Introduction

Loving v. Virginia in a Post-Racial World: Rethinking Race, Sex, and Marriage

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On June 16, 1967, the U.S. Supreme Court unanimously ruled that state laws prohibiting interracial marriage were unconstitutional. In this landmark case, *Loving v. Virginia*,[1] the Court championed the rightful place of Fourteenth Amendment guarantees of equal protection and due process in the realm of marriage and family. As a result of the Court's opinion, petitioners Richard Loving, a White man, and Mildred Jeter, a woman of color, could finally live in Virginia as a legally married couple. No longer would they – and other interracial couples who wanted to marry – be subject to the discriminatory regulations of the state that sought to maintain and police racial boundaries.

For most of American history, law not only placed restrictions on the selection of a marital partner, but also forged a collective definition of the legitimate family. At most, forty-one states enacted laws preventing interracial marriage, with the majority of jurisdictions banning Black-White unions.[2] In a minority of other states, intermarriages between Whites and Asians, Latinos/as, or Native Americans were also prohibited.[3] Racial classifications differed from state to state, thus allowing a "Black" person to cross state lines to find themselves categorized differently according to their blood quantum.[4]

[1] 388 U.S. 1 (1967).

[2] Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 J. Am. Hist. 44, 49 (1996).

[3] *See*, Note *Constitutionality of Anti-Miscegenation Statutes*, 58 Yale L.J. 472, 480 (1949); Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. Davis L. Rev. 795, 798–99 (stating that while antimiscegenation laws were originally intended with a focus on Black-White relationships, some states also prohibited marriages between Whites and Native Americans, Asians, and/or Filipinos).

[4] *See generally*, Kevin Noble Maillard and Janis McDonald, *The Anatomy of Grey: a Theory of Interracial Convergence*, 26 Law & Ineq. 305 (2008) (for a discussion on traditional "racial passing" and the inherent difficulties of rigid racial categorization); Kevin Noble Maillard, *The Pocahontas Exception: The Exemption of American Indians from Racial Purity Laws*, 12 Mich. J. Race & L. 351 (2007) (for a

The law at issue in *Loving*, Virginia's Racial Integrity Act, made it "unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian."[5] Because of Virginia's antimiscegenation law, the Lovings traveled to Washington, DC to get married. They returned to Virginia as a married couple yet they were unable to live openly as an interracial family. Within months, they were arrested in the middle of the night and sentenced to one year in prison. Offered the possibility of avoiding imprisonment if they left Virginia for twenty-five years, the Lovings moved to Washington, DC. However, longing for home, the Lovings paired with the American Civil Liberties Union to challenge the constitutionality of the Racial Integrity Act.

The case reached the Supreme Court. Using forceful language, the Court recognized that the antimiscegenation law constituted "measures designed to maintain White Supremacy."[6] Notably, the Supreme Court expressed that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."[7] Additionally, the Court viewed marriage as "implicit in the concept of ordered liberty,"[8] a freedom that should have included interracial unions.

The moral and legal arguments in *Loving* underscored the importance of equality and freedom in the selection of a marital partner. According to the Supreme Court, constitutional doctrine prohibits the state from denying a person's decision to marry a person of another race. With few exceptions, equal protection means that the government must treat similarly situated people the same way. If a law discriminates against one group, offering preferential treatment for another, equal-protection law affords the disadvantaged class a judicial remedy. Thus, classifications that draw sharp distinctions between groups must withstand constitutional review. In the context of discrimination based on race, such governmental distinction must be subject to the "most rigid scrutiny."[9]

Additionally, in *Loving*, the Supreme Court emphasized that due process protects individuals from arbitrary governmental intrusions upon their intimate lives. This includes an individual's freedom to marry the person of his or her own choosing. Thus, the *Loving* Court viewed interracial marriage as a valid and protected matter of equal treatment and individual liberty.

discussion on the racial identification of Native Americans based on blood quantum). *See*, *supra* n.3, at 480 (for a list of the antimiscegenation laws of each state and how the prohibited race is defined).

5 *Loving*, 388 U.S. at 5 n.4. This exception for Native-American ancestry was written to accommodate the descendants of Pocahontas and John Rolfe, who identified as White. *See*,Maillard, *The Pocahontas Exception*, *supra*, n.4, at 354. *1924*, 12 MICH. J. RACE & L. 107 (2007).

6 *Loving*, 388 U.S. at 11.

