather, mandated the banishment of the white party to any interracial marriage that occurred, if free and thus owing labor to no planter: "[W]hatsoever English or other white man or women being free shall intermarry with a negroe, mulatto, or Indian man or woman bond or free shall within three months after such marriage be banished and removed from this dominion forever . . . ."[94] Perceiving that not all Virginia laws secured the full attention of local authorities, the Burgesses directed that "the justices of each respective countie within this dominion make it their perticular care, that this act be put in effectuall execution."[95]

In view of the provision for banishment, perhaps few white women involved in interracial marriages would still be in the colony when their children came along. But this addressed only the question of the children of white women who actually went through a wedding ceremony, those whose relationship was, up to that time, "lawful." What about children whose parents' "accompanying with one another" was "unlawful"? Any "such bastard child," mixed-race and

92. Act of April 1691, No. 16, 1691 Va. Acts 86, 86.

93. *Id.*; Finkelman, *supra* note 89, at 2085-86. For examples of black-white marriages in Virginia in the late-seventeenth century, see EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 334-35 (1975). For extended discussion and analysis, see A. Leon Higginbotham, Jr., & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967 (1989), and Kathleen M. Brown, Gender and the Genesis of a Race and Class System in Virginia, 1630-1750, at 337-80 (1990) (unpublished Ph.D. dissertation, University of Wisconsin (Madison)).

94. 1691 Va. Acts at 87.

95. *Id.*

born in Virginia, was to be taken by the wardens of the church in the parish where the child was born and "bound out as a servant . . . untill he or she shall attaine the age of thirty yeares."[96]

One other component of this measure targeted the white mothers of interracial children: "[i]f any English woman being free shall have a bastard child by any negro or mulatto," she must, within a month of the birth, pay a fine of fifteen pounds sterling to the church wardens in her parish. If she could not pay the fine, the church wardens were to auction off her services for five years. If a servant and thus not owning her own labor at the time of the offense, her sale for five years would take place after she had completed her current indenture.[97] The law said nothing about the father of her child. It imposed no penalty of loss of labor or liberty, though it surely broke up any family there might have been. The father was important to the law because, regardless of whether he was free or slave, he was nonwhite and had fathered a child by a white woman. The penalties were imposed on the woman and their child.

The specific question of 1662—regarding the status, slave or free, of the child of a white man and a black woman—retained the same answer three decades later, that is, that it depended on the status of the mother. The 1691 legislature worried about other questions, however, and it devised a new rule to address them. The new rule meant that the identity of the father could be as important as that of the mother. The primary question of the status of a child in Virginia now had to do with whether the mother was white or black, not whether she was free or slave. Most black women were slaves, so most children of black women would be slaves, though free children would still be born to free black mothers. If the mother was white, the answer depended on the racial identity of the father. The legislature's object there was to retain scarce white women for white men.[98] The crime,

96. *Id.*

97. *Id.* Hoping to foster enforcement, the legislature provided that one-third of the fine (or proceeds of sale) would go to "the informer." *Id.*

98. MORGAN, *supra* note 93, at 336. In the seventeenth century's final quarter, white immigration to Virginia declined, and natural increase went up; births began to contribute more than immigration to population growth, and of course Virginia-born youngsters had a sex ratio near parity. By the 1690s, therefore, in aggregate terms, the white sex ratio was moving toward parity, but it was not doing so among the large cohort that had immigrated during the century's third quarter, nor for the more recent arrivals; for those cohorts, white women remained in short supply. CRAVEN, *supra* note 90, at 15-16, 25-27. Moreover, in 1690 and again in 1691, more black newcomers reached Virginia than in any previous year—and a large majority of these were men, men who, like their surviving elders who had arrived earlier, could see that black women were in short supply in Virginia. *Id.* at 86, 99. White men could nonetheless see that perhaps one-third of all black newcomers were female, and the rising generation of Virginia-born blacks

such as it was, entailed a sexual relationship between a white woman and a nonwhite man.

After 1691, the broad contours of Virginia's laws on race, sex, and marriage showed limited change through the colonial era, the Revolution, and even the Civil War. Legislation in 1705 introduced three significant changes. It defined a "mulatto" as any mixed-race Virginian with at least one-eighth African ancestry.[99] Under a new law in 1705 "for a further prevention of that abominable mixture and spurious issue," a white Virginian would face six months in prison and a fine rather than suffer exile for marrying a nonwhite.[100] The legislature set a fine of 10,000 pounds of tobacco for any preacher who officiated at a marriage between a white and a nonwhite; half that amount would go to the colony and half to the informer.[101] The "bastard child" of any "negro, or mulatto," and "a free christian white woman" would now be bound as a servant until the age of 31, rather than 30; so would the "bastard child" of a "negro, or mulatto" father and "any woman servant."[102]

A 1723 law extended to the next generation the time of servitude established for female Virginians born under the laws of 1691 and 1705. Hereafter,

> where any female mullatto, or indian, by law obliged to serve 'till the age of thirty or thirty-one years, shall during the time of her servitude, have any child born of her body, every such child shall serve the master or mistress of such mullatto or indian, until it shall attain the same age the mother of such child was by law obliged to serve unto.[103]

In 1765, the Virginia legislature relaxed the terms of its 1691, 1705, and 1723 legislation in one important respect. Children born after

included about equal numbers of males and females. Surely the 1691 law reflected the competition between black men and white men for female companionship, and white men had a monopoly on power in the House of Burgesses.

99. In framing an act "declaring who shall not bear office in this country" that excluded "any negro, mulatto, or Indian," the Virginia legislature defined "mulatto"—for the purpose of "clearing all manner of doubts" that might develop regarding "the construction of this act, or any other act"—as "the child, grand child, or great grand child, of a negro." Act of Oct. 1705, ch. 4, 1705 Va. Acts 250, 250-52. The statute must have sufficed at the time to exclude virtually all Virginians with any traceable African ancestry. In 1705, only 86 years after the first arrival of African Americans in the Virginia colony, probably few great-great-grandchildren of a black Virginian had yet been born, let alone grown old enough to marry or hold public office.

100. Act of Oct. 1705, ch. 49, § 19, 1705 Va. Acts 447, 453.

101. *Id.* § 20, at 454.

102. *Id.* § 18, at 452-53.

103. Act of May 1723, ch. 4, § 22, 1723 Va. Acts 126, 133. The 1723 Act went far to perfect Virginia's laws of race and slavery; the same statute barred slaveowners from freeing any of their "negro, mullatto, or indian slaves" and declared, too, that "no free negro, mullatto, or indian" would vote in any subsequent election. *Id.* §§ 17, 23, at 132-34.

that time who would have been subject to the previous laws would serve much shorter periods, males to the age of 21 and females to 18.[104]

One family's story illustrates the complexity that developed in the years that followed the passage of the 1691 law. An eighteenth-century Virginia resident, described as a "Christian white woman," had a daughter, Betty Bugg, whose father was black. Under Virginia law, Betty Bugg became a servant until the age of 31. During her servitude, she had a son, who, while in his twenties, brought suit for his freedom on several grounds. Against that effort, his master's lawyer argued successfully in 1769 that (1) a 1705 statute required that mixed-race children like Betty Bugg (whose mothers were not slaves) be bound out for 31 years but, silent on the status of their children, presumably left them free; (2) a 1723 act required children of that next generation, too, to live as servants to age 31, and, since Bugg's son was born after 1723, he was subject to that law; and (3) a 1764 law could not help him, even though, for people with such lineage as Betty Bugg as well as her children, it set their terms of servitude at 18 for females and 21 for males. Born after 1723 but before 1764, he was born too late to gain his freedom at birth and too soon to obtain it at age 21. Yet, his bondage was not defined in terms of life, for he was scheduled to become free at age 31.[105]

Virginia's laws on sex, race, and marriage underwent further development after independence. A 1785 law redefined "mulatto" as a mixed-race Virginian with at least one-fourth African ancestry, or one black grandparent, a fraction that persisted into the twentieth century.[106] A 1792 act abandoned the language of "abominable mixture" to speak instead simply of "preventing white men and women intermarrying with negroes or mulattoes"; repeated the fine (but converted it from pounds to $30) and the six-month sentence for "whatsoever white man or woman, being free," who married "a negro or mulatto man or woman, bond or free"; and it converted to $250 the fine for

104. The 1765 Act termed being bound out until the age of 30 or 31 "an unreasonable severity" and directed that "such bastard children already born, and not yet bound out, or which shall hereafter be born, either of white women servants or of free christian white women," should be bound out for the much shorter terms. Act of Oct. 1765, ch. 14, § 3, 1765 Va. Acts 133, 134.

105. Note that the court dated the 1765 Act to 1764 and that, though the 1760s statute related solely to the children of white mothers (see *supra* note 104), Betty Bugg was not white. Gwinn v. Bugg, Jefferson 87 (1769). For another example, see T. O. MADDEN, JR., WE WERE ALWAYS FREE: THE MADDENS OF CULPEPER COUNTY, VIRGINIA, A 200-YEAR FAMILY HISTORY 1-25 (1992). Regarding "the problem of racial identity," see JAMES H. JOHNSTON, RACE RELATIONS IN VIRGINIA AND MISCEGENATION IN THE SOUTH, 1776-1860, at 191-215 (1970).

106. Act of Oct. 1785, ch. 78, § 1, 1785 Va. Acts 184.

any minister or other Virginian who might "presume" to preside over an interracial marriage.[107] In 1848, the Virginia legislature modified the 1792 law against miscegenous marriages. It changed the term of imprisonment from a mandatory six-months to a maximum twelve-months; raised the maximum fine from $30 to $100; and lowered the mandatory fine against ministers who presided at interracial marriages from $250 to $200.[108] Finally, the Code of 1849 and the Code of 1860 each declared that "all marriages between a white person and a negro [including mulattoes] . . . shall be absolutely void, without any decree of divorce, or other legal process."[109]

The Code of 1860 framed the law as it would stand for many years in its prohibition of any marriage between a "white" person and a "negro" or "colored person." The 1860 Code declared it a crime for any clerk of court to knowingly "issue a marriage license contrary to law," for anyone to "perform the ceremony of marriage between a white person and a negro," or for any "white person" to "intermarry with a negro." Penalties for violating these provisions were a maximum fine of $500 and a maximum imprisonment of a year for a clerk of court who wrongfully issued a marriage license; the mandatory fine of $200 for a person presiding at a banned marriage ceremony; and jail for as long as a year and a fine as high as $100 for a white person who married anyone of at least one-fourth African ancestry.[110]

107. Act of Dec. 22, 1792, ch. 42, §§ 17-18, 1792 Va. Acts 130, 134-35. Despite Virginia's official position on such matters, see Thomas E. Buckley, *Unfixing Race: Class, Power, and Identity in an Interracial Family,* 102 VA. MAG. HIST. & BIOGRAPHY 349 (1994), a story about a white planter, Thomas Wright, and his full-blooded black slave companion Sylvia, whose mulatto son Robert Wright, born in 1780 and freed at the age of 21 in 1801, married Mary Godsey, a white woman, in 1806 and in 1816 petitioned the legislature for a divorce from her on grounds of desertion and adultery. It appears that no legal action was ever taken against him—or her—for their interracial relationship, but as Buckley notes about the legislature's summary rejection of his petition, "Although Wright could be married to a white woman in his community, he could not be married to her in law." *Id.* at 363. His marriage violated official policy, and the legislature would not grant him a divorce. Other evidence also suggests that antimiscegenation laws were not heavily enforced in Virginia during the first half of the nineteenth century. In a single county, Nansemond, the census taker in 1830 indicated nine cases where a free black man lived with "his white wife." JOHNSTON, *supra* note 105, at 265-66. For a discussion, however, of two prosecutions involving white men, one in the 1820s with a free mulatto woman, the other in the 1840s with a slave woman (not his own), see Higginbotham & Kopytoff, *supra* note 93, at 2003-04.

108. Act of 1848, ch. 8, §§ 4-5, 1848 Va. Acts 110, 111.

109. 31 VA. CODE ch. 109, § 1 (1849); 31 VA. CODE ch. 109, § 1 (1860).

110. 31 VA. CODE ch. 109, § 1 (1860); 54 VA. CODE ch. 196, § 4 (1860); 54 VA. CODE ch. 196, §§ 8-9 (1860).

VI. RACE, SEX, AND MARRIAGE IN EARLY-POSTWAR VIRGINIA

The legal definition of a white person in nineteenth-century Virginia required that a person have less than one-fourth African ancestry—if one grandparent was fully black, even if the other three grandparents were fully white, the person was legally nonwhite. Yet, the "one drop" rule that came to prevail in the twentieth century had no place in the law at that time. On the eve of the Civil War, according to the Code of Virginia, "[e]very person who has one-fourth part or more of negro blood shall be deemed a mulatto, and the word 'negro' . . . [in any Virginia statute] shall be construed to mean mulatto as well as negro."[111] Following the war, an 1866 act offered new language, dropping the term "mulatto," but left the definitions largely intact. The new act stated that "every person having one-fourth or more of negro blood, shall be deemed a colored person, and every person, not a colored person, having one-fourth or more of Indian blood, shall be deemed an Indian."[112]

For a time after Emancipation, the Virginia General Assembly took little action to tighten the laws on interracial relationships. Changes in the statutes applied prewar laws to postwar conditions: they applied the general Virginia laws on sex and marriage to freedmen and freedwomen.[113] For example, the 1860 Code had specified a minimum fine of $20 for any "free person" who committed "adultery or fornication," and thus it had excluded slaves.[114] The postwar penalty, still a fine of at least $20, applied to all residents.[115] As in Alabama, relationships in Virginia that clearly persisted beyond single sexual encounters outside marriage might incur greater penalties. The 1860 Code had called for a minimum fine of $50 for "any white persons, not married to each other," who "lewdly and lasciviously associate and cohabit together . . . ."[116] After Emancipation, the racial qualifier vanished from the law on cohabitation: "If any persons, not married to each other, lewdly and lasciviously associate and cohabit together, . . . they shall be fined not less than fifty nor more than five hundred dollars."[117]

111. 30 VA. CODE ch. 103, § 9 (1860).
112. Act of Feb. 27, 1866, ch. 17, § 1, 1866 Va. Acts 84.
113. Act of Feb. 27, 1866, ch. 18, 1866 Va. Acts 85, 85-86.
114. 54 VA. CODE ch. 196, § 6 (1860).
115. 54 VA. CODE ch. 192, § 6 (1873).
116. 54 VA. CODE ch. 196, § 7 (1860).
117. 54 VA. CODE ch. 192, § 7 (1873).

