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978-0-521-19858-5 - *Loving v. Virginia in a Post-Racial World: Rethinking Race, Sex, and Marriage*

Edited by Kevin Noble Maillard and Rose Cuison Villazor

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**LOVING V. VIRGINIA IN A POST-RACIAL WORLD**  
**RETHINKING RACE, SEX, AND MARRIAGE**

In 1967, the U.S. Supreme Court ruled that laws prohibiting interracial marriage were unconstitutional in *Loving v. Virginia*. Although this case promotes marital freedom and racial equality, there are still significant legal and social barriers to the free formation of intimate relationships. Marriage continues to be the sole measure of commitment, mixed relationships continue to be rare, and same-sex marriage is legal in only eight out of fifty states. Most discussion of *Loving* celebrates the symbolic dismantling of marital racial discrimination. This book, however, takes a more critical approach to ask how *Loving* has influenced the “loving” of America. How far have we come since then, and what effect did the case have on individual lives?

Kevin Noble Maillard is an associate professor of law at Syracuse University where he teaches family law, trusts and estates, and on the subjects of children and the law, adoption, and popular culture and the law. He has written about and lectured on nontraditional families, racial intermixture, the role of marriage in America, civil liberties within the family, and popular culture and the law. His work has been published in the *New York Times*, *Cardozo Law Review*, *SMU Law Review*, *Fordham Law Review*, and *Law & Inequality*. He is a frequent presenter at legal and interdisciplinary conferences.

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# *Loving v. Virginia* in a Post-Racial World

RETHINKING RACE, SEX, AND MARRIAGE

Edited by

**KEVIN NOBLE MAILLARD**

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**ROSE CUISON VILLAZOR**

Hofstra University, School of Law



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## Foreword

*Angela Harris*

On or about June 12 each year since 2004, Loving Day – “an educational campaign and a global network of annual celebrations” – holds a “Flagship Celebration” in New York City to commemorate the anniversary of the Supreme Court’s ruling in *Loving v. Virginia*.<sup>1</sup> In 2009, according to the website Blended People of America, the sixth annual Loving Day celebration in New York City “saw the gathering of about 1,100 people.... From 3 to 7 pm, guests mingled, heard and exchanged stories, danced to music, looked over the riverfront, created artwork, or gathered as families in a warm and welcoming environment.”<sup>2</sup>

Loving Day presents itself as a quintessentially post-racial celebration. The Loving Day organizers, and their website, look back respectfully and gratefully to the Lovings, whose legal struggle made it possible for Americans of different racial identities to dance, marry, kiss, form families, and celebrate beauty, pleasure, and desire without fear of police or prisons. Now, in the new fluid reality that Loving Day celebrates, even the concept of “miscegenation” has begun to seem bizarre and antiquated. The very idea of race mixing assumes that there is purity to be lost. The “blended people” who come together for Loving Day, however, represent themselves as already various – each a tapestry of ethnicities, religions, racial identities, and cultures. Mixing, in this new context, does not represent a falling-away from purity and strength. Instead, mixing takes on a postmodern meaning. Loving Day celebrants see their mixed backgrounds as making possible deep, complex, rich identities layered with history, custom, and meaning, in the way that a deejay mixes beats, melodies, and rhythms to make deep, rich, funkier layers of sound.

The personal testimonials that Loving Day collects and displays on its website applaud the beauty and power of “love.”<sup>3</sup> Couples describe how their attraction

<sup>1</sup> 388 U.S. 1 (1967).

<sup>2</sup> See <http://blendedpeopleamerica.com/component/content/article/50-featured/88-loving-day.html> (last visited November 3, 2010).

<sup>3</sup> Loving Day, <http://www.lovingday.org/> (last visited February 25, 2010).