7 *Id.* at 12.

8 Palko v. Connecticut, 302 U.S. 319, 324–25 (1937).

9 *Loving*, 388 U.S. at 11 (internal quotations omitted).

Theoretically, *Loving*'s principle of constitutional freedom in marital choice should have transformed the racial composition of the American family. Yet more than forty years later, interracial marriage and mixed-race people remain out of the mainstream. According to the 2010 census, only 8 percent of married couples were classified as interracial,[10] up from 2 percent in 1970.[11] Analysis by the Pew Research Center indicates that, for Asians and Latinos/as, interracial marriages are actually on the decline.[12] Examined from a gender lens, interracial marriages reveal a gap in mixed-race relationships as well: Black men are more likely to enter an exogamous union than Black women.[13]

As these statistics demonstrate, legal and social barriers to interracial marriage persist. Indeed, in the last few years, an interracial couple in Louisiana reported that they were prohibited from marrying. On October 6, 2009, Beth Humphrey, who is White, and Terence McKay, who is Black, contacted Keith Bardwell, a justice of the peace, to obtain a marriage license.[14] Mr. Bardwell's wife answered the phone and asked several questions, including whether Beth and Terence were forming an "interracial marriage."[15] Upon discovering the couple's interracial status, Mrs. Bardwell informed Beth that she and Terence would have to find another justice of the peace. According to Beth, Mrs. Bardwell told them, "well, we don't do interracial marriages."[16] In an interview, Mr. Bardwell explained that, "I have one problem with marrying mixed marriages, and that is the offspring."[17]

Without doubt, part of what many found troubling about the Louisiana couple's rejection of marriage was Mr. Bardwell's blatant disregard of principles of racial equality. In our so-called "post-racial" world, where the current American president

[10] Pew Research Center, *Marrying Out: One-in-Seven New U.S. Marriages Is Interracial or Interethnic*, June 4, 2010, at 11, *available at* http://pewsocialtrends.org/files/2010/10/755-marrying-out.pdf (last visited June 22, 2011).

[11] U.S. Bureau of the Census, Table 1: Race of Wife by Race of Husband: 1960, 1970, 1980, 1991, and 1992 (1994), *available at* http://www.census.gov/population/socdemo/race/interractab1.txt (last visited June 22, 2011).

[12] Pew Research Center, *supra* n.10, at 8 (see chart, *Intermarriage Trends, 1980 and 2008*).

[13] *Id.*, at 11 ("One-in-eight (12.5%) married black men have a non-black spouse, compared with 5.5% of married black women.").

[14] Associated Press, *Interracial Couple Denied Marriage License by Louisiana Justice of the Peace*, October 15, 2009, *available at* http://www.huffingtonpost.com/2009/10/15/interracial-couple-denied_n_322784.html (last updated March 15, 2009).

[15] Samira Simone, *Governor Calls for Firing of Justice in Interracial Marriage Case*, CNN.COM, October 17, 2009, *at* http://edition.cnn.com/2009/US/10/16/louisiana.interracial.marriage/index.html (last visited June 23, 2011).

[16] *Louisiana Newlyweds Want Justice of Peace Fired*, CNN.COM, October 19, 2009, *at* http://articles.cnn.com/2009–10–19/us/interracial.marriage_1_keith-bardwell-interracial-marriages-social-justice (last visited June 23, 2011).

[17] Transcripts: American Morning (October 19, 2009), CNN.COM, *available at* http://transcripts.cnn.com/TRANSCRIPTS/0910/19/ltm.02.html (last visited June 23, 2011).

is himself the child of an interracial family, such action counters the social and legal gains achieved from the civil rights movement. At minimum, Bardwell's discriminatory conduct reveals what many interracial couples already know: ongoing barriers and prejudices to family formation continue. More generally, it requires a closer examination of how law and society affect intimate choices and a deeper look at *Loving* itself.

This anthology takes *Loving v. Virginia* to task for its influence on the "loving" of America. First, the book underscores *Loving*'s promise to challenge the legal definition and cultural expectations of the traditional family. Yet, there is an ongoing struggle to eradicate the divisive legacies of the past. Second, in a post-racial world, *Loving*'s pronouncements of equality and liberty are limited at a time when our employment of race is changing. Third, this book explores *Loving*'s role in the current debate on the changing definition of marriage. Fourth, it examines its untapped potential to transform the legal recognition of intimacy beyond marriage. Overall, this anthology interrogates *Loving*'s impact on race, sex, and family in a "post-racial" world.

