

2018

The Fight to be Equal and Equally Different

Melissa Dupor

Follow this and additional works at: <https://lawecommons.luc.edu/pilr>



Part of the [Civil Rights and Discrimination Commons](#), [Criminal Procedure Commons](#), [Environmental Law Commons](#), and the [Human Rights Law Commons](#)

Recommended Citation

Melissa Dupor, *The Fight to be Equal and Equally Different*, 24 Pub. Interest L. Rptr. 80 (2018).
Available at: <https://lawecommons.luc.edu/pilr/vol24/iss1/10>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Public Interest Law Reporter by an authorized editor of LAW eCommons. For more information, please contact law-library@luc.edu.

The Fight to be Equal and Equally Different

Melissa Dupor

Equal protection under the Fourteenth Amendment is a right which limits the power of the government to interfere with people's affairs and freedoms, unless the person's actions are illegal.¹ But what happens if laws do not specify whether a person's actions are illegal? Lesbian, gay, bisexual, and transgender (LGBT) individuals have virtually no protection under the law against discrimination towards sexual orientation, gender identity, and gender expression because the law is either unclear or undefined.²

In the 1950s, the Supreme Court first defined equal protection under the Fourteenth Amendment by focusing on racial equality in *Brown v. Board of Education*.³ Twenty years later, the Court applied equal protection to equal rights for women.⁴ While the fight for LGBT legal protections began as early as the 1990s, what Equal Protection under the Fourteenth Amendment means for LGBT individuals is yet to be determined.⁵ LGBT individuals routinely face prejudice and discrimination by the public, police, and the legal system's enforcement of laws that are not only unconstitutional but pervasive.

THE STORY OF FUNDAMENTAL RIGHTS

The Bill of Rights is a list of fundamental rights recognized by the Supreme Court as rights requiring a high degree of protection from government infringement.⁶ These rights include the right to: marry, privacy, contraception, interstate travel, procreation, child custody, and voting.⁷

The Supreme Court has and continues to struggle over deciding exactly what rights are fundamental and where fundamental rights come from.⁸ Typi-

¹ U.S. Const. amend. XIV, §1, CORNELL LAW SCHOOL, <https://www.law.cornell.edu/constitution/amendmentxiv>.

² Evan Gerstmann, 14th Amendment Fundamental Rights and Same Sex Marriage, *INSIGHTS ON LAW & SOCIETY*, Vol. 17 - Issue 2. (Sept. 7, 2018), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society-1/2017/winter2017/14th-amendment-fundamental-rights-and-same-sex-marriage/.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Fundamental Right, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/fundamental_right.

⁷ *Id.*

⁸ Gerstmann, *supra* note 2.

cally, the court defines fundamental rights as implied under the constitution, and defined and limited by our nation's traditions and history.⁹ Defining fundamental rights through our nation's history and traditions is not only problematic but possibly dangerous for the LGBT community.¹⁰ History has shown that there is an unwillingness by our country and our legal system to understand or accept lifestyles that are outside of this country's traditional definition of "normal."¹¹

For example, interracial marriage was not a fundamental right until 1967.¹² In the landmark civil rights case, *Loving v. Virginia*, the court held that miscegenation statutes were unconstitutional, further holding that marriage between different races was a fundamental right.¹³ For LGBT individuals, the right to marry was not recognized as fundamental until 2015.¹⁴ After decades of trying, the court finally ruled that prohibiting same sex couples from marrying violated the Fifth and Fourteenth Amendments in *Obergefell v. Hodges*.¹⁵

Another example can be seen in this country's history with "sodomy laws." In the 1986 case, *Bowers v. Hardwick*, a gay couple was confronted by a police officer for violating Georgia's sodomy law, state law prohibiting same sex couples from engaging in sexual acts.¹⁶ The Supreme Court ruled in favor of Georgia law over the issue of whether the Constitution confers fundamental rights for homosexuals to engage in sodomy.¹⁷ It was not until 2003, in *Lawrence v. Texas*, that the Court overturned *Bowers v. Hardwick* and found sodomy laws unconstitutional.¹⁸ However, the court struck down sodomy laws under the Due Process Clause of the Fourteenth Amendment, which protects the right to privacy, and not under the equal protection clause.¹⁹

Cases like *Bowers v. Hardwick* and *Lawrence v. Texas* exemplify the struggle for the court to define fundamental rights and lay a foundation for equal pro-

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

¹³ *Id.* at 11-12.

¹⁴ *Obergefell v. Hodges*, S. Ct. 2585, 2602 (2015).

¹⁵ *Id.* at 2602-03.

¹⁶ David Oshinsky, *Strange Justice*, N.Y. TIMES (March 16, 2012), <https://www.nytimes.com/2012/03/18/books/review/the-story-of-lawrence-v-texas-by-dale-carpenter.html>.

¹⁷ *Id.*

¹⁸ Gerstmann, *supra* note 2.

