University of Florida Journal of Law & Public Policy

Volume 20 | Issue 1 Article 2

2009

Reflections on Loving and Children's Rights

Barbara Bennett Woodhouse

Kelly Reese

Follow this and additional works at: https://scholarship.law.ufl.edu/jlpp

Recommended Citation

Bennett Woodhouse, Barbara and Reese, Kelly (2009) "Reflections on Loving and Children's Rights," *University of Florida Journal of Law & Public Policy*: Vol. 20: Iss. 1, Article 2.
Available at: https://scholarship.law.ufl.edu/jlpp/vol20/iss1/2

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in University of Florida Journal of Law & Public Policy by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

University of Florida Journal of Law and Public Policy

VOLUME 20 | APRIL 2009 | NUMBER 1

ARTICLES

REFLECTIONS ON *LOVING* AND CHILDREN'S RIGHTS

Barbara Bennett Woodhouse[*] & *Kelly Reese*[**]

I. INTRODUCTION 11

II. THE CHANNELLING FUNCTION OF *LOVING V. VIRGINIA* 13

III. MARRIAGE AS A GATEKEEPER TO CHILDREN'S RIGHTS 16

IV. *LOVING*'S LEGACY IN CHILD CUSTODY CASES 19

V. *LOVING*'S LEGACY FOR CHILDREN OF SAME SEX COUPLES 23

VI. THE EFFECT ON CHILD DEVELOPMENT OF GROWING UP IN A NONTRADITIONAL FAMILY 26

I. INTRODUCTION

In 2007, forty years after the decision in *Loving v. Virginia*,[1] a man born to a mother as "[W]hite as milk and a father as [B]lack as coal" announced his candidacy for the Presidency of the United States of America.[2] As a young man, Obama was acutely aware that his parents' marriage would have been illegal for many years after he was born. "Miscegenation. The

---

* David H. Levin Chair in Family Law Emeritus, University of Florida; L.Q.C. Lamar Chair in Law, Emory University School of Law.

** University of Florida Levin College of Law, Class of 2007.

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

2. BARACK OBAMA, DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE (1996).

word is humpbacked, ugly portending a monstrous outcome: like antebellum or octoroon, it evokes images of horsewhips and flames, dead magnolias and porticoes."[3] To the astonishment of many, Obama succeeded in winning the White House. It was a great day for freedom, a great day for Americans and a great day for people of color. It was also a great day for children of the post-*Loving* generation.

In *Loving*, the Supreme Court held that miscegenation laws that barred marriage between persons of different races violated their constitutional rights to liberty and equality.[4] Most discussions of *Loving* have focused on its importance to adults, seeing it as a case about the adults' fundamental freedom to marry, or as a case about adults' rights to be free of racial discrimination. But the decision has also been of critical importance to children. The decision in *Loving* was a necessary chapter in the Obama family story, finally making good on the promise that any child, regardless of skin color or circumstances of birth, could grow up to become President of the United States. Children imagine themselves in the present, but these images affect their futures. As children of today watch Sasha and Malia move into the White House and acquire the long-awaited puppy, they can imagine that no doors are closed to them. As they grow older, *Loving's* expansion of the very definition of what makes a family, and its elevation of the role of individual choice in creating a family, liberates young people of the post-*Loving* generation to find and embrace their own life mates and their own identities.

Richard Loving (part English and part Irish) had grown up with his hometown sweetheart, Mildred Jetter (part Black and part Cherokee).[5] Despite community norms, they were determined to marry and create a legal family across a then very stark color line.[6] The risks they took and the landmark case that bears their surname turned an important page in the American story and the story of Barack Obama.

Children have been born of "illicit"[7] relationships since the earliest days of human history. But they were, at best, forced to live in a legal and social limbo, or, at worst, severely punished for their parents' sins in challenging the dominant norms of family formation and racial and sexual identity. Too often, the meaning of Supreme Court opinions for children is

---

3. *Id.* at 11.
4. *Id.* at 12.
5. *See id.*
6. *See id.*
7. The authors frequently use "scare quotes" in their text to highlight the stigmatizing language that has too often been used to suggest that difference is a "deviant" rather than a "normal" state of being.

overlooked or treated as a collateral matter unworthy of focused attention. However, when examined from a child-centered perspective, it is clear that *Loving* was a landmark case for children. As it touches the lives of younger generations, *Loving* has played a central role in the development of children's rights to equality, privacy, agency, dignity and protection.[8]

How can a case about marriage have such a broad legacy for children? Children define themselves and are defined by law in relation to those who bring them into the world, who claim them as their own and who guide their upbringing. Because of *Loving* and the cases that followed from it, the current generation of children, like no other before, enjoys the right to equal protection of the laws, regardless of the race or marital status of their parents. This generation also enjoys, as never before, the liberty to envision building families free from state-sanctioned discrimination. Nevertheless, pockets of discrimination remain, marginalizing many children who are growing up in nontraditional families and preventing many children from equal access to the benefits of a legally recognized family relationship. As long as these forms of discrimination continue, the legacy of *Loving* will remain unfulfilled.

II. THE CHANNELLING FUNCTION OF *LOVING V. VIRGINIA*

Forty years ago there were sixteen hold-out states that still prohibited interracial marriage.[9] The U.S. Supreme Court, in *Loving v. Virginia,* invalidated a Virginia anti-miscegenation law that prohibited marriages of Whites with persons of color, holding it violated the Fourteenth Amendment to the U.S. Constitution.[10] *Loving* was truly a marriage of equality and liberty. The decision rested on two distinct grounds. It held that race-based classifications limiting who might marry whom infringed rights established by the Equal Protection Clause of the Fourteenth Amendment.[11] It also held that marriage was a fundamental liberty under the Due Process Clause of the Fourteenth Amendment, triggering

---

8. *See* Barbara Woodhouse, *Waiting for* Loving: *The Child's Fundamental Right to Adoption*, 34 CAPITAL U. L. REV. 297-329 (2005) [hereinafter Woodhouse, *Waiting for* Loving]. These are the five core human rights principles that Woodhouse identifies in "Revisioning Rights for Children." Barbara Woodhouse, *Revisioning Rights for Children*, *in* RETHINKING CHILDHOOD 229-43 (Pufall et al. eds., 2004). Woodhouse elaborates on this theory of rights in her book. BARBARA WOODHOUSE, HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE (2008) [hereinafter WOODHOUSE, HIDDEN IN PLAIN SIGHT].

