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More Than Love: Eugenics and the Future of Loving v. Virginia

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MORE THAN LOVE: EUGENICS AND THE FUTURE OF *LOVING V. VIRGINIA*

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This Symposium is dedicated to celebrating how *Loving v. Virginia*[1] paved the way for greater acceptance of multiracial families and interracial intimacy.[2] *Loving* is largely understood as a case that rejected the bigotry and hatred experienced by interracial couples and affirmed the idea that law supports love across racial lines. With this narrative comes the popular understanding that *Loving* stands for the notion that love conquers all. This idea has shaped other legal strategies and social movements, such as the effort to have same-sex marriage legally recognized.[3] Thus, *Loving* is thought of as drawing attention to the importance of romantic notions of love in creating a more inclusive society. But, in this brief Essay, allow me to explore one simple provocation: *Loving* was not simply about love.

It is clear that the Supreme Court's 1967 decision represents a profound triumph in law and society. *Loving*'s contribution to making multiculturalism and inclusion core values in our society is undeniable. But when we look closely at the history of the law at issue in *Loving* and the text of the ruling, we see that the case had little to do with the ideals of love and multiculturalism that have come to define how the decision is commonly discussed.

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

2. "In 2015, 17% of all U.S. newlyweds had a spouse of a different race or ethnicity, marking more than a fivefold increase since 1967, when 3% of newlyweds were intermarried, according to a new Pew Research Center analysis of U.S. Census Bureau data." GRETCHEN LIVINGSTON & ANNA BROWN, PEW RESEARCH CTR., INTERMARRIAGE IN THE U.S. 50 YEARS AFTER *LOVING V. VIRGINIA* 5 (2017), http://assets.pewresearch.org/wp-content/uploads/sites/3/2017/05/19102233/Intermarriage-May-2017-Full-Report.pdf [http://perma.cc/K3AD-MH5L].

3. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015). For a discussion of same-sex marriage and *Loving*'s impact, see Ronald Turner, *Same-Sex Marriage and* Loving v. Virginia*: Analogy or Disanalogy?*, 71 WASH. & LEE L. REV. ONLINE 264, 267–68 (2015).

In *Loving*, the Supreme Court was faced with a challenge to Virginia's Racial Integrity Act of 1924—an early twentieth century piece of state legislation that prohibited marriage between whites and persons of color.[4] The Act was part of a suite of state laws that had the specific purpose of preventing interracial intimacy.[5] This was not Virginia's first attempt to stop interracial marriage; such laws had been common for many years.[6] But the motivations of this particular Act were different: the Racial Integrity Act was signed into law on the same day—March 20, 1924—that the state legislature passed a separate act permitting the forced sterilization of disabled people.[7] The lawfulness of Virginia's forced sterilization law was upheld by the Supreme Court three years later in *Buck v. Bell*,[8] where the Court stated:

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.[9]

Virginia's peculiar legislative shift toward racial integrity and sterilization in 1924 draws attention to the idea that lawmakers at this time had concerns that went beyond interracial sex and parentage. While they may initially appear to be unrelated, laws that prevent certain racial groups from marrying and allow for the sterilization of people with disabilities reflect a shared ideology: eugenics. Popular in the early twentieth century, eugenics is the idea that scientific and medical interventions could be used to weed out people who had so-called defective lineages that were thought to lead to crime, poverty, or disabilities—endowments that were perceived as hindering the progress of any modern civilization.[10] Eugenicists believed that state involvement in reproductive practices could strengthen human populations.[11] Central to this ideology was the notion that differences in social and health outcomes—whether a person is rich or poor, healthy or sick, intelligent or intellectually limited—reflect the biological "fitness" of people as inherited from their families. Interracial marriage, reproduction between people with disabilities, and other related activities were seen as threats to the state and its social ordering.[12]

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4. *See Loving*, 388 U.S at 4–5.

5. VA. CODE ANN. §§ 20-50 to -60 (1950) (repealed in 1968).

6. *See generally* A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967 (1989) (discussing the evolution of the concepts of racial purity, interracial sex, and interracial marriage in colonial and antebellum Virginia).

7. *See* Act of March 20, 1924, ch. 394, 1924 Va. Acts 569–70 (repealed 1974); Act of March 20, 1924, ch. 371, 1924 Va. Acts 534 (repealed 1968).

