

Why Same Sex Marriages Should Continue To Be Legal

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I want to address three reasons why same-sex marriages should continue to be legal in the United States: marriage as a basic human right, the relationship between law and religion, and the history of marriage as a changing institution,

1. MARRIAGE AS A BASIC HUMAN RIGHT

For those most directly involved, marriage is a long-term legal and public commitment to intertwine their lives, to share responsibilities, to share joy, and to share love--in good times and in bad times, or as traditional vows often put it, in sickness and in health. To link our lives with another's in the commitment of marriage is one of the most precious personal decisions we can make. To the rest of society, recognizing a loving relationship between two adults through the

institution of marriage is a fundamental way in which we recognize our mutual humanity with those individuals.

Those governments that have prohibited some consenting adults from marrying form a list of hatred and intolerance. Southern states refused to allow slaves to have legal marriages prior to the Civil War. Many of these same states prohibited interracial marriages from the 1680s until 1967 (when the Supreme Court struck down those laws). The Nazis outlawed marriages between Jews and "Aryan" Germans in the 1935 Nuremberg laws.

Opponents of marriage between slaves, between interracial couples, and between Jews and Germans were labeling them as less than human. They were declaring that their love was not deserving of the same recognition as the love of the members of the "superior" race. They denied those couples the basic human right of marriage.

The rationales used to justify prohibiting interracial marriages sound remarkably contemporary. According to historian Peggy Pascoe, there were five arguments commonly used by opponents of interracial marriage in America in the late nineteenth century. Three of those arguments are quite relevant to my topic. First, they defined "all interracial relationships (even longstanding, deeply committed

ones) as illicit sex” rather than loving relationships. Second “they insisted that interracial marriage was contrary to God's will.” Third, “they declared, over and over again, that interracial marriage was somehow ‘unnatural.’”¹

The parallels between the views of those who opposed interracial marriage and those who now oppose gay marriage seems obvious and was noted quite effectively by *Chicago Tribune* columnist Eric Zorn in 1996 when he took a series of statements denouncing interracial marriages from 1823 to 1964 and easily transformed them into contemporary denunciations of gay marriage.²

1. THE RELATIONSHIP BETWEEN LAW & RELIGION

What is “legal” is not necessarily “moral” for all people. We live in a pluralistic society with long constitutional tradition of separating church and state. For example, both Judaism and Islam forbid eating pork, yet we do not outlaw it. The Old Testament penalty for adultery,³ or cursing one’s parents was death.⁴ In the New Testament Jesus equated remarriage after divorce with adultery.⁵ As a society,

we neither execute children for cursing their parents nor prohibit divorced folks from remarrying.

Marriage within a religious tradition and as a celebration of a community of faith with friends and family, is not the same as marriage as a legal institution. You cannot be legally married without a marriage license, but you can be legally married by a justice of the peace. Those of us who support the rights of gays and lesbians to marry do not seek to force any religious denomination to perform same-sex marriages. We only want the same legal protections and rights for our friends, our relatives, or ourselves that heterosexual couples enjoy.

2. THE HISTORY OF MARRIAGE AS A CHANGING INSTITUTION

Marriage as a legal institution has changed considerably in Western Europe and the United States. Throughout much of our history, marriage was often "traditionally" defined as a union of two people of the same religion, or the same race, or as a relationship in which the female was simply the property of the male. With the rise of individualism and equality of all individuals, those "traditional"

elements have changed. Now we emphasize that marriage is matter of personal choice of each of the individuals involved, not their parents, their church, or their government. Let me give you some examples of how the "traditional" definition of marriage has changed.

- From the 5th to the 14th centuries, the Roman Catholic Church conducted special ceremonies to bless same-sex unions that were almost identical for those to bless heterosexual unions. At the very least, these were spiritual, if not sexual, unions.⁶
- In 1076 Pope Alexander II issued a decree prohibiting marriages between couples who were more closely related than 6th cousins.⁷
- In the 16th century servants and day laborers were not allowed to marry in Bavaria and Austria unless they had the permission of local political authorities. This law was not finally abolished in Austria until 1921.⁸

