SHOULD WE BE LOVING *LOVING V. VIRGINIA*?

R.A. Lenhardt*

* Professor of Law and Faculty Director, Center on Race, Law and Justice, Fordham University School of Law.

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INTRODUCTION

Loving v. Virginia stands as one of the most celebrated precedents in the constitutional law canon.[1] Perhaps because of its aptly named defendants – Mildred and Richard Loving – the case has also entered the mainstream in ways that few others have. In the last few years alone, it has been the subject of two acclaimed films.[2] It was a galvanizing force in the monumental effort to secure equal marriage rights for same-sex couples. It now even has its own day: Loving Day.[3]

All this made the op-ed that acclaimed New York Times commentator Brent Staples published in March of 2017 – just a few months before *Loving*'s fiftieth anniversary – so noteworthy.[4] At a time when so many around the country were gearing up to honor *Loving* and its affirmation of the right to love across racial bounds, Staples posed a critical question: what if *Loving* had been decided differently? Even more, particularly, "[w]hat if the *Loving* Court had declared race a false idea?"[5] The query itself was pretty simple. But it challenged a widely held understanding: the idea that the Court – after endorsing Jim Crow segregation[6] and years of ducking opportunities to hear challenges to bans on interracial marriage, the third rail of race relations – had finally gotten things right on race.[7] Staples asserted that, had the court challenged the very idea of race instead of merely focusing on interracial marriage, "the Loving decision might well have been a more enduring strike against white supremacy – and changed the way the country talks about race."[8]

This essay considers Staples's intervention and asks, given all that we know now about the dangers of biologized race: should we still be loving *Loving v. Virginia*? Part I begins the inquiry by looking at what was known about race in 1967, briefly discussing social science research challenging the myth of race and its impact in litigation on race. Part II

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

[2] *See* LOVING (Focus Features Insiders 2016); THE LOVING STORY (HBO Films 2011).

[3] *See, e.g.*, Loving Day, http://www.lovingday.org (last visited Feb. 13, 2018).

[4] *See* Brent Staples, *What If the Loving Court Had Declared Race a False Idea?*, N.Y. TIMES, March 6, 2017, at A22, available at https://www.nytimes.com/2017/03/06/opinion/what-if-the-court-in-the-loving-case-had-declared-race-a-false-idea.html.

[5] *Id.*

[6] *Plessy v. Ferguson*, 163 U.S. 537 (1896), gets the credit for first constitutionally endorsing Jim Crow segregation. *But see* R.A. Lenhardt, *Forgotten Lessons on Race, Law, and Marriage: The Story of* Perez v. Sharp *in* RACE LAW STORIES (Rachel F. Moran & Devon W. Carbado eds., 2008) (citing Peggy Cooper Davis for proposition that *Pace v. Alabama*, 106 U.S. 583 (1883), holds that honor).

[7] Staples, *supra* note 4.

[8] *Id.*

considers why, given the availability of this research, Chief Justice Warren – who authored the *Loving* opinion – failed to confront the fallacy of race. Part III asks whether we should still be loving *Loving* in the 21st Century. It answers that question in the affirmative, arguing that *Loving* opens the door to a beneficial and more deeply theorized conception of white supremacy and its impact as we struggle to comprehend the violence and loss of life that unfolded in Charlottesville, Virginia, in the summer of 2017. Part IV concludes that essay.

I. WHAT WAS KNOWN ABOUT RACE IN 1967?

In the wake of World War II, the work of anthropologist Franz Boas and others exposing the fallacy of biologized race "gain[ed] ascendancy."[9] Over time, the "consensus in the social sciences that race is a social concept", not a biological phenomenon, "grew so strong that . . . it was rarely questioned."[10] This research, which Staples references in his article,[11] provided the foundation for new insights in social science research, but also in other areas, such as international human rights and law.[12]

