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Loving's Legacy: Decriminalization and the Regulation of Sex and Sexuality

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LOVING'S LEGACY: DECRIMINALIZATION AND THE REGULATION OF SEX AND SEXUALITY

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2017 marked the fiftieth anniversary of Loving v. Virginia, *the landmark Supreme Court decision that invalidated bans on miscegenation and interracial marriages. In the years since* Loving *was decided, it remains a subject of intense scholarly debate and attention. The conventional wisdom suggests that the Court's decision in* Loving *was hugely transformative—decriminalizing interracial marriages and relationships and removing the most pernicious legal barriers to such couplings. But other developments suggest otherwise.*

*If we shift our lens from marriages to other areas of the law—child custody cases, for example—*Loving*'s legacy seems less rosy. In the years preceding and following* Loving, *white women routinely lost custody of their white children when they remarried or began dating black men. That this should happen in the years before* Loving *is perhaps unsurprising. But one might expect a shift after* Loving, *when interracial marriages and dating were decriminalized and made lawful. This was not the case. Even after* Loving, *white women routinely lost custody when they remarried or dated black men.*

These underexplored child-custody cases illuminate an important aspect of Loving*—and indeed, any civil rights effort that is predicated on decriminalization. Despite the turn toward decriminalization and subsequent legalization, the impulse to punish and stigmatize certain conduct does not dissipate entirely. Instead, it may simply be rerouted into other legal avenues where disapprobation of the challenged conduct may continue to be expressed and felt. Recognizing and understanding this "regulatory*

* Alexander F. and May T. Morrison Professor of Law, University of California, Berkeley, School of Law. I presented this Article as a keynote lecture at the *Fordham Law Review*'s Symposium commemorating *Loving*'s fiftieth anniversary, a University of Virginia Symposium on *Loving*, a Cardozo Law School faculty workshop, the Harvard Public Law Workshop, and at the annual Brigitte Bodenheimer Lecture at the University of California, Davis. For an overview of the *Fordham Law Review* Symposium, held November 2–3, 2017, see R.A. Lenhardt, Tanya K. Hernández & Kimani Paul-Emile, *Foreword: Fifty Years of* Loving v. Virginia *and the Continued Pursuit of Racial Equality*, 86 FORDHAM L. REV. 2625 (2018). I am grateful to those in attendance at these events for their thoughtful questions and feedback. I wish to thank Aziza Ahmed, Richard Chused, Katie Eyer, Marie-Amélie George, Solangel Maldonado, Serena Mayeri, Douglas NeJaime, Alice Ristroph, Russell Robinson, Charisa Smith, Emily Stolzenberg, and Sarah Swan for their insightful comments and feedback. Kiet Lam, Angela Lesnak, Caitlin Millat, and Sonia Roubini provided helpful research assistance. Jacob Walpert and the staff of the *Fordham Law Review* provided outstanding editorial assistance. All errors are my own.

displacement" phenomenon is critical as we assess the progress of other decriminalization efforts, including the recent struggle to legalize same-sex marriages.

INTRODUCTION

2017 marked the fiftieth anniversary of *Loving v. Virginia*,[1] the landmark U.S. Supreme Court decision that invalidated bans on miscegenation and interracial marriages. In the fifty years since *Loving* was decided, it remains a subject of intense scholarly debate and attention.[2] Some have argued that *Loving* was a transformative decision, delivering a death blow to the most durable aspect of Jim Crow segregation—its antipathy for race mixing—and marking a path toward dismantling the residue of racism in the United States.[3] Others have focused on the decision's lasting implications for other civil rights projects, notably the struggle for marriage equality.[4] Others have been less sanguine about *Loving*. Although the decision formally eradicated bans on interracial marriages, critics have noted that social taboos around interracial sex and marriage persist, especially between particular groups.[5] On this account, although *Loving* largely dismantled the legal impediments to interracial marriage and relationships, it did little to undermine the social impediments between those who dare to love across the color line.

I do not dispute the latter point. Although much has changed in our society, the norm of racial homogamy remains remarkably durable, particularly

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

2. *See, e.g.*, Paula Joy Strand, *Loving and* Loving*: Eroding the Stance of Other*, 50 CREIGHTON L. REV. 621, 626–27 (2017) (discussing how *Loving* disrupted the social constructions of race in America).

3. *See, e.g.*, Gregory Michael Dorr, *Principled Expediency: Eugenics,* Naim v. Naim*, and the Supreme Court*, 42 AM. J. LEGAL HIST. 119, 120 (1998) (examining the Court's history leading up to *Loving* and arguing that the case ultimately "remov[ed] the last legally-enforced barrier facing Americans of color").

4. *See generally* Mark Strasser, *Let Me Count the Ways: The Unconstitutionality of Same-Sex-Marriage Bans*, 27 BYU J. PUB. L. 301 (2013) (arguing that *Loving*'s impact on equal protection and due process jurisprudence would render same-sex marriage bans vulnerable even under rational basis review).

5. *See, e.g.*, Kevin R. Johnson, *The Legacy of Jim Crow: The Enduring Taboo of Black-White Romance*, 84 TEX. L. REV. 739, 755–61 (2006) (book review) (discussing post-*Loving* taboos around interracial relationships).

among certain groups.[6] Indeed, as some scholars have noted, the preference for in-group marriage is so strong that individuals may choose to forgo marriage entirely, or settle for less desirable marriage partners, rather than marry outside of the race.[7]

Instead, my focus is on the first point. If *Loving* accomplished anything, its legacy is in formally dismantling the legal impediments that banned interracial marriage and relationships. Today, this aspect of *Loving*—the notion that law no longer bars interracial love—is taken as an article of faith. On this account, the real issue is whether, and how, to disrupt the social norms that remain the primary deterrent to racial heterogamy. But is this account correct? Is it the case that, post-*Loving*, law is neutral to the question of interracial relationships?

This Article argues that if we shift our lens from marriage to other areas of the law—child-custody cases, for example—*Loving*'s legal legacy is decidedly more complicated. Although *Loving* decriminalized interracial marriages, post-*Loving*, law continued to actively discourage interracial love and romance, albeit through different means. As this Article documents, in the years preceding and following *Loving*, white women routinely lost custody of their white children when they remarried or dated black men. That this should happen in the years before *Loving* is perhaps unsurprising. After all, interracial marriages were prohibited in a number of jurisdictions and considered taboo, even in those jurisdictions where they were permitted. But one might have expected a shift after *Loving*, when interracial marriages and dating were decriminalized and legalized throughout the country. This, however, was not the case. Even after *Loving*, white women frequently lost custody when they remarried or dated black men.

This aspect of *Loving*'s afterlife tells us much about the law's enduring skepticism of interracial relationships, but it also offers important lessons about law reform that go beyond the issue of interracial love. On this point, it is worth remembering that *Loving* was not simply a case about interracial marriage, it was a case about *crime* and, specifically, the use of the criminal law to signal public disapprobation of interracial marriages and relationships. In striking down miscegenation bans, the *Loving* Court decriminalized interracial marriages, thereby making them legal throughout the country. Critically, however, *Loving* did not eradicate the legal impulse to deter and punish interracial marriage and romance. Instead, the interest in deterring and punishing interracial relationships shifted to other venues—including the civil context of child custody.

On this account, these underexplored child-custody cases illuminate an important aspect of *Loving*—and indeed, any effort to use decriminalization as a vehicle of law reform. Despite the strong impulse toward decriminalization, the impulse to punish and stigmatize certain conduct does not dissipate entirely. Instead, it may simply be rerouted into other legal

6. *See* GRETCHEN LIVINGSTON & ANNA BROWN, PEW RESEARCH CTR., INTERMARRIAGE IN THE U.S. 50 YEARS AFTER *LOVING V. VIRGINIA* 5–8 (2017).

7. *See* RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE 115–28 (2012).

avenues where disapprobation of the challenged conduct may continue to be expressed and felt. As this Article argues, recognizing and understanding this phenomenon, which I have termed "regulatory displacement," is critical not only for understanding *Loving*'s legacy but for assessing the progress of other decriminalization efforts, including the recent struggle to legalize same-sex marriages.[8]

This Article proceeds in three parts. Part I discusses the *Loving* decision and the conventional wisdom that posits *Loving* as eradicating most legal barriers to interracial marriage and relationships. Part II shifts to the consideration of race in child-custody cases. As this Part explains, following *Loving*, courts stripped white mothers of custody of their children when they remarried or dated interracially. Critically, *Loving* altered the landscape in which such decisions could be made. Recognizing that the fact of an interracial relationship, without more, was likely to prompt close scrutiny upon appellate review, courts went to great lengths to couch their decisions in more neutral terms. But while the rationales were nominally race neutral, the outcomes were the same. White women often lost custody of their children as a penalty for dating and marrying across racial lines.

Part III reflects on the implications of this history. As this Part explains, these custody cases complicate the conventional wisdom that surrounds *Loving*. Although *Loving* removed most formal legal barriers to interracial relationships, it did not eliminate *all* legal deterrents to such relationships. As importantly, though *Loving* eliminated the use of the criminal law as a vehicle for stigmatizing and punishing interracial relationships, other legal vehicles emerged to continue communicating law's disapprobation of racially transgressive relationships. This aspect of *Loving* warrants further consideration. Historically, the effort to liberalize laws that regulate sex and sexuality has relied primarily on decriminalization as a tool of legal reform. However, as this history makes clear, decriminalization as a method of law reform has important limitations that must be recognized and understood.

I. *LOVING V. VIRGINIA*: THE CONVENTIONAL WISDOM

The facts of *Loving* are well known. In June 1958, Richard Loving, a white man, and Mildred Jeter, a black woman, left their home in Virginia and traveled to the District of Columbia in order to marry.[9] Upon returning to Virginia, where they began cohabiting as man and wife, the Lovings were charged and convicted of violating Virginia's Racial Integrity Act of 1924, which prohibited interracial unions.[10] The Lovings challenged their convictions through the Virginia state court system all the way to the U.S. Supreme Court.

