

Employment Discrimination Based on Sexual Orientation: The American, Canadian and U.K. Responses

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Introduction

One of the last frontiers in American civil rights protection concerns the extent to which lawmakers—both legislative and judicial—show a willingness to prohibit workplace discrimination based on sexual orientation. Regrettably, the record of the United States has been less than exemplary. Human rights legislation covering sexual orientation is limited to a few states and localities, gay and lesbian employees enjoy no federal protection from employment discrimination and, generally speaking, the judiciary has displayed a reluctance to defend expansively the rights of the nation's "homosexual"¹ minority. The failure to address discrimination based on sexual orientation not only sanctions unjust treatment of gay and lesbian employees, but also perpetuates societal prejudice.

The objective of this Article is to compare America's responses to employment discrimination based on sexual orientation with the Canadian and United Kingdom (U.K.) responses. It will become clear that Canada leads in the judicial and legislative defense of sexual orientation rights while the U.K., though potentially at the cross-roads between protecting and disregarding the human rights of homosexuals, is more closely aligned with the American approach of non-protection, if recent developments in the case law of the European Court of Justice are any indication.

The Article is divided into several parts. Each part compares the U.S., Canadian and U.K. responses to discrimination based on sexual orientation. Part I references studies and commentary from elected officials to reveal anti-homosexual attitudes and the problems those attitudes present for protecting gay and lesbian employees. Part II explores constitutional protections against sexual orientation discrimination. Part III highlights the extent to which the gay or lesbian employee can find protection through human rights legislation. Part IV turns to the common law and considers its competence to protect gay and lesbian employees from discrimination. The Article concludes by emphasizing the importance of legislative intervention to protect employees from sexual orientation discrimination in the workplace. Such legislative action would provide an alternative to inadequate common

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1. As Professor Bruce MacDougall has observed, terminology in this area is a "loaded subject." Bruce MacDougall, *Silence on the Classroom: Limits on Homosexual Expressions and Visibility in Education and the Privileging of Homophobic Religious Theology*, 61 SASK. L. REV. 41, 41 n.1 (1998). Like MacDougall, we use the term "homosexual" in this Article because it is commonly used in the case law. Also like MacDougall, we will sidestep the issue of the social construction of homosexuality. Additionally, we have not addressed the specific civil rights issues regarding bisexuals, although to a great extent they are closely allied with the rights of gays and lesbians.

law protections and also serve as a symbol of solidarity between the state and homosexuals.

I. Anti-Homosexual Sentiment and Public Policy

A. *The United States*

In September 1996, the United States Senate acted on two important pieces of legislation affecting the treatment of lesbians and gay men.² An overwhelming majority of senators and representatives voted in favor of a law that prohibits agencies of the federal government from recognizing same-sex marriages.³ Another bill, which sought to protect lesbians and gay men from employment discrimination, lost by a single vote in the Senate⁴ and was not introduced in the House. In June 1997, the bill was again introduced and referred to committees in both houses of Congress.⁵ The debate over these measures included a substantial amount of distressing and deplorable rhetoric, including this statement by Senator Nickles (R-Okla.), a leader of the opposition to the Employment Non-Discrimination Act and a leading proponent of the Defense of Marriage Act: "The very definition of bisexual means you are promiscuous. You are having sex with males and females."⁶ Senator Hatch (R-Utah) raised the specter of child molestation when he recounted the comments of a local school board member who stated:

[In Loudoun County, Virginia,] we have a [homosexual] teacher in a middle school working with children who are at that age where they are struggling with their identity. This is obviously a person who has made bad choices. To give someone like this access to children at that stage of development would be irresponsible of us.⁷

The rhetoric of both senators illustrates the prejudice and ignorance surrounding gay and lesbian civil rights at the highest levels of government. Similar negative stereotyping has led to harassment, discrimination and even

2. See 75 CONG. INDEX (CCH), at 1 (Sept. 13, 1996) (discussing Senate votes on the Defense of Marriage Act, H.R. 3396, 105th Cong. (1996) (enacted), and the Employment Non-Discrimination Act, S. 2056, 105th Cong. (1996)).

3. This bill passed the House of Representatives on a vote of 342 in favor, 67 opposed; and in the Senate, 85 in favor, 14 opposed. See 142 CONG. REC. H7505-06 (daily ed. July 12, 1996) (House vote); 142 CONG. REC. S10,129 (daily ed. Sept. 10, 1996) (Senate vote). It was signed by President Clinton on Sept. 21, 1996. See Statement on Same Gender Marriage, 2 PUB. PAPERS 1635 (Sept. 20, 1996).

4. See 142 CONG. REC. S10,139 (daily ed. Sept. 10, 1996).

5. H.R. 1858 and S. 869 were introduced on June 10, 1997. See 143 CONG. REC. H3659 (daily ed. June 10, 1997); 143 CONG. REC. S444 (daily ed. June 10, 1997).

6. Deb Price, *Anti-Discrimination Vote Shows Senate May Not Be So Chilly Toward Gay Rights*, DETROIT NEWS, Sept. 13, 1996, at E1.

7. 142 CONG. REC. S10,132 (daily ed. Sept. 10, 1996) (statement of Sen. Hatch).

violence in the workplace.⁸ A review of twenty-one surveys of lesbian, gay and bisexual people found that between 16% and 46% of survey respondents reported having experienced employment discrimination in some form related to hiring, promotion, firing or harassment.⁹ Moreover, there is evidence that gay men, identified in the workplace as being gay, suffer economic disadvantage of between 11% and 27% reduction in earnings.¹⁰

Fortunately, not all responses to the equal treatment of homosexual individuals have been negative. Senator Robb (D-Va.), who was the only Southern senator to vote against the Defense of Marriage Act and for the Employment Non-Discrimination Act,¹¹ warned: "[I]f we don't stand here against this [Defense of Marriage] bill, we will stand on the wrong side of history."¹² Senator Robb also stated:

I suspect that for older generations fear has often kept this issue from being discussed openly before now—fear that anyone who expressed an understanding view of the plight of homosexuals was likely to be labeled one. Because of this fear, the battle against discrimination has largely been left to those who were directly affected by it. I believe it is time for those of us who are not homosexual to join the fight.¹³

B. Canada

The American senators noted above have their Canadian counterparts. Mr. Bob Ringma, a Reform Member of Parliament (MP), stated to a newspaper on April 29, 1996, that he would dismiss "or move to the back of the

8. Recent events demonstrate the violence and the lack of remedy:

Take the case of Ernest Dillon, a gay postal worker in Michigan who was taunted, ostracized and beaten unconscious by co-workers. When Dillon brought the matter up to his supervisors, they told him not to waste their time. In a subsequent lawsuit, a federal court rejected his complaint because discrimination based on sexual orientation is not covered under federal law.

Gay Rights Issue Won't Go Away: Senate Fluke Isn't Enough to End the Quest for Employment Equality, L.A. TIMES, Sept. 12, 1996, at B8.

9. See M. V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 INDUS. & LAB. REL. REV. 726, 728 (1995).

10. See *id.* at 737. According to Badgett, the evidence of economic disadvantage for lesbians was less significant. See *id.* The author of the study suggests that the lack of statistical significance, after correcting for occupation and selection bias, is attributed to the small sample size or the survey model's failure to account for unobservable differences between lesbian and heterosexual women in the work force. See *id.* The fact that economic disadvantage is not readily recognized may account for the attitude that gays and lesbians do not need civil rights protection as a group. See *infra* notes 68-70 and accompanying text (explaining the U.S. Supreme Court's view that homosexuals are not economically disadvantaged).

11. See 142 CONG. REC. S10,129 (daily ed. Sept. 10, 1996) (voting record showing that Sen. Robb voted against the Defense of Marriage Act); 142 CONG. REC. S10,132 (daily ed. Sept. 10, 1996) (voting record showing that Sen. Robb voted for the Employment Non-Discrimination Act).

12. 142 CONG. REC. S10,123 (daily ed. Sept. 10, 1996) (statement of Sen. Robb).

13. *Id.* at S10,122.

shop" any gay employees whose presence offended customers.¹⁴ Mr. Ringma continued: "If I had a business and a homosexual was there working for me and he was responsible for my losing business, then indeed I would think of letting him go, just as I would think of letting go anyone else who was losing business for me."¹⁵ Another MP, Dr. Grant Hill, stated during debate on bill C-33 (a bill to amend the Canadian Human Rights Act¹⁶ to prohibit discrimination on the grounds of sexual orientation) that if homosexuals were protected from discrimination, it would encourage the spread of disease and promote an unhealthy lifestyle.¹⁷ "My specific problem with this bill is that it will produce and allow a promotion of an unhealthy lifestyle, [because homosexuals suffer from] HIV, gay bowel syndrome, increasing parasitic infections, lowered life expectancy and . . . hepatitis."¹⁸

Perhaps not to be outdone, MP Jake Hoeppner suggested that civil unrest might be the result of bill C-33:

If we want to look at what homosexuality and permissiveness have done to some countries let us look at Africa and the problems it has run into. Are we to destroy the family and destroy the government? Let us look at Liberia right now. Do we want that type of system. [sic] I do not.¹⁹

The homophobic attitudes of politicians like Hill and Hoeppner are also reflected in sexual orientation discrimination in the Canadian workplace.²⁰ Stephen Samis's conclusions in his study of homophobia are summarized in the following terms:

The most comprehensive Canadian survey to date concerning harassment of and discrimination against lesbians and gay men in the workplace determined that because of their sexual orientation, 21.4 percent of the survey's respondents believed that they had not been hired, 20.1 believed that they had not been promoted, and 20.5 percent believed that they had been fired . . . [I]n addition to actual harassment and discrimination in the workplace, the survey determined that there was overwhelming concern among lesbians and gay men that they would in the future face sexual orientation discrimination. For example, when

14. Jim Morris, *Party Backs Reform MP Who Would Fire Blacks, Gays*, NAT'L GEN. NEWS (Ottawa), Apr. 30, 1996, available in QL System, CP96. For good measure, Ringma indicated that he would fire a black employee for the same reason. See *id.*

15. *Id.*

16. R.S.C., ch. H-6 (1985) (Can.).

17. See Linda Drouin, *Reform MP Says Equality for Gays Would Promote Unhealthy Lifestyle*, NAT'L GEN. NEWS (Ottawa), May 7, 1996, available in QL System, CP96.

18. *Id.*

19. *Reform MP Sees Civil War the Result of Homosexuality* NAT'L GEN. NEWS, May 9, 1996, available in QL System, CP96.

20. See DONALD CASSWELL, *LESBIANS, GAY MEN AND CANADIAN LAW* 171 (1996) (summarizing Stephen Samis, *An Injury to One Is an Injury to All: Heterosexism, Homophobia, and Anti-Gay/Lesbian Violence in Greater Vancouver* (1994) (unpublished sociology thesis, Simon Fraser University) (on file with Simon Fraser University)).

asked "Are you afraid you could experience employment discrimination because you are lesbian, gay or bisexual?" 62.6 percent of males and 79.8 percent of females answered "Yes," and 75.3 percent of male and 73.4 percent of female respondents who answered "Yes" to the question conceal their orientation in employment situations "Sometimes" or "Always."²¹

In spite of anti-homosexual attitudes and rhetoric, however, the Canadian Parliament passed bill C-33 in a free vote and by a large majority.²² Section 2 of the Canadian Human Rights Act now reads as follows:

The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an equal opportunity to make for themselves the lives that they are able and wish to have, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, *sexual orientation*, marital status, family status, disability or conviction for an offence for which a pardon has been granted.²³

The Senate also passed the bill by an overwhelming majority,²⁴ and it came into force on June 20, 1996.²⁵

This amendment to Canada's human rights legislation, representing governmental resolve to protect the human rights of homosexual individuals, is a logical outgrowth of the Canadian Supreme Court's ruling in *Egan v. Canada*.²⁶ Justice Cory, dissenting in part, stated that those of a same-sex orientation have suffered an "historic disadvantage" which has been "widely recognized."²⁷ As Justice Cory summarizes the matter:

Public harassment and verbal abuse of homosexual persons is not uncommon. Homosexual women and men have been the victims of crimes of violence directed at them specifically because of their sexual orientation They have been discriminated against in their employment and their access to services. They have been excluded from some aspects of public life solely because of their sexual orientation . . .

21. *Id.*

22. See COMMONS DEBATES 2587 (1996). The vote was 153 in favor; 76 opposed. See *id.*

23. Canadian Human Rights Act, R.S.C., ch. H-6, § 2 (1985) (Can.) (emphasis added). The amendment goes on, in section three, to identify sexual orientation as a prohibited ground of discrimination. See *id.* § 3.

24. See SENATE DEBATES 552 (1996). The vote was 54 in favor; six opposed. See *id.*

25. See Canada Statute Citator c19-1 (Can. Law Book Inc. Mar. 1998).

26. [1995] 2 S.C.R. 513. It should also be observed that, previous to this amendment, the Ontario Court of Appeals in *Haig v. Canada* (1992), 94 D.L.R. (4th) 1, had ordered that the *Canadian Human Rights Act* be read as if it did prohibit discrimination based on sexual orientation. See *id.* at 14. The *Haig* court ruled that such a reading was required by the equality provision of the Canadian Charter of Rights and Freedoms. See *id.* at 6 (quoting CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms, § 15(1))).

27. *Egan*, [1995] 2 S.C.R. at 518 (Cory, J. dissenting in part).

The stigmatization of homosexual persons and the hatred which some members of the public have expressed towards them has forced many homosexuals to conceal their orientation. This imposes its own associated costs in the work place, the community and in private life.²⁸

C. *The United Kingdom*

While there is evidence that public opinion may be slowly turning towards a greater tolerance and acceptance of homosexuality,²⁹ it is still easy to find examples of homophobic attitudes in government.³⁰ In a speech welcoming legislation preventing the "positive promotion" of homosexuality by local authorities, one politician noted:

Those bunch of queers that legalise filth in homosexuality have a lot to answer for and I hope they are proud of what they have done It is disgusting and diabolical. As a cure I would put 90 per cent of queers in the ruddy gas chamber. I would shoot them all. Are we going to keep letting these queers trade their filth up and down the country? We must find a way of stopping these gays going around.³¹

Like the other jurisdictions under consideration in this Article, there is clear evidence in the U.K. of discrimination against gay people in housing, employment, education and other public services as a direct result of their sexual orientation.³² In the employment field, gay men and lesbians are singled out for security vetting procedures for all posts in the diplomatic service, the police special branch, the U.K. Atomic Energy Authority and for posts with any firm which has a government contract involving classified material.³³ Gay men and lesbians are also treated differentially in the armed forces: there is an absolute bar on their employment.³⁴ This government

28. *Id.* at 600-01(citations omitted) (Cory, J. dissenting in part). Note that all the Supreme Court justices agreed that homosexuals were entitled to section 15 protection, but differed on whether the legislation in question was unconstitutional or not. *See id.* at 514-22.

29. In the "gays in the military" case, *Regina v. Ministry of Defence*, [1996] Q.B. 517 (Q.B. Div'l Ct.), *aff'd*, [1996] Q.B. 551 (Eng. C.A.), Simon Brown, L.J., of the Court of Queen's Bench stated that he personally disagreed with the Ministry of Defence's policy that homosexuality was incompatible with service in the armed forces. *See Regina*, [1996] Q.B. at 540.

30. *See* SUSAN S. M. EDWARDS, SEX AND GENDER IN THE LEGAL PROCESS 73-76 (1996) (listing examples of homophobic attitudes in government in the U.K.).

31. *Id.* at 74 (citing HIGH RISK LIVES: LESBIAN AND GAY POLITICS AFTER THE CLAUSE 4 (T. Kaufman et al. eds., 1991)).