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transcended their fear of difference. Individuals describe the strength and beauty of their “blended” backgrounds, or the circumstances that drew them to people different from themselves. The decision in *Loving v. Virginia*, with its apt name, represents for this group the transformation from fear and hatred into love. For the Loving Day organization, moreover, *Loving* is a triumph not only of love, but of law. The Loving Day logo, designed by one of the group’s founders, is a red shield containing a heart. The heart represents love, but the shield, the group’s website explains, represents law. Visitors to the website are accordingly encouraged to learn about the case and to be thankful for the Lovings’ struggle, knowing that love and the rich beauty that it makes possible are now safely protected by the state.

Other kinds of stories, however, also float around the website, beneath and between the stories of love victorious. One contributor to the “couples” page – a white woman named Amy, married to a black man – writes cheerfully, “No matter what ‘mix’ your relationship might be, there will always be ups and downs ... just be sure to live your life in love, because at the end of the day that is what truly matters!”<sup>4</sup> But Amy’s blog about her relationship, “The Many Shades of Love,” paints a more complicated picture. For example, one of Amy’s clients, a white woman, intermittently feels compelled to share her racist thoughts. Amy reports:

Yesterday it went a little like this ... somehow the topic of her children came up, who by the way she does not speak to, and she said the reason she doesn’t to speak to one of her sons is because “He is married to a black.” Yes “a black.” Wow ... really!? What year are we in? What century is she from? Oh wait, it gets much worse. Then she proceeds to share her “lovely” feelings about black people and how much she hates them. Oh I’m not done yet. It just keeps going downhill from there! Then she starts talking about the grandbaby in the equation, and she says, “Yes, and my son has a monkey baby from her too.” Are you kidding me!!!!!!??? That comment made me sick to my stomach. How on earth do you feel this way about your own grandchild? How, how, how!!!!???

What is the opposite of love? Not hate, as the convention goes; nor indifference, as some have suggested. If love is a set of practices through and by which we build connections to others, its opposite is the process by which connection is denied. Critical theorists use the word “abjection” to describe how bodily products that teeter on the line between self and not-self – sputum, saliva, waste – are cast out and treated as foreign. That which is abject inspires feelings of revulsion and horror because it is neither this nor that; it reminds us with a shiver that the line between me and not-me is permeable.<sup>6</sup> Abjection, the act of casting out in disgust, redraws the boundary again.

<sup>4</sup> <http://www.lovingday.org/couples-stories/amy-o> (last visited February 25, 2010).

<sup>5</sup> <http://themanysadesoflove.blogspot.com/2009/11/seeing-beneath-skin.html> (last visited October 3, 2011).

<sup>6</sup> See Martha C. Nussbaum, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* (2004) (arguing that laws and policies should not be built on feelings of disgust, because disgust embodies “magical



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Just as individuals patrol the borders of their bodies, keeping the self in and the other out, human social groups patrol their borders. From day to day, humans grant or deny one another small courtesies and recognitions in rituals that confer personhood.<sup>7</sup> We acknowledge that the people standing in line with us or sharing an elevator with us are deserving of dignity and equal treatment. Philip Zimbardo and others have demonstrated, however, how readily humans, especially when seeking acceptance or praise from one another, are willing to withdraw this acknowledgment from others.<sup>8</sup> When denied treatment as a person, a human becomes abject: something carrying the form of a person but not the substance of a person. This uncanniness inspires disgust and forms a basis for cruelty and casting-out.

As the high incidence of child abuse attests, individual humans idiosyncratically and spontaneously “dehumanize” each other all the time.<sup>9</sup> But some kinds of dehumanization are organized, systematic, and group-based. Sometimes dehumanization is state-sponsored, as in war and torture, when the rules under which we acknowledge others’ personhood are officially suspended. Sometimes subnational groups undertake a campaign to dehumanize other subnational groups, resulting in campaigns of extermination. The twentieth century saw the birth of technologies that facilitated the horrors of genocide: killing an entire cohesive human group. But the most effective and crucial technology is a story that explains why certain humans are not persons and thus can be tortured or killed with impunity. Race – a symbolic system within which visible bodily marks betray invisible inherent cultural, mental, and moral differences that divide humans into fixed and enduring subspecies – has, since its invention and elaboration, been one of the most efficient devices for the abjection of human groups.

