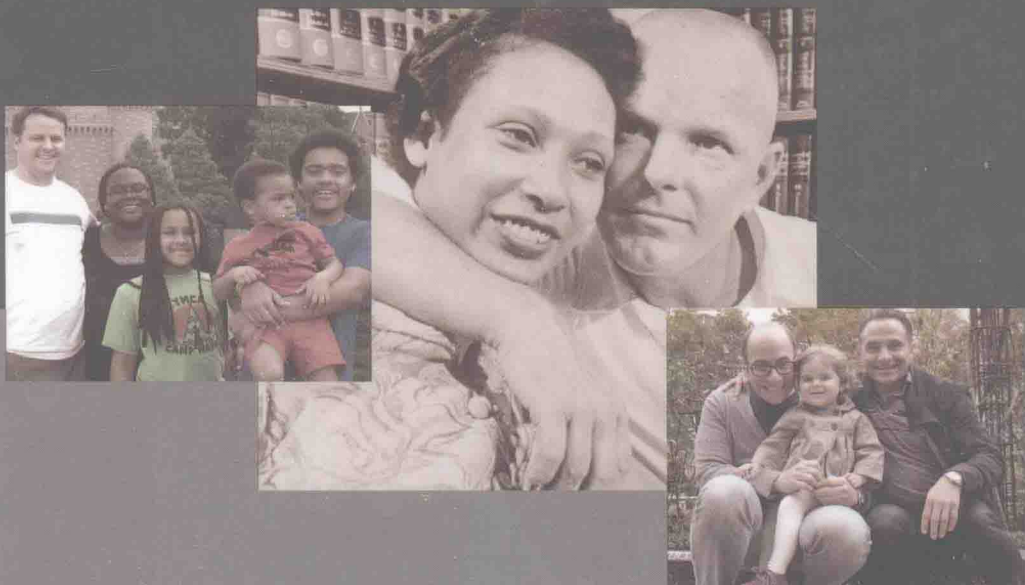


Loving v. Virginia

IN A POST-RACIAL WORLD

Rethinking Race, Sex, and Marriage



Edited by

Kevin Noble Maillard & Rose Cuison Villazor

CAMBRIDGE

Loving v. Virginia in a Post-Racial World

RETHINKING RACE, SEX, AND MARRIAGE

Edited by

KEVIN NOBLE MAILLARD

Syracuse University, College of Law

ROSE CUISON VILLAZOR

Hofstra University, School of Law



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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 seven 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 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.

Rose Cuison Villazor is an Associate Professor of Law at Hofstra Law School. She teaches and writes in the areas of race, citizenship, property, and immigration law. Her articles have appeared in the *New York University Law Review*, *California Law Review*, *Washington University Law Review*, and *Southern California Law Review*. In 2011, she received the AALS Minority Section Derrick A. Bell, Jr., Award, which is given to a junior faculty member who, through activism, mentoring, teaching, and scholarship, has made an extraordinary contribution to legal education, the legal system, or social justice.

About the Contributors

Taunya Lovell Banks is the Jacob A. France Professor of Equality Jurisprudence and the Francis & Harriet Iglehart Research Professor of Law at the University of Maryland School of Law, where she teaches constitutional law, torts, and seminars on popular culture, citizenship, and critical race theory. Prior to entering legal education in 1976, Professor Banks worked as a civil rights lawyer in Mississippi, litigating voting rights and housing discrimination cases and providing technical assistance to black elected officials. Her scholarship has appeared in the *Asian Law Journal*, *Harvard Civil Rights–Civil Liberties Law Review*, *Michigan Law Review*, and *UCLA Law Review*.

Jacquelyn L. Bridgeman is Professor of Law and Associate Dean for Academic Affairs on the University of Wyoming's College of Law faculty. Her work focuses on African Americans and the American legal system. She teaches in the areas of family law, torts, and legal writing. Before joining the College of Law faculty, Professor Bridgeman was an associate attorney at the Los Angeles, California, law firms of Curiale, Dellaverson, Hirschfeld, Kraemer & Sloan and Loeb & Loeb. Her work has been published in the *Boston College Third World Law Journal*, *Seattle Journal for Social Studies*, and *Seton Hall Law Review*.