- From the 1690s until the 1870s “wife sale” a type of public self-divorce in which a woman with a rope around her neck was “sold” by husband to another man was common in rural and small-town England.⁹
- Marriage was strictly a civil and not an ecclesiastical ceremony for the Puritans in Massachusetts Bay from 1630 until 1686.¹⁰ They explicitly wanted marriage as a civil ceremony, not a church sacrament as it was in England.
- In the seventeenth century, the Pilgrims outlawed courtship of a daughter or a female servant unless consent was first obtained from parents or master.¹¹
- Until 1662 there was no penalty for interracial marriages in any of the British colonies in North America. In 1662 Virginia doubled the fine for fornication between interracial couples. In 1664 Maryland became the first colony to ban interracial marriages. By 1750 all southern colonies, plus

Massachusetts and Pennsylvania had enacted anti-miscegenation laws.¹²

- Under English common law, and in all American colonies and states until the middle of the 19th century, married women had no legal standing. They could not own property, sign contracts, or legally control any wages they might earn.¹³
- Informal marriage, self-marriage, or common law marriage was very frequent in backwoods areas of the United States until about 1750. They continued to be common in the South "well into the nineteenth century."¹⁴
- In 1833 the Chief Justice of Pennsylvania claimed that the "vast majority" of children born in the previous 50 years would be considered illegitimate if marriage laws were strictly enforced.¹⁵

- In 1848 New York became the first state to pass a Married Woman's Property Act, guaranteeing the right of married women to own property.¹⁶
- Throughout most of the 19th century, the minimum age of consent for sexual intercourse in most American states was 10 years old. In Delaware it was only 7 years old.¹⁷
- In 1871 in response to what he perceived as a threat from the Fourteenth Amendment's guarantee of "equal protection under the laws" Congressman Andrew King (D-Missouri) made the first attempt to prohibit interracial marriages with a constitutional amendment.¹⁸
- Between 1887 and 1948 thirty of the forty-eight states outlawed interracial marriages.¹⁹ These laws were not merely empty threats. For example, between 1883 and 1938 Alabama prosecuted 343 people for violating its anti-miscegenation laws.²⁰

- In 1913 Congressman Seaborn Roddenbery (D-Georgia), introduced a proposed constitutional amendment to outlaw interracial marriages because Jack Johnson, the Black heavyweight boxing champion had married a white woman the previous year.²¹
- In 1928 Senator Coleman Livingston Blease (D-South Carolina) introduced the final attempt to outlaw interracial marriages with a constitutional amendment.²²
- As late as 1930, twelve states allowed boys as young as 14 and girls as young as 12 to marry (with parental consent).²³
- As late as 1940 married women were not allowed to make a legal contract in twelve states.²⁴
- In 1948 California Supreme Court became the first state high court to declare a ban on interracial marriage unconstitutional.²⁵

- In 1958 in the first Gallup poll on interracial marriages 94% of non-Hispanic whites disapproved of them.²⁶
- In 1959 when Richard and Mildred Loving pleaded guilty to violating Virginia's anti-miscegenation law, they were sentenced to a year in jail, with the sentence suspended on the condition they leave the state and not return for 25 years. At their sentencing, Virginia lower court judge, Leon Bazile declared:

"Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with his arrangements there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."²⁷
- In a 1965 Gallup poll 42% of Northern whites and 72% of Southern whites supported outlawing interracial marriages.²⁸

- In January 1967 Mildred and Richard Loving received justice when the U.S. Supreme Court struck down state laws banning interracial marriage in *Loving v. Virginia*. In what can only be seen as a bizarre irony, just months earlier U.S. Solicitor General, and future (August 1967) Supreme Court Justice, Thurgood Marshall and his Asian wife were unable to purchase their dream house in Virginia because as in interracial couple they could not lawfully live together.²⁹
- As a result of the *Loving v. Virginia* decision, Virginia and fifteen other states had their anti-miscegenation laws declared unconstitutional.³⁰ Those states were: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and West Virginia. In the fifteen years prior to the decision, fourteen states had repealed their anti-miscegenation laws. Those fourteen states were: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, **North Dakota**, Oregon, South Dakota, Utah, and Wyoming.³¹

- Despite the overturning of these anti-miscegenation laws, 36.8% of Americans still favored outlawing interracial marriages in 1972. By 1998 only 10.6% of Americans still wanted such a law.³²
- On the other hand, whereas there were only 51,000 black-white married couples in 1960, there were 363,000 by 2000. In 1960 only 1.7 percent of married black Americans had a white partner, whereas 4.3 percent did in 2000.³³
- In a 2003 Gallup poll 70% of non-Hispanic whites approved of interracial marriages, as compared to 4% in 1958.³⁴
- In 1978 New York became the first state to outlaw rape in marriage. By 1990 only a total of ten states outlawed rape in marriage. In thirty-six states rape in marriage was a crime only in certain circumstances. In four states, rape in marriage was never a crime.³⁵

These examples, and there are more, clearly document that "traditional" marriage has not been an unchanging institution with unchanging definitions of who can marry and under what circumstances.

