6-1-2016

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Elizabeth M. Toledo

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Recommended Citation
Elizabeth M. Toledo, When Loving is Not Enough, 104 CALIF. L. REV. 769 (2016).

Link to publisher version (DOI)
https://doi.org/10.15779/Z38VC4G

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When *Loving* Is Not Enough

Elizabeth M. Toledo*

Loving v. Virginia is a landmark case that banned antimiscegenation laws over forty years ago. Today, we credit *Loving* with dismantling legal barriers to interracial relationships. Despite this legacy, the incidence of interracial coupling and multiracial families is still low. Scholars have acknowledged this disconnect and have attributed the low rates of interracial relationships to social and cultural barriers. However, social and cultural norms are not the only factors at play. This Note discusses the role of law in regulating interracial relationships and multiracial families post-*Loving*. It uses examples from family and criminal law to show how laws operate, in effect and cumulatively, to sanction and deter individuals who deviate from the monoracial model. The legal regulation of interracial relationships post-*Loving* undermines the case’s seemingly progressive legacy. This Note seeks to unpack the importance of this contradiction and suggests that acknowledging the limits of *Loving* for interracial relationships can create an avenue for assessing the elimination of race-based discrimination in a time when “colorblind discourse” distorts common perceptions of progress. The Note concludes by arguing that reliance on *Loving*’s legacy threatens to continue masking discrimination, and further, by acknowledging *Loving*’s limits, we can better assess how to advance civil rights under today’s supposedly race-neutral laws.

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*I.D., University of California, Berkeley, School of Law, 2016; B.A., Villanova University, 2009. Sincere thanks to Dean Melissa Murray for her insightful and motivating feedback during this writing process. Deepest appreciation to my readers and fervent supporters Joe Robert Gonzalez, Asher Waite-Jones, and Evelyn Rangel-Medina.*
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INTRODUCTION

On September 11, 2014, Los Angeles Police Department officers detained and handcuffed Daniele Watts, an African American actress. Officers arrived on the scene after a witness called the police to report lewd conduct between Watts and a white man (who was later identified as her boyfriend Brian James Lucas) in a car parked outside of CBS studios. Both Watts and Lucas stated that the police officers mistakenly believed them to be a sex worker and client. At the scene, the police officers questioned both of them. Even though Watts and Lucas denied having engaged in lewd conduct, one of the officers asked them to produce proof of identification, which Watts refused. Watts recounted that the officers detained her, placed her in a police car, and, after investigating her identity, released her. Watts’s story quickly drew public attention due to concerns that racial profiling and suspected commercial sex work motivated

4. See id.
her detention. It appeared that the witness and officers suspected Watts and Lucas of engaging in commercial sex only because Watts and Lucas were an interracial couple.

Watts’s story is an example of how the law continues to regulate interracial relationships. The landmark case Loving v. Virginia, decided in 1967, prohibited antimiscegenation laws and permitted the marriage of interracial couples. Historically, this case has come to represent the elimination of legal barriers to interracial coupling. However, almost a half-century after Loving, rates of interracial coupling are still low. Scholars have attributed the low incidence of interracial coupling to social and cultural taboos that continue to mark interracial romance as illicit. But, as Watts’s situation suggests, social and cultural norms only partially explain the low incidence of interracial coupling. Law also plays a role, even as law prohibiting interracial unions has been banned. This Note considers the various ways that law continues to mark and stigmatize interracial relationships by operating, in effect, to punish and deter them. Colorblind discourse and Loving’s legacy prevents us from acknowledging where the law continues to punish and deter interracial couples. Recognizing Loving’s limits is necessary for society to assess the progress made in breaking down legal racial barriers for interracial couples.

Part I of this Note focuses on the Loving v. Virginia decision, its legacy, and how it represents the elimination of legal barriers for interracial couples. Part II then considers scholarly responses to the contemporary resistance to interracial coupling. In most cases, the scholars have credited the low incidence of interracial coupling to social and cultural taboos.

Part III argues that in addition to social and cultural factors, law plays a critical role in the low incidence of interracial relationships. First, it notes that

5. See id. When referring to a law or legal matter, this Note elects to use “commercial sex work” or “sex worker” rather than the terms “prostitution” or “prostitute” because the latter terms “describe[] and condemn[].” See Silvia A. Law, Commercial Sex: Beyond Decriminalization, 73 S. Cal. L. Rev. 523, 525 (2000) (“The term ‘prostitute’ conflates work and identity. Women who sell sex for money typically have other identities, that is, daughter, mother, athlete, musician, et cetera.”). However, the term “prostitution” is used in the description of prostitution laws and prosecutions. See id.
7. Id. at 12.
8. See Rachel F. Moran, Interracial Intimacy: The Regulation of Race and Romance 101 (2001) (“Legal barriers have fallen, but interracial marriages, particularly between blacks and whites, remain an anomaly over thirty years after the decision.”).
9. See id.
11. For the sake of maintaining a manageable scope, this Note is mostly limited to the discussion of heterosexual, interracial relationships between African Americans and white individuals. Discussions on how the legacy of Loving applies to the LGBTQ community, intraracial couples (such as Latinos in relationships with Latinos of a different ancestry or ethnic background), and interracial couples comprised of nonwhite individuals, are also critical to consider for the overall discussion.
even though *Loving v. Virginia* is credited with dismantling formal legal barriers to interracial marriages and relationships, it did not eradicate the forces motivating those barriers. Then, it explains how the mechanism of discouraging interracial relationships has shifted from so-called “antimiscegenation” laws to subtle regulation of interracial relationships through other laws. These laws have other objectives, yet still regulate and limit interracial coupling through a web of de facto prohibitions. Finally, Part III uses four examples of other laws—child custody, adoption, drug, and prostitution—to show how the law, even post- *Loving*, continues to discourage, punish, and discipline interracial couples.

Finally, Part IV looks at the negative implications of this treatment of interracial couples, the overestimation of *Loving*’s legacy, and the “preservation-through-transformation,” as coined by Reva Siegel, of legal regulation of interracial coupling post-*Loving*. This Note also considers the problem with failing to recognize the continuation of legal regulation over interracial relationships, post-*Loving*. It proposes acknowledging the legal barriers to interracial relationships as one prescription to challenge colorblind discourse and to better understand the strides made to achieve racial and gender equality.

I.

**LOVING V. VIRGINIA: SETTING THE STAGE**

This Part lays the foundation for what follows by providing a history of *Loving v. Virginia* and how it has claimed a place among landmark constitutional cases. Then, it will consider the contemporary legacy of *Loving*.

A. The History of Loving

Forty-seven years ago in *Loving v. Virginia*, the United States Supreme Court invalidated antimiscegenation laws.12 Defendants Mildred Jeter and Richard Loving, an interracial couple, were prohibited from marrying in their home state of Virginia.13 For this reason, they traveled to Washington, D.C. to marry, but immediately returned to Virginia to live.14 Five weeks after their return, three police officers entered the couple’s home in the early morning.15 Even though the couple said they were married, the officers stated that the marriage license hanging in their bedroom was not valid in Virginia.16 As such, the officers “charged the couple with unlawful cohabitation” and took them to a

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12. 388 U.S. at 2.
13. Id.
14. Id.
16. Id.
local jail.\textsuperscript{17} Three months later, a grand jury indicted the Lovings for violating two statutes within “Virginia’s 1924 Racial Integrity Act.”\textsuperscript{18} Specifically, the Lovings were charged with violating the statute that prohibited a white person and a person of color from leaving the state to marry and then returning to reside in Virginia.\textsuperscript{19} The Lovings were also charged with violating a statute that imposed a penalty of imprisonment for an interracial marriage between a white person and a person of color.\textsuperscript{20} Virginia law also automatically voided these interracial marriages.\textsuperscript{21}

The Lovings pleaded guilty to violating the ban on interracial marriages.\textsuperscript{22} The trial court sentenced them to a year in jail but suspended their sentence on the understanding that the couple would leave Virginia and not return together for at least twenty-five years.\textsuperscript{23} After moving to Washington, D.C. the Lovings successfully appealed their case to the Supreme Court of Appeals of Virginia. Unfortunately, the Supreme Court of Appeals of Virginia upheld the statute claiming that the legal regulation of marriage was traditionally within the ambit of state power.\textsuperscript{24} The state court relied on precedent that supported the validity of antimiscegenation laws.\textsuperscript{25}

Nevertheless, the Lovings once again appealed and presented their case to the United States Supreme Court.\textsuperscript{26} Nine years after the Lovings’ marriage was charged as illegal, the United States Supreme Court reversed the decision, finding that the statute preserved “White Supremacy” and violated the Fourteenth Amendment.\textsuperscript{27} The \textit{Loving} holding also invalidated similar bans on interracial marriages in fifteen other states.\textsuperscript{28} After this ruling, the Lovings and their children finally returned to Virginia.\textsuperscript{29}

