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Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination

Reginald Oh[*]

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INTRODUCTION

Brown v. Board of Education[1] is the seminal U.S. Supreme Court decision addressing race. In *Brown*, the Court declared that state-sponsored racial segregation of public schools violated the Fourteenth Amendment's Equal Protection Clause. When decided in 1954, *Brown* sparked enormous political and legal controversy. Today, it is considered the cornerstone of modern equal protection jurisprudence on race, standing for the principle that invidious governmental discrimination against racial minorities is immoral and unconstitutional. However, understanding *Brown* solely as a case dealing with race and racial segregation obscures the fact that racial segregation in public schools has always been about both race *and* gender. As a system of legal subordination, racial segregation concerns the regulation of *gender* relations as much as it concerns the regulation of race relations.

An examination of the law and practice of two aspects of Jim Crow society, racial segregation in public schools and the prohibition of interracial marriages, shows that racial segregation is actually a system of racial and gender subordination. Although scholars today typically analyze racial school segregation and antimiscegenation laws only as discrete forms of racial discrimination, a closer examination reveals the interplay of race and gender. These issues are so intertwined that *Loving v. Virginia*,[2] the 1967 U.S. Supreme Court decision striking down antimiscegenation laws, should be viewed as a continuation of the 1954 *Brown*[3] decision. *Loving* is as much a case about racial segregation in public schools as *Brown* is a case about prohibiting interracial marriages. Both cases ultimately implicate the states' attempts to regulate racial and gender relations.

However, legal scholars do not regard racial segregation as a system of race and gender subordination, nor do they consider *Brown*'s gender implications. Our inability to see the gendered nature of racial segregation undermines our ability to fully understand how racial subordination operates and thus undermines our ability to develop effective strategies for ending racial subordination. We have lost sight of the gendered aspects of racial segregation due to the language we use to analyze the structures of racial segregation. Our essentialist language blinds us to the multidimensional nature of racial subordination systems.

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[1] 347 U.S. 483 (1954).

[2] 388 U.S. 1 (1967).

[3] *Brown*, 347 U.S. at 495.

This Essay works through essentialist language to reveal the multidimensional nature of racial segregation as a system of subordination. Specifically, it examines how racial segregation in public schools and laws prohibiting interracial marriage mutually reinforce racial and gender inequality. Part I discusses *Brown* and the traditional analysis of that decision as a case dealing with race, racial stigma, and equal educational opportunity. Part II reviews laws prohibiting interracial marriage, the reasoning and purpose behind these laws, and the *Loving* decision that rendered such laws unconstitutional. Part III then examines racial segregation in public schools as more than just a system regulating race in education. This Part contends that racial segregation should be viewed more broadly as a tool of antimiscegenation. Just like laws prohibiting interracial marriage, a central purpose of racial segregation was to prevent the development of intimate social relationships between blacks and whites. Segregationists believed this was necessary to prevent the production of racially mixed children and thus preserve white supremacy and white racial purity.

Part IV demonstrates that once racial segregation is viewed as an antimiscegenation tool, it becomes clear that racial segregation in public schools is as much about regulating *gender* relations as it is about regulating *race* relations. Our essentialist language, however, prevents us from perceiving the intertwined gender-racial components of Jim Crow segregation. This final Part first briefly discusses theories of essentialism and anti-essentialism, and then it explicates an anti-essentialist theory of language. Next, it shows how the way we talk about race and racial segregation obscures the gendered nature of racial segregation. Finally, it employs an anti-essentialist linguistic analysis to illustrate how we can glean new insights into racial subordination by renaming "racial segregation" as "gender segregation on the basis of race" or "racial-gender segregation."

I. RACIAL SEGREGATION IN PUBLIC SCHOOLS AND THE TRADITIONAL VIEW OF *BROWN*: A CASE ABOUT EQUAL EDUCATIONAL OPPORTUNITY

Racial segregation was the lynchpin of Southern Jim Crow society. The systematic physical and social separation of the white and black races was fundamental to maintaining a social system of white supremacy and black inferiority. In *Brown v. Board of Education*, the Court dealt with the constitutionality of state-imposed racial segregation

in public schools.[4] It declared that such segregation violated the Fourteenth Amendment's Equal Protection Clause.[5] The landmark decision not only overruled the infamous 1896 *Plessy v. Ferguson*[6] case, which held that state-imposed racial segregation was constitutionally permissible state action, but also helped to catalyze the civil rights movement.[7] However, while today we laud *Brown* as a seminal and foundational equal protection decision, in 1954 it sparked enormous legal and political controversy. Southern states fiercely resisted the racial integration of its schools.[8] The intensity of that resistance was ultimately attributable to the fact that Southerners knew *Brown*'s implications would extend far beyond the context of schooling and education. They understood *Brown* could deeply transform the realm of intimate relations between whites and blacks.

As one of the most important twentieth century Supreme Court decisions, *Brown* has been heavily analyzed by legal commentators.[9]

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[4] *Id.* at 487-88.

[5] *Id.*

[6] 163 U.S. 537 (1896).

[7] *See generally* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUITY 363-442 (2004) (examining history and circumstances surrounding Supreme Court's civil rights decisions.).

[8] *See generally* NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S, at 67-81 (1969) (discussing politics of southern resistance to public school intergration); David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 591 (2004) (examining relevant Supreme Court civil rights decisions, especially Progressive Era cases and *Brown*); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era: Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444 (1982) (describing Jim Crow laws and courts' decisions concerning racial separation).

[9] *See generally* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955) (providing point by point discussion by legislators enacting Fourteenth Amendment and their intention to end discrimination against freedmen); Ernst Borinski, *A Legal and Sociological Analysis of the Segregation Decision of May 17, 1954*, 15 U. PITT. L. REV. 622 (1954) (analyzing legal and social aspects of *Brown v. Board of Education*); J. Braxton Craven, Jr., *Integrating the Desegregation Vocabulary -- Brown Rides North, Maybe*, 73 W. VA. L. REV. 1 (1971) (discussing *Brown*'s impact on Northern desegregation); G. L. DeLacy, *"Segregation Cases" Supreme Court*, 38 NEB. L. REV. 1017 (1959) (discussing *Brown*, along with other segregation cases); Owen M. Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHIL. & PUB. AFF. 3 (1974); Daniel Gordon, *Happy Anniversary* Brown v. Board of Education: *In Need of a Remake After Forty Years?*, 25 COLUM. HUM. RTS. L. REV. 107 (1993) (analyzing whether Court made decision based on social pressures or constitutional violations); Benjamin H. Kizer, *The Impact of* Brown v. Board of Education, 2 GONZ. L. REV. 1 (1967) (discussing *Brown*'s impact on American society); Laurence W. Knowles, *School Desegregation*, 42 N.C. L. REV. 67 (1963) (discussing various aspects of school desegregation after *Brown*); Donald E. Lively, *Desegregation and the Supreme Court: The Fatal Attraction of* Brown, 20 HASTINGS CONST. L.Q. 649 (1993) (arguing that since *Brown*, Court has retreated from commitment to desegregate schools); Louis

Well-established views hold that *Brown* is a case about: (1) how segregation of public schools denied equal educational opportunity to segregated black schoolchildren,[10] by (2) stigmatizing them and treating them as racially inferior to white schoolchildren.[11]

In *Brown*, black public schoolchildren filed suit challenging their racially segregated schools and seeking to be admitted into schools on a "nonsegregated basis."[12] The plaintiffs' primary obstacle in challenging the constitutionality of racially segregated public schools was the Court's decision in *Plessy v. Ferguson*.[13] *Plessy* upheld state racial segregation laws as long as they provided for separate but equal treatment of the races.[14] Thus, under *Plessy*'s separate but equal doctrine, racially

