

## **The Empire State and LGBT Criminal Law:**

### **Leading the Way to Progress under Lady Liberty's Rainbow**

**by Joshua Cruz**

Though it took centuries for practice to follow rhetoric, the United States was founded on the idea that every man is created equal. Thomas Jefferson, the man who wrote those words, also wrote a law in Virginia which would have sentenced convicted “sodomites” with castration. Unbelievably, this was a liberal gesture at the time, considering that Virginia, like New York, made sodomy an offense punishable by death (Canaday, 2008). Over time, however, Jefferson’s liberal language in the Declaration of Independence, plus the flexibility of our Constitution and our approach to judicial review, have allowed a legal requirement for equality to spread from educated, land-owning males to include all human beings that live, breathe and bleed.

Though the process started with Andrew Jackson’s populism towards non-landowners, the legal equality that New York’s LGBT community has utilized both in and outside the courtroom can be traced back to the 14<sup>th</sup> Amendment and the struggles of people of African descent in this country. It was their sacrifices and struggles that forced America to take the 14<sup>th</sup> Amendment seriously more than a century after it was written. Owing to this lineage, which helped overturn infamous Supreme Court cases like *Plessy v. Ferguson* (1896), women in this country gained a platform to fight for the right to vote and respect in the workplace. It is this history of civil rights law and politics that sets the context for the struggles of New York’s LGBT community over the past several decades, including the important topic of hate crimes legislation – a controversial means of integrating civil rights into statutory criminal law.

Civil rights – the legal pursuit of equality – remains difficult for our court system to handle because it is both a newer idea in the law (traditionally, civil liberties in defense of

“natural rights” were favored), and because *de facto* discrimination (unlike *de jure* segregation) is difficult to prove or counteract in court. Politically, it is America’s long and horrible history of violence towards women and minorities that has often provided the impetus for legislators and courts to eventually act. After all, it was Southern legislators and police officers who attacked peaceful civil rights protesters, or condoned these attacks – not to mention many condoning or actively donning Ku Klux Klan robes at night and enforcing a reign of violent terror. It is often only thanks to media coverage of such violence (and counter-protests like the Stonewall Rebellion) that governments eventually put equality into action.

LGBT rights are one of the “last frontiers” of equality in terms of a group that has had to wait longer than most to get their civil rights taken seriously. Internationally, there are currently 76 countries where homosexuality is criminalized, and not long ago the United States was among them. Fortunately, though, we as a nation have done an about face when it comes to criminal law in relation to LGBT Americans. New York is one of the states that has, over time and due to pressures like the Stonewall Rebellion, gone from enforcing laws criminalizing “lascivious, deviant behavior” to actually making criminal attacks against sexual minorities subject to harsher penalties.

From the criminalization of homosexuality, to the enactment and enforcement of hate crimes law, the struggle for Lesbian, Gay, Bisexual and Transgender civil rights has come a long way since the 1950’s when the pan started to simmer. The 1950’s was an era when – partially due to Cold War paranoia – the sexual proclivities of many perceived to be communists would be investigated, and any question of their sexuality could provide extra grounds for persecution or blackmail threats. Ironically, it was a reputedly gay man (J. Edgar Hoover) who led this charge of extrajudicial persecution, even while serving as our nation’s top law enforcement

officer. This is one way in which the media has certainly helped things, since Hoover would never have been able to get away with his (relatively) open lifestyle today while conducting such a campaign.

Under this climate, two gay rights organizations, The Mattachine Society and the Daughters of Bilitis, formed chapters in New York City. All of their meetings were held underground and kept top secret from the public. Their mission was the legalization of consensual Gay and Lesbian relationships. Every state in the nation had anti-sodomy laws on their books, strictly prohibiting Gay and Lesbian relationships, or what was referred to as “lascivious” behavior. Many of these laws dated back to British colonial days. Anyone participating in such behavior would be taken to jail. In 1903, it was our own NYPD who conducted the first recorded raid on a gay bathhouse. Twenty-six men were arrested and twelve brought to trial on sodomy charges; seven received sentences ranging from 4-to-20 years in prison (Duberman et al., 1989). Cross-dressing was also stigmatized and homosexuality was never even thought of in the media. It was actually *The New York Times*, in 1926, that was the first major publication to use the term “homosexuality” rather than something more pejorative (Fone, 2000). Homosexuality was classified as a mental illness, and this position would not be changed by the American Psychological Association until 1973.