32. *See id.* at 53-58.

33. *See id.* The Security Commission recommended that homosexuality should not be treated as an absolute bar to the positive vetting clearance for these posts. *See id.* The procedures were introduced in 1952 and the most recent revision was in 1990. *See id.* The aim is to safeguard national security and counter terrorism. *See id.*

34. *See Regina*, [1996] Q.B. at 524. The prohibitions derive from sections 66 and 69 of the Army Act 1955; sections 66 and 69 of the Air Force Act 1955 and sections 37 and 39 of the Naval Discipline Act 1957. *See id.*; Air Force Act, 1955, ch.

policy was criticized in *Regina v. Ministry of Defence*.³⁵ The court criticized the armed force's anti-homosexual policy in the following words:

The tide of history is against the ministry. Prejudices are breaking down; old barriers are being removed. It seems to me improbable, whatever this court may say, that the existing policy can survive for much longer. I doubt whether most of those present in court throughout the proceedings now believe otherwise.³⁶

Despite the judicial optimism expressed above, an independent study by the Social and Community Planning and Research Group has confirmed the serious nature and extent of discrimination against gay men and women in the U.K.³⁷ Based on questionnaires and interviews with a random sample of homosexual, bisexual and heterosexual employees, the study concluded that the problem was widespread.³⁸ The study found that 4% of gay employees have lost their jobs because of their sexuality; 8% have been refused promotion; 21% have been harassed at work; and 64% have concealed their sexuality from colleagues at work.³⁹ The study confirms that homophobic attitudes are endemic in British society.

D. Conclusion

While homophobic attitudes cross national boundaries, legal responses to discrimination based on sexual orientation are varied. Societal prejudice influences the legal protections available to gay and lesbian employees, but this Article will show that Canada, and to a lesser extent the U.K., have taken stronger steps to address sexual orientation discrimination. The next sections will compare constitutional, statutory and common law protections in these three jurisdictions.

II. The Constitutional Status of Gay Men and Lesbians

A. Introduction

Constitutional law is a conspicuous place to inquire after protection against sexual orientation discrimination. A national constitution, whether contained in a single document as in the United States, or in a variety of sources as is the case for Canada and the U.K., is "an agreement among the

19, §§ 66, 69 (Eng.); Army Act, 1955, ch. 18, §§ 66, 69 (Eng.). The position was expressly maintained by section 1(5) and section 2 of the Sexual Offences Act 1967. See *Regina*, [1996] Q.B. at 524.

35. See *Regina*, [1996] Q.B. at 533.

36. *Id.*

37. See Jilly Welch, *The Invisible Minority*, PEOPLE MGMT., Sept. 26, 1996, at 31.

38. See *id.* at 24.

39. See *id.* at 31.

people to determine the nature of their community"⁴⁰ as well as an instrument defining the nature of the individual-state relationship. Therefore, the extent to which constitutions protect against sexual orientation discrimination provides important evidence regarding state and societal attitudes toward gay men and lesbians.⁴¹

A starting point for a constitutional comparison of the jurisdictions under analysis is first, whether consensual homosexual sex has been criminalized and second, the judicial response to such criminalization. Consensual gay and lesbian sex was decriminalized in Canada in 1969.⁴² As then-Justice Minister Pierre Elliot Trudeau observed at the time: "The state has no place in the nation's bedroom."⁴³ Similarly, in the United Kingdom, male homosexual sex was decriminalized in Great Britain in 1967⁴⁴ and in Northern Ireland in 1982.⁴⁵ These changes in the criminal law followed the *Dudgeon v. United Kingdom*⁴⁶ decision by the European Court of Human Rights in 1982, holding that the prohibitions against homosexual conduct in the criminal law were in breach of the right to privacy and in contravention of Article 8 of the European Convention on Human Rights, as applied to men over the age of twenty-one.⁴⁷ This case, which was the first to raise the issue of gay rights in international human rights law, holds an important place in the his-

40. Jules Lobel, *The United States Constitution in its Third Century: Foreign Affairs: Rights—Here and There: The Constitution Abroad*, 83 AM. J. INT'L L. 871, 875 (1989).

41. For a scholarly review of constitutional protections for gay men and lesbians, see ROBERT WINTERMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION, AND THE CANADIAN CHARTER* (1995); CASSWELL, *supra* note 20.

42. See *Criminal Law Amendment Act*, ch. 38, 1968-1969 S.C. 869 (Can.). On a related front, the *Immigration Act of 1952* was amended in 1976 to remove homosexuality as a ground of prohibition of entry to or deportation from Canada. See CASSWELL, *supra* note 20, at 566.

43. COLOMBO'S CANADIAN QUOTATIONS 595 (John Robert Columbo ed., 1974) (Dec. 22, 1967 Ottawa interview). The authors extend their appreciation to Wanda Quoika-Stanks, Research Librarian, Faculty of Law, University of Alberta, for her assistance in finding the source of this quotation.

44. See *Sexual Offences Act*, 1967, ch. 60 (Eng.).

45. See *Homosexual Offense (Northern Ireland) Order*, 1982 N. Ir. Stat. No. 1536 (1982).

46. App. No. 7525/76, 3 Eur. H.R. Rep. 40 (1982) (Commission report). This case is discussed in SUE FARRAN, *THE UK BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS, CASE LAW AND COMMENTARY* 202-08 (1996).

47. See *Dudgeon*, 3 Eur. H.R. Rep. at 40. For a similar development in Australia, see *Communication No. 488/1992, Toonen v. Australia*, U.N. GAOR Hum. Rts. Comm., 49th Sess., Supp. No. 40, vol. II at 226, U.N. Doc. A/49/40 (1994), in which the United Nations Human Rights Committee ruled that statutes criminalizing homosexual sodomy in Tasmania violated the rights of privacy and nondiscrimination protected by the International Covenant on Civil and Political Rights. The case is discussed in Lawrence Hefler & Alice Miller, *Sexual Orientation and Human Rights*, 9 HARV. HUM. RTS. J. 61 (1996).

tory of the equality struggle for gay men and lesbians.⁴⁸ The decision forced the British Government to revise the Northern Ireland legislation to bring it into line with the rest of the U.K.⁴⁹ While the age of consent for private homosexual acts has been lowered to eighteen years,⁵⁰ it is still higher than the age of consent for heterosexual acts, which is sixteen.⁵¹

By contrast, in the United States, the constitutionality of the criminal sodomy statute from the state of Georgia was upheld in the 1986 case of *Bowers v. Hardwick*.⁵² The United States Supreme Court held, in a five to four decision, that the sodomy laws of Georgia (and, by analogy, those of twenty-four other states) did not violate the constitutional right to privacy, given the historical roots of anti-sodomy legislation.⁵³ The Court went on to distinguish the right asserted in *Bowers* from other recent privacy cases because no connection was established between family, marriage or procreation on the one hand, and homosexual activity, on the other.⁵⁴ In a well-reasoned and vehement dissent, however, Justice Blackmun rejected the majority's analysis of the case:

I believe we must analyze respondent Hardwick's claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an 'abominable crime not fit to be named among Christians.'⁵⁵

Fortified by the majority reasoning in *Bowers*, nineteen states⁵⁶ continue to

48. See James Kingston, *Sex and Sexuality under the European Convention on Human Rights*, in *HUMAN RIGHTS: A EUROPEAN PERSPECTIVE* 179-95 (L. Heffron ed. 1994). Sanders has described the case as "the watershed event in international human rights law for lesbian women and gay men" in Douglas Sanders, *Getting Lesbian and Gay Issues on the International Human Rights Agenda*, 18 *HUM. RTS. Q.* 67, 78 (1996).

49. See Sanders, *supra* note 48, at 79.

50. See Criminal Justice and Public Order Act, 1994, ch. 33, § 145(1) (Eng.). The unequal age of consent laws are currently being challenged before the European Commission on Human Rights. See Sanders, *supra* note 48, at 80.

51. See Sexual Offences Act, 1956, 4 & 5 Eliz. 2, ch. 69, § 6 (Eng.).

52. 478 U.S. 186 (1986).

53. See *id.* at 192.

54. *Id.* at 191.

55. See *id.* at 199 (Blackmun J., dissenting) (citing *Herring v. State*, 119 Ga. 709, 721 (1904)).

56. See Sabine Koji, *Constitutional Law—Campbell v. Sundquist: Tennessee's Homosexual Practices Act Violates the Right to Privacy*, 28 *U. MEM. L. REV.* 311, n.122 (1997). Of the 19 states, 13 criminalize same and opposite sex sodomy, and six criminalize only same sex sodomy. See National Gay and Lesbian Task Force, *The Right to Privacy* (last modified Dec. 1998) <<http://www.nglrf.org/downloads/sodomy1298.pdf>>. The Georgia Supreme Court recently struck down the Georgia statute, holding that it violated the right to privacy guaranteed by the Georgia Constitution. See *Powell v. State*, No. S98A0755, 1998 Ga. LEXIS 1148, at *10-14 (Ga. Nov. 23, 1998) (decision not final until expiration of rehearing period).

criminalize consensual sodomy.⁵⁷

As will be seen in the next section, constitutional protections for homosexuals in the United States remain weak, especially when compared to those in Canada.⁵⁸ While there can be no single account for this difference, the continued constitutionality of criminal sodomy statutes in America is rooted in homophobic attitudes that are an important part of the explanation.⁵⁹ In fact, the legal status of homosexual relations in the criminal law context appears to be a harbinger in the development of civil law protections based on sexual orientation.⁶⁰

B. *The Constitutional Status of Homosexual Persons in the United States*

It is well known that the United States Constitution protects funda-

57. A different constitutional tack was taken in another case involving Michael Bowers, the attorney general of Georgia who defended the state sodomy law in *Bowers v. Hardwick*. See *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997), cert. denied, 118 S. Ct. 693 (1998). This case involved Robin Shahar, a law student who was offered a job in the Georgia State Legal Department headed by Bowers. See *id.* at 1100. Upon learning that Shahar had entered into a marriage ceremony with her lesbian partner, Bowers withdrew the offer of employment, and Shahar sued him. See *id.* at 1101. The court of appeals assumed *arguendo* that the district court correctly characterized the issue in the case as involving plaintiffs' right to freely associate under the First Amendment, rather than a denial of equal protection under the Fourteenth Amendment. See *id.* at 1097. First Amendment rights, however, are not absolute and must be balanced against the government interest at stake. See *id.* at 1102-03 (citing balancing test from *Pickering v. Board of Ed.*, 391 U.S. 563, 566-68 (1968)). Thus, the court of appeals in *Shahar* weighed the plaintiffs' right to associate with whomever she chose against the defendant's responsibility to defend Georgia laws and prosecute those who break them, including those who break sodomy laws. See *id.* at 1105. The court concluded that even if Shahar had a right of association that included the right to associate with a same-sex partner, the defendant reasonably believed that Shahar's sexual orientation and public marriage ceremony would seriously undermine public confidence in the office of the Attorney General. See *id.* at 1106-10. Moreover, the court held that the Attorney General was to be afforded greater deference than other employers because of the trust required in his relationship with staff. See *id.* at 1103-04. The court held that the balance of interests weighed in favor of the defendant's withdrawal of the offer of employment. See *id.* at 1110. Under a different set of facts, however, a gay or lesbian plaintiffs' right to freely associate might well outweigh any interest the government could assert to justify discrimination on the basis of sexual orientation.

58. See *infra* notes 61-78 and accompanying text (exploring the constitutional status of homosexuals in the United States). See generally, Bobbie Bernstein, *Power, Prejudice, and the Right to Speak: Litigating "Outness" Under the Equal Protection Clause*, 47 STAN. L. REV. 269 (1995) (exploring the backdrop and reasons behind failures in constitutional challenges to homosexual discrimination in the United States).

59. See *supra* notes 2-10 and accompanying text (discussing homophobic attitudes in the U.S.).

60. See *supra* note 56 and accompanying text (referring to states that criminalize sodomy).

mental rights—including privacy, intimate association, due process and equal protection of the law—and that constitutional protection is particularly important when discrimination is visited upon a class of persons who are already stigmatized in society. As Justice Stone noted in his famous footnote in *United States v. Carolene Products Co.*: “[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial scrutiny.”⁶¹ Thus, the application of the Fourteenth Amendment’s Equal Protection Clause has been the basis of a heightened degree of scrutiny by the courts of government actions that negatively affect certain discrete and insular groups, such as women and African-Americans.⁶²

Despite the significance of equal protection under the Constitution, its reach is admittedly limited because a constitution protects people only from government or state action, not from the actions of private individuals.⁶³ Furthermore, since most civil rights plaintiffs who allege discrimination in the public sector rely on the Equal Protection Clause of the U.S. Constitution,⁶⁴ such plaintiffs must also establish themselves as members of a particular group recognized as deserving a high level of judicial scrutiny based on the group classification.⁶⁵ Laws that classify based on race receive the strictest scrutiny, and have consistently been struck down by the courts, because that classification is found not to be necessary to achieve any legitimate government objective.⁶⁶ Classifications based on gender are given an intermediate level of scrutiny, and the proponent of such a classification

61. 304 U.S. 144, 152-53 n.4 (1938).

62. See, e.g., *Reed v. Reed*, 401 U.S. 71 (1971) (striking down an Idaho law giving males a preference over females as estate administrators); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding Virginia’s law prohibiting interracial marriages unconstitutional).

63. See *The Civil Rights Cases*, 109 U.S. 3, 17 (1883). The Thirteenth, Fourteenth and Fifteenth amendments to the Constitution were passed shortly after the Civil War. See *POCKET GUIDE TO THE CONSTITUTION OF THE UNITED STATES* 28-30 (1996). But it was almost 100 years later before the Congress of the United States passed the 1964 Civil Rights Act that would finally make discrimination based on race unlawful in the private sector. See *Civil Rights Act*, 42 U.S.C. § 2000 (1994).

64. “nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, §1.

65. See *LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW* 1436-54 (1988). Thus, a law which classifies people based on race is subject to the strictest scrutiny and is likely to be struck down as unconstitutional, whereas a classification based on being a smoker, for example, would be subject only to limited scrutiny and would probably be upheld. See *Webber v. Crabtree*, 158 F.3d 460 (9th Cir. 1998) (finding that smoking is not a fundamental right and thus deserves only rational basis review); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1988) (stating that classification on the basis of race deserves strict scrutiny).

66. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (striking down laws that had disparate effects on Chinese laundrerers).

would have to make a compelling justification for a law which classifies people based on their gender in order to successfully withstand this intermediate scrutiny.⁶⁷ Classifications based upon sexual orientation have not been categorized as suspect,⁶⁸ perhaps because, as a group, lesbians and gay men are not perceived as having suffered the economic deprivation and political powerlessness associated with other protected groups. In fact, Justice Scalia took the position in his dissent in *Romer v. Evans*⁶⁹ that the majority of citizens in Colorado needed a constitutional amendment forbidding protection of lesbians and gay men because "those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, . . . have high disposable income, . . . and of course care about homosexual rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide."⁷⁰

Lesbians and gay men have recently received a measure of constitutional recognition in the United States through the *Romer* decision, but this recognition has exceptionally limited precedential value for discrimination issues in the public workplace. In *Romer*, the Supreme Court was asked to rule on the constitutionality of a referendum-approved amendment to Colorado's state constitution which sought to prohibit localities from passing ordinances which ban discrimination based on sexual orientation.⁷¹ The majority of the Court held that the amendment violated the Constitution of the United States by singling out a group (homosexuals) and prohibiting its members from influencing the political process with regard to a particular issue, while all other groups would be free to do so.⁷²

Significantly, the *Romer* court merely held that the amendment violated the fundamental right of all persons to participate in the political process.⁷³ It did not find that sexual orientation could be the basis for recogniz-

67. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (striking down an Oklahoma law prohibiting the sale of 3.2% beer to males under the age of 21 and females under the age of 18).

