

# LOVING LESSONS: WHITE SUPREMACY, *LOVING V. VIRGINIA*, AND DISPROPORTIONALITY IN THE CHILD WELFARE SYSTEM

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## INTRODUCTION

This Article looks back at the antimiscegenation laws that were at the center of the U.S. Supreme Court's decision in *Loving v. Virginia*<sup>1</sup> to reveal what they teach us about the current overrepresentation of black children in the American child welfare system.<sup>2</sup> It is widely accepted that antimiscegenation laws worked to preserve white supremacy—particularly, the superiority of white people to blacks<sup>3</sup>—but these laws also worked to forestall the creation of interracial families.<sup>4</sup> Moreover, laws banning interracial marriage were said to prevent children from suffering harm caused by race mixing.<sup>5</sup> Thus, these laws were viewed by supporters as preventing child abuse.<sup>6</sup> By focusing on the harm—or “damage”<sup>7</sup>—of being biracial, these laws foreshadowed the pervasive disproportionality in the child welfare system today.

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

2. For recent data on the overrepresentation of black children in the child welfare system, see CHILD WELFARE INFO. GATEWAY, RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE (2016), [https://www.childwelfare.gov/pubPDFs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf) [<https://perma.cc/B4XW-PH38>].

3. See Christopher R. Leslie, *Justice Alito's Dissent in Loving v. Virginia*, 55 *B.C. L. REV.* 1563, 1571 (2014); James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 *B.U. L. REV.* 93, 99–101 (1993).

4. See Leslie, *supra* note 3, at 1605; Trosino, *supra* note 3, at 101–02.

5. See Oral Argument at 1:26:19–:26:40, *Loving*, 388 U.S. 1 (No. 395), <https://www.oyez.org/cases/1966/395> [<https://perma.cc/9LCP-BZ8C>].

6. See *id.*; Trosino, *supra* note 3, at 102.

7. Oral Argument, *supra* note 5, at 1:26:32–:26:40.

While there is widespread agreement that antimiscegenation laws reinforced white superiority over blacks, the claim that these laws were designed to prevent child abuse is less apparent in scholarship.<sup>8</sup> This Article explores one argument put forth by the state of Virginia in support of its ban on interracial marriage—that the prohibition against interracial marriage was a valid exercise of state power to protect children from damage that would result from intermarriage between blacks and whites.<sup>9</sup> The state’s argument in *Loving* focused on the challenges that biracial children would face while navigating the racist context of the United States at the time.<sup>10</sup> Underneath Virginia’s veiled concern for the well-being of biracial children was a more insidious claim: children of black and white unions would be harmed by exposure to black family norms.<sup>11</sup>

The persistent overrepresentation of black children in the child welfare system provides an opportunity to examine how racist attitudes about black family norms continue to influence family law.<sup>12</sup> There is already an established body of literature pointing to the role of bias in perpetuating racial disproportionality in the child welfare system.<sup>13</sup> This Article argues that child-abuse reporting laws—and particularly, mandates focused on reporting and investigating child neglect—invite decision makers to use implicit attitudes to evaluate black parents. In doing so, these decision makers summon the ghosts of white supremacists’ ideas about preventing child abuse, the very same ideas that informed arguments in support of Virginia’s antimiscegenation laws that were struck down in *Loving*.

Part I of this Article introduces a brief discussion of the history of antimiscegenation laws and, specifically, their prevalence in the Commonwealth of Virginia during the 1950s. Next, Part II sets forth a short commentary about the Lovings’ triumph over antimiscegenation. Part III then details the Lovings’ judicial hurdles against the state, which argued that its antimiscegenation laws were enacted, in part, to prevent child abuse and thus served legitimate state interests. Part IV argues that the remnants of the

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8. See Leslie, *supra* note 3, at 1605–07.

9. Oral Argument, *supra* note 5, at 1:26:19–:26:40; see also VA. CODE ANN. § 20-54 (1950 & Supp. 1960) (repealed 1968).

10. See Oral Argument, *supra* note 5, at 1:26:19–:26:40; see also *id.* at 1:27:03–:27:17, 1:27:54–:28:06.

11. The opinion denying the Lovings’ motion to vacate their conviction, written by Judge Leon Bazile, had no such pretense. *Loving v. Commonwealth* (Va. Cir. Ct. Caroline Cty. Jan. 22, 1965). Judge Bazile opined that the legislature’s decision to enact antimiscegenation laws was based upon “wisdom and the moral development of both races.” *Id.* He referred to marriages between blacks and whites as “unnatural alliances” and ultimately declared:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

*Id.*; see also *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting Judge Bazile).