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Lusky, *The Stereotype: Hard Core of Racism*, 13 BUFF. L. REV. 450 (1964) (suggesting that *Brown* was first time Court ignored remedying constitutional harm suffered by individual plaintiffs in order to fashion remedy for entire class of individuals in similar circumstances); Gerald N. Rosenberg, Brown *Is Dead! Long Live* Brown*!: The Endless Attempt to Canonize a Case*, 80 VA. L. REV. 161 (1994) (arguing against notion that *Brown* set stage for civil rights movement and legislative action); Steven Siegel, *Race, Education, and the Equal Protection Clause in the 1990s: The Meaning of* Brown v. Board of Education *Re-Examined in Light of Milwaukee's Schools of African American Immersion*, 74 MARQ. L. REV. 501 (1991) (finding principles articulated in *Brown* problematic when applied to Milwaukee's attempt to improve education of black children); Mark Tushnet, *The Significance of* Brown v. Board of Education, 80 VA. L. REV. 173 (1994) (noting *Brown's* prohibition of reliance on race for purposes of advancing segregation); Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867 (1991) (noting that personal contributions and interrelationships of (Justices) Vinson, Frankfurter, and Warren significantly affected *Brown*'s final outcome); Note, *Desegregation of Public Schools: An Affirmative Duty to Eliminate Racial Segregation Root and Branch*, 20 SYRACUSE L. REV. 53 (1968) (discussing desegregation of public schools in light of *Brown* decision).

[10] *See, e.g.*, Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 238-39 (1991).

[11] *See, e.g.*, Paul Brest, *Foreword: In Defense of the Anti-Discrimination Principle*, 90 HARV. L. REV. 1, 10 (1976).

[12] Brown v. Bd. of Educ., 347 U.S. 483, 487 (1954).

[13] Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896).

[14] *Id. See generally* CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 3 (1987) (discussing *Plessy*'s legal history); Derrick Bell, *Revocable Rights and a Peoples' Faith:* Plessy*'s Past in Our Future*, 1 RUTGERS RACE & L. REV. 347 (1999) (observing that during times of economic crisis, black needs become vulnerable to compromise and sacrifice); Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996) (placing *Plessy* dissent into context of Justice Harlan's decisions in Chinese exclusion and citizenship cases); Lisa M. Fairfax, *The Silent Resurrection of* Plessy*: The Supreme Court's Acquiescence in the Resegregation of American's Schools*, 9 TEMP. POL. & CIV. RTS. L. REV. 1 (1999) (analyzing Supreme Court decisions contradicting *Brown* decision); Molly Townes O'Brien, *Justice John Marshall Harlan as Prophet: The* Plessy *Dissenter's Color Blind Constitution*, 6 WM. & MARY BILL RTS. J. 753 (1998) (attributing Harlan's *Plessy* dissent to his unflagging support of federalism); J. Clay Smith, Jr., *Exact Justice and the Spirit of Protest: The Case of* Plessy v. Ferguson *and the Black Lawyer*, 4 HOW. SCROLL SOC. JUST. REV. 1 (1999) (discussing role of black lawyers in bringing about justice in

segregated schools were constitutional as long as white and black schools were equal in terms of physical facilities and other tangible factors.[15] In *Brown*, however, the Court rejected the application of the *Plessy* doctrine. It reasoned that schools with equal tangible factors may not truly be equal for purposes of equal protection:

> There are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of these cases. We must look instead to the effects of segregation on public education.[16]

The Court then concluded that, even if black and white schools had equal tangible factors, racial segregation still impeded the learning of black schoolchildren.[17] It therefore held that laws requiring or permitting racial segregation in public schools violated the Equal Protection Clause of the Fourteenth Amendment.[18]

In declaring racial segregation in public schools unconstitutional, the Court's opinion focused narrowly on the relationship between racial segregation and equal educational opportunity. Throughout its opinion, the Court emphasized the importance of education in modern society. It associated a sound system of public education with citizenship and democracy. Education, the Court asserted, "is the very foundation of good citizenship. Today it is a principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[19] The Court then hinted at the fundamental nature of the right to education, declaring that once a state has provided for public education, access to that education "must be made available to all on equal terms."[20] The Court then asked whether the "segregation of children in public schools

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America); William M. Wiecek, *Civil Rights: Looking Back — Looking Forward: A Synoptic of United States Supreme Court Decisions Affecting the Rights of African-Americans, 1873-1940*, 4 BARRY L. REV. 21 (2003) (discussing history of civil rights cases that affected African Americans).

[15] *See* Sweatt v. Painter, 339 U.S. 629, 635-36 (1950) (holding black law school unconstitutional because it was separate but unequal to white law school).

[16] *Brown*, 347 U.S. at 492.

[17] *Id.* at 494.

[18] *Id.* at 495.

[19] *Id.* at 493.

[20] *Id.*

solely on the basis of race . . . deprive[d] the children of the minority group of equal educational opportunities?"[21] The Court affirmatively answered its own question: "We believe that it does."[22]

Once the *Brown* Court framed the issue as equal educational opportunity, it devoted the remainder of its opinion to examining how racial segregation in public schools denied black schoolchildren this equal opportunity.[23] That argument focused on the harmful psychological effects of racial segregation on segregated black schoolchildren.[24] Specifically, the Court emphasized the stigmatic harm that undermined their learning and education.[25] The Court quoted at length a district court decision that found that racial segregation had a detrimental psychological impact on black schoolchildren.[26] Then, in a famous passage, the Court asserted that, "[t]o separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[27] Based on its analysis of the severe stigmatic harm racial segregation inflicted on black schoolchildren, the Court concluded that "in the field of public education the doctrine of 'separate but equal' has no place."[28] "Separate educational facilities are inherently unequal,"[29] and, therefore, "segregation is a denial of equal protection of the laws."[30]

The Court's narrow focus on segregation's effects on equal educational opportunity has profoundly shaped the subsequent legal discourse on *Brown*'s meaning. To this day, debates over *Brown*'s substance focus on the soundness of the Court's reasoning regarding the harmful

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[21] *Id.*

[22] *Id.*

[23] *Id.* at 493-96.

[24] *Id.* at 493-504.

[25] *See generally* Kevin Brown, *The Road Not Taken in* Brown: *Recognizing the Dual Harm of Segregation*, 90 VA. L. REV. 1579 (2004); John D. Casais, *Ignoring the Harm: The Supreme Court, Stigmatic Injury, and the End of School Desegregation*, 14 B.C. THIRD WORLD L.J. 259 (1994); John Hart Ely, *If at First You Don't Succeed, Ignore the Question Next Time? Group Harm in* Brown v. Board of Education *and* Loving v. Virginia, 15 CONST. COMMENT. 215 (1998) (analyzing nature of stigmatic harm in *Brown* and *Loving*); Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275 (1972); Jeffrey J. Leech, *Busing as a Judicial Remedy: A Socio-Legal Reappraisal*, 6 INDIANA L. REV. 710 (1973).

[26] *Brown*, 347 U.S. at 494.

[27] *Id.*

[28] *Id.* at 495.

[29] *Id.*

[30] *Id.*

educational effects of racial segregation on black schoolchildren. *Brown*'s critics question whether racial segregation causes such psychological harm and whether integrated schools in fact provide black students with better educational opportunities. Justice Clarence Thomas, for example, has questioned whether integration actually promotes black schoolchildren's learning.[31] He suggests that there is an underlying assumption of black inferiority in the integrationist belief that they must to sit next to white children in order to become better students.[32] Critical race theorist Derrick Bell has even suggested that black children might have been better served had the Court required the equalization of school resources, rather than racial integration.[33]

Thus, the focus on *Brown*'s educational and pedagogical implications narrows our understanding of racial segregation. It diverts our attention away from how racial segregation in public schools concerns more than just education and race. In particular, *Brown*'s narrow focus on race and education prevents us from understanding racial segregation as antimiscegenation.