8. 274 U.S. 200 (1927).

9. *Id.* at 207 (citation omitted).

10. *See* Hannah Lou, *Eugenics Then and Now: Constitutional Limits on the Use of Reproductive Screening Technologies*, 42 HASTINGS CONST. L.Q. 393, 394–96 (2015).

11. *See* Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1, 2–6 (1996).

12. *Id.* at 5–6.

These perceived "threats" were steeped in racism, classism, and ableism. Eugenics promoted the idea that the preferred group (i.e., affluent able-bodied whites) was in danger of having their ostensibly superior genes weakened by the inferior and socially undesirable traits found in racial minorities, disabled people, and social deviants. Note the language used above in the *Buck* holding: "degenerate offspring," preventing the "manifestly unfit," and parallels to "compulsory vaccination."[13] Eugenic laws concerning racial integrity and forced sterilization during this period were seen as key efforts by the state to promote public health.[14]

It is also important to note that while eugenics was popular from social, political, and economic standpoints, it was utter pseudoscience without merit. Many scientists and physicians (among other professionals in powerful positions) embraced its ideals at the time.[15] However, it would be a mistake to think that this popularity was linked to scientific rigor when it was largely driven by common social prejudices.[16] Nevertheless, the appearance of credibility given to eugenics—shifting racial discourse from a largely religious and affective sentiment[17] to one seemingly based in objective and neutral scientific principles[18]—was key to the state being able to target vulnerable groups with democratic precision in a postbellum era where equal protection was allegedly the law of the land. While the principles behind eugenics are without merit and quickly collapse under scrutiny, its ideology and practice had a profound impact in the United States and across the globe as a way to mobilize state power in a fashion that appeared to be in the public's interest.

The early twentieth century was a moment of increasing immigration, urbanization, and postbellum integration of former slaves into everyday life. This diversification gave rise to the perception of impending demographic warfare that could lead to inferior traits flooding the gene pool. It was

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13. *Buck*, 274 U.S. at 207.
14. Lombardo, *supra* note 11, at 20.
15. *Id.* at 9–12.
16. Legal historian Paul A. Lombardo notes:

> An investigation of the people who laid the groundwork for Virginia's miscegenation law reveals that the pseudo-science of eugenics was a convenient facade used by men whose personal prejudices on social issues preceded any "scientific theory." Stated more bluntly, the true motive behind the Racial Integrity Act of 1924 was the maintenance of white supremacy and black economic and social inferiority—racism, pure and simple. It was an accident of history that eugenic theory reached its peak of acceptability in 1924 so as to be available as a respectable veneer with which to cover ancient prejudice.

Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to* Loving v. Virginia, 21 U.C. DAVIS L. REV. 421, 425 (1988).

17. *See generally* TERENCE KEEL, DIVINE VARIATIONS: HOW CHRISTIAN THOUGHT BECAME RACIAL SCIENCE (2018) (arguing that Christian ideas about creation, ancestry, and universalism helped to form the basis of modern scientific accounts of human diversity).

18. *See generally* EDWIN BLACK, WAR AGAINST THE WEAK: EUGENICS AND AMERICA'S CAMPAIGN TO CREATE A MASTER RACE (2003) (discussing the evolution of the American eugenics movement); DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY (1985) (exploring the history of the eugenics movement and its impact on modern society).

thought that new laws and public policies were needed to protect whiteness; civilization would otherwise crumble.[19] This informed several types of practices that had the eugenic sensibilities of isolating social groups to prevent the racial dilution of whites. "Negative eugenics" practices, such as immigration restrictions, incarceration, and genocide, were common in many nations across the globe. At the same time, other forms of "positive eugenics," which encouraged individuals with desirable traits to mate, reproduce, and raise strong families, also rose to prominence.[20] In short, eugenics supporters worked under the guise of societal concern for public health to encourage regulations and practices that promoted the reproduction of those deemed fit and desirable while at the same time discouraging and depressing the populations of stigmatized groups as seen in *Loving* and *Buck*.

In looking back at the Supreme Court's decision in *Loving*, it is interesting that a case noted for its affirmation of love contains little discussion about this ideal. Apart from the name of the appellants and a handful of unremarkable statements that marriage is a civil right, the Court did not engage with the interpersonal nature of the dynamics implicated in the case.