12. See generally Sonia M. Gipson Rankin, *Black Kinship Circles in the 21st Century: Survey of Recent Child Welfare Reforms and How It Impacts Black Kinship Care Families*, WHITTIER J. CHILD & FAM. ADVOC., Spring 2013, at 1; Zanita E. Fenton, Note, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACKLETTER L.J. 39 (1993).

13. See, e.g., CHILD WELFARE INFO. GATEWAY, *supra* note 2, at 2.

white supremacist ideology at the center of *Loving* appear in our modern child welfare system, which has long been plagued by disproportionate representation of black children and families. Finally, Part V builds on this discussion and contends that the prevalence of racial disproportionality in the current child welfare system is the product of front-end implicit bias, a view supported by extensive research on decision-making and behavioral conduct. It argues that current child welfare management and investigatory practices allow implicit bias to sneak in at the front end of such practices, thereby providing gateways to disproportionality.

### I. WHITE SUPREMACY AND ANTIMISCEGENATION LAWS

Laws prohibiting interracial marriage in the United States date back to colonial times, when the first of such laws banned white women from marrying slaves.<sup>14</sup> By the time Mildred and Richard Loving were married in 1958, more than half of the states had enacted laws prohibiting miscegenation.<sup>15</sup> These laws worked primarily to promote and preserve white supremacy; particularly, the superiority of the white race when compared to that of blacks.<sup>16</sup> Although laws barring whites from marrying nonwhites varied from state to state, they all had one consistent provision: whites were prohibited from marrying blacks.<sup>17</sup> It is not surprising that when the Lovings were married in 1958, interracial relationships were rare, especially between blacks and whites.<sup>18</sup> Significantly, interracial relations between white men and black women were almost nonexistent.<sup>19</sup>

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14. See generally Byron Curti Martyn, *Racism in The United States: A History of the Anti-Miscegenation Legislation and Litigation* (May 19, 1979) (unpublished Ph.D. dissertation, University of Southern California) (on file with the University of Southern California Digital Library); see also 1 ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND: JANUARY 1637/8—SEPTEMBER 1664, at 533 (William Hand Browne ed., 1883); Carter G. Woodson, *The Beginnings of the Miscegenation of the Whites and Blacks*, 3 J. NEGRO HIST. 335, 339–40 (1918); Tom Head, *Interracial Marriage Laws History & Timeline*, THOUGHTCO. (Feb. 23, 2018), <https://www.thoughtco.com/interracial-marriage-laws-721611> [https://perma.cc/A89A-U8E5].

15. James R. Browning, *Anti-Miscegenation Laws in the United States*, 1 DUKE B.J. 26, 26–31 (1951); see also Trosino, *supra* note 3, at 98.

16. Browning, *supra* note 15, at 33–35; Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1656–58 (2005) (arguing that following emancipation, states permitted and encouraged former slaves to marry in order to maintain control over blacks on the one hand, but prohibited interracial marriage in order to maintain white dominance in the social hierarchy on the other); see also *Perez v. Lippold*, 198 P.2d 17, 23–25 (Cal. 1948) (rejecting the state's justification that its miscegenation statute “prevents the Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians”).

17. Browning, *supra* note 15, at 31.

18. Gretchen Livingston & Anna Brown, *Intermarriage in the U.S. 50 Years After Loving v. Virginia*, PEW RES. CTR. (May 18, 2017), <http://www.pewsocialtrends.org/2017/05/18/intermarriage-in-the-u-s-50-years-after-loving-v-virginia/> [https://perma.cc/C5F5-KDND].

