

THE LOVE IN *LOVING*: OVERCOMING ARTIFICIAL RACIAL BARRIERS

*Justice Leah Ward Sears (Ret.) & Sasha N. Greenberg**

INTRODUCTION

In *Loving v. Virginia*,¹ the U.S. Supreme Court struck down the Virginia statute that criminalized marriages between Whites and non-Whites. Rather than relying on history or precedent, Chief Justice Earl Warren simply declared, in a unanimous opinion, that the law violated the central meaning of the Equal Protection Clause and that it ran afoul of the Due Process Clause because it deprived the Lovings of liberty in the form of the right to marry.

The rewritten opinion in *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*² is in stark contrast to the original. Professor Teri McMurtry-Chubb’s judgment for the court “unmasks—and renders unavoidable—the link between America’s history of White supremacy and patriarchy and America’s legal structures for regulating marriage and families.”³ The feminist opinion relies almost entirely on legal, social, and cultural history, in particular the history of marriage and family relationships among and between Blacks and Whites during the colonial, antebellum, and postbellum eras in the American South.

While the original opinion mentions that the maintenance of White supremacy is the only possible rationale for the Virginia statute,⁴ the feminist judgment digs deeper into the extensive ties between White supremacy and patriarchy, and in particular the ways in which the patriarchal ties of matrimony were designed to confer racial benefits.⁵ The rewritten feminist judgment tells the story of the

© 2018 Leah Ward Sears & Sasha N. Greenberg. Individuals and nonprofit institutions may reproduce and distribute copies of this Symposium in any format, at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to the *Notre Dame Law Review Online*, and includes this provision and copyright notice.

* Leah Ward Sears, a partner in the law firm of Smith, Gambrell & Russell, LLP (“SGR”), is a retired Chief Justice of the Georgia Supreme Court. Sasha N. Greenberg, originally from Savannah, Georgia, is an associate at the Atlanta office of SGR and a graduate of Duke University School of Law.

1 388 U.S. 1 (1967).

2 Teri McMurtry-Chubb, *Rewritten Opinion in Loving v. Virginia*, in *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 119* (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) [hereinafter *FEMINIST JUDGMENTS*].

3 Inga N. Laurent, *Commentary on Loving v. Virginia*, in *FEMINIST JUDGMENTS*, *supra* note 2, at 114, 117.

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

5 McMurtry-Chubb, *supra* note 2, at 130–33.

Lovings' marriage, but their story is recounted as a part of a bigger cultural and legal history that provides both the essential context and the necessary reasoning. In the rewritten opinion, *Loving* is significant not only to family relationships, but also to the relationship between history and law and between government and individuals.⁶

For the authors of this response Essay, both the original and rewritten *Loving* opinions get it right by focusing on White supremacy, but they fall short in treating Mildred and Richard as proxies for racial justice. In their view, it is important for the law to remember that Mildred and Richard were real people, whose lives depended on the outcome of this case. The authors also reflect on the future of what they identify as artificial racial barriers. In emphasizing that Mildred Jeter identified as mixed race, the authors highlight the difficulty of racial categorization in the modern era when so many are discovering, sometimes surprisingly, their mixed and diverse ancestry. Thus, the Essay suggests, while the rewritten feminist judgment might have worked some societal change through the development of the law, time and culture are equally powerful agents of change.⁷

DISCUSSION

To American history, the marriage of Mildred Delores Jeter and Richard Perry Loving will always be important. It was the focal point of the landmark 1967 U.S. Supreme Court decision that put an end to Virginia's 300-year-old antimiscegenation laws, which made marriages between Whites and non-Whites a crime. Fifty years later, movies, television shows, and books celebrate their story as a touchstone in the fight for racial equality which ultimately brought an end to "the most odious of the segregation laws and the slavery laws."⁸ But, to Mildred and Richard, their marriage was not about race, or politics, or laws. As Mildred explained on the fortieth anniversary of the Supreme Court decision, to them, their marriage was about love: "We were in love, and we wanted to be married."⁹

To the Lovings, their love story was not simply the Black and White tale that historians recount. In fact, the marriage license displayed on the Lovings' dresser when the police barged into the couple's bedroom revealed that Mildred identified as both African American and Indian,¹⁰ suggesting as diverse and complicated a background as so many other Americans. Whereas the Lovings ultimately saw race as insignificant in the face of their commitment to one another, society saw a need to categorize and separate them based solely on their skin color. As the local trial judge, Leon M. Bazile of the Caroline County Circuit Court, wrote, echoing Johann

6 *Id.* at 119–36.

7 *See id.* at 117–19.

8 *Excerpts from a Transcript of Oral Arguments in Loving v. Virginia*, ENCYCLOPEDIA VA. (Apr. 9, 2014), https://www.encyclopediavirginia.org/Excerpts_from_a_Transcript_of_Oral_Arguments_in_Loving_v_Virginia_April_10_1967.

9 *Mildred Loving, 40 Years Later*, ATLANTIC (June 18, 2007), <https://www.theatlantic.com/daily-dish/archive/2007/06/mildred-loving-40-years-later/227582/>.

10 Arica L. Coleman, *What You Didn't Know About Loving v. Virginia*, TIME (June 10, 2016), <http://time.com/4362508/loving-v-virginia-personas/>.