If living together without benefit of marriage was banned in post-Civil War Virginia, for blacks as well as whites, so was marriage if it involved crossing racial lines. The Code of 1873 persisted in declaring miscegenous marriages "absolutely void," while the law continued for a time to penalize only white partners in such marriages.[118] The penalty for living together outside marriage, unlike that against interracial marriage, could apply to people of any race. The language of the postwar Code clearly permitted indictments against both partners in an interracial couple—and black couples as well as white couples—who lived together outside marriage, with potential fines ranging from $50 to $500. Authorities brought such charges and imposed such fines; perhaps they were particularly likely to do so when interracial couples came to their attention—and interracial couples were incapable of getting married to satisfy the law. The law in Virginia, however, in contrast to the law in Alabama, did not specify interracial cohabitation as a separate crime with more stringent penalties than single-race relationships.

Given the wartime carnage, white women of marrying age in Virginia faced a shortage of eligible white men in the early postwar years.[119] Meanwhile, emancipation greatly increased the number of Virginians whose marital relations were of interest to public officials. As early as 1866 and 1867, newspapers published reports of interracial relationships in Virginia. Together, such reports supplied evidence that some men and women sought to forge marriages across racial lines and that sometimes the law intervened. In 1867, newspapers reported that black preachers officiated when "a negro man married a so-called white woman" in Wytheville and when a freedman from Winchester joined in "an amalgamation marriage" with a white woman there. In Bedford County in 1868, the county clerk refused to

118. 31 VA. CODE ch. 192, §§ 8-9 (1873); 54 VA. CODE ch. 192, §§ 8-9 (1873); Wadlington, *supra* note 91, at 1195 n.48. With regard to the maximum imprisonment of twelve months for a "white person" who married a "negro," and the maximum fine of $100, the Code of 1873 specifically noted that "[a] similar penalty is not imposed on the negro." 54 VA. CODE ch. 192, § 8 (1873).

119. One the eve of the Civil War, females comprised 51 percent of white Virginians in their twenties; men comprised 51 of those in their thirties. 2 UNITED STATES CENSUS BUREAU, *supra* note 24, at 620. The 1870 census showed as many males as females below the age of twenty-one and again in the age-group 45-59. In between those two categories, by contrast, males were in a substantial deficit: only 47 percent of the 21-24 age-group, 46 percent among white Virginians ages 35-39 and 40-44, and not quite 45 percent in the 25-29 and 30-34 groups. *Id.* at 612-14. "Colored" Virginians, too, displayed a deficit of males in the age-groups from 21-24 through 40-44, *id.* at 652-55, so the enormous number of deaths of Civil War soldiers was not the only force at work to skew the sex ratios, but many white women—and perhaps black women, too—nonetheless had reason to downplay race in their quest for marriage partners. *See*, WILLIAMSON, *supra* note 18, at 89-90.

issue a marriage license to a black man, Henry Dunham, who intended to marry a white woman; when the clerk explained that Virginia law banned such a marriage, "Dunham became very indignant."[120] In 1870 a Smyth County court convicted a black preacher of officiating at the marriage of a black man and a white woman, fined him the mandated $200, and jailed him for four months.[121]

In 1868, a Richmond paper reported that "some of the Yankees who have come to this city since the close of the war have illustrated their belief in the doctrine of negro equality by marrying negro women."[122] It pointed to two examples of "white men from the North" marrying mixed-race women, marriages that were "solemnized," it seemed, in Washington, D.C., not Virginia.[123]

At the 1877-78 session, the Virginia legislature took stronger action against interracial marriages. An 1878 statute ended the lopsided nature of the Virginia prohibition on interracial marriage that had imposed criminal penalties only on the white partner, and it vastly increased those penalties. The 1860 Code had targeted the white partner alone. The penalties could be steep, or they could be nominal: confinement "in jail not more than one year" and a fine "not exceeding one hundred dollars."[124] The 1878 revision declared, instead, that "[a]ny white person who shall intermarry with a negro, or any negro who shall intermarry with a white person, shall be confined in the penitentiary not less than two nor more than five years."[125] Thus, the new law eliminated the cash fine, but it subjected whites and blacks alike to felony convictions. By the back door, Virginia had begun in this sense to apply equal protection. There was now a minimum penalty that exceeded the previous maximum, and the place of confinement was now the penitentiary, not the local jail.[126] The law retained the

120. ALRUTHEUS A. TAYLOR, THE NEGRO IN THE RECONTRUCTION OF VIRGINA 59 (1926).

121. *Id.* at 54-62. For other accounts see CHARLES E. WYNES, RACE RELATIONS IN VIRGINIA, 1870-1902, at 92-94 (1971), and SAMUEL N. PINCUS, THE VIRGINIA SUPREME COURT, BLACKS, AND THE LAW, 1870-1902, at 63-84 (1990).

122. TAYLOR, *supra* note 120, at 58.

123. *Id.* The newspaper accounts do not make it clear whether these couples had left Virginia to get married or had been married before they entered the state. Virginia laws could explain why the marriage ceremonies had taken place outside the state, though they did not explain any failure by authorities to prosecute the newlyweds—as they might have, for living together as a married couple though they had no valid marriage—when they came to Virginia. It may be that those mixed-race women were less than one-fourth black.

124. 54 VA. CODE ch. 196, § 8 (1860). The code of 1873 left all that alone. 54 VA. CODE ch. 105, § 8 (1873).

125. Act of 1878, ch. 7, § 8, 1878 Va. Acts 301, 302.

126. *Id.*

$200 fine against presiding ministers as well as the penalties of as much as a $500 fine and a year in jail for an offending court clerk.[127]

The same law closed another ancient loophole. It now applied to race what had previously applied to brother-sister and other same-race categories of marriages banned under state law:

> [I]f any white person and negro, shall go out of this state for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be as guilty, and be punished as if the marriage had been in this state. The fact of their cohabitation here as man and wife shall be evidence of their marriage.[128]

The rules against enduring sexual relationships across racial lines in Virginia, whether within marriage or not, were now fully developed. Under the statutes, the crime and the punishment alike showed little change from the late 1870s to the time of the Lovings.

VII. Interracial Couples and the Virginia Courts, 1877-1883

The nineteenth-century Virginia version of the story differed from Alabama's in two major ways. First, the Old Dominion's history betrayed no prewar time of a relaxed legal regime on matters of miscegenous marriage. Second, Virginia's Supreme Court never ruled against the constitutionality of the legislature's handiwork. The two states nonetheless resembled each other in that an important series of cases came before each state's high court between about 1877 and 1883.

In Alabama, as a rule, convictions were upheld: only one conviction was overturned, and that case involved a justice of the peace who had presided at an interracial marriage. In Virginia, though the law was clear and unyielding in principle, a number of appeals led to reversal of the trial courts' convictions. Thus, Alabama was more relaxed before 1865, and its high court actually declared antimiscegenation laws unconstitutional for a time during Reconstruction. Virginia, by contrast, though firmly opposed to interracial marriages from the late seventeenth century on, saw its high court relax the implementation of that ban under circumstances that judges found to appear uncertain. Despite these dissimilarities, by 1883 the major

127. *Id.* §§ 4, 9, at 302-03.

128. *Id.* at § 3. Such restrictions had appeared in Virginia law as early as 1818; a version from 1819 had applied language of that sort only to people "within certain degrees of relationship." Act of Feb. 25, 1818, ch. 18, 1818 Va. Acts 18, 19; Va. Code ch. 108, § 18 (1819).

questions in both states had been clearly resolved in favor of a highly restrictive racial environment on who could marry whom.

When cases arose in Virginia regarding race, sex, and marriage, the definition of the racial boundary could prove to be of central importance. *McPherson v. Commonwealth*[129] illustrates this. The case arose from events that occurred across the James River from Richmond in the city of Manchester, where Rowena McPherson and George Stewart faced charges of "living [together] in illicit intercourse." They were convicted and fined despite their insistence that they were legally married. The trial court determined that he was white but she was not. Thus, their marriage was not valid and could supply no shield in their defense.[130] A unanimous state supreme court, to the contrary, judged the facts to suggest that McPherson was not, in fact, "a negro." Her father was white (the court seems to have taken that as meaning he was 100 percent of non-African ancestry); her maternal grandfather was also white, and thus she was at least three-fourths white.[131] Because three-fourths white would leave her nonwhite in the eyes of the law at that time in Virginia, the case hinged on the racial ancestry of her maternal grandmother. If that grandmother had been entirely African, then McPherson was nonwhite, but otherwise she qualified as white. Testimony from the family stipulated that the mother of that grandmother—and thus McPherson's great-grandmother—was "a brown skin woman," "half-Indian."[132] Thus, the court concluded that "less than one-fourth" of Rowena McPherson's "blood" was "negro blood." And "[i]f it be but one drop less, she is not a negro."[133] Because she had, therefore, not married across race lines, the marriage was valid, so they were not guilty of the offense of which they had been convicted.[134]

A few years later, similar charges jeopardized the relationship of William H. Scott and Retta Jackson in Culpeper County.[135] Convicted in 1882 of "unlawful, lewd and lascivious associating and cohabiting" with Jackson, and fined $75, Scott appealed to the state's high court.[136] One of his grounds for appeal was that the indictment had been brought only against him and not also against Jackson. The court re-

129. 69 Va. (28 Gratt.) 939 (1877).
130. *Id.*
131. *Id.* at 940.
132. *Id.*
133. *Id.*
134. *Id.*
135. Scott v. Commonwealth, 77 Va. 344 (1883).
136. *Id.* at 345.

jected that argument and all the other arguments he mounted. Writing for the court, Judge Thomas T. Fauntleroy noted that "Scott, a *white* man, admitted that Jackson, a *colored* woman, was *his wife*; that they lived together; that he, Scott, admitted that Jackson's daughter was *his child*."[137] Other witnesses testified that Scott "carried her mail to her from the post-office," that "he familiarly associated with the woman, Jackson," and that "he live[d] with her as man and wife."[138] Thus, in this case, unlike McPherson's, the appeals court upheld the conviction. They had lived as husband and wife, and they had not denied that one was white and the other not. Even in the absence of racial considerations, the conviction could well have been sought and upheld, though—a critical distinction—two people of the same race had the option of marrying to avoid prosecution.

In another decison, also written by Judge Fauntleroy, the Virginia appeals court reversed the conviction of D'Orsay Jones for "lewd and lascivious cohabitation"—outside of marriage—with Kate Oliver.[139] Though he was black and she was white, the court's opinion does not even suggest a racial component.[140] And though they may have had sexual relations, the court took pains to insist that the offense charged in the indictment was for "lewdly and lasciviously associat[ing] and cohabit[ing] together," not fornication or adultery.[141] For the more serious charge to stick, there had to be "*cohabitation*" and it had to be "*lewd and lascivious*"; "[t]here must be a living together."[142] Yet, testimony had gone no farther than the "mere implication that he might possibly have had some intimacy with her," and "[t]he facts certified prove that he did *not* cohabit with her."[143] Thus, the court reversed the decision and remanded the case.

One Virginia case, related directly to the 1878 statute, soon developed in the federal courts.[144] Edmund Kinney, a black man, had married Mary S. Hall, a white woman, in Washington, D.C., in 1878. Then they returned to their home in Hanover County. Convicted of violating the 1878 statute against going out of state to get married, both parties were sentenced to five years of hard labor in the Virginia penitentiary. Kinney petitioned U.S. District Judge Robert W. Hughes for

137. *Id.* at 346 (emphasis in original).
138. *Id.*
139. Jones v. Commonwealth, 80 Va. 18 (1885).
140. PINCUS, *supra* note 121, at 73-74.
141. *Jones*, 80 Va. at 19.
142. *Id.* at 20.
143. *Id.* at 21.
144. *Ex parte* Kinney, 14 F. Cas. 602 (C.C.E.D. Va. 1879) (No. 7825).

a writ of habeas corpus.[145] Judge Hughes rejected all of the constitutional grounds advanced by Kinney. He declared that the Equal Protection Clause of the Fourteenth Amendment gave "no power to congress to interfere with the right of a state to regulate the domestic relations of its own citizens . . . ."[146] Judge Hughes continued:

> But even if it did require an equality of privileges, I do not see any discrimination against either race in a provision of law forbidding any white or colored person from marrying another of the opposite color of skin. If it forbids a colored person from marrying a white, it equally forbids a white person from marrying a colored. . . . In the present case, the white party to the marriage is in imprisonment as well as the colored person. I think it clear, therefore, that no provision of the [F]ourteenth [A]mendment has been violated by the state of Virginia in its prosecution of this petitioner.[147]

These and other cases demonstrated the operations of the law of freedom as it applied to miscegenous relationships in Virginia; but even before the 1878 law, the case of Andrew Kinney, a black man, and Mahala Miller, a white woman, supplied Virginia's major precedent.[148] By 1874, they had lived together long enough to have had three sons born since 1867. [149] Perhaps seeking to avoid charges of unmarried cohabitation, yet unable to find a preacher who would marry them in Virginia, they left their home in Augusta County in November 1874 and traveled to Washington, D.C., to get married. Then they returned to Augusta County. Though they were married according to the law of the nation's capital, they were viewed as unmarried by Virginia authorities, who then brought charges against Kinney for "lewdly associating and cohabiting" with Miller. After being convicted and fined $500, the maximum fine under the law, Kinney appealed the decision, first to the circuit court and then to the Virginia Supreme Court of Appeals. At trial, he claimed to have a valid marriage, and his attorney urged the trial judge to instruct the jury that the marriage was "valid and a bar to this prosecution."[150] To the contrary, the judge instructed the jury that the marriage was "but a vain and futile attempt to evade the laws of Virginia."[151] The question on appeal, simply put, was: Did the defendant have a valid marriage that gave him an effective defense against the charge he faced?