Instead, the *Loving* decision was largely in conversation with the eugenic qualities of Virginia's Racial Integrity Act.[21] Rather than effusively affirming the power of love, the Court noted that antimiscegenation laws were unconstitutional since they are "measures designed to maintain White Supremacy."[22]

At this fifty-year mark, it is important to celebrate and acknowledge the impact that *Loving* had in facilitating multiculturalism and diversifying

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19. *See generally* BLACK, *supra* note 18; KEVLES, *supra* note 18.

20. *See generally* Alexandra Minna Stern, *Making Better Babies: Public Health and Race Betterment in Indiana, 1920–1935*, 92 AM. J. PUB. HEALTH 742 (2002) (discussing the rural Indiana contests that brought public health, "race betterment," and animal breeding together through "Better Babies Contests"); Mark Landler, *Results of Secret Nazi Breeding Program: Ordinary Folks*, N.Y. TIMES (Nov. 7, 2006), http://www.nytimes.com/2006/11/07/world/europe/07nazi.html [perma.cc/NL2S-THFT].

21. *See* Loving v. Virginia, 388 U.S. 1, 4 (1967). While the Court in *Loving* did not expressly discuss the eugenics movement as giving rise to the antimiscegenation law, the Court did note that the law was passed during a "period of extreme nativism which followed the end of the First World War." *Id.* at 6. This nativism was linked to the eugenics movement because the deep skepticism of foreigners was also tied to controlling reproductive practices in a domestic capacity to promote white supremacy and fend off any perceived demographic decline that might make the United States noncompetitive in global affairs. Tied closely to this nativism was the eugenic rearticulation of old entrenched biases that were not only skeptical of foreigners but deeply invested in controlling reproduction as a means of preserving power for a particular slice of white America.

22. *Loving*, 388 U.S. at 11. The *Loving* Court notes, in full, that

> [t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

Id. at 11–12.

family formation in America. But if we take the anti-eugenic aspects of *Loving* seriously, we can begin to appreciate how the case might have different lessons for us to learn at a moment when technology is changing family formation and reproduction in profound ways.

New reproductive technologies such as embryo screening and gene editing make a future with designer babies seem ever so close.[23] These technologies create the possibility that one day people may be able to choose the traits of their children the way that they select options for a new car; preferences regarding height, eye color, and perhaps even intelligence or musical ability could become highly coveted features not unlike moonroofs and leather seats. Some of these technologies have the capacity to impact the germ line—that is, traits selected by parents that one child can pass on to future generations.[24]

If the idea of using science and technology to ingrain our social and political preferences concerning physical appearance or other endowments into the bodies of future generations sounds familiar, well, it should. As such, the emergence of these powerful new technologies creates a profound need for serious public discussion.[25] Is the increased control over human reproduction and the traits of future generations a reasonable extension of human reproduction and ongoing efforts to improve the health of future generations? Or is it a form of eugenics that we should avoid?

In conclusion, it is important to emphasize that *Loving* is an outstanding achievement in the pursuit of social justice and greater inclusion in our society. But as we look forward, it is also important for us to appreciate how the anti-eugenic sensibilities in the decision might guide law and society in facing challenges connected to new developments in reproductive and genetic technologies. These developments have the potential to take us back down a dangerous path to a time where science and medicine were used to filter out those with disfavored traits in the name of public health and where social and health disparities were thought to be linked to inherent group differences. Apart from its popular narrative invoking notions of romantic love, *Loving* and its strong stance against eugenics can be instructive for how we think about the state's involvement in regulating new technologies that might facilitate the same eugenic outcomes that the Court in *Loving* sought to prevent.

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23. *See generally* Jennifer A. Doudna & Emmanuelle Charpentier, *The New Frontier of Genome Engineering with CRISPR-Cas9*, 346 SCIENCE 1077 (2014) (describing how CRISPR-Cas9 functions and analyzing its ability to potentially correct genetic mutations responsible for inherited disorders).

24. *See* Edward Lanphier et al., *Don't Edit the Human Germ Line*, 519 NATURE 410, 411 (2015).

25. *See generally* OSAGIE K. OBASOGIE & MARCY DARNOVSKY, BEYOND BIOETHICS: TOWARD A NEW BIOPOLITICS (2018) (discussing how emerging bioethical issues affect race, gender, class, disability, privacy, and notions of democracy).