¹⁹ *Id.*

tection for LGBT individuals.²⁰ Finally in *Obergefell v. Hodges*, the Court created a concept that when a majority of justices conclude that a right has historical importance, societal recognition, and meets judicial criteria, the Court may create a new fundamental right.²¹ The court acknowledged the freedoms expressed and secured by the Constitution consisted of the right of the individual not to be injured by the power of the government.²² Therefore, when a person's rights are violated, the Constitution requires redress.²³

PREJUDICE AND DISCRIMINATION

Unequal protection under the law can lead to discriminatory application of laws for many in the LGBT community.²⁴ An LGBT individual is more likely than a non-LGBT individual to interact with law enforcement in ways that lead to criminalization because of discriminatory and biased enforcement of laws.²⁵ Once in the criminal justice system, an LGBT individual is subject to discriminatory legal proceedings and inhumane treatment behind bars.²⁶ Discriminatory treatment of the LGBT community is evidenced by state indecency laws, like the law at issue in *Lawrence v. Texas*, HIV criminalization laws, and harsh sentencing guidelines.²⁷

One does not have to go far to find cases which illustrate how unequal protection under the law leads to negative and unfair treatment towards the LGBT community. For example, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the court held that a bakery owner had the right to deny service to LGBT patrons based on his religious beliefs.²⁸ The court ruled in favor of the bakery owner, because the Colorado Civil Rights Commission did not employ religious neutrality when reviewing the case under the state's anti-discrimination law.²⁹ The decision has been criticized as encouraging discrimi-

²⁰ *Id.*

²¹ Joseph Z. Fleming, *The Establishment of Fundamental Rights: A Review of Aspects of Obergefell et al.*, ABA ANNUAL MEETING (July 31, 2015), available at https://www.americanbar.org/content/dam/aba/events/labor_law/am/2015/fleming.pdf.

²² *Id.*

²³ *Id.*

²⁴ Dawn Ennis, *Unjust: How the Broken Criminal Justice System Fails LGBT People*, BLOG INDEPENDENT (FEB. 13, 2016), <https://www.advocate.com/crime/2016/2/23/report-how-broken-criminal-justice-system-fails-lgbt-americans>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S.Ct. 1719, 1729 (2018).

²⁹ *Id.*

nation towards the LGBT community and condoning the actions of the bakery.³⁰

One of the most profound ways discriminatory treatment of LGBT individuals is illustrated is through state HIV criminalization laws.³¹ In Illinois, a person living with HIV is required to disclose their HIV status prior to engaging in sexual intercourse without a condom.³² However, state statute requires there be “specific intent to commit the offense,” while never fully defining what specific intent means.³³ Illinois courts have not defined whether specific intent means an intent to transmit HIV or an intent to perform acts such as sexual activity, donating blood or bodily fluid, or transferring non-sterile drug paraphernalia.³⁴ Even more confusing is that transmission of HIV is not needed for prosecution and the crime is a felony punishable up to seven years in prison and \$25,000 in fines.³⁵

Until 2014, Iowa had one of the most severe HIV transmission laws in the United States.³⁶ Prior to 2014, any person with HIV that exposed another without disclosing his or her status, whether infection occurred or not, was a felony, punishable up to twenty-five years in prison.³⁷ Additionally, the offender was required to register as a sex offender.³⁸ After 2014, the statute was updated to include several levels of crime and punishment based on intent and whether the disease was actually transmitted.³⁹ Currently in Iowa, transmission with intent is a felony punishable up to twenty-five years, however, if exposure occurs without transmission it is a felony punishable up to five years.⁴⁰ Under the current statute, a person’s awareness of their HIV status while engaging in

³⁰ Sam Stanley, *Masterpiece Cakeshop and the Hidden Tolerance for Gay Rights*, BLOG INDEPENDENT (JUL. 13, 2018), <http://blog.independent.org/2018/07/13/masterpiece-cakeshop-and-the-hidden-tolerance-for-gay-rights/>

³¹ Ennis, *supra* note 24.

³² *HIV Criminalization in the United States: A Sourcebook on State and Federal HIV Criminal Law and Practice*, THE CENTER FOR HIV LAW AND POLICY, available at www.hivlawandpolicy.org.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Iowa First State to Repeal HIV Criminalization Law*, BETA BLOG, <https://betablog.org/iowa-repeals-hiv-criminalization-law/>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *HIV Criminalization in the United States*, *supra* note 32.

conduct that exposed another, regardless of how many times, is not sufficient to prove the individual intended to transmit HIV.⁴¹

HIV criminalization laws are detrimental to the LGBT community because, as of 2016, gay and bisexual men account for 67% of all HIV diagnoses and 83% of diagnosis among males.⁴² The percentages translate that 26,200 out of 38,500 new HIV infections are among gay and bisexual men.⁴³ In comparison, heterosexuals and people who inject drugs account for 24% of all HIV diagnoses.⁴⁴ When coupled with incredibly high HIV criminalization conviction rates, for example, 99% in California, the effects on LGBT individuals are staggering.⁴⁵ HIV criminalization laws penalize sexual behavior of people living with HIV, even when such behavior never results in any risk of transmission or unintentional exposure of the virus.⁴⁶