\section*{B. The Long-Lasting Legacy of Loving}

As part of its legacy, \textit{Loving} has come to represent a variety of constitutional principles. Conventionally, the \textit{Loving} decision has been

\begin{itemize}
\item Id.\textsuperscript{17}
\item See \textit{Loving}, 388 U.S. at 4; \textit{Pratt}, supra note 15, at 236.\textsuperscript{18}
\item \textit{Loving}, 388 U.S. at 4 (citing VA. CODE ANN. § 20–58 (1960 Repl. Vol.) (“Leaving State to evade law”)).\textsuperscript{19}
\item Id. (citing VA. CODE ANN. § 20–59 (1960 Repl. Vol.) (“Punishment for marriage”)).\textsuperscript{20}
\item Id. (citing VA. CODE ANN § 20–57 (1960 Repl. Vol.) (“Marriages void without decree”)).\textsuperscript{21}
\item Id. at 3.\textsuperscript{22}
\item Id.\textsuperscript{23}
\item Id. at 7.\textsuperscript{24}
\item Id.\textsuperscript{25}
\item Id. at 4.\textsuperscript{26}
\item Id. at 11–12.\textsuperscript{27}
\item See id. at 6 n.5.\textsuperscript{28}
\item \textit{Pratt}, supra note 15, at 240.\textsuperscript{29}
\end{itemize}
understood as “defin[ing] and affirm[ing] the fundamental right to marry.”\textsuperscript{30} Rachel Moran noted that from 1967 to 1990 the United States Supreme Court “cited \textit{Loving} seventeen times for the proposition that there is a constitutionally protected right to marry.”\textsuperscript{31} In addition, \textit{Loving} has been seen as “invalidat[ing] racial classifications and other practices that perpetuate racial subordination.”\textsuperscript{32} Scholars have found that \textit{Loving} can be understood as iconic for dismantling legal barriers for interracial couples by “racially deregulat[ing] the marriage market” and eliminating the government’s role in an interracial couple’s right to marry.\textsuperscript{33} Furthermore, the \textit{Loving} holding has been seen as having strengthened a subsequent line of cases that went on to establish protection for a family’s right to privacy, free of government interference.\textsuperscript{34} Doctrinally, the case is also considered groundbreaking because it “enforce[d] federal constitutional limits on domestic relations” when there had been no standard federal approach to regulating marriage and divorce.\textsuperscript{35} And after \textit{Loving}, the “body of constitutional family grew dramatically,” and more specific rights were protected under this doctrine.\textsuperscript{36}

Scholars have extended the application of \textit{Loving} to other areas of the law, such as same-sex marriage and immigration.\textsuperscript{37} For instance, scholars have


\textbf{31.} Wardle, \textit{supra} note 30, at 308.


\textbf{33.} Kennedy, \textit{supra} note 30, at 817; see also Kevin Noble Maillard, \textit{The Multiracial Epiphany, or How to Erase an Interracial Past, in LOVING V. VIRGINIA: IN A POST-RACIAL WORLD: RETHINKING RACE, SEX, AND MARRIAGE} \textit{91, 92} (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012) (“Loving has claimed a place in the legal imagination as the landmark event for legitimating the existence and condoning the formation of multiracial families in America.”). According to Professor Angela P. Harris, the United States Supreme Court, in \textit{Loving}, “made an important intervention . . . with respect to . . . the connection between citizenship and political and social identity” by addressing the “racialized gender” ideologies that had ordered citizenship categories. Angela P. Harris, \textit{Loving Before and After the Law}, \textit{76 FORDHAM L. REV.} 2821, 2824, 2836 (2008). As a result, “Loving is a case that speaks both to the movement for racial justice and the movement for the rights of sexual minorities.” Id. at 2836.


\textbf{35.} Id. at 13.

\textbf{36.} Id. at 20.

\textbf{37.} See, e.g., Jennifer M. Chacón, \textit{Loving Across Borders: Immigration Law and the Limits of Loving, 2007 WIS. L. REV.} 345, 345–48 (analogizing the Racial Integrity Act with immigration and nationality laws that interfere with the fundamental right of freedom to marry that \textit{Loving} defined); Adele M. Morrison, \textit{Same-Sex Loving: Subverting White Supremacy Through Same-Sex Marriage}, \textit{13 MICH. J. RACE & L.} 177, 179–83 (2008) (arguing that the “Loving Analogy” applies to same-sex marriages not only under the freedom of choice and antidiscrimination elements of \textit{Loving}, but also under an antisubordination approach).
analogized the freedom of choice to marry, established in \textit{Loving}, to challenge legal barriers to same-sex marriage.\textsuperscript{38} Other scholars have challenged immigration and nationality laws that continue to “impede intra- and interracial marriages,” though \textit{Loving} banned antimiscegenation laws that regulated marriage on the basis of race.\textsuperscript{39} In some ways, the \textit{Loving} analogy highlights the ways in which \textit{Loving} represents a civil rights achievement, a benchmark for equality that should be extended to other struggles for equality.

The \textit{Loving} decision rightfully holds an important place in social and legal history.\textsuperscript{40} However, homogamy is still the norm for intimate relationships today. While this Note does not take a position on whether the norm of homogamy or the low incidence of interracial coupling are negative or positive,\textsuperscript{41} it focuses on the negative implications of the persistent legal regulation of personal relationships on the basis of race. The subsequent Part will consider the current state of interracial relationships post-\textit{Loving} and the factors affecting the preservation of homogamy.

\textbf{II.\hspace{1em}INTERRACIAL RELATIONSHIPS AFTER \textit{LOVING}}

\textbf{A. Rates of Interracial Coupling Post-Loving}

After \textit{Loving}, some scholars argued that the proliferation of interracial marriages could serve as an avenue of promoting racial equality between racial minorities and whites.\textsuperscript{42} Specifically, Professor Randall Kennedy argued that Black and white interracial coupleings would communicate the value of the minority to the dominant group and instill “transracial empathy,” allowing people to understand the experiences of those racially different from themselves.\textsuperscript{43}

Post-\textit{Loving}, the incidence of interracial coupling gradually increased.\textsuperscript{44} However, despite the \textit{Loving} ruling and the steady increase of interracial

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\textsuperscript{38} See, \textit{e.g.}, Morrison, \textit{supra} note 37 at 179–83.

\textsuperscript{39} See, \textit{e.g.}, Chacón, \textit{supra} note 37, at 358.

\textsuperscript{40} The story of Mildred Jeter and Richard Loving and their legal battle has been made even accessible to children in the form of an illustrated children’s book. SELINA ALKO, \textit{THE CASE FOR \textit{LOVING}: THE FIGHT FOR INTERRACIAL MARRIAGE} (Sean Qualls & Selina Alko illustrators, 2015).

\textsuperscript{41} For instance, whether interracial coupling promotes racial equality or causes erasure of racial identity is an area of debate. See, \textit{e.g.}, Kennedy, \textit{supra} note 30, at 819 (arguing that interracial marriage can promote racial equality). But see Rashmi Goel, \textit{From Tainted to Sainted: The View of Interracial Relations as Cultural Evangelism}, 2007 \textit{Wis. L. Rev.} 489, 513 (arguing that proponents of interracial relationships for increased racial equality, such as Randall Kennedy, are wrong to argue “that the acceptance of interracial marriages is born of a desire to accept—on an equal basis—the partners of color whom some white people choose”).

\textsuperscript{42} See, \textit{e.g.}, Kennedy, \textit{supra} note 30, at 819.

\textsuperscript{43} \textit{Id.}

couplings, interracial relationships are still rare occurrences. The rate of interracial coupling is still much lower than if there were “random matching weighted by the size of the relevant groups.” And the current incidence of interracial coupling does not reflect the increasing public opinion favorable to interracial relationships and dating.\textsuperscript{47} In reality, interracial relationships comprise only a small number of relationships and marriages overall.\textsuperscript{48} According to the 2010 census, interracial couples make up 6.9 percent of all marriages and 14 percent of unmarried relationships.\textsuperscript{49} Percentages also vary depending on the combination of racial and ethnic groups. For example, 37 percent of interracial marriages involve whites and Hispanics.\textsuperscript{50} Marriages involving whites and Asians comprise 13.7 percent of interracial marriages.\textsuperscript{51} And only 7.9 percent of interracial marriages include whites and Blacks.\textsuperscript{52}

More specifically, as seen by the comparatively low number of interracial relationships made up of Blacks and whites, the incidence of interracial coupling falls along racial groups and gender. Rachel Moran noted that “[o]ver 93 percent of whites and blacks marry within their own group, while 70 percent of Asians and Latinos and 33 percent of Native Americans do.”\textsuperscript{53} For example, there are fewer interracial relationships between Blacks and whites than between other racial groups.\textsuperscript{54} Also, “outmarriage patterns within groups differ for men and women, depending on how racial and sexual stereotypes interact.”\textsuperscript{55} Gender asymmetry is especially recognizable in the number of Blacks who marry white individuals.\textsuperscript{56} More African American men marry whites than do African American women.\textsuperscript{57} The differences between subgroups indicate that members of racial minority groups may face unique pressures or motivations in regards to interracial coupling, such as varying racial or ethnic

\begin{itemize}
  \item \textsuperscript{45} See Gregory & Grossman, supra note 30, at 26.
  \item \textsuperscript{46} Emens, supra note 44, at 1319 (noting that, according to this calculation of random matching, 44 percent of all U.S. marriages would be interracial).
  \item \textsuperscript{47} Id.
  \item \textsuperscript{49} Id. at 17–18 tbl.7.
  \item \textsuperscript{51} Id.
  \item \textsuperscript{52} Id.
  \item \textsuperscript{53} MORAN, supra note 8, at 103.
  \item \textsuperscript{54} ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: RHINELANDER V. RHINELANDER AND THE LAW OF THE MULTIRACIAL FAMILY 123–25 (2013) ("[B]lack-white marriages are the least normative of all (heterosexual) relationships.").
  \item \textsuperscript{55} MORAN, supra note 8, at 103.
  \item \textsuperscript{56} ONWUACHI-WILLIG, supra note 54, at 126.
  \item \textsuperscript{57} Id.
\end{itemize}
stereotypes and more prominent racial or spatial segregation from whites than other minority groups.

B. Scholars’ Social and Cultural Explanations for Low Rates of Interracial Coupling

Scholars have pointed to social and historical reasons to explain subgroup disparities in interracial coupling. Professor Randall Kennedy has described racial separation between whites and African Americans as “social isolation.” More specifically, he found that “a wide of array of social pressures continue to make white-black marital crossing more difficult, more costly, and thus less frequent than other types of interethnic or interracial crossings.” Professor Russell Robinson specifically pointed to “[r]esidential segregation [a]s a primary influence on romantic preferences.” He also found that “perceptual segregation”—where the nonwhite partner and the white partner perceive the existence (or nonexistence) of discrimination differently—can create challenges in a relationship. And from interviews with African Americans and whites, Professor Erica Chito Childs found that views on interracial relationships vary by racial group. Professor Childs recorded that the white group adopted a “supportive opposition” stance by claiming that “they did not have a problem with interracial relationships but then actively expressed reasons why they (and those close to them) would not, could not, and should not be involved interracially.” On the other hand, African American interviewees conveyed “oppositional support” by expressing serious concerns with interracial relationships, but also offering acceptance for those in interracial unions. Group-specific perceptions, such as the view that a Black member of a black-white couple is “selling out their blackness for a white ideal,” were also found to discourage interracial relationships.