What does law have to do with all this? The essays in this book complicate *Loving Day’s* picture of the law as a sturdy shield that surrounds and protects love. The fact

ideas of contamination, and impossible aspirations to purity that are just not in line with human life as we know it”).

<sup>7</sup> Here I am using “human” to denote a biological, species connection, and “person” to denote the social subject, a human who is recognized by other humans as possessed of dignity and requiring equal treatment and respect. The sociologist Erving Goffman used the metaphor of dramaturgy to describe the labor humans put in every day to present themselves to one another as worthy of personhood, and described in detail the small slippages and failings that can result in “stigma” – personhood partially denied by others. See Erving Goffman, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959); *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963).

<sup>8</sup> Philip Zimbardo, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* (2007); see also Stanley Milgram, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (reprinted 2009).

<sup>9</sup> “Depersonalization” might be a better term given my distinction between the human and the person. However, I will stick with the more familiar term. On the incidence of child abuse, see the Fourth National Incidence Study of Child Abuse and Neglect (NIS-4): Report to Congress, Executive Summary, January 2010, available at [http://www.acf.hhs.gov/programs/opre/abuse\\_neglect/natl\\_incid/index.html](http://www.acf.hhs.gov/programs/opre/abuse_neglect/natl_incid/index.html) (estimating that in 2005–2006, 1.25 million children experienced “maltreatment” (including neglect), with 44% of that number, or about 553,300 children, being abused. For a sad and vivid example of the dehumanization of a child within a family, see Dave Pelzer, *A CHILD CALLED IT* (1995).

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978-0-521-19858-5 - *Loving v. Virginia* in a Post-Racial World: Rethinking Race, Sex, and Marriage

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*Foreword*

that *Loving v. Virginia* had to be brought at all, of course, recognizes the law's past complicity with dehumanization. Law's concern with maintaining the social order has meant a commitment to maintaining, and sometimes extending, the color line, from Virginia's first statute connecting the condition of slavery with one's ancestry to the Supreme Court's decision in 1967. When the Court in *Loving v. Virginia* finally overturned Virginia's miscegenation laws, the majority opinion contained a critical phrase that signaled the justices' awareness of the link between marriage and racial domination: "White Supremacy."

The law speaks endlessly of relations between persons, but rarely speaks of its own role in creating, or destroying, personhood itself. *Loving's* mention of white supremacy broke this silence, yet the Court's opinion provides no explanation or definition of the concept. This book fills the gap, investigating the law's role in regulating and intervening in the social process by which humans are made into persons or non-persons. Marriage is a function of the "police power," a broad and amorphous power that permits the law to regulate and control bodies and populations. And the regulation of marriage, like the regulation of immigration, has been used not only to prevent certain unions from being legally recognized, but to protect the racial purity of the nation itself. In the early days of the republic, as Matthew Jacobson argues, a white person was a person willing to take up arms against Indians and slaves.<sup>10</sup> Whiteness later evolved to exclude Asians (too "foreign" to be assimilated), Mexicans (racial "mongrels" lacking the mental and moral strength to assimilate), Italians, Jews, and many other groups. In purportedly protecting the purity of whiteness, miscegenation law – and the case that overturned it – speaks not only to the recognition of personal bonds, but of national ones; not only the conferral of individual personhood, but the consolidation of citizenship.

*Loving's* dominant legacy has been the simple narrative sketched by the founders of Loving Day: a story about prejudice overcome. The essays in this book go further. They describe how state power can be used in the "private" sphere to make some human bodies unintelligible as persons. In the process, they reveal what is at stake in marriage law – not only love and beauty, but power and privilege; not only private celebration, but public order. They reveal how "love" is made possible or impossible by law: through geographical restrictions keeping bodies away from one another; through legal restrictions meant to do the same (including miscegenation law and immigration law); through legal doctrines that distribute personhood unequally; and through legal rules that refuse the right to sex and family to some persons and relationships, but not to others. This powerful collection thus revises what *Loving*, and "loving," signify.

<sup>10</sup> See, generally, Matthew Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (1998).