9. *Loving*, 388 U.S. at 6.

10. *See id.* at 2.

11. *Id.* at 12.

heightened scrutiny of laws that significantly interfere with the individual's choice of marriage partner.[12]

The effect of this decision has been an expansion of the definition of family. For centuries, in American jurisprudence, recognition of legal family status had been confined to two opposite sex married parents of the same race and their biological children. Even marriages between people of different religions were frowned upon as "mixed marriages" and considered deviant. In the years since *Loving*, the notion of family has grown and expanded to include a broad range of nontraditional families of many colors and many different configurations.

As Professor Carl E. Schneider has observed, law plays a key role in shaping a society's moral beliefs.[13] Legal decisions, in addition to their direct effects on the parties to the dispute, often have a "channeling function."[14] In other words, the law itself builds a normative framework for thinking about social institutions and the law itself "offers people models for organizing their lives."[15] While the decision in *Loving* did not change attitudes overnight, it has clearly had a major impact on the way people live their lives. Since *Loving*, the percentage of interracial marriages in the United States has risen dramatically: from 0.7% of all marriages in 1970, rising to 1.3% in 1980 and 2.2% in 1992.[16] By the time of the 2000 Census, interracial marriages had risen to 2,669,558 and represented 4.9% of all marriages.[17]

Drawing upon Schneider's theory of the channeling function, one might say that the Supreme Court, when it decided *Loving*, recruited the institution of marriage and molded it.[18] In fact, the Court had avoided the issue of interracial marriage for many years. In *Naim v. Naim*,[19] an appeal from a decision of the Supreme Court of Virginia lodged only a year after *Brown v. Board of Education*,[20] the U.S. Supreme Court passed up the

---

12. *Id.*

13. Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 496 (1992).

14. *Id.*

15. *Id.* at 506-07.

16. U.S. Census of 1994: Race of Wife by Race of Husband: 1960, 1970, 1980, 1991, and 1992, *available at* http://www.census.gov/population/socdemo/race/interractab1.txt.

17. U.S. Census of 2000 PHC-T-119 Hispanic Origin and Race of Coupled Households: 2000.

18. *See* Schneider, *supra* note 13, at 503.

19. 350 U.S. 891 (1955).

20. 347 U.S. 483 (1954) (declaring school segregation violated the Equal Protection Clause).

opportunity to address the same law it would later strike down in *Loving*.[21] In 1964, the Court struck down a Florida law imposing criminal penalties against cohabitation between people of different races.[22] Only after numerous states had abandoned their miscegenation laws did the Supreme Court finally address the issue. But once the Court had spoken, the legal system incorporated people into the newly defined institution by recognizing and endorsing marriage across color lines.[23] Richard and Mildred Loving were but one among many couples who had before been deemed deviant and who were now definitively eligible to be "married." The recognition of interracial marriage by the Court legitimized the institution and gave it permanency.[24] This legitimization by the Court was itself legitimized by the Court's application of fundamental principles of equality and liberty to a changing social context.[25] The Court's decision responded to changing mores, but it also contributed to change. It led to widespread moral and social acceptance of interracial relationships, resulting in the large increase of interracial marriages and bi-racial children. In the words of Peter J. Riga:

> These judicial influences on family law have directly contributed to the change in marriage and family behavior and in the way people think about marriage and family . . . The educative force of law in America is so strong that people tend to draw moral conclusions for practical living from it which in turn influence social life itself.[26]

Those who prophesied that *Loving v. Virginia* spelled the demise of marriage as an agent for patrolling the boundaries of racial purity and warned that it would lead to "mongrelization" of the races were correct. The notion that law should play a role in enforcing racial purity and deterring lovers from crossing the color line has been rejected. Over time, the stigma visited on the children of such couples has diminished. For

---

21. *Naim*, 350 U.S. at 891 (refusing on procedural grounds to decide validity of Virginia anti-miscegenation law).

22. McLaughlin v. Florida, 379 U.S. 184, 193, 196 (1964) (declaring a Florida statute that prohibited cohabitation between an African American and a Caucasian violated the Equal Protection Clause).

23. *See* Schneider, *supra* note 13, at 503.

24. *See id.* at 501-03.

25. Loving v. Virginia, 388 U.S. 1, 12 (1967).

26. Peter J. Riga, *The Supreme Court's View of Marriage and the Family: Tradition or Transition?*, 18 J. FAM. L. 301, 306 (1979-1980).

instance, in a recent survey, Barack Obama topped the list of men living today that are most admired by Americans.[27]

Racism, however, is still a powerful force in American culture. But, as these stories show and the statistics on interracial marriage confirm, children's imaginations are far less stunted by intolerance than at the time of *Loving*. Children see around them, in media, on the streets and in their schools and homes, many different kinds of families, and they can imagine themselves in many different kinds of relationships. As they mature, children enjoy far more liberty to follow their hearts and forge their own identities, whether marrying within their own religious, ethnic and racial communities, or finding or creating new and different communities.

Under common law and constitutional law, the channeling function of cases like *Loving*, when it comes to the actual formation of new laws, is far more explicit and direct than in the realm of sociology and human behavior. While people falling in love are unlikely to cite to *Loving v. Virginia*, the decision figures prominently in many court cases striking down restrictions on the freedom to marry and to enjoy protection of one's intimate relationships.[28] In the following sections of this Article, the authors will examine the arenas in which *Loving* and its progeny have affected children.