The Court, in a unanimous decision, reversed the convictions and, in so doing, invalidated Virginia's miscegenation laws.[11] Because the statutes

8. *See infra* Part III.
9. Loving v. Virginia, 388 U.S. 1, 2 (1967).
10. *Id.* at 2–3.
11. *Id.* at 11–12.

rested "solely on distinctions drawn according to race" and were "designed to maintain White Supremacy,"[12] the Court concluded that they were unconstitutional, having "patently no legitimate overriding purpose independent of invidious racial discrimination."[13] The Court went further to note that the statutes "also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment."[14] "Under our Constitution," the Court reasoned, "the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."[15]

In the fifty years since it was decided, *Loving v. Virginia* has come to stand for various constitutional principles. It confirmed the fundamental right to marry[16] and, in doing so, undergirded the logic of *Obergefell v. Hodges*,[17] the 2015 Supreme Court decision legalizing same-sex marriage.[18] It has also been understood as a critical civil rights intervention, "invalidat[ing] racial classifications and other practices that perpetuate racial subordination."[19] But, perhaps most importantly, *Loving* has come to represent the "unequivocal condemnation of legal barriers to interracial marriage."[20] Indeed, for many, this canonical decision is an "unambiguous triumph" that "racially deregulat[ed] the marriage market" by eliminating the most pernicious legal impediments to interracial coupling.[21]

The emphasis on *Loving*'s removal of *legal* barriers to interracial coupling is meaningful. As studies show, although there has been a steady increase in interracial marriages since the *Loving* decision,[22] rates of interracial marriage and relationships remain low in the United States.[23] In 2015, just over 16 percent of all married couples included spouses of different races.[24] While this represents an increase since 1970, when less than 1 percent of married couples were interracial,[25] it is below what might result under random matching. Indeed, one study reports that 44 percent of all U.S. marriages

12. *Id.* at 11.
13. *Id.*
14. *Id.* at 12.
15. *Id.*
16. *See* Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (citing *Loving* for the proposition that "the right to marry is of fundamental importance").
17. 135 S. Ct. 2584 (2015).
18. *Id.* at 2599.
19. John DeWitt Gregory & Joanna L. Grossman, *The Legacy of* Loving, *in* LOVING *v.* VIRGINIA IN A POST-RACIAL WORLD: RETHINKING RACE, SEX, AND MARRIAGE 13, 13 (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012).
20. Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1855 (1996).
21. Randall Kennedy, *How Are We Doing with* Loving*?: Race, Law, and Intermarriage*, 77 B.U. L. REV. 815, 817 (1997).
22. LIVINGSTON & BROWN, *supra* note 6, at 5.
23. RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 127 (2003) ("It should therefore be stressed that mixed marriages remain remarkably rare.").
24. LIVINGSTON & BROWN, *supra* note 6, at 5.
25. Sharon M. Lee & Barry Edmonston, *New Marriages, New Families: U.S. Racial and Hispanic Intermarriages*, POPULATION BULL., June 2005, at 11.

would be interracial under random matching weighted by the size of the relevant groups.[26]

On this telling, law no longer plays a direct role in prohibiting interracial couplings, as it did in the period when miscegenation bans, like the one invalidated in *Loving*, were common. Instead, the relative dearth of interracial marriages is attributable to informal cultural and social norms that continue to stigmatize and discredit interracial unions.[27] For example, Professor Erica Chito Childs notes that views on interracial marriage differ by racial group, with whites claiming that they "[did not] have a problem with interracial relationships" but nevertheless "actively express[ing] reasons why they (and those close to them) would not, could not, and should not be involved interracially."[28] While African Americans signaled tentative acceptance of those in interracial unions, they nonetheless expressed serious concerns, including the view that the African American member of a black-white couple was "selling out."[29] These kinds of informal social and cultural norms, Childs suggests, continue to discourage interracial pairings, especially among African Americans and whites.[30]

Some scholars, however, have made clear that cultural norms alone do not explain the durability of racial homogamy. As they explain, law, in tandem with social and cultural norms, has played a role in facilitating racial homogamy, although not in the form of direct legal prohibitions, as was the case with antimiscegenation bans.[31] Instead, law, by structuring default norms around coupling and failing to regulate certain contexts, cultivates,

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26. Raymond Fisman et al., *Racial Preferences in Dating*, 75 REV. ECON. STUD. 117, 117 (2008). The study calculated this figure based on the U.S. population regardless of age but asserted that "[a]lternative measures that restrict the calculation to 'marriageable' populations yield a similar figure." *Id.* at 117 n.1.

27. *See, e.g.*, KENNEDY, *supra* note 23, at 127 ("At the dawn of the twenty-first century, a wide array of social pressures continue to make white-black marital crossings more difficult, more costly, and thus less frequent than other types of interethnic or interracial crossings."); Kevin R. Johnson, *Taking the "Garbage" Out in Tulia, Texas: The Taboo on Black-White Romance and Racial Profiling in the "War on Drugs,"* 2007 WIS. L. REV. 283, 297 ("Racial separation in U.S. society does much to explain the low rates of intermarriage between blacks and whites. De facto residential and school segregation remains a pressing reality in the modern United States."); Johnson, *supra* note 5, at 757–59 (identifying structural and social impediments to interracial romance).

28. Erica Chito Childs, *Listening to the Interracial Canary: Contemporary Views on Interracial Relationships Among Blacks and Whites*, 76 FORDHAM L. REV. 2771, 2774, 2778 (2008).

29. Angela Onwuachi-Willig, *Undercover Other*, 94 CALIF. L. REV. 873, 890, 904 (2006) ("[O]ne risks destabilizing his or her racial identity as a black person by marrying a non-Black, especially a White." (citing LAWRENCE OTIS GRAHAM, MEMBER OF THE CLUB: REFLECTIONS ON LIFE IN A RACIALLY POLARIZED WORLD 41 (1995) (describing how the race of one's spouse may label a black individual as a sellout))); *see also* Johnson, *supra* note 5, at 760 ("Marrying outside of one's own race can be viewed as racial betrayal and can signify the internalization of the belief in black inferiority.").

30. *See* Childs, *supra* note 28, at 2780.

31. *See* Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1308–09 (2009) (noting that the state plays "important roles" in reinforcing the "norm" of racial homogamy "by shaping social capital and relative advantages" and facilitating "the accidents of who meets whom and how").

albeit indirectly, conditions that favor in-group dating and marriage.[32] For example, a number of scholars have noted the role that de facto residential segregation plays in facilitating racial homogamy.[33] As they explain, a combination of land use and economic policies have contributed to racial segregation in many American cities and towns.[34] Because individuals are likely to seek romantic partners in the areas in which they live, these residential housing patterns perpetuate in-group coupling.[35] Professor Dorothy Roberts makes the point more concretely: despite the legality of interracial marriage in cities like Chicago, residential segregation operated "as a deterrent to interracial intimacy and penalized those who breached the taboo against interracial marriage."[36]

And it is not simply law's cultivation of homogenous spaces that deters interracial coupling. As Professor Russell Robinson suggests, law's failure to regulate virtual spaces, like internet dating sites, may also contribute to the durability of intraracial dating and racial homogamy.[37] As he explains, "[l]aw and social norms create structures that channel and limit our interactions with people of various identities,"[38] facilitating, albeit indirectly, intraracial coupling.

On this account, although law no longer affirmatively prohibits interracial coupling, it nonetheless structures, indirectly and perhaps unwittingly, the background norms against which intimate choices are made. But is this account correct? Is it the case that law no longer plays a direct role in fostering the norm of racial homogamy and instead plays only an indirect role in shaping romantic choices? In Part II, I take up these questions. In doing

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32. *See* Courtney Megan Cahill, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43, 48–49 (2012) (arguing that the law uses the "back door" method of regulating on the margins "to articulate a normative vision of intimate and family life" that is focused on heterosexual married couples); *see also* Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 FORDHAM L. REV. 2787, 2788 (2008) (discussing how the structure created by the interaction of law and norms "determines, in part, the romantic possibilities and inclinations we imagine, express, and pursue").

33. *See* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 39 (2006) (discussing the role of residential segregation in impeding interracial interactions); Dorothy E. Roberts, *Crossing Two Color Lines: Interracial Marriage and Residential Segregation in Chicago*, 45 CAP. U. L. REV. 1, 1 (2017) (discussing how residential segregation complemented racial homogamy in Chicago); Robinson, *supra* note 32, at 2788 ("Residential segregation is a primary influence on romantic preferences.").

34. *See* Roberts, *supra* note 33, at 13 (noting that, in Chicago, "[f]orced segregation required a colossal systemic effort carried out by realtors, banks, neighborhood associations, national organizations, and government officials . . . all sanctioned by legal authority"); *see also* Solangel Maldonado, *Romantic Discrimination and Children*, 92 CHI.-KENT L. REV. 105, 132 (2017) ("Racially restrictive covenants, redlining, and racial steering created the racially segregated neighborhoods and schools that anti-discrimination laws have failed to integrate.").

35. *See* Robinson, *supra* note 32, at 2788–89 (discussing how the racial makeup of a neighborhood can dramatically impact an individual's romantic preferences).

36. Roberts, *supra* note 33, at 27.

37. Robinson, *supra* note 32, at 2794 ("Whether compelled or encouraged by law or adopted voluntarily, the designers of a web site might reduce users' consideration of race in assembling a pool of potential dates.").

38. *Id.* at 2788.

so, I demonstrate that while *Loving* eliminated the most egregious formal legal barriers—antimiscegenation laws—law continued to play a role in impeding interracial unions. Critically, this role was not merely indirect. As the following Part demonstrates, through the vehicle of child-custody decisions, law played a direct role in discrediting and penalizing interracial unions.