68. See generally Bernstein, *supra* note 58, at 269. Bernstein concludes that the classification of homosexuality under the Equal Protection Clause has not been a successful approach for gay victims of discrimination, and proposes instead that the expression of one's sexual identity (coming out), should be subject to strict scrutiny as a fundamental right of free expression under the First Amendment. *Id.*

69. 116 S. Ct. 1620 (1995).

70. *Id.* at 1634 (Scalia J., dissenting).

71. See *id.* at 1620. The amendment passed with a 53% majority, but was never enforced, as litigation commenced immediately. See *Evans v. Romer*, 854 P.2d 1270, 1272 (Colo. 1993). The Supreme Court of Colorado enjoined the enforcement of the amendment until final disposition by the United States Supreme Court. See *Romer*, 116 S. Ct. at 1624.

72. See *Romer*, 116 S. Ct. at 1621.

73. See *id.* at 1628-29.

ing a specially protected class.⁷⁴ Notwithstanding the court's decision, some scholars believe that the *Romer* decision means that *Bowers v. Hardwick*⁷⁵ would be overruled if another litigant were to bring "such sex crime laws before the Court."⁷⁶ Others, such as Professor Robert Wintemute, persuasively contend that the reasoning of the court in *Romer* was so circumscribed that the judges in the majority "left themselves plenty of room to limit *Romer*" and follow *Bowers* in future cases.⁷⁷ According to Wintemute, "a future majority of the court might point to the difference between 'status' and 'conduct' as explaining the difference between invalid 'animosity' [as determined by the court in *Romer*] and valid 'sentiments about morality' [the rationale of *Bowers*]."⁷⁸ So far at least, *Romer* is not thought of as a strong victory for the equal rights of homosexuals. Discourse surrounding civil rights for gay men and lesbians in the U.S. is still strongly influenced by "traditional" notions of morality and family.

C. *The Constitutional Status of Homosexual Persons in Canada*

The lack of constitutional protection in the U.S. is in marked contrast to such protection in Canada.⁷⁹ In *Egan v. Canada*,⁸⁰ Justice Cory determined that those of a same-sex orientation have suffered an "historic disadvantage"⁸¹ as a result of having been the chronic targets of crimes of violence, public harassment, verbal abuse and employment discrimination.⁸² All members of the Court ruled that homosexuals are a constitutionally protected class under the section 15 equality provision contained in the Canadian Charter of Rights and Freedoms.⁸³ Section 15 of the charter states that "every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."⁸⁴

74. See *id.* at 1629. According to Justice Scalia in his dissenting opinion in *Romer*, the purpose of Amendment 2 was to "both counter the geographic concentration and the disproportionate political power of homosexuals" in certain areas of Colorado. *Id.* at 1634. Such a rationale suggests that the intent of the proponents of the amendment was indeed to limit the exercise of political power by a group deemed "undesirable" by a state-wide majority. See *id.* at 1634-35.

75. 478 U.S. 186 (1986).

76. Ian Loveland, *Gay Rights in the USA?*, 146 NEW L.J. 1847, 1847 (1996).

77. Robert Wintemute, *A "Fundamental Right to be Gay" in the USA? Not Yet*, PUB. L., Autumn 1997, at 420, 420.

78. *Id.* at 421.

79. See *infra* notes 80-88 and accompanying text (discussing Constitutional protection in Canada).

80. [1995] 2 S.C.R. 513 (Can.).

81. *Id.* at 600.

82. See *id.* at 600-01.

83. See *id.* at 514.

84. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and

Even though section 15 does not expressly protect gay men and lesbians, it is to be read as if it did because sexual orientation is analogous to specifically enumerated grounds such as race and sex.⁸⁵ The decision in *Egan* very clearly means that governmental persons are prohibited from discriminating against gay men and lesbians.⁸⁶ If such discrimination occurs which cannot be "demonstrably justified,"⁸⁷ the plaintiff is entitled under section 24 to "such remedy as the court considers appropriate and just in the circumstances."⁸⁸

Freedoms), § 15.

85. See *Egan*, [1995] 2 S.C.R. at 514.

86. Though providing homosexuals the status of an analogous group under section 15 of the Canadian Charter of Rights and Freedoms, *Egan* went on to hold that the definition of spouse in the Old Age Security Act, R.S.C., ch. O-9 (1985) (Can.), which was restricted to a person of the opposite sex, was not impeachable. *Id.* at 515-16.

The reasoning of *Egan* was recently applied by the Ontario Court of Appeals in *Rosenberg v. Canada (Attorney General)* (1998), 38 O.R. (3d) 577. The court ruled unconstitutional the restriction in the *Canadian Income Tax Act* that registration of a private pension plan with Revenue Canada is only permissible if the plan restricts survivorship benefits to spouses of the opposite sex. See *id.* at 577. According to Justice Abella: "The government's objective in favoring heterosexual partnership choices permits intolerance of the constitutionally protected rights of gays and lesbians. As such it is discriminatory and cannot be viewed as justification for a constitutional violation." *Id.* at 586. She further observed: "Differences in cohabitation and gender preferences are a reality to be equitably acknowledged, not an indulgence to be economically penalized. There is less to fear from acknowledging conjugal diversity than from tolerating exclusionary prejudice." *Id.* at 589.

Egan has also recently been relied on by the Ontario Court of Appeal in *M. v. H.* (1996), 31 O.R. (3d) 417, 419 (C.A.), leave to appeal to the S.C.C. granted, No. 25838, [1997] S.C.C.A. Q.L. 101, at 3 (Apr. 24, 1997). The court ruled unconstitutional the exclusion of same sex couples from the definition of spouse in section 29 of the Ontario Family Law Act, R.S.O., ch. F-3 (1990). See *id.* at 418. In *Kane v. A.G. Ontario* (1997), 152 D.L.R. (4th) 738, 739 (Ont. Ct. Gen. Div.), the Ontario Court held that the definition of spouse in the Ontario Insurance Act is unconstitutional because it restricted death benefits to opposite sex couples. The court distinguished *Egan* on the basis that the additional premium costs would be minimal to the insured. See *id.* at 745-46.

In *McAleer v. Canada* the court relied on *Egan* to uphold the constitutionality of a law making it a discriminatory practice to communicate hate messages against an identifiable group by telephone. (1996), 132 D.L.R. (4th) 672, 677 (F.C.T.D.). In this case, the applicants had disseminated a recorded message by telephone advocating the trampling of 'queers' into the peat bog. See *id.* at 675.

87. See CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms). Section 1 provides: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." *Id.* § 1.

88. *Id.* § 24.

D. Constitutional Status of Homosexual Persons in the United Kingdom

The United Kingdom has no formal written constitution, and discussion of the constitutional protection of gays and lesbians is not useful, at least within the context of domestic law. In addition, the distinction between public and private employment is not one that is commonly made.⁸⁹ As a general rule, legislation in the area applies equally to public and private employers,⁹⁰ with only the most limited exceptions in the case of employment in the armed forces, if national security grounds apply.⁹¹ However, the United Kingdom is a member of both the Council of Europe and the European Union, and the instruments of both organizations have a status which is in some senses akin to constitutional protection, as a form of "higher law."⁹² With regard to the Council of Europe, Article 8 of its (European) Convention for the Protection of Human Rights and Fundamental Freedoms states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.⁹³

89. See generally Sex Discrimination Act, 1975, ch. 65, § 85 (1) (Eng.); Race Relations Act, 1976, ch. 74, § 75 (1) (Eng.); Disability Discrimination Act, 1995, ch. 50, § 64 (1) (Eng.). The domestic discrimination statutes apply to both private and public sectors, including the Crown. See *id.*

90. See Sex Discrimination Act, 1975, ch. 65, § 85 (1); Race Relations Act, 1976, ch. 74, § 75 (1); Disability Discrimination Act, 1995, ch. 50, § 64 (1).

91. See Sex Discrimination Act, 1975, ch. 65, § 52 (1) (Eng.); Race Relations Act, 1976, ch. 74, § 42 (1) (Eng.). Under the provisions of the Armed Forces Act 1996, members of the forces are permitted to bring claims of sex or race discrimination before the Industrial Tribunal. See Armed Services Act, 1996, ch. 46, §§ 21-27 (Eng.).

92. See European Communities Act, 1972, ch. 68, § 2 (1) (Eng.). The United Kingdom has undertaken to give supremacy to European Community Law wherever there is a conflict between the principles of domestic (U.K.) law and those of Community Law. See *Factortame Ltd. v. Secretary of State for Transport*, [1989] 2 All E.R. 692. The decisions of the European Court of Justice are binding under principles of international law, and the United Kingdom has a good record of compliance. See JOSEPHINE STEINER & L. WOODS, TEXTBOOK ON EC LAW 66-71, 369-71, 409-17 (1996).

93. Sept. 21, 1970, Europ. T.S. No. 5, Art. 8 (1950). The European Convention for the Protection of Human Rights and Fundamental Freedoms was drawn up by the Council of Europe in 1950 and entered into force in 1953. See Bernhard Schloh, *The Presidency of the Council of the European Union*, 25 SYRACUSE J. INT'L L. & COM. 93, 113 (1998). It has now been ratified by 40 states, including many former Communist, Eastern-block states. See *id.* It has been described as "the quasi-constitutional bill of rights of a nascent, quasi-federal Europe." WINTERMUTE, *supra* note 41, at 4.

In *Dudgeon v. United Kingdom*, discussed earlier, the Court ruled that the criminalization of homosexual relations violated the right to respect for private life under Article 8.⁹⁴ The Commission, however, has since ruled that homosexual relationships do not come within the right to respect for family life.⁹⁵ The failed challenge in *Regina v. Ministry of Defence*⁹⁶ to the government's policy to dismiss all homosexual service personnel has now been referred to the Court under the same article, though it will be some time before a decision is forthcoming.⁹⁷ A particularly important development in this area was the decision by the British Government in October 1997 to publish a Human Rights Bill, which aims to incorporate the European Convention on Human Rights into the domestic law of the United Kingdom.⁹⁸ The importance of this Bill is that provisions of the Convention will, for the first time, be enforceable directly in the domestic courts.⁹⁹ This piece of human rights legislation will have an important impact on the protection of gays and lesbians from governmental discrimination, given that the European Court of Human Rights has already considered cases from several countries where homosexual men have successfully complained about the denial of their right to privacy under Article 8.¹⁰⁰

Turning to the European Union, the question of what protection European law gives against discrimination on grounds of sexual orientation has thus far been answered in a disappointing way. The European Court of Justice (ECJ) has recently ruled, for example, that sexual orientation discrimination is not a form of direct sex discrimination prohibited by the Equal Pay

94. *Dudgeon v. United Kingdom*, App. No. 7525/76, 3 Eur. H.R. Rep. 40, 54 (1982) (Commission report).

95. See Pieter van Dijk, *The Treatment of Homosexuals Under the European Convention on Human Rights*, in *Homosexuality: A European Community Issue*, 26 INT'L STUD. HUM. RTS. 179 (1993). This has sharply narrowed the grounds that can be argued under the Convention. See *id.* For example, immigration rights, marriage rights, succession rights and accommodation rights have all been denied. See *id.*

96. [1996] Q.B. 517 (Q.B. Div'l Ct.), *aff'd*, [1996] Q.B. 551 (Eng. C.A.).

97. See *R. v. Secretary of State*, [1997] I.R.L.R. 297, 299 (Q.B.).

98. Human Rights Bill (visited Feb. 10, 1999) <<http://www.official-documents.co.uk/document/hoffice/rights/rights.htm>>. At the time of writing of this Article, the bill had passed through the House of Lords and was introduced in the House of Commons on February 6, 1998. See *House of Commons, Weekly Information Bulletin* (visited Feb. 7, 1998) <<http://www.parliament.the-stationary-office.co.uk/pa/cm199798/cmwiwb/wb980207/pub.htm>>.

99. See Human Rights Bill, cls. 2-3 (visited Feb. 10, 1999) <<http://www.official-documents.co.uk/document/hoffice/rights/rights.htm>>; TIMES (London), Jan. 19, 1998, at 5 (citing a speech made by Sir William Wade to a conference of judges and lawyers at Cambridge University's Centre for Public Law, in which he expressed his opinion that some individuals would bring their challenges directly to the courts for the sake of their "more powerful remedies").

100. See Douglas Sanders, *Constructing Lesbian and Gay Rights*, CAN. J. L. & SOC'Y, Fall 1994, at 99, 103.

Directive.¹⁰¹ In the 1998 decision of *Grant v South West Trains*,¹⁰² the ECJ ruled that denial of employment benefits for same-sex partners is not contrary to Article 119 of the Treaty Establishing the European Community.¹⁰³ In light of the *Grant* decision, the reference of another sexual orientation case to the ECJ was withdrawn.¹⁰⁴ These cases, mentioned here to illustrate the topicality of sexual orientation litigation, are discussed in more detail later in this Article.¹⁰⁵

Within the European Union, action to protect gay men and lesbians is also being taken at the level of the Council of Ministers.¹⁰⁶ In October of 1997, a proposed revision to the Treaty Establishing the European Community¹⁰⁷ was signed by the member states.¹⁰⁸ Article 2(7) of the Treaty of Amsterdam provides for the insertion of a new Article 13 into the EC Treaty, which will allow the Council of Ministers to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or *sexual orientation*."¹⁰⁹ However, this proposal requires a unanimous vote by the Council of Ministers, acting on a proposal from the Commission, after consulting the European Parliament.¹¹⁰ Even then, it merely provides a legal base for the Council to initiate legislation or other measures at some future date.¹¹¹ Given the great diversity that currently exists among the laws of member states of the European Union, it is unlikely

101. Council Directive 75/117/EEC of 10 February 1975 on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women, 1975 O.J. (L 45).

102. Case C-249/96, 1998 E.C.R. I-621.

103. See *id.* at I-653.

104. See *R. v. Secretary of State for Defence*, [1998] I.R.L.R. 508 (Q.B.).

105. See *infra* notes 163-83 and accompanying text (discussing *Grant v. South-west Trains* and *R. v. Sec. of State for Defence*).

106. See generally Mark Bell & Lisa Waddington, *The 1996 Intergovernmental Conference and the Prospects of a Non-Discrimination Treaty Article*, 25 INDUS. L.J. 320 (1996) (alerting readers to the controversy surrounding the addition of sexual orientation to an existing non-discrimination provision of the Treaty); Frances Russell, *Sexual Orientation Discrimination and Europe*, 145 NEW L.J. 374 (1996) (comparing legislation in the United Kingdom dealing with discrimination based on sexual orientation with that of the rest of the European community).

107. Feb. 7, 1992, O.J. (C224) 1 (1992) [hereinafter EC treaty].

108. See Treaty of Amsterdam (last modified Feb. 27, 1998) <<http://europa.eu.int/en/agenda/igc-home/index.html>>.

109. *Id.* (emphasis added).

110. See EC Treaty, *supra* note 107, at Art. 189 (b), § 2.

111. See Catherine Barnard, *The United Kingdom and the Amsterdam Treaty*, 26 INDUS. L.J. 275, 281 (1997) (referring to presidential comments in a draft of the treaty indicating that the provision is only an enabling measure, but noting that it will ultimately be a matter of judicial interpretation to determine whether the treaty gives more power). While Member States agreed upon the need for an anti-discrimination clause, they did not agree upon the grounds of discrimination to be included. See *id.* In particular, concerns were raised about the inclusion of disability and sexual orientation. See *id.* For this reason the clause is permissive rather than mandatory. See *id.*

that this will happen in the foreseeable future. Perhaps the proposal's greatest significance for the present is its recognition that non-discrimination on the basis of sexual orientation should be a general principle of Community law.