145. *Id.* at 603.
146. *Id.* at 605.
147. *Id.*
148. Kinney v. Commonwealth, 71 Va. (30 Gratt.) 858 (1878).
149. Manuscript population schedule, Census of 1880.
150. *Kinney*, 71 Va. (30 Gratt.) at 858-59.
151. *Id.* at 860.

Or, rather, was his living as though he were married precisely the basis for that charge? Was he married? Or was he guilty?

The decision of Virginia's high court remained the leading Virginia precedent when the Lovings confronted a similar situation. That court viewed Kinney's action as "a violation of [Virginia's] penal laws in this most important and vital branch of criminal jurisprudence, affecting the moral well being and social order of this state."[152] As to whether the law of Washington, D.C, or that of Virginia—"the *lex loci contractus* or the *lex domicilii*"—governed the case, Judge Joseph Christian, speaking for a unanimous court, declared: "There can be no doubt as to the power of every country to make laws regulating the marriage of its own subjects; to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying."[153] In this case, the "country" was Virginia, and Kinney was the "subject." Judge Christian reviewed the precedents, English and American. Only one case, which related to a marriage that took place in New England before the American Revolution, seemed to support Kinney. In that case, which also involved one black partner and one white, the couple had left Massachusetts, which banned such marriages, and gone to a neighboring colony, Rhode Island, which did not ban them. After their wedding ceremony, they returned to Massachusetts. The Massachusetts court had ruled, as Kinney now asked the Virginia court to rule, that a marriage, if valid "according to the laws of the country where it is entered into, shall be valid in any other country."[154]

Judge Christian rejected Massachusetts' position. If the ritual itself were at issue, the marriage should be recognized as valid. Kinney, however, faced a problem not of "forms" but of "essentials,"[155] and "*the essentials* of the contract depend upon . . . the law of the country . . . in which the matrimonial residence is contemplated."[156] As the judge noted,

> 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

152. *Id.* at 861-62.

153. *Id.* at 862.

154. Medway v. Needham, 16 Mass. 157, 158 (1819). The New England marriage had taken place at some time before 1770. The case arose in 1819 over which of two towns was responsible for maintaining them as aged paupers; the case gives the name of Ishmael Coffee, the black man, but not of his "supposed wife," a white woman. *Id.* at 159.

155. *Kinney*, 71 Va. (30 Gratt.) at 864.

156. *Id.* at 868.

> 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.[157]

What "God and nature" had sundered, let no man seek to bring together. The state of Virginia would not allow a marriage, such as the one Andrew Kinney and Mahala Miller had contracted, to persist—at least in Virginia. "If the parties desire to maintain the relations of man and wife, they must change their domicile and go to some state or country where the laws recognize the validity of such marriages."[158] The 1880 census nonetheless showed the Kinneys—now in their forties and the parents of five sons—still living together in Augusta County.[159]

As the courts wrestled with such questions—and, in particular, with the complicated matter of racial identity—individual Virginians' freedom remained in jeopardy, as a Montgomery County case illustrates. In February 1883, Isaac Jones obtained a license to marry Martha Ann Gray. The license listed both parties as "black." That month, Reverend Charles S. Schaeffer performed the marriage ceremony at "the colored Baptist church near Christiansburg," where Schaeffer, a former Freedmen's Bureau agent, had ministered since the 1860s.[160] All had perhaps gone well enough at first in the new couple's life, but then they were indicted in September 1883 for "feloniously" marrying across race lines—he "a negro" and she "a white person." Convicted in county court, he was sentenced to the penitentiary for two years and nine months, and she for the minimum two years. They appealed their convictions to the Montgomery County circuit court, which affirmed the decision of the trial court, and then to the state supreme court.[161] They asserted that the 1878 statute violated the U.S. Constitution,[162] and they denied that the statute applied to them. Jones claimed to be mixed-race and not "negro." Gray, who

157. *Id.* at 869.

158. *Id.* at 870.

159. Manuscript population schedule, *supra* note 149. A mixed-race family from Pittsylvania County—a white man, a nonwhite woman, and their two daughters—supplies an alternative story line. Martha Logan, who was born free, one-fourth black, and three-fourths white, and James Miliam maintained a monogamous extralegal relationship for fifty years beginning in the late 1850s. SARAH DELANY ET. AL., HAVING OUR SAY: THE DELANY SISTERS' FIRST 100 YEARS 28-35 (1993).

160. Jones v. Commonwealth, 79 Va. 213, 216-17 (1884) [hereinafter Jones I]; Ann S. Swain, Christiansburg Institute: From Freedmen's Bureau Enterprise to Public High School 25, 66-67 (1975) (unpublished M.A. thesis, Radford University).

161. Jones v. Commonwealth, 80 Va. 538, 541 (1885) [hereinafter Jones II].

162. *Id.* at 540.

"was accustomed to associate and attend church with the negroes," claimed to be mixed-race and not "white." The church pastor had testified that some "colored persons attending his church" were "whiter" than she.[163] Speaking on July 24, 1884, for a divided court, Judge Thomas T. Fauntleroy noted that Jones stood "convicted of a crime, not only against the law of Virginia, but against the just sensibilities of her civilization."[164] Yet, Judge Fauntleroy said that the State had failed to carry the burden of proof beyond a reasonable doubt. Thus, the appeals court reversed the couple's convictions and remanded their case to Montgomery County for a new trial.[165]

On August 3, within two weeks of the appeals court's reversal, the county court came to the same judgment it had the year before. The circuit court again confirmed that decision, and "the prisoners" again appealed. The following June, the state supreme court again reversed and remanded. Applying its reasoning from the 1877 *McPherson* decision, it rejected Isaac Jones's contention that the statute did not apply to mixed-race Virginians but insisted nonetheless that the law applied only to people at least one-fourth black. What was his racial status under the law? What, for that matter, was hers? The court could not tell.[166] This time, again with Judge Drury A. Hinton dissenting, Judge Benjamin Watkins Lacy wrote:

> The charge against Isaac Jones is, that he is a negro, and that being a negro he was married to a white woman. To be a negro is not a crime; to marry a white woman is not a crime; but to be a negro, and being a negro, to marry a white woman is a felony; therefore it is essential to the crime that the accused shall be a negro—unless he is a negro he is guilty of no offence.[167]

Jones had both European and African ancestry, and the crucial question was how much of each. The prosecution, however, had developed

> no evidence of his parentage except that his mother was a yellow woman. If his mother was a yellow woman with more than half of her blood derived from the white race, and his father a white man, he is not a negro. If he is a man of mixed blood he is not a negro, unless he has one-fourth at least of negro blood in his veins, and this must be proved by the commonwealth as an essential part of the crime, without which it cannot exist.[168]

163. *Id.* at 541-42.
164. *Jones I*, 79 Va. at 216.
165. *Id.* at 219.
166. *Jones II*, 80 Va. at 541-44.
167. *Id.* at 542.
168. *Id.* at 544.

Because, Lacy wrote, "every accused person is to be presumed to be innocent until his guilt is proved, this person must be presumed not to be a negro until he is proved to be such."[169] Two years and three months after their wedding, the couple's freedom to live together as husband and wife—and out of prison for doing so—remained in the hands of the Virginia courts.

The politics of judicial recruitment had some bearing on the way in which southern appellate courts handled such miscegenation cases as came before them. The period of greatest uncertainty and greatest fluidity came in the 1870s, when the new constitutional dispensation still offered the possibility that the Fourteenth Amendment controlled state action on the subject. Republican judges sat on the Alabama Supreme Court for a time, and the only example of a nineteenth century court overturning a conviction for violating an antimiscegenation statute came at that time.[170] When Democrats resumed control of the Alabama court, a new approach to the Fourteenth Amendment, one that narrowed it to the vanishing point, quickly took shape.

The story in Virginia, an Upper South state, differed a bit. The constitutionality of antimiscegenation laws did not give Virginian judges much pause, and there was no anomalous anti-antimiscegenation ruling to ignore, explain away, or reverse. Not until 1877 did the supreme court of Virginia hand down a ruling on miscegenation, and it employed that state's one-fourth definition of a person of color to overturn a conviction. But Reconstruction came late to Virginia; the court that ruled on miscegenation cases for a period beginning in 1883 was appointed by a legislature controlled by Readjusters, a biracial coalition that proved more latitudinarian in its definition of racial equality.[171] Thus, it can be surmised that when Judge Fauntleroy spoke for the court, he spoke in a way that pushed the envelope about as far as could be done in 1880s Virginia, particularly when the consti-

169. *Id.* at 544-45.

170. The second time an American court ruled an antimiscegenation statute unconstitutional came in California in 1948. Perez v. Sharp, 138 P.2d 17 (Cal. 1948). For a full history see Martyn, *supra* note 3.

171. Peter Wallenstein, *'These New and Strange Beings': Women in the Legal Profession in Virginia, 1890-1990*, 101 VA. MAG. HIST. & BIOGRAPHY 199-200 (1993); Jack P. Maddex, Jr., *Virginia: The Persistence of Centrist Hegemony, in* RECONSTRUCTION AND REDEMPTION IN THE SOUTH 113, 146-50 (Otto H. Olsen ed., 1980). Jane E. Dailey, Race, Sex, and Citizenship: Biracial Democracy in Readjuster Virginia, 1879-1883, at 203-16, 224-46 (1995) (unpublished Ph.D. dissertation, Princeton University), analyzes the relationship between postwar Virginia politics and whites' fears of miscegenation. Angered at the racist symbolism and concerned at the practical pitfalls, black Readjusters in the legislature sought repeal of the new antimiscegenation law, but white Readjusters refused to support the effort. *Id.* at 226-28.

tutional argument appeared to have played out in 1883, the same year that the Readjuster judges took their seats.

Either way, in the 1870s or the 1880s, the latitudinarian interlude, such as it was, proved brief. Particularly after the U.S. Supreme Court gave its approval to antimiscegenation laws, the Fourteenth Amendment proved ineffective, and the antimiscegenation statutes endured. What might not have been predicted was that what followed in the first half of the twentieth century was a more rigid, more exclusive racial regime than the late-nineteenth century paraded.

VIII. TOWARD GREATER EXCLUSION: THE 1910S AND 1920S

Regarding race, sex, and marriage, the law of freedom in both Alabama and Virginia had largely concluded its development by the early 1880s. It congealed in its 1880s form and, for the most part, stayed that way well into the 1960s.[172] The most significant change—which occurred at about the same time in both states—made the law more restrictive, not less.

Under Alabama law, beginning with the Code of 1852, a "mulatto" was a mixed-race "negro" who had "descended . . . from negro ancestors, to the third generation inclusive, though one ancestor of each generation may have been a white person."[173] That definition persisted into the twentieth century, but then it was tightened. Regarding racial attitudes among white southerners, historian Joel Williamson has written of a growing horror at the specter of "invisible blackness" and a growing "passion for racial purity."[174] He concludes that "[t]he animus against miscegenation and mulattoes seemed to reach a crescendo in the South about 1907,"[175] and indeed the "third generation" definition of mulatto persisted in Alabama only until the Code of 1907, which changed it to reach the fifth generation.[176] Thus, the one-eighth fraction of the previous half-century was abandoned in favor of one part in thirty-two.

Meanwhile, however, the definition for purposes of determining miscegenation remained at one-eighth.[177] In 1927, the Alabama legis-

172. For a survey of miscegenation cases in Alabama, Virginia, and indeed all the other states, see Martyn, *supra* note 3.

173. ALA. CODE § 4 (1852).

174. WILLIAMSON, *supra* note 18, at 103-08.

175. *Id.* at 94.

176. The Code notes: "'Fifth' substituted for 'third' by Code Committee." ALA. CODE § 2 (1907).

177. ALA. CODE § 7421 (1907). As late as the mid-1920s, therefore, as the Alabama Court of Appeals observed, "In the sense . . . that it is criminal for an octoroon and a white person to

lature—white legislators representing white constituents—moved aggressively to change the racial boundary and apply the new definition to marriage. One 1927 law made the definition of a white person in Alabama more exclusive than ever before. Scrapping the one-eighth rule, scrapping even the one-thirty-second rule, it stipulated that a "negro" was a person "descended on the part of the father or mother from negro ancestors, without reference to or limit of time or number of generations removed."[178] Another statute applied the new language to miscegenation. "If any white person and any negro, or the descendant of any negro intermarry, or live in adultery or fornication with each other, each of them must, on conviction, be imprisoned in the penitentiary for not less than two nor more than seven years."[179] In 1927, at last, the Alabama legislature had completed its work in defining the races and in banning marriage between them. Marital Apartheid in Alabama had been fully realized.

Meantime, the Virginia legislature, too, had been at work. A 1910 law redefined the races by adjusting the boundary that separated white from black. The new law left the definition of an Indian unchanged—"every person not a colored person" who had "one-fourth or more of Indian blood." But from then on, the statute insisted, "Every person having one-sixteenth or more of negro blood shall be deemed a colored person. . . ."[180]

Virginia echoed Alabama in shifting by two generations the minimal requirements for being defined as white. At about the same time that Alabama moved from a one-eighth fraction to one-thirty-second, Virginia's quest for racial purity took it from a one-fourth fraction to one-sixteenth. Under the nineteenth-century rule of one-fourth, three full-blooded white grandparents sufficed to make a person white only if the fourth grandparent were part Indian or part white. Under a

intermarry, an octoroon is a negro." Weaver v. State, 116 So. 893, 895 (Ala. Ct. App. 1928). Someone one-eighth black could not marry a "white person" without becoming subject to a felony conviction, but a fraction black less than one-eighth put the couple beyond the reach of the antimiscegenation statute: "After the limit of the octoroon is passed, there can be no prosecution, although the marriage is not legal." *Id.*

178. Act of Sept. 6, 1927, No. 626, § 5, 1927 Ala. Acts 716, 717. One outcome was a court decision that some students, though formerly defined as white, would now have to go to the local black school. State *ex rel.* Farmer v. Board of Sch. Comm'rs, 114 So. 575, 576 (Ala. 1933). For a discussion of the emergence and implications of the "one drop rule" in the United States, see F. JAMES DAVIS, WHO IS BLACK? ONE NATION'S DEFINITION (1991).