I. Bennett Capers joined the faculty of the Maurice A. Deane School of Law at Hofstra University as an Associate Professor of Law in 2005. Prior to teaching, Professor Capers served as an assistant U.S. attorney in the Southern District of New York and as an associate at Willkie Farr & Gallagher. Professor Capers teaches Criminal Law, Criminal Procedure, Evidence, Law and Literature, and Race and the Law. His scholarship explores the dialogic relationship between culture and law and has appeared in the *California Law Review*, *Columbia Law Review*, *Michigan Law Review*, and the *UCLA Law Review*.

Rose Cuison Villazor is an Associate Professor of Law at the Maurice A. Deane School of Law at Hofstra University. She teaches and writes in the areas of race,

citizenship, property, and immigration law. In 2011, she received the Association of American Law Schools Minority Section Derrick A. Bell, Jr., Award. Her articles have appeared in the *New York University Law Review*, *California Law Review*, *Washington University Law Review*, and *Southern California Law Review*.

Tucker B. Culbertson is Assistant Professor of Law and LGBT Studies at Syracuse University. Before joining the faculty at Syracuse, Professor Culbertson was a Fellow with the Center for the Study of Law and Culture at Columbia Law School and a Lecturer in Political Science at San Francisco State University and UC-Berkeley. Professor Culbertson's research and writing presently focus on counterterrorism, color-blindness, marriage, and the extraterritorial application of the U.S. the Constitution. His recent and forthcoming works appear, among other places, in the *Washington University Law Review*, *University of Miami Law Review*, *Stanford Journal of Civil Rights and Civil Liberties*, *Journal of Animal Law*, *Women's Studies Quarterly*, and two anthologies of critical legal theory.

Angelique Davis is Assistant Professor of Women and Gender Studies and Political Science at Seattle University. She is the Director of the Pre-law Program for the College of Arts and Sciences and is a frequent writer and presenter of issues of race, reparations, and the multiracial category. Professor Davis teaches Civil Rights, Citizenship/Civic Engagement, Constitutional Law, Law, Politics and Society, and Gender and the Law. Prior to entering academia, Professor Davis was an Assistant City Attorney for the City of Seattle and a Senior Associate at the Seattle law firm of Williams, Kastner & Gibbs. Her work has been published in the *Berkeley La Raza Law Journal* and *Thomas Jefferson Law Review*.

Jason A. Gillmer is the John J. Hemmingson Chair in Civil Liberties at the Gonzaga University School of Law. Prior to teaching, Professor Gillmer clerked for Judge Donald Alsop on the District Court of Minnesota and for Judge Kim Wardlaw on the U.S. Court of Appeals for the Ninth Circuit. He was also an associate in the law firm of Robins, Kaplan, Miller & Ciresi. Professor Gillmer is a legal historian whose scholarship focuses on race, slavery, and civil rights, including issues of interracial intimacy, racial identity, and racial and class ideology. His articles have been published in the *Alabama Law Review*, *North Carolina Law Review*, and *Southern California Law Review*.

John DeWitt Gregory is the Sidney and Walter Siben Distinguished Professor of law at the Maurice A. Deane School of Law at Hofstra University. He teaches primarily in the areas of matrimonial and family law. He is an elected member of the American Law Institute, a Fellow of the American and New York Bar Foundations, and a member of the board of editors of the *Family Law Quarterly*. He has co-authored numerous books, including *The Law of Equitable Distribution*, *Property*

Division in Divorce Proceedings, and *Understanding Family Law*. His scholarship has appeared in the *Family Law Quarterly*, *Florida Law Review*, *Howard Law Journal*, and *Santa Clara Law Review*.

Joanna L. Grossman is Professor of Law and Hofstra Research Fellow at the Maurice A. Deane School of Law at Hofstra University. She writes extensively about family law, especially state regulation of marriage. Professor Grossman has served on the editorial board of *Perspectives*, the magazine of the ABA's Commission on Women in the Profession. She was elected to membership in the American Law Institute in 2009. She is the co-author, with Lawrence M. Friedman, of *Inside the Castle: Law and the Family in 20th Century America*, and the coeditor, with Linda McClain, of *Gender the Equality: Dimensions of Women's Equal Citizenship*. She has published articles in the *Stanford Law Review*, *Georgetown Law Journal*, and the *Yale Journal on Law and Feminism*, among other publications.