Despite its monumental impact on civil liberties, *Loving* is generally overlooked as an important case in constitutional law and legal history. In comparison to its more famous cousin, *Brown v. Board of Education*,[18] *Loving*, on its own merits, is woefully neglected as a landmark case involving equal protection and civil liberties. What was seen as the biggest fear of racial separatists – the integration of the home – is treated as an afterthought to the civil rights movement of the 1960s. If *Brown* dismantled systems of racial supremacy at the institutional and public level, *Loving* enables a transformation at the most domestic and private. This leaves *Loving* as one of the most underexamined cases in the modern era.[19] This book gives *Loving* the attention it deserves.

Marriage, the contested institution that it is, remains the most visible and recognized referent for legitimate families.[20] Today, perhaps the most contested restriction

[18] 347 U.S. 483 (1954), *supplemented by* 349 U.S. 294 (1954).

[19] In the last few years, a number of law reviews held symposia to celebrate the fortieth anniversary of *Loving v. Virginia*: Wisconsin Law Review (2006), California Law Review (2006), Fordham Law Review (2007).

[20] Nancy F. Cott, who has written extensively on the history of marriage, has sworn that:

> Marriage thus is a bundle of rights, obligations, and benefits, but it also is more than that. It has a legitimacy earned through many years of validation and institutionalization in law and society. Enhanced by government recognition for so long, being legally married in the United States is, and has been for hundreds of years, a privileged status. The idea that marriage is the happy ending, *the marker of a relationship's legitimacy*, the sign of adult belonging, and the definitive expression of love and commitment, is deeply ingrained in our society. It is reflected in and perpetuated through law, custom, literature, and even folk tales.

Affidavit of Nancy F. Cott, Varnum v. Brien, 2007 WL 2461202 (D. Iowa, 2007) (No. CV5965) (emphasis added); *see also* R. A. Lenhardt, *Beyond Analogy:* Perez v. Sharp, *Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CAL. L. REV. 839, 889–94 (2008).

is sex-based. The fight for marriage equality for gays and lesbians is being waged on both the state and federal levels. In California, for example, a state ballot initiative, Proposition 8, which defined marriage as a union between "one man and one woman," successfully passed in 2008. Although it has been successfully challenged in both the state and federal courts, Proposition 8's goal of defining the "traditional family" continues to gain support from many. Currently, only eight states – Connecticut, Iowa, Massachusetts, New Hampshire, New York, Vermont and Washington – and the Maryland District of Columbia allow same-sex marriage.[21] On the federal level, Congress enacted the Defense of Marriage Act (DOMA),[22] which ensured that states that prohibit same-sex marriages do not have to recognize same-sex marriages validly entered elsewhere. Even at the time this book goes to press, the status of same-sex marriage remains unsettled. Choosing a partner regardless of race has an ideological parallel to choosing a partner regardless of sexual orientation. Accordingly, *Loving* is most often referenced in constitutional arguments about same-sex marriage, in what has become known as the "*Loving* Analogy."

This book covers five sections that analyze, critique, and reconsider the lasting effects of antimiscegenation law on marital and family unions in the twenty-first century. Part One analyzes the case itself and the quiet revolution begun by Mildred Jeter and Richard Loving. As John DeWitt Gregory and Joanna L. Grossman wrote in their chapter, *Loving* marked the first time that the Supreme Court invoked the Fourteenth Amendment in marriage law, an area normally regulated by states. Although the case dismantled formal barriers to marriage, they point out that cultural norms have been slow to change.

Part Two of the volume includes five chapters that examine the regulation of interracial marriage, intimacy, and sexual relations at different points in U.S. history before 1967. Collectively, the chapters in this part highlight that prohibitions against interracial marriages affected all racial groups. Recognizing that antimiscegenation laws had a significant impact on Black-White relationships, these chapters also question the legitimacy of the Black-White binary by addressing racial restrictions on other groups, including Latinos, Asian Americans, and Native Americans.

To begin, Jason Gillmer demonstrates that Black-White intimacy and affection occurred despite legal prohibitions against it. In the shadow of antimiscegenation laws, interracial couples and families faced challenges in obtaining legal and societal recognition. His essay reminds us that antimiscegenation laws were just that: formal restrictions on interracial intimacy that did not always stop Black and White individuals from having consensual and long-term intimate relationships. Next, Carla

[21] Note that several other states recognize same-sex marriages entered elsewhere but do not allow same-sex couples to get married within their state.