19. *Id.*

The antimiscegenation statutes at the center of the *Loving* case were blunt in condemning marriage between blacks and whites.<sup>20</sup> The law held that any white person who married a “colored person” and any colored person who married a white person would be guilty of a felony punishable by up to five years in prison.<sup>21</sup> On the one hand, a person was defined as “white” if he had “no trace whatever of any blood other than Caucasian.”<sup>22</sup> On the other hand, one was defined as a “colored person” if he had any “ascertainable . . . Negro blood.”<sup>23</sup> Hence, white supremacist ideals of white purity and black taint were written into the statute.<sup>24</sup> Any marriage in violation of Virginia’s prohibition against interracial marriage was deemed void.<sup>25</sup> Interracial couples who left the state to marry were barred from returning as husband and wife and faced arrest if they did.<sup>26</sup>

## II. LOVING TRIUMPH

The Lovings’ story is one of triumph over the hate that permeated life in the 1950s. They were married at the height of the Jim Crow era, when laws barring interracial marriage were part of the broader legacy of legalized racism and segregation born out of white supremacist ideology.<sup>27</sup> Blacks and whites lived in separate worlds under Jim Crow and rarely interacted as equals.<sup>28</sup> What was unique about Richard and Mildred Loving is that they did not grow up in a segregated community.<sup>29</sup> They were raised in Caroline County, Virginia, a small and rural community that “had so many multiracial residents of white, black and Native American heritage that during segregation, their children all attended the county’s all-black high school.”<sup>30</sup> Caroline County was described as a place where race relations among whites

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20. See, e.g., VA. CODE ANN. § 20-54 (1950 & Supp. 1960) (repealed 1968) (“It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian.”).

21. VA. CODE ANN. § 20-59 (1950) (repealed 1968).

22. VA. CODE ANN. § 20-54 (emphasis added). An exception was made for white people who were otherwise pure but had “one-sixteenth or less of the blood of the American Indian.” *Id.*

23. VA. CODE ANN. § 1-14 (1950 & Supp. 1964) (repealed 1968).

24. See Trosino, *supra* note 3, at 102.

25. VA. CODE ANN. § 20-57 (1950) (repealed 1968).

26. VA. CODE ANN. § 20-58 (1950) (repealed 1968).

27. See ANDREW L. BARLOW, BETWEEN FEAR AND HOPE: GLOBALIZATION AND RACE IN THE UNITED STATES 48 (2003) (“Jim Crow consciousness was white supremacist, in which the assertion of genetic and moral superiority was necessary to bolster an otherwise unclear claim to racial privilege.”).

28. ANDREW MCNEILL CANADY, WILLIS DUKE WEATHERFORD: RACE, RELIGION, AND REFORM IN THE AMERICAN SOUTH 75 (2016) (“In large part, the two races lived in separate worlds, and what little interaction did occur took place as whites employed black servants and farmworkers.”).

29. Carol Morello, *Virginia’s Caroline County, ‘Symbolic of Main Street USA,’* WASH. POST (Feb. 10, 2012), [https://www.washingtonpost.com/local/virginias-caroline-county-symbolic-of-main-street-usa/2012/01/26/gIQAKH0z2Q\\_story.html](https://www.washingtonpost.com/local/virginias-caroline-county-symbolic-of-main-street-usa/2012/01/26/gIQAKH0z2Q_story.html) [https://perma.cc/R4LH-PAQ8].

30. *Id.*

and blacks were generally good.<sup>31</sup> Interracial marriage or relation was not uncommon in this area, and many in the farming community went to bat for the Lovings.<sup>32</sup> Mildred and Richard thus did not grow up in the separate, isolated worlds common for blacks and whites during that time. Having lived side by side, the Lovings had a shared experience, which presumably led to the kind of mutual respect and comfort upon which they built their relationship.<sup>33</sup>

### III. FEAR OF THE BLACK FAMILY: PREVENTING CHILD ABUSE

The Lovings' journey to the U.S. Supreme Court began when they left Caroline County and were married in Washington, D.C.<sup>34</sup> Following their marriage, the couple returned to Caroline County to live and start a family.<sup>35</sup> Not long after their return, they were arrested for attempting to evade Virginia's prohibition against interracial marriage by leaving the state to marry and returning there to live as husband and wife.<sup>36</sup> The two ultimately pled guilty and were each sentenced to one year in jail.<sup>37</sup> Their sentences were suspended on the condition that they leave Virginia and not return together as man and wife for twenty-five years.<sup>38</sup> After failed attempts to reverse their convictions in state court, the Lovings challenged the constitutionality of Virginia's antimiscegenation statute as violative of the

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31. Simeon Booker, *The Couple That Rocked Courts: Lovings' Fight Brought Supreme Court Decision Against Miscegenation Laws*, *EBONY MAG.*, Sept. 1967, at 79 ("Reporters dispatched to [Caroline County] found few individuals who would discuss the case. 'We have a community of our own,' explained a prominent Caroline County leader. 'Our mores apply only here. We've done more integrating than in any other part of the U.S.'").

