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Katharine Franks Kyros
Using Marriage to Protect White Supremacy
and Heterosexual Privilege: A Historical
Analysis of Marriage Law in the United
States

This study tracks the ways that the regulation of marriage in the United States has been used to oppress populations and protect privilege, specifically focusing on racial and heterosexual privilege. Looking at the intersection of oppression with marriage law in the United States, the more specific concepts of othering, marginalization, and institutional discrimination are addressed. The United States had laws prohibiting interracial marriage in place from 1630 until these laws were declared unconstitutional by the US Supreme Court in 1967. Miscegenation laws were used to target and punish individuals engaging in relationships that threatened the social order. The exclusion of same-sex couples from marriage reinforces the image of the homosexual as an outsider, drawing upon a long history of marginalization and othering. Same-sex couples denied the right to legally marry face denial of inheritance of property and wealth, denial of hospital visitation rights, limits to adopting or gaining custody of children, as well as roughly 1,135 other rights afforded to heterosexual married couples. Examining the implication of marital law in civil rights infringements and broader social oppression from a historical perspective changes the way we must frame the current discussion around same-sex marriage and marriage in general. The implications for professional Social Work are addressed.

Using Marriage to Protect White Supremacy and Heterosexual Privilege:
A Historical Analysis of Marriage Law in the United States

A project based upon an independent investigation,
submitted in partial fulfillment of the requirements
for the degree of Master of Social Work.

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2011

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Chapter I

Introduction

Marriage—A Tool of Oppression

Marriage has been called “the basic building block of our societal structure” (Maushart, 2002, p.7). Historian Nancy Cott (2000) succinctly observes that “marriage prescribes duties and dispenses privileges” (p. 2). Marriage laws have been used to set social and moral standards, to influence family structure, to determine the inheritance of economic privilege, immigration and citizenship status, and to shape racial relations and gender roles (Cott, 2000). In doing so they have conferred privileges on some groups while oppressing others. This study takes a historical look at the intersection of marriage law and oppression in the United States with a focus on race and sexual orientation.

Marriage has always been a malleable institution, responding to social pressures and political contexts. Stephanie Coontz (2005) points out that people across time have always been concerned with the changing nature of marriage, and this is no less true in the last century. She asserts in her extensive historical analysis that marriage has changed more in the past thirty years than it has in the last three thousand. In the United States marriage has a complicated history. In 1967, the United States Supreme Court declared laws restricting marriages across the color line unconstitutional, ending a restriction with a 276 year legacy. In 1996 President Bill Clinton signed the Defense of Marriage Act (DOMA) into law, which defined marriage as a union

between one man and one woman; effectively excluding same-sex relationships from the institution of marriage. The religious right has declared that there is currently a crisis of "family values," even as voices on the left are declaring marriage an outdated and oppressive institution to be done away with (Bennett & Ellison, 2010; Metz, 2004; Cossman, 2004; Brown, 2004).

Marriage is an intersection of our personal lives and the state.

In the last century racial relations in the United States can be tracked by looking at marriage laws and policy surrounding marriages across the color line. Correspondingly we can track both state and national views towards homosexuality by looking at laws and policy around same-sex marriage. Writer Andrew Sullivan (2004) succinctly states,

The same-sex marriage debate, indeed, is perhaps best not seen as some modern aberration in our particular culture wars but as yet another instance of how a particularly divisive social issue—this time the place of homosexuals in society—has collided once again with the social institution that defines for many people the most meaningful part of their lives (p. xxiii).

Defining Oppression

In this study, I have chosen to use the general term *oppression* to describe the process and experience of institutional discrimination as reflected by marriage laws. Traditionally this term has been used to describe an exercise of tyranny by a ruling group at the expense of the powerless (Young, 2000). Through the social movements of the 1960s in the United States the term has been expanded to describe the disadvantage and injustice that certain groups suffer due to structural power differentials in our everyday lives (Young, 2000). Feminist scholar Marilyn Frye (1983) describes individuals in oppressed groups as "caught between or among forces and

barriers which are so related to each other that jointly they restrain, restrict or prevent the... motion or mobility" (Frye, 1983). The concept of oppression can be broken down into five categories: exploitation, marginalization, powerlessness, cultural imperialism, and violence (Young, 2000, p.36). Institutional discrimination can be defined as the policies of a dominant group's institutions and "the behavior of individuals who control those institutions and implement policies that are intended to have a differential and/or harmful effect" on subjugated groups (Pincus, 2000, p.31)

Marginalization refers to the process by which a subjugated group is given less access or opportunity; be it economically, politically, or socially. Often this process is considered a symptom of a larger condition of structural oppression or exploitation by a body/bodies of power – it results in people operating literally at the margins of social and political power. Closely related to this is the concept of the Other. In its simplest psychological form, the Other is the not-self, or the opposite of the self. The concept of Othering has been used to describe the process by which a dominant group attributes undesirable characteristics to a subjugated group and uses this created truth as justification for exploitation and marginalization of that group. Othering occurs when a group in power defines a subjugated group, positioning them outside of what is deemed normal, or that which is naturalized. Political philosopher Iris Marion Young (2000) asserts that "the culturally dominated [Other] undergo a paradoxical oppression in that they are both marked out by stereotypes and at the same time rendered invisible" (p.45).

Focusing on evolving marriage policy provides a view of oppression and liberation touching on many identities. In a discussion the unique place marriage law holds in the broader context of discrimination, sociologist Peggy Pascoe (2009) writes "when societies decide who can and who can't legally marry, they determine who is and who isn't really part of the family"

(p. 2). Using marriage law as a lens to look at oppression gives an almost candid picture of widely held societal views. As Cott (2008) explains, "law and society stand in a circular relation: social demands put pressure on legal practices, while at the same time the law's public authority frames what people can envision for themselves and can conceivably demand" (p. 8).

Because the marital relationship, and the nuclear family that relationship is assumed to create are the foundation for society, it makes sense that the state would have an interest in determining who is allowed to be "legitimate" and who will be outside of that framework. But the right to marry is not solely a marker of social acceptance—the United States General Accounting Office issued a report in 2004 identifying 1,138 distinct benefits, rights and privileges connected to marital status. Davina Koulski's research found that there are an average of an additional 300 per state (Koulski, 2004, p.3).

Purpose of the Study

This study will track the ways that the regulation of marriage in the United States has been used to oppress populations and protect privilege, specifically racial and heterosexual privilege. Looking at the intersection of oppression with marriage law in the United States, the more specific concepts of othering, marginalization, and institutional discrimination in particular will be addressed. At the same time, change in marriage laws currently reflect a trend towards egalitarianism, which has been promoted by social justice movements since the beginning of the nation. This study will explore the history of social policy around the prohibition of inter-racial marriage in the United States and how it was used as a tool of oppression. It will also examine social policy governing same-sex marriage in the United States. In what ways was the struggle

leading up to interracial marriage similar to and different from the current struggle around same-sex marriage? What can professional social work learn from this?

Methodology

I investigated these questions by searching for records on marital policy and social trends and movements which have had bearing on the institution of marriage across time. I drew upon primary sources such as legal briefs, opinions of the court, courtroom transcripts, and state and federal laws, well as secondary reports and analyses. I tracked the legal limitations of marriage around race and sexual orientation and using that as a primary framework to structure this study.

Organization of the Report

Chapter Two will focus on law governing inter-racial marriage in the United States, beginning in 1691 and ending with the supreme court case that declared such laws unconstitutional in 1974. Chapter Three will introduce laws and policies surrounding same-sex marriage. Chapter Four will integrate the historical trends as well as discuss the current context of marriage policy. The historical and current role of professional social work will be discussed, as well as areas for future research.

Chapter II

The History of Marriage Across the Color Line in the United States

The purpose of this study is to explore the intersection of American marriage laws and oppression. This chapter will track laws restricting marriage across the color line through history, starting with the American colonies, and moving through the 1967 US Supreme Court case *Loving v. Virginia* in which anti-miscegenation laws were declared unconstitutional.