179. Act of Aug. 2, 1927, No. 214, 1927 Ala. Acts 219 (amending § 5001 of the Code of 1923). The editor of the Alabama Code of 1940 noted that one drop of negro blood seemed to be sufficient to create the offense of miscegenation, when there is marriage, adultery or fornication.

180. Act of Mar. 17, 1910, ch. 357, § 49, 1910 Ala. Acts 581 (amending and reenacting § 49 of Virginia Code, 1887).

one-eighth rule, seven of eight great-grandparents would have been required in addition to whatever margin the eighth could offer. Now fifteen white great-grandparents out of sixteen would fail to satisfy the definition of a white person unless the sixteenth could help out by being part white. The intent, of course, was to make the definition of a white person more exclusive, making it ever more difficult for a person of both African and European ancestry to qualify for marriage to someone who satisfied the more rigid requirement as a white person.[181]

The practical significance of Virginia's new law could be confounding and threatening. A mixed-race person who, under the previous law, could marry only a white person—barred from marrying a "colored person" under penalty of indictment for a felony—could now marry only another person of color and, if marrying a white person, would be subject to prosecution for that choice. Two mixed-race people who, under the previous dispensation, might have legally married each other as white people (if, for example, each were seven-eighths European and one-eighth African), might now marry each other just as legally as nonwhite people. Finally, two mixed-race Virginians who could not have married across the previous barrier—for example, if one had one-fourth and the other only one-eighth African ancestry—might now legally marry each other. Genealogical tests to determine who could marry whom had taken on even greater complexity than in the past.

Even the Supreme Court of Appeals may have suffered confusion under the 1910 law.[182] A white woman, Lucy May, had married a white man, I. B. Grasty, and borne two white children, Madeline and Ruby. After Grasty died, she and John Moon went to Washington, D.C., and married there. Moon was one-sixteenth African; he qualified as "white" under the "one-quarter rule" but could not meet the new racial standard. Authorities subsequently challenged her right to retain custody of her children; now that she was involved in an interracial marriage, the children would be associating with "persons of mixed blood" and "would be deterred from association with gentle people of white blood."[183] The trial court ordered their removal to the Children's Home Society, which was required by law to take into custody all children found to be living in "vicious or unsalutary sur-

181. Regarding twentieth-century definitions of race for purposes of regulating marriage, see Paul Finkelman, *The Color of Law*, 87 Nw. U. L. REV. 937, 955 n.96 (1993).

182. Moon v. Children's Home Soc'y of Virginia, 72 S.E. 707 (Va. 1911).

183. *Id.* at 741.

roundings."[184] Speaking for a unanimous state supreme court, Judge John Alexander Buchanan recognized and reported all this but declined to recognize that the case at hand might meet that standard. He overruled the trial court and left the children with their mother. As Judge Buchanan concluded his opinion, "It is not pretended in this case that the step-father was a colored person within the meaning of our statute, or that he and the mother of the children were guilty of any crime in intermarrying, or were not persons of good character."[185]

After the 1910 statute, the Virginia legislature further redefined race in the Old Dominion. In 1924 it passed "[a]n act to preserve racial integrity" that, with racial intermarriage in mind, required all Virginians to register their racial identities with a local registrar as well as with the state registrar of vital statistics. The process was cumbersome and designed to be fail-safe. Any trace of nonwhite ancestry whatever meant that a person was defined as nonwhite and thus incapable of marrying someone who still qualified as white. The sole exception related to the Pocahontas defense, the fact that a number of "white" Virginians had long admitted, even celebrated, their descent from the seventeenth-century union between Pocahontas and John Rolfe. Any otherwise white Virginian, if possessing no more than one-sixteenth Indian ancestry—and no African ancestry—would still qualify as a "white person."[186]

The 1924 statute did not specify any races other than "white," "negro," and "Indian." Legislators' central concern, after all, related to European and African ancestry, but the exclusive language also brought Asians into the binary world of Virginia's racial laws, and it placed Asians on the nonwhite side of the racial boundary. Thus, a "white" person and someone of Asian birth or ancestry could no longer marry each other under Virginia law.[187] This aspect of the new law led to litigation in the 1950s and early 1960s.

The 1924 law redefined race as it related to marriage but otherwise left interracial marriage as it had been since 1878, a crime carrying a penitentiary sentence of two to five years. The 1932 legislature changed that, by declaring the crime a felony with a penitentiary sen-

184. *Id.*

185. *Id.* at 708.

186. Act of Mar. 20, 1924, ch. 371, § 5, 1924 Ala. Acts 534, 535 (preserving racial integrity).

187. *See* Wadlington, *supra* note 91, at 1200-03. If Virginia was not intentionally targeting Asians in 1924, Congress that year certainly was in the Immigration Act of 1924, which has also been called the Oriental Exclusion Act. *See* DAVID M. REIMERS, STILL THE GOLDEN DOOR: THE THIRD WORLD COMES TO AMERICA 4-7 (1985).

tence of one to five years.[188] The new minimum sentence remained in effect when the Lovings encountered it in 1959.

IX. ALABAMA AND VIRGINIA FROM THE 1920S THROUGH THE 1940S

Alabama produced more antimiscegenation litigation than any other American state in the first half of the twentieth century.[189] This appears to have resulted less from a greater incidence of miscegenation in that state than from a combination of zealous prosecution by authorities and eager conviction by juries.[190] A number of people appealed their convictions, and as often as not, the state appeals courts—the Alabama Supreme Court or the Court of Appeals (a twentieth-century appellate court below the Alabama Supreme Court)—reversed the convictions and remanded the cases on grounds of insufficient evidence or flawed procedures.[191] Frequently, however, the appeals courts sustained the convictions, and surely many were never appealed.

During that period, moreover, the appeals courts maintained constructions of Alabama's antimiscegenation laws that fostered convictions. In affirming a conviction in *Lewis v. State*, for example, the Court of Appeals observed, "As has been stated many times before," no testimony was required by witnesses who had seen the defendants "actually engage in sexual intercourse"; all that was required was that the jury be "satisfied beyond a reasonable doubt that there was an act of sexual intercourse and an agreement between the parties, either express or implied, that they would continue the relation when the occasion offered or they so desired."[192] Yet, the court did hold to that standard, as when it reversed the conviction of Alexander Markos, "a Greek woman," where the prosecutor had insisted in court, and the judge had agreed, that "[t]he only issue is whether or not he [Markos' co-defendant] had intercourse with this woman and whether or not she is a white woman and he is a negro."[193] The Court of Appeals insisted instead that there be evidence of "cohabitation,"

> some living together in a state of adultery or fornication. Just one act, or [even] the occasional act, without the intention to live to-

188. Act of Mar. 2, 1932, ch. 78, 1932 Va. Acts 68 (amending and re-enacting § 4546).
189. Martyn, *supra* note 3, at 1093.
190. *Id.* at 1093, 1126, 1129.
191. *See id.* at 952-55, 1093-1100, 1124-35.
192. Lewis v. State, 89 So. 904, 905 (Ala. Ct. App. 1921).
193. Jackson v. State, 129 So. 306, 306-07 (Ala. Ct. App. 1930).

> gether in a state of adultery or fornication, would not make out the offense. It is a question of intention. One act would be sufficient if they intended to live together, but there must be some evidence to show that.

In this case, the evidence showed the opposite.[194]

The appeals courts even tightened the application of the Alabama statutes. In the 1920s, the prevailing rule held that, in a miscegenation trial, if the jury acquitted one defendant, it must acquit the other as well, as the Court of Appeals held in *Reed v. State*.[195] In *Jackson v. State*, the court retained that rule, which embodied the spirit of "equal" treatment that the supreme courts of both Alabama and the United States had articulated in the 1880s in *Pace v. Alabama*: the offense "is necessarily the act of two persons, and, on the trial of both, a verdict of guilty as to one only cannot be sustained, . . . for from the very nature of the offense charged both defendants are equally guilty or equally innocent."[196] But in a later decision, *Bailey v. State*, the Alabama Supreme Court overruled *Reed* by holding that one defendant could be convicted even though the other was acquitted.[197]

In Virginia in the 1930s and 1940s, though apparently far less often than in Alabama, the courts intervened to prevent couples deemed interracial from living as husband and wife. The binary world of two racial categories sometimes led to disputes as to who belonged in which category. Rowena McPherson's marriage, like Isaac Jones's, proved to be far from the only case of a Virginia couple in which the racial identity of at least one partner was resolved in the courts. But indictment did not necessarily lead to conviction, or at least one that could be sustained on appeal. And people convicted in twentieth century Virginia, unlike those in Alabama, were often permitted to escape imprisonment.

The Virginia Supreme Court of Appeals decided one such case in 1935. Bascomb Keith had married Reda Baker in Russell County. Both had identified themselves as white at the time of their marriage. Then, on the charge that Keith had "traceable colored blood," both were indicted, convicted, and sentenced to the penitentiary for the crime of marrying across race lines. The genealogical exercise at issue purported to identify a man named Pat Keith as a person of color who

194. *Id.* at 307.
195. Reed v. State, 103 So. 97 (Ala. Ct. App. 1925).
196. *Jackson*, 129 So. at 306-07.
197. Bailey v. State, 193 So. 871 (Ala. Ct. App.); *aff'd*, 193 So. 873 (Ala. 1939).

was Bascomb Keith's maternal grandfather. The state's high court overturned the convictions:

> As in all criminal trials, the burden in this case was upon the Commonwealth to prove beyond a reasonable doubt that Pat Keith had negro blood and also that he was the grandfather of the accused, Bascomb Keith. . . . The cases are remanded to the lower court with directions to dismiss the indictments unless the Commonwealth can produce other and stronger evidence.[198]

On occasion in the 1930s and the 1940s, as before, other cases alleging interracial marriages came before the lower courts of Virginia. Such cases, because they were not appealed, cannot be traced by resorting to the reported cases that reached the state's highest court, but they nonetheless occurred. Three cases illustrate how the law of race and marriage operated in Virginia in the late 1930s and 1940s.

A 1938 case that arose in Fincastle, Virginia, offers one example. In 1937, Grace Mohler, age 19, married Samuel Christian Branaham, age 26. Both were later indicted for violating the state's ban on interracial marriages. She escaped conviction when she testified that she had not known that he was of African descent. He testified that he was not of mixed race, but other testimony contradicted him. Some witnesses stated that his family "came from Amherst County, where they lived to themselves, even today, and were colloquially known as 'issues.'"[199] The sheriff from Amherst County, A. B. Watts, informed the court that the Branahams "of his county once were forced out of membership in a white church because they were of Negro extract."[200] And birth certificates for some of Branaham's alleged kinsmen designated them as nonwhite. Clearly Branaham had considerable European ancestry—perhaps enough to have met the nineteenth-century definition of white—but that could offer no support to his claim in 1938 to be exempt from the ban.

Judge Benjamin Haden declared Branaham to be black, not white, and imposed a one-year prison sentence, the shortest possible under the law. Then the judge suspended that sentence but "stipulated the suspension was to be for 30 years, revocable at any time during that period should he again live with the woman he married or marry another white woman."[201] Thus, as one newspaper account put

198. Keith v. Commonwealth, 181 S.E. 283, 283-84 (Va. 1935).
199. *Ruled a Negro, Man Must Quit White Wife*, RICHMOND TIMES-DISPATCH, June 8, 1938, at 1.
200. *Id.*
201. *Id.*

it, having been "adjudged a Negro," Samuel Branaham was ordered "never again to live with the pretty young white woman he married here a year ago under penalty of serving a year's suspended sentence."[202]

Another case that arose in western Virginia is equally illuminating. Clark Council Hamilton and Florence Madelon Hammond obtained a marriage license in Salem on May 22, 1948. The pastor of the Riverdale Baptist Church, Rev. K. A. Painter, married them the same day. Hamilton claimed to be 22 years old and a native of California. Hammond, a "19-year-old country girl," and he each claimed to be white.[203] They lived "in a white section of Roanoke for about two months before moving to Baltimore."[204] In November, the bride's mother obtained a warrant for the groom's arrest for the felony of breaking Virginia's law against interracial marriage, and in December her father filed a suit for annulment of the marriage.

By late December, Hamilton had been brought back to Roanoke County, the scene of the alleged crime, from his new home in Maryland. Meanwhile, back in Baltimore, his wife, who continued to work in a store there, answered all questions with "what do you want to know for?"[205] Hamilton, never having requested bond, stayed in jail until his trial on March 4. At that time, the Virginia prosecutor claimed to have obtained a birth certificate for Hamilton that showed him to be a 20-year-old native of Alabama whose race was listed as "colored." Hamilton pled guilty and received a three-year suspended prison sentence. Circuit Court Judge T. L. Keister asked whether he planned to leave Virginia and was told "as soon as possible." The newspaper reported that "the short, light-skinned Negro," when his sentence was suspended "on good behavior," "left immediately, presumably for Baltimore."[206]

Hammond, having reported marrying Hamilton "without doubt that he was white," for that reason (like Grace Mohler) escaped being charged for the same crime. Under Virginia law, she nonetheless had no valid marriage. If she and he were to be husband and wife in an-

202. *Id.*

203. *Miscegenation Case Defendant Fails to Make Bond Request*, RICHMOND TIMES-DISPATCH, Dec. 30, 1948, at 5 [hereinafter *Miscegenation Case Defendant*].

