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Law and the Boundaries of Place and Race in Interracial Marriage: Interstate Comity, Racial Identity, and Miscegenation Laws in North Carolina, South Carolina, and Virginia, 1860s-1960s

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LAW AND THE BOUNDARIES OF PLACE AND RACE IN INTERRACIAL MARRIAGE: INTERSTATE COMITY, RACIAL IDENTITY, AND MISCEGENATION LAWS IN NORTH CAROLINA, SOUTH CAROLINA, AND VIRGINIA, 1860S-1960S

by

Peter Wallenstein*

In North Carolina in 1869, Wesley Hairston, a black man, and Puss Williams, a white woman, went on trial in Forsythe County for "fornication and adultery."[1] They claimed they were married, but the judge instructed the jury that no such marriage could be valid in North Carolina.[2] When the jury convicted both defendants, they appealed the judge's instruction and the jury's verdict.[3] The North Carolina Supreme Court dashed their hopes when it declared: "The only question in this case is, whether the intermarriage of whites and blacks is lawful."[4] A unanimous appeals court rejected the "pretended marriage" and upheld the convictions.[5]

Hairston and Williams did not see their convictions as consistent with the facts. They thought they had both contracted a marriage and found instead that they had each committed a felony. Other couples ran into similar problems. Brought to court, some argued that they had entered a valid marriage and, having moved into another state, they should not be subject to the enforcement of its laws against interracial marriage. Others, challenging the premise that they did not share one racial identity, argued that, since they were both black or both white, the miscegenation law should not reach their marriage.

This essay draws from case materials in three states to explore two of the main problems in enforcing—or escaping conviction under—laws in the United States against interracial marriage during the hundred years after the Civil War. Questions of interstate comity and racial identity, though not both involved in every miscegenation case, would remain issues in many such cases as long as laws against interracial marriage remained in effect. Only in 1967, when the U.S. Supreme Court decided *Loving v. Virginia* and declared such laws unconstitutional,[6] would the boundaries of race and place no longer have any bearing on the law of marriage between a man of one race and a woman of another.

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[1] State v. Hairston, 63 N.C. 451, 451 (1869).

[2] *Id*.

[3] *Id*. at 452.

[4] *Id*.

[5] *Id*. at 453.

[6] Loving v. Virginia, 388 U.S. 1 (1967).

1. A Marriage, Valid in the State Where Contracted, Must It Be Recognized Elsewhere? The View(s) from North Carolina

What if a couple had married legally in another state and then moved to North Carolina, where they would not have been permitted to marry? State boundaries affected the law of interracial marriage in multiple ways. At any one time, some states permitted interracial marriages, while others did not. If a married couple moved from a state where they had a valid marriage into a state that banned such marriages, did their marriage survive the move? If so, might a marriage be valid if a couple deliberately went out of state to evade the law, married, and then returned to their home state?

Two cases, both decided in 1877 by the North Carolina Supreme Court, illustrate the doubtful validity of interracial marriages in view of different states' conflicting laws. North Carolina had a constitutional provision and a statute that banned marriages between black and white citizens, and the state's authority to enact such a law was not challenged in these two cases. Nonetheless, enough uncertainty surfaced at trial that one couple was found guilty and the other acquitted. In both cases, the losing side appealed to the state supreme court, and that court—in each case, in an opinion written by the same judge—upheld the lower court, though in one case with a divided voice. The question arose because at that time South Carolina permitted interracial marriages, while North Carolina did not.

Two citizens of North Carolina—Isaac Kennedy, a black man, and Mag Kennedy, a white woman—went to South Carolina to get married. Immediately after their wedding, they returned to North Carolina, where they were indicted for fornication and adultery and tried and convicted in Mecklenburg County, just across the state line from South Carolina.[7] Speaking for a unanimous supreme court, Justice William R. Rodman noted that their domicile, both before and after their marriage, was North Carolina.[8] Had they left with the intent to evade the North Carolina law? Justice Rodman found the question immaterial, for they had never established another domicile.[9] Speaking of his state's law against such marriages, he said, "A law like this of ours would be very idle if it could be avoided

[7] State v. Kennedy, 76 N.C. 251 (1877).
[8] *Id*.
[9] *Id*. at 252.

by merely stepping over an imaginary line."[10] As the judge noted, "when it is conceded as it is, that a State may" pass such a law as North Carolina's, "the main question is conceded."[11] How could this particular pair be anything but guilty?