E. Conclusion

The recognition of homosexual equality rights *vis à vis* the state is of foundational importance and counts as a critical step in the development of human rights protection for gays and lesbians. This is because any law, and particularly a national constitution, has the power both to impugn and legitimize hatred¹¹² against an identifiable group. Second, given that the state is embedded in society and "linked in thousands of ways to interests in society," a governmental standard which is non-homophobic incrementally advances that same standard in the private sphere and, more specifically, can provide momentum for the promulgation of human rights codes regulating private sector behavior.¹¹³ Finally, liberal political theory acknowledges that interference with the government's freedom to act as it sees fit is inherently more palatable than interference with decisions taken by employers in the private marketplace.¹¹⁴ Hence, if the public sector is entitled to discriminate on the basis of sexual orientation, there is no obvious principle upon which the private sector could be held to a more restrictive standard.

III. Protection in the Private Sector Through Human Rights Legislation

A. Protection from Private Employment Discrimination Based on Sexual Orientation in the United States

There is no federal protection in the United States against private employment discrimination based on sexual orientation, even though such legislation would have the potential to alter significantly the employment landscape for lesbians and gay men.¹¹⁵ This absence, in turn, permits a wide

112. See KENNETH KARST, *LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* 186 (1993) (suggesting that laws have a role in maintaining social order).

113. Alan Cairns, *The Embedded State: State-Society Relations in Canada*, in *STATE AND SOCIETY: CANADA IN COMPARATIVE PERSPECTIVE* 53, 79 (Keith Banting ed., 1986).

114. See generally Shannon Kathleen O'Byrne, *Towards an Integrated, Liberal Theory of the Canadian State*, 33 *LES CAHIERS DE DROIT* 1057 (1992) (analyzing the broadly shared public values that call for a distinction between treatment of government and private institutions at common law).

115. An expansive reading of Title VII of the 1964 Civil Rights Act to include same sex sexual harassment was successfully sought by the plaintiff in *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1002 (1998). The Supreme Court noted that with respect to "hostile environment" same-sex sexual harassment cases, lower courts have taken a "bewildering variety of stances," including a

disparity among states and localities. For example, virtually all states and the District of Columbia have human rights legislation or state constitutional provisions prohibiting some form of discrimination in the private sector.¹¹⁶ However, only ten specifically bar discrimination based on sexual orientation,¹¹⁷ and approximately 126 localities have enacted anti-discrimination ordinances.¹¹⁸ This patchwork of protection, though constitutionally secure as a result of *Romer*,¹¹⁹ is seriously and obviously deficient.¹²⁰

B. Protection from Private Employment Discrimination Based on Sexual Orientation in Canada

In the private sector, Canada again takes the lead with respect to prohibiting employment discrimination based on sexual orientation. The vast majority of Canadian provinces and territories have human rights legislation prohibiting, *inter alia*, discrimination on the grounds of sexual orientation either as a result of legislative enactment¹²¹ or judicial fiat.¹²² Additionally,

refusal to recognize any claim, recognizing only claims involving a homosexual harasser, or recognizing claims regardless of the sexual orientation of the parties. *Id.* While the parties to this suit were not homosexual, the Court's decision clearly extended protection from sexual harassment to victims, regardless of sexual orientation. *See id.*

116. *See, e.g.,* Eric Sohlgrén, *Group Health Benefits Discrimination Against AIDS Victims: Falling Through the Gap in Federal Law*, 24 LOY. L.A. L. REV. 1247, 1248 (1991) (explaining that all states prohibit employment discrimination on the basis of disability).

117. *See* CONN. GEN. STAT. § 46a-81a (1997); HAW. REV. STAT. § 368-1 (1997); MASS. ANN. LAWS ch. 151B, § 1 (1998); MINN. STAT. § 363.03 (1998); N.H. REV. STAT. ANN. § 10:5-12 (Supp. 1998); N.J. STAT. ANN. § 10:5-4 (West 1993); R.I. GEN. LAWS § 28-5-5 (1995 & Supp. 1998); VT. STAT. ANN. tit. 8, § 1211 (1997); WIS. STAT. ANN. § 111.36 (1997). In *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77, 87 (1991), the California Court of Appeals found that homosexuality is the equivalent of a political activity or association and, therefore, discrimination is prohibited under the California Labor Code. Section 1101(b) prohibits employers from making, adopting or enforcing any policy that tends to control or direct the political activities or affiliations of employees. CAL. LAB. CODE § 1101(b) (West 1998).

118. *See* James Button, et al., *Where Local Laws Prohibit Discrimination*, PUB. MGMT., Apr. 1995, at 9, 10.

119. *See supra* notes 69-78 and accompanying text (describing the usefulness of the holding in *Romer*).

120. Recent events in the state of Maine clearly illustrate this deficiency. In 1997, the Maine legislature enacted legislation prohibiting, *inter alia*, employment discrimination based on sexual orientation. *See* ME. REV. STAT. ANN. tit. 5, § 4552 (West 1964). In a procedure known as the "peoples veto", the law was repealed in February of 1998 after an extensive grass roots campaign by the law's opponents. *See* Carey Goldberg, *Maine Voters Repeal a Law on Gay Rights*, N.Y. TIMES, Feb. 12, 1998, at A1, A1.

121. The Human Rights Act in British Columbia was amended in 1992 to prohibit discrimination on the basis of sexual orientation. S.B.C., ch. 43 (1992) (Can.). The same was done in Manitoba in 1987-1988, New Brunswick in 1992, Nova Scotia in 1991, Ontario in 1986, Quebec in 1977, Saskatchewan in 1993, the Yukon in 1987 and federally in 1996. *See* R.S.M., ch. 45 (1987-1988) (Can.); R.S.N.B., ch. 30 (1992) (Can.); S.N.S., ch. 12 (1991) (Can.); S.O., ch. 64 (1986) (Can.); S.Q., ch. 6

and as mentioned earlier, the federal Human Rights Act has recently been amended to forbid such discrimination.¹²³ This means that where an individual has suffered private employment discrimination on the basis of sexual orientation, he or she can make a complaint to an administrative agency established by the legislation.¹²⁴ If, upon investigation, this administrative body cannot secure a satisfactory resolution to the matter, a tribunal is convened and mandated to adjudicate on the question of whether a prohibited discriminatory practice has occurred and, if so, to order a remedy.¹²⁵

The province of Alberta, by way of contrast, has historically refused to amend its human rights legislation, now known as the Human Rights, Citizenship and Multiculturalism Act,¹²⁶ so as to prohibit marketplace discrimination based on sexual orientation.¹²⁷ The majority of the Alberta Court of Appeals, in *Vriend v. Alberta*,¹²⁸ ruled that this refusal did not violate the constitutional guarantee of equality contained in the Canadian Charter of Rights and Freedoms.¹²⁹ This ruling has recently been reversed by the Supreme Court of Canada.¹³⁰

The Supreme Court expressly overturned Justice McClung's lead decision that legislative silences, omissions, or other forms of under-inclusiveness are immune from constitutional scrutiny.¹³¹ The Supreme

(1977) (Can.); S.S., ch. 61 (1993) (Can.); S.Y.T., ch. 3 (1987) (Can.); COMMONS DEBATES, *supra* note 22, at 552. For a comprehensive discussion of Canadian legislative history in this area, see CASSWELL, *supra* note 20, at 21.

122. Four Canadian jurisdictions do not have human rights legislation expressly prohibiting discrimination on the basis of sexual orientation. In *Newfoundland (Human Rights Commission) v. Newfoundland (Minister of Employment and Labour Relations)* (1995), 127 D.L.R. (4th) 694 (Nfld. S.C.T.D.), however, the court ordered that Newfoundland's Human Rights Code be read as prohibiting discrimination on the grounds of sexual orientation, based on the reasoning, *inter alia*, of *Haig v. Canada* (1992), 94 D.L.R. (4th) 1. Prince Edward Island's human rights legislation does not expressly protect sexual orientation, but its human rights commission does accept complaints alleging this kind of discrimination, based on *Haig*. See CASSWELL, *supra* note 20, at 29-39. Neither the Alberta Human Rights, Citizenship and Multiculturalism Act nor the Northwest Territories' Fair Practices Act prohibits discrimination on the basis of sexual orientation. See R.S.A., ch. H-11.7 (1996) (Can.); R.O.N.W.T., ch. F-2, §§ 3(1)-4(1) (1988) (Can.); see also CASSWELL, *supra* note 20, at 29-39.

123. See Canadian Human Rights Act, R.S.C., ch. H-6, §§ 1-2. For a history of the bill, see CASSWELL, *supra* note 20, at 24.

124. See CASSWELL, *supra* note 20, at 24.

125. See *id.* at 21-22.

126. S.A. ch. H-11.7.

127. See *infra* notes 137-42 and accompanying text (noting Alberta's refusal to include sexual orientation as a prohibited basis for discrimination).

128. (1996), 132 D.L.R. (4th) 595 (Alta. C.A.), *rev'g* [1994] 6 W.W.R. 414 (Q.B.).

129. See *id.* at 601. The court found that it was a valid legislative determination. See *id.* at 601-10.

130. See *Vriend v. Alberta* (1998), 156 D.L.R. (4th) 385 (deciding that omission of sexual orientation from the Act denied gays and lesbians equal protection).

131. See *id.* at 412-13.

Court also rejected his contention that any judicial review of Alberta's human rights legislation would be illegitimate for being anti-democratic.¹³² Canada's highest court defended the constitutionally-mandated judicial role of scrutinizing legislative and executive conduct for compliance with constitutional values.¹³³ It reasserted and defended the judiciary's constitutional obligation as trustees to assess government action "in the interests of the new social contract that was democratically chosen" during the years leading up to the patriation of the Canadian constitution.¹³⁴

More specifically, the Supreme Court ruled that Alberta's failure to protect homosexuals from discrimination in its very own human rights legislation was patently contrary to the equality provision of the Charter.¹³⁵ Writing for a unanimous court on this point, Justice Cory stated that the legislative exclusion at bar sent a message:

[I]t is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation. The effect of that message on gays and lesbians is one whose significance cannot be underestimated. As a practical matter, it tells them that they have no protection from discrimination on the basis of their sexual orientation. Deprived of any legal redress they must accept and live in constant fear of discrimination. These are burdens which are not imposed on heterosexuals.

Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetuates the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.¹³⁶

Perhaps because the discrimination was so blatant and unjustifiable, the Supreme Court agreed with the appellants and ordered that the Act *immediately* be read as if it prohibited discrimination based on sexual orientation.¹³⁷ Though section 33 of the Charter would permit the government to "opt out" of having to follow the Supreme Court's ruling in this matter, the

132. *See id.* at 412, 439-40.

133. *See id.* Justice Iacobucci, writing for a unanimous court on this point, notes that this remedial role given to the judiciary was chosen by the Canadian people "through their elected representatives as part of a redefinition of our democracy." *Id.* at 437-38.

134. *Id.* at 438.

135. *See id.* at 428.

136. *Id.*

137. *See id.* at 448.

government caucus has stated that this option would not be exercised.¹³⁸ As a result of the Supreme Court of Canada's decision, the individual who suffers discrimination on the basis of sexual orientation anywhere in Canada is entitled to make a complaint to the appropriate human rights tribunal and seek redress through that administrative forum.¹³⁹

C. Protection from Private Employment Discrimination Based on Sexual Orientation in the U.K.

In the U.K., only discrimination based on race, gender, religion or disability is outlawed.¹⁴⁰ There is no specific legislation which prohibits discrimination on grounds of sexual orientation in either public or private employment. Recently, however, the argument has been advanced in U.K. courts that sexual orientation discrimination is also sex discrimination,¹⁴¹ and as such unlawful under the Sex Discrimination Act of 1975¹⁴² and the Equal Treatment Directive.¹⁴³

The first reported decision raising this argument was *Regina v. Ministry of Defense ex parte Smith*,¹⁴⁴ in which four gay and lesbian members of the armed forces challenged their dismissals as unlawful under the Equal Treatment Directive.¹⁴⁵ The Court of Appeal upheld the High Court's refusal to grant judicial review of the policy of discharging all service personnel known to be gay.¹⁴⁶ The court adopted a very narrow, literal approach to the interpretation of the European Directive and argued that it could not be construed to cover dismissal on the grounds of sexual orientation because this had not been in the minds of the drafters of the Directive in 1976.¹⁴⁷

138. See *Alberta Takes Out Ads on Gay Rights Ruling*, NAT'L GEN. NEWS (Ottawa), Apr. 14, 1998, available in QL System, CP98.

Note that section 33 of the Charter provides: "(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of the Charter." *Vriend*, 156 D.L.R. (4th) at 452. Section 15 is the equality provision which was violated in *Vriend*. *Id.* at 386.

139. See *Vriend*, 156 D.L.R. (4th) at 386.

140. See generally Sex Discrimination Act, 1975, ch. 65 (Eng.); Race Relations Act, 1976, ch. 74 (Eng.); Disability Discrimination Act, 1995, ch. 50 (Eng.); Fair Employment (NI) Act, 1989, ch. 32 (Eng.).

141. See *infra* notes 144-181 and accompanying text (discussing challenges to discrimination based on sexual orientation under the two pieces of legislation).

142. 1975, ch. 65 (Eng.).

143. Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions, 1976 O.J. (L 39).

144. [1996] Q.B. 517, *affd.*, [1996] Q.B. 551 (Eng. C.A.).

145. See *id.* at 523.

146. See *id.* at 517.

147. See *id.* at 543-44. Thorpe, L.J., of the Court of Appeal, stated: "[A]ny common sense construction of the Directive in the year of its issue leads in my judg-

This may be literally true, but under European law the intention of the drafters is not conclusive.¹⁴⁸ The English court refused to refer the case to the ECJ on the grounds that European law was sufficiently clear in this area.¹⁴⁹ As indicated earlier, however, the matter will proceed to review before the European Court of Human Rights.¹⁵⁰

In the second case, *Smith v. Gardner Merchant*,¹⁵¹ a gay barman challenged his dismissal under the Sex Discrimination Act of 1975.¹⁵² The Industrial Tribunal refused to accept the argument that the correct approach was to compare the treatment of a gay man to that of a heterosexual woman, that is, both were attracted to men, but only the gay man was subjected to sanctions in the form of harassment.¹⁵³ The Employment Appeal Tribunal (E.A.T.) further refused to refer the case to the ECJ although there were two contentious issues: the choice of an appropriate comparator, and the question of whether sexual orientation discrimination is also sex discrimination.¹⁵⁴ On appeal to the Court of Appeal, the court confirmed that discrimination on grounds of sexual orientation is not discrimination on the grounds of sex within the meaning of the Sex Discrimination Act.¹⁵⁵ The court found that a person's sexual orientation is not to be treated as an aspect of his or her sex.¹⁵⁶ For the purposes of the Act, the proper comparison, where a male employee has been harassed by reason of his sexual orientation, is with the treatment of a female homosexual employee.¹⁵⁷ The case was remitted to the Tribunal to consider whether such an employee would have been treated any

ment to the inevitable conclusion that it was solely directed to gender discrimination and not to discrimination against sexual orientation." *Id.* at 565.

148. In Case 283/81, *CILFIT v. Minister of Health*, 1982 E.C.R. 3415, at 3430, the ECJ ruled that "every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied." (emphasis added). The question of the intention of the drafters was not even asked by the ECJ in the case which decided that pregnancy discrimination was also sex discrimination. See Case C-177/88, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen Plus*, 1991 E.C.R. I-3941.