1630 to the 1930s

Marriage in the United States has always been regulated at the state level, and thus the laws pertaining to marriage across the color line have been state laws. There have been three attempts in Congress to add anti-miscegenation amendments to the United States Constitution. The first attempt was in 1871 when it was feared that the recently ratified Fourteenth Amendment would make anti-miscegenation laws unconstitutional (which it was not interpreted to do until 1967 in the case of *Loving v. Virginia*). The Fourteenth Amendment is one of the reconstruction amendments, containing the Citizenship Clause to overrule *Dred Scott v. Sanford* (1857) which set the precedent that African Americans could not be citizens; the Due Process Clause, which prohibits the state from denying life, liberty, or property; and the Equal Protection Clause requiring the state to provide equal protection for all citizens under the law. A constitutional amendment was proposed again in 1912 and 1913. In his introduction of the bill, Representative Seaborn Roddenbery of Georgia made reference to heavyweight boxing world

champion Jack Johnson, and his marriages and affairs with white women. In 1908 Jack Johnson became the first African American World Champion boxer. Johnson's victory over white opponents, and his marriages and affairs with white women sparked race riots (Gilmore, 1975, p.108). Roddenbery compared relationships between white women and black men to the enslavement of white women; predicting that, without a constitutional amendment making interracial marriage unconstitutional, another civil war would break out (Pascoe, 2009, p.167). All three attempts to amend the constitution failed.

The first reference to any restrictions on interracial relationships can be seen in 1630. Jamestown court records indicate a white man was "to be soundly whipt" for having sexual relations with a black woman (Zinn, 2003, p.30). Some hypothesize that Bacon's Rebellion in 1676 was a turning point in terms of racial segregation. Nathaniel Bacon led a rebellion against the Governor of the colony of Virginia charging him with being "negligent and wicked, treacherous and incapable," and characterizing "the Lawes and Taxes as unjust and oppressive" (Zinn, 2003, p.39). At the time of Bacon's Rebellion, most of the individuals in forced servitude were white and there was not a clear racial caste system. (Williams, 2010; Zinn, 2003) Bacon rallied support from the economically destitute, which included both white and black individuals. The armed rebellion can be characterized as both anti-aristocrat and anti-Native American, developing in the context of extreme economic desperation and increasing conflict with the local Native people. The rebellion was effectively crushed by the Virginia government, but certainly called attention that government's tenuous position. The Virginian government was afraid that "discontented whites would join black slaves to overthrow the existing order" (Zinn, 2003, p. 37). It declared that "white men were superior to black," men and enacting protective measures to ensure that this would not happen, mostly by creating the slave codes and requiring masters to

provide freed indentured white servants with food, money, and a gun when their time was up. The first explicit legal regulation of marriage based on race occurred in that context, in 1691 when the colony of Virginia enacted a law stating that any "white man or woman being free" who married an individual not deemed to be white also, would be banished from the colony (Zinn, 2003, p.31; Wallenstein, 2002; Pascoe, 2009). The restrictions on interracial marriages were part of a "divide and rule" tactic on the part of wealthy white landowners, creating and supporting the racial caste system in the United States.

After the institution of slavery was securely in place in the United States, less overt control was needed over racial segregation because the social hierarchy was so firmly codified. South Carolina, Alabama, Mississippi and Georgia had no state laws prohibiting interracial marriage during the antebellum years. This can probably be attributed to "slave codes" and a clear social hierarchy maintaining inequality. However with the end of the Civil War and emancipation, several southern states passed laws against white individuals marrying across the color line. At this time interracial marriages "represented the looming reality of 'social equality' between the races" (Cott, 2001, p.45). Violation of those laws had high penalties; in many cases a felony conviction. In Mississippi the penalty for interracial marriage was life imprisonment (Cott, 2001). It is important to note that all of the laws regulating marriage were framed around who could not marry white people. "These laws did not concern all mixed marriages. They aimed to keep the...*legitimate* white race unmixed—and thus only addressed marriages in which one party was white" (Cott, 2001, p.41).

The term *miscegenation* was coined during this time to refer to interracial relationships. It was first seen in an anonymous propaganda pamphlet titled, *Miscegenation: the Theory of Blending the Races* distributed in New York City in 1863. The pamphlet claimed to be based in

science, and endorsed a biological existence of race. *Miscegenation* quickly became a political buzzword.

This period of history, particularly in the south, was a time of great social upheaval. The Reconstruction Amendments (the Thirteenth, Fourteenth, and Fifteenth) were passed between 1865 and 1870, respectively outlawing slavery, establishing that African Americans had equal rights and protections under the law, and ensuring voting rights. At the same time "black codes" sprang up around the south, and the Ku Klux Klan was founded and gathered strength as a terrorist organization. Jim Crow laws began appearing in 1875—local and state laws which enforced segregation, circumventing the Fourteenth Amendment with the rationale of "separate but equal."

In 1872 in the Alabama Supreme Court minister James Burns was indicted for presiding over the marriage of an interracial couple, and thus violating Alabama law. In Burns' appeal, citing the U.S. Supreme Court's 1857 *Dred Scott* ruling, Justice Benjamin F. Safford ruled that the law violated the state constitution, the Civil Rights Act of 1866, and the Fourteenth Amendment (Wallenstein, 2002, p.73). Safford wrote,

"[M]arriage is a civil contract. The same right to make a contract as is enjoyed by white citizens, means the right to make any contract which a white citizen may make. The law intended to destroy the distinctions of race and color in respect to the rights secured by it" (Burns v. State, 1872).

The ruling did not reflect majority white public opinion at the time, but was grounded in Constitutional debate about "establishing comprehensive colorblindness in U.S. law," during discussions of post-war policies, civil rights acts, and the Fourteenth Amendment (Novkov, 2008, p.47). The court deliberating on *Burns* was Republican, and clearly part of the

reconstruction era. According to Novkov (2008), following the *Burns* ruling there was increased attention paid to the management of interracial intimacy and marriage in Alabama. Three subsequent court cases effectively undermined *Burns*—*Ford et al. v. State* in 1875, *Green v. State* in 1878, and *Hoover v. State* in 1878. By 1875, there had been a conservative shift in the court. In *Green* in particular, Attorney General John W. A. Sanford argued that the state had an interest in prohibiting interracial marriages and that *Burns* should be overruled (Wallenstein, 2002). With a different political climate in the court, and escalating racism in the sociopolitical climate outside the court, Justice Amos R. Manning delivered the *Green* verdict upholding anti-miscegenation laws and overturned *Burns* (Wallenstein, 2002). The court reasoned that when the 1866 Civil Rights Act was passed in Congress, several northern states had current laws prohibiting interracial marriage, and that these laws were never brought into the debate. Justice Manning went on to write that the Fourteenth Amendment did not apply to the case of interracial marriages because the laws punished each member of the interracial couple equally and so there was "no discrimination made in favor of the white person, either in the capacity to enter into such relation, or in the penalty" (*Green v. State*, 1878). This argument becomes one of the main legal defenses and justifications for laws banning interracial marriage when they were challenged as being discriminatory.

In 1883 the US Supreme Court heard *Pace v. Alabama*, which used the same equal application rationale as *Green v. State*—that miscegenation laws are considered to not be in conflict with the Fourteenth Amendment because the laws apply equally to both people in the interracial couple—to defend the constitutionality of anti-miscegenation laws. Ultimately, the legacy of *Pace v. Alabama* was that the Supreme Court determined "a law which punishes persons of each race in the same manner and to the same extent for its violation is not a

discrimination against either race, nor does it deny to any person the equal protection of the law" (Pace v. Alabama, 1883). In this case the *Burns* ruling was never mentioned, as it had been overturned with *Green*. The result was that "racial segregation in marriage and the family became just as central a part of American apartheid as did segregation on trains and in schools... no state had to answer to federal authority for what it chose to do regarding the law of race and marriage" (Wallenstein, 2002, p.120). *Pace* gave legal precedent for the "equal application rational."