Yet an exception might be permitted, as Justice Rodman decided that same term in the case of *State v. Ross*.[12] This case, too, concerned a black man and a white woman who married in South Carolina and were later living in North Carolina, in the same border county. In May 1873, Sarah Spake, a citizen of North Carolina, went to Spartanburg, South Carolina, to marry Pink Ross, a citizen of that state. They married that month, lived "as man and wife" in South Carolina for three months, and then moved to Charlotte, North Carolina.[13] In Mecklenburg County, Judge David Schenck found the couple not guilty of fornication and adultery, even though he had decided otherwise in the case of Isaac Kennedy and Mag Kennedy. The Rosses, unlike the Kennedys, had a valid marriage.[14]

The state appealed the decision, but Justice Rodman spoke for a majority of the supreme court in upholding Judge Schenck. The appeals court understood the central question to be "whether a marriage in South Carolina between a black man and a white woman *bona fide* domiciled there and valid by the law of that State, must be regarded as valid in this State when the parties afterwards migrate here? We think that the decided weight of English and American authority requires us to hold that the relation thus lawful in its inception continues to be lawful here."[15]

"Our laws have no extra territorial operation," Rodman wrote.[16] When the woman married a man from another state, she immediately acquired his domicile, and when they moved to North Carolina, they came as citizens of that other state.[17] "We are under obligations of comity to our sister States," he said, and the marriage remained valid when the couple moved into the state.[18] "Upon this

[10] *Id*. at 252-53.
[11] *Id*. at 253.
[12] 76 N.C. 242 (1877).
[13] *Id*. at 243.
[14] *Id*.
[15] *Id*. at 245.
[16] *Id*. at 243.
[17] *Id*. at 244.
[18] *Id*. at 247.

question above all others," he concluded, "it is desirable . . . that there should not be one law in Maine and another in Texas, but that the same law shall prevail at least throughout the United States."[19] As for Pink Ross and Sarah Spake, their "cohabitation," although "unnatural and immoral," met the standard of "lawful."[20]

Justice Edwin G. Reade wrote a vigorous dissent, one that suggested that the court's approach in that case would hardly prevail everywhere and might not last long in North Carolina.[21] The state attorney general had argued that this interracial marriage ought to be treated in the same way that an incestuous or polygamous marriage would—it should be criminalized under North Carolina law.[22] According to Justice Reade, comity had its limits; it was "secondary to the public good,"[23] and "the public good is paramount."[24]

North Carolina, with its clear declaration of law on the subject, had no need to recognize a neighboring state's laws in this respect. "If such a marriage solemnized here between our own people is declared void, why should comity require the evil to be imported from another State? Why is not the relation severed the instant they set foot upon our soil?"[25] Any "individuals who have formed relations which are obnoxious to our laws can find their comfort in staying away from us."[26]

Justice Reade went farther in his statement of the limits of the comity. The Fourteenth Amendment's privileges and immunities clause, he wrote, "does not mean that a citizen of South Carolina removing here may bring with him his South Carolina privileges and immunities; but that when he comes here he may have the same privileges and immunities which our citizens have. Nothing more and nothing less."[27] Reade rejected the majority's position. "We give to comity all the force of a constitutional provision when we allow it to annul a statute. Indeed we put it

[19] *Id*. at 247.
[20] *Id*. at 247.
[21] *Id*. at 248.
[22] *Id*. at 245.
[23] *Id*. at 249.
[24] *Id*. at 250.
[25] *Id*. at 249.
[26] *Id*. at 250.
[27] *Id*.

above the [North Carolina] Constitution itself; as I believe one of the late amendments prohibits the intermarriage of white and colored."[28]

2. South Carolina Eliminates a Legal Sanctuary

South Carolina did not long remain without a miscegenation statute of its own. The Palmetto State had suspended its previous ban in 1868. In 1879, proponents of a new ban complained that interracial couples from North Carolina were choosing to live in South Carolina.[29] The new miscegenation statute of 1879 provided that, for each partner in an interracial marriage, the penalty would be a minimum fine of $500 or a minimum term of imprisonment of twelve months.[30] Within the next three years, a white woman who married a black man was sentenced in Kershaw County to twelve months in jail, and a white man who married a black woman was convicted in Union County.[31] South Carolina's temporary tolerance of interracial marriage, because it attracted interracial couples from a more restrictive neighboring state, helped spur passage of a law that ended the opportunity for residents and non-residents alike.