204. *Salem Court Suspends Term of Negro, 20, on Race Count*, RICHMOND TIMES-DISPATCH, Mar. 5, 1949, at 3 [hereinafter *Court Suspends Term of Negro*].

205. *Miscegenation Case Defendant*, *supra* note 203, at 5.

206. *Court Suspends Term of Negro*, *supra* note 204, at 3.

other state than Virginia, they would likely have to have another ceremony there first.[207]

Sometimes—one time, at least—charges were brought that did not stick. Was Willie E. Purcell white or black? A 33-year-old truck driver living in Richmond, he married Stella May Rhoton, white, in Richmond City Hall on December 31, 1948. The bride's mother, Ada Rhoton, charged that he was black and that he had thus broken the statute against miscegenation. Mrs. Rhoton had been excluded from the wedding—her daughter, in obtaining the marriage license, had said she was 21, she was born in Tennessee, and her parents were dead. In fact, she was 18, born in Scott County, Virginia, and her mother was very much alive in South Richmond. Charges were pending against the daughter for perjury. But what of Mrs. Rhoton's charge against her putative son-in-law? At a trial in Police Court, the evidence was mixed. An unspecified number of police records appeared evenly divided as to Purcell's race, with "about half" listing him as black and half as white. Much more conclusive were his Army discharge papers, which indicated that he was white; his birth certificate, which listed both of his parents as white; and his father's testimony that both he and Purcell's mother were white. Judge Harold C. Maurice dismissed the case.[208] The law would still deal with the bride, who in turn would have to deal with her mother. But in this case, the law would not separate the newlyweds on racial grounds.

X. JACKSON AND NAIM: ALABAMA AND VIRGINIA IN THE 1950S

In 1878, in the *Green* case, Justice Manning had pointed to two criteria that drove the state of Alabama, under white control, to mandate antimiscegenation policies—"the relative proportions and condition of the two races." By 1950, the black percentage of Alabama's population had dropped from 48 percent to 32 percent and was still declining. Similarly, census data indicated that the nonwhite proportion (however defined) of Virginia's population dropped from 42 percent in the 1870s to 22 percent in 1950.[209] In both states, of course, slavery receded ever farther into the past. But the policy of prohibiting interracial marriages persisted, along with its enforcement.

207. *Id.*

208. *Miscegenation Charge Here is Dismissed*, RICHMOND TIMES-DISPATCH, Feb. 4, 1949, at 2.

209. THE ENCYCLOPEDIA OF SOUTHERN HISTORY, *supra* note 22, at 31, 1295.

As late as the 1950s, miscegenation cases continued to come before the Alabama Court of Appeals, and they demonstrated the continuing impossibility of securing change in the courts. A black woman named Linnie Jackson was convicted for her miscegenous relationship with a white man named A. C. Burcham. E. B. Haltom, Jr., her lawyer, relying on a long train of twentieth-century civil rights decisions from the U.S. Supreme Court, challenged the proceeding on Fifth and Fourteenth Amendment grounds. Nonetheless, the Alabama Court of Appeals surveyed the history of decisions in miscegenation cases in the Alabama courts, declared that the nation's high court had affirmed the *Pace* decision, and noted that "the decisions of the [Alabama] Supreme Court shall govern the holdings and decisions of this court." It upheld her conviction.[210]

Jackson did not give up. She took her case to the Alabama Supreme Court, which rebuffed her as well,[211] and then to the U.S. Supreme Court. There she found that the justices were by no means eager to push an equal-rights agenda on the matter of miscegenation. Focused as they were on the school segregation cases that had been decided in 1954, they recognized that, were they to take on miscegenation, they might only get in their own way.[212] The first decision announced in *Brown v. Board of Education* came in May 1954; the second, implementing decision came in May 1955. Linnie Jackson's case came to the Court in between those two dates.[213]

Early writers surmised that, as one put it, though "[t]here is no doubt that these statutes are unconstitutional," "the Court, or at least some of its Justices, did not believe that airing this inflammatory subject, of little practical significance, would be in the public interest while strident opposition is being voiced to less controversial desegregation because it allegedly leads to intermarriage."[214] The papers of various Supreme Court justices now make it clear that such speculations were exactly right.

Harvey M. Grossman, law clerk to Justice William O. Douglas, expressed his conflicted response when advising his boss on the *Jack-*

210. Jackson v. State, 72 So.2d 114 (Ala. Ct. App.), *cert. denied*, 72 So.2d 116 (Ala. 1954).
211. *Id.*
212. *Id.*
213. *Id.*; Jackson v. Alabama, 348 U.S. 888 (1954); Brown v. Board of Educ., 347 U.S. 483 (1954); Brown v. Board of Educ., 349 U.S. 294 (1955). For more detailed analysis see Chang M. Sohn, Principle and Expediency in Judicial Review: Miscegenation Cases in the Supreme Court, 70-73 (1970) (unpublished Ph.D. dissertation, Columbia University); and Martyn, *supra* note 3, at 1247-49.
214. JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW 345 (1959). *See also* WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 192-93 (1964).

son case. "It seems clear that the statute involved is unconstitutional," he wrote on November 3, 1954. And yet, he continued,

> review at the present time would probably increase the tensions growing out of the school segregation cases and perhaps impede solution to that problem, and therefore the Court may wish to defer action until a future time. Nevertheless, I believe that[,] since the deprivation of rights involved here has such serious consequences to the petitioner and others similarly situated[,] review is probably warranted even though action might be postponed until the school segregation problem is solved.[215]

Later that month, the Supreme Court dodged the bullet. With no indication of dissent, it denied certiorari.[216] Seven decades had elapsed from one miscegenation case to another before the Court, and nothing, it seemed, had changed. The precedent, such as it was, in *Pace* remained intact. Linnie Jackson went to the penitentiary. And the next year, the Court dodged another such case, one that came from Virginia.[217]

On June 26, 1952, Ham Say Naim, a Chinese sailor, married a white woman from Virginia in Elizabeth City, North Carolina. That state, unlike Virginia, permitted marriages between Caucasians and Asians, though not between whites and blacks.[218] For some months the Naims made their home in Norfolk, Virginia. Then they separated. On September 30, 1953, Ruby Elaine Naim filed a petition seeking annulment on grounds of adultery, and if that effort failed, she asked that an annulment be granted on the basis of Virginia's ban on interracial marriages.[219]

Judge Floyd E. Kellam of the Portsmouth Circuit Court knew an easy case when he saw one. Here was a marriage between a white

215. Memorandum from Harvey M. Grossman, law clerk, to Justice William O. Douglas (Nov. 3, 1954) (on file with Justice William O. Douglas Papers, Box 1156, Library of Congress). For a related observation that, given the furor in the South over *Brown v. Board of Education*, "the last thing in the world the Justices wanted to deal with at that time was the question of interracial marriage," see Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 845-47 (1987).

216. *Jackson*, 348 U.S. 888.

217. Naim v. Naim, 350 U.S. 891 (1955); Naim v. Naim, 350 U.S. 985 (1956); Sohn, *supra* note 213, at 73-94.

218. The North Carolina state constitution, a relic of Reconstruction, retained an 1875 amendment declaring that "All marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation, inclusive, are hereby forever prohibited." N.C. CONST. of 1943, art. XIV, § 8. The North Carolina Code applied the ban to people one-eighth Native American as well, but the legislature had never reached beyond those groups in the way that Virginia, by implication, had beginning in 1924. N.C. Code of 1943, ch. 51, art. 1, §§ 51-53.

219. *Racial Intermarriage Case Faces High Court*, RICHMOND TIMES-DISPATCH, Oct. 7, 1964, at 2; *State's High Court Spurns U.S. Order*, RICHMOND TIMES-DISPATCH, Jan. 19, 1956, at 1.

person and a nonwhite. The couple had gone to North Carolina in order to evade the Virginia law. Of course, the marriage was void and he granted the annulment.[220]

Now it was Mr. Naim's turn to go to court. On the basis of his marriage to an American citizen, he had applied for an immigrant visa, and unless he remained married he could not hope to be successful. His immigration attorney, David Carliner, had his own reasons for challenging the constitutionality of Virginia's antimiscegenation statute. He and Naim mounted a test case. They challenged the circuit court's decision on the grounds that the Fourteenth Amendment overrode the Virginia statute.[221]

Speaking for a unanimous Virginia Supreme Court of Appeals, Justice Archibald Chapman Buchanan relied on the Tenth Amendment to fend off the Fourteenth. "Regulation of the marriage relation," he insisted, "is . . . distinctly one of the rights guaranteed to the States and safeguarded by that bastion of States' rights, somewhat battered perhaps but still a sturdy fortress in our fundamental law, the tenth section of the Bill of Rights."[222]

What about *Brown v. Board of Education* and its incantation of the Equal Protection Clause? No problem, Justice Buchanan assured Virginia authorities. "No such claim for the intermarriage of the races could be supported; by no sort of valid reasoning could it be found to be a foundation of good citizenship or a right which must be made available to all on equal terms."[223] He could find nothing in the U.S. Constitution, he wrote, that would "prohibit the State from enacting legislation to preserve the racial integrity of its citizens, or which denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens."[224] Rather than promote good citizenship, he suggested, "the obliteration of racial pride" and "the corruption of blood" would "weaken or destroy the quality of its citizenship."[225]

220. *Virginia Ban on Racial Intermarriages is Upheld*, RICHMOND TIMES-DISPATCH, June 14, 1955, at 5.

221. Sohn, *supra* note 213, at 73-88.

222. Naim v. Naim, 87 S.E.2d 749, 755 (Va. 1955). Since 1928, members of Virginia's state supreme court have carried the title "Justice" rather than "Judge" and "Chief Justice" rather than "President." VA. CONST. art. VI, § 88 (amended June 19, 1928). In 1971, Virginia's Supreme Court of Appeals was renamed the Virginia Supreme Court. VA. CONST. of 1971, art. VI, § 1.

223. *Naim*, 87 S.E.2d at 754.

224. *Id.* at 755.

225. *Id.*

Refusing to give up, Naim appealed to the U.S. Supreme Court. Unfortunately for Naim, his case came to the Supreme Court only one year after *Jackson*, and the Court was no more eager to confront the issue then than it had been the year before. John Marshall Harlan, a recent appointee to the nation's high bench, brought a tormented mind and a tortured prose to the task of writing a formal statement that he wished to read in conference on November 5, 1955, regarding the case from Virginia. He spoke of "moral considerations," which he proceeded to identify as "of course, those raised by the bearing of adjudicating this question to the Court's responsibility in not thwarting or seriously handicapping the enforcement of its decision in the segregation cases."[226] He felt certain, he said, that every member of the Court agreed with him that "to throw a decision of this Court other than validating this legislation into the vortex of the present disquietude would . . . seriously, I believe very seriously, embarrass the carrying out of the Court's decree of last May."[227]

The Court neither accepted nor refused the case. Rather, it sent the case back to Virginia. Determining the record insufficiently clear or complete to address the question Naim raised, it directed the Virginia Supreme Court of Appeals to remand the case to Portsmouth for further proceedings.[228] But that state's highest court refused to cooperate with the high court's request—or, rather, it acted to help the high court out of its dilemma. It remonstrated that

> the record before the Circuit Court of the City of Portsmouth was adequate for a decision of the issues presented to it. The record before this court was adequate for deciding the issues on review. . . . The decree of the trial court and the decree of this court affirming it have become final so far as these courts are concerned.[229]

The Virginia statutes were sound, the Naims' marriage was void, and the Virginia courts' decisions were final, said the court.

> We have no provision either under the rules of practice of this court or under the statute law of this Commonwealth by which this court may send the cause back to the Circuit Court with directions to reopen the cause so decided, gather additional evidence and render a new decision. Indeed, such action would be contrary to our fixed rules of practice and procedure and our statute law.[230]

226. Memorandum from Justice Harlan to other Supreme Court Justices (Nov. 4, 1955) (John Marshall Harlan Papers, Box 11, Mudd Library, Princeton University).

227. *Id.*

228. Naim v. Naim, 350 U.S. 891 (1955).

229. Naim v. Naim, 90 S.E.2d 849, 850 (Va. 1956).

230. *Id.* (internal citations omitted).

The *Richmond Times-Dispatch* published an editorial about the standoff. While acknowledging that the Virginia court had "used some rather tart language in refusing to comply," it insisted nonetheless that "the Virginia court has not defied the nation's highest tribunal." Rather, the paper noted that the state court had simply declared that "it had *no* legal means of conniving with the Federal court's order." Noting many Virginians' displeasure with the Supreme Court's recent rulings on segregation, the editorial observed that those "[m]any Virginians . . . also applaud the Virginia court in rebuffing the Federal court's attempt to operate in an area of State affairs over which it has no jurisdiction."[231]

Naim took his case back to the Supreme Court, but there it died. The Court simply noted that the response of the Virginia Supreme Court of Appeals "leaves the case devoid of a properly presented Federal question." The Virginia court had helped take the U.S. Supreme Court off the hook.[232] No judicial reconsideration took place in the 1950s regarding Alabama's or Virginia's antimiscegenation laws.

During the interlude between the *Naim* and *Loving* cases, another case regarding interracial marriage went to trial and then to Virginia's highest court. In 1962, the Virginia Supreme Court upheld a lowercourt ruling that a white woman and a Filipino man ("a member of the Malayan race") who had been married in New Jersey had no valid marriage in Virginia, and thus could not obtain a divorce in that state.[233] A member of the U.S. armed forces, Cesar Calma had relocated to Virginia under military orders, and his case caused great concern among similar families in the Norfolk area. Authorities had taken no action against the couple, and, as in the case of the Naims, their marriage had come into the courts only through their own actions. Nonetheless, if no marriage of an Asian-white couple could be valid, then that carried ominous implications regarding such matters as inheritance and adoption, and it left open the threat of prosecution for

231. *Virginia's Top Tribunal Rejects Order of U.S. Supreme Court*, RICHMOND TIMES-DISPATCH, Jan. 19, 1956, at 12.