II. ANTIMISCEGENATION LAWS AND THE PRESERVATION OF WHITE RACIAL PURITY

In addition to the racial segregation of public schools, another fundamental aspect of Jim Crow society was the social and legal prohibition of interracial relationships and interracial marriages. Antimiscegenation laws in the United States date back to the colonial era.[34] Aimed at preserving the racial purity of the white race,[35] they prevented interracial couples from marrying and producing legitimate, racially mixed children.[36] Racially mixed children threatened white supremacy. A large number of such children would destabilize a system of racial apartheid premised on keeping social relations between whites

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[31] Missouri v. Jenkins, 515 U.S. 70, 114-38 (1995) (Thomas, J., concurring).

[32] *Id.*

[33] Derrick Bell, *supra* note 14, at 350-51.

[34] *See, e.g.*, Perez v. Sharp, 32 Cal. 2d 711, 747-48 (1948); RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE, 17-42 (2001); Judy Scales-Trent, *Racial Purity Laws in the United States and Nazi Germany: The Targeting Process*, 23 HUM. RTS. Q. 259, 272 (2001).

[35] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 7 (1967); Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955); Green v. State, 58 Ala. 190, 194 (1877); Scott v. State, 39 Ga. 321, 323 (1869); *cf.* State v. Jackson, 80 Mo. 175, 177 (1883).

[36] Scales-Trent, *supra* note 34, at 273.

and blacks separate and distinct.[37] A social system based on preserving white privilege and supremacy must maintain clear boundaries between white and nonwhite people.[38] Racially mixed children make it harder to preserve such racial boundaries.[39] Moreover, the fear of racially mixed children was rooted in eugenics-based beliefs that "'race crossing' produced forms of 'racial degeneration,' including infertility."[40]

These concerns were evident in the Virginia Supreme Court decision, *Naim v. Naim*,[41] which upheld the constitutionality of the state's prohibition against interracial marriage. Virginia's statute made it unlawful "for any white person in [that] state to marry any save a white person."[42] In *Naim*, a white woman sued to annul her marriage to her Chinese American husband.[43] Although both were Virginia residents, the couple had traveled to North Carolina to marry.[44] The statute, however, also prohibited Virginia residents from getting married in another state solely to avoid the antimiscegenation statute and did not consider such marriages legal in Virginia.[45] Subsequently, when the wife sought an annulment in the Virginia courts, she argued that the marriage was in contravention of the State's antimiscegenation statute and therefore void from its inception.[46]

The Virginia Supreme Court annulled the marriage and upheld the statute's constitutionality.[47] Moreover, the court explained the purpose behind the antimiscegenation law — preserving white racial purity — and affirmed its legitimacy.[48] It stated: "The preservation of racial integrity is the unquestioned policy of this State, and that it is sound and wholesome, cannot be gainsaid."[49] The court held that the Fourteenth Amendment permits states to enact legislation seeking to preserve racial integrity:

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[37] *Id.* at 271.

[38] *Id. See generally* IAN F. HANEY-LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (exploring social and, specifically, legal origins of white racial identity).

[39] Scales-Trent, *supra* note 34, at 273.

[40] *Id.*

[41] 87 S.E.2d 749 (Va. 1955).

[42] *Id.* at 750 (quoting VA. CODE ANN. §§ 20-54 (1960)).

[43] *Id.*

[44] *Id.*

[45] *Id.* at 751.

[46] *Id.* at 750-51.

[47] *Id.* at 755-56.

[48] *Id.*

[49] *Id.* at 751.

> We are unable to read in the Fourteenth Amendment to the Constitution . . . any words or any intendment which prohibit the State from enacting legislation to preserve the racial integrity of its citizens, or which denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens. We find there is no requirement that the State shall not legislate to prevent the obliteration of racial pride, but must permit the corruption of blood even though it weaken or destroy the quality of its citizenship. Both sacred and secular histories teach that nations and races have better advanced in human progress when they cultivated their own distinctive characteristics and culture and developed their own peculiar genius.[50]

The court emphasized the dangers that miscegenation posed for the white race and its racial purity. If a state permitted interracial marriages, mixed couples would reproduce and create a "mongrel breed of citizens," destroying white racial identity and corrupting the quality of the previously white citizenry.

Although this Virginia Supreme Court decision was challenged to the U.S. Supreme Court, the higher Court ultimately refused to hear the appeal, contending that the case failed to present a proper federal question.[51] However, *Naim* came to the Court in the year immediately following *Brown*. In all likelihood, the higher Court did not take the appeal largely because it did not want to address the politically incendiary issue of antimiscegenation.[52] It was too soon after the Court had taken the monumental step of striking down racial segregation in public schools.[53]

It was thirteen years after *Brown* when the U.S. Supreme Court finally held that antimiscegenation laws were unconstitutional.[54] In *Loving v. Virginia*, an interracial couple challenged the same Virginia statutory scheme at issue in *Naim*.[55] The statute made it a felony for a white person to intermarry with a "colored person"[56] and rendered void any marriage between "a white person and a colored person."[57] However, while the

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[50] *Id.* at 755-56.

[51] Naim v. Naim, 350 U.S. 985, 985 (1956).

[52] *See* Gregory Michael Dorr, *Principled Expediency: Eugenics, Naim v. Naim, and the Supreme Court*, 42 AM. J. LEGAL HIST. 119, 120 (1998).

[53] *Supra* note 52.

[54] Loving v. Virginia, 388 U.S. 1 (1967).

[55] *Id.* at 2-7.

[56] *Id.* at 4 (quoting VA. CODE ANN. §§ 20-59 (1960)).

[57] *Id.*; *see* VA. CODE ANN. §§ 20-57 (1960).

statute required that white persons marry only other white persons, it permitted marriages between persons of different nonwhite racial groups.[58] For example, it prohibited whites from marrying nonwhites, but permitted Asian Americans to intermarry with African Americans.

In a unanimous opinion, the Court struck down antimiscegenation laws for violating both the Equal Protection[59] and Due Process Clauses.[60] In its equal protection analysis, the Court stated that racial classifications are suspect, particularly in criminal statutes, and should be subject to rigorous judicial scrutiny.[61] The Court then outlined the modern strict scrutiny test and concluded that, for a racial classification to survive rigid judicial scrutiny, it "must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."[62] Since *Loving*, the Court has adopted the rule that a racial classification will survive heightened judicial scrutiny only if it is narrowly tailored to serving a compelling state interest.[63]

Applying "rigid scrutiny" in *Loving*, the Court examined Virginia's purported interest in prohibiting interracial marriages. It held that the state did not have any legitimate interest in enacting an antimiscegenation law.[64] In ascertaining Virginia's purpose in the law, the Court noted the Virginia Supreme Court's lower opinion's reference to *Naim v. Naim*.[65] The Court quoted several passages from the *Naim* decision asserting that Virginia legitimately sought to protect "'the racial integrity of citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride.'"[66] The Court, however, concluded that these stated justifications were "an endorsement of the doctrine of white supremacy" and not legitimate state interests.[67] Accordingly, the Court held that antimiscegenation laws violated equal protection because it was an illegitimate tool "designed to maintain White Supremacy."[68]

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[58] *Loving*, 388 U.S. at 12.
[59] *Id.*
[60] *Id.*
[61] *Id.* at 11.
[62] *Id.*
[63] *See, e.g.*, Johnson v. California, 125 S. Ct. 1141, 1146 (2005).
[64] *Loving*, 388 U.S. at 11.
[65] *Id.* at 7.
[66] *Id.* (quoting Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955)).
[67] *Id.*
[68] *Id.* at 11.