3. But What Race Is She Really?

In October 1881, John Crawford and Maggie Dancey went on trial for violating South Carolina's new law against interracial marriage. After courting in North Carolina, they had decided to marry. The couple had heard that North Carolina had a stringent law against their doing so but, believing that South Carolina had no such law, they thought they had a remedy. Crawford moved back south across the state line to his home in York County, and Dancey soon followed from her family's home in Mooresville, just north of Charlotte. They approached a black preacher, Edward Lindsay, about their wishes, and he assured them that they could marry in South Carolina. The ceremony took place, and their arrests soon followed.[32]

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[28] *Id*.

[29] Byron C. Martyn, Racism in the United States: A History of Anti-Miscegenation Legislation and Litigation 604, 626-27 (1979) (unpublished Ph.D. dissertation, University of Southern California) (on file with author); GEORGE BROWN TINDALL, SOUTH CAROLINA NEGROES, 1877-1900, at 296 (1952).

[30] TINDALL, *supra* note 29, at 297 (citing 1879 S.C. Acts No. 5, § 2).

[31] *Id*. at 297-98.

[32] *Intermarriage of the Races*, CHARLESTON (S.C.) NEWS AND COURIER, Oct. 31, 1881, at 1.

The newlyweds' marriage did not involve the question of comity, but it definitely involved another thorny issue, the question of racial identity. John Crawford testified that the fair-skinned woman he had married came from a family that, back in her hometown, was regarded as mixed-race. He had seen his wife's grandmother, a "bright mulatto," he said.[33] The family attended a black church, associated only with African Americans, and despite their color, seemed to fall on the black side of the great racial divide.[34] The couple's argument was that, even though Maggie was of "fair complexion," with "flaxen or light auburn hair and light blue eyes," she was black just the same as her "dark mulatto" husband.[35] If proved, the couple had not, after all, broken the law.

The fact that the only evidence in the case consisted of the defendants' own testimony left the court perplexed. Because Maggie Dancey went on trial some distance from her family's residence, no local witnesses could help the court with testimony regarding the Dancey family's racial reputation. The judge called upon a white medical doctor, W. J. Whyte, to offer his expert testimony, but the doctor, after a brief examination in the waning light of day, reported the woman's identity difficult to pin down.[36] The judge held the trial over to the next morning.[37] The doctor tried again but complained that the microscope with which he examined the woman's hair and skin seemed inadequate to the task.[38] If forced to choose, he held to his original opinion that Maggie Dancey was a white woman, but he could not be certain.[39]

The judge put the matter in the hands of the jury. He told them that if they were unsure, they should resolve their doubt in favor of the woman.[40] After an hour's deliberation, the jury reported its verdict. Maggie Dancey was white, and John Crawford was not. Both were guilty.[41]

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[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*

The kind of question that Maggie Dancey raised could never vanish as long as the law of marriage insisted on dividing people into two racial categories, categories that in fact existed along a continuum. A few years after the convictions of Crawford and Dancey, other South Carolinians demonstrated the political problem of defining race when delegates to the state constitutional convention of 1895 considered whether to incorporate the miscegenation statute into the fundamental law. One proposal would have classified as white only those residents without "any" African ancestry.[42] Another would have set the boundary so that only those people with less than one-quarter African ancestry qualified as white.[43] The convention settled upon a boundary at one-eighth, so that having one African-American great-grandparent would result in classification as black.[44]

4. "Subject to No Evasion": State Boundaries and the Law of Interracial Marriage in Virginia

The case of Andrew Kinney, a black man, and Mahala Miller, a white woman, supplied Virginia's major precedent regarding miscegenation cases in the late-nineteenth and twentieth centuries. By 1874, Kinney and Miller had lived together long enough to have had three sons born since 1867.[45] 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.[46]

The gesture failed to protect them from prosecution. Virginia authorities charged Kinney with "lewdly associating and cohabiting" with Miller.[47] Kinney claimed to be married to Miller, and his attorney urged the trial judge to instruct the jury that the marriage was "valid and a bar to this prosecution."[48] Instead, the judge instructed the jury that the marriage was "but a vain and futile attempt to evade the laws of Virginia," laws that banned any marriage between a white resident and an African American.[49] Convicted and fined $500—the maximum