II. RACE AND CHILD CUSTODY BEFORE AND AFTER *LOVING*

The conventional wisdom surrounding *Loving v. Virginia* holds that this landmark case eradicated formal legal barriers to interracial marriages. This Part complicates this rosy narrative of legal reform and progress. As this Part explains, although *Loving* invalidated miscegenation laws that prohibited interracial unions, it left open other legal avenues for stigmatizing, punishing, and discouraging interracial unions. Specifically, the arena of child custody often proved to be an especially potent vehicle for communicating disapprobation of interracial unions, even after *Loving*.[39] The Parts that follow detail custodial challenges in the wake of interracial marriages before and after *Loving*.[40]

A. Custodial Challenges Before Loving

It is perhaps unsurprising that, in the years before *Loving* was decided, custodial disputes involving mixed race couples were relatively rare in the South. As Professor Renee Romano has documented, in 1945, just two decades before *Loving* was decided, thirty states had laws that criminalized interracial unions.[41] The fact of criminalization was often enough to deter such unions. Accordingly, during this pre-*Loving* period, custodial disputes involving mixed-race unions typically arose in the handful of ostensibly

39. In reviewing child-custody decisions, I do not mean to suggest that child custody is the *only* area in which the law continues to express skepticism of interracial relationships. As Professor Kevin Johnson has documented, antipathy for interracial relationships, in tandem with a concern for drug trafficking, fueled prosecutorial decisions in Tulia, Texas. *See generally* Johnson, *supra* note 27. Professor Angela Onwuachi-Willig has demonstrated the manner in which workplace discrimination laws work to discourage interracial relationships. *See* ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: *RHINELANDER V. RHINELANDER* AND THE LAW OF THE MULTIRACIAL FAMILY 199–232 (2013). Likewise, skepticism about the propriety of interracial relationships may lead law enforcement to mistake interracial couples for those engaged in illicit sexual pursuits. *See* Elizabeth M. Toledo, Note, *When* Loving *Is Not Enough*, 104 CALIF. L. REV. 769, 770–71 (2016).

40. A note about methodology. To compile the cases for this case study, I searched LexisNexis and Westlaw state and federal cases databases using the following search terms: "'interracial marriage' /s custody," "interracial /p custody," "interracial /s custody /s modif!." This resulted in a set of just over thirty reported appellate decisions, most of which explicitly referenced lower court decisions below. To be clear, this set does not encompass the entire universe of custodial cases, many of which are not appealed and, as such, are unlikely to be reported and available on traditional legal databases. Nevertheless, the fact that roughly thirty cases resulted from this search may suggest that similar cases likely arose but were never appealed or reported.

41. Renee C. Romano, *"Immoral Conduct": White Women, Racial Transgressions, and Custody Disputes*, *in* "BAD" MOTHERS: THE POLITICS OF BLAME IN TWENTIETH-CENTURY AMERICA 230, 231 (Molly Ladd-Taylor & Lauri Umansky eds., 2003).

"progressive" midwestern and northern states where interracial unions were permitted.[42]

But, even in "progressive" states where interracial marriages were lawful, courts often took a dim view of white mothers who divorced their white husbands and subsequently partnered with someone of a different race. Critically, these cases reveal the force of social disapprobation of interracial unions—even in states that nominally permitted such marriages. In these cases, the courts did not rely exclusively on the fact of an interracial marriage in transferring custody. Instead, in their efforts to consider the child's best interests, the courts often took into account the interracial marriage alongside a range of other facially race-neutral factors. In so doing, they frequently overrode the (gendered) presumption that favored vesting custody of young children with the mother.[43]

People ex rel. Portnoy v. Strasser[44] is instructive on these points. There, Ann Portnoy Strasser, who had divorced her white husband, found herself battling her own mother for custody of her daughter, Robin.[45] Molly Portnoy sought custody of Robin on the grounds that Strasser was "unable properly to maintain and rear the child," was a communist, lacked "any regard for [the child's] religious upbringing," and, perhaps most damning, was "married to a second husband who is of a race and religion different from that of the child."[46]

The trial court concluded that Strasser "had neglected the child's care and training because of other activities in which [she] participated" and granted Portnoy's petition.[47] The intermediate appellate court agreed with the trial court that Strasser was "not a fit or proper person to have custody" and affirmed.[48] On appeal to the New York Court of Appeals, Strasser's lawyers, as well as several amici, sought to prove that Portnoy's claims that Strasser was a neglectful and disinterested mother were merely pretextual. In fact, what had animated Portnoy's decision to seek custody was Strasser's interracial relationship.[49] As they noted, Portnoy had not initiated custody proceedings until well after her efforts to break up Strasser's interracial marriage proved fruitless.[50] Equally troubling was the trial court's "subtle

42. *Id.*

43. This presumption, known as the "tender years" doctrine, maintained that maternal custody of young children was in the child's best interests. The origin of the doctrine is attributed to the case *Helms v. Franciscus*, 2 Bland 544 (Md. Ch. 1830), where the court noted that "[t]he father is the rightful and legal guardian of all his infant children" but that it would violate the laws of nature to "snatch" an infant "from the bosom of an affectionate mother, and place it in the coarse hands of the father," *id.* at 562–63.

44. 104 N.E.2d 895 (N.Y. 1952).

45. *Id.* at 896.

46. *Id.*

47. *Id.* Evidence of this neglect included enrolling the child in nursery school from nine a.m. to five p.m. *Id.*

48. *Id.*

49. *See* Brief for Defendant-Appellant at 27–31, *Strasser*, 104 N.E.2d 895 ; Brief for the New York City Chapter of the National Lawyers' Guild as Amicus Curiae Supporting Defendant-Appellant at 17, *Strasser*, 104 N.E.2d 895.

50. Brief for Defendant-Appellant, *supra* note 49, at 25 (quoting Portnoy as saying, "I want you to leave him . . . or I shall take your child away from you").

and serious social prejudice" in crediting Portnoy's racially inflected concerns.[51] The custody petition was nothing more than Portnoy's effort to punish Strasser for her marital transgression and "to compel her . . . to leave the husband she love[d]."[52] In the end, the New York Court of Appeals agreed, concluding that the trial court lacked meaningful evidence that would override a fit parent's right to custody of her children. Reiterating that only "the gravest reasons" could justify transferring custody from a fit parent to another person, the court ordered Robin returned to Strasser's care.[53]

Portnoy v. Strasser was not anomalous. In making custodial decisions, courts in ostensibly progressive jurisdictions were loath to rely exclusively on the fact of an interracial marriage. Instead, they relied on a constellation of other factors—a mother's "serious rebellion,"[54] the "social and economic"[55] conditions that attended the mother's new living situation, the fact that the mother's interracial marriage had alienated her parents, thereby depriving the child of contact with his maternal grandparents—to support their decisions to divest mothers of their custodial rights.[56]

For example, in *Stingley v. Wesch*,[57] a 1966 Illinois case, Marta Wesch Stingley lost custody of her son, Alan, upon her remarriage to Wayne Stingley, whom the court noted was "of the Negro race."[58] As in *Strasser*, Stingley's own parents were staunchly opposed to her remarriage, and sought, along with her ex-husband, custody of Alan.[59] The trial court agreed and modified the original custodial degree to award custody of Alan to his maternal grandparents over the claims of both parents.[60] In doing so, the trial court specifically found "that neither the mother nor the father are unfit persons and that both desire the custody of the child" but nonetheless determined that the custodial change was "for [Alan's] personal benefit and for social and economic reasons."[61] In this regard, the trial court's decision likely evinced prevailing racial and gender norms associated with the family. Not only did the trial court's decision to award custody to the maternal grandparents suggest discomfort with the prospect of a child being raised in an interracial household, it also suggested a desire to ensure that the child would be reared by a female caregiver.

But if the trial court was focused on social norms regarding race and gender in rendering a decision, the reviewing court considered other values. On appeal, the Illinois Supreme Court made clear that to warrant a modification of child custody, "the change in circumstance must be substantial" and "must

51. *Id.* at 27.
52. Brief for the New York City Chapter of the National Lawyers' Guild as Amicus Curiae Supporting Defendant-Appellant, *supra* note 49, at 17.
53. *Strasser*, 104 N.E.2d at 896.
54. Potter v. Potter, 127 N.W.2d 320, 326 (Mich. 1964).
55. Stingley v. Wesch, 222 N.E.2d 505, 507 (Ill. 1966).
56. *See* Murphy v. Murphy, 124 A.2d 891, 893 (Conn. 1956).
57. 222 N.E.2d 505 (Ill. 1966).
58. *Id.* at 506.
59. *Id.*
60. *Id.*
61. *Id.* at 506, 507.

relate to the welfare of the child."[62] On this view, "nothing short of a hearing relating to unfitness and the interests of the child and a finding thereon is adequate support for an order changing custody."[63] Critically, the court underscored that Stingley's remarriage to a black man was "not of itself a sufficient reason for changing an order of custody."[64] Recognizing that the "rights of the parent are superior to those of any other person," as well as the unorthodox nature of a court issuing a decision awarding custody to a child's maternal grandparents while concurrently acknowledging the fitness of both parents, the Illinois Supreme Court remanded the case back to the trial court "for further proceedings to determine custody as between the parents consistent with the views" expressed in its opinion.[65]

Both *Strasser* and *Stingley* underscore the importance of appellate review in these circumstances. In both cases, appellate courts—despite the discretion typically afforded trial courts in custodial decisions—probed beneath the surface to explicitly and implicitly question whether the mother's interracial remarriage had colored the trial court's analysis. In other cases, however, appellate tribunals seemed all too willing to credit the trial court's reasoning, however spurious.