The Court also held that antimiscegenation laws violate substantive due process by infringing upon the fundamental right to marry.[69] It declared that "marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[70] Moreover, denying that fundamental right on the basis of race deprives "all of the State's citizens of liberty without due process of law."[71] The Court concluded that "[u]nder our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."[72]

In *Loving*, the Court ultimately declared antimiscegenation laws unconstitutional because they infringed upon the fundamental right to marry in order to maintain a social system based on white supremacy.[73] However, the opinion fails to connect antimiscegenation to racial segregation. A cursory reading of *Loving* and *Brown* thus suggests that there is no link between them beyond the fact that both deal with racial discrimination against blacks. For the Court, *Brown* is a case about race and education, and *Loving* is a case about race and marriage. However, these issues directly implicate each other. Racial segregation and antimiscegenation practices were ultimately designed to further the same goal: to preserve white racial purity and maintain a social system of white supremacy.

III. RACIAL SEGREGATION AND ANTIMISCEGENATION: WHAT *LOVING* HAS TO DO WITH *BROWN*

Although the *Brown* decision focused on the educational detriment of racial segregation in public schools, segregation did not operate only to impede the educational opportunities of black students. It also functioned as an antimiscegenation policy. Its underlying purpose was to prevent the formation of interracial relationships in public schools and so prevent interracial marriages.

Curiously, while much scholarship has been devoted to discussing *Loving* and *Brown*, very few law review articles analyze them jointly as cases dealing with antimiscegenation.[74] Although both cases are

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[69] *Id.* at 12.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* at 11.

[74] *See, e.g.*, United States v. Barber, 80 F.3d 964, 971-73 (4th Cir. 1996) (discussing *Loving* and *Naim* cases, and stating that purpose of such statutes was to protect racial purity); Robert A. Destro, *Law and the Politics of Marriage:* Loving v. Virginia *After 30 Years*

fundamentally about preserving white racial purity,[75] scholars distinctly view *Loving* as a case about race[76] and the right to marry[77] and *Brown* as a case about racial segregation in education.[78] While antimiscegenation laws have been critically examined as tools to promote "white racial purity," there has been little commentary likewise examining racial segregation in public schools as a tool to prevent the development of interracial marriages.[79]

Scholarly discussion of the antimiscegenation policies underlying racial segregation is lacking. This is partially because the *Brown* Court never considered racial purity as a state rationale for racially segregating public schools.[80] As discussed earlier, while the *Brown* Court argued at some length that racial segregation inflicted detrimental psychological harm on black schoolchildren, it did not inquire into the reason for racially segregating public schools. Why exactly did states force black

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Introduction, 47 CATH. U. L. REV. 1207, 1219-21 (1998) (stating purpose of law was preserving racial purity); J. Allen Douglas, *The "Most Valuable Sort of Property": Constructing White Identity in American Law, 1880-1940*, 40 SAN DIEGO L. REV. 881, 937 (2003); Ely, *supra* note 25, at 216 (articulating group-based harm theory that reconciles several major Supreme Court equal protection decisions); A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 2021-22 (1989) (giving comprehensive historical overview of miscegenation statutes); Scales-Trent, *supra* note 34, at 282-84 (noting that antimiscegenation laws prohibit marriage between members of different "races").

[75] *See* Rice v. Gong Lum, 104 So. 105, 108 (Miss. 1925).

[76] For articles discussing the equal protection analysis in *Loving*, see generally Allison Moore, Loving*'s Legacy: The Other Antidiscrimination Principles*, 34 HARV. C.R.-C.L. L. REV. 163 (1999) (arguing that true legacy of *Loving* is conception of antidiscrimination principle in which law's neutrality between individuals is not enough); Keith E. Sealing, *Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation*, 5 MICH. J. RACE & L. 559 (2000) (reviewing history of antimiscegenation statutes); Ronald Turner, *Were Separate-but-Equal and Antimiscegenation Laws Constitutional?: Applying Scalian Traditionalism to* Brown *and* Loving, 40 SAN DIEGO L. REV. 285 (2003) (applying Scalia's traditionalism to *Brown* and *Loving*).

[77] For articles discussing *Loving* as a case about the fundamental right to marry, see generally Margaret F. Brinig, *The Supreme Court's Impact on Marriage, 1967-90*, 41 HOW. L.J. 271 (1998) (discussing Supreme Court decisions on marriage from 60s to 90s); Robert F. Drinan, S.J., *The* Loving *Decision and the Freedom to Marry*, 29 OHIO ST. L.J. 358 (1968) (discussing Loving decision and right to marry); Mark Strasser, Loving, Bachr, *and the Right to Marry: On Legal Argumentation and Sophistical Rhetoric*, 24 NOVA. L. REV. 769 (2000) (discussing same sex marriage and constitutional rights); Lynn D. Wardle, Loving v. Virginia *and the Constitutional Right to Marry, 1790-1990*, 41 HOW. L.J. 289 (1998) (discussing same sex marriage and its constitutional issues in light of *Loving*).

[78] *See* Klarman, *supra* note 10, at 238-39.

[79] *See* Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 HARV. C.R.-C.L. L. REV. 255, 268 (2002) (discussing briefly racial segregation in public schools as tool to prevent development of interracial relationships).

[80] Brown v. Bd. of Educ., 347 U.S. 483, 483 (1954).

and white children to attend different schools? As it never mentioned any possible justifications for school segregation, the Court consequently never examined whether they were legitimate and justifiable. Instead, the Court focused its analysis solely on how racial segregation denied black children an equal educational opportunity.[81]

A. Rice v. Gong Lum

One case that explicitly discusses the rationale behind racial segregation in public schools is the Mississippi Supreme Court's decision in *Rice v. Gong Lum*.[82] Evident in this court's reasoning was that the prevention of interracial marriages and racial amalgamation was a fundamental policy underlying racial segregation in public schools. In *Gong Lum*, the court had to determine whether a Chinese American girl born in the United States should be required to attend the white public school or the black public school.[83] The Mississippi State Constitution required that public schools be segregated between whites and colored people.[84] The issue in *Gong Lum*, therefore, was whether a Chinese American student was white or colored under the Mississippi Constitution.[85] The Mississippi Supreme Court held that the Chinese American student was "colored" for constitutional purposes and that if she wanted to attend public school, she must attend the all black public school.[86]

In reaching its holding, the court relied on Mississippi's antimiscegenation statute to conclude that Chinese Americans should be considered "colored" for purposes of school segregation.[87] The antimiscegenation statute explicitly prohibited interracial marriage between whites and the "Mongolian race."[88] The court then explained the underlying purpose of both the segregation and antimiscegenation statutes:

> To all persons acquainted with the social conditions of this state and of the Southern states generally it is well known that it is the earnest desire of the white race to preserve its racial integrity and purity,

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[81] *Id.* at 492.

[82] Rice v. Gong Lum, 104 So. 105 (Miss. 1925).

[83] *Id.*

[84] *Id.* at 107 (quoting MISS. CONST. OF 1890, § 207).

[85] *Id.*

[86] *Id.* at 110.

[87] *Id.* at 108.

[88] *Id.*

> and to maintain the purity of the social relations as far as it can be done by law. It is known that the dominant purpose of the two sections of the Constitution of our state was to preserve the integrity and purity of the white race. When the public school system was being created it was intended that the white race should be separated from all other races.[89]

For the court, racially segregating public schools was a legitimate way to preserve white racial purity.[90] The court asserted: "Taking all of the provisions of the law together, it is manifest that it is the policy of this state to have and maintain separate schools and other places of association for the races so as to prevent race amalgamation."[91] Moreover, "[r]ace amalgamation has been frowned on by Southern civilization always, and our people have always been of the opinion that it was better for all races to preserve their racial purity."[92]

What did the Mississippi Supreme Court mean when it spoke of "race amalgamation"? The amalgamation of the races concerned more than members of different racial groups simply interacting together in schools and other places of association. The court's concern with preventing race amalgamation was ultimately about preventing the development of intimate sexual and romantic relationships between whites and nonwhites.[93] Unless schools were kept strictly segregated, white and colored students would have continuous and regular social contact with each other. This contact would erode notions of racial pride and racial consciousness among whites. Inevitably, intimate interracial relations would develop, inexorably leading to interracial marriage and the production of racially mixed children.