Friedrich Blumenbach's eighteenth-century interpretation of race,¹¹ the Lovings were faced with the view that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents The fact that he separated the races shows that he did not intend for the races to mix."¹² They were also faced with the application of eugenics (the set of beliefs and practices which aims at improving the human population by exploiting genetic engineering)¹³—a theory that was intended to be applied to "animals, to pigs, and hogs, and cattle," not to human beings.¹⁴ Race may have seemed inconsequential to them, but Judge Bazile, Sheriff Brooks, and the law saw it differently.

Unfortunately, Judge Bazile and Sheriff Brooks were not wrong—race would ultimately prove to be far from irrelevant for the Lovings. Because of their different skin colors, they were jailed, banished from their homes, and ultimately forced to face years of legal battles. But the reality is that the cause of this turmoil was not their skin color at all: it was society's reaction to their skin color. It was Sheriff Brooks's view that their marriage was "no good here"¹⁵ and Judge Bazile's view that God intended them to be separate. It was the Virginia legislature's view that their marriage was a "sociological, psychological evil[.]"¹⁶ Absent the application of those views to the Lovings' marriage, race would have been, and ultimately should have been, entirely irrelevant.

The Lovings' marriage appears to have been a real love story, so much so that when Richard died in a car wreck in 1975, Mildred never remarried: "[S]he said she missed him."¹⁷ Their lives serve as an important reminder that once the imaginations of people who seek to assign import to skin color are rightfully ignored, race has the same insignificance as hair or eye color. People should not look to skin color to discriminate against others.

Certainly, in the years since the *Loving* decision, our society has made much progress in removing the imaginary meaning that U.S. history has assigned to race. Fifty years ago, three percent of marriages crossed ethnic and racial lines.¹⁸ Today,

11 See generally JOHANN FRIEDRICH BLUMENBACH, THE ANTHROPOLOGICAL TREATISES OF BLUMENBACH (1865).

12 *Opinion of Judge Leon M. Bazile (January 22, 1965)*, ENCYCLOPEDIA VA. (Mar. 25, 2014), https://www.encyclopediavirginia.org/Opinion_of_Judge_Leon_M_Bazile_January_22_1965.

13 See generally DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY (1985).

14 Marisa Peñaloza, *'Illicit Cohabitation': Listen to 6 Stunning Moments from Loving v. Virginia*, NPR (June 12, 2017), <https://www.npr.org/2017/06/12/532123349/illicit-cohabitation-listen-to-6-stunning-moments-from-loving-v-virginia>.

15 David Margolick, *A Mixed Marriage's 25th Anniversary of Legality*, N.Y. TIMES (June 12, 1992), <http://www.nytimes.com/1992/06/12/news/a-mixed-marriage-s-25th-anniversary-of-legality.html?pagewanted=all>.

16 Peñaloza, *supra* note 14.

17 Mary C. Curtis, *Is "The Loving Story" Over, Even Now?*, WASH. POST (Feb. 13, 2012), https://www.washingtonpost.com/blogs/she-the-people/post/is-the-loving-story-over-even-now/2012/02/13/gIQAkqrqECR_blog.html?utm_term=.93b4f52832a3.

18 Sheryl Gay Stolberg, *50 Years After Loving v. Virginia*, N.Y. TIMES (June 11, 2017), <https://www.nytimes.com/2017/06/11/us/50-years-after-loving-v-virginia.html>.

that number has risen by a factor of five, to one in six marriages.¹⁹ These numbers reflect the fact that, in large part, marriage no longer appears to be focused on “blood” or “supremacy” or “breed.”²⁰ Instead, today, as America becomes less White and the multiracial community formed by interracial unions and immigration continues to expand, “[m]arriage [merely] responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.”²¹ The removal of racial barriers to marriage is now readily apparent. Whereas Judge Bazile had no problem characterizing individuals as “white, black, yellow, malay [or] red,”²² today, people recognize that ancestry is so “mixed” that more than two million people have turned to DNA analyses to identify their ancestry, making 23andMe a billion dollar online personal genomics and biotechnology company.²³

At the same time, education, poverty, employment, crime, and incarceration rates all demonstrate that race is, unfortunately, still far from unimportant in our society. The Judge Baziles and Sheriff Brooks of the world still exist and, regrettably, still enforce and interpret the laws that govern us. Plus, many Americans still look to their skin color to define not only who they are but who others are as well. As Mildred Loving wrote, “[m]y generation was bitterly divided over something that should have been so clear and right.”²⁴ Unfortunately, the same can often be said today, as the issue of race continues to play a much too significant role in our lives. Nevertheless, Mildred’s words are still applicable. That is to say, it is still true that once the imaginary value assigned to racial composition is removed from the equation, the solution to racial turmoil will become “so clear and right.”²⁵

19 *Id.*

20 *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (quoting *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955)).

21 Osagie K. Obasogie, *Was Loving v. Virginia Really About Love?*, ATLANTIC (June 12, 2017), <https://www.theatlantic.com/politics/archive/2017/06/loving-v-virginia-marks-its-fiftieth-anniversary/529929/> (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015)).

22 *Opinion of Judge Leon M. Bazile (January 22, 1965)*, *supra* note 12.

23 Erika Check Hayden, *The Rise and Fall and Rise Again of 23andMe*, NATURE (Oct. 11, 2017), <https://www.nature.com/news/the-rise-and-fall-and-rise-again-of-23andme-1.22801>.

24 *Mildred Loving, 40 Years Later*, *supra* note 9.

25 *Id.*