Scholars have also relied on cultural analyses to explain gender disparities in interracial coupling, pointing to historical traditions and stereotypes. Professor R. Richard Banks, for instance, has argued that gender asymmetry can be explained by the fact that “black women may have . . . become disinclined to enter relationships with white men” because Black women bear

59. Id.
61. Id. at 2803–04.
63. Id. at 2778.
64. Id. at 2780–81.
65. Id. at 2780.
the “responsibility to uphold the sanctity of the black family.” Additionally, he noted the effects of historically rooted stereotypes of African American women as unfeminine and unattractive, which do not reflect the “feminine ideals of beauty and delicateness” that men may desire. Similarly, Professor Robinson referred to a study of Black men to describe the possibility that Black men will idealize the physical attributes of a white woman and consider her to be a “racial trophy.” In addition, he noted that Black men may “justify their preference for nonblacks by stereotyping their own race.” For example, Black men may consider Black women not as financially responsible as white women. And in her interviews, Professor Childs found that African Americans, women in particular, “attributed the gender differences to both opportunity and choice.” The interviewees explained that Black men not only desire the physical attributes of white women but also find white women to be readily available. They also believed that white men would not be interested in Black women.

Although scholars recognize the low incidence of interracial coupling, most have attributed the low incidence specifically to social and cultural norms. Professor Angela Onwuachi-Willig, who also examined the existing social and cultural limitations on interracial relationships, noted that the “imprint of law is no longer explicitly towering over such interracial relationships.” This serves as an example of how the continuing role of law in regulating interracial relationships has gone largely unaddressed. This is problematic because without a discussion of how a confluence of law and social stereotypes interact

67. Id. at 537.
68. See Robinson, supra note 60, at 2805.
69. Id.
70. Id.
71. Childs, supra note 62, at 2780.
72. See id.
73. Id.
74. Id. Dean Melissa Murray also explains that:
   [A]lthough law no longer constructs the color line, the line nonetheless persists in our hearts and minds. And critically, law facilitates its survival. Today, the law does not formally construct the color line, nor does it (as a formal matter) condemn those who cross it. Nevertheless, the law’s omissions make life for those who cross the color line deeply complicated and emotionally fraught.
to limit interracial relationships, we lack a fuller understanding of why there is a low incidence of interracial relationships post-\textit{Loving}.

I argue that law plays a role in cultivating norms of homogamy. As I explain, the enforcement of child custody, adoption laws, and criminal laws, to name a few, operate together to effectively legally sanction and deter interracial relationships, even when laws have the objective of regulating other activity. Even though \textit{Loving v. Virginia} banned laws prohibiting interracial unions decades ago, the cumulative effect of these other laws creates a proxy regulation of interracial relationships.

III. LEGAL BARRIERS: A WEB OF PROHIBITIONS

The following Part reviews incidents and cases in four areas of the law—custody, adoption, drug, and prostitution—to highlight the de facto regulation on interracial relationships and mixed-race families.

A. Child Custody: Punishing "Bad" Mothers

1. Racially-Tinged Logic in Child Custody Before Loving

From the 1940s to the 1970s, courts generally applied a “best interests of the child” standard in child custody disputes, which afforded a presumption in favor of awarding the mother custody, especially when the children were young.\footnote{Renee Romano, "Immoral Conduct": White Women, Racial Transgressions, and Custody Disputes, in “BAD” MOTHERS THE POLITICS OF BLAME IN TWENTIETH-CENTURY AMERICA 230, 234 (Molly Ladd-Taylor & Lauri Umansky eds., 1998).} However, Professor Renee Romano has identified cases involving white mothers in interracial relationships where the general presumption for the mother did not apply.\footnote{See id. at 230–31; see, e.g., In re Marriage of Kramer, 297 N.W.2d 359 (Iowa 1980); Potter v. Potter, 127 N.W.2d 320 (Mich. 1964); People ex rel. Portnoy v. Strasser, 104 N.E.2d 895 (N.Y. 1952).} In these cases, courts would routinely divest the mother of custody of her white children from a previous marriage, transferring custody to her white ex-husband on the ground that the mother’s sexual relationship or marriage to a Black man rendered her presumptively unfit.\footnote{See Romano, supra note 76, at 230, 234–36.} As Romano documents, these decisions used racially-tinged logic to “punish white women who intermarried,” shadowing child custody decisions before and after \textit{Loving}.\footnote{Id. at 231.}

In many of these child custody cases, the decisions scrutinized the white mother’s racial and gender transgressions.\footnote{Id.} For instance, a white mother in an interracial relationship was seen as selfishly seeking sexual gratification.\footnote{Id.}
Because the “ideal” motherhood is “selfless,” the mother seeking sexual gratification would not be a good mother. Courts would not only define the mother’s competency, but also judge her moral capacity. For example, in In re Marriage Kramer, the Iowa trial court awarded custody of the children to the white father because exposing them to a biracial relationship was not in their best interest. The court concluded that growing up in a biracial household would make their lives “much more difficult.” Some courts also relied on separate but related reasoning, such as “social and economic reasons,” a lack of a predetermined religious upbringing, and maturity level to justify their decisions.

Court decisions also expressed concern for the white child and the stigmatization they could face by living in interracial homes. Courts sometimes considered the opinions of family members into account, even when their views were openly discriminatory. When a white mother remarried or entered into interracial relationships, family members were the first to object. Some would use child custody proceedings to impose their views and punish the mother through law. This was the case in Portnoy v. Strasser. There the New York Court of Appeals considered an appeal of the Official Referee’s decision to award custody of a young girl to her grandmother who sued for custody because she opposed her daughter’s second marriage to a man of a different race. At times, a white family member explicitly expressed their concerns for fear that the white child would lose his or her racial status by virtue of being raised in a mixed household. To illustrate, in Potter v. Potter, the white father sought custody because he feared that his daughter would “not grow up and mature as a normal white child should but rather will be rejected, shunned and avoided by other children of both races.” The trial judge in Potter v. Potter went as far as to explain that the daughter would need guidance during puberty, implying that it was necessary to avoid repeating the racial

83. Romano, supra note 76, at 231.
84. In re Marriage of Kramer, 297 N.W.2d 359 (Iowa 1980) (finding the trial court erred in considering race but affirming the decision on the grounds that the mother’s nonmarital relationship could be harmful to the children and raised doubts about her emotional stability).
85. Id.
86. Romano, supra note 76, at 233.
87. Id. at 231, 234–35.
88. Id. at 232, 235.
90. See Romano, supra note 76, at 235–36.
91. Id. at 236. The appellate court upheld the trial court’s decision to award custody to the white father in Potter v. Potter, 127 N.W.2d 320 (Mich. 1964).
order anomaly her mother had committed by marrying an African American man.\[^92\]

2. **Race-Neutral Logic in Child Custody After Loving**

After *Loving*, courts could no longer rely on racially explicit justifications to transfer custody from the white mother in an interracial relationship to the white father. *Loving* applied to marriage “the Supreme Court’s rule[] that any law which made a classification based on race was subject to the most judicial stringent scrutiny.”\[^93\] For this reason, most appellate courts were less likely to uphold lower court rulings if they were made solely on the basis of race.\[^94\] However, Professor Romano found that appellate courts in southern states continued to affirm—relying on seemingly “nonracial” reasoning—cases that punished white mothers in interracial relationships.\[^95\] In doing so, courts focused their decisions on the mother’s morality to determine they were “bad” mothers.\[^96\] For instance, in *Schexnayder v. Schexnayder*, the Supreme Court of Louisiana awarded custody of two young children to the white father because the white mother had had a brief affair with an African American man.\[^97\] According to the appellate court, the trial court had found that the mother had exhibited a “flagrant disregard for established moral principles” by having an affair with an African American man.\[^98\] Even though the court acknowledged that infidelity did not necessarily render a parent unfit, the mother’s actions were sufficient to justify its decision.\[^99\] The court reasoned that it was immoral for a white woman to have been in a relationship with an African American man, which reflects society’s deep disapproval of interracial relationships and multiracial families more generally. This case was decided thirteen years after *Loving*, and still courts were enforcing their belief of the “immorality” of interracial relationships through child custody law.

In *Palmore v. Sidoti*, the United States Supreme Court finally addressed the courts’ continued pattern of punishing white women in interracial relationships.\[^100\] In that case, following the divorce, Anthony Sidoti sued Linda Sidoti Palmore for custody of their daughter after Ms. Palmore moved in with

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\[^92\] See Romano, *supra* note 76, at 236.
\[^93\] See id. at 238.
\[^94\] Id. at 239.
\[^96\] Id.
\[^97\] 371 So. 2d 769, 774 (La. 1979). In the dissent, the lower court stated that “the mother’s conduct here was particularly scandalous and offensive to the sensibilities of the local community in that her lover was of another race.” 364 So. 2d 1318 n.1 (La. Ct. App. 1978).
\[^98\] Schexnayder v. Schexnayder, 371 So. 2d 769, 774 (La. 1979).
\[^99\] Id. at 772–74
an African American man. The lower court found for the father, not because of its opposition to the mother’s interracial relationship but rather because of the harm to the child from “remaining in a racially mixed household.” But the Court reversed the lower court’s decision. The Court found that “the reality of private biases and the possible injury they might inflict” were not permissible considerations in a child custody dispute. Therefore, custody decisions could not be based in “the potential effects of racial prejudice.”

Professor Romano found that the holding in Palmore v. Sidoti “was quite narrow: the Court did not preclude the consideration of actual effects of racial prejudice in deciding custody.” Nor did the court “call into question the indirect devices southern courts had used” previously to find the mother “unfit” as a result of her participation in an interracial relationship.