Litigants in cases addressing race-based discrimination quickly comprehended the potential of research documenting that race was socially constructed, rather than natural or rooted in biology as eugenicists had asserted.[13] Soon, attacks on the very idea of race and its utilization by government and even private actors could be found in cases involving, among other things, annulments;[14] will contests;[15] and racially restrictive covenants.[16] For example, in *Ridgway v. Cockburn,* Patricia Cockburn challenged a white property holder's lawsuit contesting Cockburn's purchase of land due to a restrictive covenant on the land restricting sale to certain racial groups. Cockburn challenged the covenant by challenging the definition of the term "Negro". Cockburn essentially insisted that she "did not know whether or not she was a 'Negro,' although she admitted that she had some colored blood, possibly as much as one eighth."[17] The U.S. Supreme Court later invalidated such agreements in *Shelley v. Kramer*.

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[9] Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 FORDHAM L. REV. 22, 30 (2013).

[10] Osagie K. Obasagie et al., *Race in the Life Sciences: An Empirical Assessment, 1950-2000*, 83 FORDHAM L. REV. 3089, 3091 (2014).

[11] *See* Staples, *supra* note 4 (mentioning research and Dorothy Roberts).

[12] *See* United Nations Educ., Sci. & Cultural Org., Statement by Experts on Race Problems (July 20, 1950), available at http://unesdoc.unesco.org/images/0012/001269/126969eb.pdf.

[13] *See* Peggy Pascoe, *Miscegenation Law, Court Cases, and the Ideologies of "Race" in the Twentieth-Century America*, 83 J. AM. HIST. 44 (1996).

[14] *See, e.g.*, Kirby v. Kirby, 24 Ariz. 9 (1922).

[15] *See, e.g.*, In re Monks Estate, 120 P. 2d 167 (Cal. Dist. Ct. 1941).

[16] *See, e.g.*, Ridgway v. Cockburn, 296 N.Y.S. 936 (Sup. Ct. 1937).

[17] *Id.* at 940.

Experts like Boas began to serve as expert witnesses, working to rebut the long-held and extremely deleterious ideas about biological race on which slavery and so many legal systems rested.[18] Integration of these ideas into U.S. judicial opinions proved more challenging, however. Indeed, *Perez v. Sharp* provides the only fulsome pre-1967 judicial integration of the relevant social science insights.[19]

Decided in 1948 by the California Supreme Court, *Perez* was the first post-Reconstruction case to invalidate an antimiscegenation law.[20] Sylvester Davis and Andrea Perez challenged California's complex antimiscegenation provision, which banned marriages between Whites and "a Negro, mulatto, Monglian or member of the Malay Race", after a county clerk refused to give them a wedding license.[21] Sylvester was African-American and Andrea was Mexican-American, a pairing that would not have posed a problem in other jurisdictions, including Virginia. In California, however, Mexican-Americans were subject to similar discrimination and segregation other groups faced in all areas but marriage.[22] For purposes of that institution, they were white.

After a 4-3 vote of the justices, Justice Roger Traynor – a former law professor and highly-respected judge who later led his colleagues as chief judge[23] – wrote the *Perez* majority opinion striking down California's law.[24] Both his race skepticism and knowledge of social science were on display as early as oral argument: during colloquy with the state's attorney, he stated that anthropologists "'say . . . there is no such thing as race.'"[25] The first section of Traynor's opinion began by discussing the research of Gunnar Myrdal and Otto Kleinberg, as well as others who refuted California's eugenics-inspired assertions about racial difference and the presumed superiority of Whites. [26] Turning to doctrine, the opinion then rejected the prevailing notion of the pre-*Brown v. Bd. of Education* era,[27] rejecting that the single question in the case was wheth-

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[18] *See* Pascoe, *supra* note 13, at 53. Significantly, the defendant in *Ridgway v. Cockburn* reinforced her challenge to the racially restrictive covenant at issue by submitting an affidavit from Franz Boas himself, explaining that "a 'Negro' is a person of full West or Central African racial descent from those regions where no admixture of foreign blood has occurred . . . .". Lenhardt, *supra* note 6, at 376 (citing George H. Cohen, *Who Is Legally a Negro?*, 3 INTRAMURAL L. REV. OF N.Y.U. 93-96 (1948)).