The Mississippi Supreme Court, unlike the *Brown* Court, did not mention any pedagogical rationales in discussing the policies underlying racial segregation in public schools.[94] Rather, the court only discussed the vital function that segregation of public schools played in preventing the later development of interracial marriages and thereby preserving the purity of the white race.[95] Thus, for the Mississippi Supreme Court, racial segregation in public schools did not primarily serve an educational function. Racial segregation in public schools served an

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[89] *Id.*

[90] *Id.*

[91] *Id.* at 110.

[92] *Id.*

[93] *Id.* at 108; *see also* Loving v. Virginia, 388 U.S. 1, 6-7 (1967).

[94] *Rice*, 104 So. at 110.

[95] *Id.*

antimiscegenation purpose: to prevent the formation of interracial relationships in order to preserve white racial purity and maintain white supremacy.[96]

B. Historical Attitudes Toward Racial Segregation

Historical evidence also suggests that the Mississippi Supreme Court was correct when it asserted:

> To all persons acquainted with the social conditions of this state and of the Southern states generally it is well known that it is the earnest desire of the white race to preserve its racial integrity and purity, and to maintain the purity of the social relations as far as it can be done by law.[97]

During the nineteenth and early twentieth centuries, whites throughout the United States viewed racial segregation in public schools as an important tool for ensuring the purity of the white race.[98] In 1860, the California state legislature passed a law which prohibited racial minority groups from attending school with white children.[99] A California newspaper printed an editorial piece supporting the segregation law, praising the law's ability to "keep our public schools free from the intrusion of the inferior races."[100] It emphasized the antimiscegenation purposes of racially segregating schoolchildren:

> If we are compelled to have Negroes and Chinamen among us, it is better, of course, that they should be educated. But teach them separately from our own children. Let us preserve our Caucasian blood pure. We want no mongrel race of moral and mental hybrids to people the mountains and valleys of California.[101]

Thus, the desire to racially segregate public schools was intrinsically linked with the desire to prevent the development of sexual relationships between whites and people of color. This would ultimately prevent

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[96] *Id.*

[97] *Id.* at 108.

[98] *See* Douglas, *supra note* 74, at 937 (discussing 19th century state laws requiring "absolute prohibition of racial intermixing in schools"); Herbert Ravenel Sass, *Mixed Schools and Mixed Blood*, 198 ATLANTIC MONTHLY 45, 48 (1956).

[99] *See* Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 ASIAN L.J. 181, 190 (1998).

[100] *Id.*

[101] *Id.*

interracial couples from creating a "mongrel race of moral and mental hybrids."[102]

School segregation was an important element in preserving white racial purity because of the vital role that schools play in socializing children. Schools not only impart knowledge, but also indoctrinate values and beliefs in impressionable young children. Moreover, during the course of a person's childhood, schooling is a significant aspect of life. A child will spend the majority of each year in school, being socialized not only through classroom teaching but also through interaction with his or her schoolmates. Accordingly, people feared the power of schools to break down racial beliefs among children and promote racial mixing.[103] As Professor Josephine Ross asserts: "In the segregated South, parents feared that their children would themselves 'fall prey' to interracial relationships as they grew into adolescents, thereby becoming impure themselves."[104]

Given that elementary level children are highly impressionable and subject to teachers' and peers' influence, white Southerners saw public schools as key social institutions for inculcating racial consciousness in whites and blacks.[105] White children and children of color needed to be taught at an early age that they should not mix or socialize.[106] The development of white racial consciousness through racially segregated schools ensured that white children grew up to maintain equal social relations only with other whites and not "fall prey" to interracial relationships.[107] Hence, white Southerners supported racially segregated public schools because they firmly believed that "the key to the schoolroom door is the key to the bedroom door."[108] Ironically, the importance of schools as social spaces for transmitting racial attitudes is reflected in the *Brown* Court's observation that "the socialization process of schooling can affect the hearts and minds of children in a way that cannot ever be undone."[109]

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[102] *Id.*

[103] *See* Sass, *supra* note 98, at 48.

[104] Ross, *supra* note 79, at 268.

[105] *See* Sass, *supra* note 98, at 48.

[106] *Id.*

[107] *Id.*

[108] Ross, *supra* note 79, at 268 (quoting CHARLES HERBERT STEMBER, SEXUAL RACISM: THE EMOTIONAL BARRIER TO AN INTEGRATED SOCIETY 15 (1976)).

[109] Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

Moreover, when *Brown* was decided, Southerners who immediately denounced the *Brown* decision understood that it had implications beyond the educational context.[110] They quickly protested the decision as the first step in a "social program for the amalgamation of the two races."[111] *The Daily News* of Jackson, Mississippi, reacted to Brown with similar fears: "White and Negro children in the same schools will lead to miscegenation. Miscegenation leads to mixed marriages and mixed marriages lead to mongrelization of the human race."[112]

Understanding the fierce Southern resistance to racially integrating schools requires acknowledgement that the battle involved more than children's formal education. Rather, at the heart of this fierce resistance was the belief that racial segregation as a whole, and school segregation in particular, was the structural foundation for a way of life based on notions of white racial supremacy. As one Southern segregationist asserted, the object of racial segregation was to "prevent the two races from meeting on terms of social equality."[113] Southerners believed that "racial segregation [was] necessary to preserve racial integrity"[114] and therefore believed that racial integration in public schools was one of the greatest threats to that white racial purity.[115] The preservation of white supremacy depended on the preservation of racial segregation.[116]

C. *Racial Segregation as Antimiscegenation*

Once racial segregation in public schools is viewed as a tool to protect white racial purity and supremacy, the connection between racial segregation and antimiscegenation laws becomes clear. By preventing the early development of social relations between white and black schoolchildren, racially segregated public schools decreased the likelihood that such children would later consider dating and marrying each other. Antimiscegenation laws may prohibit whites and blacks from marrying each other, but they cannot prevent the formation of the

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[110] *See* Sass, *supra* note 98, at 46–47; *see also* THEODORE G. BILBO, TAKE YOUR CHOICE: SEPARATION OR MONGRELIZATION 55 (1947) (arguing racial segregation necessary to preserve integrity of white race).

[111] Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1482 (2004).

[112] *Id.*

[113] BILBO, *supra* note 110, at 49.

[114] *Id.*

[115] *See* Rice v. Gong Lum, 104 So. 105, 110 (Miss. 1925); Sass, *supra* note 98, at 48.

[116] *See* BILBO, *supra* note 110, at 55 (arguing integration of races would mean "the southern white race, the Southern Caucasian, would be irretrievably doomed").

romantic connections that lead to the desire to intermarry. This was left to such mechanisms as racial segregation in the public schools and other places where interracial social relations could potentially develop. The segregation of public accommodations,[117] transportation,[118] restaurants,[119] beaches,[120] and swimming pools[121] can all be viewed as tools for eliminating sites of potential development of intimate interracial relations. For Southern segregationists, physical separation was absolutely critical to preventing the amalgamation of the races. "Unless the races are physically separated, [racial mixing] will continue until amalgamation has reached such a point that racial lines no longer exist."[122]

Understanding racial segregation in public schools as a tool for preserving white racial purity also helps contextualize its stigmatic harms.[123] The Court in *Brown* focused primarily on how racial segregation denied black schoolchildren equal educational opportunities by instilling in them a sense of racial inferiority and diminishing their ability to learn.[124] The Court, however, failed to recognize that this sense of inferiority also impeded the development of equal social relations between blacks and whites. Racial segregation not only taught black children that they were academically inferior to whites, but that they were *socially* inferior. As social inferiors, they did not deserve to develop equal intimate relations with whites.

