

Traveling While LGBT in the Current Legal Climate

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Introduction

The world is a conglomeration of ever-evolving diversity. Just as plants and animals evolve to live on a changing world, human beings and the laws that govern them must do the same. What might have once been frowned upon or even illegal, may now be commonplace. In the 1860s, an amendment to the United States Constitution formally ended the right to own slaves in the United States. Then, in the early 1900s, women finally gained the right to vote in elections after decades of inequality. If history has taught Americans (and the world) anything, it should be that no single person is any less of a human being because of any differences – race, sex, religion, or sexual orientation. Why, then, are same-sex couples (married or otherwise) not afforded the same rights and privileges as anyone else? The concept of same-sex marriage is relatively new to the United States and many other countries, hence there are still many misconceptions surrounding what liberties same-sex couples should be afforded in the legal system, namely in immigration proceedings. This paper will first provide a summarization of important key points in Lesbian, Gay, Bisexual, and Transgender (LGBT) history in the U.S. Additionally, the paper will utilize laws, legal articles, news stories, journal entries, interviews, and other sources to determine whether or not same-sex couples have a more difficult time, as compared to opposite-sex couples, in progressing through immigration proceedings or simply traveling, in general (and if so, why)?

LGBT History in the United States

The 1600s – 1700s

Being openly lesbian, gay, or bisexual was not always an option in America. In fact, many years ago, it was considered a crime and could even be punished by death or torture. In

1624, a man named Richard Cornish was executed in the state of Virginia for allegedly engaging in homosexual acts with a servant.¹ Then, nearly two (2) decades later, an Essex County, Massachusetts woman named Elizabeth Johnson (a maid) was whipped and fined for having “unseemly practices” with another maid. Exactly a decade later, Joseph Davis was fined for putting on women’s clothing and then publicly ridiculed in front of the community in Haverhill, New Hampshire.² In 1677, Nicholas Sension of Windsor, Connecticut was put on trial for sodomy, during which time the court found he had been openly gay for over 30 years.³ The last milestone in the 1600s was when Deborah Byar was fined and publicly humiliated in Massachusetts simply for wearing men’s clothing.⁴ Moving forward to the 1700s...In 1756, a Baptist minister named Steven Gorton was suspended from the ministry following accusations of lying in bed and having “unchaste behavior” with men. After confessing to the accusations, he was reinstated.⁵ In 1777, Thomas Jefferson made revisions to Virginia state law to reduce the punishment for sodomy from death to mutilation.⁶

The 1800s – Early 1900s

During the 1800s, things got a bit more interesting and pronounced. In 1863, Colonel Conrad of the 15th Missouri Regiment was made aware that two (2) people serving under his command were actually women – they disguised themselves as men in order to serve, along with hundreds of other women in the Civil War.⁷ Additionally, there are many reports of men and women from various Native American tribes (including the Sioux and Crow) having same-sex

¹ A Timeline of Lesbian, Gay, Bisexual, and Transgender History in the United States, (2003), <https://www.gsafewi.org/wp-content/uploads/US-LGBT-Timeline-UPDATED.pdf> (last visited May 17, 2018).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

relationships.⁸ In the 1900s, people began to speak out more and more, and in 1915, writer and political activist Emma Goldman traveled cross-country to defend lesbianism and homosexuality. This influenced many women who had been hiding their sexuality to share their stories.⁹ In spite of the advancements toward equality, in 1917 a United States immigration law was modified to include a ban on “persons with abnormal sexual instincts”¹⁰ – in other words, people who were considered psychopathic inferiors were barred from entering the country. Perhaps partially in response to the ban, Henry Gerber and partners founded the Society for Human Rights in 1924 – the first widely known gay rights organization. Almost 20 years later, in 1942, the U.S. Military began working with psychiatrists to develop guidelines and methods to recruiters to identify gay men so they could be excluded from military service.¹¹ Not so different than the Salem Witch Trials in the 1690s, the State Department began firing people suspected of being homosexual under President Truman’s National Security Loyalty Program in 1947.¹²