III. MARRIAGE AS A GATEKEEPER TO CHILDREN'S RIGHTS

While *Loving* was not explicitly about children, marriage and the birth right of legitimacy have long been linked in law and in social custom. Historically, the child of an unmarried couple was stigmatized as a bastard and deprived of many basic legal rights. Prohibiting marriage between parents of different races meant that children of such non-conforming couples would be deprived of equal status with other children. Prohibiting marriage between persons of different races also had another more subtle effect. It deprived children and adolescents of the liberty to imagine their own futures as individuals free to love and marry according to the dictates

---

27. Susan Page, *Obama is Man Americans Admired the Most, by Wide Margin in Poll*, USA TODAY, Dec. 26-28, 2008, at 1 (USA/Gallup poll reporting Obama six times more popular than nearest contender).

28. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (protecting intimate relations between people of same sex); Turner v. Safley, 482 U.S. 78, 96 (1987) (invalidating restrictions on marriage of incarcerated inmates); Zablocki v. Redhail, 434 U.S. 374, 375, 388 (1978) (striking down financial restriction on entry into marriage); Moore v. City of E. Cleveland, 431 U.S. 494, 504-05 (1977) (protecting extended family ties of grandmother and grandson); Smith v. OFFER, 431 U.S. 816, 836-37 (1977) (discussing protection of foster parent relationship).

of their hearts. At its core, *Loving* was about both equality and liberty and the two concepts have long been intertwined.[29]

Looking back at the roots of anti-miscegenation laws in Antebellum America, it is clear that slavery and the consequences for children of illegitimacy were mutually reinforcing. Factors such as race, poverty, illegitimacy, and minority combined to deprive children of many valuable rights. Take for example, the childhood of the great abolitionist orator Frederick Douglass.[30] If it was true, as Douglass believed, that the slaveholder who "owned" his mother was his biological father, he should by birth have been among the lucky few children enjoying a life of leisure and learning.[31] However, under the one drop rule, a child with a drop of African blood was deemed Black and deprived of his father's privileged racial status.[32] Thus, because Douglass's father did not and could not marry his mother, he was considered illegitimate as a result of interlocking and mutually reinforcing disabilities.

Black children in Antebellum America, in an exception designed to perpetuate and reinforce racialized slavery and to guarantee a renewable source of human capital, did not belong to their fathers.[33] In every slave state, as in Maryland, their status was defined by that of their mother.[34] White men who fathered children with Black women were able to "own" their own children, without having to share their wealth or their status with them.[35] Another large class of children, children born out of wedlock, were stigmatized as bastards. Considered "*filius nulius*," or children of no one, they had no right to claim their fathers' name or inheritance, regardless of their color or class status.[36] Since legal marriage was denied to slaves, and interracial marriage was a crime, mixed-race children could rarely escape becoming "chattels personal" of their mothers' owners.[37] Frederick Douglass's childhood illustrates the uncertain existence of a "chattel" – a

29. *See Loving*, 388 U.S. at 11, 12.

30. *See generally* Barbara Woodhouse, *Dred Scott's Daughters: Nineteenth Century Urban Girls at the Intersections of Race and Patriarchy*, 48 BUFF. L. REV. 669 (2000).

31. *Id.* at 674.

32. *Id.*

33. *Id.*

34. *Id.*

35. *See* A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL SYSTEM 34 (1996).

36. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 197 (1985); MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF THE CHILD IN THE UNITED STATES, 24-27, 96 (1994).

37. *See* HIGGINBOTHAM, *supra* note 35, at 35.

form of moveable personal possession with attributes both of thing and of human being, used to satisfy the needs of his owners.[38]

Children of unmarried mothers, whatever their color, were extremely vulnerable to being treated like chattel, transferred to their most economical use and separated from their kin. Even after unmarried mothers were given rights of custody to bastard children, Poor Laws, patterned on those of England, continued to authorize local authorities to remove any child lacking support, and offer the child as an indentured servant or laborer until the age of majority.[39] Although single mothers were more likely to be destitute, the laws applied to all families unable to care for their young, and many children with two living married parents found themselves involuntarily indentured.[40] Mulatto children born to white mothers received still harsher treatment, designed to discourage miscegenation. These children were indentured at birth until they reached age thirty-one.[41] Indenture provided not only a means of redistributing labor, but also a method of controlling unmarried and interracial sexual activity and of privatizing responsibility for the poor, who would otherwise be a drain on the community's resources.[42] Viewed against this historical background, it is clear that the child's rights, whatever her skin color, were severely prejudiced by her parents' exclusion from the institution of marriage and by limitations on her parents' freedom to marry when and whom they wished.

Marriage remains a crucial gateway to children's equal rights. Although the Court has whittled away at many of the disabilities imposed by out-of-wedlock birth, children whose parents cannot or do not marry still face greater obstacles than children of married parents. A child born to a married mother automatically has a legal father without the necessity of proving paternity.[43] She is eligible to be covered by both parents'

---

38. *See id.* at 34-36; Kenneth M. Stampp, *Chattels Personal*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER 203, 204 (Harry N. Schreiber & Lawrence M. Friedman eds., 1998); WOODHOUSE, HIDDEN IN PLAIN SIGHT, *supra* note 8, at 51-74.

39. MASON, *supra* note 36, at 25.

40. *Id.*

41. HIGGINBOTHAM, *supra* note 35, at 35.

42. MASON, *supra* note 36, at 24-31; 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, 1971 (1989).

43. The presumption of paternity (that the father of a child born to a married woman is the woman's husband) is a common law doctrine embodied in modern statutes and in model laws. *See, e.g.*, Uniform Parentage Act, section 4 (presumption of paternity); Michael H. v. Gerald D., 491 U.S. 110, 113 (1989) (upholding constitutionality of California code's presumption of paternity).

insurance, enjoys unquestioned rights of inheritance and rights to support from both parents, and benefits in numerous other ways.[44]

IV. *LOVING*'S LEGACY IN CHILD CUSTODY CASES

Loving v. Virginia also led to changes in child custody laws. If people of different races had the constitutional right to marry, it followed logically that they had the constitutional right to be free from state discrimination based on their interracial marriages. The context of child custody differs significantly from that of marriage. Marriage is a contract between two consenting adults. Unlike the decision to marry, in a custody decision, the state mediates conflicts between parents over the control of a third party, the child. Child custody decisions represent a zone in which the state, in the guise of a family court judge applying a "best interest of the child" test, has broad discretion in defining which family members or forms are deviant and which are normal and healthy. As long as laws remained on the books criminalizing and prohibiting interracial relationships, breaches of such laws could be used as a factor in determining custody of a child.