[19] Perez v. Sharp, 198 P.2d 17 (Cal. 1948).

[20] Lenhardt, *supra* note 6, at 343-44.

[21] CAL. CIV. CODE § 69 (West 1941), *invalidated by* Perez v. Sharp, 198 P.2d 17 (Cal. 1948). Another provision dictated that any marriages between members of the above listed groups would be void. *See* CAL. CIV. CODE. § 60 (West 1941), *invalidated by Perez* v. Sharp, 198 P.2d 17 (Cal. 1948).

[22] Lenhardt, *supra* note 6, at 348.

[23] *Id.* at 358.

[24] A concurrence and a dissent were also filed. *Id.*

[25] *Id.* at 362-64 (citing Transcript of Oral Argument, *Perez*, 198 P.2d 17 (No. L.A. 20305).

[26] *Perez,* 198 P.2d at 24-25.

[27] *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

er individuals of different races were treated the same under California law.[28] Instead, in a manner reminiscent of what the Supreme Court would later do in *Loving*[29], Traynor insisted that because the right to marry is fundamental, [30] the core inquiry was actually whether the state had sufficient justification for its policy.[31] Holding that it did not, Traynor addressed why Sylvester and Andrea's ability to marry other people but not each other failed constitutional muster.[32] "A person consigned to segregated facilities might still ride a railway car or be educated in a public school," he explained, "but for the individual prevented 'by law from marrying the person of his choice . . . that [other] person to him may be irreplaceable."[33]

This analysis could easily have ended the opinion, as it addressed the key questioned presented by the lawsuit. But Traynor seemed intent on further grounding his survey of race social research in law. Highlighting the extent to which California's provisions had "outlived their purpose,"[34] he emphasized that the state's "illogical and discriminatory" categories were likely also "void for vagueness."[35] For Traynor, the fact that state law failed to designate how "determinations about race should be made" was extremely problematic.[36] Linked to this was the statutes' problematic treatment of "persons of mixed ancestry".[37] He observed, *inter alia*, that "a person with three-sixteenths Malay ancestry might have many so-called Malay characteristics and yet be considered a white person in terms of his preponderantly white ancestry. Such a person might easily find himself in a dilemma, for if her were regarded as a white person . . ., he would be forbidden to marry a Malay, and yet his Malay characteristics might preclude his marriage to another white person."[38] These bizarre results only reinforced Traynor's view that California's provisions "were too vague and uncertain to be upheld as valid. . . ."[39] In his estimation, they offered no meaningful notice of an individual's violation of the law and only confirmed the inherent instability and vagueness of race.

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[28] Lenhardt, *supra* note 6, at 360. Traynor also declined to rest his opinion on the issues of religion emphasized by the plaintiffs. *See id.* at 359.

[29] *Id.* at 366.

[30] *Perez,* 198 P.2d at 20-21.

[31] Lenhardt, *supra* note 6, at 360.

[32] *Id.*

[33] *Id.*; *see also* R.A. Lenhardt, *Beyond Analogy:* Perez v. Sharp, *Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CAL. L. REV. 839 (2008) (noting equal marriage advocates' later reliance on *Perez* in seeking marriage rights for same-sex couples).

[34] *Perez,* 198 P.2d at 26.

[35] *Id.*

[36] Lenhardt, *supra* note 6, at 361.

[37] *Perez,* 198 P.2d at 28.

[38] *Id.* at 29.