In *Murphy v. Murphy*,[66] a Connecticut trial court transferred custody from a white mother to her ex-husband following her remarriage to an African American man.[67] The court did not root its decision in the interracial remarriage explicitly but focused instead on the mother's excommunication from the Catholic Church following her remarriage, her failure to make provisions for her son's religious education, and her alienation from her parents following the remarriage, which had deprived her son of his grandparents' "care and good influence."[68] Transferring custody to the ex-husband, by contrast, offered the prospect of "being brought up in a clean, modern, comfortable home [with the child's sister, who remained in the custody of the ex-husband], under the supervision of the defendant, and their paternal grandmother, with an opportunity to visit their maternal grandparents . . . and with the opportunity to continue their religious education in a Catholic home."[69]

On appeal, the Connecticut high court affirmed the decision. It concluded that, despite the mother's claims that her remarriage had shaped the trial court's reasoning, the lower court's decision, in fact, had been "guided and controlled by" the best interests of the child.[70] Further, the appellate court determined that "the subordinate facts," which were race neutral and did not

62. *Id.* at 507.
63. *Id.* (citing Bulandr v. Bulandr, 162 N.E.2d 585, 587 (Ill. App. Ct. 1959)).
64. *Id.*
65. *Id.* at 507–08.
66. 124 A.2d 891 (Conn. 1956).
67. *Id.* at 892.
68. *Id.* at 893.
69. *Id.*
70. *Id.*

refer to the mother's interracial marriage, "amply justif[ied] the conclusion that the change of custody" was in the child's best interest.[71]

These pre-*Loving* cases are noteworthy. In these seemingly progressive jurisdictions where interracial unions were lawful, white mothers paid a high price for marrying interracially. And, meaningfully, many of them were confident that the decision to vest them of custody hinged on the fact of their interracial marriage, even when the courts professed race-neutral justifications. In this regard, the "best interests of the child" analysis, which is both capacious and prone to subjective judgments, allowed courts to mask any antipathy for interracial unions by considering a range of other factors in the custodial decision. And indeed, insulated by the cover of the "best interests" standard, courts were free to consider race in ways that were both implicit and explicit.

For example, in vindicating the child's best interests, courts often explicitly considered the consequences of interracial marriages on children—and found interracial families to be deeply problematic and troubling. In *Ward v. Ward*,[72] decided in 1950, a Washington trial court explicitly focused on the effects of an interracial marriage on the children born of the union.[73] The court's decision arose in the context of a custody dispute between a white woman and her ex-husband, a black man. The father sought custody of the couple's two daughters who, according to the court, presented as "colored."[74] In arguing for custody, the father pointed to the mother's "associat[ions] with other men, and . . . excessive use of intoxicating liquor."[75] The trial court agreed with the father and granted him custody alongside an order "that he turn [his daughters] over for care and attention to Goldie Green, his mother, to whom he shall pay the necessary money for their care and support."[76]

The court's decision was unusual in numerous respects. As an initial matter, although the court did not vest custody in the mother, it nonetheless evinced a clear preference for *maternal* custody by insisting that the father enlist his mother's assistance in caring for his two daughters. As importantly, the court evinced a preference for the monoracial family. According to the court, the two daughters were phenotypically "colored"—that is, they had African American coloring and features that distinguished them from their white mother.[77] Granting custody to the father and paternal grandmother would provide the two daughters with a monoracial family unit and strong ties to the African American community—important considerations for two girls who, in the court's view, appeared to be "colored" rather than white. Moreover, vesting custody in the white mother would require the girls to be raised in an interracial household without strong ties to the African American community and, perhaps more troublingly, would prevent the mother from

71. *Id.*
72. 216 P.2d 755 (Wash. 1950).
73. *Id.* at 755.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*

successfully reintegrating into white society upon the dissolution of her interracial marriage.

On appeal, the Supreme Court of Washington acknowledged the unorthodox nature of the trial court's decision to vest custody in a nonparent, but it nonetheless expressed satisfaction with the lower court's decision.[78] Indeed, the high court offered additional reasons "why [it thought] the trial court was correct in its ruling."[79] While the Supreme Court of Washington did not question the mother's "love for her children," its

> primary concern [wa]s the welfare of the children. . . . These unfortunate girls, through no fault of their own, are the *victims* of a mixed marriage and a broken home. They will have a much better opportunity to take their rightful place in society if they are brought up among their own people.[80]

In this vein, the high court made explicit what the trial court had only intimated. Interracial marriages, by themselves, posed grave harms to children. Those born into interracial marriages were doomed to be unwitting victims of their parents' selfish desires—confused in their racial identity and betwixt and between two racial worlds. For white children brought into interracial households through a parent's subsequent remarriage, the concerns were perhaps even more profound. Because many interracial couples typically lived apart from white society, white children raised in an interracial household with a stepparent of another race risked losing their ties to the white world—and the many privileges associated with whiteness.

Another case from this era illustrates these concerns about the loss of whiteness, albeit in a slightly different context. In *In re Adoption of a Minor*,[81] an African American stepfather sought to adopt his white wife's white son from a previous relationship.[82] Importantly, the child had been born outside of marriage and had no relationship with his biological father, whose whereabouts were unknown.[83] Although the child had lived with his mother and her husband since their marriage, and they had "supported and carefully reared the child as their own,"[84] the trial court refused the adoption petition.[85] In so doing, the trial court conceded the unorthodox nature of its decision, which would deny an illegitimate child the opportunity to be adopted and raised as legitimate.[86] Typically, adoptions under such circumstances "should be not only approved but encouraged."[87] But the stepfather's race proved a "problem" for the court.[88] Fearing that the child "might lose the social status of a white man by reason of the fact that by

78. *Id.* at 756.
79. *Id.*
80. *Id.* (emphasis added).
81. 228 F.2d 446 (D.C. Cir. 1955).
82. *Id.* at 446.
83. *Id.*
84. *Id.*
85. *Id.* at 447.
86. *Id.* at 448.
87. *Id.* at 447.
88. *Id.*

record his father will be a negro," the trial court denied the petition, citing concern for the child's best interests.[89]

In both *Ward v. Ward* and *In re Adoption of a Minor*, the courts' considerations are illuminating. Even in jurisdictions where interracial marriages were lawful, other concerns—including broad concerns about children's welfare, the "society" in which they would be raised, and the loss of whiteness and its privileges—furnished ample grounds for custodial decisions. In so doing, these considerations underwrote the continued disapprobation of mixed-race marriages.

B. Child Custody Decisions After Loving v. Virginia

As Part II.A notes, prior to *Loving*, in jurisdictions where interracial marriages were permitted, courts nonetheless took a dim view of such unions when making custodial decisions. The question is whether *Loving v. Virginia* had an impact on courts' consideration of custodial decisions. On this account, the answer is decidedly less rosy than the conventional wisdom that surrounds *Loving* would suggest. Throughout the country, and especially in the South, concerns about child welfare and other race-neutral grounds were often deployed post-*Loving* to continue divesting white mothers of custody when they remarried outside of their race. In this regard, the post-*Loving* landscape looks much like the landscape in the jurisdictions discussed in Part II.A.[90] Post-*Loving* courts, like the pre-*Loving* courts, continued to be wary of interracial unions regardless of their legality. Like the courts in those jurisdictions that permitted interracial marriages prior to 1967, these post-*Loving* courts, many of which were in the South, were loath to focus explicitly on the fact of a subsequent interracial marriage or relationship in making a custodial determination. Instead, these courts considered the fact of an interracial marriage in tandem with a range of factors in determining how the child's interest might be best served. On this account, the cases that preceded *Loving* provided post-*Loving* courts with a blueprint for continuing to signal disapproval of interracial marriages on nominally race-neutral grounds.

Consider *Ethridge v. Ethridge*.[91] There, a father successfully sought a modification of custody upon learning that his ex-wife had remarried and was pregnant by a black dentist.[92] Despite evidence that the children wished to return to their mother and her new husband, and despite evidence that "the mother and children were in better circumstances than they had ever known" with the mother's new husband "desirous of supporting the wife and her children," the trial court agreed with the father and modified the custodial order accordingly.[93]

89. *Id.*
90. *See supra* Part II.A.
91. 360 So. 2d 1005 (Ala. App. 1978).
92. *Id.* at 1006.
93. *Id.* at 1007.

On appeal, an Alabama intermediate appellate court upheld the lower court's judgment, despite its own reservations.[94] Although the mother insisted that the trial court based its decision on her interracial marriage, the intermediate appellate court "examined the record closely" and found "no overt evidence that the charge [was] true."[95] Still, the appellate court mused "whether the trial court would have been so persuaded if the mother were married to a caucasian dentist with an income of $56,000 per year."[96] But "speculat[ing] affirmatively" on such a provocative question, the appellate court surmised, "would be contrary to [its] duty of review and [would] dishonor the trial judge without sufficient proof."[97] Mindful of its duty as an appellate tribunal, and conscious of the norms of professional courtesy, the court affirmed the award of custody to the father.[98]

Even where appellate courts were skeptical of the trial court's rationale, the time-consuming nature of litigation, coupled with the capaciousness of the best-interest standard, often spelled doom for mothers seeking custody. In *Langin v. Langin*,[99] a white mother remarried to an African American man. "Shortly thereafter [she] was committed" to a mental facility and her ex-husband petitioned to have custody transferred.[100] The trial court agreed, though it transferred custody to the maternal grandparents, citing the ex-husband's failure to pay child support.[101] To support its decision to divest the mother of custody and award custody to a third party, the court opined that it "would not be best for the children to take them from the environment and the area which they have known, and to transport them into a strange place into a racially mixed family."[102] The mother appealed the custodial award, and the appellate court appeared receptive to her claims that race concerns had unduly influenced the trial court's deliberations.[103]

While this might seem like a victory, the result is likely more mixed. Though the appellate court reversed, vacated, and remanded the trial court's order for further proceedings, the mother faced an uphill battle to regain custody. On remand, the case would be heard by the same trial judge who had issued the initial custodial award. Although the trial judge was prohibited from focusing unduly on race and the fact of the mother's interracial marriage reconsidering the custody petition, he was authorized to weigh "the fitness of the parties . . . , as well as the fitness of the maternal grandparents, with whom [the children] have resided *in excess of five years*, the attitude of the spouses of the parties, the mental stability of the parties and the numerous other factors as may bear upon the best interest and welfare