Accordingly, with the annual divorce rate at 3.6 per thousand, there are many custody proceedings that involve parents of different races. For instance, a divorced parent in a same race couple may go on to remarry a person of a different race. Or an interracial marriage may end in divorce, leaving the custody decision up to a state actor, the family court judge. Or unmarried parents may be of different races and engage in a dispute over custody. Even after *Loving*, trial judges continued to weigh the stigma against interracial relationships as a factor supporting shifting custody.[45]

The New York State Court, in *Farmer v. Farmer*, addressed whether state family law required a judge determining custody of a child born in an interracial marriage to award custody to the parent who most closely matched the obvious racial characteristics of the child and society's identification of the child.[46] The argument was that this was an

---

44. *See, e.g.*, Clark v. Jetter, 486 U.S. 456, 463-64 (1988); Gomez v. Perez, 409 U.S. 535, 538 (1973); Trimble v. Gordon, 430 U.S. 762, 772 (1977); *see also* Barbara Woodhouse, *The Status of Children: A Story of Emerging Rights*, *in* CROSS CURRENTS: FAMILY LAW AND POLICY IN THE U.S. AND ENGLAND 423, 438-39 (Sanford Katz et al. eds., 2000); Barbara Woodhouse, *Children's Rights in Gay and Lesbian Families: A Child-Centered Perspective*, *in* CHILD, FAMILY, AND STATE 273, 285 (Stephan Macedo & Iris Young eds., 2003).

45. *See* Farmer v. Farmer, 439 N.Y.S.2d 584, 589 (N.Y. Sup. Ct. 1981) (noting that while appellate courts were unanimous in rejecting the use of race as a significant factor in custody disputes between parents, some courts in *nisi prius* (trial courts) still failed to follow their directive).

46. *Id.* at 584.

indispensable step in applying the best interest of the child standard.[47] After divorce, the Black father of a biracial child sought custody from the White mother.[48] The father argued that the court below had erred in failing to give weight to his argument that he, as the Black parent, could provide a better setting for raising the child.[49] Ultimately, the *Farmer* court held that race should be a factor but not a dominant, controlling, or crucial factor.[50] Neither parent should gain priority for custody by race alone, nor should being of a particular race disqualify a natural parent for custody.[51] The *Farmer* court ruled in favor of the child's mother based on her superior parenting skills, emotional and employment stability, and because "the mother offers the best hope of raising Bethany to adulthood with an adequate sense of self-worth which, as [one expert] testified, is the result of being treated as worthwhile, valuable, important and loved."[52]

In *Palmore v. Sidoti*[53] the Supreme Court confronted the constitutional question lurking behind such family law cases, and held that the social stigma to which a child might be exposed as a consequence of his or her custodial parent's interracial relationship or remarriage could not be used as the dispositive factor in determining the child's best interest.[54] While the stigma might be very real and might, in fact, be harmful to the child, a custody court violated the rights of the parent and the child when it gave effect to such discriminatory private biases.[55] The Court argued that the legal system could not control nor could it tolerate racial prejudices.[56] Private biases may be outside the reach of the law, but the law could not, directly or indirectly, give them effect.[57]

Of course, *Palmore* was that unusual case in which a family court judge explicitly referred to race as the basis of his custody decision.[58] The trial judge stated on the record:

> This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable

47. *See id.*
48. *Id.* at 585.
49. *Id.* at 586.
50. *See id.* at 590.
51. *See id.*
52. *See id.*
53. 466 U.S. 429 (1984).
54. *See id.* at 433-34.
55. *Id.* at 434.
56. *Id.* at 433.
57. *Id.*
58. *Id.*

> that Melanie will, if allowed to remain in her present situation [i.e., the custody of a mother who is in an interracial relationship] and attains school age and thus more vulnerable to peer pressures, suffer from social stigmatizion that is sure to come.[59]

Few judges would make such a statement on the record today, yet it would be naïve to deny that racism, whether conscious or unconscious, continues to play a role in custody decisions.

This ruling was quickly applied in situations where racial bias was not at issue. After *Palmore,* it became harder to point to social stigma and its potential to harm the child through peer pressure and teasing as a compelling or even a legitimate basis for treating non-traditional families differently from other families.[60] The year after *Palmore* was decided, the Court extended its holding in a case involving bias against persons with disabilities, *City of Cleburne v. Cleburne Living Center.*[61] Individuals affected by mental retardation had been barred (for their own good) from establishing a group home in a particular neighborhood.[62] The argument was that the "disabled" residents of the home would be teased and harassed by the "normal" children attending the nearby public school.[63] Quoting from *Palmore v. Sidoti*, the Court wrote:

> But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[64]

Much as *Loving* played a role in channeling attitudes toward marriage, *Palmore* both reflected and accelerated a change in attitudes toward custody. The focus was shifting away from the parent's conformity to social norms and toward examination of the quality of the parent and child relationship. Conduct by parents that violated sexual norms about chastity and adultery had long been a recognized basis for depriving the

---

59. *Id.* at 431.
60. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 472 (1985).
61. *Id.* at 448.
62. *Id.* at 435.
63. *Id.* at 449.
64. *Id.* at 448.

transgressing parent, especially mothers, of a child's custody.[65] The notion that children's "best interests" must be judged without reference to social stigma has found expression in statutes and cases that require a "nexus" between sexual conduct of the parent and demonstrable harm to the child.[66] This idea, once thought shocking, is now accepted in large parts of the United States, and is reflected in the Uniform Marriage and Divorce Act and the ALI Principles of Family Dissolution.[67]

These applications of *Loving*'s liberty and equality values to custody and adoption have benefited children in a number of ways. Just as marriage had been the carrot to encourage conformity to dominant norms of family formation, loss of custody or denial of an opportunity to form a legal family was the stick to control and punish deviant parents. Many children suffered the consequences, and like Melanie Sidoti, were abruptly and traumatically separated from primary attachment figures with whom they had strong and supportive relationships because the parent's choices of partner or "lifestyle" were "different."[68]

But what of the theme in *Loving* that family formation is a fundamental right, even when racial issues are not in play? Woodhouse has argued that children have a fundamental right to be part of a family unit that flows from the substantive due process theory undergirding the second prong of the decision in *Loving*.[69] One approach might be the paternalistic assertion that the state must decide for children what families will be best for them. Under this theory, a family that is "different" is, *per se*, not in the child's best interest. But we cannot shield a child from all adversity. Children's best interest, whether in custody or adoption cases, cannot be assessed in a vacuum, as if the child were an object rather than an active participant in shaping her own and society's values.