Around this same period, in the 1880's, so called "miscegenation dramas" began appearing in newspapers. These sensationalized stories often depicted white women with men of color, and fueled public outrage towards interracial relationships. This social anxiety about the need to protect white women and fear of them partnering with men of color provided the context and support for legislators introducing even more restrictions to interracial marriage (Pascoe, 2009, p.93 & p.86) These were particularly popular on the West Coast, and fueling a burst of legislation there.

The 1880s were also the beginning of a major immigration wave in the United States. In 1875, the U.S. passed the Page Act (also known as the Asian Exclusion Act), barring Asian women from immigration which was followed in 1882 by the Chinese Exclusion Act, which was intended to stop all immigration from China for ten years. These discriminatory policies speak to the racial relations in the country at the time. Interestingly, while laws banning interracial marriage in the South specifically prohibit relationships between white and African American or Native American individuals, state laws out West focus on prohibiting relationships between white and Asian individuals. This is further evidence that these laws were designed primarily to protect white supremacy, regardless of the racialized group who were identified as a threat.

In 1888, the case of *Maynard v. Hill* went to the U.S. Supreme Court to determine whether a couple married in one state could divorce in another. This case wasn't actually directly about interracial marriage, yet it had huge implications for cases that followed. *Maynard v. Hill* established that states had the authority to regulate marriage, and that while contracts are considered valid across states due to Article IV, Section 1—the full faith and credit clause—marriage was not a contract covered by this clause. This case determined the "portability" or marriage across state lines—states could choose whether or not to recognize marriages performed in other states – and established that each state had the authority to determine a unique law of marriage.

Pascoe (2009) points out that, despite the increase in legislation prohibiting marriage across the color line, from the 1880s to the 1930s, many states did not have to rely on these laws—they were able to use existing laws which prohibited adultery, fornication, and/or "illicit" sex to prosecute couples. (Pascoe, 2009, p.135 & 252). During the 1920s, police in North Carolina arrested more than 200 couples each year on charges of generic sex-crimes. The racial make-up of these couples was not documented. While both interracial and same-race couples were arrested on these grounds, the racial make-up of the couple greatly influenced how they were dealt with in court. Same-race couples had the option of marrying to avoid criminal charges, while interracial couples were not afforded this privilege. These arrests speak to an attempt to control change that might threaten the social order of white supremacy. Pascoe (2009) states,

Only when a relationship became visible enough to threaten the public order or raise community eyebrows—when, in other words, couples might be accused of the "crime" of

coming to close to claiming the status of marriage and family life—were police likely to intervene (p.136).

Interracial marriage was also controlled through legal recognition of marital rights in probate court. So, while some couples were allowed to live essentially as if they were married, when questions of inheritance or property rights came into question miscegenation law could be used to deny widows, and occasionally children, rights. "In inheritance cases, miscegenation law offered disgruntled relatives, state officials, and creditors a powerful tool for taking property away" from women of color widowed by white men. (Pascoe, 2009, p.136). Pascoe (2009) estimates that inheritance cases account for one third of all instances where miscegenation law arose in state appellate courts. This is another example of marriage laws being used to maintain white supremacy. Miscegenation law was also used by spouses as an exit strategy which made people of color more vulnerable in marriage—by claiming that they had unwittingly married a person of another race, unhappy spouses could petition courts for annulment of their marriages (Pascoe, 2009).

In 1923, in a case that would go all the way to the Supreme Court, a teacher was convicted of teaching a child German in Nebraska, where it was illegal to teach children who hadn't passed 8th grade a foreign language. It is interesting that this case seems to indicate immigrant-related rather than miscegenation-related panic in Nebraska. What was remarkable about this case in relation to future cases around interracial marriage was that Justice McReynolds explicitly stated in the decision that the Fourteenth Amendment guarantees citizens the right to marry (Myer v. Nebraska, 1923). McReynolds wrote that the Fourteenth Amendment

without doubt... denotes not merely freedom from bodily restraint but also the right to the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and raise children, to worship God according to the dictates of his own conscience, and generally to enjoy these privileges long recognized at common law as essential to the orderly pursuit of happiness by free men (Myer v. Nebraska, 1923).

This articulated fundamental right to marry was noted by lawyers who would use it as precedent in future cases challenging anti-miscegenation laws.

1940s to 1967

In 1948, with the case of *Perez v. Sharp*, the California Supreme Court overturned its miscegenation law. It was the first time that such a law had been overturned since *Burns* in 1872. Judge Traynor stated that marriage was "something more than a civil contract subject to regulation by the state" and asserted that it was "a fundamental right of free men" (Perez v. Sharp, 1948). In this case, marriage went from being viewed as public to private. The court ruled that the state of California had no interest in preventing interracial marriage, and that the laws restricting marriage across the color line were in conflict with the state's constitution. Pascoe (2009) points to this case as the beginning of the end, so to speak, for miscegenation laws. She points out that before *Perez*, lawyers defending interracial couples in court were pleading for exceptions to well-established laws with little precedent for change. Afterward, however, lawyers were working with civil rights organizations, framing their cases to go before the U.S. Supreme Court, and attempting to question the "equal application" rationale (Pascoe, 2009). Six years later, the 1954 US Supreme Court ruling in *Brown v. The Board of Education*

was essential to destabilizing the interpretation of the Fourteenth Amendment around segregation and the fallacy of "separate but equal," declaring that segregation in schools is unconstitutional due to the Fourteenth Amendment.

In 1952, Ham Say Naim from China and Ruby Elaine Lamberth from Virginia went to North Carolina to get married. Virginia had laws explicitly prohibiting marriage between whites and Asians, but North Carolina's laws only prohibited marriage between whites and African Americans (Wallenstein, 2002). In 1953, Lamberth attempted to get her marriage annulled on the basis of Virginia's ban on interracial marriage. The marriage was annulled, but Naim appealed: his immigration status was based on his being married to a US citizen (Wallenstein, 2002, p.181). The case went to the Virginia Supreme Court in 1955. The court ruled unanimously against Mr. Naim. Justice Archibald Chapman Buchanan, in his delivery of the court's opinion, cited the Tenth Amendment protecting state's rights to govern marriage laws. Even though the Tenth Amendment had not stood up against the Fourteenth Amendment regarding education in *Brown v. Board of Education* just a year earlier in the US Supreme Court, Buchanan stated the "regulation of marriage" was "distinctly one of the rights guaranteed to the states" (Naim v. Naim, 1955). The case was appealed to the US Supreme Court but then kicked back to the Virginia courts due to "the record being insufficiently clear or complete to address the question" (Wallenstein, 2002, p.183).

The National Association for the Advancement of Colored People's Legal Defense Fund (NAACP-LDC) had been making significant gains in its campaign against segregation in the 1930s, 1940s, and 1950s. However, the LDC had been focusing primarily on segregation and discrimination in housing, employment and education, and anti-miscegenation laws seemed risky. The LDC feared that challenging anti-miscegenation laws would "bring down a firestorm

of criticism and possibly intimidate the Court of some of its justices" and that there was "a great likelihood of an unfavorable Appellate Court precedent" (NAACP-LDC quoted in Pascoe, 2009, p.202-203). At the same time the LDC acknowledged that the laws were unconstitutional and it would be wrong not to challenge them. The LDC chose to "duck, [the issues of miscegenation cases] artfully, if possible" (NAACP-LDC statement quoted in Pascoe, 2009, p.203).