Indeed, some courts found ways to circumvent Palmore’s call for race-neutral custodial decision making. In Parker v. Parker, the Supreme Court of Tennessee affirmed a judgment granting custody to the father despite the fact that the trial court considered race-based testimony. The trial court had credited the father’s allegations that Teri Parker, the white mother, had sexual relations with Dr. Sidberry, her African American employer. The father believed that an affair between Ms. Parker and Dr. Sidberry would interfere with Ms. Parker’s ability to care for their white son. A nurse in Dr. Sidberry’s practice testified to this alleged relationship and explained the harm that she believed the child would face living in an interracial household. Ms. Parker’s mother also expressed concern with her grandson living “in that environment.” In response, the trial court judge agreed with Ms. Parker’s mother, noting “[s]he comes from the same school I do.”

Despite finding that both Richard Parker and Teri Parker were “fit” parents, the court found that Ms. Parker had lied, made Dr. Sidberry “her ‘primary concern,’” and prioritized her romantic relationship over her child. On this account, Mr. Parker received custody, not due to racial concerns, but

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101. Id. at 430.
102. Id. at 431–32.
103. Id. at 434.
104. Id. at 433.
105. Romano, supra note 76, at 243.
106. Id.; see also J.H.H. v. O’Hara, 878 F.2d 240, 245 (8th Cir. 1989) (“Palmore’s holding that an otherwise fit natural parent may not be deprived of permanent custody based solely on race did not clearly establish that race may never be taken into account in determining the best interests of a child in a foster care placement decision.”).
107. Romano, supra note 76, at 230, 243.
108. 986 S.W.2d 557, 558 (Tenn. 1999).
109. Id. at 559.
110. Id.
111. Id.
112. Id.
113. Id. at 560.
114. Id. at 559.
rather because it “was wrong for anyone to have a relationship with an employer.”

Ms. Parker appealed the decision, claiming that the court had in fact improperly considered race as a factor. Although the Supreme Court conceded that it was “troubled” by the race-based testimony and the trial judge’s comment, it found that the decision did not run afoul of Palmore. Because this case involved a comparative fitness analysis in an initial custody hearing, and evidence of race was only a factor, it was unlike Palmore, where there was a change in custody and the decision was based solely on race. In the end, the Court took the trial court at its word that race did not factor into the decision-making process despite the race-based testimony.

The veiled language that courts adopted after Loving is still used in cases today. For example, in Jones v. Jones, a white mother, Carol Jeanne Jones, lost custody of her son after engaging in physical relationships with men who were Black. Her ex-husband, Mr. Jones, alleged that the mother failed to provide their son with supervision and care. Based on his testimony, the trial court found that Ms. Jones “entertained men to whom she was not married,” that she shared a bed with them, and that many of the men had “extensive criminal records.” Tellingly, before stating its decision to transfer custody to the father, the trial court noted that it would “decide this case as if race was not a factor, and that all parties were of the same race.” Ms. Jones, however, saw the court’s discussion as racially motivated. She appealed and alleged that the trial court improperly took into account the allegations of her association with African American men.

But the appeals court gave the trial court great latitude in its findings. The appellate court agreed that the environment was harmful to the child “due to the moral climate attributable to [the] Mother’s series of affairs with unmarried men . . . and due to the criminal propensities of some of the individuals she regularly entertained.” The appeals court denied Ms. Jones’s challenge because it found the facts distinguishable from those in Palmore v. Sidoti. Unlike in Palmore, the trial court’s decision in Jones was “not based on [the] Mother’s association with persons of a race different from hers. It was based on [the] Mother’s conduct.”

115. Id.
116. Id. at 559–62.
117. Id. at 563.
118. Id.
119. Id.
120. See 937 S.W.2d 352, 353 (Mo. Ct. App. 1996).
121. Id.
122. Id. at 353–54.
123. Id. at 355.
124. Id. at 354.
125. Id.
126. Id. at 357.
127. Id.
3. **How Structural Racism in Child Custody Continues to Punish Interracial Relationships**

Within the last few decades, court decisions have shifted from a presumption in favor of the mother, as in *Palmore*, to the child’s needs. Nevertheless, under the child-centered standard, judges still look to “what kind of person each parent is.” Judges have a wide breadth of discretion under this standard, unlike regular adjudication processes. For example, child custody decisions are “relatively unconstrained” by precedent and appellate review. Rather, this standard permits judges to determine which factors are relevant to the child and then decide how much weight to assign each factor. The discretion judges have in choosing and weighing relevant factors greatly affects the outcome of a case. While the latitude in the balancing test is meant to “achieve individualized justice in every case,” such judicial discretion in child custody cases can be questionable.

Judicial discretion in child custody cases is problematic because it creates opportunities for racial and gender stereotypes to motivate decisions. In deciding the best interests of the child, judges choose and weigh factors by “draw[ing] on embedded knowledge structures.” To assess which parent and what type of family will better provide for the child’s needs, “judges will look to their own images of ideal families.” Race is a factor that often becomes the decisive consideration. The role of race in a judge’s determination is evident in *Parker* and *Jones*. A problematic result of considering race is that the standard’s “indeterminacy invites the use of cognitive shortcuts; these shortcuts include stereotypes and biases.” To make matters worse, judges rely on their “own sense of right and wrong, rather than the [state’s] custody statute” to justify a difficult custody decision. Consequently, it is not necessarily the needs of the child that are determinative, but rather the personal

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129. Id.

130. Id.


132. Mercer, supra note 128, at 391.

133. See, e.g., Perry, supra note 131, at 59–83 (arguing for the replacement of the best interests of the child standard with a structured set of rules because “the unconfined best interests rule can provide a forum for judges to act upon biased or stereotyped assumptions that are without empirical support”).

134. Berger, supra note 82, at 284.

135. Id. at 298.

136. Perry, supra note 131, at 55, 57.

137. Berger, supra note 82, at 298.

138. Julie E. Artis, *Judging the Best Interests of the Child: Judges’ Accounts of the Tender Years Doctrine*, 38 LAW & SOC’y REV. 769, 790 (2004) (explaining that judges “can use the statutory guidelines to protect them from being overturned on an appeal”).
opinion of the judge.\textsuperscript{139} For this reason, a judge’s views on race will affect the outcome of a child custody dispute involving a parent who entered into an interracial relationship.

Some judges have considered race under the “best interests of the child” standard by cloaking their reasoning in racially neutral factors. Some of these courts have even explicitly disclaimed any reliance on racial justifications. The \textit{Parker} court used this type of disclaimer, which the Tennessee Supreme Court accepted at face value.\textsuperscript{140} Many courts have also used coded reasons, a mother’s moral health, to discredit the fitness of another. The \textit{Jones} court first looked to the criminal records of the men with whom Ms. Jones associated to determine that they possessed “criminal propensities,” distinguishing it from \textit{Palmore}.\textsuperscript{141} But her relationships did not fit the historical paradigm of the black-rapist myth where interracial sex is viewed as coercive due to the stereotype that Black men are hypersexual and predatory, and white women are victimized.\textsuperscript{142} Because Ms. Jones entered the sexual relationships willingly, she did not satisfy the role of the white female victim in this paradigm. Her voluntary participation seemed sexually unnatural and likely also led the \textit{Jones} court to conclude that she created a harmful environment “due to the moral climate attributable” to her affairs with men with “criminal propensities.”\textsuperscript{143}

The mothers in \textit{Jones} and in \textit{Parker}, where the trial court concluded that Ms. Parker made Dr. Sidberry her “primary concern” rather than her son, were considered selfish because they prioritized sexual gratification ahead of the welfare of their children.\textsuperscript{144}

Professor Romano’s documentation of cases from the 1940s to the 1970s describes how child custody laws have been continuously enforced in ways that are detrimental to those who enter interracial relationships. Even though \textit{Palmore}, like \textit{Loving}, established race-neutral policies in judicial decision making, the “best interests of the child” standard still provides judges with significant room for discretion. Racial and gender stereotypes can take hold in judges’ discretion in defining what is “moral” behavior. Whether intended or not, these decisions communicate a message of deterrence to women—white women in particular. These rulings force mothers to weigh the risk of losing their child in making choices about their romantic relationships. Even when the

\textsuperscript{139} See Perry, supra note 131, at 57 (“The rule affords a level of discretion by courts and agencies that permits decisions to be made on the basis of personal biases, unsupported assumptions, and incomplete analyses that are often insensitive to the range of children’s needs and that ignore other important interests.”).

\textsuperscript{140} See Parker v. Parker, 986 S.W.2d 557, 559, 563 (Tenn. 1999).

\textsuperscript{141} See Jones v. Jones, 937 S.W.2d 352, 357 (Mo. Ct. App. 1996).

\textsuperscript{142} Romano, supra note 76, at 242. According to the black-rapist myth, “[a]ny act of interracial sex became a rape, even if the woman had supposedly consented.”\textit{Id}.

\textsuperscript{143} Jones, 937 S.W.2d at 357.

\textsuperscript{144} See Parker, 986 S.W.2d at 559.
reasoning is seemingly race-neutral, judicial enforcement of child custody laws can sanction and deter interracial relationships and multiracial families.

B. Adoption: Preservation of the Monoracial Model

In According to Our Hearts: Rhinelander v. Rhinelander and the Law of the Multiracial Family, Professor Onwuachi-Willig noted that “the ways in which we protect potential race discrimination along lines of intimacy and have used law as a tool to regulate race and adoption in the family hint at the continuing prominence of race as an ‘essential’ of marriage.”145 Because appropriate, intimate relationships are the unspoken but protected foundation of marriage, race matching in adoptions further upholds the monoracial model for romantic and sexual relationships. Although there are laws in place to regulate racial discrimination in adoptions, those laws fail to eliminate race matching and, as a consequence, fail to legitimize interracial relationships.