---

65. KELLY WEISBERG & SUSAN APPLETON, MODERN FAMILY LAW 746 (2006).

66. *See* Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J.L. FAM. STUD. 135, 153-54 (2005).

67. WEISBERG & APPLETON, *supra* note 65, at 746; *see also* Mahoney, *supra* note 66, at 155 (pointing out that many jurisdictions still discriminate against unmarried heterosexual parents).

68. Linda Sidoti Palmore never recovered custody of her child. The family court ruled in favor of continuing custody with the father, citing the importance of stability and continuity in the child's life. WEISBERG & APPLETON, *supra* note 65; *Woman Married to Black Will See Her Daughter*, Around the Nation, N.Y. TIMES, Aug. 16, 1984 (Texas court grants temporary visitation).

69. *See* Woodhouse, *Waiting for* Loving, *supra* note 8, at 239. Professor David Meyer has reached a similar conclusion, using a three part substantive due process analysis that focuses on the equal protection tensions between recognizing some intimate relations as fundamental liberties and denying others. David D. Meyer, *A Privacy Right to Public Recognition of Family Relationships*, 51 VILL. L. REV. 891, 906-07 (2006).

Respect for children's agency and resilience should temper our paternalistic tendency to underestimate children's capacity to deal with prejudice and intolerance and the value to children of being trusted and empowered to stand up to adversity. The lesson of teasing is often pride in one's self and loyalty to one's family. A recent commentary on transracial adoption that has validity for all forms of adoption points out that visible differences between the adoptive parent and the adoptive child are an "unblinkable" truth that has a positive value in affirming the child's identity.[70] Differences between the adoptive parent and the adopted child emphasize and make even more visible the fact that the child is an individual in his or her own right.

Woodhouse is the adoptive parent of a redheaded child of Irish and Scottish ancestry. As a toddler he was asked by someone who did not know he was adopted, "Who's the red-head in your family?" He proudly replied, "I am!" As an adult, he knows who his biological parents are, has met them, and takes pride in his Scottish/Irish/Canadian heritage. Where difference is visible, the individual can be accepted for him or her self and not cast in the role of a stand-in for a biological child.

By validating the nontraditional families in the cases noted above, the legal system is changing and endorsing the evolution of the image of what makes a socially acceptable, "natural" and "normal" family. The influence of the legal system is everywhere; by recognizing new families that break away from the traditional mold, the courts and legislatures are saying that these nontraditional homes are real families, despite past histories of social and legal exclusion.

V. *LOVING*'S LEGACY FOR CHILDREN OF SAME SEX COUPLES

Intolerance is a moving target. Growing up is getting easier for children of interracial marriages and adoptions, so our focus is shifting to children in other "nonconforming families" now emerging from the shadows and facing social and legal barriers to recognition. The boundaries of intolerance may have shifted but marriage remains its most contested terrain. The hot topic of the past decade has been recognition of intimate relationships between people of the same sex. Many observers see no relationship between laws that prohibit marriage between men and women of different races and laws that prohibit marriage between two women or

70. *See* Jennifer Swize, *Transracial Adoption and the Unblinkable Difference: Racial Dissimilarity Serving the Best Interests of Adopted Children*, 88 VA. L. REV. 1079, 1100, 1102 (2002).

two men. But the authors of this Article, along with a number of courts and commentators, are persuaded that similar values of liberty and equality are at stake.[71] More importantly, from a child's perspective, growing up as the child of a lesbian or gay relationship carries an unjust burden of stigma and exclusion that will never be lightened as long as such discrimination is sanctioned by law.

Same sex marriage is prohibited in all states with the exception of Massachusetts.[72] A number of states, some citing the reasoning of *Loving v. Virginia*, have created a status that is not called marriage but carries with it all of the same privileges and responsibilities.[73] However, until federal law recognizes same sex relationships, children of these unions will be adversely impacted in a range of ways.[74] The Defense of Marriage Act currently prohibits recognition of same sex marriages or civil unions in federal benefits schemes, reversing a long tradition of treating marriages that are valid in the state where they are performed as valid everywhere.[75]

Opposition to same sex unions has spilled over into the adoption context as well. In the 1980s and 1990s, courts in a number of states rejected restrictions on adoption by gays and lesbians. In *Matter of Adoption Anonymous*,[76] a single, lesbian woman sought to adopt a child. The court held that there was no bar against a single parent adopting a child.[77] Furthermore, the court stated that adoption of a child may not be precluded solely on the basis of homosexuality.[78] Citing the fact that there was no indication in the record that adoption in this case would not be in the best interest of the child, the court overturned the lower court's ruling and held for the lesbian mother, granting her petition for adoption.[79]

---

71. Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993); Baker v. State, 744 A.2d 864, 886 (Vt. 1999).

72. *See* Goodridge v. Dep't of Health, 798 N.E.2d 941, 950, 968 (Mass. 2003) (applying state constitutional law to require state to provide access to marriage regardless of sex). At this writing, five states allow same sex couples to marry (Connecticut, Iowa, Maine, Massachusetts, and Vermont). Times Topics, "Same Sex Marriage, Civil Unions, and Domestic Partnerships," N.Y. Times, updated May 7, 2009.

73. Civil unions are recognized in several states including New Jersey and Connecticut. *Id.* Domestic partnerships tend to be more common at the local level, see Metro News Briefs: New York; Domestic Partner Law is Upheld in Court, *N.Y. Times*, Nov. 7, 2003.