[42] TINDALL, *supra* note 29, at 299.
[43] *Id*.
[44] *Id.*
[45] Manuscript population schedule, Census of 1880, Augusta County, Virginia.
[46] Kinney v. Commonwealth, 71 Va. (30 Gratt.) 858, 859 (1878).
[47] *Id*. at 858-59.
[48] *Id*. at 859.
[49] *Id*. at 860.

fine under the law—Kinney appealed the decision, first to the circuit court and then to the Virginia Supreme Court of Appeals.[50]

The question, simply put, was: Did the defendant have a valid marriage that gave him an effective defense against the charge he faced? Or, rather, was his living as though he were married precisely the basis for that charge? Was he married? Or was he guilty?

The appeals court viewed Andrew 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."[51] As to whether the law of Washington, D.C., or that of Virginia—"the lex loci contractus or the lex domicilii"[52] 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."[53] In this case, the "country" was Virginia, and Kinney the "subject."

Judge Christian reviewed the precedents, English and American. Only one, involving a marriage that took place before the American Revolution, seemed to support Kinney. The case of *Medway v. Needham*[54] also involved one black partner and one white. The couple had left Massachusetts, which banned such marriages, and traveled to a neighboring colony, Rhode Island, which did not. They had a wedding ceremony, and then returned to Massachusetts. There the Massachusetts court had ruled, as Kinney now asked the Virginia court to do, that a marriage, if valid according to "the laws of the country where it is celebrated, is valid in every other country."[55]

Speaking for the court, Judge Christian rejected this position.[56] If the ritual itself were at issue, the marriage should be recognized as valid.[57] Kinney, however,

[50] *Id*. at 859.
[51] *Id*. at 861-62.
[52] *Id*. at 862.
[53] *Id*. at 862.
[54] 16 Mass. R. 157 (1819).
[55] *Kinney*, 71 Va. at 866.
[56] *Id*. at 867-68.
[57] *Id*. at 868.

faced a problem not of "rites," or "the form of the contract," but of "essentials," and "the essentials of the contract depend upon . . . the law of the country . . . in which the matrimonial residence is contemplated."[58] As the judge noted,

> [t]he purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization, under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent—all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion.[59]

What "God and nature" had sundered, let no man seek to bring together. The state of Virginia would allow no such marriage as 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."[60] Despite the heavy fine and the possibility of further prosecution, the Kinneys stayed together. The 1880 census showed the couple—now in their forties and the parents of five sons—still living together in Augusta County.[61]

Having gone to the Virginia Supreme Court and generated widespread publicity, the case jolted the Virginia General Assembly into taking further action. The new legislation enacted in March 1878 criminalized the behavior of both parties to an interracial marriage, and converted the penalty from the taking of property, such as Andrew Kinnney's $500, to the taking of liberty, with at least two years in prison though no more than five.[62] This act, which might be termed the Andrew Kinney bill, was soon followed by prosecutions. Expressly going beyond criminalizing interracial marriages contracted in Virginia, the 1878 statute imposed the same new penalties on Virginians who went outside the state to evade the law and then returned to Virginia to live.[63]

One Virginia case, related directly to the 1878 law, went to federal court. Edmund Kinney, black, had married Mary S. Hall, white, in Washington, D.C., in October 1878 and they then returned to their home in Hanover County.[64] Convicted of violating the March 1878 statute against going out of state to get married, both parties were

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[58] *Id*.
[59] *Id*. at 869.
[60] *Id*. at 870.
[61] Manuscript population schedule, Census of 1880, Augusta County, Virginia.
[62] Act of March 14, 1878, ch. 7, art. 8, 1878 Va. Acts 301.
[63] *Id*. at art. 3.
[64] Ex parte Kinney, 14 Fed. Cas. 602, 603 (C.C.E.D. Va., 1879).

sentenced to five years at hard labor in the Virginia penitentiary.[65] Kinney petitioned U.S. District Judge Robert W. Hughes for a writ of habeas corpus.[66]

Judge Hughes rejected all constitutional grounds for intervention.[67] What about the Fourteenth Amendment and its talk of privileges and immunities? Nowhere, declared Judge Hughes, did that amendment "forbid a state from abridging the privileges of its own citizens," a matter left to "the discretion of each state."[68]