Even though colorblindness is the legally required standard policy for government adoption programs,146 courts and agencies often consider race in their decision-making processes.147 Federal law, such as the Multiethnic Placement Act and the Removal of Barriers to Interethnic Adoption Act (MEPA), prohibit denying or delaying the placement of a child for adoption or foster care on the basis of race.148 These laws apply specifically to public adoption agencies and some private agencies that are funded by the government.149 Under these laws, federal officials have declared that adoption agencies cannot even use culture as a proxy for race.150 And although “[g]eneralizations based on race, national origin, and ethnicity were forbidden in the adoption process,” “agencies could consider the attitudes and preferences of prospective parents to decide whether placement was in a child’s best interest.”151 Yet Professor Moran has noted that “[s]hifts in the official interpretation of federal adoption policy left colorblindness a contested and uncertain principle.”152 The looseness of these prohibitions therefore calls into question the effectiveness of these federal laws to proscribe race matching in adoptions.

In addition to race matching, Professor R. Richard Banks has argued that “facilitative accommodation” is another “race-based state action that structures

146. Moran, supra note 8, at 126, 134.
147. Id.
148. Id. at 134.
150. Moran, supra note 8, at 134.
151. Id.
152. Id.
the adoption process.” 153 Through facilitative accommodation, agencies list children by race, ask potential adoptive parents for their race preference, and then provide the potential parents with the list of children that corresponds with their preference. 154 Because the state frames adoption decisions on the basis of race, it is a “race-based state action.” 155 Yet Banks has noted that the general public still perceives facilitative accommodation to be a matter of individual autonomy and choice that is free of state regulation, and pays little attention to it. 156 Federal laws prohibiting race matching therefore overlook facilitative accommodation, and “the judiciary customarily validates and gives legal effect” to this practice by approving the adoption. 157 By allowing this loophole, federal laws prohibiting race matching fail to address the root problem stifling the accessibility of transracial adoptions. These laws do not acknowledge the “white adoptive parents’ racial preferences.” 158 Instead, courts reinforce the problem through facilitative accommodation.

The public’s awareness of transracial adoptions reignited in 2008 when the Evan B. Donaldson Adoption Institute published a report finding that the colorblind approach espoused by federal laws, such as MEPA, “had a chilling effect on agencies that might want to facilitate transracial adoptions.” 159 In response, the law’s supporters expressed the concern that considering race delays adoption of children in foster care. 160 Banks, on the other hand, argued that the law should not differentially treat parents who want to adopt a child of another race because that would imply that transracial adoptions are abnormal. 161

Despite the fact that federal laws specifically prohibit race matching, the regulatory scheme does not completely eliminate the possibility that courts consider race in approving adoptions. Although “race matching is currently illegal for adoption agencies that receive federal funding, the practice persists, partly as a result of broad support for moderate race matching among social work professionals, judges, and the public at large.” 162 In addition, courts

153. Banks, supra note 149, at 881 (“The state’s racial classification promotes the race-based decisionmaking of prospective adoptive parents by framing the choice of a child in terms of race, encouraging parents to consider children based on the ascribed characteristic of race rather than individually.”).
154. Id. at 880–81 n.19.
155. Id. at 881.
156. Id. at 918.
157. Id. at 899, 900.
158. Id. at 895.
161. Lee-St. John, supra note 159.
recognize “facilitative accommodation” as a legal policy. This permits adoption agencies to categorize children by race, denying Black children the opportunity to be considered by potential adoptive parents, who are mostly white. Potential adoptive parents partake in this system by expressing their racial preferences. But adoption agencies and courts legitimize this type of aversion to interracial families by further discouraging and deterring an interracial familial model.

Although race-based adoption policies are prohibited, courts nonetheless have failed to fully eradicate race-matching policies. In effect, courts prevent the formation of multiracial families. As Banks noted, the “anxieties about seeing mixed-race families” underlies the debate of race matching in adoptions. Anxiety may stem from the same concerns of danger to the child discussed before. For example, some critics of MEPA have argued that it is important for families to consider the background of the child they want to adopt so as to find the best fit. They argued that the family should be prepared to handle the difficulties of raising a child from a different background so that the child does not suffer. Others responded by arguing that placing a child with families of the same background does not necessarily mean that they will be better prepared than another family. Instead, MEPA supporters argue, it is most important for children to be placed in homes as quickly as possible.

Just as laws operate to punish and deter the normalization of interracial relationships and multiracial families, laws may encourage and facilitate them. If multiracial families continue to be uncommon familial structures due to the application of adoption laws, then multicultural families will remain invisible. While the legal system does not directly deter these types of relationships through adoptions, it does not encourage them either. Instead, in a system that allows facilitative accommodation, the lack of encouragement becomes a mere

163. Banks, supra note 149, at 901.
165. Lee-St. John, supra note 159.
168. See, e.g., id.
169. See, e.g., id. at 44. Relatedly, professional football player DeMarcus Ware and his wife Taniqua Ware received widespread criticism for their transracial adoption of a white baby in 2009. Concerns over the African American couple’s adoption came from Blacks and whites alike, who felt that there were many African American children in need of adoption. Tony Dokoupil, What Adopting a White Girl Taught One Black Family, NEWSWEEK (Apr. 22, 2009), http://www.newsweek.com/what-adopting-white-girl-taught-one-black-family-77335 [http://perma.cc/39W2-FNW9].
preservation of the status quo. In turn, the legal adoption system becomes a de facto form of deterrence.

C. Criminal Laws: The Criminality of Interracial Relationships

Ultimately, the effects of racial and gender profiling throughout criminal law can have punitive and deterrent effects on interracial relationships. The following Parts consider the examples of drug and prostitution laws to illustrate the role of police discretion in enforcing stereotypes and in legally sanctioning interracial couples.

1. Drug Laws—Imprisonment for Crossing the Color Line

Although the “tolerance of interracial relationships” has increased after Loving, “black-white intimacy remain[ed] off-limits . . . in much of the United States.”\(^\text{170}\) For example, in July of 1999, a corrupt undercover police officer framed forty-seven residents of Tulia, a small southern town in Texas, for possession of drugs.\(^\text{171}\) In the sting operation, thirty-eight of those arrested were African Americans.\(^\text{172}\) Those African American defendants made up 20 percent of the Black community in Tulia.\(^\text{173}\) At first glance, it may appear that this was merely another fight within the War on Drugs. However, Professor Kevin R. Johnson provided a different angle from which to understand the sting operation.\(^\text{174}\) He documented that the “victims of the sting came from a discrete subsection of the African American community: those who were, or had been, in interracial relationships with whites.”\(^\text{175}\) Moreover, many of the African American defendants in interracial relationships with white women had biracial children.\(^\text{176}\) In fact, one of the few white defendants had a child with a Black woman.\(^\text{177}\) Additionally, that there were few interracial relationships in Tulia in general supports Johnson’s hypothesis.\(^\text{178}\) Johnson posited that although there could have been many motivations for the sting operation, the police officer “could not have missed the fact that blacks with histories of interracial relationships were the most vulnerable members of an already marginalized community.”\(^\text{179}\) Johnson also argued that federal financial incentives within the War on Drugs motivated the undercover officer’s accusation of an easy-to-
target group of selling him cocaine. In the end, even though the police officer was sentenced to probation and the defendants were vindicated, some defendants spent up to three years in prison, and families were destroyed.

The officer’s prejudicial actions went unchallenged during the initial criminal trial. The trial did not include facts regarding the police officer’s previous transgressions, including perjury. In addition, during the trial of one of the Black defendants, the prosecutor questioned the defendant about his neighbors’ interracial relationship with a white woman. In effect, even briefly, the prosecutor had “raised the specter of interracial sex, one of the most sensitive social issues in rural America.” The prosecutor knew that his line of questioning would have a negative effect on the jury and the public since Tulia residents “had no qualms about expressing their opposition to interracial dating” and mixed-race families.

Importantly, the egregious targeting of interracial couples under drug laws is not unique to Tulia, Texas. In Church Point, Louisiana, the Colomb family was “framed for a massive drug conspiracy” that was unfounded. The Colombs, a Black family, had faced harassment since the early 1990s due to their sons’ relationships with white women. The harassment included receiving calls threatening to hang the son for dating white women. However, in 2001 the police raided the Colomb family home and confiscated cocaine and a gun “belonging to the soon-to-be husband of Colomb’s daughter.” The federal government indicted Ann Colomb and her three sons for federal drug conspiracy charges. Even though the prosecution lacked significant evidence to show that the Colomb family could be involved in a massive drug ring, the case went to trial. In fact, “the defendants were

180. Id. at 288–89.
181. Id. at 288–89.
182. Johnson, supra note 75, at 287.
183. Id. supra note 173, at 155–56.
184. Id. at 156.
185. Id. at 195.
187. Michaels, supra note 186.
188. Id.
189. Id.
191. See id.
convicted of conspiracy and other drug charges.”\(^{192}\) However, the district court dismissed the Colomb family’s charges with prejudice after evidence surfaced that jailhouse witnesses provided fabricated testimony.\(^{193}\)

Criminal laws, such as the drug laws applied in these cases, allow for a great deal of discretion, which leaves room for racial bias.\(^{194}\) This was evident in the Tulia case. The officer operated within drugs laws, which typically requires profiling to identify suspects. The discretion facilitates racial profiling, exposing people of color to the risk of fitting those profiles.\(^{195}\) The court did not question or challenge the officer’s actions—targeting individuals in interracial relationships—most likely due to the presumption of good faith and the discretion afforded him in his role enforcing drug laws.\(^{196}\) In some ways, the prosecutor even supported the officer’s actions. The prosecution “in effect discourag[ed] such relationships through the use of the drug laws.”\(^{197}\) In overlooking the officer’s history and allowing the prosecutor’s strategic allusion to the interracial relationships, the court legitimized the officer’s race-based judgment.\(^{198}\) Similarly, the Church Point case presents the extent of the prosecutor’s power to regulate interracial relationships.\(^{199}\) The judicial system’s message from here was clear—not only might the law fail to protect you within an interracial relationship, but it may also punish you.\(^{200}\)

2. **Prostitution Laws—Profiling the “Jezebel” and the “John”**

Daniele Watts’s incident with the police on September 11, 2014, also exemplifies the social rejection and legal sanction of interracial relationships after *Loving*, and how suspicions of sex work stemmed from her interracial relationship.\(^{201}\)