32. *See id.*

33. A *New York Times* review of a documentary film featuring the Lovings describes their undeniable connection with one another:

The improbably named Lovings, Mildred and Richard, make a compelling couple, and not just because she is half-black, half-Native American and he is good ol' boy white. In a rich collection of 16-millimeter film, old news clips and still photographs, the Lovings don't look like two people caught up in a cause, they seem like two people caught up in each other.

Alessandra Stanley, *Scenes from a Marriage that Segregationists Tried to Break Up*, *N.Y. TIMES* (Feb. 13, 2012), <http://www.nytimes.com/2012/02/14/arts/television/the-loving-story-an-hbo-documentary.html> [<https://perma.cc/3MK9-9XTH>]. The review also references quotes from interviews with the Lovings, which were featured in the film. In one scene, Richard Loving describes the experience of growing up in Caroline County: "There's a few white, there's a few colored and we all, as we grew up and as they grew up, we all helped one another . . . It was all mixed together, you know, to start with, so we just kept going that way." *Id.*

34. Brief for Appellants, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 1967 WL 113927, at \*6-7.

35. *Id.* at \*7.

36. *Id.* at \*6-7; *see also* VA. CODE ANN. § 20-58 (1950) (repealed 1968) ("If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished . . . and the marriage shall be governed by the same law as if it has been solemnized in this State.").

37. Brief for Appellants, *supra* note 34, at \*7.

38. *Id.*

Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>39</sup> The Lovings' case made its way to the U.S. Supreme Court, where oral arguments were conducted on April 10, 1967.<sup>40</sup> R.D. McIlwaine III, an Assistant Attorney General for the Commonwealth of Virginia, presented Virginia's case.<sup>41</sup> The state's core argument was that the antimiscegenation statute in question did not run afoul of the Fourteenth Amendment because it applied equally to blacks and whites.<sup>42</sup> Further, the state argued that the Court should uphold the antimiscegenation statute because it served a legitimate state interest in protecting the institution of marriage.<sup>43</sup>

Assistant Attorney General McIlwaine's discussion of why the prevention of interracial marriages was a "legitimate exercise of the state power"<sup>44</sup> shed light on the state's desire to prevent the dilution of the white race. The discussion of the state's purpose began with a sly focus on the challenges that faced children born of interracial marriages.<sup>45</sup> While acknowledging that there was scientific evidence "on both sides," Mr. McIlwaine stated: "It is clear from the most recent available evidence on the psycho-sociological aspect of this question that intermarried families are subjected to much greater pressures and problems [than] those of the intramarried . . ."<sup>46</sup> Relying on a dubious "study,"<sup>47</sup> McIlwaine then proceeded to place the state's interest in prohibiting interracial marriage on equal footing with the state's prohibition of polygamous marriage, incestuous marriage, and marriage between incompetent parents.<sup>48</sup> He argued that children born of interracial marriages "have almost insuperable difficulties in identification and that the problems which a child of an interracial marriage faces are those which no child can come through without damage to himself."<sup>49</sup> McIlwaine derided the parents of children born to interracial unions and stated that "interracial marriages bequeath to the progeny of those marriages, more psychological problems than parents have a right to bequeath to them."<sup>50</sup> He then referred to the children of interracial marriages as "victims."<sup>51</sup> McIlwaine conceded that the problems faced by children of interracial

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39. *Id.*; see also U.S. CONST. amends. V, XIV.

40. See generally Oral Argument, *supra* note 5.

41. *Id.* at 00:51:28–2:03:37.

42. *Loving v. Virginia*, 388 U.S. 1, 7–8 (1967); see also Oral Argument, *supra* note 5, at 1:00:05–:00:42.