94. *Id.* at 1008.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* ("This court is not at liberty to set aside the judgment of the trial court merely because we might have decided differently had we been sitting as the trial judge.").
99. 276 N.E.2d 822 (Ill. App. Ct. 1971).
100. *Id.* at 823.
101. *Id.*
102. *Id.*
103. *Id.* at 823–24.

of the children."[104] Under these circumstances, and in light of the "best interests" standard, it is unlikely that a mother with a history of mental instability and an African American husband could prevail over the claims of the grandparents, who had provided stable, continuous care to the children for over five years.[105]

Circumstances involving interracial relationships that had not been formalized by marriage furnished courts with other ostensibly race-neutral grounds on which to base a custodial transfer. In *Brim v. Brim*,[106] Lynn Marie Brim lost custody of her child after beginning an interracial sexual relationship with Melvin Jackson, an African American man.[107] Critically, the trial court noted that "while she [had] no plans to marry Mr. Jackson, she had no inclination to discontinue having 'sexual relations with him . . . quite frequently.'"[108] Indeed, the court noted that Brim had continued to cohabit with Jackson, including sharing her bed with him while her son was in residence, "right up to the time of the [custody] hearing."[109] Accordingly, the trial court modified its previous order to award custody to the child's father on the basis of changed circumstances, noting that when "a woman starts living with a man without the benefit of marriage, where the man spends three to five nights a week in that home where the child is . . . [t]his does not agree with the Court's concept of moral conduct."[110]

On appeal, an Oklahoma appellate court agreed. As it explained, Brim's cohabitation with Jackson in full view of her son was a "substantial post-divorce change in the home environment."[111] And, despite Brim's claims that she sequestered her relationship from her son, the appellate court was skeptical:

> [W]e have a situation where a three-year-old's subconscious is recording a man staying in the house and sleeping in the same bed as his mother three to five nights a week. He may not at all have any meaningful understanding of what is going on. He is unlikely to realize the counterculture implications, or the antisocial character of the relationship between his mother and Mr. Jackson. But still his brain records what his eyes see and his ears hear. And unless he can begin now to learn through the same senses society's conceptual norm of man-woman, mother-child, father-child relationships, it will, in the next few significant months, become fixed in his mind that his mother's relationship with Mr. Jackson is one society accepts as proper. And because of all people it is his mother involved he can become an excellent candidate for a real psychic hang-up when faced with having to accept, live and cope with existing incompatible social mores.[112]

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104. *Id.* at 824–25 (emphasis added).
105. *Id.* at 822.
106. 532 P.2d 1403 (Okla. Civ. App. 1975).
107. *Id.* at 1404.
108. *Id.*
109. *Id.* at 1404–05.
110. *Id.* at 1405 (alterations in original).
111. *Id.*
112. *Id.* at 1405–06.

With all of this in mind, the appellate court concluded that the trial court was "entitled to infer that any prolonged subjection of a young child to a *countercultural* environment probably will have a future adverse effect on the small one's psychological well-being"[113] and that the "the child's welfare . . . is best served by a transfer of custody."[114] As for Brim's contention that "the change of custody was reversibly erroneous because it was premised solely on the fact that she, a white woman, 'had been cohabiting with a black man,'" the appellate court was flatly dismissive.[115] After all, the trial court explicitly disclaimed any racial considerations, going so far as to declare that "this is not a question of color, it is a question of morals and to the best interest of the child."[116] On this account, for the appellate court, the issue was not whether Brim's "swain be white, yellow, red, brown or black"[117] but rather the fact that she allowed her son to live in a "home environment society currently considers immoral."[118]

A mother's unorthodox sexual conduct also shadowed the decision in *Schexnayder v. Schexnayder*.[119] There, a trial court vested custody in Sheila Schexnayder despite evidence of her interracial, adulterous relationship transacted during her marriage.[120] In issuing its ruling, the trial court made clear its views of the relationship, which Sheila had conducted in a "flagrant, even open and notorious" fashion, including "meeting her lover at a motel, . . . behind a church, . . . at a bar, behind the school house, on the levee, [and] on a little traveled road in the area."[121] Not only was her conduct "openly observed"[122] and the cause of "scandal and gossip in the community,"[123] it "was particularly scandalous and offensive to the sensibilities of the local community in that her lover was of another race."[124]

Despite these clear misgivings, the trial court was reluctant to strip Sheila of custody. The preference for maternal custody loomed large,[125] and, as importantly, *Loving* seemed to put Sheila Schexnayder's shocking interracial romance beyond the trial court's reach.[126] As the trial court noted, "Our laws against miscegenation have been ruled unconstitutional and insofar as the law is concerned the question of race is irrelevant."[127] Also of relevance was the fact that Sheila's adultery had been intermittent rather than pervasive and

113. *Id.* at 1406 (emphasis added).
114. *Id.*
115. *Id.*
116. *Id.* at 1407.
117. *Id.*
118. *Id.*
119. 364 So. 2d 1318 (La. Ct. App. 1978), *rev'd*, 371 So. 2d 769 (La. 1979).
120. *Id.* at 1319 (Samuel, J., dissenting).
121. *Id.* at 1320.
122. *Id.*
123. *Id.*
124. *Id.* at 1318 n.1 (majority opinion).
125. As a dissenting judge noted, Louisiana maintained a firm preference for maternal custody. *Id.* at 1320 (Samuel, J., dissenting).
126. *Id.* at 1321 ("Further, it appears to me that the trial judge was overly concerned about the fact that we no longer have any laws against miscegenation.").
127. *Id.* at 1318 n.1 (majority opinion).

ongoing. Indeed, she averred that the affair had lasted only a few months and involved only ten acts of intercourse.[128] More importantly, she had ended the relationship and "denie[d] having any contact with [her lover]."[129] Noting that there was no proof of any further misconduct and recognizing "the very strong maternal preference rule . . . [that] compels an award of very young children to the mother," the trial court awarded "provisional" custody to Sheila, subject to her "continued good conduct."[130]

On appeal, however, the Supreme Court of Louisiana reversed the trial court's judgment, concluding that where

> the mother has consistently engaged in a course of open and public adultery in defiance of generally accepted moral principles and in disregard of the embarrassment and injuries which might be sustained by the children, then the court is justified in depriving her of the care of the children, and in awarding custody to the father.[131]

Although the Louisiana high court did not refer explicitly to race, the fact of Sheila's interracial romance haunted the appellate court's decision. The "embarrassment and injuries which might be sustained by the children" were likely not just those associated with a parent's sexual conduct but with conduct that also transgressed racial boundaries—boundaries that persisted, even in *Loving*'s wake.[132] And while a series of "infrequent indiscretions may be born out of human frailty" and thereby overlooked, in this case, the mother's "open and public adultery in defiance of generally accepted moral principles" could not be similarly dismissed.[133] Such conduct contravened the essential duty of parents "to demonstrate to his or her children qualities of good moral character."[134] If "a child learns by example," then Sheila Schexnayder's lax moral leadership would surely infect her children and lead them astray.[135]

There is much that can be said about the two decisions in Schexnayder. As an initial matter, the Louisiana Supreme Court's decision to reverse the trial court's ruling, which had been affirmed by the intermediate appellate court, was highly unorthodox. Unless there is a showing of an abuse of discretion, which by itself is an incredibly high bar, appellate courts generally defer to the trial court's custodial determinations.[136] Further, though unwilling to

128. *Id.*
129. *Id.*
130. *Id.*
131. Schexnayder v. Schexnayder, 371 So. 2d 769, 772–73 (La. 1979).
132. *Id.*
133. *Id.* at 773.
134. *Id.*
135. *Id.*
136. *See, e.g.*, Ed H. v. Ashley C., 221 Cal. Rptr. 3d 911, 915 (Ct. App. 2017) ("We generally review custody and visitation orders for abuse of discretion."); *In re* Marriage of Melville, 18 Cal. Rptr. 685, 691–92 (Ct. App. 2004) ("The trial court's order is reviewed for abuse of discretion; reversal is warranted only if there is no reasonable basis upon which the trial court could conclude that its decision advanced the best interests of the child."); *In re* Marriage of Pfeiffer, 604 N.E.2d 1069, 1071 (Ill. App. Ct. 1992) ("On review, a strong and compelling presumption exists in favor of the trial court's determination; this court will not

actually name race, the high court's opinion nonetheless trades in stock tropes that historically attended societal discomfort with interracial relationships. It was not just that Sheila Schexnayder was open and notorious[137] and therefore unwilling to keep her transgressive conduct under wraps. It was that, in conducting her relationship, she cared little for the fact that her behavior would reflect poorly upon her children. More troublingly, her conduct set a poor example for her children, who were receiving the misguided impression that such relationships—adulterous, interracial relationships—were normal and acceptable rather than deeply transgressive and regrettable.

But while the high court's decision expressed the sort of concerns that we might ordinarily expect in these circumstances, it is the trial court's opinion that is perhaps most revealing about the continued disapprobation of interracial romance, even ten years after *Loving*. Although the *Schexnayder* trial court ultimately awarded Sheila custody, its decision was hardly a full-throated endorsement of interracial relationships. And, indeed, the trial court's rationale speaks volumes about the weight of the interracial romance in the disposition of the case. Only a decade after *Loving*, interracial romances remained taboo—so much so that they were the cause of gossip and scandal in a small town.[138] Still, the court recognized *Loving*'s importance as a limit on its ability to rely too heavily on the mother's romance in determining custody.[139] Tellingly, gendered concerns about the proper care of young children weighed more heavily on the court, especially in light of a mother's apparent willingness to relinquish her lover and the relationship.[140]

However, this aspect of the case is also worth noting. Not only did the court credit Sheila Schexnayder's decision to give up her relationship, its custodial award was contingent upon her "continued good conduct"[141]—that is, staying away from her lover and others like him. That a court could continue to keep tabs on a litigant after making an award of custody is

disturb the trial court's judgment unless that judgment results in manifest injustice or is against the manifest weight of the evidence.").