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192. Michaels, supra note 186.
193. Id.
194. See Johnson, supra note 75, at 306–07 (“Racial bias may be the cause of some of the criminal justice system’s problems . . . .”)
195. See id. at 308.
196. See id. at 312–13 (noting that the United States Supreme Court required defendants to show that the prosecution had not treated whites similarly under crack-cocaine laws).
197. Id. at 304–05.
198. Id. at 311 (“The Supreme Court has played a central role in the ‘war on drugs’ [and] has become a loyal foot soldier in the Executive’s fight against crime.”)
199. See Michaels, supra note 186. See also Radley Balko’s reference to the Church Point prosecutor who “said it didn’t matter if he believed the evidence he was putting on was truthful, it only mattered what the jury believed,” and a discussion of how it “isn’t necessarily unethical for a prosecutor to introduce evidence he isn’t certain is truthful.” Radley Balko, *The Untouchables: America’s Miserable Prosecutors, and the System That Protects Them*, HUFFINGTON POST (Aug. 5, 2013), http://www.huffingtonpost.com/2013/08/01/prosecutorial-misconduct-new-orleans-louisiana_n_3529891.html [https://perma.cc/JN8D-YD7T].
200. Johnson, supra note 75, at 318 (“In both instances, the criminal-justice system operated to punish people engaged in interracial relationships. Like the lynchings used to police racial boundaries before *Loving*, the word of one white person was sufficient to result in the harsh punishment of African Americans.”).
201. Id. at 305.
Recounting the details of Watts’s story helps to uncover how gendered and racial stereotypes may have played a role in making the couple look “suspicious.” The police arrived at the scene and conducted a Terry stop after receiving a call from a witness who reported that Watts and Lucas were engaging publicly in lewd behavior. 202 The officer asked Lucas for Watts’s proof of identification. 203 After Watts refused to produce identification, the officer handcuffed her. 204 Lucas later confirmed in an interview that the officer insinuated that Watts and Lucas were engaging in commercial sex. 205 Importantly, the caller and police officer may have both based their suspicions on racial stereotypes.

Women of color, Black women in particular, face deeply embedded stereotypes regarding their race and sexuality. Such stereotypes likely played a role in this incident. 206 Professor Regina Austin considered these racial and gender stereotypes in her analysis 207 of Ruby Clark v. American Broadcasting Co., a case where an African American woman brought a defamation suit against the American Broadcasting Company (ABC). 208 ABC ran a segment on commercialized sex, specifically on street sex work. 209 In the program, the narrator explained the impact of street sex work in the neighborhood, including how the majority of commercial sex workers in the area were African American and the customers were white. During the narration, ABC displayed a photograph of Clark, a young African American woman, leaving a grocery store alongside two older women. 210 When Clark viewed the program, she and others were shocked to find out that the “program presented her as being a prostitute,” in contrast to the older women. 211 In her lawsuit, Clark argued that ABC defamed her. 212 For this defamation claim, Clark had to not only

202. Fisher, supra note 1. The United States Supreme Court authorized a search or seizure, in certain circumstances, by a police officer who has less than probable cause, which is known as a Terry stop. See Terry v. Ohio, 392 U.S. 1 (1968). For a discussion on the discriminatory effects of Terry stops on people of color, see Renée McDonald Hutchins, Stop Terry: Reasonable Suspicion, Race, and a Proposal to Limit Terry Stops, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 883 (2013).
204. Fisher, supra note 1.
205. Duke & Fantz, supra note 203.
206. See Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241, 1242 (1991) (“In the context of violence against women, this elision of difference in identity politics is problematic, fundamentally because the violence that many women experience is often shaped by other dimensions of their identities, such as race and class.”).
208. 684 F.2d 1208 (6th Cir. 1982).
209. Id.
210. Id. at 880.
211. Id. at 880–81.
212. Id. at 882.
challenge the confusion that she was a commercial sex worker, but also challenge the stereotype that Black women are associated with sex work.\textsuperscript{213} In addition, Clark, like many African American women, had to walk the line between two stereotypical groups: “the matrons and the prostitutes.”\textsuperscript{214} Clark had to distinguish herself from “any clichés that pertain[ed] to black prostitutes and middle-class women alike (for instance, the extent to which black women yearn for white sexual partners).”\textsuperscript{215}

The stereotypical characteristics associated with commercial sex workers are relevant to the case at hand and parallel the stereotype of the “jezebel,” which is the image of the “controlling and oversexualized, black female aggressor.”\textsuperscript{216} Moreover, this racial and gender stereotype increases suspicions that women of color are engaged in commercial sex work.\textsuperscript{217} A woman “fitting” the jezebel stereotype who is in an interracial relationship with a white man is problematic, as it defies the model of a conventional, intimate relationship. In our society, an “ideal” couple comprises of a “feminine” individual and “masculine” individual.\textsuperscript{218} The heterosexual couple is the most common intimate pairing for this model. In that “ideal” couple scenario, women are expected to fulfill the “feminine” role, while men are expected to fulfill the “masculine” role. It is likely that a woman of color perceived as a “jezebel” in a relationship with a white man is incongruous to this model because both the woman and man are seen as “masculine” sexual aggressors.\textsuperscript{219}

Under the pretense of curtailing the sexually aggressive “jezebel,” the law regulates the sexual lives of women of color by using the threat of commercial sex laws to reinforce sexual boundaries.\textsuperscript{220} Because the image of the jezebel is

\begin{itemize}
\item \textsuperscript{213} Id.
\item \textsuperscript{214} Id. at 885 (“[The prostitutes and the matron labels] represent the Scylla and Charybdis of the narrow strait in which bourgeois black women are supposed to channel their sexuality. On one side are the ‘de-sexed,’ ‘de-heterosexed,’ and androgynous females . . . ; on the other side are the wild, wicked women who are written off as whores. If Mrs. Clark veered too far in either direction, she risked censure, a decline in her reputation, and increased exploitation.”).
\item \textsuperscript{215} Id. at 884.
\item \textsuperscript{216} ONWUACHI-WILLIG, supra note 54, at 145.
\item \textsuperscript{217} Although the “jezebel” stereotype is traditionally associated with Black women, this Note refers to “women of color” more broadly because similar stereotypes of sexual aggressiveness have been applied to Latinas. See, e.g., Ediberto Román, Who Exactly Is Living La Vida Loca?: The Legal and Political Consequences of Latino-Latina Ethnic and Racial Stereotypes in Film and Other Media, 4 J. GENDER RACE & JUST. 37, 39 (2000) (“Latinas and Latinos are still largely portrayed as one of the following: (1) the hot-blooded sexy character—the macho man or sultry curvy vixen. . . .”); see also Raquel Reichard, 7 Lies We Have to Stop Telling About Latina Women in America, Mic (June 2, 2014), http://mic.com/articles/90195/7-lies-we-have-to-stop-telling-about-latina-women-in-america#.Bcb1DwrMN [https://perma.cc/6FPY-X32C].
\item \textsuperscript{218} ONWUACHI-WILLIG, supra note 54, at 145–46.
\item \textsuperscript{219} Id. at 146 (noting that stereotypes and images of African American women in the media “place black women outside of the normative ideal of family by framing them in traditionally masculine terms and roles”).
\item \textsuperscript{220} Rubin, supra note 166, at 291 (“This system of sex law is similar to legalized racism. State prohibition[s] . . . make homosexuals a criminal group denied the privileges of full citizenship. With such laws, prosecution is persecution. Even when they are not strictly enforced . . . the members of
associated with women of color, specifically with Black women, women of color carry with them a suspicious badge of hypersexualization. This badge of hypersexualization makes women of color targets of profiling by law enforcement and vulnerable to the threat of arrest for prostitution.221 According to the 2009 Census, there were 39,600 arrests of women and 23,021 arrests of African Americans for prostitution or other commercialized vices.222 The number of African American women arrested for prostitution nationally is unclear. However, there are reports that there are disproportionate arrests of Black women overall. For example, the Center of Juvenile and Criminal Justice found that the rate of arrest for Black women for prostitution in San Francisco was 345,400, compared to 11,100 for nonblack women.223 Moreover, in 2013, arrests of Black women made up 65.9 percent of all female arrests for “prostitution.”224

Two recent cases highlight the prevalence of viewing the bodies of women of color as hypersexual and criminally deviant. In 2008, Galveston, Texas, police officers beat and arrested a twelve-year-old African American girl outside of her home for alleged prostitution.225 To make matters worse, they later arrested and tried her for assaulting a public servant.226 More recently, in September 2014, a security guard asked three African American women to leave The Standard Hotel in New York because he suspected them


224. Id. at app. tbl.1.


226. Id.
of “soliciting prostitution.”227 The three women, a lawyer and two teachers, suspected that they had been profiled because they were the only African American women in the hotel’s lobby.228

Accordingly, in Watts’s case, society’s discomfort with viewing a white man and woman of color publicly sharing affection reinforced an already threatening “jezebel” stereotype because the relationship between Watts and Lucas did not fit the conventional standard mentioned above. Under the specter of the “jezebel” stereotype, Watts was seen as the masculine yet overly sexual woman. Lucas fulfilled the role of the white “john,” a male customer of commercial sex. Even though Loving v. Virginia eliminated legal prohibitions on interracial relationships, Watts and Lucas did not escape the scrutiny and subsequent disapproval of society and the law. Dean Melissa Murray has observed that “the criminalization of prostitution reinforced the understanding of marriage as involving non-commercial, private sex.”229 The binary of commercial sex work and marriage was evident here. Because the caller did not perceive Watts and Lucas as a socially acceptable couple, the caller interpreted Watts’s and Lucas’s actions as commercial, public sex.230

Like the case in Tulia, Texas, the policing of Watts and Lucas sends a deterrent message. Because a police officer can consider “racial incongruity in assessing whether reasonable suspicion exists to justify a Terry stop,”231 the enforcement of prostitution laws regulates interracial relationships. The discretion allowed in Terry stops and other policing mechanisms creates ample breeding ground for pernicious stereotypes, like that of the “jezebel” to take hold. Therefore, by sheer proximity and physical interaction with a white man in public, Watts ran the risk of criminal liability.

