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# From Outlaws to In-Laws: Issues Surrounding the Evolving Legal Status of Lesbian and Gay Individuals

Christopher S. Hargis  
*University of Kentucky*

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## FROM OUTLAWS TO IN-LAWS: ISSUES SURROUNDING THE EVOLVING LEGAL STATUS OF LESBIAN AND GAY INDIVIDUALS

### Foreword

In 1986, the late United States Supreme Court Justice Lewis F. Powell, Jr. remarked to his fellow justices and a law clerk that he had never known a homosexual. That same year, Justice Powell would cast a crucial vote in *Bowers v. Hardwick*, the decision that denied any fundamental right to engage in homosexual sodomy existed. Justice Powell was incorrect. His decision in *Bowers* aside, he was incorrect that he had never known a homosexual. His law clerk that overheard the remark was gay.

If there ever existed a time when homosexuals were strangers to the Supreme Court or its Justices, that time has surely passed. Today, the judicial system plays a significant, if not the most significant, role in defining the legal implications of homosexuality. From equal protection to the First Amendment to due process, the constitutional implications of homosexual status are wide in breadth, despite the relatively short amount of time the law has struggled with homosexuality.

A legal symposium in 2001 exploring the interaction between the law and homosexuality is not groundbreaking. For the past two decades, social, political, and moral arguments (if one can so neatly categorize them) concerning homosexuality have fomented at the front of our national

dialogue. From arguments challenging the constitutionality of sodomy laws to the passage of antidiscrimination legislation, the legal system has been placed in the position of constructing, defining, and often implementing the legal ramifications of one's sexual orientation.

The legal treatment of homosexuality, however, is changing. Previously, homosexuality was conceptualized as conduct that was easily distinguishable from the individual who engaged in that conduct. Thus, decisions such as *Bowers* quaintly ruminated over the existence of a fundamental right to engage in homosexual sodomy. The question of whether there was a fundamental right to *be* homosexual was not addressed. Perhaps it did not exist. The law's conceptualization of homosexuality has transformed from an independent activity to a status fused with the individual. The legal issues have concomitantly changed. Current issues surrounding homosexuality address not the constitutional implications of a homosexual act, but rather the constitutional implications of a homosexual status. The identity of homosexuality not only affects the lesbian or gay individual but also individuals or groups in her or his surrounding, such as the case in *Boy Scouts of America v. Dale*. The legal adoption of homosexuality as status has spawned a new host of issues: What does it mean to be gay? Is there a message in one's gayness? Is the status of homosexuality equivalent to a heterosexual status? And, if so, what role should the legal system play in achieving that equality? This journal issue endeavors to further such dialogue, capturing current legal issues surrounding homosexuality, from the constitutional ramifications of civil unions to the expressive nature of a homosexual identity and beyond.

The Symposium is introduced with an Essay by Professor Nan Hunter. Hunter's Essay takes a retrospective look at the legal fallout from the controversial Supreme Court decision *Romer v. Evans*. While hesitating to ascribe any great doctrinal lesson from *Romer*, Professor Hunter explores the effect of the decision on equal protection analysis. Notably, Hunter views the ultimate effect of the case as being a strong, useful check on the categorical inequality present before the decision.

The lead Article in the issue is *A "Clanging Silence": Same-Sex Couples and Tort Law* by Professor John Culhane. Culhane explores the fertile world of tort law and the noticeable absence of application of traditional tort theory to same-sex couples. Focusing on the torts of negligent infliction of emotional distress, loss of consortium, and wrongful death, Culhane's Article argues that foundational principles in these torts should be applied to same-sex couples, and, furthermore, such application aids in the validation of such relationships.

Professor Nancy Knauer's Article, *"Simply So Different": The Uniquely Expressive Character of the Openly Gay Individual After Boy Scouts of America v. Dale*, offers a unique response to the controversial 2000 Supreme Court decision. While finding fundamental flaws in the *Dale* majority opinion, Professor Knauer primarily takes issue with Justice Stevens's dissent. Knauer advances that perhaps gay identity is so unique in society today that the mere presence of an openly gay individual does "send a message," as the majority opinion held, that can and does alter existing group messages.

*Vermont Civil Unions, Full Faith and Credit, and Marital Status* by Professor Lewis Silverman explores the thorny issue of sister state recognition of civil unionized same-sex couples. Silverman's conclusion that same-sex couples can rely on the guarantees found in the Full Faith and Credit Clause redounds not from the presence of the civil union per se, but rather from the couple's "marital status" that is created from the denial of the right of either party to a civil union to marry in another jurisdiction.

Professor Christopher R. Leslie catalogs the weighty obstacles placed before homosexuals attempting to attack laws specifically aimed at homosexuals with his Article, *Procedural Rules or Procedural Pretexts?: A Case Study of Procedural Hurdles in Constitutional Challenges to the Texas Sodomy Law*. Leslie explores the myriad examples of how one state sodomy law has been insulated from attack by the bending and torturing of legal doctrine.

Of primary importance to Kentucky practitioners is Matt Morrison's *Currents in the Stream: The Evolving Legal Status of Gay and Lesbian Persons in Kentucky*. In an unparalleled historical comment on the origins, defeats, and tribulations of gay and lesbian Kentuckians and the law, Morrison's piece traces the origins of Kentucky laws relating to homosexuality back to medieval times. Morrison's Article ranges from the earliest sodomy laws to the current antidiscrimination laws in place throughout the State.

The Symposium concludes with two student Notes. The first, Romer, Hurley, and Dale: *How the Supreme Court Languishes with "Special Rights,"* takes a critical eye to the Court's handling of homosexual identity and its concomitant constitutional implications. The second student Note, *A Family Affair: Constitutional and Prudential Interests Implicated When Homosexuals Seek to Preserve or Create Parent-Child Relationships,* explores the burgeoning legal world of family law and homosexuality, specifically reviewing case law regarding custody, visitation, and adoption issues.

*Christopher S. Hargis*  
*Symposium Editor*