Moreover, the Court failed to recognize that racial segregation reinforces white supremacy by teaching *white* children that blacks are intellectually and socially inferior to them.[125] Through racial segregation, white children were given the "subtlest form of human flattery — their

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[117] *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (racially segregated hotels).

[118] *See* Plessy v. Ferguson, 163 U.S. 537 (1896) (racially segregated railroad passenger cars).

[119] *See* Turner v. City of Memphis, 369 U.S. 350 (1962) (racially segregated public restaurants).

[120] *See* Dawson v. Baltimore, 220 F.2d 386 (4th Cir. 1955) (racially segregated public beaches and bathhouses).

[121] *See* Palmer v. Thompson, 403 U.S. 217 (1971) (racially segregated public swimming pools).

[122] BILBO, *supra* note 110, at 222.

[123] *See* MORAN, *supra* note 34, at 17-18 (discussing how antimiscegenation laws' were "used to establish norms about race" and effects of those norms on blacks and Asians, specifically "intense racialization and entrenched inequality.").

[124] Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

[125] *See id.* at 493-94 (lacking discussion of effect of racial segregation on white schoolchildren).

social superiority over masses of other human beings."[126] White children were taught from an early age that they should not develop equal intimate relations with blacks.[127] The racial segregation of public schools resulted in both races learning that they should not develop equal social relations with each other. It was thereby less likely that they would develop equal or intimate relationships as adults.[128] White racial purity was preserved by affecting the hearts and minds of white children as well as the hearts and minds of black children.

How racial segregation instilled a sense of inferiority in black children and a sense of superiority in white children, therefore, played a critical part in preserving a social system premised on white supremacy. In this system, whites maintained their racial purity, and the privileges, powers, and status that went along with their whiteness.[129] Racial segregation as an antimiscegenation tool was central to the maintenance of white supremacy.

IV. RE-CONCEPTUALIZING RACIAL SEGREGATION: RACIAL SEGREGATION AS GENDER SEGREGATION ON THE BASIS OF RACE

Clarifying the connection between racial segregation in public schools and laws prohibiting interracial marriage reveals how Jim Crow apartheid regulated both gender relations and race relations. Protecting white supremacy required preventing the development of interracial relationships and mixed-raced children. Accordingly, Jim Crow states strictly regulated intimate relations between *males and females* on the basis of their race. Jim Crow operated to keep white women from black men, and white men from black women. Therefore, the practice of physically separating the races can be understood, not just as "racial segregation," but as "gender segregation on the basis of race." Viewed this way, *Brown* involves more than just equal educational opportunity and race. Along with racial equality, it deals with issues of gender equality.

Essentialist language and language structure has helped obscure the *gendered* nature of racial segregation. When we use "race" as lens

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[126] Amii Larkin Barnard, *The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women's Fight Against Race and Gender Ideology 1892-1920*, 3 UCLA WOMEN'S L.J. 1, 2 (1993).

[127] *See* BILBO, *supra* note 110, at 49.

[128] *See* Ross, *supra* note 79, at 260-61 (discussing black men and women treated as sexual objects but not as potential marriage partners).

[129] *See* Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1752 (1993).

through which we analyze "racial segregation," the language of race inevitably narrows our focus. We concentrate solely on racial issues and divert our attention from gender issues. Taking an anti-essentialist linguistic approach to legal discourse helps uncover the relationships between race and gender. It can help scholars better understand the multidimensional nature of racial segregation in particular and racial subordination in general.

A. Essentialism and Anti-Essentialism

In Critical Race Feminist theory, "[e]ssentialism is the notion that there is a single woman's, or Black person's, or any other group's, experience that can be described independently from other aspects of the person — that there is an essence to that experience."[130] Essentialist beliefs about groups and group experience "assumes that the experience of being a member of the group under discussion is a stable one, one with a clear meaning, a meaning constant through time, space, and different historical, social, political, and personal contexts."[131] The problem with essentialist beliefs is that they limit our perspective on social reality. Making assumptions about an "essential woman's experience" tends to exclude the experiences of women who do not fit the characteristics of the "essential woman."[132]

In Critical Race Feminist theory, anti-essentialism is a tool for critiquing and deconstructing essentialist notions of racial and gender identity.[133] Anti-essentialism seeks to "define complex experiences as

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[130] Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 19 (1995).

[131] *Id.*

[132] *Id.* at 19-20.

[133] *See generally* Robert S. Chang & Natasha Fuller, *Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections Performing LatCrit*, 33 U.C. DAVIS L. REV. 1277 (2000) (introducing Sumi Cho and Robert Westley's analysis of anti-essentialist theory as it limits political organization as one dimension in an effective antisubordinationist praxis); Sumi Cho & Robert Westley, *Critical Race Coalitions: Key Movements that Performed the Theory*, 33 U.C. DAVIS L. REV. 1377 (2000) (arguing that anti-essentialist movement hinders political organization as it contributes to deconstruction of minority group to disunited individuals); Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629 (2002) (exploring possible effects of litigating from anti-essentialist standard rather than social constructionist standard in individual discrimination suit); Grillo, *supra* note 130, at 19; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990); Tracy E. Higgins, *Anti-Essentialism, Relativism and Human Rights*, 19 HARV. WOMEN'S L.J. 89 (1996) (suggesting that feminists must respond to anti-essentialist arguments as it relates to cultural differences while recognizing that global women's oppression takes many forms); Elizabeth M. Iglesias & Francisco Valdes, *Expanding Directions, Exploding Parameters: Culture and Nation in LatCrit*

closely to their full complexity as possible."[134] Anti-essentialism contends that people and experiences are too complex, dynamic, and historically and spatially situated to be thought of as possessing fixed and stable attributes.[135] Rather, anti-essentialism posits that categories such as "woman" and "black" or "Asian" are socially constructed categories and do not possess any essential or fundamental attributes.[136] Thus, Critical Race Feminists have criticized some feminist theories for being essentialist in that they reflect only the experiences of white, middle-class, heterosexual women when describing "the woman's" experience. As a result, these theories exclude and marginalize the experiences of women of color, lesbians, and poor women.[137]

B. Anti-Essentialist Linguistics[138]

Just as anti-essentialism is a tool for critiquing inadequate feminist theories, it is also a tool for examining language and language structures. It allows us to analyze how language shapes our understanding of law, legal discourse, and social reality. Anti-essentialism is concerned with the relationship between law, language, thought, and the social

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Coalitional Imagination, 5 MICH. J. RACE & L. 787 (2000) (advocating use of anti-essentialism in LatCrit theory); Elizabeth M. Iglesias, *Out of The Shadow: Marking Intersections In and Between Asian Pacific American Critical Legal Scholarship and Latino/o Critical Legal Theory*, 40 B.C. L. REV. 349, 374-77 (1998) (advocating use of anti-essentialism in joint collaboration between LatCrit and APACrit ventures); Elizabeth M. Iglesias & Francisco Valdes, *Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas*, 19 CHICANO-LATINO L. REV. 503 (1998) (urging LatCrit theorists to use anti-essentialist theory as it pertains to role of religion in Latina/o communities); Alisa D. Nave, *Feminist Legal Theory: An Anti-Essentialist Reader*, 19 BERKELEY WOMEN'S L.J. 313 (2004) (summarizing and reviewing anti-essentialism as advocated in collection of articles); Francisco Valdes, *Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience — RaceCrits , QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265 (1999) (outlining role that anti-essentialism has had for RaceCrits, QueerCrits, and LatCrits); Jane Wong, *The Antiessentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond*, 5 WM. & MARY J. WOMEN & L. 273 (1999) (studying law reform through dichotomy of essentialism and anti-essentialism as it pertains to feminist legal theory).

[134] Grillo, *supra* note 130, at 22.

[135] *See id.* at 19.

[136] *See* Harris, *supra* note 133, at 585.