43. *Loving*, 388 U.S. at 8; see also Oral Argument, *supra* note 5, at 1:00:44–:01:12.

44. Oral Argument, *supra* note 5, at 1:19:08–:19:11.

45. *Id.* at 1:19:58–:27:19.

46. *Id.* at 1:19:34–:21:07.

47. McIlwaine principally relied upon a book written by Dr. Albert Isaac Gordon, which McIlwaine said "is characterized as the definitive book on intermarriage, and has the most careful, up to date, methodologically sound study of intermarriage in North America that exists." *Id.* at 1:22:08–:22:24. See generally ALBERT I. GORDON, INTERMARRIAGE: INTERFAITH, INTERRACIAL, INTERETHNIC (1964) (containing information that served as the bases for Virginia's arguments in *Loving*).

48. Oral Argument, *supra* note 5, at 1:20:51–:21:26.

49. *Id.* at 1:26:19–:26:40.

50. *Id.* at 1:23:43–:23:51.

51. *Id.* at 1:27:03–:27:17.

marriage were likely due to racism.<sup>52</sup> Ultimately, McIlwaine was forced to acknowledge the primary reason antimiscegenation laws were enacted—to advance the cause of white supremacy.<sup>53</sup>

#### IV. BIAS AND DISPROPORTIONALITY

Vestiges of the white supremacist ideology at the center of *Loving* appear in our current child welfare system, which has long been plagued by disproportionate representation of black families in its charge.<sup>54</sup> For nearly two decades, studies have indicated that black children are overrepresented in the child welfare system.<sup>55</sup> Black children are referred to child protective authorities, investigated by child protective workers, and placed in foster care at much higher rates than are white children.<sup>56</sup> This pattern of disproportionate representation has persisted despite efforts by federal, state, and local government programs to address disproportionality.<sup>57</sup>

Bias<sup>58</sup> and poverty<sup>59</sup> may influence such disproportionality. Both of these factors can be traced back to the broader legacy of legalized racism and segregation that underpinned antimiscegenation laws.<sup>60</sup> Studies on the role of bias in perpetuating disproportionality conjure up the arguments raised by Assistant Attorney General McIlwaine in *Loving*: that black parents—and by extension, the white parents who create families with them—are inherently incompetent.<sup>61</sup> For example, a recent report on disproportionality cites two studies in Texas that found “that race, risk, and income all influence case decision, but even though black families tended to be assessed with lower risk scores than White families, they were more likely than White families to have substantiated cases, have their children removed, or be

52. *Id.* at 1:26:19–:26:40.

53. *Id.* at 1:34:47–:35:33.

54. See CHILD WELFARE INFO. GATEWAY, *supra* note 2, at 2; DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 6 (2002); Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 109, 109 (2008).

55. CHILD WELFARE INFO. GATEWAY, *supra* note 2, at 2–5.

56. *Id.* at 3–4.

57. See Chapin Hall Ctr. for Children at the Univ. of Chi., *Understanding Racial and Ethnic Disparity in Child Welfare and Juvenile Justice*, in RACIAL AND ETHNIC DISPARITY AND DISPROPORTIONALITY IN CHILD WELFARE AND JUVENILE JUSTICE: A COMPENDIUM 9, 20 (2009), [https://jeffreybutts.files.wordpress.com/2008/03/cjir\\_ch\\_final1.pdf](https://jeffreybutts.files.wordpress.com/2008/03/cjir_ch_final1.pdf) [<https://perma.cc/4GFL-2S3N>].

58. See ROBERTS, *supra* note 54, at 95 (“We should not ignore, though, the considerable evidence that race and not poverty alone affects decision making at every step of the child protection process. Racism in reporting illustrates how racial bias combines with broader inequities to push disparate numbers of Black children into the system.”); see also John Fluke et al., *Research Synthesis on Child Welfare Disproportionality and Disparities*, in DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE: ANALYSIS OF THE RESEARCH 1, 16–18 (2011), [https://www.cssp.org/publications/child-welfare/alliance/Disparities-and-Disproportionality-in-Child-Welfare\\_An-Analysis-of-the-Research-December-2011.pdf](https://www.cssp.org/publications/child-welfare/alliance/Disparities-and-Disproportionality-in-Child-Welfare_An-Analysis-of-the-Research-December-2011.pdf) [<https://perma.cc/Z6TY-SP2Q>].