Comity would require recognition of most marriages contracted in another state, but there were exceptions—"marriages which are polygamous, incestuous, or contrary to public policy" and "made the subject of penal enactments."[69] Edmund Kinney was "a citizen of Virginia amenable to her laws."[70] Though married in the District of Columbia, he brought back with him to Virginia "no other right in regard to the marriage which he made abroad than he took away. He cannot bring the marriage privileges of a citizen of the District of Columbia any more than he could those of a citizen of Utah, into Virginia, in violation of her laws."[71]

Judge Hughes also rejected the relevance of the Fourteenth Amendment's Equal Protection Clause, which, he said, gave "no power to congress to interfere with the right of a state to regulate the domestic relations of its own citizens."[72] He 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 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 fourteenth amendment has been violated by the state of Virginia in its prosecution of this petitioner.[73]

Both she and he, white and black, were in the penitentiary, Judge Hughes observed, and thus they had received equal treatment.[74] It did not matter to the judge that their crime could just as well be seen as a consequence of their color, not their behavior.

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[65] *Id.*
[66] *Id.* at 602-03.
[67] *Id.* at 608.
[68] *Id.* at 604.
[69] *Id.* at 607.
[70] *Id.*
[71] *Id.*
[72] *Id.* at 605.
[73] *Id.*
[74] *Id.*

Year after year, Virginia's penitentiary records showed the couple serving out their five-year sentences.[75]

5. "To Be a Negro Is Not a Crime": Racial Boundaries and the Law of Interracial Marriage in Virginia

In the 1870s and 1880s, when cases arose in Virginia regarding race, sex, and marriage, the definition of the racial boundary could prove of central importance, as *McPherson v. Commonwealth*[76] demonstrates. The case arose across the James River from Richmond in the city of Manchester, where Rowena McPherson and George Stewart faced charges of "living in illicit intercourse" with each other.[77] They were convicted and fined despite their insistence that they were legally married.[78] The trial court determined that, while he was white, she was not, and thus their marriage had no validity and could supply no shield in their defense.[79]

A unanimous state supreme court, to the contrary, judged the facts to suggest that McPherson was not, in fact, "a negro."[80] 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 already she was three-fourths white.[81] To be sure, that fraction would leave her nonwhite in the eyes of the law at that time in Virginia.[82]

The case hinged on the racial ancestry of Rowena McPherson's maternal grandmother; if she had been entirely African, then McPherson was nonwhite, but, if not, then McPherson qualified as white.[83] Testimony from the family stipulated that McPherson's great-grandmother was "a brown skin woman," "half-Indian."[84] Thus, the court concluded, "less than one-fourth" of Rowena McPherson's "blood" was "negro blood."[85] And "[i]f it be but one drop less, she is not a negro."[86] Because she

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[75] 1879 ANNUAL REPORT OF THE PENITENTIARY at 24, 28; 1880 ANNUAL REPORT OF THE PENITENTIARY at 41; 1881 ANNUAL REPORT OF THE PENITENTIARY at 35; 1882 ANNUAL REPORT OF THE PENITENTIARY at 29.

[76] 69 Va. (28 Gratt.) 939 (1877).

[77] *Id*. at 939.

[78] *Id*.

[79] *Id*.

[80] *Id*. at 940.

[81] *Id*.

[82] For a discussion, see Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s*, 70 CHI.-KENT L. REV. 371, 395 (1994).

[83] *McPherson*, 69 Va. at 940.

[84] *Id*.

[85] *Id*.

had not married across race lines, the marriage was valid, and they were not guilty of the offense of which they had been convicted.[87]

A case from Montgomery County, in western Virginia, also raised the complicated matter of racial identity and jeopardized two Virginians' freedom. In February 1883, Isaac Jones obtained a license to marry Martha Ann Gray. The license listed both parties as "black"—the form supplied only a single blank, not even suggesting that both parties might not be of the same race.[88] Rev. 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.[89] All had perhaps gone well for the new couple, until they were indicted in September 1883 for "feloniously" marrying across race lines—he "a negro" and she "a white person."[90]

Convicted in county court, Jones was sentenced to the penitentiary for two years and nine months, Gray for the minimum two years.[91] 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.[92] They asserted that the 1878 statute violated the U.S. Constitution, and they denied, in any case, that the statute applied to them.[93] Jones claimed to be mixed-race and not "negro," and Gray claimed to be mixed-race and not "white"; certainly she "was accustomed to associate and attend church with the negroes," and the church pastor had testified that some "colored persons attending his church" were "whiter" than she.[94]

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."[95] Yet the state had failed, he said, to carry the

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[86] *Id*.