In 1962, the NAACP's Legal Defense Fund took on the case of Connie Hoffman and Dewey McLaughlin, an interracial couple living together in Miami who were arrested for violating the state's laws against cohabitation, illicit sex, and miscegenation. The LDF lawyers focused less on what had been up until that point the traditional avenue for fighting anti-miscegenation laws—focusing on marriage as a fundamental right denied to interracial couples—and came from the broader context of the civil rights movement for racial integration (Pascoe, 2009) The US Supreme court did not address the issue of laws prohibiting interracial marriage, stating that the court had not reached "the question of the validity of the State's prohibition against interracial marriage or the sourness of the arguments rooted in the history of the Amendment" (McLaughlin v. Florida, 1964). The court upheld Florida's laws forbidding illicit sex on the basis of their being race-neutral, but declared Florida's law forbidding interracial couples from occupying the same room at night unconstitutional (McLaughlin v. Florida, 1964). The argument for this was that the law prohibiting any "negro man and white woman, or any white woman and negro man" to "habitually live in and occupy in the nighttime the same room" (McLaughlin v. Florida, 1964) was discriminatory because it targeted specific races. However, interracial couples in Florida (and many other states) were still denied the right to marry, and could still be charged with the theoretically race-neutral ban on illicit sex.

Though the case of *Loving v. Virginia* is most often cited as overturning all law restricting interracial marriage, *McLaughlin v. Florida* set the stage for the Lovings. The most important outcome of this case was that it overturned the *Pace v. Alabama* precedent set in 1883. "Every state that upheld its state miscegenation law... had cited Pace in doing so" (Pascoe, 2009, p.269). This is extremely important for the eventual overturn of laws restricting marriage across the color line, though it may now appear to have been somewhat inevitable. Pascoe (2009) states that, "over the course of the twentieth century, the *Pace* decision stood on increasingly shaky ground, and the commonsense conflation that sustained Justice Field's reasoning slowly eroded" (p.249). *McLaughlin* lined everything up for a case to challenge the constitutionality of miscegenation law across the country.

In 1958, Mildred and Richard Loving were arrested in their home. Residents of Virginia, they had gone to the District of Columbia to get married and had then moved in with Mildred Loving's parents (Wallenstein, 2002). Virginia had a law banning interracial marriage and refusing recognition of interracial marriages performed outside the state. Virginia also had a specific law prohibiting interracial couples from living together if they had left the state to get married (Wallenstein, 2002). The Lovings pled guilty and were given the option of having their sentence suspended for twenty-five years if they agreed to leave the state of Virginia. The Lovings moved to Washington DC, yet still wanted to move back to Virginia to be closer to family and the place they considered to be their home (Wallenstein, 2002). In 1963, while the Civil Rights Act of 1964 was being discussed in Congress, Mildred Loving wrote to Robert F. Kennedy, Attorney General of the United States, asking for assistance. Kennedy stated that there was nothing he could do for the couple, but suggested she contact the American Civil Liberties

Union (ACLU). Bernard S. Cohen and Phil Hirschkop of the ACLU took their case, and it was expected that it would go to the U.S. Supreme Court (Pascoe, 2009, p.275-276).

The case worked its way slowly through the Virginian court system, and eventually did make its way to the U.S. Supreme court. Several groups offered amicus briefs in support of the Loving's case, including the NAACP-LDF, the Japanese American Citizens' League (JACL), and a coalition of Catholic bishops. These briefs attacked the "scientific" rationale of race, appealed for colorblindness in law, and argued that anti-miscegenation laws violated the individual's religious freedom (Pascoe, 2009, p.279).

The Supreme Court came to a unanimous ruling that Virginia's miscegenation laws violated both the guarantee of equal protection, and denied the liberty to marry. Justice Earl Warren wrote,

the Fourteenth Amendment requires that the freedom to marry not be restricted by invidious racial discriminations. Under 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 (Loving v. Virginia, 1967).

In the ruling Warren also explicitly stated that miscegenation laws were "obviously an endorsement of the doctrine of White supremacy" (Loving v. Virginia, 1967).

Summary

It was not until 1967 that anti-miscegenation laws were overturned. It took more than 300 years for the United States to allow interracial marriages, and this landmark was not reached by an act of legislation in Congress, but rather by a Supreme Court ruling. Following *Loving* several states were reprimanded for failing to comply with the mandate (Novkov, 2008). It was

not until 1984 that the U.S. Supreme Court ruled in *Palmore v. Sidoti* that custody of a child could not be denied to a parent because that parent was involved in an interracial relationship. Further, it was not until 2000 that Alabama officially took miscegenation stipulations out of their state constitution (Mississippi and South Carolina removed their bans in 1987 and 1998 respectively) (Novkov, 2008; Wallenstein 2002). It is perhaps even more notable, that the ballot initiative to take miscegenation language out of the state constitution passed by a margin of only 60 percent of those who voted. There was a 66 percent voter turnout—higher than in the previous eight years, and the amendment failed in twenty-five counties (Novkov 2008, p. 277). Removing miscegenation laws from the Alabama State Constitution was purely symbolic as the laws were declared unconstitutional with *loving* and could not be enforced, but it is telling that there was such opposition to this symbolic act. Novkov (2008) points out that there was little public campaigning against this bill, yet "in the silence and privacy of their voting booths" a full 40 percent of those who voted opposed the symbolic amendment (p. 277).

Several of the court cases challenging miscegenation law discussed in this chapter build on one another, slowly setting legal precedent and chipping away at structural oppression. Miscegenation laws maintained white supremacy by reinforcing the social construction of race and a racial hierarchy. They prescribed a marginalized or "less than" status to people of color, enforcing segregation, as well as denying property and inheritance rights.

The next chapter will look at the current debate around legalizing same-sex marriage in the United States.

Chapter III

The History of Same-Sex Marriage in the United States

Continuing with our exploration of the intersection of marriage law and oppression, this Chapter will track laws restricting same-sex marriage through history, starting with the American colonies, and moving through to the present status.

1600s to 1900

All of the US colonies had laws against sodomy, also called "buggery" or "the crime against nature" (Eskridge, 2008). What these laws regulated was only vaguely defined and varied among the colonies, but was generally referring to anal sex between men and women, men and men, men and minors, or men and animals; as well as any sexual assault. The penalties for violating these laws were steep—primarily capital punishment. Some colonies prohibited sexual activity between women, labeled "unclean practices," or "lewd conduct," but most of these laws were taken off the books and there is no evidence of any colonial prosecutions for sexual behavior between women after 1649 (Eskridge, 2008, p.18).

Court records from the colonial period reveal fewer than ten executions related to sodomy, the majority involving either sexual assault or sex with animals (Eskridge, 2008, p.18). After independence, all original thirteen colonies and almost all new ones criminalized sodomy, though the focus of these laws moved consistently towards issues of consent. In the nineteenth century sodomy laws were primarily used to regulate sexual assault (Canaday, 2008). In his

expansive history of sodomy law in the United States, Eskridge reports that sodomy laws were not linked to homosexuals until the twentieth century. Indeed, the word "homosexual" did not even enter the English language until 1892; previously, while there was an understanding of certain sexual behaviors, the concept of a "homosexual person" had not entered into use (Eskridge, 2008, p.15).

The 20th Century

1900 – 1969.

In the first half of the Twentieth century homosexuality was considered criminal, deviant, and immoral. The Judeo/Christian view of homosexuality being sinful, and deeply shameful was pervasive. To be "out" meant rejection and exclusion from one's family, employment, community, and society at large. Lesbian, Gay, Bisexual, Transgender, Questioning, or Intersex (LGBTQI) individuals lived in the shadows, in fear of being discovered and the consequence of discovery. The fields of medicine and psychiatry did not help this picture. Gregory Herek (2009) at the University of California Davis suggests that psychoanalytic thinking in the early part of the twentieth century was partially responsible for the shift in conceptualizing homosexuality as pathological as well as criminal. Homosexuality was considered a Sociopathic Personality Disorder in the American Psychiatric Association's Diagnostic and Statistical Manual (DSM) published in 1952. Homosexuality was linked to pedophilia and bestiality. There was public fear of homosexuals, viewing them as either lewd immoral people who would lure innocent children into homosexuality or as sick contagious people who would infect others with their homosexuality.