Mid-to-Late 1900s

In a landmark decision in 1962, Illinois became the very first state to allow consensual homosexual relations without fear of arrest or prosecution. In disagreement with the 1917 U.S. immigration law modification, the American Psychiatric Association formally declared that being homosexual was not a psychiatric disorder. In 1972, in the case of *Baker v. Nelson*, the Supreme Court of Minnesota ruled that marriage is limited to opposite-sex couples. Further, in 1975 the U.S. Civil Service Commission stopped barring homosexual people from obtaining government employment.¹³ Just seven (7) years later, in 1982, the state of Wisconsin passed a

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

civil rights bill which expressly prohibited any bias in housing, public accommodations, and employment based on sexual orientation.¹⁴ Four (4) years later, in *Bowers v. Hardwick*, the Supreme Court ruled that the U.S. Constitution provides individual states the authority to pass and enforce sodomy laws with homosexuals as the targets.¹⁵

The 1990s were truly a breaking-point in the fight for equality for Lesbian, Gay, and Bisexual (LGBT) people. In 1993, Minnesota passed a law banning transgender discrimination in any venue, and in 1995, President Bill Clinton issued an executive order which forbade the discrimination of security clearance applicants based on sexual orientation.¹⁶ In spite of the positive efforts toward equality, President Clinton still signed the 1996 Defense of Marriage Act, ensuring that if same-sex marriage ever became legal, they would not be eligible for federal benefits,¹⁷ such as tax breaks for “married filing jointly” on returns.

The 2000s

In the last two (2) decades, the United States has made leaps and bounds toward true, across-the-board equality among all citizens. Massachusetts exemplified this in 2004, when it passed a law legalizing same-sex marriage. It was the very first state to do so,¹⁸ and although other states had no obligation to honor the same-sex union from another state, it was still a significant stepping-stone. California followed suit behind Massachusetts, ruling that same-sex couples have the same constitutional right to marry as anyone else.¹⁹ Sodomy laws in the U.S. were lifted in 2003, under the U.S. Supreme Court ruling in *Lawrence v. Texas*, stating that they were unconstitutional.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

LGBT in Immigration Proceedings & Law

In the 1990s

In spite of the many improvements to federal and state laws in the United States related to LGBT equality, there are still certain stipulations which may negatively affect same-sex couples when traveling to and from abroad (whether obtaining a visa, applying for asylum, etc.). Looking back to the year 1990, the United States in addition to 13 other nations openly granted asylum to homosexual people. The groundbreaking case for asylum in the U.S. based on homosexuality was in 1989, when Fidel Armando Toboso-Alfonso claimed he was being persecuted in Cuba for being gay.²⁰ This is arguably due to the fear of being persecuted in their own country, which is a condition under the Universal Declaration of Human Rights that applies to “an identifiable group viewed by the government as a threat” or “a group sharing a common characteristic that is so fundamental to their individual identities that the members cannot, or should not, be expected to change it.”²¹ Still concentrating on the 1990s, 10 countries (not including the United States) allowed the sponsorship of one’s same-sex partner for immigration visas, with no discernable distinction between same-sex couples and opposite-sex couples.²² Although those 10 countries allowed same-sex partner visa sponsorship, they, nor any other country at the time, recognized or allowed same-sex marriages; however, several countries did grant “domestic partnerships” for

²⁰ James Edwards, (1999), Homosexuals and Immigration, <https://cis.org/Report/Homosexuals-and-Immigration> (last visited May 18, 2018).

²¹ [21] Dagmar Myslinska, (2018), What a “Particular Social Group” Means for Asylum Purposes, <https://www.nolo.com/legal-encyclopedia/what-particular-social-group-means-asylum-purposes.html> (last visited May 9, 2018).