232. Naim v. Naim, 350 U.S. 985 (1956); *High Court Shelves Plea By Seaman*, RICHMOND TIMES-DISPATCH, Mar. 13, 1956, at 3. *See* Wadlington, *supra* note 91, at 1210-12. For further discussion, see Martyn, *supra* note 3, at 1231-38.

233. Calma v. Calma, 128 S.E.2d 440 (Va. 1962). For a discussion, see Martyn, *supra* note 3, at 1239-40. The appellate decision hinged on procedural considerations, but the outcome at the trial level made it clear that the 1924 legislation applied fully to nonwhites, even if not of African ancestry, if they had marriages with white residents of Virginia, even if those marriages had been contracted outside of Virginia by people who, at the time of their marriage, were not Virginia residents.

living together outside of marriage.[234] It could not be said of the Calmas that they had gone out of Virginia for the purpose of getting married and with the intent to return to live together, all to evade the Virginia statute. Nonetheless, under Virginia law they had no marriage.

XI. THE NEW FOURTEENTH AMENDMENT OF THE 1960S: MCLAUGHLIN AND THE LOVINGS

In the 1960s, the U.S. Supreme Court displayed a new willingness to take on the issue of miscegenation. Recovering from the paralysis it had suffered in the mid-1950s, the Court now drove toward utter demolition of the structure of Jim Crow in American public life—and thus in private life as well. In the *Pace* decision eighty years before, the Court had unblinkingly upheld Alabama's antimiscegenation law. In the 1950s, it had refused to deal with the question. In 1964, the Court began to confront it.

In a case that came from Florida, *McLaughlin v. Florida*, the Court ruled unanimously that the State could not use a miscegenation statute to prosecute an interracial pair for "habitually liv[ing] in and occupy[ing] in the nighttime the same room . . . ."[235] A unanimous Court rejected the use of racial classification in this manner.[236] Justice Byron White argued that "the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from offical sources in the States."[237]

It was a crucial decision because the Court overturned the *Pace* precedent. Yet, the Court sidestepped the central question. Plaintiffs and state alike attempted to tie together Florida's laws against interracial nonmarital cohabitation and interracial marriage, the plaintiffs on the basis that marriage was not an option available to them,[238] the state on the grounds that the "interracial cohabitation law . . . is ancillary to and serves the same purpose as the miscegenation law itself."[239] Writing for the Court, Justice White insisted on untying the two bans: "We reject [the State's] argument, without reaching the question of the validity of the State's prohibition against interracial marriage or the soundness of the arguments rooted in the history of

234. *See* Wadlington, *supra* note 91, at 1206; Arness, *supra* note 91, at 72-74.
235. McLaughlin v. Florida, 379 U.S. 184 (1964).
236. *Id.* at 197 (Harlan, J., concurring); *id* at 198 (Stewart & Douglas, J.J., concurring).
237. *Id.* at 192.
238. *Id.* at 187.
239. *Id.* at 195.

the [Fourteenth] Amendment."[240] Thus, the Justices invalidated the statute under which the pair had been convicted, but they took pains to make explicit that they did so "without expressing any views about the state's prohibition of interracial marriage . . . ."[241]

Finally, in 1967, in another unanimous decision, *Loving v. Virginia*, the U.S. Supreme Court invalidated the Virginia miscegenation statutes. And it did so in language designed to strike down all such legislation in every state. Basing the decision on due process as well as equal protection grounds, Chief Justice Earl Warren directed the Fourteenth Amendment against anti-miscegenation laws. "The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."[242] He concluded: "These convictions must be reversed."[243] Justice Potter Stewart, as he had in the *McLaughlin* case, went even farther in a concurring opinion. He argued that "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor."[244]

XII. MR. AND MRS. LOVING VERSUS THE STATE OF VIRGINIA

On July 11, 1958, Caroline County Commonwealth's Attorney Bernard Mahon obtained warrants for the arrest of Richard Loving and "Mildred Jeter" each for a felony associated with their marriage on June 2 in Washington, D.C.[245] Late at night, three law officers entered the Lovings' bedroom with their flashlights, awakened them, and arrested them for living together as husband and wife.[246] The grand jury brought indictments at its October term. At their trial on January 6, 1959, they pled "not guilty" and waived a jury trial. At the close of argument, however, they changed their pleas to "guilty." Cir-

240. *Id.*

241. *Id.* at 196. For greater detail and further analysis, see Wadlington, *supra* note 91, at 1219-22; Sohn, *supra* note 213, at 94-107; Martyn, *supra* note 3, at 1268-79; and CURRIE, *supra* note 87, at 416.

242. Loving v. Virginia, 388 U.S. 1, 12 (1967). Here the Chief Justice relied on a series of cases beginning in 1923. For a discussion of the right to privacy and the freedom to marry, see *infra* note 264.

243. *Loving*, 388 U.S. at 12.

244. *Id.* (quoting McLaughlin v. Florida, 579 U.S. 184, 198 (1964) (Stewart, J., concurring)). For more detail and analysis, see Sohn, *supra* note 213, at 107-120; Martyn, *supra* note 3, at 1298-1320; and ROBERT J. SICKELS, RACE, MARRIAGE, AND THE LAW 1-3, 76-91, 104-110 (1972).

245. Record at 1, Loving v. Virginia, No. 6163 (Va. 1965) (Commonwealth warrant).

246. Interview with Mildred Loving, Defendant (Jan. 7, 1994).

cuit Court Judge Leon M. Bazile sentenced each of them to one year in jail, but suspended the sentences "for a period of twenty-five years" provided that "both accused leave Caroline County and the state of Virginia at once and do not return together or at the same time to said county and state for a period of twenty-five years."[247]

As earlier Virginia cases suggest—such as those of Samuel Christian Branaham and of Clark Council Hamilton—this approach to such cases was typical in the Old Dominion in the mid-twentieth century, though the details of a suspended sentence, with or without banishment, varied. Judge Bazile imposed the lightest sentence that the law allowed (from one to five years). In the face of a statute that specified that the sentence was to be served in the penitentiary, he sentenced them to jail. Then, he suspended the sentence for a period of many years. The Lovings could not live as husband and wife in Virginia, and they would not be raising their mixed-race children in Virginia. The finite suspension did not even mean that, after twenty-five years, the Lovings could move back to Virginia. One of them, it seemed, could live in Virginia with impunity. Or, after twenty-five years, both could live there separately. But, even after twenty-five years, if they attempted to live together in their native state, both would again face prosecution.

Thus, Richard Loving and Mildred Jeter, as the Virginia court knew them, moved to Washington, D.C., and resumed their identities as Mr. and Mrs. Loving. There, they lived at 1151 Neal Street Northeast with Mrs. Loving's cousin, Alex Byrd, and his wife Laura.[248] Over the next few years, they had three children: Sidney, Donald, and Peggy.[249] Though either Mr. Loving or Mrs. Loving could visit Caroline County, they could not both do so at the same time. They had to make their home and find employment outside the state. They did so for more than four years.

But then they began to contest their situation. In 1963, Mildred Loving wrote Robert F. Kennedy, Attorney General of the United States, for assistance. The Justice Department redirected the letter to the National Capitol Area Civil Liberties Union with the suggestion that, though the government could not help the Lovings, perhaps the

247. Record at 4, *Loving*, No. 6163 (Va. 1958).

248. Interview with Mildred Loving, Defendant (Jan. 4, 1994); POLK'S WASHINGTON CITY DIRECTORY 226, 950 (1962).

249. *The Crime of Being Married*, LIFE, Mar. 18, 1966, at 85-91.

American Civil Liberties Union could. The ACLU did.[250] And thus the Lovings' case made its way back into the courts. While it was pending, the Lovings returned home to Caroline County, where they faced uncertainty, but kept their Washington, D.C., sanctuary at the ready.[251]

ACLU member Bernard S. Cohen, a young lawyer practicing in Alexandria, Virginia, welcomed an opportunity to take the case. In November 1963, he went to state court seeking reconsideration of the Lovings' convictions and sentences. He filed a motion in Caroline County Circuit Court to set aside the original judgment. Nothing happened; Judge Bazile was in no hurry to second-guess himself. Another young attorney, Philip J. Hirschkop, joined Cohen in the case, and in October 1964 they began a class action in U.S. District Court for the Eastern District of Virginia.[252] They requested that a three-judge court convene to determine the constitutionality of Virginia's antimiscegenation statutes and to enjoin the enforcement of the Lovings' convictions under those laws. Pending a decision by a three-judge panel, Cohen and Hirschkop requested a temporary injunction to prevent the enforcement of those laws, which they said were designed "solely for the purpose of keeping the Negro people in the badges and bonds of slavery."[253] Seeing no "irreparable harm" to the Lovings in the meantime, District Judge John D. Butzner, Jr., rejected the motion.[254] Then, with the federal panel due to meet soon, Judge Bazile finally brought the case back to trial.[255]

Cohen and Hirschkop knew that they would have to be creative to overturn a century's worth of adverse precedents. Of course they would rely on the Fourteenth Amendment's Equal Protection Clause to contest the constitutionality of Virginia's antimiscegenation statutes. Citing George Mason's Declaration of Rights from 1776, they also argued that the suspended sentence "denie[d] the right of marriage which is a fundamental right of free men." They argued that the sentence constituted "cruel and unusual punishment" in violation of the Virginia Constitution; that it exceeded the "reasonable period of

250. *Anti-Miscegenation Case Move Rejected*, RICHMOND NEWS LEADER, Oct. 29, 1964, at 21. At the time, no Virginia ACLU affiliate yet existed.

251. Interview with Mildred Loving, Defendant (Jan. 7, 1994). They are listed as late as 1967 as living at the home of Alex Byrd. POLK'S WASHINGTON CITY DIRECTORY 827 (1967).

252. Interview with Bernard S. Cohen, Attorney for the Lovings (Jan. 4, 1994); Interview with Philip J. Hirschkop, Attorney for the Lovings (Aug. 18, 1994).

253. *Pair Files Suit to End State Ban*, RICHMOND NEWS LEADER, Oct. 28, 1964, at 23.

254. *Anti-Miscegenation Case Move Rejected*, *supra* note 250, at 21; *Couple Begins Legal Attack on Mixed-Marriage Law*, N.Y. TIMES, Oct. 29, 1964, at 26.

255. *Mixed-Marriage Ban is Fought in Virginia*, N.Y. TIMES, Dec. 29, 1964, at 35.

suspension" permitted by Virginia law; and that it constituted banishment in violation of due process.[256]

In January 1965, six years after the original proceedings, Judge Bazile presided over a hearing of the Lovings' petition to have his decision set aside. In a written opinion, he rebutted each of the contentions that might have forced a reconsideration of their guilt. Citing *Kinney v. Commonwealth*, for example, Judge Bazile noted that the Lovings' marriage was "absolutely void in Virginia," and that they could not "cohabit" there "without incurring repeated prosecutions" for doing so.[257] Referring to the Virginia high court's decision in *Naim*, he noted that marriage was "a subject which belongs to the exclusive control of the States."[258] In fact, he noted, quoting an 1871 Indiana Supreme Court decision on interracial marriage, "If the federal government can determine who may marry in a state, there is no limit to its power."[259] As for antimiscegenation statutes, he cited the federal precedent in *Pace* as well as the Supreme Court's denial of certiorari in *Jackson* even after *Brown v. Board of Education* as support for their continued validity.

By way of conclusion, Judge Bazile wrote:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his 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.[260]

The three federal judges decided in February 1965 to postpone action until the Lovings had exhausted their appeals in state court. The office of the Virginia attorney general, Robert Y. Button, argued that the Virginia appellate court should first rule in the case. Accepting that position, United States District Judge Oren R. Lewis, of the Eastern District of Virginia, expressed the view that "a matter so sensitive to the social structure of the South as is racial intermarriage should first be ruled upon by state courts." He assumed that the case would in fact go to the Virginia Supreme Court of Appeals. If it did, he wanted to see the main issue "squarely presented." Together with the other judges on the panel—District Court Judge John D. Butzner,

256. Record at 5, Loving v. Virginia, No. 6163 (Va. 1965) (Motion to Vacate and Set Aside Judgment).

257. *Id.* at 11.

258. *Id.* at 12.

259. *Id.* at 11-12 (quoting State v. Gibson, 36 Ind. 389, 402-03 (1871)). The Alabama Supreme Court also relied on the *Gibson* case in the 1870s when determining the constitutionality of its own antimiscegenation statute. Green v. State, 58 Ala. 190, 195 (1877).

260. Record at 15, *Loving*, No. 6163.

Jr., of the Eastern District and Circuit Court Judge Albert V. Bryan of the Fourth Circuit—he promised a decision after that "as quickly as possible." Thus the panel deferred the matter to the Virginia courts but noted that, if they failed to move promptly, it would resume jurisdiction.[261]

The Lovings appealed Judge Bazile's decision to Virginia's highest court. There, lawyers for the State and the Lovings rehearsed arguments that were likely to be heard again at the U.S. Supreme Court. In mounting one of their arguments, Cohen and Hirschkop quoted the California Supreme Court's opinion in *Perez v. Sharp*, the only previous successful litigation—aside from the 1872 Alabama decision in *Burns*—against the constitutionality of antimiscegenation laws: "If the right to marry is a fundamental right, then it must be conceded that an infringement of that right by means of a racial restriction is an unlawful infringement of one's liberty."[262] They went on to assert:

> The caprice of the politicians cannot be substituted for the minds of the individual in what is man's most personal and intimate decision. The error of such legislation must immediately be apparent to those in favor of miscegenation statutes, if they stopped to consider their abhorrence to a statute which commanded that "all marriages must be between persons of different racial backgrounds."[263]

Such a statute would be no more "repugnant to the constitution"—and no less so—than the law under consideration. Something "so personal as the choice of a mate must be left to the individuals involved," they argued; "race limitations are too unreasonable and arbitrary a basis for the State to interfere."[264]

261. *Mixed Couple Case Delayed in Virginia*, N.Y. TIMES Jan. 28, 1965, at 17.