In 1948, Alfred Kinsey published "Sexual Behavior in the Human Male," a study that revealed same-sex sexual activity to be more common than the dominant social, medical and political culture had assumed. Harry Hay founded the first sustained gay rights organization called the Mattachine Society in 1950. By the 1950s most major cities had underground GLBTQI communities. These underground communities on the fringes of society were vital to survival in a time where homosexuality was both criminalized and pathologized and meant certain expulsion from mainstream society.

During the 1950s, the interpretation and enforcement of sodomy laws shifted. Previously they had been used protectively; roughly 90% of sodomy-related arrests involved assaults of minors (Eskridge, 2008, p.77). Now, however, sodomy laws were linked to homosexuality and were being used against the increasingly visible LGBTQI population.

In 1962, as the American Law Institute developed the Model Penal Code to guide state lawmakers, laws prohibiting consensual sodomy began to be dropped, due to their generally unenforceable nature. Laws prohibiting the solicitation of sodomy, however, began to emerge, (Canaday, 2008) leading to a sharp increase in arrests of gay men engaging in consensual sexual behavior. The definition of sodomy was also expanded to include oral sex between partners of the same sex in some states (Eskridge, 2008). These laws were used to target LGBTQI individuals.

The Stonewall Riots – 1969.

The three-day Stonewall Riots in 1969 are often cited as a turning point in the gay rights movement. At this time police raids of gay bars and "gay friendly" establishments resulting in arrests and harassment were common occurrences. On June 27, 1969 the patrons at the

Stonewall Inn, a gay bar in Greenwich Village, New York, fought back against a routine police raid. This was a spontaneous "breaking point"—the resistance was not planned, but once it was underway, word spread through New York City fast and more protestors joined the fray. Signs of "gay power" were carried and a Rockette-style chorus line chanted protest slogans. The crowd returned night after night and continued to protest in the neighborhood around the bar. This highly publicized act of resistance served to mobilize the movement. At this time LGBTQI individuals were not asking for the right to marry, they were simply fighting for the right to exist openly as themselves, without having to hide, and without persecution. Other progressive social movements such as the Civil Rights Movement and the Women's Movement provided a context for visible social change.

1970 to 1990s.

The first stirring towards legalizing same-sex marriage also occurred in the late 1960s and early 1970s. Buoyed by the recent US Supreme Court rulings around interracial marriage (*Loving v. Virginia*, *McLaughlin v. Florida*) in 1964 and 1967, several same-sex couples filed lawsuits fighting for the right to be married (Coontz, 2005), among them Richard John Baker and James Michael McConnell. Baker and McConnell sued the state of Minnesota's issuer of marriage licenses in 1972 (Wallenstein, 2002), but later lost both the trial and the appeal (*Baker v. Nelson*, 1972). In 1970, President Richard Nixon stated that he could understand interracial marriage but could not support the idea of same-sex marriage stating "I can't go that far—That's for the year 2000" (quoted in Coontz, 2005, p.256). While Nixon was throwing out the year 2000 to evoke the distant future, his prediction was, ultimately, somewhat accurate.

The next legal marker on the road towards same-sex marriage occurred in 1986. At this point several states still had anti-sodomy laws. These laws, much like those prohibiting interracial sexual activity, could be used to target individuals in a discriminatory way. Overturning anti-sodomy laws would be the first step in legalizing same-sex marriage. After being arrested for violation of Georgia's sodomy law and then having his case dropped by the local district attorney, Michael Hardwick sued the attorney general of Georgia, Michael Bowers, claiming that Georgia's sodomy law was unconstitutional (Sullivan, 2004). The US Supreme Court case upheld the constitutionality of a Georgia law that criminalized consensual oral or anal sex between two individuals of the same sex, stating "the constitution does not confer a fundamental right upon homosexuals to engage in sodomy" (Bowers v. Hardwick, 1986). In Chief Justice Warren E. Burger's concurring opinion he stated that "to hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching" (Bowers v. Hardwick, 1986).

1990s to 2011.

The gay rights movement was well established by the 1990s. The media was beginning to portray gay and lesbian people in a more positive way. More people were coming out and more same-sex couples were openly living together. Discriminating against individuals based on sexual orientation in housing and employment was illegal. The movement towards the goal of legal same-sex marriage was becoming stronger in the LGBTQI community. Universities were developing "LGBT studies" courses and departments modeled after "women's studies," and professional journals were publishing studies on the injustices and oppression same-sex couples faced. Attention was being drawn to the rights and privileges that came with legal marriage such

as hospital visitation rights, adopting and fostering children, and inheriting property. All of this helped to humanize same-sex couples, presenting them as people and couples who were relatable.

Hawaii, 1993.

The first ruling in the country to shake the heteronormative view of marriage occurred in Hawaii in 1993. Three same-sex couples sued the state for denying them marriage licenses. Interestingly these couples sought but did not receive support from the American Civil Liberties Union or Lambda Legal. Both civil rights organizations felt that the time and place were not right to pursue same-sex marriage. The couples went to a private attorney who agreed to argue the case reportedly because "no other attorney was interested in the case" and his belief that "the couples were entitled to have their day in court" (Ball, 2010, p.166).

Just as issues of "morality" and "social values" got tangled up in the miscegenation cases, here too cases were weighed down and distracted from the civil rights at stake. The court clarified this case, stating

The precise question facing this court is whether we will extend the present boundaries of the fundamental right of marriage to include same-sex couples, or, put another way whether we will hold that same-sex couples possess a fundamental right to marry (Baehr v. Lewin, 1993).

The Hawaii Supreme Court ruled that the state's laws against same-sex marriage were in violation of the state's constitution.

In response to the defense that homosexuality was immoral, and thus same-sex marriage should not be legalized, the court responded

With all due respect to the Virginia courts of a bygone era (referring to *Jones*), we do not believe that trial judges are the ultimate authorities on the subject of Divine Will, and, as *Loving* amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order (Baehr v. Lewin, 1993).

The court went on to assert,

The result we reach today is in complete harmony with the *Loving* Court's observation that any state's powers to regulate marriage are subject to the constraints imposed by the constitutional right to the equal protection of the laws (Baehr v. Lewin, 1993).

However, the court did not mandate that the state begin issuing marriage licenses – rather, it issued a stay allowing the state to justify its position. In 1996, another trial judge determined that the state has no legitimate interest in denying same-sex couples the right to marry, but stayed the ruling pending further review by the Hawaii Supreme Court (Sullivan, 2004).

The backlash – The 1996 Defense of Marriage Act.

The precedents in Hawaii, and other legal challenges percolating in Alaska, Vermont, and Massachusetts, stirred up dialogue across the nation about the legalization of same-sex marriage. Activist groups sprang up on either side of the debate. Groups against same-sex marriage claimed that allowing same-sex partners to marry would destroy marriage. In May of 1996, Georgia Representative Bob Barr introduced the Defense of Marriage Act in the US House of Representatives (DOMA). The bill had two components: to define marriage for federal purposes as being exclusively a legal union between a man and a woman, and to free states from the obligation to recognize same-sex marriages performed in other states (1996 DOMA). Section three of The Defense of Marriage Act of 1996 represented the first time marriage was defined on

a federal level (Sullivan, 2004, p.205). DOMA states, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife" (1996 DOMA). DOMA's third section raises constitutional questions concerning animus towards a specific population.

Section two of DOMA grants states the right not to recognize same-sex marriages performed in other states. This was in conflict with the Full Faith and Credit Clause of Article IV in the United States Constitution, which obligates states to, among other things, honor contracts made in other states. It is through this clause that marriages from one state are honored in another. With the movement in Hawaii following *Baehr v. Lewin*, there was hope and fear (depending on one's view of same-sex marriage) that same-sex marriage would soon become legal in Hawaii; and that due to the Full Faith and Credit Clause, other states would have to honor those marriages. Section two of DOMA frees states from this constitutional obligation in regard to same-sex marriages (Sunstein, 1996). DOMA's second section raises constitutional questions concerning Congress' rights to limit or alter the Full Faith and Credit Clause in the particular case of marriage.