Rather than protect Watts and Lucas, the police and the legal system failed to treat their relationship like monoracial couples. For example, Professor Diana Williams noted that two white individuals who engaged in unambiguous public sexual activity faced no criminal repercussions, yet Watts was detained for alleged and unclear acts.232 What makes the Watts case


228. Id.


231. Onwuachi-Willig, supra note 54, at 189.

different from situations with more explicit criminal activity is that the witness and the police officer suspected criminal activity based on gender and racial stereotypes. It is likely that the police officer understood public affection in a parked car to resemble acts of commercial sex. He may even have implicitly “connected the dots” in seeing a Black woman alongside a white man. Surely because an interracial couple is not within the category of socially accepted couples, the officer was able to question Watts and her boyfriend because they were engaged in the “wrong” kind of relationship.233

Moreover, “[w]omen of color, including transgender women of color, and immigrant women, and particularly Asian and Latina immigrant women, are routinely profiled—based on age-old stereotypes—as being engaged in prostitution.”234 Despite what the officer may have deduced based on gendered and racial stereotypes, he defined Watts’s and Lucas’s behavior, and by extension their relationship, as inappropriate. In fact, the officer told Watts that “[s]he needs to know that she doesn’t dictate what happens.”235 In essence, after Watts refused to comply with the police officer’s demands, he made clear that his judgment and decisions would dictate the category in which this relationship fell.

IV.
COLORBLIND LAWS AND THE REGULATION OF INTERRACIAL RELATIONSHIPS

At first glance, the low incidences of interracial relationships today, specifically between whites and Blacks, may not seem problematic. The predominance of same-race relationships, decades after Loving v. Virginia,236 may seem like a reflection of personal and romantic preferences held by a nation of individuals. Yet, scholars have pointed to social and cultural disparities that disfavor interracial relationships and instead preserve the model of monoracial relationships and families. And as seen by preceding examples, law continues to regulate interracial relationships despite Loving’s legacy of dismantling legal barriers to interracial coupling.

Consequently, Loving’s holding under the Equal Protection Clause of the Fourteenth Amendment permits the unequal protection of intimate relationships today. The premise of equal protection law is that discrimination “occurs when

Law: A Conversation About the Daniele Watts Controversy, YOUTUBE (Nov. 4, 2014), https://www.youtube.com/watch?v=9pRhXu4lS7g [http://perma.cc/ZMZ6-W4R2] (showing panelist Professor Diana Williams considers what is obscene and offensive by comparing Watts’s case and the students at USC who were photographed having sex in public).

233. See USC GOULD SCH. OF LAW, supra note 231. Panelist Professor Camille Gear Rich noted that the recording showed the officer inviting Lucas “to engage in these sort of racially charged stereotypes.” Id. The officer’s tone even changed when speaking to Lucas as if he did not perceive him to be threatening. Id.

234. Ritchie, supra note 221.
235. Watts, supra note 230.
236. 388 U.S. 1 (1967).
the state regulates on the basis of race- or sex-based classifications.\textsuperscript{237} Accordingly, courts often uphold state regulations that are facially neutral even when they have “injurious effects on minorities or women.”\textsuperscript{238} Only when a challenger demonstrates that the state adopted the regulation with a discriminatory purpose will a court strike down the law.\textsuperscript{239} In the development of this contemporary equal protection doctrine, it was not until the \textit{Loving} decision when the United States Supreme Court clearly established a “categorical presumption against race-based regulation.”\textsuperscript{240}

\textit{Loving} is part of a larger equal protection doctrine that dismantles de jure racial discrimination by striking down race-based laws and upholding race-neutral laws.\textsuperscript{241} As these cases show, state regulation based on racial classifications would fail today. For example, a law explicitly regulating intimate relationships between white individuals and racial minorities, like African Americans, would not pass constitutional muster under \textit{Loving}. Yet race-neutral laws, in effect, continue to regulate interracial relationships. Even though white supremacist antimiscegenation laws banning interracial unions are no longer in place,\textsuperscript{242} similar deterrent and punitive effects persist. Differentiated treatment of individuals in interracial relationships and the preservation of gender and racial stereotypes may offer insight into why law regulates interracial relationships post-\textit{Loving}.

The law’s disparate treatment of racial minorities offers one explanation for the continued regulation of interracial relationships. Professor Haney-López has observed how “unconscious racism . . . fosters the racially discriminatory misapplication of laws that themselves do not make racial distinctions” and “engenders the design and promulgation of facially neutral laws likely to have racially disparate effects.”\textsuperscript{243} He further explained how “racially discriminatory application of neutral laws is particularly pronounced in areas where the law regulates behavior often understood in racial terms—for example, in criminal

\begin{flushright}
238. Id.
239. Id.
240. Id. at 1129.
241. \textit{See}, \textit{e.g.}, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (finding that, in public schools, the “separate but equal” doctrine was unconstitutional and segregation on the basis of race violated the Fourteenth Amendment); Strauder v. West Virginia, 100 U.S. 303 (1879) (holding that states could not exclude people from jury service on the basis of race).
243. \textit{IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE} 138 (1997); \textit{see}, \textit{e.g.}, McCleskey v. Kemp, 481 U.S. 279 (1987) (stating that a study showing a disproportionate impact along racial lines in death penalty cases was not sufficient to show discriminatory purpose); Pers. Adm’r v. Feeney, 442 U.S. 256 (1979) (holding that a gender neutral policy did not violate the Fourteenth Amendment despite disproportionate impact on one gender); Washington v. Davis, 426 U.S. 229 (1976) (finding that a written personnel test with a disproportionate impact on African American applicants was not necessarily unconstitutional).
\end{flushright}
Racially disparate effects are evident in the cases discussed in Part III, especially in the child custody cases. For example, the Court in Palmore v. Sidoti held that racial prejudices could no longer be a factor in child custody cases. As a result, the Court established a race-neutral decision-making process for courts. Despite Palmore’s holding, however, cases like Parker v. Parker and Jones v. Jones signify the continued punishment of white mothers who enter into interracial relationships. Under race-neutral decision making, judges changed the language in their reasoning by using coded, subtle references to the racial and gender stereotypes that motivated decisions before Palmore. Even though case law changed to permit only race-neutral considerations, the same deterrent and punitive effects on interracial couplings remained. In many ways, the disparate treatment of interracial relationships under race-neutral laws post-Palmore mirrors the same effect post-Loving.

In addition, Professor Reva Siegel has offered a theoretical framework to understand how race-neutral laws can regulate interracial relationships. Siegel explains how through “preservation through transformation,” rhetoric and laws change, but new rules still preserve the past status regime. This process can even “revitalize a body of status law, enhancing its capacity to legitimate social inequalities that remain among status-differentiated groups.” For instance, under contemporary equal protection doctrine, laws are race-neutral yet the discriminatory purpose requirement “does not reflect prevailing understandings of the ways in which racial or gender bias operates.” In essence, the biases underlying race-based laws were not eliminated along with racial classification in the law. Instead, those same biases pervade application of the law, even though the manifestations of those biases take different and subtle forms under race-neutral laws. Furthermore, the dynamic of preservation through transformation is seen in how law draws on racial stereotypes and the model of the ideal monoracial family to police the sexual propriety of interracial couples, which in turn reinforces the application of those stereotypes and models against interracial couples.

Professor Gayle S. Rubin has observed how the “state reflects and maintains the social relations of sexuality.” She explained that socially permissible sexual acts fall within in a “charmed circle” and those that are
impermissible fall in the outer limits.\textsuperscript{253} Rubin also discussed the concept of sexual hierarchy, which maintains the line separating “good and bad” sex.\textsuperscript{254} Many interracial relationships, depending on the racial combination, are not fully included in the charmed circle. Yet the factors Rubin named as relevant to border patrolling are applicable to interracial relationships. For example, Rubin explained that the line distinguishes acts that are “sanctifiable, safe, healthy, mature, legal, or politically correct” from “dangerous, psychopathological, infantile, or politically reprehensible” acts.\textsuperscript{255} Professor Brenda Cossman further explained how the dichotomy of “good and bad” consensual sex informs who is a good or bad citizen.\textsuperscript{256} As a result, law and social norms play vital roles in policing the borders of these categories, which result in defining one category through the other.\textsuperscript{257}

As seen in Part III, law polices the borders of “good and bad” sex and defines non-monoracial relationships outside of what is socially appropriate. In Part III’s custody cases, the regulation of interracial relationships was evident in the preservation of the hierarchy of sex. The courts in \textit{Parker} and \textit{Jones} policed the interracial relationships by finding them to be dangerous, specifically to the white children involved.\textsuperscript{258} In \textit{Parker}, the trial court judge agreed with the concerns of the nurse and mother that a relationship between Ms. Parker and Dr. Sidberry would harm the child because an interracial relationship would be unacceptable in a small town.\textsuperscript{259} The court in \textit{Jones} also homed in on the danger of the mother’s actions in bringing in African American men with criminal records into her home when her son was present.\textsuperscript{260} The court held that the “moral climate” was dangerous for the child involved because the mother was partaking in “bad” sex, which warranted punishment.\textsuperscript{261}

In part, these custody cases demonstrate how regulation and punishment of a white mother in an interracial relationship is also regulation of sexual decency. Historically, the relationships between white women and African American men were seen as “bad” because the woman was likely a victim and the African American man a sexual predator. Relatedly, men of color, particularly Black men, have borne the stereotypes of the overly sexualized

\begin{footnotesize}
\textsuperscript{253} \textit{Id.} at 281.
\textsuperscript{254} \textit{Id.} at 282.
\textsuperscript{255} \textit{Id.}
\textsuperscript{256} \textsc{Brenda Cossman}, \textsc{Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging} 22 (2007).
\textsuperscript{257} \textit{See id.}
\textsuperscript{258} \textit{Parker} v. \textit{Parker}, 986 S.W.2d 557, 559–60 (Tenn. 1999); \textit{Jones} v. \textit{Jones}, 937 S.W.2d 352, 357 (Mo. Ct. App. 1996).
\textsuperscript{259} \textit{Parker}, 986 S.W.2d at 559.
\textsuperscript{260} \textit{Jones}, 937 S.W.2d at 353–54.
\textsuperscript{261} \textit{Id.} at 357.
\end{footnotesize}
In these custody cases, the law is acting to police the border between good and bad sex even as reform of criminal law has purportedly changed these boundaries. In one sense, the court may interpret the relationship through the lens of history to conclude that the sex, generally, is “bad.” Or the court may find that it is “bad” because the white mothers acted perversely in seeking sexual gratification from Black men, who are merely reduced to hypersexualized beings. In other words, the court sees the implications of the interracial relationships as sets of binaries: bad and good choices. The mother has a choice between the white children and the Black man. And either the man of color is a sexual predator or the white woman is engaging in a “selfish” sexual relationship, at the expense of her children. In the end, the mother has chosen a “bad” sexual relationship, is therefore a bad citizen, and must be punished. Removal of her children also serves as deterrence to others daring to engage in similar activity. In this sense, the courts police the borders of “proper” relationships through case law.

