

## Lots of Love for this Loving Analysis

**Author :** Angela Onwuachi-Willig

**Date :** March 26, 2014

I. Bennett Capers, *The Crime of Loving: Loving, Lawrence, and Beyond*, in [Loving v. Virginia in a Post Racial World](#) [Rethinking Race, Sex, and Marriage](#) (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012).

Few authors can bring cases and their meaning(s) alive like Professor [Bennett Capers](#). Capers does not disappoint with his recent chapter *The Crime of Loving: Loving, Lawrence, and Beyond*. Capers provides a criminal law lens for family law scholars to further examine and understand the landmark decision, [Loving v. Virginia](#). In *Loving*, the Supreme Court struck down Virginia statutes that criminally prohibited and punished marriage between Whites and non-Whites as violations of equal protection and due process. In reconsidering this landmark case through the lens of criminal law, Capers exposes the power of “white-letter law,” which “suggests societal and normative laws that stand side by side and often undergird black-letter law, but . . . [that] remain invisible to the naked eye.” (P. 120.) More so, Capers beautifully reveals how “*Loving* and [Lawrence](#) both serve as cautionary reminders of the long leash we have given to criminal law.” (P. 125.) He details the many ways in which criminal law has been used to regulate and shape many aspects of our personal and social lives. Noting such regulation has occurred through the use of “a whole host of victimless crimes,” such as adultery, gambling, pornography, and premarital sex, Capers joins scholars such as Melissa Murray in exposing the often-ignored manner in which criminal law is used to invade citizens’ privacy and enact a moral code upon behaviors that are not generally associated with criminality.<sup>1</sup>

Capers begins his chapter with a compelling narrative that provides a vivid picture of *Loving’s* limited impact on towns such as his hometown of Charleston, South Carolina. Capers starts by comparing the “Charleston of [his] youth,” a place that “had only one interracial couple” with Richard and Mildred Loving’s hometown of Central Point, Virginia, a rare, integrated community in the South “in which [the Lovings] knew they could live as husband and wife . . . a place where they would be welcome . . . a place they could call home.” (Pp. 114, 118–19.) The difference, Capers explains, was not the black-letter law in the two locations; after all, interracial marriage was illegal in Virginia at the time the Lovings got married, but was legal in Charleston—and indeed, nationally—during his youth. Rather, the difference was in the white-letter law, the extralegal prohibitions “that reminded people of their place and reminds them still.” (P. 116.) As Capers makes clear, “*Brown* or no *Brown*, *Loving* or no *Loving*,” the Charleston of his youth and of today includes very few interracial families because “people kn[o]w their place.” (P. 116.) Indeed, Capers implies that a black-letter prohibition was unnecessary to maintain this status quo. He writes:

[I]t is hard for me to imagine a black person and a white person falling in love there. The blacks in Charleston, unlike the blacks in Central Point [many of whom were mixed-race like Mildred Loving], tend to be very black—“pure black,” outsiders sometimes say—so much so that the few light-skinned blacks that are there are still viewed with a mixture of envy and suspicion. And it is all but impossible for me to imagine a black person and white person, as a married couple, wanting to stay there, or being welcomed there. . . . And race is still everything for South Carolina, as the controversies over the Confederate flag and interracial dating at Bob Jones University attest to. It is a place where miscegenation was so unthinkable that for the longest time, no black-letter prohibition was necessary. (P. 119.)

Noting that *Loving* “did little to disrupt the white-letter law of racial trespass,” Capers also highlights how the policing of interracial intimacy, not just in South Carolina, but also nationally, is (and was) influenced by both race and gender, as evidenced by the disparate policing of and punishment for relations between black men and white women and the limited prosecution of rape and assault of black women by white men. (P. 120.) He explains, “[i]t was primarily

interracial intimacy between black men and white women that was policed. Intimacies between white men and black women, as long as kept on the down-low, enjoyed a white-letter exemption.” (P. 121.)

Critically, Capers analyzes the differences and connections between *Loving* and *Lawrence v. Texas*, adding another complex and important layer to his analysis of *Loving*. As he observes, both cases involved interracial lovers, and both cases involved the use of criminal law to regulate “outsider” intimacies, but gender, or rather, the absence of any gender difference between the actors in one of these cases, has played an important role in shaping the different ways in which *Loving* and *Lawrence* were viewed and have been considered. Through his comparison of the two cases, Capers reveals how “sexual sameness” can often trump racial difference, as it arguably did in *Lawrence*, where no mention is made of the defendants’ races at all and instead “the gay black man in *Lawrence* [is] treated as white.” (Pp. 125–26.) Capers also exposes how “sexual sameness” among couples—in a land of presumed heterosexuality—may raise no eyebrows and may even work to advantage a black person in a same-sex, interracial couple (such as Capers himself) by, for example, explaining his presence in a predominantly white neighborhood. As Capers poignantly reveals:

In my darker moods, I tell myself that, partnered with a white man, I am marked as safe, I’m allowed to pass through. Sometimes, when my mood is darker still, I use the words “assimilated” and “domesticated.” Me, marked as assimilated and domesticated, allowed to pass, I become not black. Black no more. Or, at least, a good black. (P. 127.)

In all, Capers provides a sobering account of the history (and enduring presence) of criminal law’s reach (as well as the reach of social norms) on love and intimacy.

In the end, Capers leaves us with a hopeful outlook. He finishes with sweet sentiments about his own love and interracial marriage and concludes with a comment that perhaps he was wrong when he “said before that *Loving*, like [McLaughlin](#) [*v. Florida*] before it and *Lawrence* after it, began with a tip and arrest.” Implicitly recognizing intimacy’s triumph over the force of the criminal law, Capers instead notes:

*Loving*, I’m sure, began with a look.  
With a kiss.  
With love.  
I’m sure. (P. 127.)

Such beautiful, honest, and courageous moments in Capers’s chapter, along with Capers’s searing analysis of the *Loving* and *Lawrence* cases, make *The Crime of Loving* well worth reading.

1. See generally Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 **Iowa L. Rev.** 1253, 1257 (2009) (examining and using the case *State v. Koso* as “a unique lens through which to view the relationship between criminal law and family law and the way that it organizes intimate life”).

Cite as: Angela Onwuachi-Willig, *Lots of Love for this Loving Analysis*, JOTWELL (March 26, 2014) (reviewing I. Bennett Capers, *The Crime of Loving: Loving, Lawrence, and Beyond*, in *Loving v. Virginia in a Post Racial World*: Rethinking Race, Sex, and Marriage (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012)), <https://family.jotwell.com/lots-of-love-for-this-loving-analysis/>.