In terms of criminal law, it would not be until 1961 that the first state, Illinois, would decriminalize sodomy. The next state to do so was Connecticut in 1969. For the times, this was actually significant movement on LGBT issues. Certainly, the liberal climate of the 1960’s began to free things up from the deeply conservative legacy of preceding decades. Slowly but surely the more liberal culture of the 1960’s opened up the conversation.

In New York State, however, laws were actually strengthened against homosexual, “deviant” activity, due to the advent of the World’s Fair in 1965. Mayor Robert F. Wagner did not want the city to earn a bad reputation while the eyes of the world were upon it. Gay parties were frequently raided by the NYPD, and the Liquor Authority had a law that the presence of even one “known homosexual” made an establishment “unruly” and “disorderly.” Serving a known homosexual in any establishment was against the law (Tirella, 2013).

In 1966, gay rights activists held a “sip-in” at the Julius bar on West 10<sup>th</sup> Street in Greenwich Village, in which they went in the bar, announced their homosexuality, and demanded that they be served a drink. When service was denied, they then filed a complaint with the city and won the battle, though more was to come before the tide of the war turned. On June 28, 1969, the Stonewall Inn, a popular but best kept secret gay bar, was raided by police officers. The patrons of the bar had decided that they had had enough. They were human beings and had the same right to party and be free to express themselves that everyone else had. They were tired of years of being oppressed, attacked, and profiled because of their sexual orientation or gender identity. Some threw bottles, a drag queen threw her shoe, others threw punches; not many are sure how it started, but soon a riot ensued. The fighting filled all of Christopher Street and actually lasted for three days. It did not receive much media attention; it was written off automatically because it was perceived as just a bunch of homosexuals fighting. Who was going to take a bunch of “pansies” and “gender benders” seriously? But regardless, this would be written down as a very important day in history and is now known as the “Stonewall Riots” (American Experience 2015).

The decade from 1970 to 1979 truly opened the door for LGBT Equality. On June 28, 1970, cities across the country – including New York and San Francisco – held marches for

“Christopher Street Liberation Day,” which could be considered as the first Gay Pride Parade. Gays, Lesbians, Bears, Transsexuals, Drag Queens, Pansexuals, Bisexuals, Gender Non-Conformists and their sympathizers marched from Christopher Street and 7<sup>th</sup> Avenue up Sixth Avenue all the way to 59<sup>th</sup> Street at Central Park. They displayed signs proclaiming their respective identity in public for the first time, with a sense of empowerment and self-determination. One by one the dominoes began to fall across the country. Anti-sodomy laws were trashed and anti-discrimination bills were proposed.

It was in 1977 that a hero to the movement, Harvey Milk, was elected to the San Francisco board of supervisors. This arguably provided a key catalyst for hate crimes legislation. Originally a New Yorker and as a gay man raised in Long Island, Milk’s first initiative was to pass an anti-discrimination bill in San Francisco that would protect sexual orientation. In 1978, Harvey Milk and Mayor Mascone were shot to death for their activism by another city supervisor named Dan White. This is arguably one the first high-profile hate crimes against an LGBT person, and an LGBT politician to be precise. The message was announced on the news by then-city supervisor Diane Feinstein, who is now the senior senator from California and a stark supporter of Queer Equality. When Dan White was acquitted on the murder charges, using the so-called “Twinkie Defense,” many rioted in the streets. The following year, 1979, saw the first-ever march on Washington for gay and lesbian rights. The conversation on LGBT rights was shifting and the climate of violence was receiving more attention and discussion from authorities and society.

In 1980, the New York Courts took the matter of homosexuality into their own hands. A New York State resident was criminally charged for participating in consensual sodomy. The accused person in question, Mr. Onofre, argued that such a law was unconstitutional and

appealed. The ultimate question boiled down to whether or not the Empire State really had a compelling reason or interest to prohibit such behaviors. Is this a crime that is detrimental to the safety and security of the people of New York? The court saw no such reason and scrapped the law in its final decision in 1980 (Leagle.com 2015). LGBT people in the state of New York could freely have relationships without fear of criminal charges now, right? Well, not quite.