74. For a compendium of ways in which lack of access to marriage for their parents hurts children, see *Goodridge*, 798 N.E. at 962-64.

75. *See* 28 U.S.C. § 1738 (1996).

76. *See* In the Matter of Adoption Anonymous, 209 A.D.2d 960, 960 (N.Y. Sup. Ct. 1994).

77. *See id.* at 960.

78. *Id.*

79. *See id.*

Based on cases such as this one, Woodhouse had long believed that adoption was a wedge issue that opened doors for gay marriage. Recently, the reverse has occurred. A backlash against gay and lesbian adoption developed in the wake of successes in attacking restrictions on same sex relationships. This backlash has been threatening to close the doors to adoption by same sex couples. In 2003, only one state (Florida) banned gay adoption. During the 2004 election season, a total of sixteen states had initiatives to ban gay adoption on the voting ballots.[80] As of this writing, Florida explicitly prohibits gay adoption by statute; Mississippi bans adoption by gay couples, though gay singles can adopt; and Utah bans adoption by any unmarried couple.[81]

How times have changed. In 1990, Woodhouse found it difficult for her family law students to take seriously and fully explore an exam question about same sex marriage. But when she put the same hypothetical gay couple in a state that forbid adoption by unmarried couples, giving them a "special needs" foster child named "Mary" who had thrived under their care, the same students would go to great lengths to find the couple legally married in order to give Mary a permanent home in an adoptive family.

Fast forward to 2003, when a federal appeals court upheld the constitutionality of the Florida statute that bans gay adoption in *Lofton v. State*.[82] Lofton involved equally compelling facts, but the gay couple (and the child they wished to adopt and who wanted to be adopted by them) lost their case. The Supreme Court placed a hold on this case and then remanded it for reconsideration in light of the decision in *Lawrence*. On reconsideration, the Tenth Circuit in *Lofton* accepted an argument about the differences between adoption and marriage that the panel in *Compos v. McKeithen* had flatly rejected some thirty years before: that adoption, unlike marriage or sexual intimacy, is not a fundamental right, but is a creation of statute subject to whatever conditions the legislature sees fit to place upon it.[83]

Woodhouse has argued against this theory in her article *Waiting for Loving* and in briefs she coauthored for the Child Welfare League of America urging the Court to grant certiorari in *Lofton* and for the National Association of Social Workers in subsequent cases.[84] She has argued that

---

80. *See* Andrea Stone, *Drives to Ban Gay Adoption Heats up in 16 States*, USA TODAY, Feb. 30, 2006, http://www.usatoday.com/news/nation/2006-02-20-gay-adoption_x.htm.

81. *See id.*

82. *See* Lofton v. Sec'y of Dep't of Children & Families, 377 F.3d 1275, 1275 (11th Cir. 2004).

83. *See* Compos v. McKeithen, 341 F. Supp. 264, 265-66, 268 (D.C. La. 1972).

84. *See generally* Woodhouse, *Waiting for* Loving, *supra* note 8; Motion of the Child

adoption is as deeply rooted in tradition as marriage and is no more a creature of the law than is marriage.[85] Like marriage, adoption appears in many societies and has an ancient lineage; adoption is ubiquitous in all societies and an integral part of the social fabric that encourages caregiving and mutual support.[86] Since adoption is the sole avenue into a fully equal legal relationship with other children, categorical bans on adoption, based on some presumed quality of a class of would-be parents, violates children's rights as well as those of adults.[87] The protections of *Loving* should be extended to children without arbitrary state interference, providing children with a protected right of family formation through adoption. Only time will tell whether the protections of nontraditional family formation adumbrated in *Loving* will be extended to all children awaiting adoption, not only children of color.

VI. The Effect on Child Development of Growing up in a Nontraditional Family

Much of our discussion so far has focused on children's legal rights. But included among these rights are the rights to protection from harm. If there were an irreconcilable clash between the best interests of children and the expansion of the nontraditional family, the tension between children's liberty and equality rights and their rights to protection would be difficult to resolve. Best interest is a malleable standard, but the social sciences, including psychology, anthropology and sociology, provide a context that gives content to legal abstractions such as the child's "best interest" and "substantial risk of harm." They also supply a starting point for determining whether a proffered state interest is truly "legitimate" or "compelling" or merely a pretext for invidious discrimination. While social

---

Welfare League of America for Permission to File Brief Amicus Curiae in Support of Petitioners and Brief Amicus Curiae, *available at* http://www.law.ufl.edu/centers/childlaw/pdf/lofton.pdf.

85. Woodhouse, *Waiting for* Loving, *supra* note 8, at 308-09.

86. *See* FIONA BOWIE, *Adoption and the Circulation of Children: A Comparative Perspective*, *in* CROSS-CULTURAL APPROACHES TO ADOPTION 3, 3-5 (Fiona Bowie ed., 2004) (practice of raising non-biological children is ubiquitous).

87. *See* Woodhouse, *Waiting for* Loving, *supra* note 8, at 318-19. At the time of this writing, a recent successful challenge to the Florida law prohibiting adoption by homosexuals is under consideration at the state appellate court level. For a redacted text of Judge Lederman's order in the case of *In re* Adoption of John Doe & James Doe, issuing from the Juvenile Division of the 11th Judicial Circuit of Miami-Dade County can be seen on the ACLU website at http://www.aclufl.org/pdfs/GillRedactedFinal.pdf. Unlike *Lofton*, this case directly presents questions under the Florida Constitution of the child's right to be adopted; many amicus briefs are being filed and the decision of the Florida appeals court is eagerly awaited.

science has often been misused in the past,[88] and this Article cannot fully explore the debates among experts in this area, our discussion would not be complete without a brief treatment of the social science.

Many critics of nontraditional family forms argue that there are behavioral and psychological consequences of growing up in nontraditional families.[89] Critics most heavily cite cultural and identity issues of a minority child growing up in a majority household, or of a straight child growing up in a gay or lesbian household.[90] Inevitably, these arguments are inextricably intertwined with culture and context. As Barack Obama's story illustrates, the meaning of growing up in an interracial family has been changing for children as well as for adults, due in part to the channeling function of law.