137. The court's use of the terms "open and notorious" recalls the common law doctrine of adverse possession, whereby a person who does not have legal title to a piece of property attempts to claim legal ownership based, in part, upon a history of open and notorious possession or occupation of the land without the permission of its legal owner. *See Acquisition of Title to Property by Adverse Possession*, 142 AM. JUR. PROOF OF FACTS 3d 349 (2014). Interestingly, the court's concern with Sheila Schexnayder's open and notorious interracial romance may belie similar concerns that her interracial associations would dispossess her—and by extension, her children—from whiteness and the white community. For further discussion of property interests in racial status, see generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

138. Schexnayder v. Schexnayder, 364 So. 2d 1318, 1320 (La. Ct. App. 1978) (Samuel, J., dissenting), *rev'd*, 371 So. 2d 769 (La. 1979).

139. *Id.* at 1318 n.1 (majority opinion) ("Our laws against miscegenation have been ruled unconstitutional and insofar as the law is concerned the question of race is irrelevant."); *see also id.* at 1321 (Samuel, J., dissenting) ("[I]t appears to me that the trial judge was overly concerned about the fact that we no longer have any laws against miscegenation.").

140. *Id.* at 1318–19 n.1 (majority opinion) ("[T]he court is reluctantly compelled to the conclusion that the maternal preference rule requires an award of custody to the mother.").

141. *Id.* at 1319.

unsurprising. A critical feature of divorce and child custody proceedings is that the court retains jurisdiction over the custody decision and thus is free to modify custodial arrangements in the future to address changed circumstances and vindicate the best interests of the child.

In *Schexnayder*, the court's continuing jurisdiction, however, takes on a more controlling posture. In specifically noting Sheila's abandonment of her interracial relationship and making custody contingent upon her "continued good conduct,"[142] the court's decision might be understood as an informal "ban" on any future involvement with her lover—and, more generally, interracial romance. Obviously, an informal ban is meaningfully different from the criminal miscegenation bans held unconstitutional in *Loving*. That said, such an approach was likely to be as effective as any criminal ban. Living in a small community, where her actions were likely to be closely observed, it is unlikely that Sheila Schexnayder felt free to resume her interracial relationship—or even to engage in a new interracial relationship at some point in the future. The fear of losing custody of her children may have been as effective a deterrent to seeking love across the color line.

Taken together, all of these cases make clear the continued skepticism and, in some cases, antipathy that attended interracial unions—before and after *Loving*. Though post-*Loving* courts were loath to rest their decisions entirely on the fact of an interracial marriage or relationship, they nonetheless took these facts into account in their decisions.

C. Aftermath: Palmore v. Sidoti

Obviously, not all of these cases ended tragically with a mother losing custody. In a number of cases, a trial court's decision was reversed on the ground that consideration of an interracial relationship, without more, was insufficient to constitute a change in circumstances that warranted a modification of custody.[143] Critically, in 1984, the U.S. Supreme Court constitutionalized this stance in *Palmore v. Sidoti*.[144] There, a Florida trial court divested a white mother of custody because of her remarriage to an African American man.[145] In awarding custody to the father, the trial court recognized that "the father's evident resentment of the mother's choice of a black partner" was, by itself, an insufficient ground for transferring custody.[146] That said, the trial court nonetheless noted other circumstances that could be brought to bear on a modification decision:

> It is of some significance, however, that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him. Such action tended to place gratification of her own desires ahead of her concern for the child's future welfare. . . . *[D]espite the strides that have been made in bettering relations between the races in*

142. *Id.*

143. *See generally* Goldman v. Hicks, 1 So. 2d 18 (Ala. 1941); Stingley v. Wesch, 222 N.E.2d 505 (Ill. 1966); People *ex rel.* Portnoy v. Strasser, 104 N.E.2d 895 (N.Y. 1952).

144. 466 U.S. 429 (1984).

145. *Id.*

146. *Id.* at 431.

> *this country, it is inevitable that [the child] will . . . suffer from the social stigmatization that is sure to come.*[147]

In petitioning the U.S. Supreme Court for review, the mother explicitly relied on *Loving*'s logic. Maintaining that the trial court's decision rested solely on the fact of her interracial marriage, the mother argued that, under *Loving*, "[t]he equal protection and due process clauses of the Fourteenth Amendment . . . prohibit a court . . . from relying upon a subsequent interracial marriage . . . as a ground for ordering a change of custody."[148] The Court granted her petition for review and, on appeal, reversed the lower court's ruling. In so doing, the Court noted that while "the child's welfare was the controlling factor," the trial court "made no effort to place its holding on any ground other than race. . . . [I]t is clear that the outcome would have been different had petitioner married a Caucasian male of similar respectability."[149] Although the best-interests standard required courts to consider all of the factors that might affect a child's welfare, "the reality of private biases and the possible injury they might inflict" were not "permissible considerations for removal of an infant child from the custody of its natural mother."[150] In holding that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect,"[151] the *Palmore* Court specifically cited *Loving* alongside other canonical equal protection cases mandating "the most exacting scrutiny" for explicit racial classifications.[152]

Like *Loving*, *Palmore* drew a line in the sand, condemning the use of race in custodial decisions. But, in practice, courts have interpreted *Palmore* far more narrowly than many appreciate. Indeed, some courts have concluded that *Palmore* does not preclude consideration of race entirely.[153] As one federal appellate court noted, in the context of a foster-care placement, "at most [*Palmore*] establishes that race may not be the sole factor in determining the best interests of the child."[154] Other courts similarly have determined that *Palmore* requires only that courts refrain from relying exclusively on race and racial concerns as the basis for their decisions.[155] As Professor Katie

147. *Id.*

148. Petition for Writ of Certiorari at 17, *Palmore*, 466 U.S. 429 (No. 82-1734).

149. *Palmore*, 466 U.S. at 432.

150. *Id.* at 433.

151. *Id.*

152. *Id.* at 432 (citing McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (invalidating, on equal protection grounds, a Florida statute criminalizing interracial fornication); Loving v. Virginia, 388 U.S. 1, 11 (1967) (invalidating miscegenation bans)).

153. *See* Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 574–75 (2014) (listing cases that hold that the use of race as a factor in family law decisions is constitutionally permissible); *see also* Jim Chen, *Unloving*, 80 IOWA L. REV. 145, 169–70 (1994) (observing that *Palmore* did not eradicate the use of race in custodial decisions).

154. J.H.H. v. O'Hara, 878 F.2d 240, 245 (8th Cir. 1989).

155. Tallman v. Tabor, 859 F. Supp. 1078, 1086 (E.D. Mich. 1994) (concluding that "[i]t appears well-settled in the case law" that race can be a factor in child placement as long as it is not the only factor); *see also* Gloria G. v. State Dep't of Soc. & Rehab. Servs., 833 P.2d 979, 984 (Kan. 1992) (finding that race could be used as a factor in adoption decisions if it is not the sole factor); *In re* Adoption/Guardianship No. 2633, 646 A.2d 1036, 1047–49 (Md. Ct.

Eyer observes, "only the most unsophisticated government actor would be unable to demonstrate compliance" with this narrow interpretation of *Palmore*.[156]

But, even following *Palmore*, in those circumstances where racial concerns appeared to predominate in determining custody, the capacious best-interests standard continued to provide cover for judicial decision-making. *Jennings v. Jennings*[157] is instructive on this point. There, an Alabama intermediate appellate court upheld a trial court's decision awarding custody to a father in the face of the mother's relationship, begun during the marriage, with an African American doctor.[158] On appeal, the mother claimed that racial concerns had shaped the trial court's decision in violation of *Palmore*.[159] The appellate court disagreed and noted that the trial court had only become aware of the interracial relationship because the mother's attorney had introduced that fact in his cross examination of the husband. The trial court had also specifically cited *Palmore* for the proposition that "it would be inappropriate and beyond the bounds of the court's discretion to permit racial differences to control an award of custody."[160] Despite considerable evidence of the trial court's consideration of the mother's interracial relationship, the appellate court maintained that the custodial award was amply supported by nonracial considerations—namely, the trial court's finding that, in the "pursuit of her relationship," the mother had "substantially ignored" her child's "sensibilities and moral development."[161]

Similar "race-neutral" concerns were at play in *Parker v. Parker*,[162] where a Tennessee trial court granted a father's request for a modification of custody. The court's decision was supported by evidence of the mother's interracial relationship, including a private investigator's video recording of the boyfriend visiting the mother's home, as well as witness testimony about the relationship and the harm posed to the child if "raised in an interracial household because of small town views."[163] When pressed, the trial judge later disclaimed any notion that his decision was based on the interracial nature of the relationship. Instead, he maintained, his concern about the mother's relationship was animated by his disapproval of "shacking up. I am not referring to white and black."[164] Still, as the Tennessee Supreme Court concluded, the record contained statements indicating that the judge's decision had focused unduly on race. Although the Tennessee high court was "troubled by the interjection of race based testimony . . . which is so clearly

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Spec. App. 1994) (finding that the use of race as a factor was constitutionally permissible but that exclusive reliance on race was not).