In the case of *New York v. Uplinger* in 1984, two more were convicted under a companion statute. This time it was not for the act of engaging in “deviant” sexual intercourse, but simply for “cruising.” Cruising is the act of going to a popular hangout spot to meet people, and perhaps get to know them really well. But the law prohibited “loitering for the purpose of engaging in or soliciting immoral sexual acts.” The judge in this case swiftly dropped the charges when it became clear that this law was nothing but a companion law to the law that prohibited sodomy, which already had been declared unconstitutional (American Civil Liberties Union, 2015). It is a shame that the United States Supreme Court did not go down the same road in 1986 in the case of *Bowers v Hardwick*, in which the nation’s highest court defended the constitutionality of a sodomy prohibition in the state of Georgia, which would eventually be overturned two decades later. *Bowers v Hardwick* was a dismal embarrassment to the United States Supreme Court. It was the *Plessy v Ferguson* of gay rights. A reluctant Supreme Court, careful to avoid any controversies, decided not to make a move in the right direction on the constitutionality of state sodomy bans and decided, therefore, to continue condoning the culture of criminalization of LGBT people. One judge went even as far as to say that homosexuality was a “crime against nature.” Thus, many state legislatures began to repeal their statutes on their own.

During the close of the 20<sup>th</sup> century, the movement began to shift. It shifted away from a debate about whether two adult men or women could be together, but a debate about whether or not gay rights were the new frontier of civil rights. Included in this was a discussion whether there should be special penalties for violent crimes perpetrated due to a person's actual or perceived sexual orientation or gender identity. During the tenure of President George H.W. Bush, much research was devoted to the possible effects of hate crimes legislation. In 1989, Congress passed the Hate Crimes Statistics Act, which furthered research into hate crimes legislation. The 1990's showed slow but steady process on hate crimes legislation. But what would really shed light on the problem would be an event in 1998 in a small town in Wyoming.

Matthew Shepard is America's poster boy for anti-gay hate and violence. On a grim day in 1998, Shepard, a University of Wyoming student, was killed because of the fact that he was a gay man. Aaron McKinney and Russell Henderson had met Shepard at a bar. The two men took him out to the boondocks of Wyoming and proceeded to rob, pistol whip and murder Shepard in one of the most gruesome displays of hate our contemporary nation has seen. His body was left tied to a fence and was not found until almost a full day after the fact. He was pronounced dead at a local hospital. The fallout was a national news story that spread across the country like wildfire. The tale brought national attention to hate crimes. A hate crime law is a powerful statement to a community. Hate crimes are meant to instill fear in members of a particular community. It is a violent demonstration of hate and says that if you are a member of the community targeted, you are put on notice and should watch your back. That sentiment is what hate crimes legislation aims to make go away. But in the words of Christine Quinn, "We are never going away."

With the new millennium in its infant stages, on July 10, 2000, then-New York Governor George Pataki signed into law a measure that protected Gay and Lesbian New Yorkers from hate crimes. The distinct measure had been controversial because of its inclusion of the word “sexual orientation.” Many religious officials from across the state opposed any inclusion of Gay and Lesbian New Yorkers as a protected class. This would not be the first time the LGBT and religious communities had clashed. In the 1980’s, during the height of the AIDS crisis, many activists had infiltrated and interrupted mass at Saint Patrick’s Cathedral in order to shed light on the health crisis, which was mostly ignored by the church. In any case, the landmark law, like many LGBT issues, had been debated for over a decade, and Governor Pataki, a New York Republican, was the one who championed its success.

When the decision was handed down in 2003 by the United States Supreme Court in the case of *Lawrence v. Texas*, 13 states still had anti-sodomy laws on their books. The remaining statutes were struck down because of the argument that they violated the 14<sup>th</sup> Amendment. New York was not one of the states included, as they had legalized gay relationships in 1980 and further upheld that fact in 1984. After years of fighting, it was no longer constitutional to have laws that criminalized LGBT status. The overwhelming majority of the states that were still enforcing or had these laws on their books were in the Midwest and Deep South. Although it was a close 5-4 decision, the United States Supreme Court finally agreed that such laws violated the right to equal protection under the Constitution. The court was finally on the right side of history.

Our nation and our Empire State still have a long way to go when it comes to Lesbian, Gay, Bisexual and Transgender rights. We still need to pass GENDA in order to ensure the safety and security of Gender Non-Conforming New Yorkers. We have gone to many extremes



to seek equality for every community. We have gone through courts and legislatures, marches, protests and acts of civil disobedience. We have been through all of this just so that we can open our eyes and stretch out our arms to help our fellow humans, to ensure that we are looked at through the same eyes in the law. We are adjusting laws to changes in public opinion. The scope and interpretation of “every man is created equal” keeps growing and is being reinterpreted daily, so as we see members of our society going without the equal protection of the law, we act.

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