In the United States alone, interracial marriages have increased four hundred percent since the holding of *Loving*.[91] This increase, as well as an increase in parenthood by unmarried interracial couples, has led to a substantial growth in the numbers of biracial and multi-racial children. The American Academy of Child and Adolescent Psychiatry (AACAP) has concluded that multi-racial children do not differ from other children in self-esteem, comfort with themselves, or number of psychiatric problems.[92] Research has also suggested that multi-racial children tend to be high achievers with a very strong sense of self and tolerance of diversity.[93]

There are of course external influences such as peers or neighbors that can have an impact on multi-racial children. Some multi-racial children report whispers and stares when they are with their family, but the impact of the jeers and ignorance can be lessened by open communication with parents.[94] The AACAP advises that parents can help children understand their identity and culture by openly discussing skin color, hair texture, and facial features among family members.[95] Parents can also make the transition easier for children by encouraging and supporting a multicultural life for the whole family.[96] Overall, for the majority of multi-racial

---

88. *See, e.g.*, Stephen A. Newman, *The Use and Abuse of Social Science in the Same Sex Marriage Debate*, 49 N.Y. L. SCH. L. REV. 537, 542-43 (2004-2005).

89. *See id.*

90. *See id.*

91. *See* American Academy of Child and Adolescent Psychiatry, Facts for Families No. 71 (Dec. 1999), *available at* http://www.aacap.org/csroot/facts_for_families/facts_for_families.

92. *See id.*

93. *Id.*

94. *See id.*

95. *See id.*

96. *See id.*

children, growing up amongst multiple races and cultures is enriching, rewarding and contributes to healthy adult adjustment.[97]

What about children in interracial and multiethnic adoptions? How does a child growing up without a parenting figure who identifies as a minority adapt to a majority culture? What is the parent's role in a child's ability to cope and adapt? Most observers agree that for racial/ethnic minorities, cultural socialization entails the transmission of cultural values, beliefs, customs, and behaviors from parents, family, friends, and the community to the child.[98] Cultural socialization encourages racial/ethnic identity development and equips children with coping strategies to deal with racism and discrimination.[99] For transracial adoptive parents, this process is complicated by the apparent racial and ethnic differences between themselves and their adoptive children.[100]

There is evidence to support the idea that positive racial and ethnic experiences contribute to the psychological adjustment of transracial adoptees.[101] One study showed that Korean adoptees whose adoptive parents actively promoted their children's ethnic cultures, had more positive racial and ethnic identity development that resulted in greater psychosocial adjustment.[102] It seems that children of transracial adoptions can grow up emotionally and socially adjusted while also being aware and comfortable with their racial identity.[103] In determining the best interest of the child, it is the quality of the parenting as opposed to whether the child had been adopted interracially or transracially that matters most.[104]

Children of gay and lesbian parents are now facing similar discriminatory challenges to the fitness of their families. According to the American Psychological Association (APA), those who oppose gay adoption as psychologically harmful cite three major concerns with homosexual parents: first, homosexuals are mentally ill; second, homosexual women are less maternal then heterosexual women; and third, homosexual relationships with partners leave little time for children.[105] The

---

97. *See id.*

98. *See* Richard M. Lee, *The Transracial Adoption Paradox: History, Research, and Counseling Implications of Cultural Socialization*, 31 COUNSELING PSYCHOLOGIST 711, 720-21 (2003).

99. *Id.* at 721.

100. *Id.*

101. *See id.* at 720.

102. *See id.*

103. *See* Rita J. Simon, *Adoption and the Race Factor: How Important is it?*, 68 SOC. INQUIRY 275, 278 (1998).

104. *See id.* at 276.

105. American Psychological Association Counsel of Representatives, Resolution on Sexual

APA has concluded that homosexuality is not a psychological disorder and that sexual orientation or affliliation does not *per se* impair psychological functioning.[106] There is also no empirical evidence to show that homosexual women are less maternal than their heterosexual counterparts.[107] The evidence shows that homosexual parents divide their time evenly between work, children and relationships.[108] Furthermore, the evidence shows that gay parents are just as capable as heterosexual parents at providing a supportive and healthy environment for their children.[109]

Other concerns often cited are that children in homosexual homes will struggle with their sexual identity; that children in homosexual homes will have more behavioral problems, are more vulnerable to mental breakdowns and more psychologically unhealthy; and finally, that children of homosexual parents will experience difficulty in social relationships.[110] Results of social science research have failed to confirm any of these concerns about children raised by gay men and lesbian women.[111] Overall, the results of research suggest that the development, adjustment and well-being of children raised by gay parents do not differ markedly from children with heterosexual parents.[112]

In contrast with the many myths surrounding the ill effects of growing up in a nontraditional family, the evidence is clear that a stable and nurturing family life can bolster the resilience of children and lessen the negative impacts of stressors on their developmental outcome.[113] Children who are reared in safe and stable environments have better short- and long-term adjustment than children who are exposed to violent and highly unstable environments.[114] Of all the environmental influences in a child's life, the family has the most profound impact on child development.[115]

What is family stability? For children living in nontraditional families, the law cannot create stability, but it can provide the legal and environmental supports that foster stability. Among these are marriage and access to the many tangible benefits that marriage provides for children, as

---

Orientation, Parents and Children, American Psychological Association, 1 (2004).

106. *See id.*

107. *See id.*

108. *See id.*

109. *Id.*

110. *Id.*

111. *Id.* at 1-2.

112. *Id.* at 2.

113. Brenda Jones Harden, *Safety and Stability for Foster Children: A Developmental Perspective*, 14 FUTURE OF CHILDREN 31, 31 (2004).

114. *Id.* at 32.