Adoption laws also police the border between appropriate relationships. While the relationships here are not directly based on sexual impropriety, the suspicions underlying bad sex and the bad citizen remain the same. In adoptions, the arms of the law are courts and agencies. Through “facilitative accommodation” and judicial discretion, adoption laws preserve the monoracial family as the ideal family unit. In maintaining this ideal, courts and adoption agencies darken the line between “good and bad” personal and familial associations. As a result, interracial relationships and multiracial families become questionable, and in some cases, “bad.”

In both the Tulia and Watts cases, the police officers determined and subsequently reinforced the idea that the interracial relationships were not socially acceptable. In both cases, the police officers viewed the interracial relationships as dangerous or politically reprehensible. Specifically, in the Watts case, the officer, by using his legal authority to enforce the prostitution law, policed the border of acceptable sex and found an interracial relationship to be inappropriate. According to Rubin, sex law is an avenue where the state “routinely intervenes in sexual behavior at a level that would not be tolerated in other areas of social life.”

As a result, the message is clear: a woman of color may be punished, socially and legally, for entering into an interracial relationship. The Bad Black Man image includes “the image of heterosexual black men as hypersexual evidences a similar en-gendering of racism. The gendering of that image is seen in popular culture’s focus on black men’s penises . . . [and] imputation of black male criminality flows in part from a gender-based fear of heterosexual black men as potential competitors for white women”).

262. Frank Rudy Cooper, Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy, 39 U.C. DAVIS L. REV. 853, 879 (2006) (explaining that the “Bad Black Man image” includes “the image of heterosexual black men as hypersexual evidences a similar en-gendering of racism. The gendering of that image is seen in popular culture’s focus on black men’s penises . . . [and] imputation of black male criminality flows in part from a gender-based fear of heterosexual black men as potential competitors for white women”).

263. Id.

264. Id.

265. Rubin, supra note 166, at 288.
Due to doubts of their sexual propriety and ultimately their citizenship, African American women are particularly vulnerable to “regulatory discipline.” Unfortunately, the Watts incident serves as another warning of the heightened social and legal risks of transgressing the border of acceptable sexual behavior.

Similarly, the police officer in the Tulia case relegated the defendants’ interracial relationships and multiracial families to the outer limits of the charmed circle. Because there were so few interracial relationships and residents were generally disapproving of them, the police officer’s and prosecutor’s application of drug laws reinforced the existing status of interracial relationships. This was evident to African Americans in Tulia, who “saw the sting as an effort to punish those who crossed racial lines.” The investigation and subsequent trial of the Colomb family in the Church Point case provide a similar example, which also describes the breadth of prosecutorial power in drug cases. The threat of prosecution and imprisonment in both cases align with Rubin’s assertion that the lower a behavior falls on the hierarchy the more likely the “bad” behavior will be labeled as criminal activity. That the defendants actually faced the label of “criminals” in these cases is evidence that Tulia and Church Point interracial relationships fell low on the hierarchy of sex and far outside of the “charmed circle.”

These examples provide insight into how law draws on stereotypes to police the border of sexual propriety, categorize interracial relationships as “bad,” and reinforce the stereotypes undermining interracial relationships. The continuing existence and reinforcement of the same racial and gender stereotypes that motivated laws banning interracial unions that law has maintained—through “preservation through transformation”—the legal barriers for interracial couples and multiracial families. The legal relegation of interracial relationships and multiracial families to the outer limits of the “charmed circle” contradicts the legacy of Loving.

The contradiction between Loving’s legacy and the real effects of the law is largely problematic, but I will consider two particular reasons. First, as seen in the examples in Part III, law can regulate interracial relationships and

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266. A man of color in an interracial relationship with a white woman can also face suspicions of criminality as seen in stereotypes of the “black rapist.” However, I focus on the suspicion of women of color, especially as it relates to the gender asymmetry in black-white interracial relationships. An interesting story to follow is that of Bay Area comedian, W. Kamau Bell, a Black man, who was told to “scram” by a café employee while he was talking to his white wife and her white friends outside of the restaurant. Tracey Taylor & Frances Dinkelspiel, Updated: New Details in W. Kamau Bell/Elmwood Café Storm, KQED NEWS (Feb. 5, 2015), http://ww2.kqed.org/news/2015/01/30/racist-incident-at-berkeleys-elmwood-cafe-opens-debate-on-profiling [http://perma.cc/B3XN-Z6EW]. It is plausible that the employee was enforcing solicitation ordinances, and as such, the law could have played a role here.

267. See COSSMAN, supra note 256, at 67.


269. Rubin, supra note 166, at 280–82.
multiracial families even under the guise of racially neutral legal standards. Also, the low incidence of interracial couplings is a symptom of the law’s disparate treatment of individuals who venture outside of the monoracial model. Second, Loving’s legacy can overshadow the continued regulation of interracial relationships under race-neutral laws.

Landmark constitutional cases, like Loving v. Virginia, have been celebrated as symbols of legal progress. There is certainly much to celebrate in the case of Loving, and it rightfully holds its place in history. But what becomes conflicted is the reliance on Loving’s legacy to overestimate the progress made for interracial relationships up to this point. Loving is an iconic case that represents the elimination of legal barriers for people of different races to marry. This legacy can lead to the conclusion that low incidence of interracial relationships is due to personal preferences and romantic circumstances, not legal prohibitions, because “colorblind” policies supposedly ensure equality under the law. For example, Professor Rachel Moran has explained how “[t]he relevance of race is submerged in romantic complexity” today. And the “colorblind” legal approaches common today facilitate this type of overestimation of progress. Despite the lack of explicit race-based regulation, the examples highlighted in Part III suggest that there are still legal barriers for interracial relationships and multiracial families. As Professor I. Bennett Capers explained, although Loving changed black-letter law, the case “did little to disturb the white-letter law that polices interracial intimacy.”

It is important to recognize the preservation and transformation of legal barriers to interracial relationships post-Loving for two reasons. First, interracial couples may face punishment, suspicion of criminality, and deterrence by virtue of their relationship. Their safety and civil rights are vulnerable to racial prejudice in the legal system. Second, recognizing the role of law in the regulation of interracial relationships is necessary to have an accurate understanding of progress in eliminating race-based legal regulations of intimate relationships. This is especially important to the prevalent colorblind discourses and overestimations of the decrease in racial barriers. It is difficult to imagine improvement when there is a false sense of equality. This is not to say that an increase in interracial marriages or multiracial families is a

270. Furthermore, “facially neutral state action” can “perpetuate the racial and gender stratification of American society.” Siegel, supra note 248, at 1138, 1143.
271. Moran, supra note 8, at 101.
272. Siegel, supra note 248, at 1130 ("Now status-enforcing state action is facially neutral in form... ").
solution or a necessary step toward true equality. Rather, there is a need to clarify the extent of progress made in the law since Loving. Until there is acknowledgment of this continuing regulation—as a first step—colorblind laws will continue to reproduce, preserve, and maintain racial stratification.

After understanding the role of law in regulating interracial relationships, it would be helpful to enumerate the second and third steps. Perhaps those steps would lead to solutions or prescriptions that could begin to eliminate barriers for interracial couples. Yet it is not easy to imagine specific and discrete solutions. In part, this difficulty stems from how law is not isolated from social constructions. And people of color can face prejudiced application of the law regardless of whether they are in an interracial relationship or not. This is not to say that there is no solution. Rather, it is worth considering legal prohibitions on interracial coupling post-Loving to be one specific example of how the law treats people of color relative to whites. As a result, it is possible that contributing to a discussion that challenges the colorblind discourse and the misconception that facially neutral laws mean equal application of the law is necessary to begin thinking about proposals for change. This Note hopes to contribute to that conversation by considering why the legacy of Loving is not enough.

CONCLUSION

Loving v. Virginia eliminated the direct legal barriers on interracial relationships. But decades later, law still plays a role in punishing and deterring interracial coupling. Though law no longer explicitly bans interracial marriages, the effects of various laws, such as family and criminal laws, create a web of prohibitions on interracial relationships and multiracial families. In effect, law has preserved underlying racial prejudice and has transformed it to fit the rhetoric of a colorblind legal system. Because colorblind discourse clouds and distorts an accurate understanding of legal advancement, it is necessary to be critical of the role of law today relative to the past. For this reason, to understand the amount of true progress made, it is helpful to contemplate the times when Loving is not enough.

275. Some argue that interracial marriage is a vehicle to racial equality. See Kennedy, supra note 30 and accompanying text. However, it also worth considering the possibility that marriage as an institution is not the answer to accomplishing this objective. See, e.g., Melissa Murray, Black Marriage, White People, Red Herrings, 111 Mich. L. Rev. 977, 978 (2013) (considering “whether marriage should be the normative ideal for intimate life and the vehicle by which we confer a range of important public and private benefits”).