²² James Edwards, *Supra* Note 20.

same-sex couples.²³ As previously mentioned in the preceding section, the Defense of Marriage and Immigration Acts were instituted in the United States – the former precluded same-sex spouse visa sponsorship even if they couple were officially married in another country; the latter officially removed homosexuality as a means to exclude LGBT people from entering the United States.²⁴ Another piece of information worth mentioning is that many judges used their discretion during this decade to suspend deportation of LGBT people on the basis that separation of an LGBT couple would constitute extreme hardship.²⁵

2000s – Present

As of 2016, a whopping 267,000 undocumented self-identified lesbian, gay, bisexual, or transgender people were living in the United States. It has been noted that immigration detention centers, especially those run by private corporations, do not guarantee representation to immigrants and there have been (and continue to be) high numbers of abuse reports by transgender detainees.²⁶ Additionally, the Fusion Media Network (Fusion TV) conducted an investigation into U.S. Immigration and Customs Enforcement (ICE) detention facilities – they found that approximately 75 transgender immigrants are end up in detention every day, with around 90% identifying as transgendered women.²⁷

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Covering LGBTQ Immigration Issues, (2016), <https://www.glaad.org/vote/topics/immigration> (last visited May 18, 2018).

²⁷ Cristina Costantini, Jorge Rivas, & Kristofer Rios, (2014), Why Did the U.S. Lock Up These Women with Men, <http://interactive.fusion.net/trans/> (last visited May 18, 2018).

Stories From/About LGBT Immigrants in the U.S.

Johanna Vasquez, a transgendered woman, was just 16 years-old when she was violently gang-raped in her home country of El Salvador, while calling her a “faggot” and holding a machete to her neck. Her rapists threatened her life if she ever encountered her again.²⁸ Vasquez fled to the U.S. to obtain asylum because she thought she would be safe; however, she confessed that she spent seven (7) months in an ICE detention facility in solitary. Finally, after not getting any closer to asylum, she asked ICE officials to deport her back to El Salvador so at least she would not feel like a prisoner. After arriving in San Salvador and leaving the airport, she reported that 10 gang members approached her, ending in her being gang-raped again.²⁹

In January of 2018, a gay couple living in Los Angeles used a surrogate to have twins, each belonging (by DNA) to one of the fathers. One father is a U.S. citizen and the other is an Israeli citizen. The children were born in Canada. The fathers are married and both names legally appear on the twins’ birth certificates; in spite of this, the U.S. government ruled that only one (1) of the two (2) children is eligible to become a U.S. citizen. The decision is based on the fact that one (1) son shares the same DNA with the spouse who is a U.S. citizen, while the other shares DNA with the spouse who is an Israeli citizen (with a current green card). Even though the men are married, and the surrogate may or may not be a U.S. citizen, she has no legal claim to either son and the couple’s marriage is not recognized under current citizenship and immigration laws.³⁰ The non-profit group called Immigration Equality has filed a lawsuit against

²⁸ Cristina Costantini, Jorge Rivas, & Kristofer Rios, *Supra* Note 27.

²⁹ *Id.*

³⁰ Sam Levin, *One ruled a US citizen, the other not: gay couple’s twins face unusual battle*, THE GUARDIAN, (2018), <https://www.theguardian.com/world/2018/jan/23/gay-couple-twin-sons-citizenship-ruling-lgbt-discrimination> (last visited May 18, 2018).

the U.S. Department of State on the grounds that the current immigration and citizenship laws are unconstitutional and discriminate against married gay or lesbian couples and their children.³¹

In a similar proverbial boat, Allison Blixt and Stefania Zaccari, a married lesbian couple, have two (2) sons and are experiencing hardship due to immigration and citizenship laws in the U.S. One (1) son was carried to term by Blixt, a U.S. citizen, while the other was carried by Zaccari, an Italian citizen – both born in London. The former’s son was able to obtain citizenship without any difficulties, but the latter’s son has been denied U.S. citizenship. The Immigration Equality group is filing a lawsuit on behalf of this couple as well.³²

Examples of LGBT Immigration & Marriage Law Outside the U.S.

Australia’s Visa Bureau reports that the island-country has what are known as partner visas and same-sex partner visas, respectively.³³ There is no real difference between the two (2) types of visas, aside from the name and distinction of what type of relationship the visa applicants are engaged in. General requirements for both visas include being at least 18 years of age, proof of mutual commitment and continuing relationship for at least 12 months prior to applying for a visa, cohabitation, and the applicants must meet certain health requirements and not be in a prohibited relationship (i.e. blood relatives, related by marriage, etc.).³⁴

Ireland has basically the same requirements as Australia with regard to obtaining visas; however, Ireland now also allows tax and other benefits for same-sex married couples.³⁵ A story in 2017 about an elderly Irish man and a younger man getting married went viral, and even the

³¹ *Id.*

³² *Id.*

³³ Australian Same Sex Partner Visa, (2018), <http://www.visabureau.com/australia/same-sex-partner-visa.aspx> (last visited May 19, 2018).