[87] *Id*. at 941.

[88] Marriage License, Issued to Issac Jones and Martha A. Gray, 15 Feb. 1883, Montgomery County Courthouse, Christiansburg, Va.

[89] 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) (on file with author).

[90] Jones v. Commonwealth and Gray v. Commonwealth, 80 Va. 538, 541 (1885) [hereinafter *Jones II*].

[91] *Id*.

[92] *Id*.

[93] *Id*. at 540.

[94] *Id*. at 542.

[95] *Jones I*, 79 Va. at 216.

burden of proof beyond a reasonable doubt.[96] Thus the appeals court reversed the couple's convictions and remanded their case to Montgomery County for a new trial.[97]

On August 3, within two weeks after 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.[98] The following June, the state supreme court again reversed and remanded.[99] 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.[100] What was his racial status under the law? What, for that matter, was hers? The court could not tell.

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.[101]

Jones had both European and African ancestry, and the crucial question was how much of each, but the prosecution had developed, wrote Judge Lacy, "no evidence of his parentage, except that his mother was a yellow woman."[102]

> 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.[103]

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."[104] Two years and three months after their wedding, the couple's freedom to

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[96] *Id*. at 219.
[97] *Id*.
[98] *Jones II*, 80 Va. at 538.
[99] *Id*. at 545.
[100] *Id*. at 544.
[101] *Id*. at 542.
[102] *Id*.
[103] *Id*. at 544.
[104] *Id*. at 545.

live together as husband and wife—and out of prison for doing so—remained in the hands of the Virginia courts.

F. Boundaries of Race and Place in Twentieth-Century North Carolina

Sam Miller and Josephine Shook left North Carolina long enough to marry in South Carolina.[105] Then they lived together in Catawba County, northwest of Charlotte, until they were prosecuted in 1943 for fornication and adultery.[106] Shook was white. Was Miller? At the outset of their trial, the defendants admitted the facts of their behavior and conceded, "if the defendant Sam Miller is of Negro blood within the prohibited degree, that said marriage is null and void."[107]

The trial turned on the question of Miller's racial identity. To be white, he had to be more than seven-eights white, and if the state determined him to be as much as one-eighth black, he was black. South Carolina's miscegenation law differed in no material way from the North Carolina law, and comity did not enter the proceedings. His racial identity, however, did-what it was and who would decide it.

At the trial, Dr. Fred Long testified that he had been the attending physician at Miller's birth.[108] Long said of Miller's mother that she was "of the whole white blood."[109] Miller's father, thought to be Henry Hewitt, "a Negro,"[110] was the son of a woman who was probably not "a full Negro," said the doctor, and of a man whose "people" probably "had some white blood in them."[111] Dr. Long guessed Miller to be "about 3/8 Negro," though his own testimony suggested the figure might be smaller.[112] Could it be said to be less than one-eighth? Only such a fraction could legitimate the marriage of Sam Miller and Josephine Shook.

Evidence from various witnesses for the state suggested that "the reputation of the defendant Sam Miller in the community in which he lives is that he is of the colored race."[113] The jury determined him to be a "Negro" under the law.[114] Miller was convicted of the charge of fornication and adultery, though his prison sentence was

[105] State v. Miller, 224 N.C. 228 (1944).
[106] *Id*.
[107] *Id.* at 229.
[108] *Id*. at 230.
[109] *Id*.
[110] *Id*. at 229.
[111] *Id.* at 231.
[112] *Id*.
[113] *Id.* at 230.
[114] *Id.* at 229.