115. *Id.* at 33.

well as access to orderly and child-centered procedures for dissolution of the marriage and preservation of the child's care-giving and support relationships. For children in the foster care system, family stability includes limited movement from home to home, speedy reunification wherever possible, and permanency where reunification is not possible.[116] Adoption is essential to providing stability for children, whether in foster care or in the general population, who need the security of legally protected family relationships. Research shows that positive and consistent caregiving has the ability to compensate for factors that may have a negative impact on children, such as identity issues or culture clash.[117] Shortening the time spent in foster care has been the primary thrust of policies geared toward permanency and stability.[118] The adoption of the Multi Ethnic Placement Act (MEPA) and the Interethnic Adoption Act was geared toward reducing the waiting period a child must endure before being placed in a permanent and stable home environment. When applied with sensitivity, these acts can at least partially accomplish that goal. But we must also pay attention to why so many children of color end up in foster care, addressing problems of racism, poverty and violence at their roots.

A child's ability to be a part of a legal family unit should be a fundamental right. Forty years ago, the *Loving* court broadened the definition of what a family was by normalizing interracial families as well as same race families.[119] Interracial families have rapidly become traditional. Though there is a chance that a child who is part of a complex family will have identity issues, most interracial and multiethnic adoptees do not suffer identity confusion. Parents can mediate the possible detrimental effects by keeping open communication, and by acknowledging and supporting the child's search for his or her own identity.

Neither of the authors of this Article is a person of color nor member of the LGBT community, so the authors have not personally experienced the sting of racial discrimination or homophobia or the pull of deep personal identification with a community under siege. While the authors reject White privilege and the privileging of heterosexual relationships, they know they inexorably benefit from such privilege as long as it continues to exist. Thus, their comments may lack the crucial perspective

---

116. *Id.*

117. *See id.*

118. *Id.* at 40, 42.

119. *See* 42 U.S.C. 622 (1994); Interethnic Adoption Provisions of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1903-04 (1996).

that members of a minority community could provide. But the fact that the authors are of different generations does offer some temporal perspective on changes in society that can be traced in part to *Loving v. Virginia.*

As a child in the 1950s, Barbara Woodhouse recalls knowing, without anyone explaining, that her aunt and uncle, an interracial couple, were always at risk of violence. They could never travel in the American South or feel safe in rural America; even a child could see the hostile stares and sense the tension their intertwined hands evoked even on the streets of New York City. As a liberal northern adolescent during the 1960s, Woodhouse was astonished to hear twelve-year-old white southern girls from her summer camp agonize over how they would respond if their heart throb, singer Johnny Mathis,[120] were to fall as much in love with them as they had fallen for him. If he asked them for a date, how could they ever say no? But how could they *ever* say yes? While the moral dilemma seems silly today, these preteens were grappling with serious issues and struggling to understand how to behave in a changing world.

Fast forward forty years to the 1990s, and we find Kelly Reese's sister, during her high school years in Florida (a confederate state), dating the son of a Jamaican mother and a Caucasian father. When Kelly asked her sister recently whether she ever thought of or experienced social stigma from dating interracially, the sister replied that she had frankly never thought about the possibility that others would disapprove of their relationship. Her peers never made any comments and her parents were very accepting and welcomed the young man into their home. Kelly's cousin recently married a woman of Mexican descent and the family enthusiastically invited her into the family. Kelly is secure that, if she were to meet a man of a different race or ethnicity, they would be able to walk down the street together without becoming targets of violence, and though possible concerns due to race could eventually surface, they certainly would not be as daunting as in years past.

The years since *Loving v. Virginia* have also brought major changes in the climate for children of nontraditional families. Woodhouse has watched her biracial niece and nephews growing up and finding their own mates in a very different social climate from that of their parents and grandparents. Each young person has realized and embraced his or her own identity, in his or her own way, including in their choices of partners. One of Woodhouse's nephews married a Yankee blue blood and the second

---

120. Johnny Mathis was one of the most popular African-American music recording stars to reach a national audience. His many gold and platinum albums recorded, during the years from 1957 to 1963, included romantic songs such as "Wonderful, Wonderful," "It's Not for me to Say," and "Chances Are." Official Website of Johnny Mathis, www.johnnymathis.com.

married a beautiful Black woman from Grenada. Their sister married the son of a Caucasian mother and a Yap Island father (Yap Island is part of the Federated States of Micronesia). All of these weddings were joyous occasions, enriched by cross-cultural ceremonies and pluralistic symbolism, and unblighted by racism.

Cultural and racial boundaries are not always easy to navigate, even for lovers and loving parents. When Woodhouse's niece was married, the father of the groom journeyed from the Yap Island to attend the ceremony. He brought with him from Yap a large piece of beautifully decorated "shell money" to present to the father of the bride, as was his culture's custom. He found himself trying to decide whether to present it to her African-American father or Caucasian stepfather, both of whom proudly escorted their daughter down the aisle. Each of these young couples has produced beautiful children (grand nieces and grand nephews) who are truly part of the post-*Loving* generation. The first president they will remember is Barack Hussein Obama.

The authors are glad that the young couples of their stories are not only accepted by their families, but also protected by law from housing and job discrimination, hate crimes, and other evils that interracial couples in the 1950s took for granted as the price they must pay simply for being in love and wanting to become a family. If we are to continue to grow as a multi-racial society, we must recognize that the automatic invocation of race stereotypes retards our progress and causes continued hurt and injury.[121]

The authors also believe that *Loving* should apply full force to the institution of marriage between gay and lesbian partners and should be extended to adoption by sexual minorities as well. While cases such as *Goodridge* are busily performing at the state level the same channeling function as *Loving* did at the federal level, sexual minorities have a long way to go to achieve full acceptance. But the authors are confident that the barriers will soon crumble under the assault of reason and science. Policies that exclude same sex couples from access to marriage and adoption violate the same constitutional values as anti-miscegenation laws and racial matching laws. In a modern society where the frontiers of intolerance are constantly changing, such laws cannot be defended as deeply rooted in tradition without disavowing even more deeply rooted principles of freedom and equality. In the end, family formation and preservation, marriage, adoption and procreation, are a matter of children's rights as well as adults' rights.

---

121. Reisman v. State of Tenn. Dep't of Human Servs., 843 F. Supp. 356, 365 (D. Tenn. 1993).