262. Appellant's Petition for Writ of Error at 12, Loving v. Virginia, No. 6163 (Va. 1965) (quoting Perez v. Sharp, 198 P.2d 17, 31 (1949)).

263. Appellant's Petition for Writ of Error at 12, *Loving* (No. 6163).

264. *Id.* The *Perez* decision had relied on Supreme Court rulings regarding privacy. In declaring that parents had the right to teach their children a foreign language, the Court had stated that the Fourteenth Amendment's Due Process Clause protected an individual's libery

> to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Another decision ruled that parents had the right to send their children to private schools. Pierce v. Society of Sisters, 268 U.S. 510 (1925). By the time the Loving case came to the Court, married people also had the right to decide whether to use birth control information and devices to keep from having children. Griswold v. Connecticut, 361 U.S. 479 (1965). For detailed histories of the right to privacy, see WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927 (1994); and DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *Roe v. Wade* (1994).

Rejecting all of the Lovings' arguments, the court largely adopted the brief of the State of Virginia as its opinion.[265] On March 7, 1966, speaking for a unanimous court, Justice Harry Lee Carrico rejected the Lovings' claim that the decision in *Naim*—having relied on *Plessy*, since overruled in *Brown*, and on *Pace*, since overruled in *McLaughlin* should not govern the case. Justice Carrico reasoned that in *Brown*, the United States Supreme Court ruled that "in the field of public education, the doctrine of 'separate but equal' has no place," but said nothing that might be construed as extending to marriage.[266] Justice Carrico was able to say that the Court itself, by denying certiorari in the *Jackson* case "just six months" after *Brown*, "indicated that the *Brown* decision does not have the effect upon miscegenation statutes which the defendants claim for it."[267] Carrico concluded that *McLaughlin* "detracted not one bit from the position asserted in the *Naim* opinion,"[268] for the Supreme Court itself said, in deciding that case, that it did so "without reaching the question of the validity of [Florida's] prohibition against interracial marriage."[269]

Various writings in the social and biological sciences had been submitted for the Court's consideration urging a reversal of the Lovings' convictions. Rejecting their relevance, Justice Carrico declared:

> A decision by this court reversing the *Naim* case upon consideration of the opinions of such text writers would be judicial legislation in the rawest sense of that term. Such arguments are properly addressed to the legislature, which enacted the law in the first place, and not to this court, whose prescribed role in the separated powers of government is to adjudicate, and not to legislate.[270]

It was clear where Carrico was going.

> Our one and only function in this instance is to determine whether, for sound judicial considerations, the *Naim* case should be reversed. Today, more than ten years since that decision was handed down by this court, a number of states still have miscegenation statutes and yet there has been no new decision reflecting adversely upon the validity of such statutes. We find no sound judicial reason, therefore, to depart from our holding in the *Naim* case. According that decision all of the weight to which it is entitled under the doctrine of *stare decisis*, we hold it to be binding upon us here . . . .[271]

265. Loving v. Virginia, 147 S.E.2d 78 (Va. 1966).
266. *Id.* at 80 (quoting Brown v. Board of Educ., 347 U.S. 483, 498 (1954)).
267. *Id.* at 81.
268. *Id.*
269. *Id.* at 81-82 (quoting McLaughlin v. Florida, 379 U.S. 184, 195 (1964)).
270. *Id.* at 82.
271. *Id.*

Yet, Virginia's high court still had to address the way Judge Bazile had handled the Lovings' sentencing when it was at trial seven years before. Lawyers for the Lovings objected that the suspended sentence was, in effect, banishment and that, as the North Carolina Supreme Court had declared in 1953, "A sentence of banishment is undoubtedly void."[272] Judge Carrico differed: "Although the defendants were, by the terms of the suspended sentences, ordered to leave the state, their sentences did not technically constitute banishment because they were permitted to return to the state, provided they did not return together or at the same time."[273] Nonetheless, Judge Bazile had erred. The statute's purpose under which he had suspended the sentence was "rehabilitation," and the Lovings' real offense was their "cohabitation as man and wife" in Virginia. Thus, Judge Bazile should have related the suspension of their sentences to their cohabitation "as man and wife in this state," and not to their presence in Virginia.[274] The Virginia Supreme Court of Appeals remanded the case to the circuit court in Caroline County, not to retry the case but merely for resentencing. Any suspension of sentence must be on "conditions not inconsistent with the views expressed in this opinion."[275] As an aside, Justice Carrico noted that "although it has not been alluded to by either side," the statute called for "a sentence in the penitentiary, and not in jail."[276]

The Lovings had exhausted their appeals in the Virginia courts. Their convictions remained intact. No matter what sentences the Caroline County court might finally impose, they still would be unable to do what they continued to desire to do, "cohabit as man and wife" in Virginia. Perhaps they would go to the penitentiary. New terms of suspension might permit them to visit Virginia together. Perhaps, in what might appear the most likely outcome, they could both live in Virginia, but not together.

The Lovings appealed their case to the U.S. Supreme Court. Justice John Marshall Harlan's clerk pointed out to him that the "miscegenation issue" was "left open" in *McLaughlin* and "appear[ed] ripe for review here."[277] On December 12, 1966, the Court agreed to hear

272. State v. Doughtie, 74 S.E.2d 922, 924 (N.C. 1953).

273. *Loving*, 147 S.E.2d at 82.

274. *Id.* at 83.

275. *Id.*

276. *Id.*

277. Letter from Nimetz to Justice John Marshall Harlan, Supreme Court Justice (Oct. 10, 1966) (on file with John Marshall Harlan Papers, Box 285).

the case.[278] The Japanese American Citizens League submitted a brief as friend of the court, indicating that interest in the question went beyond black-white marriages and the law.[279] In the Lovings' brief, Cohen and Hirschkop reviewed the history of Virginia's antimiscegenation statutes—going all the way back to the seventeenth century—to characterize them as "relics of slavery" and, at the same time, "expressions of modern day racism."[280] In oral argument, on April 10, 1967, Cohen conveyed the words of Richard Loving to support his argument. "Mr. Cohen, tell the Court I love my wife, and it is just unfair that I can't live with her in Virginia."[281]

Two months later, on June 12, 1967, Chief Justice Earl Warren delivered the opinion of the United States Supreme Court. According to the Chief Justice, "This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment."[282] As the Lovings' lawyers had urged, the Chief Justice leveled both clauses at the Virginia statutes. In an unanimous decision, the statutes fell.

The Court rejected each of the State's leading contentions, as well as each of the precedents on which the State had drawn. While the historical record, the judicial precedents, and the legal logic of the State's brief were incorporated into the decision of the Supreme Court of Appeals of Virginia, those of the Lovings' brief made their way into the decision of the United States Supreme Court. Despite the decision of the Virginia Court of Appeals in *Naim*, the Tenth Amendment yielded to the Fourteenth when it came to the claim of "exclusive state control" over the "regulation of marriage."[283] As for

278. *Supreme Court Agrees to Rule on State Miscegenation Laws*, N.Y. TIMES, Dec. 13, 1966, at 40. For a description of the case's procedural history, see *Ban on Interracial Marriages Upheld by Virginia High Court*, N.Y. TIMES, Mar. 8, 1966, at 26; *Virginia Suit Scores Mixed Marriage Ban*, N.Y. TIMES, July 30, 1966, at 9.

279. For a discussion of the brief's contents see SICKELS, *supra* note 244, at 85, 89.

280. Brief for Appellants at 15, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395), *reprinted in* LANDMARK BRIEFS, *supra* note 91, at 741, 763.

281. Oral Argument of Philip J. Hirschkop, Esq., on behalf of Appellants at 12, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395), *reprinted in* LANDMARK BRIEFS, *supra* note 91, at 959, 971.

282. Loving v. Virginia, 388 U.S. 1, 2 (1967). For an analysis of the Chief Justice's leadership in the case, see BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 668-69 (1983). For another treatment, see TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 262, 267-69 (1992) (focusing on the *McLaughlin* case). Little else in judicial biography addresses the *Loving* decision. *See, e.g.*, KIM I. EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA (1993).

283. *Loving*, 388 U.S. at 7.

the narrow construction of the Fourteenth Amendment, dependent as it was on the State's reading of the intent of the framers, the Court harked back to its statement in *Brown* that the historical record was "inconclusive."[284] The argument that Virginia's "miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage" would not pass constitutional muster in the 1960s.[285] Should "this Court . . . defer to the wisdom of the state legislature" on this matter?[286] Chief Justice Warren rejected the State's contention that "these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose."[287] The burden of proof rested on the state, for "the fact of equal application does not immunize the statute from the heavy burden of justification" required by the Fourteenth Amendment, particularly when racial classifications appeared in criminal statutes.[288]

The *Brown* decision shielded the Lovings from a narrow interpretation of the intent of the framers of the Fourteenth Amendment, but nothing could protect the state from the legislative history of the miscegenation laws. "The fact that Virginia prohibits only interracial marriages involving white persons demonstrates" that those laws were "designed to maintain White Supremacy."[289] Moreover, the court's recent decision in *McLaughlin* undercut the relevance of *Pace*. As Chief Justice Warren now put it, "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."[290] Quoting Justice Stewart's concurring opinion in the *McLaughlin* case, in which Justice Douglas had joined, the Chief Justice wrote: "Indeed, two members of this Court have already stated that they 'cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense.'"[291]

The Chief Justice was certain of the Court's recent history in civil rights cases. "We have consistently denied the constitutionality of

284. *Id.* at 9.
285. *Id.* at 8.
286. *Id.*
287. *Id.*
288. *Id.* at 9.
289. *Id.* at 11. Indeed, the statute's original purpose held no interest for the court; the Chief Justice declared that "we find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the 'integrity' of all races." *Id.* at 12 n.11.
290. *Id.* at 10.
291. *Id.* at 11 (quoting McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart, J., concurring)).

measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."[292]

> As for the Due Process Clause, the Chief Justice noted that
>
> the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.
>
> . . .
>
> To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.[293]

Chief Justice Warren's final sentence put an end to the Lovings' odyssey. "These convictions must be reversed." [294]

Richard and Mildred Loving had won the case, ten days after their ninth wedding anniversary. From their farm home in Bowling Green, near Fredericksburg, Mr. and Mrs. Loving drove north to Alexandria for a news conference at the office of their lawyers. There he said, "We're just really overjoyed." And she remarked, "I feel free now." A photographer snapped a picture of two happy people sitting close together, his arm around her neck, law books in the background. "My wife and I plan to go ahead and build a new house now," said Richard Loving, the construction worker, about the permanent new home in Virginia that Richard Loving the husband and father wanted his family to live in.[295]

XIII. POSTSCRIPT IN VIRGINIA

The major white newspapers in Virginia greeted the Supreme Court's ruling with equanimity; black newspapers met it with congrat-

292. *Id.* at 11-12.

293. *Id.* at 12.

294. *Id.*; *Justices Upset All Bans on Interracial Marriage,* N.Y. TIMES, June 13, 1967, at 1, 28; Charles McDowell, Jr., *Miscegenation Ban Is Ended by High Court,* RICHMOND TIMES-DISPATCH, June 13, 1967, at 1, 4.

295. *State Couple 'Overjoyed' By Ruling,* RICHMOND TIMES-DISPATCH, June 13, 1967, at B1; *Mrs. Loving: 'I Feel Free Now',* RICHMOND AFRO AMERICAN, June 17, 1967, at 1-2; *see also* Simeon Booker, *The Couple That Rocked Courts,* EBONY, Sept. 1967, at 78-94.

ulations.[296] Norfolk's two papers, the white *Virginian-Pilot* and the black *Journal and Guide*, illustrate the responses. The *Virginian Pilot* published an editorial, "A Unanimous Court," stating that "Antimiscegenation laws go back three centuries. In the beginning, their purpose was to force mulattoes into the slave system, not to prevent what white-supremacists now call 'race-mongrelization.'" One might note, of course, that the seventeenth-century laws were in fact designed to achieve both objectives. The paper prophesied that "[s]ocial discouragements to mixed marriages . . . will not quickly disappear," but it also suggested that "Virginia in recent years had allowed . . . its law to lose vitality." Only black-white couples like the Lovings were challenged in court, though "the restriction [the Lovings] defied applied also to whites and members of brown and yellow races, including Chinese and Filipinos. But Virginia was inclined to arrest only whites and Negroes, although it withheld such marital civil rights as adoption, inheritance, and divorce from other racially mixed couples as well." In that way the paper hinted at the relief that any number of military families in the Norfolk area must have felt at the news. The editorial concluded with a celebration of sorts that the topic of interracial marriage had now "been removed, as it had to be, from the field of jurisprudence."[297]

The *Journal and Guide* led off its front page with the headline "Top Court Junks Marriage Bars"[298] and printed an editorial on "Freedom of Choice at the Altar." That paper also predicted "no noticeable increase in the number of mixed marriages in Virginia," but it rephrased the explanation. "Prospective grooms" would continue to enjoy "the privileges of withholding their requests for the bride's hand," it said, and brides would retain "the privilege and the authority to prevent mixed marriages simply by saying 'no.'" Nonetheless, the *Journal and Guide* insisted on the importance of the court's ruling:

> What makes this Supreme Court decision so desirable is that it lifts an onerous and brutalizing stigma from Negro Virginians by knock-

296. One reason for the relative equanimity could be that the white segment of Virginia's population had reached 81% at about the time of the *Loving* decision; this was the highest percentage since the middle years of the colonial era. According to census figures, by 1970 Virginia and Alabama's nonwhite population had dropped to 18.5% and 26.4% respectively. The African-American percentage in Virginia held steady at just under 19% in the years ahead, while the white percentage dropped again into the high 70s as residents of Asian ancestry increased to 4% by 1990. Peter Wallenstein, *Cartograms and the Mapping of Virginia History, 1790-1990*, 28 VA. SOC. SCI. REV. 103, 106, 110 (1993); THE ENCYCLOPEDIA OF SOUTHERN HISTORY, *supra* note 22, at 31, 1295.