[39] *Id.*

II. WHY DIDN'T THE *LOVING* COURT CONFRONT THE INHERENT VAGUENESS AND INSTABILITY OF RACE?

The deep engagement with social science research and the problem of racial vagueness on display in *Perez* is missing from the Court's opinion in *Loving*. Why? A possible reading of Staples's op-ed suggests that the Court was simply unaware of the growing body of scholarly research on race. But this would be wrong. Indeed, there is a lot to suggest that Chief Justice Warren and his colleagues were well aware of this information and legal arguments that incorporated them. To begin, Warren himself was all too familiar with *Perez*, as that decision and even the reasoning in *Loving* suggest.[40] He was Governor of California when *Perez* came down and, to that extent, was charged with its implementation.[41]

Further, by 1967, the justices of the Supreme Court had been presented with numerous opportunities to consider research on the operation of race in the United States and the racial categories that helped to establish what Professor Randall Kennedy refers to as "American pigmentocracy."[42] Indeed, the Court cited to such research as early as 1954, as the infamous footnote 11 of the unanimous *Brown* opinion underscores.[43] Further, the Court was given the direct opportunity to invalidate a provision banning interracial intimacy on grounds of racial vagueness a full three years before *Loving* was even decided. The plaintiffs in *McLaughlin v. Florida*,[44] a case concerning the constitutionality of a state provision criminalizing interracial cohabitation and sex, made the argument that "the definition of 'Negro' under that statute was unconstitutionally vague."[45] The Court, in invalidating the statute on equal protection grounds, ultimately concluded that it was unnecessary to reach this issue.[46] Yet, it cannot be said that the Court was unaware of the argument and theory on which it was based.

Finally, the record of *Loving* itself makes the Court's familiarity with the relevant research and cases very evident. In addition to hearing from the Lovings' attorneys, Philip Hirschkop and Bernard Cohen, and counsel for the State of Virgina during oral argument, the Court explicitly invited attorney William M. Marutani, legal counsel for the amicus Japanese Citizens League, to argue before them.[47] During a colloquy with the

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[40] *See* Lenhardt, *supra* note 6, at 366.

[41] Lenhardt, *supra* note 6, at 366.

[42] Randall Kennedy, Lecture, *Race Relations Law in the Canon of Legal Academia*, 68 Fordham L. Rev. 1985, 1997 (2000). Significantly, *Perez* was not immediately implemented under Warren's watch. Lenhardt, *supra* note 6, at 364 n. 165. He did not take steps to do so and the California legislature waited more than ten years to fulfill that obligation.

[43] 347 U.S. 483 at n.11 (citing, *inter alia*, research by Myrdall).

[44] *McLaughlin v. Florida*, 379 U.S. 184 (1964).

[45] *Id.* at 188.

[46] *Id.* at n.6.

[47] *See* Transcript of Oral Argument, *Loving v. Virginia*, 388 U.S. 1, 19 (1967).

Justices that further explicated the arguments contained in the amicus brief he submitted on his clients' behalf, Marutani, *inter alia*, referenced the UNESCO statement on race.[48] He also emphasized "the fact that anthropologists, flatly, reject the concept . . . [of] any notion of a pure race under Section 20-53 of Virginia's laws."[49]

The extent to which the Court found the arguments by Marutani, in particular, compelling was apparent at different times in the Justices' conversations with others. For example, at one point Chief Justice Warren himself questioned the scholarly support for the ideas about racial purity that undergirded the provisions the Lovings had been accused of violating. In response to a question from Warren about what he referred to as "the findings of this great committee of UNESCO where . . . about 20 of the greatest anthropologists in the world joined unanimously in making some very cogent findings – on the races," McIlwaine raised a number of issues and suggested that some portions of the statement had been called into question by authoritative experts and were thus less than "definitive."[50] Chief Justice Warren's reaction to this account is telling:

> R.D. McIlwaine, III: No one has challenged the statistics in . . . [the report] and it has been widely received as we put – set forth in our brief as putting statistical form on an embarrassing gap in the literature of the social sciences.
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> * * *
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> Earl Warren: It seemed to me that the last paragraph of UNESCO's report is rather definitive.
>
> It isn't general in any sense.
>
> It said, "The biological data given above stand in open contradiction of the tenets of racism.
>
> Racist's theories can in no way pretend to have any scientific foundation and the anthropologist should endeavor to prevent the results of their researches from being used in such a bias way that they would serve nonscientific ends that rather --
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> R.D. McIlwaine, III: And,

[48] *Id.* at 20.
[49] *Id.*
[50] *Id.* at 48.