59. See, e.g., CHILD WELFARE INFO. GATEWAY, *supra* note 2, at 6.

60. Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 602–03 (2014).

61. Oral Argument, *supra* note 5, at 1:23:17–:24:02.

provided family-based safety services.”<sup>62</sup> One of the Texas studies was particularly compelling. Researchers controlled for multiple variables that might contribute to disproportionate representation of black children throughout the child welfare system, including, but not limited to, risk assessment scores, type of allegation, source of report, and sociodemographic variables, such as marital status and income.<sup>63</sup> Their findings revealed that, all other things being equal, racial bias was present from the child welfare system’s very first encounter with a family.<sup>64</sup>

Research also indicates that racial bias is even more pronounced during parenting-behavior assessments when such assessments are conducted by social workers of a different race than the parent.<sup>65</sup> Scholars Lawrence Berger, Marla McDaniel, and Christina Paxson highlight the “systematic differences” between black and white interviewers and how those interviewers will assess parenting behaviors and characteristics of black families.<sup>66</sup> For example, when assessed by white observers, black mothers are more likely to be seen as having a “lack of maternal verbal and social skills,” being “harsh,” or lacking “warmth” when dealing with their children’s problem behaviors.<sup>67</sup> The study also found, however, that black mothers are not perceived this way when assessed by a black observer.<sup>68</sup> When an observer has incomplete information about a parent, there is evidence that the observer will use race as a “proxy” for poverty, which may lead the observer to “attribute poor [parenting skills] to all blacks, regardless of their socioeconomic status.”<sup>69</sup>

#### V. FRONT-END BIAS AND THE LESSONS OF *LOVING*

An exploding body of research on the nature of bias has shed new light on twenty-first-century discrimination.<sup>70</sup> Unlike the blatant racism that was

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62. CHILD WELFARE INFO. GATEWAY, *supra* note 2, at 6 (citing Alan J. Dettlaff et al., *Disentangling Substantiation: The Influence of Race, Income, and Risk on the Substantiation Decision in Child Welfare*, 33 CHILD. & YOUTH SERVICES REV. 1630, 1630–37 (2011); Stephanie L. Rivaux et al., *The Intersection of Race, Poverty, and Risk: Understanding the Decision to Provide Services to Clients and to Remove Children*, 87 CHILD WELFARE 151, 153 (2008)).

63. Rivaux et al., *supra* note 62, at 161.

64. *See id.* (“Race did contribute to the decision to take action on a case; specifically, when compared to Anglo Americans, African Americans were 20% more likely to have their case acted upon. Our theoretical variables, risk and income, were also significant predictors. . . . [A]ll else equal, when actions are taken, Anglo Americans would be more likely to be assigned to [Family Based Safety Services] while African Americans would be more likely to be removed.”).

65. *See generally* Lawrence M. Berger, Marla McDaniel & Christina Paxson, *Assessing Parenting Behaviors Across Racial Groups: Implications for the Child Welfare System*, 79 SOC. SERV. REV. 653 (2005) (finding pronounced evidence of racial bias in the assessment of black parenting behaviors when conducted by white interviewers).

66. *Id.* at 677.

67. *Id.* at 674–75.

68. *Id.* at 674.

69. *Id.* at 677.

70. *See generally* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012) (discussing explicit, implicit, and structural forms of bias and their effects on and within the justice system).



present during the 1950s when the Lovings were married, researchers have documented the pervasiveness of implicit and unintentional bias—“attitudes or stereotypes that affect our understanding, decisionmaking, and behavior, without our even realizing it.”<sup>71</sup> The persistence of disproportionality in the child welfare system raises the question of whether implicit bias is at play.<sup>72</sup> Most of the literature on disproportionality focuses primarily on the extent to which children of color are removed from their homes, placed in foster care, and remain in the child welfare system.<sup>73</sup> More recently, commentators have begun to investigate the role of bias in decision-making at the front end of the system, when claims of child abuse and neglect are initially received and investigated by child welfare authorities.<sup>74</sup> These decisions are critical because they set the stage for removal of children from their homes and placement in foster care.