[22] Defense of Marriage Act (D.O.M.A.), 1 U.S.C.A. § 7 (1996).

Pratt examines antimiscegenation law within an indigenous context by looking at tribal restrictions against Black-Native interracial marriage. Mirroring the separatist hegemony that surrounded their territory, tribes employed similar racial restrictions in an effort to maintain purity of blood. In a different context, Leti Volpp explores California's ban against marriages between Filipino men and White women. Her chapter illuminates how colonialism and immigration law played important roles in restricting intimacy between groups conceived of as "foreign" and those recognized as "American." In restricting sexual relations between Filipino men and White women, Volpp argues, antimiscegenation law functioned to deny Filipino men membership in the polity. Finally, Robin A. Lenhardt's chapter considers the 1947 California Supreme Court case of *Perez v. Sharp*. Prior to *Loving*, this case stood as the lone case in the twentieth century that invalidated antimiscegenation laws. Lenhardt argues that *Perez*, long ignored by courts and scholars, offers a more robust support of substantive due process and denunciation of race discrimination in marriage. Specifically, *Perez* underscored that the right to choose one's partner constituted an important part of an individual's fundamental liberty.

Part Three moves from past problems of racial crossings to present conflicts in "post-racial" America. Just as *Brown*'s integrationist mandate failed to be applied "with all deliberate speed," swiftness in racial acceptance has not neatly materialized in the aftermath of a court order. More specifically, the universal constitutionality of color-blind marriage laws has not led to widespread racial intermingling. Monoracialism – people partnering with and marrying others in their racial group – continues to be the norm. As chapters in this part demonstrate, with a presumption of homogeneity firmly in place, interracial couples face denials and exclusions because of their legally legitimate existence.

Nevertheless, this part of the book delights in experience. As an alternative to this restricted homogenous assumption, the authors argue for a paradigm shift that dispels notions of their families as deviant or abnormal. The shocking and enriching stories offered by the authors depict legal conflicts based on everyday experience. Following the robust tradition of critical race theory, these essays offer first-person accounts of housing discrimination, family confrontations, and social exclusion that provide individual and unique analyses of the effect of *Loving* on daily life.

This section begins with Kevin Noble Maillard's essay on the lasting effects of antimiscegenation law. Even though more than four decades have passed since *Loving*, prohibitions against interracial marriage create a presumption of illegitimacy for historical claims of mixed race. When the claim involves American political figures, interracial denial heavily relies on legal presumptions rather than actual proximity. Next, Camille A. Nelson addresses sexual stereotypes in interracial relationships. In her analysis of the "racialization of sex and the sexualization of race," she offers legal and anecdotal accounts of collective views of the politicization of sex in interracial

relationships. Couples in mixed unions face disparate impacts, and she calls for a "critical consciousness" to combat such pressures. In I. Bennett Capers's chapter on the lingering stigma of race mixing, he explains that counterintuitive yet enduring informal systems of law coexist alongside formal ones. In comparison to articulated and codified "black letter law," invisible, unwritten norms of "white letter law" continue to police Black-White interactions. In the next essay, Renée Landers offers a first-person account of growing up in a mixed-race family, and questions the affect of *Loving* on the everyday lives of families, using a number of statistics to demonstrate the slow rate of racial change. Even though courts have protected the right of persons to choose partners without regard to race, simple statistics demonstrate that people's minds are hard to change. Jacquelyne Bridgeman also offers a personal account of her life in an interracial family, noting the importance of defining oneself beyond a Black-White race-based identity. In this approach to personhood, she asks for a release of racial boundaries and entrenchments to make room for a free variety of self-identifications.

Part Four of this volume offers a more critical and less celebratory look at *Loving v. Virginia*. Collectively, the essays reveal that *Loving*'s promise of equal protection and due process in the context of race, sex, and marriage needs to be situated within the greater context of post-racialism. Yet, claims of race no longer being relevant have been largely exaggerated. Indeed, our ideas of race and racism have become more complex. It is unclear whether contemporary equal-protection laws and cases, including *Loving*, are best equipped to address the evolving understanding of race.

