

Legalize Gay:

A Forty Year Fight For Rights in The United States

Christopher S. Browder

Durham Technical Community College

Author Note

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Abstract

For forty years, homosexuals have been fighting for their right to life, liberty, and the pursuit of happiness in the United States of America. With a focus on civil law, this paper examines the legal history of gay rights. It serves as a photograph of the current state of legal affairs affecting homosexuals in America. A look at each milestone of the gay rights movement is presented, starting with the 1969 Stonewall Riots. The conclusion of the author is that despite great triumphs, there is still much work to be done to secure equality for homosexual Americans.

The United States Declaration of Independence is famous for the enshrining that “all men are created equal” and that “life, liberty, and the pursuit of happiness” are “unalienable Rights.” However, the United States has a clear history of discrimination against homosexuals. In 1953, under executive order by President Eisenhower, homosexuality became a reason for termination from Federal employment. Eisenhower's order set the precedent for unrestricted brutality by police onto the homosexual community. That abuse ended in New York City on June 28, 1969 at the Stonewall Inn, when frustrated patrons fought for their life, liberty, and pursuit of happiness. The Stonewall Riots ushered in an era of gay activism, which won its first milestone when the American Psychological Association (APA) declassified homosexuality as a mental disorder in 1973. Over the next forty years, homosexuals overcame codified legal discrimination in the areas of sexual activity and relationship recognition in the United States, yet still face employment discrimination through the inaction of lawmakers.

The overturning of sodomy laws was a critical step in the restoration of dignity to gay men. Sodomy, a non-reproductive act of eroticism, had been against civil law since at least 1925, carrying criminal penalties for those convicted of engaging in it. While these laws were written to be applicable to men and women, it was most often only imposed on homosexual men. It is impossible for one to pursue happiness when the law permits others to discriminate, humiliate, and even threaten blackmail. As a result, most gay men were forced into the proverbial “closet” to protect themselves from society. Studies have been conducted to better understand the motivation for harassment towards gay men and the findings have largely been unanimous. In their study, Bahns & Branscombe (2011) concluded that, “It appears that participants were willing (and perhaps even eager) to offend a gay student just down the hall, when the legitimacy

of discrimination against gays had been affirmed” (p.394). Sodomy laws targeted gay men in particular, and legitimized their harassment and discrimination for decades. Whether or not the APA was aware, removing homosexuality from its *Diagnostic and Statistical Manual of Mental Disorders* laid the groundwork for the overturning of sodomy laws. The landmark case that did away with sodomy laws – and, in the bigger picture, laid the groundwork that discrimination of gay men isn't socially acceptable – was *Lawrence v. Texas* in 2003. In the ruling, Justice Kennedy stated that, “The State cannot demean their existence or control their destiny by making their private sexual conduct a crime” (*Lawrence v. Texas* 2003 p. 18). This decision set a number of precedents: first, the government could not control what occurred in your bedroom; Secondly, it would foster social acceptance towards gay individuals. The next milestone, a testament to the social acceptance of relationships forged between homosexuals, would come a decade after *Lawrence*.

Before the sodomy laws fell, homosexuals couples had attempted to legally marry and had been refused the right. Sodomy laws were often times cited as reasons to not permit the marriage, as well as religious doctrine stating that marriage should be between one male and one female. Under President Clinton, the United States enacted a legislative measure that ensured homosexuals would never have their relationships recognized by their Government with the passing of 1996's Defense of Marriage Act (DOMA). After the sodomy laws fell in 2003, Fingerhut, Riggle, & Rostosky (2011) noted that “between 2004 and 2008, voters in 26 states passed such [same-sex marriage] amendments, reflecting a new strategy by opponents of marriage rights for same-sex couples” (p. 228). These actions reinforced the notion that homosexuals are less than their heterosexual counterparts, which introduced the homosexual to

minority stress. Fingerhut, Riggle, & Rostosky (2011) defined minority stress as, "...experiences of discrimination, anticipation of rejection, concealment or disclosure of the stigmatized identity, and internalized negative views of the self as a result of the stigmatized identity" (p. 230). Not all states, however, have rushed to discriminate. The voters of New York changed the course of history in 2011 when they voted to allow same-sex marriage in their state. This actions aided Edith Windsor, the plaintiff in a lawsuit against the Federal Government over survivorship denial. Windsor's Canadian marriage to wife Thea Spyer was recognized at was at the State level but not at the federal level. This created a conflict that was resolved by the Supreme Court, which resulted in a domino effect across the nation. On June 26, 2013, Justice Kennedy handed down the majority opinion of the court:

What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution (US v. Windsor 2013).