The first decision point in the child welfare journey happens when a parent is reported for suspected abuse or neglect.<sup>75</sup> Depending on the state, reports of child abuse and neglect are made via telephone or electronically by child protective agencies or law enforcement agencies.<sup>76</sup> These initial reports are then screened by agency personnel who decide whether the claims meet state law criteria.<sup>77</sup> If the report is deemed valid, it is sent to the local child protective agency and investigated.<sup>78</sup> These investigations open the door for possible removal and placement in foster care.<sup>79</sup> Thus, bias at the front end of the system provides the gateway to disproportionality.<sup>80</sup>

Two factors at the front end can lay the groundwork for how implicit bias might occur. Nationwide, most reports involve claims of child neglect.<sup>81</sup> There is already a significant body of scholarship on how the overbroad legal definitions of child abuse and neglect invite decision makers to supplant the values of families charged with neglect.<sup>82</sup> State definitions of child neglect are particularly troublesome because they point to conditions of poverty, such as inadequate food, clothing, or shelter.<sup>83</sup> The presence of these seemingly innocuous measures in evaluating parents’ capabilities belies the history of

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71. *Id.* at 1126.

72. See Rakesh Beniwal, Note, *Implicit Bias in Child Welfare: Overcoming Intent*, 49 CONN. L. REV. 1021, 1026, 1063–67 (2017).

73. See, e.g., ROBERTS, *supra* note 54, at vi–x.

74. See Beniwal, *supra* note 72, at 1027–37; see also Fluke et al., *supra* note 58, at 16–18, 22, 64.

75. All fifty states have processes for receiving and investigating complaints regarding parents who may be abusing or neglecting their children. See, e.g., CHILD WELFARE INFO. GATEWAY, MAKING AND SCREENING REPORTS OF CHILD ABUSE AND NEGLECT 1 (2017), <https://www.childwelfare.gov/pubPDFs/repproc.pdf> [<https://perma.cc/U4PQ-5PV5>].

76. *Id.* at 2.

77. *Id.* at 3.

78. *Id.*

79. See *supra* note 62 and accompanying text.

80. See *supra* note 74 and accompanying text.

81. See Fluke et al., *supra* note 58, at 31.

82. See generally Douglas J. Besharov, *Child Abuse Realities: Over-Reporting and Poverty*, 8 VA. J. SOC. POL’Y & L. 165 (2000) (discussing varying definitions of child abuse and neglect and how such differentiation affects reporting and decision-making).

83. See *id.* at 201–03.

ideological racism inherent within the child welfare system, which is rooted in legal theories that, historically and intentionally, reinforced the institution of slavery<sup>84</sup> and the inadequacy of black mothers.<sup>85</sup> Thus, evaluating whether parents have provided “adequate” care is inherently fraught. Such evaluations can easily invite a muted version of the kind of bias that permeated the antimiscegenation laws at issue in *Loving*.

Another front-end factor worth considering is the ubiquitous system of mandatory reporting laws that support the child welfare system.<sup>86</sup> All fifty states “have statutes identifying persons who are required to report suspected child [abuse and neglect] to an appropriate agency.”<sup>87</sup> These mandatory reporting statutes have built-in incentives that encourage reporters to take action, even in close cases.<sup>88</sup> Definitions of neglect and mandatory reporting laws are designed to support the child welfare system in protecting children from harm.<sup>89</sup> But what if the faulty definition of “child neglect,” combined with mandatory reporting laws, create the groundwork for implicit racial stereotypes to emerge?<sup>90</sup>

A manual developed by the U.S. Department of Health and Human Services’s Office on Child Abuse and Neglect provides a powerful example of how evaluating whether a parent has neglected her child can invite implicit bias.<sup>91</sup> The manual defines environmental neglect as being “characterized by a lack of environmental or neighborhood safety, opportunities, or resources.”<sup>92</sup> In addition, the manual encourages case workers to focus most

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84. See Rankin, *supra* note 12, at 5–6 (“At the rise of the 20th century, three legal principles would govern the child welfare system: the colonial poor laws, the principle of *parens patriae*, and the concept of the legal contract. These legal theories would shape the . . . different approaches on how to intervene in the child-parent-state relationship, but these principles would not serve as the foundation for America’s relationship to the Black family structure. Because of ideological racism, there would be a different set of guidelines used for Black families. The Black experience would begin outside of the three principles guiding child welfare. The ‘peculiar institution’ of slavery would serve as the first implementation of child welfare for Black children in the United States, with responsibility and rights legally stripped from the Black parent.” (footnotes omitted)).