"suspended upon certain conditions," chief among them surely that the couple not continue to live together.[115]

Miller appealed. His counsel and the state agreed on the only question before the North Carolina Supreme Court: "Was the evidence sufficient to take the case to the jury on the question as to whether or not Sam Miller is of negro blood, within the prohibited degree . . . ."?[116] The appeals court, characterizing the evidence as "tending to show" him to be "a Negro within the prohibited degree,"[117] ruled that "the evidence offered by the State is sufficient to sustain the verdict of the jury."[118]

G. Comity, Identity, and Miscegenation Cases in Twentieth-Century Virginia

The boundaries of race and place continued to govern the law of marriage in twentieth-century Virginia, but the state's miscegenation laws underwent two material changes between the 1880s and the 1930s. In one change, the minimum prison sentence upon conviction was reduced from two years to one.[119] According to the other, the state threw out the old one-quarter rule, first adopting a one-sixteenth threshold in 1910 and then redefining "white" in 1924 to exclude anyone of any traceable African ancestry.[120]

Shifting the boundary that separated one racial group from the other, the new law each time reclassified significant numbers of Virginians. Virginia law had long classified as "white" anyone of European descent who was less than one-fourth African—the measure that shaped the outcome in Rowena McPherson's case back in 1877. The racial redefinitions of 1910 and 1924 each moved the boundary that determined racial identity under the law.

Between 1910 and 1924, for example, a mixed-race person less than one-fourth black who, before 1910, 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.

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[115] *Id.* at 228.
[116] *Id.*
[117] *Id.* at 229.
[118] *Id*. at 230.
[119] Act of Mar. 2, 1932, ch. 78, 1932 Va. Acts 68.
[120] Act of Mar. 17, 1910, ch. 357, art. 49; Act of Mar. 20, 1924, ch. 371, art. 5.

Genealogical tests had long had a role to play in ascertaining racial identity. Moving the boundaries could alter the identities.

Grace Mohler married Samuel Christian Branaham in 1937 in Fincastle, Virginia. Both were later indicted for violating the Virginia ban on interracial marriages.[121] She escaped conviction when she testified that she had not known that he was of African descent.[122] He testified that he was not, in fact, of mixed race, yet other testimony contradicted him.[123] Judge Benjamin Haden declared him to be black, not white, and imposed a one-year prison sentence, the shortest possible under the law.[124] Then he suspended that sentence for 30 years.[125] During that time, Branaham must not live with Grace Mohler or marry any other white woman.[126] As a newspaper account put it, having been "adjudged a Negro," 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."[127]

In the 1950s, a Virginia case of interracial marriage presented a different question of race at the same time it encountered the old rejection of comity, dating back to the time of the Kinneys.[128] In June 1952, Ham Say Naim, a Chinese sailor from Malaya, married a white woman from Virginia. North Carolina, unlike Virginia, permitted marriages between Caucasians and people of Asian ancestry. The couple had crossed into North Carolina long enough to have a marriage ceremony and then returned to Virginia, where they made their home in Norfolk.

Authorities brought no criminal charges, yet the Naims' marriage made its way into the courts anyway after the couple separated, and at that point the miscegenation laws intruded. In September 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.[129] The judge knew an easy case when he saw one. Here was a marriage between a white 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 Mrs. Naim the annulment she sought.[130]

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[121] *Ruled a Negro, Man Must Quit White Wife*, RICHMOND TIMES-DISPATCH, June 8, 1938, at 1.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *See supra* notes 46-75 and accompanying text.

[129] Naim v. Naim, 197 Va. 80, 80 (1955).

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

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.[131] He challenged the local court's decision on the grounds that the Fourteenth Amendment overrode the Virginia statute, but a unanimous Virginia Supreme Court of Appeals ruled against him.[132] "Regulation of the marriage relation," insisted Justice Archibald Chapman Buchanan, is "distinctly one of the rights guaranteed to the States."[133] Refusing to give up, Naim appealed to the U.S. Supreme Court. Unhappily for Naim, the nation's high court was not yet ready to address his concerns, and it evaded his case.[134] His marriage was over. Under Virginia law, it had never begun.

Within a few years, Virginia courts faced another case much like the Naims'—similar in that the interracial couple included a Caucasian and someone of Asian ancestry.[135] It was similar, too, in that Virginia's miscegenation laws came into play in a civil case in the context of an out-of-state marriage that failed to satisfy in-state requirements. In the late 1950s, Rosina Calma and Cezar Calma were living in Virginia. The Calmas—she Caucasian, he Filipino—had married in New Jersey in 1954 and had relocated to Virginia. Virginia authorities did not arrest them, yet the public law of interracial marriage nonetheless affected their private lives.