³⁴ *Id.*

³⁵ Ed O’Loughlin, *In Ireland, a Same-Sex Marriage with a Tax Benefit*, NEW YORK TIMES, (2017), <https://www.nytimes.com/2017/12/24/world/europe/ireland-gay-marriage-inheritance-tax.html> (last visited May 19, 2018).

New York Times picked up the story. In Dublin, Ireland, an 82 year-old man married his caretaker, a 58 year-old man, in order to leave his home and other possessions to the latter in his will.³⁶ The men were not in a sexual relationship and simply married to reap the benefits of the arrangement.

Russia, unlike Australia and Ireland, does not allow same-sex marriages. In January 2018, two (2) Russian men went to Denmark (where same-sex marriage is legal), and completed their ceremony. They returned to Russia and presented their updated status for their passports, and received a stamp for “married” status. Now, the country is bringing criminal charges against the men.³⁷ According to Russian law, although being LGBT is no longer punishable as a criminal offense, it is against the law to distribute “gay propaganda.”³⁸ The men are being charged with tampering with documents (i.e. their passports) in order to exploit a loophole they found. In Article 14 of the Family Code of Russia, marriages that are conferred in another country are able to be validated in Russia, so long as there is nothing to contradict the marriage. The men used this law as the loophole, because it does not expressly mention that same-sex marriage is contradictory to Article 14.³⁹

Wales is a country that is torn – the law (the Marriage Act of 2013) was changed in 2014 to allow same-sex marriages in Wales and England.⁴⁰ While the law does permit same-sex marriages, they cannot be performed by any official church and are still viewed as undignified. The Church in Wales states that while they do acknowledge the law and that human sexuality issues

³⁶ *Id.*

³⁷ Lydia Smith, Russia brings charges against same-sex couple who received landmark recognition of marriage, THE INDEPENDENT, (2018), <https://www.independent.co.uk/news/world/europe/russia-same-sex-couple-marriage-recognised-charged-damage-passports-eugene-wojciechowski-paul-a8181341.html> (last visited May 19, 2018).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Same-sex marriage, (2018), https://www.churchinwales.org.uk/faith/believe/bench_samesexmarriage/ (last visited May 19, 2018).

are not resolved, they abide by the Christian doctrine that identifies a marriage as a union between a man and a woman. They will pray and respect all people, but they will not commit any of the church services to the unions.⁴¹

Dangerous Places to Visit for LGBT People

Even as far as the world has come toward equality for all people, including LGBT people, there are still places where simply feeling a certain way about someone is punishable by death. Sudan, Iran, Yemen, Mauritania, Saudi Arabia, Pakistan, Afghanistan, Qatar, UAE, and certain parts of Nigeria, Somalia, Syria, and Iraq have laws that make being gay or bisexual punishable by death.⁴² In 17 other countries, being LGBT is not punishable by death, but the spreading or possession of any “propaganda” (i.e. rainbow flags, etc.) is outlawed and punishable by fines and prison sentences.⁴³

The official government website for the United Kingdom (UK) actually provides travel advisories for LGBT people. The website states “attitudes towards lesbian, gay, bisexual, and transgender (LGBT) travellers around the world can be very different from those in the UK; however, you’re unlikely to have problems if you prepare well and research your destination before you go.”⁴⁴ The UK suggests investing in a guide book for LGBT travelers, reading online forums, browsing around the International LGBT Association website to find out about hazardous regions/countries, asking travel agents for advice, and checking local laws and customs.⁴⁵

⁴¹ *Id.*

⁴² Siobhan Fenton, *LGBT relationships are illegal in 74 countries, research finds*, THE INDEPENDENT, (2016), <https://www.independent.co.uk/news/world/gay-lesbian-bisexual-relationships-illegal-in-74-countries-a7033666.html> (last visited May 19, 2018).