85. See *id.* at 8–9 (explaining that the Child Abuse Prevention and Treatment Act of 1974 established legal principles and guidelines for neglect definitions and reporting procedures that were based in the nation’s view that the “Black matriarch” was “the root of all Black families’ ills,” which propelled the removal of black children from their homes and into foster care).

86. See generally CHILD WELFARE INFO. GATEWAY, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT (2016), <https://www.childwelfare.gov/pubPDFs/manda.pdf> [<https://perma.cc/5HHR-ZJ84>].

87. *Id.* at 1.

88. For example, mandatory reporters enjoy immunity for false reports made in good faith and could be subject to criminal liability for failure to report. See *id.* at 3–4.

89. See *id.* at 3.

90. See generally Paul M. Herr, *Consequences of Priming: Judgment and Behavior*, 51 J. PERSONALITY & SOC. PSYCHOL. 1106 (1986) (confirming the widespread research indicating that an individual’s previous exposure to exemplars or nonexemplars of social categories will profoundly influence their perception of a subsequent interaction or observation).

91. DIANE DEPANFILIS, U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD NEGLECT: A GUIDE FOR PREVENTION, ASSESSMENT, AND INTERVENTION 13–14 (2006), <https://www.childwelfare.gov/pubPDFs/neglect.pdf> [<https://perma.cc/3Y3Q-TTLW>].

92. *Id.*

attention on the “conditions in the home,” “parental omissions,” and “impact of dangerous neighborhoods,” and to look for signs of risk factors such as “poverty, community and society characteristics.”<sup>93</sup> Consequently, when caseworkers use federal guidelines such as these to assess a parent accused of neglect, their expectations are effectively “primed.”<sup>94</sup> If a worker has recently observed or read about parenting behavior that often leads to a finding of “neglect,” the worker may interpret a subsequent parent’s behaviors in a way that is consistent with their expectations for finding neglect.<sup>95</sup> Additionally, when examples of “good parenting” are created by the social expectations of a white-majority middle-class culture, observers are significantly more likely to evaluate a particular situation under a lens that favors families who exemplify these expectations.<sup>96</sup> In effect, mandatory reporters and other front-line decision makers called to identify and evaluate black families suspected of child neglect are primed by these faulty standards to summon the ghosts of antimiscegenation laws.

The limited data on the experiences of interracial families in the child welfare system paint an eerie path back to *Loving*’s troubling legacy. One study has shown that biracial children in the child welfare system fare worse than black children.<sup>97</sup> They were more likely to be referred for investigations and considered high risk than white or African American children.<sup>98</sup> Moreover, parents of biracial children “were more often assessed as having physical, intellectual or emotional problems.”<sup>99</sup> More data are required to illuminate whether bias is implicated for biracial children in the child welfare system, but the data reported<sup>100</sup> in this recent study are troubling, to say the least.

#### CONCLUSION

The legacy of *Loving* is far reaching. Richard and Mildred Loving will always be celebrated for the courage they exhibited and the path they created toward marriage equality.<sup>101</sup> On the flip side, the legacy of white supremacy disguised as child protection deserves to be interrogated. The pervasiveness of disproportionality in the modern child welfare system provides fodder for exploring *Loving*’s reach.

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93. *Id.* at 14, 29.

94. *See generally* Herr, *supra* note 90 (discussing the influence and effects of exposure to social characteristics and perceptions on expectation).

95. *Id.*

96. *Id.* at 1114 (“[T]he activated category may serve as a filter through which ongoing events are screened. Ambiguous . . . events may be perceived consistently with the activated category. That is, the perceiver should conclude that these events are consistent with her expectancy . . .”).

97. Rachel A. Fusco et al., *Aren’t They Just Black Kids?: Biracial Children in the Child Welfare System*, 15 J. CHILD & FAM. SOC. WORK 441, 447–49 (2010).

98. *Id.* at 447.

99. *Id.*

100. *Id.* at 444–47.

101. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015) (“[T]he abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause.” (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967))).