Angela P. Harris is Professor of Law at the University of California at Davis School of Law. She writes widely in the field of critical legal theory, examining how law sometimes reinforces and sometimes challenges subordination on the basis of race, gender, sexuality, class, and other dimensions of power and identity. She is the coauthor of *A Woman's Place Is in the Marketplace: Gender and Economics, Cultural Economics: Markets and Culture*, and *When Markets Fail: Race and Economics*, as well as numerous textbooks on race, economics, and equality. She has published articles in the *California Law Review*, *Cornell Law Review*, *Fordham Law Review*, and *Stanford Law Review*.

Renée M. Landers is Professor of Law at Suffolk University School of Law. She previously served as counsel to the Boston law firm of Ropes & Gray for five years and as an attorney for the U.S. Department of Health and Human Services and the U.S. Department of Justice. In 1985, she served as a law clerk to former Chief Justice Edward F. Hennessey of the Connecticut Supreme Judicial Court. Professor Landers' scholarship has appeared in the *DePaul Law Review*, *New England Law Review*, and the *University of California at Hastings Law Journal*.

Robin A. Lenhardt is an Associate Professor of Law at Fordham University, where she specializes in matters pertaining to race, civil rights, family law, and constitutional law. A former law clerk to U.S. Supreme Court Justice Stephen G. Breyer and Judge Hugh Bownes of the U.S. Court of Appeals for the First Circuit, Professor Lenhardt was of Counsel in the Washington, DC office of Wilmer, Cutler & Pickering, where she was a member of the litigation team that defended the University of Michigan in the *Gratz v. Bollinger* and *Grutter v. Bollinger* affirmative action lawsuits. Her scholarship has appeared in the *California Law Review*, *Fordham Law Review*, *New York University Law Review*, and *UCLA Law Review*.

Rachel F. Moran is Dean and Michael J. Connell Distinguished Professor of Law at the University of California at Los Angeles School of Law. Prior to her appointment at UCLA, Professor Moran was the Robert D. and Leslie-Kay Raven Professor of Law at the University of California at Berkeley School of Law. From July 2008 to June 2010, Dean Moran served as a founding faculty member of the University of California at Irvine Law School. She is the author of *Interracial Intimacy: The Regulation of Race and Romance*. Her law review articles have been published in the *California Law Review*, *Howard Law Journal*, *Northwestern Law Review*, and *Stanford Law Review*.

Adele M. Morrison is an Associate Professor of Law at Wayne State University Law School, where she teaches courses in Criminal Law, Family Law, and Child, Family, and State. She most recently served as visiting professor of law and acting director of the Civil Justice Clinic at Washington University in St. Louis School of Law. She was a Remington Hastie Fellow at the University of Wisconsin Law School and has taught at Western New England University, the University of Denver, and Northern Illinois University. Her research interests are family law, domestic violence, critical race theory, and LGBT studies. Her work has appeared in the *Harvard Journal of Law and Gender*, *UC Davis Law Review*, and *Wisconsin Law Review*.

Camille A. Nelson is Dean and Professor of Law at Suffolk University. Before joining Suffolk Law, Dean Nelson served as Professor of Law at the Maurice A. Deane School of Law at Hofstra University. From 2000 to 2009, she was a member of the faculty of St. Louis University School of Law. She also was a visiting professor at Washington University in St. Louis School of Law, where she became the Dean's Scholar in Residence. Dean Nelson is a member of the American Law Institute and is widely recognized for her writings and lectures, which have focused on the intersection of critical race theory and cultural studies with particular focus on criminal law and procedure, health law, and comparative law. She has published in the *Denver University Law Review*, *Florida Law Review*, *Iowa Law Review*, and *Wisconsin Law Review*.

Kevin Noble Maillard is Professor of Law at Syracuse University where he teaches family law, trusts and estates, 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*.

Angela Onwuachi-Willig is the Charles M. and Marion J. Kierscht Professor of Law at the University of Iowa. She previously taught at the University of California at Davis School of Law (King Hall). Her research and teaching interests include

family law, employment discrimination, critical race theory, feminist legal theory, and evidence. In 2006, Professor Onwuachi-Willig was honored for her service by the Minority Groups Section of the Association of American Law Schools with the Derrick A. Bell, Jr., Award. Since 2011, she has been a Fellow of the American Bar Foundation. She is the author of the forthcoming book *According to Our Hearts: Lessons on Race, Family, and Law from Rhinelander v. Rhinelander*. Her recent publications have appeared in the *Michigan Law Review*, *California Law Review*, *Wisconsin Law Review*, *Minnesota Law Review*, and *Iowa Law Review*.