> Earl Warren: -- is a rather definite finding it seems to me.[51]

This exchange and others during oral argument suggest that Chief Justice Warren, as well as some, if not all of his colleagues, found the prevailing research on race exceedingly persuasive. So, given all this, why did Chief Justice Warren elect not to address the fallacy of race in his *Loving* opinion directly? With the support provided by the UNESCO report and the contributions of social scientists like Boas, Kleinberg, and Myrdal, Warren could very easily have added a section to the opinion emphasizing the extent to which race is a social construction, an idea given shape and meaning by social practice and laws like Virginia's antimiscegenation statute. Indeed, the oral argument transcript suggests that he was virtually primed to do so. What stopped him? Why didn't he go farther in his analysis?

We, of course, may never have a definitive answer to these questions. However, at least a part of the answer to this query and the intervention by Staples may come from looking at *Loving* in conjunction with *Brown* or at least its aftermath. *Brown* stands as the most significant of the Warren Court's many contributions to modern American constitutional law.[52] Indeed, the sense that addressing bans on interracial marriage earlier might have undermined desegregation efforts in public schools and other institutions arguably explains the Court's decision to wait until 1967 – almost twenty years after *Perez* was decided – to consider the constitutionality of antimiscegenation laws.[53] Yet, at the time the Court considered *Loving*, as now, the implementation of the *Brown* Court's mandate to desegregate public schools was far from complete, very often due to the outright and sometimes violent opposition of Whites.[54] The number of states with antimiscegenation laws on the books had long been on the decline when *certiorari* was granted in *Loving*. However, the commitment to racial "integrity" and the preservation of whiteness that had long motivated the enactment of such provisions remained strong in Virginia and the other states that retained them, as well as in Northern jurisdictions, although on an informal basis.[55] Notwithstanding the Court's effort to delink segregated schools from interracial intimacy as both a strategic and constitutional matter, the unifying

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[51] Transcript of Oral Argument, *Loving*, 388 U.S. 1 (1967), at 45-46.

[52] Akhil Reed Amar, *The Warren Court and the Constitution (with Special Emphasis on* Brown *and* Loving*)*, 67 S.M.U. L. Rev. 671 (2014).

[53] *See* Philip Elman & Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-60: An Oral History*, 100 Har. L. Rev. 817 (1987) (discussing the Supreme Court's avoidance of antimiscegenation cases).

[54] *Id.*

[55] *See* Elise C. Boddie, *Racial Territoriality,* 58 UCLA L. Rev. 401 (2010). In 1948, when *Perez* was decided, 30 states had antimiscegenation laws. Lenhardt, *supra* note 6, at 366. That number declined to 16 by 1967. Significantly, after *Loving* was decided, some states took decades to remove antimiscegenation laws. Alabama, the last state to remove eliminate its antimiscegenation laws, did not do so until 2000. *Id.* at 364-65.

force of white supremacist ideology across these domains could not have been lost on the Justices of the Supreme Court. This certainly seems to have been true of Chief Justice Warren. Once again, an example from the oral argument in *Loving* proves useful:

> R.D. McIlwaine, III: Of course, we go fundamentally to the proposition that for over hundred years since the Fourteenth Amendment was adopted, numerous states as late as 1956 the majority of the States and now even 16 states have been exercising this power without any question being raised as to the authority of the States to exercise this power.
>
> Earl Warren: Those happened to be the same 16 states that had school segregation laws, do they not?
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> * * *
>
> R.D. McIlwaine, III: But I do not have available the – states which had antimiscegenation, I mean, the school segregation statutes.
>
> Earl Warren: No, I'm talking about those 16 – I've been – I've just been looking at the list and I – I can't see single one of these States that wasn't among those that had miscegenation or had the school segregation laws.[56]