The Defense of Marriage Act of 1996 passed with a huge majority in both the house and the senate, and was signed into law by President Bill Clinton on September 21, 1996. Sullivan (2004) remarks on how quickly it passed in a Congress notable for its sluggishness in passing legislation. By 2000, thirty-five states had some legislation in place limiting the recognition of same-sex marriage, including Hawaii. (Cott, 2000, p.217).

Texas, 2003.

Two year after DOMA, on September 17, 1998, John Geddes Lawrence and Tyron Garner were arrested in Lawrence's apartment outside of Houston, Texas, for allegedly violating Texas' Homosexual Conduct law. This law considered individuals of the same sex engaging in "deviant sexual intercourse" to be punishable as a Class C misdemeanor (Lawrence v. Texas, 2003). The case wound through the Texas court system, and eventually landed in the US Supreme Court in 2003. The Supreme Court ruled 6-3 that laws prohibiting sodomy are unconstitutional, This overruling *Bowers v. Hardwick* (1986), and other similar state laws. Addressing the precedent that *Bowers* set, Justice Anthony Kennedy questioned the evidence given towards the assertion that homosexuality went against the values of "western civilization" (Lawrence v. Texas, 2003). The court held that "the intimate, adult consensual conduct at issue here was part of the liberty protected by... the Fourteenth Amendment's due process protections" (Lawrence v. Texas, 2003). Five of the justices held that the Texas Homosexual Conduct law violated due process guarantees, and Justice Sandra Day O'Conner asserted that it violated equal protection guarantees based on the law only targeting same-sex couples. The gay rights movement celebrated this as a major gain for the movement towards the decriminalization and acceptance of homosexuality. In his dissent, Justice Antonin Scalia suggested that this ruling could be used to extend marriage to same-sex couples (Lawrence v. Texas, 2003), and indeed, it added momentum to what many were beginning to see as the inevitable movement towards legalizing same-sex marriage.

Massachusetts, 2003.

As sodomy laws were being challenged in Texas, several same-sex couples sued the Massachusetts Department of Public Health after being denied marriage licenses. The case examined the constitutionality of denying same-sex couples the right of marriage within the state of Massachusetts. In its statement on the case, the Massachusetts Supreme Court declared, "We have recognized the long-standing statutory understanding, derived from the common law, that 'marriage' means the lawful union of a woman and a man. But that history cannot and does not foreclose the constitutional question" (Goodridge v. The Department of Public Health, 2003). The court acknowledged civil marriage as "a wholly secular institution" (Goodridge v. The Department of Public Health, 2003) dating back to colonial days. It stated that "the benefits accessible only by way of marriage license are enormous, touching nearly every aspect of life and death" (Goodridge v. The Department of Public Health, 2003); concluding that,

Extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities... We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same-sex violated the Massachusetts Constitution (Goodridge v. The Department of Public Health, 2003).

The state was given a period of 180 days to enact the ruling. During this time, the court was asked to give an advisory opinion as to whether the state could create a new legal status of "civil unions." The court ruled

Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status... The history of

our nation has demonstrated that separate is seldom, if ever, equal (Supreme Judicial Court of Massachusetts, 2004).

California, 2004.

Following *Lawrence v. Texas* and the legalization of same-sex marriage in Massachusetts, as well as pending legislation and court cases in other states, socially conservative President George W. Bush addressed marriage in his 2004 State of the Union Address. After praising President Clinton and the 1996 Congress for passing The Defense of Marriage Act, Bush went on to state

Activist judges, however, have begun redefining marriage by court order, without regard for the will of the people and their elected representatives. On an issue of such great consequence, the people's voice must be heard. If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process. Our nation must defend the sanctity of marriage (Bush, 2004, State of the Union Address).

Mayor Gavin Newsome of San Francisco, was reportedly so outraged by President Bush's statement that he directed city hall to begin issuing marriage licenses to same-sex couples on the grounds that to deny them the right to legally marry was in violation of the state's constitution (Coontz, 2005, p.273). This effectively began what continues to be a long and drawn-out battle around same-sex marriage in the state of California. Immediately, anti-same-sex marriage groups petitioned the courts to stop the city from issuing marriage licenses, and several court cases were filed on both sides of the issue (Chiang & Wildermuth, 2004). California Governor Arnold Schwarzenegger directed Attorney General Bill Lockyer "to take immediate steps to

obtain a definitive judicial resolution of this controversy" (Schwarzenegger, quoted in Chiang & Wildermuth, 2004). Lockyer issued a statement clarifying that, while his position as Attorney General required him to defend the state in these lawsuits, he did "not personally support policies that give lesser legal rights and responsibilities to committed same-sex couples" (Lockyer, quoted in Chiang & Wildermuth, 2004). The California Supreme Court determined that Mayor Newsome had been acting beyond his jurisdiction, and the approximately 4,000 marriage licenses that had been granted to same-sex couples were voided.

In 2008, the San Francisco Superior Court ruled on *In re Marriage Cases*, six consolidated cases challenging the constitutionality of denying same-sex couples the right to marry. The court determined that domestic partnerships were akin to second-class status, and that same-sex couples have the constitutional right to marry (*In re Marriage Cases*, 2008). Following this decision, same-sex couples in California were allowed to marry. On November 4, 2008 however, voters in California passed Proposition 8, also known as the California Marriage Protection Act, amending the state constitution to include the line "only marriage between a man and a woman is valid or recognized in California" (2008 California Marriage Protection Act). Ballot initiatives in California are enacted the day following voting, so on November 5th same-sex marriage became illegal in California. Prop 8 passed by 52% (L.A. Times, 2010). The campaigns for and against Prop 8 both raised an incredible amount of money—a good deal of it coming from out of state (Wildermuth, 2008; Moore, 2009).

The constitutionality of Proposition 8 was immediately challenged in court. On August 4, 2010, the United States District Court for the Northern District of California held

Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license. Because California has no interest in discriminating against

gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, the court concludes that Proposition 8 is unconstitutional (Perry v. Schwarzenegger, 2010).

Judge Vaughn R. Walker based his ruling on the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the US Constitution. Judge Walker stated, "race and gender restrictions shaped marriage during eras of race and gender inequality, but such restrictions were never part of the historical core of the institution of marriage" (Perry v. Schwarzenegger, 2010). As of the spring of 2011, there is a stay on the ruling pending appeal. Some expect that this case will go to the U.S. Supreme Court (L.A. Times, 2010).

Defense of Marriage Act challenged, 2009.

At the same time that Proposition 8 was gaining national attention, the 1996 Defense of Marriage Act was being challenged in court. In March 2009, Gay and Lesbian Advocates and Defenders (GLAD) filed a federal court challenge to the constitutionality of DOMA's definition of marriage as limited to a man and a woman, based on the Equal Protection Clause (Gill v. Office of Personnel Management, 2009). Judge Joseph L. Tauro heard the case. Four months later in July of 2009 Massachusetts Attorney General Martha Coakley filed a federal suit challenging the constitutionality of DOMA's section two. Coakley stated that Congress "overstepped its authority, undermined states' efforts to recognize marriages between same-sex couples, and codified an animus towards gay and lesbian people" (Massachusetts v. United States Department of Health and Human Services, 2009). In July of 2010, Judge Joseph L. Tauro delivered his summary judgment on both *Gill* and *Massachusetts* determining with *Gill* that section three of DOMA violates the Due Process Clause of the Fifth Amendment. In

Massachusetts, Tauro determined that section three of DOMA violates the Tenth Amendment. In February of 2011, President Barack Obama and Attorney General Eric Holder announced that the Justice Department would no longer be defending section three of DOMA, due to President Obama's decision that it was unconstitutional, but that the Obama administration would continue to enforce the law (Ambinder, 2011). On March 4, 2011 Speaker of the House John Boehner announced that he would be taking steps to defend article three in place of the Justice Department (Ambinder, 2011).