297. *A Unanimous Court*, VIRGINIAN PILOT, June 13, 1967, at 14.

298. *Top Court Junks Marriage Bars*, J. & GUIDE, June 17, 1967, at 1.

> ing down that psychological barrier which, in effect, told them and the world that no Negro is good enough to be the husband or wife of a white Virginian.[299]

The *Journal and Guide* saluted the Lovings. "They have done an incalculably great service for their community, their state, and their nation. Had they been less persevering, the legal battle to end Virginia's oppression on the marital front might have been forfeited long ago."[300]

When Virginia newspapers reported the news in the year or so after the *Loving* decision, that news sometimes included prominent items regarding interracial marriages. In September 1967, for example, the *Richmond Times-Dispatch* offered a page-one story headlined "Miss Rusk Weds Negro." In California, Margaret Elizabeth Rusk, daughter of Secretary of State Dean Rusk, had married Guy Gibson Smith.[301] In June 1968, the *Richmond News Leader* informed Virginians about "Mixed Couple Ends Honeymoon." In Massachusetts, Donald Hasler, a white man, had married Remi Brooke, the mixed-race daughter of Edward W. Brooke, a U.S. Senator from Massachusetts.[302]

Even before either of those two weddings took place, Virginians were informed that "Caucasian, Negro Wed in Norfolk." Leona Eve Boyd was white; Romans Howard Johnson was black. In a ceremony at Kingdom Hall Church, "a Negro Jehovah's Witnesses church," they became "the first known partners to an interracial marriage in Virginia" since the *Loving* decision was handed down a month before.[303] Authorities contested neither the "forms" nor the "essentials" of their marriage. Thanks to the Lovings' persistence and the decision of the U.S. Supreme Court, the Johnsons had no need to travel from their hometown of Norfolk to Washington, D.C., to get married. And they did not have to face the prospect of midnight arrest, felony conviction, or longterm exile. The Lovings, their lawyers, and a federal court decision had forced a change in public policy in Virginia such that the Johnsons' decision, like that of the Lovings, was now a private matter.

The following summer, on July 14, 1968, another interracial marriage took place in Virginia, as Peter Edelman married Marian E. Wright. Wright, friend of the Reverend William Sloan Coffin, Jr., and

299. *Freedom of Choice at the Altar*, J. & GUIDE, June 17, 1967, at 6.
300. *Id.*
301. *Miss Rusk Weds Negro*, RICHMOND TIMES-DISPATCH, Sept. 22, 1967, at 1. For analysis of responses at the time, see Kitchen, *supra* note 3, at 140-44.
302. *Mixed Couple Ends Honeymoon*, RICHMOND NEWS LEADER, June 24, 1968, at 2.
303. *Caucasion, Negro Wed in Norfolk*, RICHMOND TIMES-DISPATCH, Aug. 13, 1967, at B2.

aid to the Reverend Dr. Martin Luther King, Jr., was the first black woman to be admitted to the Mississippi bar. Edelman, a white lawyer, had served as law clerk to Supreme Court Justices Felix Frankfurter and Arthur J. Goldberg, as special assistant at the Justice Department, and as legislative researcher and speechwriter in Robert F. Kennedy's campaign for a U.S. Senate seat from New York. Reverend Coffin performed the ceremony, and Justice Goldberg spoke as well.[304] Though a bittersweet time for all who attended—King and Kennedy had been assassinated only weeks before—a more graphic demonstration of how much had changed in Virginia law could hardly be imagined.

Whether interracial marriages appeared numerous depended on how one gauged such matters. In 1971, for example, 52,158 marriages took place in Virginia, and of them 368, or seven per thousand, were interracial. Of the interracial marriages, 139 were between a black partner and a white one—48 in which the man was white and the woman black, 91 where the man was black and the woman white.[305]

XIV. POSTSCRIPT IN ALABAMA

By contrast to the Virginia aftermath, authorities in Alabama demonstrated that legal challenges to interracial marriages might not yet be over in the South. At the time of the Lovings' victory, their lawyer Philip J. Hirschkop had characterized the Court's decision as broad enough to reach "all such laws in other states."[306] Nonetheless, on November 10, 1970, Army Sergeant Louis Voyer, a 21-year-old Vietnam veteran and Massachusetts native, went with Phyllis Bett, his Alabama-born 17-year-old fiancee, before Probate Judge G. Clyde Brittain of Calhoun County, Alabama, to obtain a marriage license. Judge Brittain balked. The couple claimed that he refused on the grounds that Alabama law prohibited the issuance of a marriage license when one party was white, as was Sergeant Voyer, and the other black, as was Miss Bett. Alabama law still made it a felony for them to marry and a misdemeanor for any judge to issue a license in such a situation.[307] The judge, declining to take his chances with an indict-

304. Nan Robertson, *Aides to Robert Kennedy and Dr. King are Married in Virginia Ceremony*, N.Y. TIMES, July 15, 1968, at 23.

305. *Interracial Weddings Total 386 Since '67*, RICHMOND TIMES-DISPATCH, Mar. 2, 1973, at B1.

306. *State Couple 'Overjoyed' By Ruling*, *supra* note 295, at B1.

307. *Alabama Marriage Law Contested*, RICHMOND TIMES-DISPATCH, Dec. 4, 1970, at A13; *Alabama Marriage Law Ruled Unconstitutional*, RICHMOND TIMES-DISPATCH Dec. 9, 1970, at A8. For a brief survey of official responses in the South see SICKELS, *supra* note 244, at 111-15.

ment for issuing a marriage license, ended up in court for his failure to issue one.

In the interests of American military policy, the Nixon administration sued the state of Alabama and Judge Brittain. Three and a half years after the *Loving* decision had been handed down, U.S. Attorney General John N. Mitchell sought to have those Alabama statutes, as well as the provision of the state constitution outlawing interracial marriages, declared void in light of *Loving v. Virginia* and to enjoin the judge and the state from enforcing such laws. A deputy assistant attorney general of Alabama, John Bookout, claimed that he considered the Alabama laws still valid regardless of *Loving*. "When the U.S. Supreme Court rules in a case," he declared, "it is binding on people in that particular case. The Alabama law is still law until it is stricken down. They don't just wipe these laws off the book all over the United States because of one ruling."[308]

U.S. District Judge Sam C. Pointer obliged both sides by striking down the Alabama laws. He also gave short shrift to a motion filed by that state to dismiss the case on the grounds that the couple had already gone to Clarksville, Tennessee, to get married. Otherwise, after all, they would still be liable to criminal prosecution when they returned to live as husband and wife in Alabama so that Sergeant Voyer could fulfill his military obligations at Fort McClellan.[309]

Shortly before Louis Voyer and Phyllis Bett sought a court order so that they could be legally married in Alabama, Johnny L. Ford and Frances Baldwin Rainer had succeeded without challenge. Before that, for a time, the thought troubled Ford: "Oh, man—a mixed marriage in the South? In the Alabama Black Belt? I got to be crazy."[310] But then he and she decided to go ahead. Thus, in September 1972, when Ford was elected the first black mayor of the town of Tuskegee, his white wife and their infant son joined in the celebration.[311]

XV. THE LAW OF SLAVERY AND THE LAW OF FREEDOM

In much of the nation, particularly in the South, Jim Crow—and his power to govern who might marry whom—lived on in full force

308. *Alabama Marriage Law Contested*, *supra* note 307, at A13.

309. *Id.*; *Alabama Marriage Law Ruled Unconstitutional*, *supra* note 307, at A8; United States v. Brittain, 319 F. Supp. 1058, 1061 (N.D. Ala. 1970).

310. Marshall Frady, *An Alabama Marriage*, *in* SOUTHERNERS: A JOURNALIST'S ODYSSEY 261, 268 (1980).

311. *Id.*; ROBERT J. NORRELL, REAPING THE WHIRLWIND: THE CIVIL RIGHTS MOVEMENT IN TUSKEGEE 201 (1985).

from the first dawn of freedom, in the aftermath of slavery, until well into the decade of the 1960s and the "Second Reconstruction." Only then, in the area of marriage and family relations, did it become true—as Justice Stewart had twice insisted that it ought to be—that "the criminality of an act" could not "depend upon the race of the actor."[312] Only then could it no longer require an exercise in genealogy to scrutinize whether two people fell into the proper racial classifications so that they might legally marry in any American state.

Reporting on the 1967 decision in the *Loving* case, the *New York Times* noted its larger significance. "In writing the opinion that struck down the last group of segregation laws to remain standing—those requiring separation of the races in marriage—Chief Justice Warren completed the process that he set in motion with his opinion in 1954 that declared segregation in public schools to be unconstitutional."[313] Bernard S. Cohen, the Lovings' lawyer through their long quest, offered a similar benediction on the proceedings. At his clients' press conference, speaking for the Lovings, Hirschkop, and himself, he said: "We hope we have put to rest the last vestiges of racial discrimination that were supported by the law in Virginia and all over the country."[314]

Various forces at work in the 1950s and 1960s help explain why, among all Jim Crow legislation, miscegenation laws were the last to fall to the constitutional revolution of the modern civil rights era. A half century ago, Gunnar Myrdal observed that in ranking the major issues in black-white relations and the law—including schools, jobs, and voting—white southerners most strongly resisted the idea of interracial sex and marriage, but African Americans ranked the question dead last in importance.[315] All the more reason for blacks not to squander their resources and jeopardize their prospects in a futile quest. Individuals like Jackson and Naim, to be sure, might consider the question of highest priority, but the state courts in the South were least likely to reconsider that one, and the U.S. Supreme Court, as we have seen, felt no urgency about confronting the issue either.

For reasons connected with Myrdal's analysis, the National Association for the Advancement of Colored People (NAACP) declined to involve itself in litigating the constitutional status of antimiscegena-

312. Loving v. Virginia, 388 U.S. 1, 13 (1967) (Stewart, J., concurring); McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart, J., concurring).

313. *Justices Upset All Bans on Interracial Marriage*, N.Y. TIMES June 13, 1967, at 1, 28.

314. *Burden Lifted by Decision*, NORFOLK VIRGINIAN-PILOT, June 13, 1967, at 4.

315. MYRDAL ET AL., *supra* note 4, at 60-62.

tion statutes before the 1960s.[316] The American Civil Liberties Union (ACLU), which normally focused on civil liberties questions (matters of freedom of religious or political expression), typically played only a supporting role in civil rights litigation. On the matter of miscegenation, however, the ACLU went out ahead of the NAACP. The two groups switched assignments, with the ACLU playing the lead role.[317]

Congress, for its part, had surely grown less sympathetic to antimiscegenation statutes by the 1960s than at any earlier time, including Reconstruction. In almost every state outside the former Confederacy, state action had already eliminated antimiscegenation laws by the time the *Loving* case arrived at the Supreme Court.[318] But the 1964 Civil Rights Act had failed to address the matter.[319] In the 1960s, only the U.S. Supreme Court could take on the issue. In contrast to the Court's approach a decade earlier, when it had ducked the *Jackson* and *Naim* cases, it proved ready to address the one major area in which Jim Crow legislation lived on.[320] More than a decade after the decisions in *Brown v. Board of Education*, the Court did what it had avoided in the 1950s. It decided to deal with the Virginia statutes and to do so in a broad rather than narrow manner. The Chief Justice, no doubt remembering with more clarity than comfort the Court's wish to hide from the matter early on in his tenure, stated

316. Regarding such concerns in the early 1950s, see also JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 102 (1994). Early in the twentieth century, it is true, the organization had worked diligently in legislative bodies to prevent the expansion of Jim Crow statutes regarding marriage. Martyn, *supra* note 3, at 1068-78. "The NAACP and its allies had succeeded in every anti-miscegenation free jurisdiction in preventing the passage of the intermarriage legislation introduced in the 1914-1929 period." *Id.* at 1078. But a program of litigation against statutes deep in enemy territory was another matter. See Sohn, *supra* note 213, at 129-30, 133-34. For the NAACP's involvement in the antimiscegenation campaign beginning with *McLaughlin* and continuing through *Loving*, see *id.* at 137-39.

317. Sohn, *supra* note 213, at 126-39. For a detailed history of the ACLU, see SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 261-78 (1990). Chapter 12 focuses on "The Civil Rights Revolution," but nowhere does Walker discuss the antimiscegenation crusade or the *Loving* case; a single sentence mentions the ACLU's successful suit in state court against the California antimiscegenation statute contested in Perez v. Sharp, 32 Cal. 2d. 711 (1948). WALKER, *supra*, at 239.

318. At the time of the Supreme Court's decision, antimiscegenation statutes persisted in all eleven states of the former Confederacy plus Delaware, Kentucky, Missouri, Oklahoma, and West Virginia. Maryland had repealed its statute earlier in 1967. Loving v. Virginia, 388 U.S. 1, 6 n.5 (1967). Thus, the states that held out through 1966 included all the slave states of 1860 plus Oklahoma and West Virginia.

319. CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985); ROBERT D. LOEVY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964 (1990).

320. For an analysis of the Court's movement from the 1950s to the 1960s that focuses on race and education, see ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 271-310 (1992).

the history correctly in his opening statement, "This case presents a constitutional question never addressed by this Court."[321]

By the middle of 1967, one hundred years after Congress had directed Alabama and Virginia to ratify the Fourteenth Amendment, the twentieth-century case against Jim Crow had been initiated, argued, and won. The law of race and slavery, dating in Virginia from the seventeenth century, had given way to a new law of freedom, and the Lovings could return home and live together in Virginia. As a consequence of the decision in the Lovings' case, the Voyers could live together legally in Alabama. The Lovings' banishment under Virginia law came to an end when the U.S. Supreme Court decreed that, even with regard to marriage, Jim Crow—America's Apartheid—be banished from American law.

321. *Loving*, 388 U.S. at 2.