With the ruling at hand, Windsor was awarded a \$363,000 refund from the Internal Revenue Service on the taxes she was forced to pay on inheritance of her late wife. More importantly, Circuit Courts were now able to rule challenges to state marriage bans – such as North Carolina Amendment One – as unconstitutional using *Windsor* as a precedent. A little over a year after the ruling in *Windsor*, on October 10, 2014, a ruling by the Tenth Circuit Court enabled same-sex couples to legally marry or have their out-of-state marriages recognized in North Carolina. Unfortunately, while one can be legally married, one face additional discrimination challenges in

states like North Carolina.

Life, liberty, and the pursuit of happiness all depend on ones ability to maintain employment. Like any other matter, employment has legal regulations to ensure fairness to all candidates and employees. The Civil Rights Act of 1964 included nondiscrimination protections in its Title VII clause that were limited to race, color, sex, religion or national origin. While this ensures that a woman can indeed be a fork lift driver, it does not always enable those it was set out to protect. Title VII does not include martial status, nor does it specifically protect sexual orientation. To address this, lawmakers have drafted legislation called ENDA: the Employment Non Discrimination Act. While the name is very straight forward, its text is anything but. Mary Ann Case, a Professor of Law at the University of Chicago, discussed the concerns of ENDA in a 2014 publication. Case (2014) states that, “The current version of ENDA seems, however, decidedly binary ... as currently framed, it serves no constituency well, neither those who fit this model nor those who diverge from it” (p. 1368). Case also comments on the religious exemption clause stating that:

ENDA has a built-in exemption for religious organizations ... The direct effect of this in itself would greatly diminish the number of employees who could benefit from the protections of ENDA ... the indirect signaling effects could be far worse, enshrining in law and in the understanding of legislators and citizens the notion that discrimination on the grounds of sexual orientation or gender identity (SOGI) is somehow more to be tolerated and accommodated than discrimination on other forbidden grounds (2014 p.1375)

Exemptions for religious organizations would seem to be required since we have a freedom of

religion under the Constitution. The problem is that the freedom of religion has already been abused by companies like Hobby Lobby to deny contraceptives to employees under the Patient Protection and Affordable Care Act of 2010. It is not unreasonable to believe that companies like Hobby Lobby would rather terminate their employees who marry a same-sex partner than extend their employment benefits. James Miller, executive director at the Lesbian, Gay, Bisexual, and Transgender (LGBT) Center of Raleigh stated that, "People are genuinely scared to tell their co-workers or bosses because they know that even though they can get legally married, by putting a picture of their partnership in their cube, they could be fired if the wrong person were to see it" (personal communication, November 4, 2014). But lawmakers are at a stalemate with updating the draft legislation, and the change in political power during the most recent Election will add to ENDA's delay.

This topic is ever evolving, which classifies this writing as a photograph of the current state. Currently, North Carolina House Speaker Thom Tillis and Senate President Phil Berger have appealed the Tenth Circuit ruling that overturned Amendment One. The Sixth Circuit has bucked the trend of the other Circuit Courts and overturned the lower Court decision to strike down marriage bans in Kentucky, Michigan, Ohio and Tennessee. This new conflict must be ruled on by the Supreme Court of the United States for a final say on the same-sex marriage debate. All of this among the ever changing scope of ENDA. Indeed, great progress has been made in regard to the homosexual's legal rights and protections over the past forty years. But, there is still a long way to go before the homosexual is considered equal under the law. Until that day comes, homosexuals will be in a state of confusion and chaos as their peers debate their right to life, liberty, and the pursuit of happiness.

References

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