Summary -- The Present

As of 2010, only the states of Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire, and the District of Columbia recognize same-sex marriage. Same-sex marriage has appeared variously and consistently in the media, in legislation, and on ballots since *Baehr* in 1993, and remains solidly centered as California's *Perry v. Schwarzenegger* heads towards the U.S. Supreme Court, with the Obama administration refusing to defend DOMA in court. The LGBTQI movement has made great gains towards social acceptance and visibility, though Marginalization of GLBTQI individuals and same-sex couples varies greatly from region to region. Echoes of the past characterization of homosexuality as criminal and pathological and immoral are still heard in contemporary conservative rhetoric (Mason, 2011).

Anti-sodomy laws, initially used to punish assault, were primarily linked to homosexuality beginning in the 1950s; and along with laws prohibiting the solicitation of sodomy, were used to persecute GLBTQI individuals. These laws were declared unconstitutional by the US Supreme Court in 2003. Decriminalizing private sexual activity between same-sex partners was a huge victory for the GLBTQI community, as well as a

necessary legal step towards same-sex marriage. The fight for same-sex marriage has seen its gains in the courtroom, and its setbacks in the legislature.

Chapter IV

Discussion

The purpose of this study was to track the ways that the regulation of marriage in the United States has been used to oppress populations and protect privilege, specifically racial and heterosexual privilege. Looking at the intersection of oppression with marriage law in the United States, the more specific concepts of othering, marginalization, and institutional discrimination are addressed. This was done by exploring the history of social policy around the prohibition of inter-racial marriage in the United States and how it was used as a tool of oppression, and also examining social policy governing same-sex marriage in the United States. In what ways was the struggle leading up to interracial marriage similar to and different from the current struggle around same-sex marriage? What can professional social work learn from this? This Chapter presents a Summary and Analysis of Findings and discusses their implications for professional Social Work.

Summary and Analysis of Findings

Interracial Marriage

The United States had laws prohibiting interracial marriage in place from 1630 until these laws were declared unconstitutional by the US Supreme Court in 1967. Miscegenation laws were used to target and punish individuals engaging in relationships that threatened the social order.

In most states miscegenation laws carried a felony conviction. Often these laws existed in conjunction with laws prohibiting "illicit" sex. Same-race couples could escape the penalties of violating these laws by getting married but interracial couples could not, and faced fines and jail time, as well as incurring a criminal record. Miscegenation laws were used as a powerful tool to deny inheritance and property rights to children and women of color widowed by white men; state officials, creditors, and unhappy relatives could claim that the marriage had been invalid. In this way miscegenation laws were used to keep wealth and property from people of color. Even during times when these laws were only sporadically enforced they still hung in the air as a threat which could be used against people of color and whites engaging in relationships across the color line. Miscegenation laws created and maintained a structure of white supremacist institutional discrimination toward people of color by reinforcing the segregation and the marginalization of people of color; assuming a quality inherent in whiteness that should be kept socially and reproductively/biologically separate.

Miscegenation law was first successfully challenged in Alabama shortly after the Civil War in the progressive political context of Reconstruction. The *Burns* case was repeatedly undermined and eventually over-ruled just six years later by a more conservative court. Laws prohibiting marriage across the color line were not successfully challenged again in court until 1948 with *Perez v. Sharp* in California.

Important cultural shifts took place before lawsuits were successful in overturning miscegenation laws. The first were around the institution of marriage—marriage was established as a fundamental right 1923 in *Myer v. Nebraska*. *Perez* also marked a shift in the conceptualization of marriage; it was defined as a private contract or agreement between two consenting individuals, rather than the more traditional placement of marriage within the

public/social context. The second important cultural shift was around race relations in the US. The civil rights movement was growing and winning legal battles over segregation and discrimination in housing, education, and employment. Civil rights groups like the NAACP and the ACLU were initially reluctant to make overturning miscegenation laws part of their campaigns due to the "risky" nature of these cases. Interracial relationships were still quite stigmatized and there was a great deal of social resistance to challenging these laws. It took two US Supreme Court cases to effectively declare miscegenation laws unconstitutional—*McLaughlin v. Florida* in 1964 and *Loving v. Virginia* in 1967. While previous challenges to miscegenation law were fought looking for an exception to the well established rule, these two cases were fought from a civil rights perspective and questioned the "equal application rational" established in *Pace* 1883. *McLaughlin* overturned precedents allowing for the "equal application rational" establishing that this reasoning was not in line with the Fourteenth Amendment. Three years later *Loving* established that miscegenation laws violated both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.

The interpretation of the constitutionality of miscegenation laws was very much determined by social and political context. The progressive political climate of the Reconstruction Era surrounded the case *Burns v. State* where the Fourteenth Amendment and the Civil Rights Act of 1866 were interpreted to "destroy the distinctions of race and color in respect to the rights secured by it" (*Burns v. State*, 1872). As the sociopolitical climate of Reconstruction gave way to the Jim Crow Era, the interpretation of the Fourteenth Amendment changed. The "separate but equal" rational of segregation became the dominant reading. It was not until this was destabilized in 1954 with *Brown v. The Board of Education* that the

constitutionality of miscegenation laws was again questionable and could be challenged effectively in court.

Same-Sex Marriage

There is a long history of criminalization, pathologizing, and marginalization of GLBTQI individuals in the United States. Until well into the 1980s to be identified as a homosexual was to be cast to the fringes of society, framed as a criminal, immoral, mentally ill, and treated as contagious. GLBTQI individuals were estranged and rejected from families and faced discrimination in housing and employment. Unwelcome in society at large, underground gay, lesbian and transgender communities developed in metropolitan areas. Laws criminalizing sodomy and same-sex sexual activity or the solicitation of it were used to target and punish GLBTQI individuals. Police raids on restaurants and bars catering to the homosexual community were common.

Civil marriage in the United States carries both social and legal weight. Same-sex couples denied the right to legally marry face denial of inheritance of property and wealth, denial of hospital visitation rights, limits to adopting or gaining custody of children, as well as roughly 1,135 other rights afforded to heterosexual married couples. Socially the exclusion of same-sex couples from marriage reinforces the image of the homosexual as an outsider, drawing upon a long history of marginalization and othering.

The Gay Pride movement was essentially born in 1969 with a spontaneous uprising in response to a routine police raid of a gay bar in New York. Known now as the Stonewall Riots (or Stonewall Uprising), this community act of resistance was highly visible, bringing this marginalized and often invisible population out in force. The LGBTQI movement quickly

gained momentum and by the late 1980s had won legal anti-discrimination victories around housing, employment and healthcare. Overturning laws outlawing sodomy was the first step towards legalizing same-sex marriage. The first attempt to do this in the US Supreme Court (*Bowers v. Hardwick*) in 1986 failed. Feeling this was a major blow, civil rights organizations felt the time was not yet right to sue states for same-sex marriage rights in the early 1990s. Acting independently of these organizations three same-sex couples sued the state of Hawaii in 1993 for denying them marriage licenses. That launched what continues to be a volatile national struggle around same-sex marriage. The constitutionality of denying same-sex couples the right to marry was being challenged in court as conservative groups were sponsoring ballot initiatives to amend state constitutions changing the definition of marriage to exclude non-heterosexual couples. In 1996 the Defense of Marriage Act passed effectively amending the US Constitution to define marriage as being between a man and a woman, and allowing states the right to not acknowledge same-sex marriages performed in other states. In 2003, seventeen years after *Bowers* the sociopolitical climate had changed and when the constitutionality of criminalizing private consensual same-sex sexual activity was challenged in *Lawrence v. Texas* the laws were overturned. Almost simultaneously a lawsuit in Massachusetts resulted in Massachusetts being the first state in the union to legalize same-sex marriage. Following these gains, a conservative backlash resulted in state ballot initiatives around Defense of Marriage Amendments, the most visible battle being Proposition 8 in California in 2004. Over half of the states in the union adopted some sort of constitutional amendment limiting same-sex marriage. Currently five states and the District of Columbia recognize same-sex marriage. The Obama Administration has declared parts of DOMA unconstitutional and will not defend it in court, and California's Proposition 8 is making its way towards the Supreme Court. The GLBTQI movement has made

great strides towards social acceptance and visibility but individuals still face discrimination and marginalization, particularly in certain regions of the country.