149. See *Regina*, [1996] Q.B. at 560, 565.

150. See *id.*

151. [1996] I.C.R. 790 (E.A.T.), *appeal allowed*, [1998] 3 All E.R. 852, 875 (C.A.).

152. See *id.* at 791.

153. See *id.* The Industrial Tribunal refused to hear the case based on lack of jurisdiction under the Sex Discrimination Act of 1975. See *id.* at 792. The decision may go against the provisions of the Code of Practice on Sexual Harassment issued by the European Commission, which states that verbal conduct of a sexual nature does not lose its sexual character merely because it is directed towards a homosexual. See Commission Recommendation 24/2/92 of 27 November 1991 on the Protection of the Dignity of Men and Women at Work, Code of Practice, § 1, 1992 O.J. (L 49) 1.

154. See *Smith*, [1996] I.C.R. at 793-94.

155. See *Smith v. Gardner Merchant*, [1998] 3 All E.R. 852, 852 (C.A.).

156. See *id.* at 863.

157. See *id.* at 865.

differently.¹⁵⁸

A case which raised the possibility that European Law might receive a wider interpretation that the domestic British legislation was the important decision of the ECJ in *P. v. S.*,¹⁵⁹ a case concerning the dismissal of a transsexual manager. In this case, the ECJ adopted a purposive approach to the Equal Treatment Directive:

To tolerate . . . discrimination [based on transsexuality] would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the court has a duty to safeguard [The Directive is] simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law Accordingly, the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex.¹⁶⁰

The case of *P. v S.* opened up the possibility that, since the Directive prohibits employment discrimination against transsexual persons, it may also prohibit such discrimination against gay, lesbian and bi-sexual persons and against same-sex couples. Unfortunately, this possibility has been all but eliminated as a result of the Court of Justice's ruling in *Grant v. South-West Trains*.¹⁶¹ As discussed earlier,¹⁶² *Grant* raised the issue of sexual orientation discrimination as a form of prohibited sex discrimination under Article 119 of the EC Treaty and specifically challenged the employer's pay policy which provided certain travel benefits for a cohabitee of the opposite sex but refused those benefits to a cohabitee of the same gender.¹⁶³ The Advocate General recommended that the Court hold that this policy constitutes discrimination based on gender and therefore is contrary to the provisions of the EC Treaty.¹⁶⁴ He stated that the travel benefit was "dependent on the gender of the employee inasmuch as employees must be of the opposite sex to their cohabitees Gender is thus, objectively, the factor that leads to pay discrimination against a particular group of employees."¹⁶⁵ Regrettably, however, the Court declined to follow the Advocate General's recommendation.¹⁶⁶

A judicial determination in accordance with this recommendation would have had a significant impact on marketplace policies which, heretofore, have discriminated on the basis of sexual orientation. It would have

158. See *id.* at 867.

159. Case C-13/94, 1996 E.C.R. I-2143.

160. *Id.* at I-2165.

161. Case C-249/96, 1998 E.C.R. I-621.

162. See *supra* note 102 and accompanying text (discussing the case).

163. See *Grant*, 1998 E.C.R. at I-622.

164. See *id.* at I-635 (opinion of Advocate General Michael B. Elmer).

165. 76 EQUAL OPPORTUNITIES REV. 2 (1997) (report of the Advocate General's opinion).

166. See *Grant*, 1998 E.C.R. at I-653.

paved the way for much broader protection against discrimination on the basis of sexual orientation in the workplace throughout the European Union, affecting an estimated thirty-five million people in total.¹⁶⁷ Employers would have been required to scrutinize their policies on pay-related benefits, including pensions and health care for possible discrimination. Furthermore, dismissals and refusals to appoint, promote or train gay people would have been unlawful.

The ECJ ruled against Ms. Grant for three reasons.¹⁶⁸ First, the court ruled that the condition which required a worker to live in a stable relationship with a person of the opposite sex in order to benefit from travel concessions was a condition that applied

regardless of the sex of the worker concerned. Thus travel concessions are refused to a male worker if he is living with a person of the same sex, just as they are to a female worker if she is living with a person of the same sex. Since the condition imposed by the undertaking's regulations applies in the same way to female and male workers, it cannot be regarded as constituting discrimination directly based on sex.¹⁶⁹

In these terms, the ECJ accepted that the appropriate comparator for a lesbian woman is a gay man, and not a heterosexual man. The fallacy in the ECJ's reasoning is neatly encapsulated in a 1995 assertion by Robert Wintemute: "because an individual's sexual orientation can only be defined by reference to the sex of the individual (and a couple's by reference to the sexes of its members), distinctions based on sexual orientation necessarily involve distinctions based on the sexes of individuals."¹⁷⁰

Second, the court deferred to the value of permitting divergent views within the EU.¹⁷¹ Hence, in considering whether Community law requires that same-sex relationships should be regarded by all employers as equivalent to marriages or other stable opposite sex relationships, the court took the view that it was "for the legislature alone to adopt, if appropriate, measures which may affect that position."¹⁷² In this context the Court observed that when the Treaty of Amsterdam enters into force,¹⁷³ the Council of Ministers

167. *See id.* at I-633.

168. *See Grant*, 1998 E.C.R. at I-645 to I-647.

169. *Id.* at I-646.

170. Robert Wintemute, *Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes*, 60 MOD. L. REV. 334, 347 (1997).

171. The lack of consensus among the Member States was argued before the ECJ by the governments of the United Kingdom and France. *See Grant*, 1998 E.C.R. at I-647. The Court's own view was that this lack of consensus was evidence that relationships between persons of the same sex are not regarded in the same way as relationships between persons of the opposite sex, and consequently Community law does not require the two to be treated as equivalent. *See id.*

172. *Id.* at I-648.

173. Treaty of Amsterdam, *supra* note 108. Under Article 14 of the Treaty, it must now be ratified by the fifteen High Contracting Parties, in accordance with

would be able to take measures with a view to eliminating various forms of discrimination, including that based on sexual orientation.¹⁷⁴

Finally, the Court addressed whether, in light of its earlier decision in *P v. S*, concerning gender reassignment, discrimination based on sexual orientation could be treated as discrimination based on sex.¹⁷⁵ The Court adopted a very restrictive approach to the earlier case, taking the view that the reasoning in *P v. S* must be "limited to the case of a worker's gender reassignment and does not therefore apply to differences of treatment based on a person's sexual orientation."¹⁷⁶ Thus, the court declined to follow the step taken in *P v. S*, away from an interpretation of the Equal Treatment Directive based purely on traditional comparisons between male and female employees, thereby permitting continued discrimination against persons based solely on their sexual orientation.¹⁷⁷

Another important case in this area is *R. v. Secretary of State*, which challenges the validity of the governmental policy barring gays and lesbians from the armed forces.¹⁷⁸ More specifically, it asks whether this policy can be justified under Article 2(2) of the Equal Treatment Directive,¹⁷⁹ on the grounds that homosexuality is incompatible with service in the armed forces.¹⁸⁰ Unfortunately, in light of the ECJ's decision in *Grant*, the court found that the policy did not violate the Equal Treatment Directive.¹⁸¹

their respective constitutional requirements. See *id.* at art. 14. The Treaty shall enter into force on the first day of the second month following ratification by the last signatory state. See *id.*

174. See *Grant*, 1998 E.C.R. at I-651.

175. See *id.* at I-648 to I-651.

176. *Id.* at I-650. The argument appears to be based not so much on logic as on the pragmatic consideration that a very small number of people will undertake gender reassignment, compared to the 35 million homosexual people living in the EU according to the estimate of A-G Elmer. See *id.* at I-633.

177. See *id.* at I-653 ("The refusal by an employer to allow travel concessions to the person of the same sex with whom a worker has a stable relationship . . . does not constitute discrimination prohibited by Article 119 of the EC Treaty or Council Directive 75/117/EEC . . .").

178. [1997] I.R.L.R. 297 (Q.B.).

179. See *id.* Article 2(2) of the Directive states: "This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities . . . for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor." Council Directive 76/207/EEC, art. 2, 1976 O.J. (L 39) 2. In Case C-222/84, *Johnson v. Chief Constable of the Royal Ulster Constabulary*, 1986 E.C.R. 1651, 1687, the ECJ ruled that the exception must be strictly and narrowly construed and that the Member States do not enjoy unfettered discretion in invoking the article.

180. See *Perkins*, [1997] I.R.L.R. at 297. Robert Wintemute is of the opinion that a "national security" justification is likely to carry little weight in the ECJ, because the majority of EU member states do not ban lesbian, gay or bisexual persons from the armed forces. See WINTEMUTE, *supra* note 41, at 352.

181. See *Perkins*, [1998] I.R.L.R. 508 (Q.B.). In reference to a letter from the ECJ requesting that in light of *Grant*, the referring judge consider whether he

The introduction of a statutory action for unfair dismissal¹⁸² has severely curtailed the freedom of an employer to terminate the contract of employment. In order to claim statutory protection, an employee would first have to establish two years' continuous employment with the same employer.¹⁸³ An employee without this qualification can be dismissed quite lawfully for no reason at all, or on any grounds, including the fact that he or she is gay.¹⁸⁴ Employers thus have two years in which to weed out "unsuitable" employees. An employee with the required service can be fairly dismissed for any of five specified "fair" reasons, most relevant among which, for present purposes, are "misconduct" and "some other substantial reason."¹⁸⁵

There appear to be only six reported cases in which dismissed homosexuals have tried to use the unfair dismissal legislation to secure redress, the latest of which was heard in 1981.¹⁸⁶ Generally, the reason advanced by the employer for the dismissal has been misconduct, often following a criminal conviction for gross indecency (outside the workplace) rather than for homosexuality per se.¹⁸⁷ The twin themes of gay men posing a threat to young people in their care, and of those working with young people having to provide acceptable role models, are also very much to the fore in the decisions. In *Saunders v. Scottish National Camps Associations*, for example, a Scottish appellate court accepted that an employer is entitled to assume, without any form of scientific evidence being required, that a gay employee poses special risks to young persons, even where his work (as a handyman at a summer camp) did not involve him coming into direct contact with

wished to withdraw the reference, Mr. Justice Lightman responded "Albeit reluctantly, I consider that I am bound to withdraw the reference in this case." *See id.*

182. This was done initially in the ill-fated *Industrial Relations Act of 1971*. Ch. 72, § 22 (Eng.). The provisions are now contained in section 98 of the *Employment Rights Act, 1996*, ch. 18, § 98 (Eng.).

183. *See id.* § 108.

184. *See id.*

185. *See id.* § 98. The five reasons are: the capability or qualifications of the employee; the conduct of the employee; the redundancy of the employee; the fact that the employee could not continue to work in the position which he held without contravention (either on his part or on the part of the employer) of a restriction or duty imposed by or under a statute; or some other substantial reason. *See id.*

186. *See Wiseman v. Salford City Council*, [1981] I.R.L.R. 202 (E.A.T.) (regarding the dismissal of a gay teacher); *Saunders v. Scottish Nat'l Camps Ass'ns Ltd.*, [1980] I.R.L.R. 174 (E.A.T.), *appeal dismissed*, [1981] I.R.L.R. 277 (Sess.) (regarding the dismissal of a maintenance handyman); *Bell v. Devon & Cornwall Police Auth.*, [1978] I.R.L.R. 283 (Ind. T.) (regarding the dismissal of a gay cook employed in the police canteen); *Nottinghamshire County Council v. Bowly*, [1978] I.R.L.R. 252 (E.A.T.) (regarding the dismissal of a gay teacher of thirty years' standing); *Boychuk v. Symons Holdings Ltd.*, [1977] I.R.L.R. 395 (E.A.T.) (regarding the dismissal of an audit clerk who insisted on wearing a badge proclaiming "Lesbians Ignite"); *Gardiner v. Newport County Borough Council*, [1974] I.R.L.R. 262 (E.A.T.) (regarding the dismissal of a gay teacher).

187. *See, e.g., Wiseman*, [1981] I.R.L.R. at 202; *Bell*, [1978] I.R.L.R. at 283.

them.¹⁸⁸ In other cases, the defenses of client prejudice and of business necessity have been successfully advanced by the employer, and are clearly a significant weakness of the unfair dismissal action.¹⁸⁹ Unfair dismissal legislation is also very limited in scope in that it offers no protection against refusal to appoint, or other forms of victimization or harassment which fall short of constructive dismissal.

D. Conclusion

Laurence Helfer and Alice Miller have recently noted that human rights legislation is very important to homosexual equality issues.¹⁹⁰ This importance lies not merely in its power to correct an unfair outcome, such as providing a remedy to individuals who are refused private employment because of their sexual orientation, but in its power to effect change in how homosexual individuals are regarded.¹⁹¹ As Helfer and Miller state in the context of international human rights:

The value of human rights law to lesbians and gay men lies principally in its ability to transform awareness about sexual practices, intimate relationships, and homosexual identity into claims against governments for recognition and protection. By locating sexual orientation within a set of rights claims, lesbians and gay men can link their struggle to a tradition that has transformed a panoply of basic human needs into rights respected under domestic and international law.¹⁹²

Such legislation is even more important because, as the next section will show, the common law is woefully deficient in protecting gay and lesbian employees from discrimination.

188. [1980] I.R.L.R. at 175.

189. See *id.* (considering the parents' reactions toward a homosexual handyman at a summer camp); *Boychuk*, [1977] I.R.L.R. at 396 (defending dismissal of a lesbian for wearing badges declaring lesbian slogans that "could be expected to be offensive to fellow-employees and customers). Such defenses would not succeed in a discrimination action. In *James v. Eastleigh Borough Council*, [1990] 2 A.C. 751 (H.L.), Lord Lowry gave the following example: "[I]f the foreman dismisses an efficient and co-operative black road sweeper in order to avoid industrial action by the remaining (white) members of the squad, he treats him less favourably on racial grounds." *Id.* at 297.

190. See Helfer & Miller, *supra* note 47 (stating that, in the last decade, there has been an important new trend in international law: legal advocacy to protect the fundamental rights of lesbians and gay men).

191. See *id.*

192. *Id.* at 85.

IV. Protections at Common Law for Employment Discrimination Based on Sexual Orientation

A. Introduction

The common law stands as the only source of redress for marketplace discrimination in jurisdictions lacking statutory human rights protection. This imposes two immediate problems. First, the common law cannot act prophylactically. At best, a common law claim for damages is heard by a court to redress a wrong that has already been committed. Given that Americans have not shown a strong national consensus that discrimination based on sexual orientation ought to be prohibited, it is unlikely that even a few successful common law cases would have the effect of reducing anti-homosexual hiring practices. Second, there is no clear cause of action in which discrimination based on sexual orientation could be pled in any of the jurisdictions under analysis. This is of particular concern because, although the common law can be expanded to accommodate novel claims, judges are rarely willing to do so absent supportive legislative or policy directives.¹⁹³

The following sections will explore possible causes of action through which homosexuals might secure legal redress in response to marketplace discrimination. It will be seen that the United States has the largest body of potentially applicable case law, perhaps because American constitutional and statutory human rights protections are so meager. Conversely, Canada has few applicable common law protections, but this is because there are considerable constitutional and statutory protections already in place. Finally, the United Kingdom appears to have the least developed common law for protection against employment discrimination based on sexual orientation.

B. The United States

1. Introduction

With no general common law prohibition against discrimination, homosexuals in the U.S. who have suffered marketplace discrimination generally would look to contract or tort law for a cause of action.¹⁹⁴ In contract law, circumstances may permit an action for wrongful termination or breach of an implied covenant of good faith.¹⁹⁵ In tort, there may be potential in the developing areas of wrongful or abusive discharge from employment and

193. See generally Richard L. Alfred & Ben T. Clements, *The Public Policy Exception to the At Will Employment Rule*, 78 MASS. L. REV. 88 (1993).