156. Eyer, *supra* note 153, at 575.
157. 490 So. 2d 10 (Ala. Civ. App. 1986).
158. *Id.* at 13.
159. *Id.*
160. *Id.*
161. *Id.* at 12.
162. 986 S.W.2d 557 (Tenn. 1999).
163. *Id.* at 559.
164. *Id.* at 560.

prohibited in *Palmore*," it concluded that the trial court had not relied unduly on racial concerns but instead had based its decision on "the relevant factors," including "the presence of an extramarital affair that interfered with the well-being of the child."[165] Accordingly, the Tennessee Supreme Court upheld the custodial award.[166]

Thus, while *Palmore* reinforced *Loving*'s logic by prohibiting judges from relying explicitly on racial considerations in custodial decisions, judges were still able to weigh their views of interracial relationships so long as the relationship was not the determinative factor in the decision. And, as these cases suggest, courts often weighed the impact of the mother's interracial relationship on her children, though they were careful to make clear that the custodial decision rested on other, race-neutral factors.

III. LESSONS FOR *LOVING* FROM INTERRACIAL CUSTODY CASES

The custodial cases recounted above complicate the narrative of unalloyed racial progress with which *Loving* is associated. *Loving* affirmatively disavowed criminal bans on interracial marriages and relationships and, in so doing, removed the most intractable legal punishments and impediments to such relationships. However, as these cases make clear, *Loving* did not remove *all* legal punishments and deterrents to such unions. Through custodial awards, courts could continue to use the law to signal disapprobation of interracial unions. Thus, in jurisdictions where interracial unions were legal prior to *Loving*, courts nonetheless wrestled with the question of whether such unions, despite their legality, were morally appropriate spaces for raising white children.

Courts worried that, by virtue of their intimate connection with a person of color, white children would lose the privileges of whiteness—that they would become irredeemably imbued with the other race. And critically, though the courts' worries were arguably for the white children whose mothers had transgressed racial boundaries, it is clear from these pre-*Loving* cases that these decisions were as much about the mother's conduct as they were about the effect of that conduct on the children. Not only had the mother compromised her children's racial identity by forcing them to live in an interracial home, she had compromised her own racial identity through her associations with her new black husband and his community. In this regard, these pre-*Loving* cases underscore the widespread disapproval of interracial unions—both in jurisdictions that maintained criminal bans against miscegenation *and* in more progressive jurisdictions where such unions were permitted.

As importantly, these cases make clear that the methods for regulating and censuring interracial relationships were varied. In the South and other jurisdictions where interracial unions were proscribed, criminal law furnished the vehicle for censuring and punishing attempts to live outside the norm of racial homogamy. By contrast, in those ostensibly progressive

165. *Id.* at 563.
166. *Id.*

jurisdictions where interracial unions were permitted, different means of expressing disapprobation of interracial unions were deployed—in these cases, through the civil context of child custody.

One might expect the *Loving* decision to dramatically change the regulatory landscape—and, indeed, it did. After *Loving*, the criminal law could no longer be used to enforce conformity with the norm of racial homogamy. In one fell swoop, miscegenation bans were invalidated, and interracial unions were recognized as lawful marriages throughout the country.

Nevertheless, the child-custody cases discussed above make clear that the absence of criminal barriers to interracial relationships does not necessarily mean the absence of *all* legal barriers to interracial relationships. Nor does it mean the absence of state regulation of such unions. In jurisdictions where interracial unions had been lawful, even before *Loving*, post-*Loving* courts continued to divest white mothers of custody by relying on a range of considerations. As they had done in the years preceding *Loving*, courts in these "progressive" jurisdictions acknowledged the fact of the mother's interracial relationship but took care to root their decisions in race-neutral rationales—the mother's promiscuity, her willingness to prioritize her relationship above her children, her general unfitness for custody. Both before and after *Loving*, courts in these jurisdictions continued to express their disapprobation of—and indeed, regulate—interracial unions by resort to child-custody awards.

Likewise, in those jurisdictions where criminal barriers had only recently been removed by virtue of *Loving*, the effort to regulate and censure interracial relationships did not end with *Loving*. Instead, the impulse to regulate—and censure—interracial unions simply shifted to a new domain—child custody determinations. In this regard, the post-*Loving* courts adopted the methods of their counterparts in the more progressive jurisdictions where interracial unions had been legal. But critically, despite *Loving*'s invalidation of miscegenation bans, the regulatory impulse was never entirely disrupted; it simply shifted to new locales outside of the criminal law.

Of course, in all of these cases, the mother was legally permitted to marry the partner of her choice, even if courts—and society—looked askance at the resulting interracial union. Unlike a miscegenation ban, a court's custodial decision did not bar interracial marriage, nor did it render the marriage null and void. In this regard, there is a considerable difference between a criminal ban and civil decision to transfer custody. This distinction, however, misses the point. The decision to divest a parent of custody is one of the most profound expressions of disapproval that a court can deliver. While it is wholly distinct from a criminal prohibition on interracial marriage, a court's decision to strip a mother of custody, in whole or in part because of her interracial marriage, is a form of regulation that has a decidedly *punitive* cast—a punishment for daring to cross the color line and a stern deterrent to other women who might consider following suit in the future.

Thus, while *Loving* invalidated criminal bans on interracial marriages, it did not eliminate all legal impediments and deterrents, nor did it diminish

fully law's direct presence in the project of regulating interracial unions. Make no mistake about it: law continued to play a direct role in expressing antipathy for interracial unions. Custodial decisions like these, which expressed concern for children raised in interracial unions, or that otherwise questioned the mother's judgment for entering into her relationship, both reflected and fed the continued skepticism and disapprobation of interracial unions.

Yet, these cases do more than simply complicate *Loving*'s legacy insofar as it concerns law's embrace of interracial relationships. They also make clear the shortcomings of decriminalization as a model for legal reform. As I have noted elsewhere, although *Loving* is a stalwart of the constitutional law canon and the family law canon, it is also a criminal law case.[167] And it is not alone in this respect. Most of the cases that are credited with liberalizing social and legal norms around contraception, abortion, nonmarital sex, and same-sex sex and sexuality—*Griswold v. Connecticut*,[168] *Eisenstadt v. Baird*,[169] *Roe v. Wade*,[170] *Lawrence v. Texas*[171]—are criminal law cases with constitutional dimensions.[172] In this regard, *Loving* is part of a larger historical arc in which decriminalization has been a principal vehicle for liberalizing social mores around sex and sexuality, and, more recently, recognizing LGBTQ rights.[173]

Yet, as we reflect upon this history and the decriminalization impulse that fueled these profound changes, a surprising commonality emerges: in all of these circumstances, criminal law was used to mark and condemn certain conduct as unworthy and illegitimate.[174] As norms shifted, decriminalization underwrote the effort to reform these laws. But even as criminal bans on this conduct were formally eliminated, the disapprobation and stigmatization that accompanied—and indeed, fueled—the criminal bans did not dissipate entirely. Instead, these impulses were rechanneled into other noncriminal contexts.[175]

Even after interracial unions were decriminalized and legalized, we nevertheless see the impulse to punish interracial relationships emerge in other, noncriminal domains, such as child-custody determinations.[176] Likewise, although *Lawrence v. Texas* decriminalized sex outside of marriage and same-sex intimacy, the impulse to censure and punish such relationships did not evaporate with that decision. Instead, as I have elsewhere documented, it was simply relocated to other, noncriminal

167. Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1272 (2009).
168. 381 U.S. 479 (1965).
169. 405 U.S. 438 (1972).
170. 410 U.S. 113 (1973).
171. 539 U.S. 558 (2003).
172. Murray, *supra* note 167, at 1272–73.
173. Melissa Murray, Griswold's *Criminal Law*, 47 CONN. L. REV. 1045, 1069–70 (2015).
174. Murray, *supra* note 167, at 1267–68.
175. *Id.*
176. Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 COLUM. L. REV. 573, 591–99 (2016) (discussing post-*Lawrence* civil regulation of sex).

contexts.[177] Through the use of professional codes of conduct and administrative regulations in various workplaces, nonmarital sexual conduct—cohabitation and adultery, as well as nonmarital same-sex conduct—continued to be regulated and, indeed, censured through other forms of law.[178]

The regulation of abortion and contraception are also instructive on this point. Although the use of contraception and abortion procedures have been decriminalized since *Griswold*, *Eisenstadt*, and *Roe*, many argue that the decision to use contraception and to have an abortion remain deeply stigmatized and, indeed, subject to state regulation that, to some, has a decidedly punitive cast.[179] On this account, civil laws that permit employers and providers to opt out of providing contraceptive coverage or that regulate various aspects of the process of obtaining an abortion are informal ways of signaling the continued disapprobation of these choices—and indeed limiting access to these choices.[180] As some proponents of abortion have argued, although abortion is nominally legal in the United States, it is the most regulated medical procedure in the country.[181] And while the various laws that regulate abortion access are, independently, unobjectionable as civil regulations, taken together, they have the effect of almost entirely proscribing abortion access.[182] That is, they effectively function as a ban, just as criminal prohibitions did, and they make clear the disapprobation and stigma with which this choice continues to be associated.

Thinking about the decriminalization of intimate life in this way illuminates the nuances of other conversations and discussions. Over the last six years, criminal law scholars and policy makers have engaged in a rich debate about overcriminalization and mass incarceration.[183] Recognizing that overcriminalization creates a range of societal problems, many have begun advocating for misdemeanor decriminalization: eliminating jail time for minor offenses such as marijuana possession and driving violations and downgrading these felony offenses to so-called "fine-only" or "nonjailable" misdemeanor offenses.[184]

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177. *Id.*

178. *Id.* at 599–603.

179. *See, e.g.*, Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2555 (2015).

180. *Id.* (noting the array of exemptions and regulations that "function[] as part of a broader legislative strategy to make access to abortion—and contraception—increasingly difficult").

181. Carol Sanger, *About Abortion: The Complications of the Category*, 54 ARIZ. L. REV. 849, 852 (2012) ("Since the development of a robust pro-life movement following the Supreme Court's 1973 decision in *Roe v. Wade*, abortion has become the most regulated medical procedure in the United States." (footnote omitted)).

182. *See* NeJaime & Siegel, *supra* note 179, at 2555.

183. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012) (discussing overcriminalization and mass incarceration); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587 (2012) (discussing decarceration as a remedy for overcriminalization); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005) (discussing overcriminalization).