Discriminatory treatment of LGBT individuals continues throughout their criminal “justice” experience. For example, LGBT individuals are adversely affected by the bias and stigma that surrounds their community.⁴⁷ In the case of Charles Rhines, a jury decided that he should be sentenced to death for his crimes because they worried that, as a gay man, he might enjoy prison too much.⁴⁸ Several members of his jury signed affidavits attesting to how homophobia played into their decision.⁴⁹ Similarly, Chelsea Manning, who was convicted of espionage and theft by leaking military intelligence records, spent most of her sentence in solitary confinement because of her transgender identity.⁵⁰ Ms. Manning’s mental health deteriorated while in solitary confinement and she attempted suicide twice during her sentence.⁵¹ Ms. Manning would have continued to spend her sentence in confinement if President Obama had not recognized the deplorable conditions she faced while in prison

⁴¹ *Id.*

⁴² *HIV in the United States: At a Glance*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/hiv/statistics/overview/atagance.html>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *HIV Criminalization in the United States*, *supra* note 32.

⁴⁶ *Id.*

⁴⁷ Leonard Pitts Jr., *His Crime was Horrendous, but so was the Reason Jurors Sentenced him to Death. He’s Gay*, MIAMI HERALD, <https://www.aclu.org/blog/lgbt-rights/criminal-justice-reform-lgbt-people/jury-may-have-sentenced-man-death-because-he>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *LGBTQ People Face Unique Challenges in the Criminal Justice System*, NBCNEWS, <https://www.nbcnews.com/feature/nbc-out/lgbtq-people-face-unique-challenges-criminal-justice-system-n760881>.

⁵¹ *Id.*

as a transgender woman.⁵² Manning's experience in prison is not uncommon for LGBT people; almost 30% of LGBT prisoners are placed into restrictive prison settings compared to 18% non-LGBT prisoners.⁵³

WHY IT MATTERS

The fight for equal protection matters because "rights are only rights if you have a right to them."⁵⁴ Because of the inconsistent protection under state laws, it is paramount that the Fourteenth Amendment explicitly include sexual orientation as a protected class.⁵⁵ Since the LGBT community is a marginalized community, it is hard to pretend that courts and law enforcement do not treat the LGBT population differently;⁵⁶ as outlined above, this differential treatment is a reality. For example, Michigan and Pennsylvania's non-discrimination laws do not explicitly include sexual orientation or gender identity.⁵⁷ However, both the Michigan Civil Rights Commission and Pennsylvania Human Relations Commission have interpreted the states' non-discrimination laws to include sexual orientation or gender identity, even though not specifically worded in the statute.⁵⁸ These types of interpretations are not always welcome in the legal community as the Michigan attorney general continues to actively work to overturn such interpretations of the law.⁵⁹

Inconsistencies matter on state level because 48% of LGBT individuals live in states that do not prohibit discrimination based on sexual orientation or gender identity.⁶⁰ While another 14% live in states that explicitly interpret existing laws that prohibit based on sex discrimination to include sexual orientation and gender identity and 2% live in states prohibiting discrimination based on sexual orientation only.⁶¹ Even with 41% of the LGBT population living in states that prohibit employment discrimination based on sexual orientation or gender identity, the patchwork of protections and multiple layers of

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Same-Sex Marriage & the 14th Amendment*, <https://www.shmoop.com/equal-protection/same-sex-marriage.html>.

⁵⁵ Interview with Daniel Hernandez, Managing Attorney for Walczak Hernandez, P.C. (September 28, 2018) [hereinafter Hernandez interview].

⁵⁶ *Id.*

⁵⁷ *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

laws leave LGBT individuals vulnerable to discrimination without much recourse.⁶²

Only twenty states have laws that protect LGBT individuals against sexual orientation and gender identity discrimination in employment in the public and private sector.⁶³ However, two of those states, Wisconsin and New Hampshire, do not include transgender individuals in their laws.⁶⁴ On a federal level, the term “sex” in the Fourteenth Amendment has been expanded to include individuals who do not conform to gender norms.⁶⁵

It is important that the law be absolute in its protection for the LGBT community.⁶⁶ However, there are some in the LGBT community that believe that the protections should only go so far.⁶⁷ The belief by some LGBT individuals, including those in the legal community, is that by normalizing the very things that make the LGBT community marginalized, the protections that are needed may no longer apply. The question may arise of whether the fight for equality will ultimately diminish the need for the laws that currently protect the LGBT community.⁶⁸ The answer might ultimately be found in the reasoning itself, “rights are only rights if you have a right to them.”

⁶² *Id.*

⁶³ Hernandez Interview, *supra* note 55.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*