194. See Mary C. Dunlap, *Employment*, in *SEXUAL ORIENTATION AND THE LAW* 5-35 to 5-37 (Roberta Achtenberg & Karen Moulding eds., 1997) (suggesting pursuit of state common law remedies due to the lack of federal remedies).

195. See *id.* at 5-38.8 to 5-38.9.

invasion of privacy.¹⁹⁶ Although judges tend to resist extending the law beyond its existing boundaries,¹⁹⁷ it is also true that incremental advances in the common law could play a role, albeit a limited one, in securing greater protections for lesbians and gay men in the paid workforce.

2. Breach of Contract

a. Challenging Dismissal

In the area of private employment, states have generally followed the employment at-will doctrine, which presumes that employment relationships are for an indefinite period, and either party can terminate the relationship for any reason or for no reason at all.¹⁹⁸ Accordingly, homosexuals who are fired from their jobs based on sexual orientation could not advance a claim of wrongful discharge in contract, absent an express or implied contract term to the contrary.¹⁹⁹ However, a plaintiff who is discharged from employment because of his or her sexual orientation may have a claim for breach of the implied covenant of good faith and fair dealing on the right facts.²⁰⁰ This is an emerging area of contract law, which is derived in part from the duty of good faith that is imposed on all contracts for the sale of goods by the Uniform Commercial Code (UCC).²⁰¹ For example, many courts have adapted the principles of the UCC to non-Code cases involving real estate, insurance and service contracts.²⁰² Building on these inroads, Mary Dunlap suggests that the breach of the duty to act in good faith is an appropriate cause of action for plaintiffs who have suffered harassment or reputation damage as a consequence of the employer's response to learning of the plaintiff's sexual orientation.²⁰³

In most states, the covenant of good faith is associated with a contrac-

196. See *id.* at 5-38.2 to 5-38.8.

197. See, e.g., *Schilling v. Bedford Mem'l Hosp.*, 303 S.E.2d 905 (Va. 1983). In some compelling circumstances, however, a court may be persuaded to extend the common law. See, e.g., *Naacash v. Burger*, 29 S.E.2d 825 (Va. 1982).

198. See Lawrence Blades, *Employment at Will v. Individual Freedom: On Limiting Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405 (1967).

199. See *id.* at 1420-21.

200. See *id.*

201. U.C.C. § 1-203 (1996) ("Every contract or duty imposed within this Act imposes an obligation of good faith performance or enforcement."). The UCC has been adopted in some form by all states. See Alice Haemmerli, *Insecurity Interests: Where IP and Commerce Law Collide*, 96 COLUM. L. REV. 1645, 1658 (1996).

202. See, e.g., *Pacific Mut. v. Haslip*, 499 U.S. 1 (1991) (awarding plaintiff one million dollars in compensatory and punitive damages for the defendant's breach of the covenant of good faith when the defendant's agent failed to submit her health insurance premiums to the company, thus depriving the plaintiff of needed medical coverage); *J.R. Waymire Co. v. Anteres Corp.*, 975 S.W.2d 243, 247-78 (Mo. Ct. App. 1998) (applying U.C.C. principles to a real estate transaction).

203. See Dunlap, *supra* note 194, at 5-38.9.

tual relationship.²⁰⁴ Before an action can be brought for its breach, therefore, the plaintiff must be able to establish the existence of a contract. Contractual duties may be established in what would otherwise be an employment at-will situation, if the employer has provided manuals, handbooks or other materials to the employee which contain policy statements, rules or procedures for addressing grievances.²⁰⁵ These, in turn, may create a subsidiary contractual arrangement that changes the "at-will" nature of the initial relationship.²⁰⁶ However, the presumption in favor of at-will employment is still quite strong in a number of jurisdictions.²⁰⁷ In a Virginia case, for example, an employee handbook which specifically stated that the employer would not terminate any employee without just cause was held to have been superseded by a form, signed by the employee, acknowledging receipt of the handbook and containing a contradictory statement that the employment relationship was at-will and could be terminated at any time by either party.²⁰⁸ The clear irreconcilable conflict between the handbook and the form was found to be insufficient to overcome the presumption that the employment relationship was at-will.²⁰⁹

Breach of the implied covenant of good faith is recognized only by about one-quarter of the states, and, given the absence of precedent, even fewer of those would be likely to recognize it in the context of a claim for damages resulting from termination of employment due to sexual orientation.²¹⁰ The additional infirmity of this line of argument is that it presumes that sexual orientation is not a proper ground for dismissal of an employee. Given the lack of statutory protection against discrimination based on sexual orientation, and given homophobic prejudice in the U.S., this may not be a realistic assumption.

204. See, e.g., *Ryczek v. Guest Services, Inc.*, 877 F. Supp. 754 (D.D.C. 1995). This case, in addition to raising the issue of breach of the covenant of good faith and fair dealing, also addresses constructive discharge. See *id.* at 757. While the court recognized each of these claims, it found that this plaintiff, a co-op student, was at best an at-will employee who did not have an employment contract with the defendant, and therefore, these causes of action would not stand, despite the egregious behavior of her supervisor. See *id.* at 762. The plaintiff's claim based on same-sex sexual harassment was likewise dismissed due to remedial action taken by the defendant. See *id.* at 758-60.

205. See *Helle v. Landmark*, 472 N.E.2d 765, 767 (Ohio 1984) (holding that employment at will "is only a description of the parties' *prima facie* employment relationship," and that employment manuals can create a binding contract).

206. See *id.*

207. See *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834 (Wis. 1983) (discussing the employee at-will doctrine and the public policy exception).

208. See *Progress Printing Co. v. Nichols*, 421 S.E.2d 428 (Va. 1992).

209. See *id.* at 431.

210. See *Dunlap*, *supra* note 194, at 5-38.9 and cases cited therein.

b. Challenging the Refusal to Hire

Refusal to hire because of an applicant's sexual orientation creates no contractual cause of action. The equitable doctrine of promissory estoppel, however, may play a role in holding employers accountable for employment related promises.²¹¹ For example, if an employee were given a promise of employment or promotion, and on the basis of that promise, refused other employment and relocated, the employer might be liable for damages resulting from the withdrawal of the job offer, even though no contract was ever formed.²¹² However, the employee would have to show that his or her reliance on the promise was reasonable,²¹³ and that the employer's decision to terminate the offer upon learning of the employee's sexual orientation was unjust—two significant and perhaps insurmountable hurdles.²¹⁴

3. Tort Actions:

a. Challenging dismissal through public policy and abusive discharge

The 1980s saw the emergence of a public policy exception to the employment at-will rule.²¹⁵ This exception applies to cases involving the retaliatory termination of employees who refuse to violate statutes or who exercise rights afforded by legislative policy or statutes.²¹⁶ For example, damages could be awarded to an employee who was fired for filing a workers' compensation claim²¹⁷ or reporting a safety violation to the Occupational Safety and Health Administration,²¹⁸ or filing a charge of unfair labor practices under the National Labor Relations Act.²¹⁹ Although many of the

211. The *Restatement of Contracts* defines promissory estoppel as follows: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." RESTATEMENT (SECOND) OF CONTRACTS § 90 (1977)

212. See AMY KASTELY, ET AL., CONTRACT LAW 393-400 (1996).

213. See *Root v. PCC Airfoils, Inc.*, Nos. 73149, 73150, 73151, 73402, 73403, 73404, 1998 Ohio App. LEXIS 4652, at *23-30 (Ohio Ct. App. 1998) (holding that neither an employee's reliance on an employee handbook nor the employee's continued employment constituted the requisite reliance for enforcement of a promise by the employer of continued employment).

214. See KASTELY, *supra* note 212, at 471.

215. See *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 838 (Wis. 1983) (finding that both contract and tort actions protecting workers who are wrongfully discharged under the circumstances are not covered by any legislation).

216. See *id.* at 839 (noting that the public policy exception is recognized in cases where the employee is discharged for refusing to violate a statute).

217. See *id.* at 839 (citing *Frampton v. Central Ind. Gas. Co.*, 297 N.E.2d 425 (Ind. 1973)).

218. See 29 U.S.C. § 660(c) (1994); *Brockmeyer*, 335 N.W.2d at 839.

219. 29 U.S.C. § 158(a)(4) (1994); see *N.L.R.B. v. Hearst*, 102 F.2d 658 (9th Cir.

above-mentioned statutes prohibit retaliatory firings, courts have held that they do not create a private right of action for damages.²²⁰ Rather, these statutes are judicially regarded as articulating an important public policy.²²¹ Because any retaliation against the employee would be a violation of that policy, it is actionable at common law.²²²

The public policy exception to the employment at-will doctrine has gained wide acceptance by state courts.²²³ Wrongful discharge cases have been brought as exceptions to the employment at-will doctrine when the firing resulted from a complaint of employment discrimination under the Civil Rights Act or state "whistle blower statutes,"²²⁴ which protect employees from retaliation by their employers if they report unsafe or illegal conditions to proper authorities.²²⁵

A few states have recognized termination on the basis of sexual orientation as a violation of the public policy of nondiscrimination.²²⁶ Ironically, at the very time this exception to the employment at-will doctrine is being recognized in a few states, employers contend that human rights statutes provide the exclusive remedy and abrogate the common law tort of wrongful discharge.²²⁷ In those few states where human rights legislation includes a

1939).

220. See, e.g., *Hearst*, 102 F.2d at 664 (stating that Congress did not intend to create any private right of action under the National Labor Relations Act).

221. See *Brockmeyer*, 335 N.W.2d at 838-39 (stating that discharged employees are allowed to recover if the termination violates a well-established and important public policy like a statute).

222. See *Frampton v. Central Ind. Gas Co.*, 297 N.E.2d 425, 427-28 (Ind. 1973) (explaining that retaliatory discharge for filing a workman's compensation claim is a wrongful, unconscionable act and should be actionable in a court of law).

223. See *Brockmeyer*, 335 N.W.2d at 839 n.10 (citing *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978); *Trombeta v. Detroit, T & I.R.R.*, 265 N.W.2d 385 (Mich. Ct. App. 1978); *O'Sullivan v. Mallon*, 390 A.2d 149 (N.J. Super. Ct. Law Div. 1978)).

224. See, e.g., *Peterson v. Browning*, 832 P.2d 1280, 1283-84 (Utah 1992) (holding that the public policy exception to employment at-will is a tort claim, rather than a contract claim because it is imposed by law rather than by agreement of the parties).

225. See Cynthia Estlund, *The Changing Workplace: Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1659-61 n.20 (1996) (referring to these well established exceptions to the employment at-will doctrine as the "bad motive").

226. See, e.g., *Kovatch v. California Cas. Management Co.*, 65 Cal. App. 4th 1256 (Cal. Ct. App. 1998); *Cataline v. Gilian Instrument Corp.*, 638 A.2d 1341, 1348 (N.J. Super. Ct. App. Div. 1994) (noting that under New Jersey law, it is unlawful for an employer to refuse to hire or discharge any employee on the basis of their sexual orientation).

227. Recently, the Virginia Supreme Court retreated from this public policy argument in *Doss v. Jamco, Inc.*, 492 S.E.2d 441 (Va. 1997) (finding that the plaintiff could not bring a common law action of wrongful termination based on the fact that she was fired because of pregnancy). The following question was certified by the United States District Court for the Western District of Virginia: "Does Virginia Code § 2.1-725(D) [part of the state human rights act] prohibit a common law

prohibition against discrimination based on sexual orientation, the statutory remedy is generally available through an administrative procedure similar to the procedure in place for violations of the 1964 Civil Rights Act.²²⁸ The Supreme Courts of Maryland²²⁹ and New Jersey²³⁰ have adopted this view, while the California Supreme Court has taken the opposite view that common law remedies are still available to plaintiffs.²³¹

As noted earlier, a minority of states have specific statutory protections against discrimination based on sexual orientation.²³² The majority of states

cause of action based upon the public policies reflected in the Virginia Human Rights Act, Va. Code § 2.1-714 *et seq.*” *Id.* at 442-43. Section 2.1-725(D), passed by the Virginia General Assembly in 1995, states in pertinent part: “Causes of action based upon the public policies reflected in this chapter shall be exclusively limited to those actions, procedures and remedies, if any, afforded by applicable federal or state civil rights statutes or local ordinances.” *Id.* at 444-45. The court interpreted this amendment as abolishing the common law claim for wrongful discharge based on a violation of the public policy of the state of Virginia, as expressed in the human rights amendment. *See id.* at 446. This leaves plaintiffs without any remedy if their case does not fit within any of the federal or state statutory schemes. The Virginia Human Rights Act does not prohibit discrimination based on sexual orientation, but this decision would arguably foreclose any common law claim for wrongful discharge on account of unlawful discrimination. *See id.* at 445 (quoting the Virginia Human Rights Act as prohibiting discrimination based only on race, color, religion, national origin or sex, or age if the employee is forty years or older).

A contrary position was taken on the same issue by the Ontario Court of Justice in *Lehman v. Davis*, No. C22568/93, 1993 Ont. C. J. LEXIS 2599 (Ont. Ct. Gen. Div.). The plaintiff filed an action for damages for constructive dismissal based on her demotion. *See id.* at *1-2. She alleged that the demotion was a result of her complaint about sexual harassment. *See id.* at *1. Significantly, she had earlier filed a complaint under the Ontario Human Rights Code, but no action had been taken on her complaint when her civil action for constructive dismissal came to trial. *See id.* According to the court, this was no impediment to proceeding with the civil action because, the court stated, her cause of action existed independently of legislation. *See id.* at *18-19. Further, there existed “a demonstrated prejudice resulting from an inability to obtain a speedy remedy through the board [set up pursuant to the Human Rights Code.]” *Id.* at *19. For a similar decision, see *White v. Bay-Shep Restaurant & Tavern Ltd.* (1995), 16 C.C.E.L. (2d) 57 (Ont. Ct. Jus. Gen. Div.).

228. *See* Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5 (1994) (providing that a plaintiff must first bring a complaint to the Equal Employment Opportunity Commission). If the Commission investigates the case, the claimant must pursue the administrative remedies. *See id.* at § 2000e-5(f). After 180 days, if the Commission has not acted, the claimant is free to file a lawsuit. *See id.*

229. *See* *Weathersby v. Kentucky Fried Chicken Nat'l Mgmt. Co.*, 587 A.2d 569 (Md. Ct. Spec. App. 1991) (noting that remedies available under statutes prohibiting wrongful discharge preclude any common law action).

230. *See* *Cataline*, 638 A.2d at 1349 (holding that common law causes of action may not go to a jury when a statutory remedy exists).

231. *See* *Rojo v. Kliner*, 801 P.2d 373, 383 (Cal. 1990) (holding that the Fair Employment and Housing Act does not displace any available causes of action and remedies).

232. *See supra* note 117 and accompanying text (naming states that have such legislation).

have enacted human rights legislation modeled after the Federal Civil Rights Act,²³³ the Age Discrimination in Employment Act²³⁴ and the Americans With Disabilities Act.²³⁵ Many state courts have been reluctant to find a public policy against discrimination based on sexual orientation when the state legislative body has not acted.²³⁶ Typical of these cases, the federal court in Pennsylvania stated:

With respect to the employee-Plaintiffs' allegations regarding wrongful discharge based on sexual orientation . . . Plaintiffs have failed to establish a clearly mandated public policy which would provide an exception to the general at-will employment doctrine. Because the employee-Plaintiffs cannot pursue their wrongful discharge claims as public policy exceptions to the general at-will employment doctrine . . . their claims for wrongful discharge shall be dismissed.²³⁷

However, in two recent cases, the courts have expanded the notion of what public policy entails.²³⁸ In *Painter v. Graley*,²³⁹ the Ohio Supreme Court stated:

Clear public policy sufficient to justify an exception to the employment at-will doctrine is not limited to public policy expressed by the general assembly in the form of statutory enactments, but may also be discerned as a matter of law based on other sources, such as Constitutions of Ohio and the United States, administrative rules and regulation and the common law.²⁴⁰

Likewise, in *Sarff v. Continental Express*,²⁴¹ the United States District Court for the Southern District of Texas stated that:

This court deeply believes that discrimination against all Americans, despite their gender, race, religion or sexual orientation, is profoundly wrong and that it violates the fundamental and essential right of individuals to engage in the full rights and privileges of citizenship. In ad-

233. 42 U.S.C. § 2000 (1994) (prohibiting discrimination based on race, sex, national origin and religion under any program receiving federal financial assistance).