184. *See generally* Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738 (2017); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66

In assessing these reforms, legal scholars like Professor Alexandra Natapoff have emphasized that the shift to misdemeanor decriminalization is complicated and not necessarily an unvarnished good.[185] As she explains, decriminalization does not mean deregulation.[186] Even under a misdemeanor regime, the offense conduct continues to be subject to state regulation, albeit less robust regulation than it was when it was classified as a felony offense.[187] Further, even though misdemeanor decriminalization promises the imposition of fines, probation, and other sanctions, rather than jail time, the behavior is still subject to public disapprobation. Misdemeanors are still crimes.[188]

Natapoff raises important points that acknowledge the very real limitations of misdemeanor decriminalization. But interestingly, in lodging this critique, Natapoff juxtaposes misdemeanor decriminalization with what might be termed "civil rights" decriminalization or legalization.[189] This model of legal reform, she maintains, is one that relies on decriminalization as a vehicle for legalizing conduct that was previously the subject of intense disapprobation, like contraceptive use, same-sex sodomy, and interracial marriage. As importantly, the process of decriminalization and subsequent legalization, Natapoff suggests, is akin to deregulation: "When same-sex rights advocates call for the decriminalization of gay sex, they mean that the state should get out of the business of regulating that intimate conduct altogether."[190] Thus, where misdemeanor decriminalization fails, and civil rights decriminalization succeeds, is that in the latter, decriminalization results in the legalization of the conduct. And legalization, Natapoff and others appear to suggest, is akin to complete deregulation.[191]

The history of interracial child custody cases makes clear that, like misdemeanor decriminalization, the civil rights decriminalization-

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STAN. L. REV. 611 (2014); Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043, 1064 (2013); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015) [hereinafter Natapoff, *Misdemeanor Decriminalization*]; Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. 255 (2015).

185. Natapoff, *Misdemeanor Decriminalization*, *supra* note 184, at 1077 ("Despite its many benefits, decriminalization can pose significant threats to the very values it seems to support.").

186. *Id.* at 1066 (noting the differences between decriminalization and deregulation or, as she terms it, "legalization").

187. *Id.* at 1078.

188. *Id.* at 1058–59 ("While misdemeanor decriminalization is in some ways less punitive, in some ways it is more so, simultaneously preserving, or even expanding, how the criminal system generates and then punishes offenders. First, decriminalization maintains many of the collateral, even direct, criminal consequences of a conviction. Nonjailable misdemeanors are still crimes that trigger the usual panoply of burdens including arrest, probation and fines, criminal records, and collateral consequences. Even so-called "nonarrestable" civil infractions can still derail a defendant's employment, education, and immigration status, while the failure to pay fines can lead to contempt citations and incarceration. These burdens, moreover, can be imposed on offenders quickly, informally, and without counsel, so that the standard procedural safeguards against wrongful conviction and overpunishment are lessened, if not eliminated altogether.").

189. *Id.* at 1065–66.

190. *Id.* at 1065.

191. *Id.* at 1066.

legalization paradigm poses challenges for those seeking less state regulation in their lives. As the post-*Loving* landscape shows, the legalization of interracial marriage did not end state regulation of this choice. While *Loving* resulted in the elimination of criminal bans on interracial unions, it did not eliminate all forms of legal regulation. The mode of regulation morphed and shifted from the criminal domain to a different context, but, in the end, it was regulation all the same.[192]

Understanding this aspect of decriminalization helps us to recognize this regulatory dynamic, even when it presents in less obvious forms. This term, the U.S. Supreme Court will take up *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[193] There, Jack Phillips, a Colorado baker and cake artist, refuses to provide cakes for celebrations commemorating the marriages of same-sex couples.[194] Phillips argues that First Amendment protections for free exercise and expression exclude him from the ambit of Colorado's nondiscrimination statute, which prohibits sexual orientation discrimination in places of public accommodation.[195]

The issue has prompted considerable discussion—particularly about the collision of religious freedom and LGBTQ rights.[196] But what is interesting is that amidst all of the discussion of the First Amendment and LGBTQ rights, no one has thought about *Masterpiece Cakeshop* as evidence of the regulatory displacement that we have seen time and time again in the wake of decriminalization. In 2003, *Lawrence v. Texas* decriminalized same-sex sex outside of marriage[197] and twelve years later in *Obergefell v. Hodges*, the Supreme Court legalized same-sex marriage.[198] Jack Phillips's refusal to provide cakes for same-sex weddings precedes the Court's decision in *Obergefell*, but, nevertheless, we might understand it as an expression of

192. *See* Murray, *supra* note 176.

193. No. 16-111 (U.S. argued Dec. 5, 2017).

194. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 276 (Colo. App. 2015), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017) (No. 16-111).

195. Brief for Petitioners at 16–46, *Masterpiece Cakeshop, Ltd.*, No. 16-111.

196. *See generally* Mary Anne Case, *Why "Live-and-Let-Live" Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. 463 (2015) (arguing that religious exemptions to laws of general applicability are unworkable); Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619 (2015) (describing functions of antidiscrimination law as suggesting an opening for certain religious exemptions); Helen Alvaré, *The Meaning of Marriage*, HARV. L. REV. BLOG (Dec. 1, 2017), https://blog.harvardlawreview.org/the-meaning-of-marriage/ [https://perma.cc/G8M3-EZDN]; John Paul Schnapper-Casteras, *Déjà Vu "No Cake for You,"* HARV. L. REV. BLOG (Dec. 1, 2017), https://blog.harvardlawreview.org/deja-vu-no-cake-for-you/ [https://perma.cc/U7X7-LQTD].

197. Lawrence v. Texas, 539 U.S. 558, 564–67 (2003).

198. Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015). Critically, we might understand the period between *Lawrence* and *Obergefell* as reflecting a series of regulatory shifts. In *Lawrence*, same-sex sexuality went from being criminalized to being noncriminal but ineligible for marriage. This shift to a place where sex is not regulated by either marriage or crime might be considered a zone of limited or no state regulation. *See* Murray, *supra* note 176, at 613. With *Obergefell*, same-sex sex shifted from this zone of very limited state regulation to being regulated by marriage—yet another form of state sexual regulation. *See id.*

continued disapprobation of same-sex intimacy and certainly the prospect of legalized same-sex marriages. That is, it is evidence that legalization does not mean complete acceptance or the absence of regulation.

Of course, Jack Phillips's personal objections to same-sex couples and same-sex unions are not the same as state criminal regulation. But if the Supreme Court does find that certain constitutional rights or statutory rights shelter this kind of personal disapprobation from the ambit of nondiscrimination laws, that might be akin to state regulation—facilitating the signaling of disapproval and censure of certain conduct and those associated with it. Or, more particularly, it might be understood as akin to the state giving effect to private biases[199] and, indeed, deputizing private actors to express the kind of disapprobation and discrimination that the state itself is now unable to express.

That at least was the Supreme Court's posture in *Bob Jones University v. United States*,[200] decided in 1983, sixteen years after *Loving* and the year before *Palmore*. There, Bob Jones University was denied tax-exempt status because it denied admission to applicants engaged in an interracial marriage or who were known to advocate interracial marriage or dating, and it expelled students who were partners to an interracial marriage.[201] The University argued that such views were mandated by their religious beliefs and thus subject to First Amendment protections.[202] The Court disagreed, citing *Loving* for the proposition that a ban on intermarriage or interracial dating "is a form of racial discrimination."[203] On this account, crediting the First Amendment as a means of shielding such discrimination from judicial scrutiny was akin to facilitating racial discrimination in violation of *Loving*. More importantly, in referencing *Loving*, the Court tacitly acknowledged that Bob Jones University's civil prohibition on interracial dating and marriage was as objectionable as the criminal ban invalidated in that landmark case.

This is all to say that because modern civil rights reform has hinged on decriminalization, we must understand and appreciate decriminalization's limits as a vehicle of law reform. So much of the effort to broaden the scope of liberty in intimate life has depended on removing criminal law as a marker of the state's presence in our lives. But, as the history of interracial child custody decisions suggests, decriminalization is no panacea.

To be clear, this critique is not intended to dismiss the obvious gains that accompany decriminalization. Removing the specter of criminal liability from intimate life is surely an important first step for civil rights reform in that it ensures that individuals cannot be deprived of their liberty and incarcerated as a mechanism of state disapprobation. But imprisonment is not the only (or, indeed, even the worst) punishment that the state can mete out to those who dare challenge state-sanctioned norms. In this regard, while

199. Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

200. 461 U.S. 574 (1983).

201. *Id.* at 580–81.

202. *Id.* at 602–03.

203. *Id.* at 605.

we can certainly celebrate the progress that decriminalization symbolizes, we ought not get too complacent. And we ought not regard decriminalization and legalization as synonymous with deregulation. As the interracial custody cases make clear, regulation comes in many forms—some more obvious than others. But regulation is regulation, whether it occurs via the hammer of the criminal law or through the subtler, velvet glove of civil regulation.

CONCLUSION

In the years since it was decided, *Loving* has stood as an exemplar of our constitutional commitments to equality and liberty in intimate life. But in focusing on these aspects of *Loving*, we have perhaps overlooked the other lessons that might be gleaned from this landmark decision.

Today, fifty years later, it is worth remembering that *Loving* was not simply a case about equality and liberty, but also about imposing limits on the state's ability to use the criminal law to regulate the contours of intimate life. But even as *Loving* designed limits on the state, decriminalizing interracial marriages and advancing the cause of equality and liberty, it was not a magic bullet. And it reminds us that decriminalization is rarely a magic bullet. Indeed, it is simply one facet of the many regulatory possibilities available to the state. If our goal is to reduce the degree to which the state is a palpable presence in the recesses of our lives, then we must be poised to recognize the way in which the state's regulatory impulses may shift and be transformed—all in service of its continued control over our intimate lives.