[137] *See id.*

[138] I discuss the concept of an anti-essentialist linguistic analysis of law in greater depth in two other articles. *See* Reginald Oh, *A Critical Linguistic Analysis of Equal Protection Doctrine: Are Whites a Suspect Class?* 13 TEMP. POL. & CIV. RTS. L. REV. 583 (2004); Reginald Oh, *Discrimination and Distrust: A Critical Linguistic Analysis of the Discrimination Concept*, 7 U. PA. J. CONST. L. 837 (2005).

construction of reality.[139] The fundamental premise underlying an anti-essentialist approach to the study of law and language is that "the structure of a human being's language influences the manner in which he understands reality and behaves with respect to it."[140] The language we use to define certain experiences shapes our understanding of those experiences.[141] Thus, an anti-essentialist approach to law and language asserts that language structure reflects a view of the world and the nature of reality.[142] Therefore, changing the language we use to describe a social reality can transform our understanding of that social reality.[143]

Linguists contend that the English language reproduces an essentialist understanding of reality.[144] The English language embraces the view that things possess an essential or ultimate nature.[145] The essentialism underlying language presumes a static view of reality and the world.[146] If a thing has a property by virtue of its essential nature, then under an essentialist view, that thing will always possess that particular property or essence.[147]

On the other hand, an anti-essentialist approach to language takes a process-oriented approach to understanding reality.[148] Contrary to essentialism, it presumes that there is no "objective or essential" reality. Instead, it presumes that "reality" is socially constructed through an interaction between subject and object.[149] This approach to language presumes that words and categories are not objective, but rather are subjective, culturally contingent constructs that reflect, shape, and

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[139] BENJAMIN LEE WHORF, LANGUAGE, THOUGHT, AND REALITY 23, 59 (John B. Carrol ed., M.I.T. Press 1964) (1956).

[140] *Id.* at 23.

[141] ANATOL RAPOPORT, OPERATIONAL PHILOSOPHY: INTEGRATING KNOWLEDGE AND ACTION 235 (1969).

[142] *See, e.g.*, RICHARD BANDLER & JOHN GRINDER, THE STRUCTURE OF MAGIC: A BOOK ABOUT LANGUAGE AND THERAPY 21-22 (1975) (stating that humans use language to represent and model experience); WENDELL JOHNSON, PEOPLE IN QUANDARIES: THE SEMANTICS OF PERSONAL ADJUSTMENT 112-42 (1946) ("The relationship between language and reality is a *structural* relationship."). *See generally* S.I. HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION 156 (1978) ("But as we know from everyday experience, learning language is not simply a matter of learning words; it is a matter of correctly relating our words to the things and happenings for which they stand.").

[143] JOHNSON, *supra* note 142, at 28.

[144] *Id.* at 7.

[145] *Id.* at 6-10.

[146] *Id.* at 83.

[147] *Id.* at 121-22.

[148] *Id.* at 83.

[149] *Id.* at 144-45.

influence how we understand the world.[150]

To better understand how language can reduce our understanding of complex, interconnected systems into overly simple and reductionistic categories, it is necessary to explain two key premises of an anti-essentialist analysis of law and language.

The first premise to an anti-essentialist linguistic analysis is the principle of non-identity, which can be summed up in the statement, "A is *not* A."[151] In other words, the premise of non-identity states that there is a fundamental difference between a word and the object that word represents.[152] For example, we clearly understand that the word "hamburger" is something entirely different from the object "hamburger."[153] Thus, we do not eat a menu with the word "hamburger" printed on it because we know that would not be the same as actually biting into a hamburger.[154]

Once we understand that a word is fundamentally different than the object represented by the word, the fact that classification is a fundamentally subjective, not objective, process becomes clear.[155] As Anthony Amsterdam and Jerome Bruner assert: "To put something in a category is to assign it a meaning, to place it in a particular context of particular ideas."[156] When humans attempt to give meaning to objects by classifying them, political, psychological, epistemological, sociological, and ideological motivations inevitably underlie such a process.[157]

Thus, when we "classify" the act of physically separating black and white children as "racial segregation," the underlying essentialist presumption is that the term "racial segregation" objectively defines that real world practice. We implicitly assume that "racial segregation" is the only term that describes that practice. We confuse the term "racial segregation" with the historical experience we are describing with that term, thus violating the anti-essentialist principle that "A is *not* A." We forget that classifying is a subjective, not objective, experience.

Even though the act of naming is dependent on a subjective frame of reference, the abstract nature of classifying tends to mislead us into believing that categories or names are objective in nature. The reality is,

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[150] *Id.*

[151] *Id.* at 171-72.

[152] *Id.* at 177.

[153] *Id.*

[154] *Id.*

[155] ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 28 (2000).

[156] *Id.*

[157] *Id.*

however, that *someone* has to classify an experience or object into a category and that different people can classify a particular object differently. Thus, because of the inherently subjective nature of classifying or naming, sociologist Anselm Strauss contends that "[t]he way in which things are classed together reveals, graphically as well as symbolically, the perspectives of the classifier."[158] Similarly, Amsterdam and Bruner assert: "[C]ategorization is not only an act of *reference*, specifying what the thing in question is, but also an act of *sense making*, specifying how the category that includes this thing fits into our larger picture of the Shape of Things."[159]

To illustrate the subjective nature of classifying, Strauss provides the example of the Laplanders, a Swedish cultural group who use the same word to describe both people and reindeer.[160] From an "objective" point of view, a person might contend that the Laplanders are incorrect to call reindeer "people," since based on objective criteria, reindeer clearly are not human beings. Strauss argues that debating this is pointless. From an anti-essentialist perspective, there is no such thing as a right or wrong answer to the question whether a reindeer is really a person. Rather, the Laplander example illustrates the culturally contingent, subjective nature of classification.

> The life of the Laplander revolves around activities having to do with reindeer. Is a reindeer a human or is a human a reindeer? . . . [T]he people and the reindeer are identified, go together, and the very fact of their identification in terminology gives the anthropologist one of his best clues to the Laplander's ordering of the world and its objects.[161]

Finally, an anti-essentialist analysis of language is conscious of the way in which *words direct action and attention toward certain situations and objects*.[162] As Anselm Strauss asserts: "The naming of an object provides a direction for action."[163] For example, if one were to classify a person as a "liar," then one would likely treat anything uttered by the "liar" with skepticism and wariness. On the other hand, if one were to classify a person as an "honest man," one would likely treat anything uttered by

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[158] Anselm Strauss, *Language and Identity*, *in* THE PRODUCTION OF REALITY: ESSAYS AND READINGS IN SOCIAL PSYCHOLOGY 74 (Peter Kollock & Jodi O'Brien eds., 1994).

[159] AMSTERDAM & BRUNER, *supra* note 155, at 28-29.

[160] Strauss, *supra* note 158, at 74.

[161] *Id.*

[162] *Id.* at 73.

[163] *Id.* at 75.

the "honest man" with greater trust and open-mindedness. When we rename an object, person, or a situation, "[t]he renaming of any object, then, amounts to a reassessment of your relation to it, and ipso facto your behavior becomes changed along the line of your reassessment."[164]

An anti-essentialist analysis of law and language helps us better understand the full complexities of subordination. Specifically, an anti-essentialist linguistic analysis seeks to develop alternative names or classifications to describe certain experiences. These alternatives redirect our attention, allowing us to see the full complexity of the reality behind a word. Thus, renaming "racial segregation" helps us realize the multidimensional nature of racial segregation — particularly how racial segregation in public schools involves more than just race and education.