234. 29 U.S.C. § 621(4)(b) (1994) (prohibiting discrimination of workers over 40 years of age).

235. 42 U.S.C. § 12,101 (1994) (prohibiting discrimination against persons with disabilities and requiring employers to provide reasonable accommodation for those employees).

236. See *Hicks v. Arthur*, 843 F. Supp. 949, 957 (E.D. Pa. 1994) (reasoning that claims of wrongful discharge based on sexual orientation and pregnancy are not a clearly mandated public policy).

237. *Id.*

238. See *Sarff v. Continental Express*, 894 F. Supp. 1076 (S.D. Tex. 1995) (noting that the court is bound by Title VII rules that do not prohibit sexual discrimination based on sexual orientation); *Painter v. Graley*, 639 N.E.2d 51 (Ohio 1994) (noting that the existence of such a public policy may be discerned by the Ohio and United States Constitutions, legislation and administrative rules and regulations, and the common law).

239. 639 N.E.2d at 56.

240. *Id.*

241. 894 F. Supp. at 1076.

dition, it makes little economic sense for employers to discriminate against the 15-25 million gay and lesbian people in this country, many of whom hold positions at the highest levels of professional, scientific, academic and political enterprises.²⁴²

One might optimistically view these two statements as the earliest indicators of a public policy prohibiting discrimination based on sexual orientation. Judicial notions of public policy provide the basis for several long standing exceptions to enforcement of private contractual promises.²⁴³ In the future, plaintiffs seeking damages for wrongful discharge based on sexual orientation may be able to argue successfully that a public policy exception to the employment at-will rule has been expressed by the courts, even in jurisdictions where the legislature has not acted.²⁴⁴

One commentator has argued that the wrongful discharge exceptions to employment at-will should be replaced altogether.²⁴⁵ Instead of asking whether the employer had a "bad motive" for the dismissal, employers would have to show a "just cause" for the dismissal.²⁴⁶ Such a shift is far more than a matter of semantics, as it radically changes the underlying doctrine of at-will employment.²⁴⁷ As Estlund argues:

242. *Id.* at 1080.

243. *See, e.g., Crawford v. Buckner*, 839 S.W.2d 754, 756 (Tenn. 1992) (noting that courts have articulated their own standards for the enforceability of exculpatory clauses and non-competition clauses, and have established standards for determining when contracts are unenforceable because they are unconscionable).

244. At the same time that some courts seem to be moving forward towards protection of gays and lesbians in the workplace, another issue has precipitated a backlash that may be the basis of a public policy *not* to offer this protection. *See Baehr v. Lewin*, 852 P.2d 44, 44 (Haw. 1993). In 1993, the Hawaii Supreme Court held that the constitution of the state of Hawaii may have been violated by a state law defining the marriage ceremony as one between man and woman. *See id.* Although this decision significantly impacts the rights and benefits of married persons, holding that the constitution requires such a fundamental and personal right to be extended to gay and lesbian couples is certainly an indication of a public policy in Hawaii to afford all rights, including freedom from discrimination in employment, to lesbians and gay men. *See id.*

In response to the Hawaii Supreme Court Decision, the Congress of the United States passed the Defense of Marriage Act, which defines marriage as the union between a man and a woman. *See Defense of Marriage Act*, Pub. L. No. 104-100, 110 Stat. 2419 (1996). Also in response to this decision, sixteen states have adopted legislation that refuses to recognize same-sex marriages entered into pursuant to the laws of other states. *See Diane M. Guillerman, The Defense of Marriage Act: The Latest Maneuver in the Continuing Battle to Legalize Same-Sex Marriage*, 34 HOUS. L. REV. 425, 440-41 (1997). This will ultimately raise a question under the Full Faith and Credit Clause of the U.S. Constitution, which requires all states to recognize valid legal acts of all other states. U.S. CONST. art. IV, § 1. While these laws do not directly affect remedies for employment discrimination, they may pose a significant barrier to the argument that a state has evidenced a clear public policy of non-discrimination against gays and lesbians.

245. *See Estlund, supra* note 225, at 1669-87.

246. *Id.*

247. There is already a body of law on what constitutes just cause for dismissal

Fair treatment should not be or appear to be a special privilege. The time may have come to move from the old rule of unfettered employer discretion, riddled as it now is with exceptions, to a new rule of fair treatment. A requirement of just cause for discharge and a fair process for enforcing it would help to realize the policies underlying the existing exceptions to employment at-will while responding to the concerns—both the valid concerns and those that are understandable but exaggerated—of those who do not normally qualify for any of those exceptions.²⁴⁸

In other words, by changing the employment paradigm as Estlund suggests, courts may find it easier to articulate a public policy that protects gay and lesbian employees from unjust termination.

b. Breach of privacy

Over one hundred years ago, Justice Brandeis defined the constitutional right of privacy as “the right to be let alone.”²⁴⁹ This right is protected in the Constitution as well as in legislative provisions.²⁵⁰

in the state administrative structures governing unemployment compensation for workers who have been terminated or quit their jobs. See *Hank v. Safari Hair Adventure*, 512 N.W.2d 614 (Minn. Ct. App. 1994); *Masterson v. Boliden-Allis, Inc.*, 865 P.2d 1031 (Kan. Ct. App. 1993). In order to receive benefits, a claimant must establish that she or he was fired without good cause, or left the employment for good cause. See *Hank*, 512 N.W.2d at 614 (left for good cause); *Masterson*, 865 P.2d at 1031 (fired without good cause). In a Minnesota case, an employee quit her job after being subjected to harassment based on her sexual orientation and, after seeking assistance but receiving none from her employer, was found to have had good cause for leaving her employment and was thus entitled to benefits. See *Hank*, 512 N.W.2d at 615-18.

248. Estlund, *supra* note 225, at 1682.

249. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

250. Privacy is protected by the United States Constitution, state constitutions and legislation. The application of these provisions depends on what kind of privacy is at issue and who is invading it. While a right to privacy is not explicitly mentioned in the U.S. Constitution, in the landmark case of *Griswold v. Connecticut*, 381 U.S. 479 (1965), in which the U.S. Supreme Court struck down a Connecticut law that banned the distribution of contraceptive devices, Justice Douglas stated that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give each of them life and substance [and] various guarantees create zones of privacy.” *Id.* at 484 (citation omitted). The Court went on to find that the activity at issue in that case was within the “zone of privacy created by several fundamental constitutional guarantees.” *Id.* at 485.

For a statutory example of privacy protection, see the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510 (1998) (“ECPA”). This statute was at issue in a recent case of Timothy McVeigh (unrelated to the Oklahoma City bombing defendant) a senior Navy enlisted man who brought suit against the Secretary of Defense to challenge his discharge from the Navy because he was gay. See *McVeigh v. Cohen*, 983 F. Supp. 215 (D.D.C. 1998). McVeigh’s sexual orientation was suspected as a result of an e-mail message from alias “boysrch” and his personal profile used with the alias. *Id.* Judge Sporkin of the U.S. District Court for the District of Columbia granted McVeigh’s request for an injunction on the basis of the probable finding that the Navy violated its own “Don’t Ask Don’t Tell

The common law also protects against invasions of privacy, and provides a framework hospitable to claims of employer misconduct with respect to an employee's sexual orientation.²⁵¹

Dean William Prosser organized the extensive case law on the common law right of privacy into four separate torts: intrusion on a person's solitude; public disclosure of private facts about a person; publicly placing a person in a false light; and misappropriation of a person's name or likeness.²⁵² Plaintiffs alleging breach of privacy based on sexual orientation would likely seek to place themselves in the first two categories.

There are several significant obstacles to successful claims for breach of privacy. First, as Mary Dunlap points out, many hold the view, supported by the language of the *Bowers v. Hardwick* decision, that lesbians and gay men are not entitled to expect privacy with regard to their "criminal activities."²⁵³ Moreover, some argue that the risk of HIV infection, for example, makes disclosure of private facts reasonable.²⁵⁴ Finally, although few reported cases have found employers liable for invading the privacy of their lesbian and gay employees, even a successful claim for invasion of privacy will do nothing to prevent the discharge of employees because of sexual orientation.

Nevertheless, the tort of invasion of privacy may provide some relief, if the information about the employee was gathered in an unreasonable manner, or used in an unreasonable manner. Two recent cases specifically found that homosexual plaintiffs had a common law claim for invasion of privacy.²⁵⁵ Scott Greenwood, a gay attorney employed by the law firm of Taft, Stettinius and Hollister in Ohio, listed his male partner as the beneficiary of his insurance plans with the firm.²⁵⁶ He subsequently brought action, alleging that this confidential information had been shared with members of the firm who had no responsibility for administration of benefits.²⁵⁷ Greenwood

Policy" by pursuing this information. *See id.* Furthermore, the court found there was a likelihood that the defendant's actions violated the ECPA, which was enacted by Congress to address privacy concerns on the Internet. *See id.*

251. *See* William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

252. *See id.* at 389-407.

253. *See* Dunlap, *supra* note 194, at 5-38.5.

254. *See* Arthur S. Leonard, *AIDS, Employment and Unemployment*, 49 OHIO ST. L.J. 929 (1988). The author suggests that the balancing test established by the Federal District Court in *Glover v. Eastern Nebraska Community Office of Retardation*, 686 F. Supp. 243 (D. Neb. 1988), which balances the employee's privacy interest protected by the fourth amendment and the employer's interest in a safe training and living environment, might "provide a model for private sector decision makers who wish to acknowledge civil rights of individuals in the private workplace, and certainly for legislators considering whether to ban HIV antibody testing by employers." *Id.* at 958-59.

255. *See* Greenwood v. Taft, Stettinius & Hollister, 663 N.E.2d 1030 (Ohio Ct. App. 1995); Borquez v. Ozer, 923 P.2d 166 (Colo. Ct. App. 1995).

256. *See* Greenwood, 663 N.E.2d at 1034.

257. *See id.*

claimed that the disclosure about his male partner and his own sexual orientation amounted to an invasion of privacy for which he was entitled to damages at common law.²⁵⁸ The law firm did not dispute that the fact was, indeed, private, but it argued that the disclosure was not public, nor was it highly offensive to a reasonable person.²⁵⁹ Because the appeal was taken from a motion to dismiss, the appellate court did not decide the merits of the case, but did find that a cause of action for invasion of privacy *could* lie based on these factual allegations.²⁶⁰

In a Colorado case another gay employee sued his employer for invasion of privacy.²⁶¹ The case arose during the controversy over Amendment 2 to the Colorado state constitution.²⁶² Like Greenwood, Plaintiff Borquez was employed by a law firm.²⁶³ Upon learning that his partner had been diagnosed with AIDS, and advised by his physician that he should be tested immediately, Borquez met with the senior partner in an attempt to have another attorney take his cases for the remainder of the afternoon and the next day.²⁶⁴ As part of that conversation, Borquez advised the senior partner of these events and asked that the information be kept confidential.²⁶⁵ Within two days, however, all members of the firm, as well as all other employees, knew about Borquez's personal life.²⁶⁶ Five days later, Borquez was fired.²⁶⁷ At the trial, a jury awarded Borquez damages for invasion of privacy, as well as for wrongful discharge.²⁶⁸ The appeals court affirmed the verdict.²⁶⁹ The court noted that more than thirty jurisdictions already recognized an action for invasion of privacy for unreasonable publicity given to the private life of another²⁷⁰ based on the Restatement (Second) of Torts.²⁷¹ The court found that both requirements of the Restatement were met: information regarding sexual conduct and HIV are private matters, and because a strong stigma still attaches both to homosexuality and AIDS, publication of this information

258. See *id.* at 1031.

259. See *id.* at 1035.

260. See *id.* at 1036.

261. See *Borquez v. Ozer*, 923 P.2d 166 (Colo. Ct. App. 1995).

262. See *id.*; *supra* notes 69-72 and accompanying text (discussing Amendment 2 and the resulting litigation in *Romer v. Evans*).

263. See *Borquez*, 923 P.2d at 169.

264. See *id.* at 170.

265. See *id.*

266. See *id.*

267. See *id.*

268. See *id.* at 171.

269. See *id.* at 178.

270. See *id.* at 172.

271. See *id.* The *Restatement of Torts* provides in relevant part: "One who gives publicity to the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public." RESTATEMENT (SECOND) OF TORTS § 652D (1976)

would be highly offensive to a reasonable person.²⁷² Furthermore, the court found that Borquez's sexual orientation was not a matter of legitimate public concern, particularly given that the confidentiality of a person's HIV status is highly protected, even in the medical arena where such information can be very important.²⁷³

A cause of action for invasion of privacy exists not only when the employer publishes private information, but also when intrusive, unreasonable methods are used to obtain such information.²⁷⁴ For example, monitoring dressing areas, rest rooms, or other places where one has a reasonable expectation of privacy, may give rise to a claim for damages.²⁷⁵ Electronic surveillance may also be in violation of federal law.²⁷⁶ Given the prejudice against gay and lesbian persons, however, courts may not be sympathetic to such claims. Mary Dunlap argues that because of such prejudice, "[c]ounsel thus must be ready to specifically and dramatically illuminate the nature and extent of the harm that the person actually has suffered, including psychological, social, occupational, and related damages."²⁷⁷

4. Conclusion

Despite the fact that common law challenges to sexual orientation discrimination have been unsuccessful in the U.S., there are a number of causes of action that are ripe for development, particularly in the areas of abusive discharge and invasion of privacy. If societal attitudes show increased tolerance towards gay men and lesbians, the common law will mirror this tolerance with increased protection of employment-related rights.

C. Canada

1. Introduction

At Canadian common law, there is no protection from discrimination based on sexual orientation. According to Tarnopolsky and Pentney, the private individual, group, trade union, or corporation "may discriminate in employment, in public service industries, in accommodation, even in the sale of property" absent legislation to the contrary.²⁷⁸ Other authors dispute this

272. See *Borquez*, 923 P.2d at 172-73.

273. See *id.* at 173.

274. See ELLEN ALDERMAN & CAROLINE KENNEDY, *THE RIGHT TO PRIVACY* 225-320 (1995).

275. See *id.*

276. See Electronic Communication Privacy Act of 1986, 18 U.S.C. §§ 2510-22 (1997).

277. Dunlap, *supra* note 194, at 5-38.6.

278. WALTER SURMA TARNOPOLSKY & WILLIAM PENTNEY, *DISCRIMINATION AND THE LAW* 25 (1982) (updated binder service to Oct. 1998).

contention, arguing that creative lawyers should be able to fashion causes of action based on cases in other areas of law.²⁷⁹ Mary Dunlap, writing from an American perspective, suggests possible actions in tort,²⁸⁰ but does concede that counsel "may need to invent a tort name to encompass the wrong and the remedy sought."²⁸¹ She also puts forward several contract actions, including breach of an implied covenant of good faith and fair dealing,²⁸² but is unable to cite any case where such a claim was successful.²⁸³ At a minimum, any common law action based on sexual orientation discrimination would have to rely on considerable innovation. The following section will set out some possible legal approaches.