The question of whether it is a violation of the Fourteenth Amendment to deny same-sex couples the right to marry, and all the rights that come with that, has been interpreted multiple ways since it was first questioned in 1972. The interpretation of the Amendment and the rights it guarantees is directly related to the sociopolitical climate outside the court. Because multiple states were being sued simultaneously for denying marriage licenses to same-sex couples, the differences in outcomes is particularly telling. For example, Massachusetts grants same-sex marriages and recognizes same-sex marriages performed in other states, while neighboring state New York does not grant same-sex marriages but recognizes those performed in other states.

Similarities and Differences

Similarities.

Both struggles against legal discrimination and marginalization through marriage regulation were fought within the judiciary system. Courts are required to address claims brought before them by citizens, and have the authority to strike down laws found to be inconsistent with the Constitution. For this reason, civil rights victories in the Judicial system are frequently hailed as a clear beginning in achieving greater social equality and recognition for subjugated/marginalized/oppressed groups (Ball, 2010). Indeed, in both of the struggles examined here, state legislatures and the Federal Congress were sources of opposition, acting with greater responsiveness to direct social pressure. That being said, Judges can be politically appointed and so while the judicial system is less influenced by direct social pressure, it still

exists in a context. Both the proponents of interracial marriage and same-sex marriage needed to have some campaign in civil society behind them before legal victories were won.

Both the struggle for same-sex marriage and interracial marriage were centered around the courts interpretation of the Fourteenth Amendment. In both cases we can see the changes in the interpretation of the amendment change with the sociopolitical climate across time.

The real analogy between the same-sex marriage and interracial marriage can be seen in both anti-sodomy laws, and in the constitutional amendments seeking to define marriage as heterosexual (also known as Defense of Marriage Acts). Julie Novkov (2008) believes that in these two arenas the state is trying to "reinvigorate civic and political culture with religious values connected to particular gender roles" (p.315). She links this closely to the debate of abortion in the United States which she also frames as "a struggle over worldviews and the meaning of gender" (p.315). Novkov states that in our current context heteronormativity is not being challenged in any substantial way, however, gender roles and values are. I argue that while heteronormativity has a strong hold in current American culture, the more widespread visibility and acceptance of GLBTQI individuals could be enough to prompt a reactive push. There was still an intensely hierarchical racial social order in the country after the civil war, yet the threat of radical social change prompted increasingly harsh legislation and social policy seen in the Jim Crow era. These Defense of Marriage Acts are an attempt to secure a social position which was until recently taken for granted. The name itself is telling—these amendments seek to "defend" heterosexual marriage from some un-named threat. It is safe to assume that this threat is an anticipated change in the social order.

Federal and state Defense of Marriage Acts are institutionalizing heterosexual supremacy. We currently have a heteronormative culture where heterosexual relationships (and

individuals identified as heterosexual) are privileged, and those deviating from this norm are marginalized, silenced, or "othered." However Defense of Marriage Acts go one step further to actively legislate against a group. These pieces of legislation and voter-initiatives are similar to the anti-miscegenation laws passed during the colonial days when the ruling class was beginning to construct the racial hierarchy, and later during reconstruction in the south when the social order was seemingly threatened. Defense of Marriage Acts are oppressive on a structural level.

Anti-sodomy laws, or laws which criminalized same-sex sexual activity, effectively operated much like laws criminalizing interracial intimacy did. Wallerstein (2002) observes that "miscegenation laws supplied standby powers that could be brought to bear as changing circumstances, or individual whim, seemed to require. Such standby authority could be used to...above all, enforce a system of caste" (p.4). The same could certainly be said for anti-sodomy laws, which similarly form a component of institutionalized oppression.

Differences.

When looking at the differences and similarities between the struggles for legal interracial marriage and legal same-sex marriage it can initially seem like comparing apples and oranges—race and sexual orientation, though both social markers/statuses which are used to place individuals in the social hierarchy they are historically quite different. The United States has a long and ugly history of oppressing both on the basis of race and sexual orientation. Some contemporary discussions happening around same-sex marriage are quick to invoke the interracial marriage analogy. Some of these degenerate into a competition, pitting racism against homophobia. I believe this is beside the point.

Interracial marriage was criminalized, while same-sex marriage just simply did not exist. While both have been actively legislated against, it is the criminalization of interracial marriage which is the biggest difference between the two struggles. Because of laws prohibiting "illicit sex" often times interracial couples could exist even outside of the institution of marriage. In our current sociopolitical context same-sex couples, while denied marriage, can in some regions of the country live together as a couple, particularly in areas with a strong GLBTQI community.

Conclusions and Implications for Professional Social Work

Examining the struggles to overturn miscegenation law and legalize same-sex marriage provides social workers with an opportunity to learn how to effect change. Both of these histories highlight the importance of the social and political context surrounding the fight. The same constitutional amendments have been interpreted differently at different times depending on the politics and social context of the court reading them. Social workers advocating for social change must be aware of the sociopolitical climate that they are operating in. Change happened in each case when there was a social movement supporting the lawsuits and advocating for the change.

Though there was some public support for both overturning miscegenation laws and legalizing same-sex marriage, both decisions were made before the majority of the populace wanted them to happen. This is the power of the judicial system, designed to check the more publicly responsive legislature. However, just as the sociopolitical climate is important to consider when advocating for social change, the political leanings of a particular court are also important to know. The 1986 case *Bowers v. Hardwick* challenging the constitutionality of

sodomy laws ended up being a setback for the GLBTQI movement. This case came before a conservative court before there was enough social support behind it.

Examining the implication of marital law in civil rights infringements and broader social oppression from a historical perspective changes the way we must frame the current discussion around same-sex marriage and marriage in general. While the conservative right posits an impending social threat to the institution of marriage requiring defense, an inspection of similar histories illuminates the reality marriage has always been a changing and evolving institution. The same panic that surrounded the conservative arguments for restricting marriage across the color line and prohibiting same-sex marriage was also present during the debates of legalizing birth control, or changing marital rape laws, or making men and women legal equals in marriage (Cott, 2000). Nancy F. Cott (2000), when discussing the 1996 congressional support for DOMA stated that legislators

voiced a tension that had been present ever since legislators began altering the terms of marriage in the 1840s with married women's property acts and new grounds for divorce. Legislators had jealously guarded their power, yet hardly wanted to admit that marriage was "state-conferred"—that they themselves, rather than nature or God, defined its outlines (p.219).

This historical perspective makes it clear that the institution of marriage is not going anywhere, and that we will continue to create it to reflect our social hierarchies and values. By reframing marriage as the continuously constructed and evolving social institution that it is, advocates for same-sex marriage can debunk the conservative rhetoric which currently is the dominant discourse around marriage.

Schools of Social Work can encourage students to examine the interaction of our public and private lives. The places where law and policy interact with our intimate lives and identities (such as marriage or sexual relations) have been sites of oppression resistant to social change. That there was such publicly silent and yet strong resistance to the symbolic act of removing the miscegenation language from the Alabama State Constitution in 2000 speaks to the hold these laws have. Heterosexual couples lose nothing when same-sex couples legally marry and yet there is a perceived threat. Further research is called for to investigate whether these laws and policies located closer to individual's identities are more resistant to social change.

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