Here and elsewhere in the oral argument, especially in interchanges emphasizing that the objective of antimiscegenation bans was to preserve a pure, unadulterated version of whiteness, Warren seems to have been coming to terms with the reality of the pervasiveness and fundamental brutality of the Jim Crow system as a whole. While the Court was charged only with looking at discrete cases about specific issues in racial discrimination – e.g., in public schools, parks, or intimate choice – the system of racialization and subjugation of minorities in the United States lived could not be so easily contained. This is not to suggest that Warren was in any way naïve about race or the critical role that the Court had assumed in that context. He would not have expected to receive blowback like the Court had seen across the country after its 1954 decision in *Brown*. Even so, his repeated questioning of McIlwaine suggests a new, emerging appreciation of the intersecting systems of oppression that made up the Jim Crow system, and their unusual staying power both in the area of education and in the sphere of intimate choice and marriage.

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[56] Transcript of Oral Argument, *Loving,* 388 U.S. 1 (1967), at 63.

In the same way that Roger Traynor felt an obligation to supplement his *Perez* holding on marriage with a discussion of racial vagueness, Chief Justice Warren – whose private papers suggest a keen interest in offering a robust conception of equality in *Loving* – may have felt the need to address the particular problem of which he had become aware.[57] An exegesis on the illogic of racial categories was within his capacity, but might not have spoken directly enough to the problem Warren was most concerned about. Warren saw the motivational force of white supremacy and racial hegemony at work in the overlap between Southern states unwilling to yield on racial segregation and those who remained staunch defenders of prohibitions on so-called race-mixing. His assertion that "the racial classifications" at issue in *Loving* "must stand on their own justification, as measures designed to maintain White Supremacy" goes to a truth about the racial hegemony in a way that, under the circumstances of the case, challenging the definition of terms like "black" or "white" might not have.[58]

III. IS THERE ANYTHING ABOUT *LOVING* WORTH LOVING TODAY?

The fact that something other than ignorance on the part of the Justices might account for the *Loving* Court's failure to "declare[] race a false idea"[59] in *Loving* begs the question whether we should still be loving the decision. Today, we have sound confirmation from the Human Genome Project and other research that, irrespective of racial groupings, humans are 99.9 percent the same.[60] This underscores the social construction of race. Still, as researchers like sociologist Ann Morning, and legal theorists Osagie Obasogie and Kimani Paul-Emile have observed, there is nevertheless strong evidence that "biological race never went away."[61] The inclusion of insights about race that Chief Justice Warren and his colleagues openly discussed during the oral argument in *Loving* might very well have stemmed this tide.

We thus can and should lament biological race's ongoing salience in the 21st Century. Its enduring impact can be seen in "genetics, medical research,"[62] and, some argue, even current legal doctrine.[63] This has consequences, as Staples noted, for how we understand and talk about race. It likewise has very serious implications for how race is experienced on the ground. On multiple levels, blackness and the stigma at-

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[57] *Id.*

[58] 388 U.S. 1 (1967) at 11.

[59] Staples, *supra* note 4, at A22.

[60] *See* Kimani Paul-Emile, *The Regulation of Race in Science*, 80 Geo. Wash. L. Rev. 1115, 1116 (2012).

[61] Obasogie et. al, *supra* note 10, at 3113.

[62] *Id.*

[63] Bridges, *supra* note 9, at 80

tached to racial difference impose social "disability" that colors areas of human functioning as diverse as policing, employment, and family life.[64]

None of this, however, means that we should not be showing *Loving* the love. If anything, we arguably need to appreciate it a little more. The discussion of white supremacy in *Loving*, although perhaps not a complete salve to the injury posed by the Court's failure to discredit biologized race, provides us with an important gift. *Loving* provides constitutional recognition of a line of white supremacist thought and actions connecting antimiscegenation provisions with efforts to separate children by race in a way that surfaced the challenge posed to both equality and human dignity.[65] The only problem is that we have yet to fully capitalize on it.