C. *An Anti-Essentialist Analysis of Racial Segregation Discourse*

As discussed earlier, racial segregation in public schools operated as an antimiscegenation tool by making it more difficult for white and black children to develop intimate relationships with one another. Once the connection between racial segregation and antimiscegenation is made, the gendered nature of racial segregation becomes clear. To function as an antimiscegenation tool, racial segregation had to divide children along both racial and gender lines. When a state segregated the white and black races, its specific goal was to separate (1) white women from black men and (2) white men from black women. The term "racial segregation," however, fails to capture the gendered sorting that occurs through segregation. Thus, armed with the anti-essentialist understanding that a word does not objectively describe a social practice, to fully describe how racial segregation also regulated gender relations, we could rename "racial segregation" as "gender segregation on the basis of race."

How does our analysis of racial segregation change when we think of it as gender segregation on the basis of race? Gender segregation on the basis of race means that all white males are kept apart from all black females and all white females are kept apart from all black males. Using the lens of race and gender, our attention shifts away from the purely racial aspects of segregation to how it also simultaneously structures relationships on the basis of gender. Physically separating males and females on the basis of their race prevented the development of social, romantic, or sexual relations between white men and black women and

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[164] *Id.*

between white women and black men. For racial segregation to operate as an antimiscegenation tool, it had to regulate whites and blacks along gender lines. The purpose of antimiscegenation was to prevent *men and women* of different races from marrying each other and producing racially mixed children. Thus, when viewing segregation through the lens of race and gender, we can more easily see that the regulation of gender relations was a critical and fundamental aspect of the regulation of race relations.

Analyzing Jim Crow segregation as gender segregation on the basis of race also raises avenues of inquiry that were shut out by thinking of segregation solely in racial terms. For example, under segregation, were the two types of interracial relationships treated and viewed in similar ways? Historical analysis suggests that Jim Crow segregation actually was a system primarily focused on preventing the development of intimate sexual relations between white women and black men, while covertly tolerating sexual relationships between white men and black women.[165] With regards to white women, racial segregation operated as a paternalistic restriction on their liberties. It sought to "protect" white women from "succumbing" to their sexual desires for black men.[166] With regard to black women, racial segregation was oppressive to the extent that it did not keep white men from having sexually exploitative and coercive relations with black women.[167] As Professor Ross asserts: "Southern laws were aimed at preventing black men from having sex with white women, but it was a one way ban that gave relatively free access to Southern white men to have sexual relations with black women."[168]

Jim Crow society's greater condemnation of white female-black male relations raises further questions regarding how racial segregation in public schools operated to reinforce gender-racial norms. How did all-white schools impart beliefs to their students about the harms and evils of interracial relationships, particularly white female-black male relationships? How did all-black schools impart to their students the taboos about interracial relationships? Thus, renaming racial segregation as gender segregation on the basis of race raises questions beyond those concerning the educational opportunities of black schoolchildren. It opens inquiries into how school segregation instilled racist norms about

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[165] *See* Ross, *supra* note 79, at 260.

[166] *See id.* at 268-69.

[167] *See id.* at 260.

[168] *Id.*

race, gender, and interracial relations in white and black schoolchildren.

Furthermore, if we continue to analyze segregation as a regulation of gender and race relations, we see that it also controlled how persons of the same sex interacted with each other on the basis of race. Thus, not only did racial segregation separate (1) white women from black men and (2) white men from black women, but it also separated (3) white men from black men and (4) white women from black women. Although it is not likely that Jim Crow laws were specifically aimed at regulating sexual relations between members of the same gender, one could argue that impeding same sex social relations across racial lines also reinforced white supremacy.

With regard to separating white and black men, perhaps the main purpose or effect of segregation was to prevent the formation of class consciousness between white and black men in similar economic situations. In analyzing the history of the South, commentators question why poor black and white men who shared similar economic interests did not join to form political coalitions. The answer given is that white racial consciousness trumped white class consciousness. Thus, poor white men disregarded their economic interests to keep political alliances with wealthy white men. Segregation may have reinforced white racial consciousness, socializing white men through segregated social practices to view black men as inferior, thereby decreasing the chances of these men building viable coalitions across racial lines.

With regard to the segregation of white from black women, the separation perhaps prevented the formation of a shared feminist consciousness. The social segregation of women also inculcated white women with notions of the inferiority of black women, making it harder for white women to see black women as having similar, gender-based interests. Thus, segregation under Jim Crow may have helped reinforce white patriarchal norms and prevented black and white women from understanding that they had shared interests in issues of woman's equality.

As long as segregation prevented the formation of equal social relations between whites and blacks along gender lines, it prevented the formation of new political consciousness and movements that could have challenged the hegemony of white supremacist and patriarchal social structures. However, it is difficult to raise questions about the multidimensional nature of segregation if segregation is understood solely in racial terms. Applying an anti-essentialist analysis to the language of racial discourse helps to show why we have failed to see that segregation regulates gender relations as part of regulating race

relations. We fail to recognize the gender implications of segregation because we use the term "race" to discuss Jim Crow apartheid and segregation. Using the term "race" focuses our attention solely on race relations issues, while diverting our attention from issues involving gender relations on the basis of race. The essentialism underlying our language structure tends to limit our perception of a phenomenon like racial segregation. We accept the single term "race" as describing the essence of that phenomenon. Once we label the separation of black and white schoolchildren into different school facilities as "racial segregation," we think of that process as being entirely about race, and therefore not about anything else.

CONCLUSION

Because we think of *Brown* as a case about racial segregation in public schools, our attention is directed to issues dealing with the regulation of race within the context of education. The categories of race and education, therefore, have made it difficult to see *Brown* as anything but a case about race and education. How does viewing racial segregation as gender segregation on the basis of race change our legal analysis of *Brown*? How does it affect issues of race, gender, and equal protection law in general? Answering these questions is beyond the scope of this Essay. The purpose of this Essay has been to start a dialogue on *Brown* as a case about race and gender and on the role of language in shaping our understanding of subordination. It has shown how an anti-essentialist linguistic analysis of legal discourse can help to reveal the fuller, more complex, and interconnected nature of systems of subordination. It has then begun to use then use this more complex understanding to rethink our legal doctrine on subordination.

Thus, this Essay calls on Critical Race Feminist scholars to think creatively about alternative language to describe systems of subordination — to help us to remain conscious of the interconnected and complex nature of subordination. Instead of talking about racial subordination or gender subordination, we can talk about racial-gender subordination. Instead of talking about racial segregation, we can talk about gender segregation on the basis of race or racial-gender segregation. We can then explore the implications of analyzing the issue using this new terminology.[169]

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[169] Of course, from an anti-essentialist standpoint, we can also rename "racial-gender segregation" and call it "racial-gender-class segregation," or "gender segregation on the basis of race and class." The point is, none of those names are the true or "essential" name

Although the analysis in this Essay is mostly of a historical nature, it is still relevant to understanding racial-gender subordination today. Structures of racial-gender segregation continue to exist in today's post-civil rights society.[170] An examination of how racial-gender segregation continues to subordinate men and women on the basis of race is also beyond the scope of this Essay. But that topic needs serious critical examination in the future.

for such a system of subordination. Rather, anti-essentialist analysis encourages scholars to come up with as many different alternative names as possible in order to derive more new insights into how subordination functions. All names can operate simultaneously, and we may strategically use alternative language for specific purposes.

[170] *See generally* DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: RESIDENTIAL SEGREGATION AND THE URBAN UNDERCLASS (1993) (arguing that racial segregation, particularly in black ghetto form, is key structural factor responsible for the perpetuation of black poverty in America).

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APA 6th ed.
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Chicago 7th ed.
Reginald Oh, "Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination," U.C. Davis Law Review 39, no. 3 (March 2006): 1321-1352

McGill Guide 9th ed.
Reginald Oh, "Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination" (2006) 39:3 UC Davis L Rev 1321.

MLA 8th ed.
Oh, Reginald. "Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination." U.C. Davis Law Review, vol. 39, no. 3, March 2006, p. 1321-1352. HeinOnline.

OSCOLA 4th ed.
Reginald Oh, 'Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination' (2006) 39 UC Davis L Rev 1321

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