¹ Peggy Pascoe, "Why the Ugly Rhetoric Against Gay Marriage Is Familiar to this Historian of Miscegenation," History News Network, 4-19-04: News at Home, <http://hnn.us/articles/4708.html>

² Eric Zorn, "Marriage Issue Just as Plain as Black And White," The Chicago Tribune 19 May 1996.

³ Leviticus 20:10; Deuteronomy 22:22.

⁴ Leviticus 20:9.

⁵ Mark 10:11-12.

⁶ John Boswell, Same-Sex Unions in Premodern Europe, (New York: Villard Books, 1994), 185, 188-198, 240.

⁷ Jack Goody, The Development of the Family and Marriage in Europe, (New York: Cambridge University Press, 1983), 136-138.

⁸ Michael Mitterauer and Reinhard Sieder, The European Family: Patriarchy to Partnership from the Middle Ages to the Present (Chicago: University of Chicago Press, 1982), 123.

⁹ John R. Gillis, For Better, For Worse: British Marriages, 1600 to the Present, (New York: Oxford University Press, 1985), 211-217.

¹⁰ Edmund S. Morgan, The Puritan Family: Religion and Domestic Relations in Seventeenth Century New England. rev. ed. (New York: Harper & Row, 1966), 32.

¹¹ John Demos, A Little Commonwealth: Family Life in Plymouth Colony. (New York: Oxford University Press, 1970), 154.

¹² John D'Emilio and Estelle B. Freedman, Intimate Matters: A History of Sexuality in America, (New York: Harper & Row, 1988), 34-36.

¹³ Sara M. Evans, Born for Liberty: A History of Women in America, (New York: Free Press, 1989), 22.

¹⁴ Nancy Cott, Public Vows: A History of Marriage and Nation, (Cambridge: Harvard University Press, 2000), 30-32.

¹⁵ Cott, 39.

¹⁶ Evans, 94.

¹⁷ Morton Keller, Affairs of State: Public Life in Late Nineteenth Century America. (Cambridge, MA.: Belknap Press of Harvard University Press, 1977), 465.

¹⁸ Edward Stein, "Past and Present Proposed Amendments to the United States Constitution Regarding Marriage," *Issues in Legal Scholarship* Symposium: Single-Sex Marriage [2004], Article 1:16.

¹⁹ Stein, 16.

²⁰ Pascoe.

²¹ Nancy F. Cott, Public Vows : A History of Marriage and the Nation (Cambridge, Mass.: Harvard University Press, 2000), 163; Stein, 17-18.

²² Stein, 18.

²³ Steven Mintz and Susan Kellogg, Domestic Revolutions: A Social History of American Family Life, (New York: MacMillan, 1988), 126.

²⁴ Carl N. Degler, At Odds: Women and the Family in America from the Revolution to the Present, (New York: Oxford University Press, 1980), 333.

²⁵ Lambda Legal Defense and Education Fund, "Marriage Equality for Same-Sex Couples - A History" <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1067> 4/20/2004 12:07 PM.

²⁶ Jack Ludwig, "Acceptance of Interracial Marriage at Record High," Gallup Poll, June 1, 2004, <http://www.gallup.com/poll/content/default.aspx?ci=11836>.

²⁷ U.S. Supreme Court, *Loving V. Virginia*, 388 U.S. 1 (1967) http://caselaw.lp.findlaw.com/scripts/printer_friendly.pl?page=us/388/1.html ; Michael Lind, "Far from Heaven," *The Nation* 16 July 2003.

²⁸ Steve Sailer, "Is Love Colorblind? Public Opinion about Interracial Marriage," *National Review* 14 July 1997.

²⁹ Sailer.

³⁰ U.S. Supreme Court, *Loving V. Virginia*.

³¹ *Loving V. Virginia*, Footnote 5.

³² RACMAR, General Social Survey, National Opinion Research Center, University of Chicago, <http://webapp.icpsr.umich.edu/GSS/>.

³³ Lind.

³⁴ Ludwig.

³⁵ Jane Sherron De Hart and Linda K. Kerber, "Gender and The New Women's History," in Linda K. Kerber and Jane Sherron De Hart, eds. Women's America: Refocusing the Past, 4th ed. (New York: Oxford University Press, 1995), 13.