Nancy K. Ota is Professor of Law at Albany Law School. Professor Ota previously taught at the University of Toledo College of Law. Before attending law school, she worked as a commercial banker in international trade and corporate finance in New Orleans and San Francisco. Professor Ota writes in the areas of race, sexuality, gender, class, and national identity in social history. Her scholarship has been published in the *Albany Law Review*, *DePaul University Law Review*, and the *Washington and Lee Race and Ethnic Ancestry Law Journal*.

Carla D. Pratt is Associate Dean for Academic Affairs and Professor of Law at the Penn State University, Dickinson School of Law. She teaches and writes in the area of race and the law, with particular emphasis on the role of law in constructing American Indian and African-American identity. Another aspect of her scholarship examines the role of race in the legal profession. She teaches Constitutional Law, Federal Indian Law, Race and American Law, and Professional Responsibility. She is the coauthor of *The End of the Pipeline: A Journey of Recognition for African Americans Entering the Profession of Law*. Her scholarship has appeared in the *Fordham Law Review*, *Houston Law Journal*, and *Wisconsin Law Review*.

Victor C. Romero is the Maureen B. Cavanaugh Distinguished Faculty Scholar and Professor of Law at the Penn State University, Dickinson School of Law. He teaches and writes in the area of immigrant and minority rights. Professor Romero has served as president of both the South Central Pennsylvania Chapter of the ACLU and the NAACP of the Greater Carlisle Area. An elected member of the American Law Institute, Professor Romero is the coeditor of the anthology *Immigration and the Constitution*, and author of *Alienated: Immigrant Rights, the Constitution, and Equality in America*. He has also published in the *Georgetown Immigration Law Journal*, *Howard Law Journal*, and *Villanova Law Review*.

Leti Volpp is Professor of Law at University of California at Berkeley School of Law. She writes about citizenship, migration, culture, and identity. Her numerous honors include two Rockefeller Foundation Humanities Fellowships, a MacArthur Foundation Individual Research and Writing Grant, and the Association of American Law Schools Minority Section Derrick A. Bell, Jr., Award. Her articles have been

published in the *Columbia Law Review*, *Michigan Law Review*, *UCLA Law Review*, and numerous edited collections.

Peter Wallenstein is a Professor of History in the History Department at Virginia Tech. His research emphasizes the American South, the history of racial identity in the United States, and the history of U.S. higher education. In 2004, he received the Hughes-Gosset Prize from the Supreme Court Historical Society for his article "To Sit or Not to Sit: The Supreme Court of the United States and the Civil Rights Movement in the Upper South." He is the author of the influential book *Tell the Court I Love My Wife: Race, Marriage, and Law—An American History*, for which he received the Sturm Award for Excellence in Faculty Research. His other published books include *From Slave South to New South: Public Policy in Nineteenth-Century Georgia* and *Blue Laws and Black Codes: Conflict, Courts, and Change in Twentieth-Century Virginia*.

Jacob Willig-Onwuachi is Associate Professor of Physics at Grinnell College, where he has served as a Harris Fellow. He previously taught in the Departments of Radiology and Biomedical Engineering at the University of California at Davis and completed a postdoctoral fellowship at Beth Israel Deaconess Medical Center/Harvard Medical School. His primary research and teaching interests include medical physics, magnetic resonance imaging, electromagnetic theory, and "workshop" physics. He has also taught and written in the areas of race, law, gender, and society. Some of his recent publications have appeared in *Magnetic Resonance in Medicine*, *Physics in Medicine and Biology*, and the *Harvard Civil Rights—Civil Liberties Law Review*.

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Finally, we thank our families for their love, patience, and support.

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*.¹ 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.”²

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.”³ Couples describe how their attraction

¹ 388 U.S. 1 (1967).

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

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

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!”⁴ 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!!!!??⁵

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.⁶ Abjection, the act of casting out in disgust, redraws the boundary again.

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

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

⁶ 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

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.⁷ 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.⁸ 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.⁹ 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”).

⁷ 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).

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

⁹ “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 (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).

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.¹⁰ 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.

¹⁰ See, generally, Matthew Jacobson, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* (1998).

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