⁴³ *Id.*

⁴⁴ Lesbian, Gay, Bisexual and Transgender foreign travel advice, (2017), <https://www.gov.uk/guidance/lesbian-gay-bisexual-and-transgender-foreign-travel-advice> (last visited May 19, 2018).

⁴⁵ *Id.*

Overall, only 24 countries or nation-states worldwide recognize same-sex marriages. Just 28 others recognize domestic partnerships, especially when religious influence does not allow the term “marriage” to be used for same-sex couples. Around the same number of nations allow joint adoptions and 2nd same-sex parental adoptions.⁴⁶ Out of 195 official countries in the world, only 85 afford special protection to LGBT people – only 43 of those 85 protect specifically against hate crimes.⁴⁷ Interestingly, the 14 countries that impose a prison sentence from 14 years to life for being LGBT do not have any laws to protect against hate crimes or discrimination.⁴⁸

Conclusion and Recommendations

By now, it is no secret that having a sexual orientation other than “straight” or heterosexual paints a picture of inequality. As highlighted in the preceding sections of this paper, the United States of America has come a long way since the savage practice of gay execution in the 1600s. Unfortunately, some other venues in the world have not followed suit and still fine, torture, imprison, and even execute human beings for simply loving or being attracted to someone – an action they have no control over. Granted there has been controversy, mainly by representatives of church groups against LGBT rights, over whether or not being gay or lesbian is a choice. Many studies were conducted, and show that possessing a gene in the X-chromosome (Xq28) is found in higher prevalence among gay men. Additionally, certain environmental factors have been linked to homosexual orientation.⁴⁹ Why, then, are heterosexual opponents, church groups, and lawmakers so adamant on denying marriage rights, government

⁴⁶ Map of Sexual Orientation Laws, (2017), <https://ilga.org/maps-sexual-orientation-laws> (last visited May 19, 2018).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Tia Ghose, *Being Gay Not a Choice: Science Contradicts Ben Carson*, LIVE SCIENCE, (2015), <https://www.livescience.com/50058-being-gay-not-a-choice.html>.

benefits, and travel/immigration/visa status to people based on who they possess romantic feelings for? Does being LGBT have an effect on how much room a person takes up on an airplane or in a house? Does being gay or lesbian mean a person is likely to commit a crime or put a “straight” person out of a job? No. There is nothing – legally, morally, or psychologically – that “should” justify discrimination of LGBT people; unfortunately, it still happens.

Going back to what the UK government website said... “you’re unlikely to have problems if you prepare well and research your destination...”⁵⁰ – why should a person need to research to find out if they are going to be ridiculed, discriminated against, arrested, or beheaded for trying to enter in a foreign country in the twenty-first century? The United States is certainly seeming more-and-more pro-LGBT, as *Windsor v. United States*, 133 S.Ct. 2884 (2013) ended with the U.S. Supreme Court striking down Section 3 of the Defense of Marriage Act (DOMA) as unconstitutional. This meant that now, a same-sex surviving (widowed) spouse could claim a federal estate tax exemption.⁵¹ While all is not lost, the world still has a long way to go to exemplify true equality. The United States, in particular, has experienced centuries of evolution from horrible race-motivated crimes committed against black people, Asian people, Irish immigrants, and Native Americans – and now, it is struggling with attaining equal treatment and benefits for LGBT people and same-sex couples. The thesis of this paper asked whether same-sex couples have a more difficult time, as compared to opposite-sex couples, in progressing through immigration proceedings or simply traveling in general (and if so, why)? The answer to this question is yes...and no. It depends on which country the couple is traveling to or from – the laws, customs, and local ordinances that are in place. Overall, however, since only 85 total countries afford constitutional or legal protection for LGBT people and only 24 countries

⁵⁰ Lesbian, Gay, Bisexual, *supra* note 44.

⁵¹ *Windsor v. United States*, 133 S.Ct. 2884 (2013).

recognize same-sex marriages,⁵² LGBT couples are likely to have a far more difficult time in travel and/or immigration proceedings as compared to opposite-sex couples.

⁵² Map, *supra* note 46.