The violence and loss of life that unfolded in Charlottesville, Virginia, in August of 2017 – not far from the town of Central Point where Mildred and Richard Loving grew up, and not long after the 50th anniversary of their Supreme Court victory – remains seared in the national consciousness.[66] News outlets and pundits discussed at length the actions taken by avowed white supremacists and Nazi sympathizers that day.[67] In the aftermath of August 12th, we also saw robust engagement with questions about memorials and statutes honoring those who fought for the Confederacy during the Civil War, and their connection to the violence and loss of life in Charlottesville. But there were comparatively few efforts to comprehensively unpack the term "white supremacy" and all that it entails in the United States.

Chief Justice Warren's choice to articulate the equal protection challenge presented in *Loving* in the register of this enduring problem provides legal theorists with a unique opportunity. Scholars in other fields have endeavored to theorize white supremacy and its effects in ways that legal scholars have not.[68] The interrogation of whiteness by Critical Race theorists and others have been an area of scholarly focus in law, especially in recent years, but there is still more to do. As Dorothy Roberts notes, we still fail universally to talk about *Loving* as a case about white su-

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[64] Kimani Paul-Emile, *Blackness as Disability*, 106 GEO. L. J. 293, 333 (2018) (arguing blackness imposes a social disability like those recognized under disability law). For a discussion of racial stigma, *see* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 M.Y.U. L. Rev. 803 (2004).

[65] For research on the link between school segregation and antimiscegenation concerns, *see* Reginald Oh, *Interracial Marriage in the Shadow of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination*, 39 U.C. Davis L. Rev. 1321, 1333 (2006).

[66] Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm_term=.a09f007e2db1.

[67] *Id.*

[68] *See, e.g.,* Charles W. Mills, *Revisionist Ontologies: Theorizing White Supremacy, 4 SOC. & ECON. STUD. 3 (1994).*

premacy.[69] Changing this requires thinking more intentionally about "modes of domination" and the structural dimensions of racial inequality. [70] For example, a global[71] and intersectional approach must acknowledge that white supremacy informs conceptions of gender, race, and notions of heterosexualism.[72] Finally, we would have to look not only at the past, but at the present, and the ways in which law currently functions to construct race and perpetuate inequality. This admittedly is a tall order. Still, it is one well worth taking up and, of course, provides a reason to love *Loving* just a little bit more.

CONCLUSION: WHY WE WILL BE LOVING *LOVING* IN ANOTHER FIFTY YEARS

This essay admittedly set out to explore the U.S. Supreme Court's failure to address the fallacy of race by setting up a similarly false choice about *Loving v. Virginia*: should we be "loving" it or not? Though *Loving* deserves criticism, namely for what it fails to say about race, it offers promising tools to combat the scar of race in this country.

Loving endures, in part, because it has managed to remain relevant across a myriad of changes in American society. It provided inspiration and doctrinal support for the equal marriage rights movement in securing the rights of LGBT couples to marry.[73] It may also hold the key to new scholarly insights into the meaning and impact of "White Supremacy" at a moment of growing awareness about, yet also significant retrenchment on, issues of race and inequality across the country—including at the highest levels of government.[74] With all its limitations, *Loving* continues to offer new purchase on the meaning and operation of race. For this reason, we should still be loving *Loving*, warts and all, for at least another 50 years.

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[69] Dorothy E. Roberts, Loving v. Virginia *as a Civil Rights Decision*, 59 N.Y.L. Sch. L. Rev. 175, 177 (2015).

[70] Mills, *supra* note 69, at 111.

[71] *Id.* at 116.

[72] Sarah Lucia Hoagland, *Heterosexism and White Supremacy*, 22 Hypatia 166, 169-80 (2007).

[73] *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); *see also* R.A. Lenhardt, *Beyond Analogy:* Perez v. Sharp *and the Fight for Same-Sex Marriage*, 96 CAL. L. REV. 839, 865 (2008) (discussing litigation).

[74] *See* Charles Blow, *Trump Is a Racist. Period.*, N.Y. TIMES, Jan. 14. 2018.