When Rosina Calma sought to end their marriage, Virginia courts refused to recognize its validity, and thus she and her husband could not terminate it through divorce in the new state of their residence.[136] When she went to the Virginia Supreme Court, she argued that "the action of the lower court in failing to recognize the marriage performed in New Jersey as valid in Virginia was in violation of the full faith and credit clause of Article IV, section 1, of the Constitution of the United States."[137] She argued, too, that the refusal to recognize her marriage violated "the rights guaranteed to her by the equal protection and due process clauses of the fourteenth amendment."[138]

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[131] For a full discussion of the *Naim* case, see Chang Moon Sohn, Principle and Expediency in Judicial Review: Miscegenation Cases in the Supreme Court 73-94 (1970) (Ph.D. dissertation, Columbia University).

[132] *Naim*, 197 Va. at 80, syllabus.

[133] *Id.* at 90.

[134] Naim v. Naim, 350 U.S. 891 (1955); Naim v. Naim, 350 U.S. 985 (1956). For more on the Supreme Court's avoidance of miscegenation cases in the mid-1950s, see Wallenstein, *supra* note 82, at 415-19.

[135] Calma v. Calma, 203 Va. 880 (1962).

[136] *Id*. at 881.

[137] *Id*. at 882.

[138] *Id*.

In December 1962 the Virginia Supreme Court, declaring that "we do not reach and decide the constitutional issues" Calma had raised,[139] upheld the lower court's disposition of the case on procedural grounds. It seems improbable that Rosina Calma could have convinced any court in Virginia to recognize her marriage. That the issue arose at all attested to the continuing salience of race in the law of marriage in the South. The boundaries of race and place—and the linkages between them—alike soon vanished from the law of marriage. But that did not come until the late 1960s, several years after Rosina Calma's time of futility in the Virginia courts had ended.

8. Boundaries of Race and Place Lose Their Salience

At about the time that the Calmas tried to divorce, two other residents of Virginia, Richard Perry Loving and Mildred Delores Jeter, tried to marry. Aware that they could not marry in their home state, they thought they could do so in the nation's capital. They made their journey, had their ceremony, and returned to Caroline County. Yet, just a few weeks into their marriage, they were arrested in the middle of the night and taken from their bedroom to the county jail.[140] They were subsequently convicted of violating Virginia's miscegenation law, which dated in its essentials back to 1878. Virginia law recognized the validity of their marriage no more than it had recognized the marriages of the Kinneys eighty years before or, much more recently, those of the Naims or the Calmas.

Mildred Jeter and Richard Loving (as the Virginia court knew them) accepted a plea bargain, the terms of which returned them their liberty but qualified it by requiring that they not live together in Virginia at any time during the next twenty-five years.[141] They moved to Washington, D.C., resumed their identities as Mr. and Mrs. Loving, and lived in exile for several years. In 1963, however, they had had enough. Hearing about a new civil rights bill under consideration in Congress, they decided to contest their fate and sought advice about their plight.[142]

The Civil Rights Act of 1964 said nothing whatever about interracial marriage, but the Lovings' lawyers—Bernard S. Cohen and Philip J. Hirschkop, both affiliated with the American Civil Liberties Union—took their case all the way to

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[139] *Id.*

[140] Wallenstein, *supra* note 82, at 421.

[141] Loving v. Virginia, 388 U.S. 1, 3 (1967).

[142] Wallenstein, *supra* note 82, at 421-23.

the U.S. Supreme Court.[143] In June 1967, that Court overturned the Lovings' convictions and the law under which they had been prosecuted.[144] Comity was not the issue; identity was. Chief Justice Earl Warren wrote for a unanimous Court: "The clear and central purpose of the Fourteenth Amendment was to eliminate all official sources of invidious racial discrimination in the States."[145]

The Lovings' exile from Virginia had ended. Miscegenation laws across the nation—among them those in North and South Carolina as well as Virginia—could no longer be enforced.

Boundaries of race and place lost their salience under the law and from this point forward had no more bearing on interracial couples who wished to marry than they did on same-race couples. When the question was a matter of who might marry whom, no longer could the question come up (as a matter of law) as to whether two partners shared a racial identity. If race did not matter, the location of the boundary between two racial identities could not matter. Moreover, if race did not matter, no longer could the question of interstate comity, of "full faith and credit," be a consideration. As regards race and the selection of a marriage partner, all states henceforth shared one legal environment.

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

[144] *Loving*, 388 U.S. at 2.

[145] *Id*. at 10.