The essays in this part explore the impact of *Loving* on the legal and political meaning of Blackness. Taunya Lovell Banks highlights that the Black community is more diverse as a result, in part, of increased interracial marriage and migration from the Carribean, Latin America, and Africa. Thus, there is no unitary Black community. Indeed, individuals within the Black community have had varied discriminatory experiences. This chapter calls for the development of more flexible and realistic legal theories and doctrines that will more adequately address the subtle yet compelling differences between the experiences of people within the Black community. Angelique Davis focuses her analysis of Blackness on examining the Multiracial Category Movement (MCM). Her chapter advocates for the concept of "political Blackness" to unify the legal and political goals of those with Black ancestry who desire redress for slavery and Jim Crow. Under this theory, an individual's desire to classify oneself as multiracial does not mean dissociation, or renouncement, of one's Black ancestry. Instead, Davis contends that the MCM could strengthen Black racial justice efforts. Even though *Loving* protects marital freedom, it is still limited in protecting the civil liberties of interracial couples and families in their everyday lives. Angela Onwuachi-Willig and Jacob Willig-Onwuachi's chapter demonstrates the specific ways in which interracial families encounter discrimination

in gaining equal access to housing. Drawing on their own experiences, they note that traditional protections afforded by contemporary antidiscrimination laws fail to cover interracial families.

Part Five considers the regulation of interracial marriage beyond the boundaries of the United States. The traditional understanding of the policing of mixed-race unions has focused on state antimiscegenation laws. Yet, contrary to the familiar story, restrictions on marriage and intimacy between races have also occurred outside of the United States. By introducing immigration law, these chapters highlight the limitations on marriage and sexual relations that have been imposed by the U.S. military and the federal government. As a whole, this part calls for greater scrutiny of the role of federal laws and regulations in shaping racial relationships in our country.

First, Rose Cuison Villazor's chapter conducts a close exploration of the complex web of laws that led to the federal government's regulation of interracial marriages in Japan after World War II. Unlike state prohibitions on mixed marriages, the federal antimiscegenation framework that Villazor identifies comprises three separate laws – immigration, citizenship, and military, which worked together to ban mainly Whites from marrying Japanese nationals. Nancy K. Ota demonstrates in her chapter that the military aimed not only to limit interracial marriages – including those between Black soldiers and White European brides – but it also sought to police private conduct and sexual relations between interracial couples. As she points out, the military's regulations regarding marriage and sexual relationships were part of a broad array of disciplining measures designed to promote the heterosexual, nuclear family. Lastly, Victor Romero's chapter analogizes the story of Richard and Mildred Loving to the struggle of American-noncitizen same-sex partners today. Because immigration law does not consider a marriage between same-sex partners as a valid marriage, thousands of binational married couples are forced to travel outside of the United States to live together where their unions are recognized. By restricting the ability of married couples to stay together, immigration law functions in some ways like Virginia's Racial Integrity Act, which forced the Lovings to temporarily leave their home state.

Part Six of this volume questions the centrality of marriage in defining family and relationships. Additionally, this part looks to alternative methods beyond marriage for desegregating the family. The traditional notion of the family is changing, in part because of same-sex marriage and nonmarital cohabitation.

Adele Morrison begins this section by drawing a link between race and sexual orientation, to conclude that rights for the LGBTQIA (lesbian, gay, bisexual, transexual, queer, intersex, and asexual) community are civil rights. At the intersection of these constituencies is the Black LGBTQIA community. Morrison views interracial same-sex couples as the crucial yet underexamined catalyst in the transformation of

a traditional, monoracial, heterosexual definition of marriage. Rachel F. Moran's chapter calls for an autonomous look at boundaries to equality in caregiving relationships, which goes beyond what is known as the *Loving* Analogy. In asking for an independent assessment of sexual orientation discrimination, she questions the traditional analogy that views all claims of inequality and discrimination through a racial lens. Finally, Tucker Culbertson confronts *Loving* for its inability to recognize alternatives to marriage. In upholding marital freedom for some, the case underscores the nuclear paradigm of family life and intimate association that excludes others. His chapter points out an irony of *Loving*: a case about freedom of choice that in fact narrows the options for legally recognized expressions of intimacy.

As a whole, this volume reinstates the contemporary and timely importance of *Loving v. Virginia* during an era when intimate decisions about race and sexuality have, once again, become a central subject of contemporary political and social discourse. We hope that our collection opens a critical dialogue between interracialism and contemporary fears about same-sex marriage..