2. Unjust Dismissal

At Canadian common law, an employee engaged for an indefinite term cannot be terminated unless notice is given, pay is given in lieu of notice, or there is just cause for dismissal.²⁸⁴ As a result, a competent employee who is not terminated in accordance with these rules can bring an action for unjust dismissal.²⁸⁵

There is only one reported case involving an unjust dismissal claim based on sexual orientation discrimination.²⁸⁶ In *Damien v. Ontario Racing*

279. See Dunlap, *supra* note 194, at 5-38.2 to 5-38.8.

280. See *id.*

281. *Id.* at 5-38.8.

282. See *id.* at 5-38.8 to 5-38.9.

283. See *id.*

284. See *Wallace v. United Grain Growers* (1998), 152 D.L.R. (4th) 1, 28 (stating the contractual principle of employment that an employee can be dismissed for any reason, but must be given reasonable notice or compensation in lieu thereof if the employee is discharged without cause).

285. See *id.*

286. See *Damien v. Ontario Racing Comm'n* (1975), 11 O.R. (2d) 489 (H.C.). At least until the late 1960s, the explanation may relate to the fact that homosexual sex was a criminal act. It was only with the Criminal Law Amendment Act, that homosexual activities between consenting adults were decriminalized. See Criminal Law Amendment Act, ch. 38, 1968-1969 S.C. 869 (Can.). Accordingly, the fired lesbian or gay man perhaps concluded that any complaint of unjust dismissal would not find a court remedy.

That the court would be unsympathetic, if not hostile to a gay man or lesbian for engaging in what was then considered to be criminal conduct, is illustrated in *Vancouver Sun v. Gay Alliance Toward Equal.* [1978] 5 W.W.R. 198 (B.C.C.A.), *appeal dismissed*, [1979] 2 S.C.R. 435. At issue was the Vancouver Sun newspaper's refusal to publish a classified advertisement on behalf of an association of gay men. See *id.* In upholding the newspaper's refusal to publish as stemming from its policy concerning public decency, Justice Branca stated:

One may well consider that the Criminal Code of our country defines the commission of an act of gross indecency by one person with another as a crime punishable with imprisonment (amended in 1968-69, [c. 38, s. 7] to exclude such acts if committed in private between husband and wife or by two persons each the age of 21 years, both of whom consent to the commission of the Act) . . . One, too, may well consider that under our Immi-

Commission,²⁸⁷ the plaintiff claimed that he had been dismissed from his position as a steward with the Ontario Racing Commission because he was a gay man.²⁸⁸ His complaint before the Ontario Human Rights Commission was dismissed on the ground that the commission lacked the statutory jurisdiction to investigate such a complaint.²⁸⁹ Although Damien filed a statement of claim against his former employer, wherein he sought a "declaration that his dismissal was wrongful and void, an order reinstating him to that position, and exemplary or punitive damages for wrongfully and maliciously, out of bias and prejudice, conspiring to injure the plaintiff in his trade,"²⁹⁰ he died without the matter having proceeded to trial.²⁹¹

It remains to be resolved judicially whether an action for unjust dismissal in the circumstances of the *Damien* scenario would stand. Some support for such an action is found in the appellate level of the *Vriend v. Alberta*²⁹² case as well as in *MacDonald v. 283076 Ontario Inc.*²⁹³ In the latter case, the Court of Appeal held, *in obiter*, that dismissal on the basis of sex alone would not be just "cause,"²⁹⁴ but for obvious reasons, this case is of limited precedential value.

The dismissed employee could argue breach of an implied covenant of good faith and fair dealing.²⁹⁵ Unfortunately, this common law avenue of attack may have been foreclosed by the 1997 Supreme Court of Canada decision in *Wallace v. United Grain Growers*²⁹⁶ which held that there is no action either in contract or in tort for "bad faith discharge" in indeterminate

gration Act, R.S.C. 1970, c. I-2, homosexuals are classed as undesirables, together with prostitutes and persons living on the avails of prostitution, and pimps, all of whom are within the prohibited classes. If one bases a bias against homosexuals because they are persons who engage in unnatural sexual activity which may make them guilty of a serious crime in certain circumstances and because they are forbidden entry into Canada as undesirables, can one say that such a bias, if it is arrived at for those reasons, is unreasonable? I would not think so.

Id. at 208.

287. [1975] 11 O.R. (2d) at 489.

288. *See id.*

289. *See id.* at 202-03.

290. *Id.* at 490.

291. *See* CASSWELL, *supra* note 20, at 195 (referencing research on the case by DIDI HERMAN, RIGHTS OF PASSAGE: STRUGGLES FOR LESBIAN AND GAY LEGAL EQUALITY 21 (1994)).

292. *Vriend v. Alberta* (1996), 132 D.L.R. (4th) 595 (C.A.).

293. (1979), 102 D.L.R. (3d) 383 (C.A.), *leave to appeal to the S.C.C. denied*, (1979), 14 C.P.C. xliii.

294. *See id.* at 384.

295. *See* Shannon Kathleen O'Byrne, *Good Faith in Contractual Performance: Recent Developments*, 74 CAN. B. REV. 70, 89 (1995) (discussing good faith in employment contracts); *Case Comment: Wallace v. United Grain Growers, Ltd., - The Supreme Court of Canada's Conflicting Analysis of Bad Faith Conduct in the Employment Context*, 77 CAN. REV. (forthcoming 1998).

296. (1998), 152 D.L.R. (4th) 1.

contracts of employment.²⁹⁷

In *Wallace*, the Supreme Court offers some hope of additional compensation where the employer is "untruthful, misleading or unduly insensitive."²⁹⁸ In short, such conduct is in breach of the employer's "obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period."²⁹⁹ While this ruling may provide some protection against employer misconduct, a homosexual employee still cannot challenge the termination itself.

Finally, the potential protections discussed above do not address an employer's refusal to hire gay or lesbian employees. Justice McClung in *Vriend* acknowledges this fact as being welcome, thereby revealing another deficiency in the common law:

In its current state, the IRPA [now known as the *Human Rights, Citizenship and Multiculturalism Act*] leaves heterosexuals the choice of contracting with, or employing, homosexuals. It does not force them to do so under pain of the imposition of the sanctions of the IRPA. Similarly, homosexuals may employ, contract, or deal with heterosexuals as they choose. Is this exercise of private choice, *ipso facto*, discriminatory? It was not proved in the record.³⁰⁰

3. Potential Tort Actions:

Being dismissed due to one's sexual orientation may be actionable as a tortious form of harassment.³⁰¹ However, because the law provides that either side to an indeterminate contract of employment may end the contract for any reason,³⁰² the fact that an employer may have a particular reason in mind, such as the employee's homosexuality, may mean that no action in tort arises. In the employment context, Canadian common law only contemplates recovery in tort in the presence of a separate actionable wrong, such as where the employer inflicts mental suffering or distress, as in *Vorvis v. In-*

297. *See id.* at 27-28.

298. *Id.* at 34. Note that under Canadian law, any award of damages beyond compensation for breach of contract for failure to give reasonable notice "must be founded on a separately actionable course of conduct." *Vorvis v. Insurance Corp. of B.C.* [1989] 1 S.C.R. 1085 (cited with approval in *Wallace*). Furthermore, and pursuant to *Vorvis*, punitive damages are only recoverable in contract where the employer's conduct is sufficiently harsh and vindictive, because the general purpose of damages in contract is merely to compensate the plaintiff. *See Wallace*, 152 D.L.R. (4th) at 28.

299. *Id.* at 33.

300. *Vriend v. Alberta* (1996), 132 D.L.R. (4th) 595, 603 (C.A.).

301. *See Lajoie v. Kelly*, No. CI 95-01-87469 Winnipeg, 1997 ACWSJ LEXIS 85490, at *7-12 (Man. Q.B. Feb. 6, 1997) (discussing tortious harassment). For the view that such a tort cannot exist in light of human rights legislation, see *Allen v. C.F.P.L. Broad. Ltd.*, No. 17892/94, 1995 Ont. C. J. LEXIS 484, at *7-8 (Ont. Ct. Jus. Gen. Div. Feb. 17, 1995).

302. *See supra* notes 296-97 and accompanying text (discussing *Wallace v. United Grain Growers*).

insurance Corporation of British Columbia.³⁰³ Furthermore, the Supreme Court of Canada has recently dismissed the possibility of suing for the tort of bad faith discharge.³⁰⁴ The plaintiff's option to pursue a common law action is further limited because, as will be discussed, to the extent that the harassment or other tortious conduct counts as discrimination on a ground prohibited by the human rights legislation of the jurisdiction in question, it may be that a civil or common law action is barred.³⁰⁵

Canadian common law might permit an action for nervous shock, such as when the conduct of the employer has been confrontational and aggressive,³⁰⁶ or for the tort of intentional interference with economic interests.³⁰⁷ Furthermore, it is possible that an action would lie for breach of privacy but, so far, such an action is not recognized in Canada as a nominate tort.³⁰⁸

The common law of tort appears to provide almost no assistance when an employer refuses to hire a person because of his or her sexual orientation.³⁰⁹ Instead, the common law has shown a "strict *laissez-faire* policy, even where the business or service whose facilities were denied on the ground of colour or race or ancestry was under government license . . ."³¹⁰ Indeed, the Supreme Court of Canada stated in *Christie v. York Corporation*³¹¹ that "the general principle of the law of Quebec is that of complete freedom of commerce" subject only to "a specific law, or, in the carrying out of the principle, the adoption of a rule contrary to good morals or public order."³¹² More recently, the court has confirmed that position, noting in *Seneca College v. Bhadauria* that the only instance where there has been recovery at common law by a plaintiff alleging discrimination has been within the context of the innkeeper's common law obligation "to receive travellers or intending guests, irrespective of race or colour or other arbitrary disqualifications."³¹³ As Justice La Forest of the Supreme Court of Canada summarizes the matter: "[r]ights against discrimination on grounds of race, colour, creed, sex and so on in employment and accommodation, for example, were

303. [1989] 1 S.C.R. at 1085; see *supra* note 298 and accompanying text (discussing *Vorvis*).

304. See Wallace (1998), 152 D.L.R. (4th) 1, 2.

305. See *infra* notes 123-25 and accompanying text (discussing the administrative procedures required by human rights legislation).

306. See *Bogden v. Purolator Courier Ltd.* (1996), 182 A.R. 216 (Alta. Q.B.) (discussing nervous shock in the employment context).

307. See LEWIS KLAR, TORT LAW 522 (1996) (listing elements of the tort of intentional interference with economic interests).

308. See *id.* at 66-67.

309. See *Seneca College v. Bhadauria* [1981] 2 S.C.R. 181, 190.

310. *Id.*

311. [1940] S.C.R. 139 (finding that a tavern owner was well within his rights in refusing to serve beer to African-Americans absent a statute to the contrary).

312. *Id.* at 142.

313. *Seneca College* [1981] 2 S.C.R. at 191.

not protected at common law"³¹⁴ Further, as the dissent in *Newfoundland Association of Public Employees v. Newfoundland*³¹⁵ states, no case had been cited "which would suggest that at common law there was anything to prevent discrimination in hiring or in promoting. However, just as one was free to discriminate in hiring or granting promotions to employees, at common law one was free to contract not to discriminate, without exceptions."³¹⁶

The majority in *Newfoundland Association of Public Employees* took a different view regarding the state of the law, however:

No doubt, prior to the *Human Rights Code* an employer was at liberty to discriminate in his hiring practices This was possible because of the absence of any statutory prohibition or cause of action for a tort of discrimination existing at common law. Perhaps in one sense, before the *Human Rights Code* became a provincial statute of general application, the opportunity and option to discriminate was considered generally to be a "right", but the prerogative and immunity of an employer to discriminate was never, in law, elevated to the status of a "right" sanctioned and backed by the law courts.³¹⁷

The court may be too generous in suggesting that the common law never sanctioned discrimination, because there are several examples in which this occurred.³¹⁸ Furthermore, the distinction it attempts to draw is extremely tenuous. In short, is there any functional difference between refusing to protect employees from discrimination or providing a right to discriminate?

It is, of course, entirely possible within the common law tradition for the court to create new torts.³¹⁹ Furthermore, to the extent that a common law rule exists which permits discrimination in hiring, that rule is impeachable pursuant to the pronouncement in *Hill v. Church of Scientology*.³²⁰ According to the Supreme Court of Canada in that case, the Canadian Charter of Rights and Freedoms will 'apply' to the common law rules affecting private civil litigation but "only to the extent that the common law is found to

314. *Scowby v. Glendinning* (1986), 32 D.L.R. (4th) 161, 180 (Can.) (La Forest, J., dissenting on other grounds).

315. (1994), 119 D.L.R. (4th) 604 (Nfld. C.A.).

316. *Id.* at 634.

317. *Id.* at 619.

318. See TARNOPOLSKY & PENTNEY, *supra* note 278, at 1-1 to 1-26.

319. See WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 3-4 (4th ed. 1971).

The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.

Id.

320. [1995] 2 S.C.R. 1130 (Can.) (deciding that common law defamation is consistent with the Canadian Charter of Rights and Freedoms because the underlying values of good reputation and the right to privacy are found in both).

be inconsistent with *Charter* values."³²¹ In addition, the court ruled that the party alleging such inconsistency "[b]ears the onus of proving both that the common law fails to comply with *Charter* values and that, when these values are balanced, the common law should be modified."³²² Given the Supreme Court of Canada's decision in *Egan*,³²³ it is possible that *Charter* values would be imported into any challenge to common law rules permitting discrimination on the basis of sexual orientation.

In *Bhadauria v. Board of Governors of Seneca College*,³²⁴ the Ontario Court of Appeal found that the right to be free from racial discrimination is a fundamental right and, accordingly, it is appropriate that this right "receive the full protection of the common law."³²⁵ In short, the right to be free from discrimination existed independently of the human rights legislation which fixed standards and remedies concerning it.³²⁶ That a remedy for such discrimination was granted by the Ontario Human Rights Code did not, in the court's view, limit the right of the complainant to pursue a common law remedy, because the right to be free from discrimination existed independently of the Code.³²⁷ Unfortunately, this view was rejected by the Canadian Supreme Court.³²⁸ It questioned Madam Justice Wilson's conclusion that a right to be free of discrimination existed apart from a statute according that protection.³²⁹ Further, the Court accused Madam Justice Wilson of over-reaching:

The view taken by the Ontario Court of Appeal is a bold one and may be commended as an attempt to advance the common law. In my opinion, however, this is foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime which does not exclude the courts but rather makes them part of the enforcement machinery under the Code.

For the foregoing reasons, I would hold that not only does the Code foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the Code. The Code itself has laid out the procedures for vindication of that public policy, procedures which the

321. *Id.* at 1170-71. It should be noted, however, that scrutiny of common law in an action between private litigants would be less strict than if government action were being impugned, as the case indicates. *See id.*

322. *Id.* at 1171.

323. *Egan v. Canada* [1995] 2 S.C.R. 513 (Can.) (holding that refusal to allow a homosexual partner to collect spousal allowance under the Old Age Security Act does not violate the Canadian Charter of Rights and Freedoms).

324. (1979), 105 D.L.R. (3d) 707 (Ont. C.A.) (deciding that a plaintiff who can show that she was discriminated against in employment because of her ethnicity has a cause of action at common law).

325. *Id.* at 715.

326. *See id.*

327. *See id.*

328. *See Seneca College v. Bhadauria* [1981] 2 S.C.R. 181 (Can.).

329. *See id.* at 194-95.

plaintiff respondent did not see fit to use.³³⁰

As a result of *Seneca College*, many lower courts have taken the position that there can be no tort of discrimination because complaints of discrimination are governed exclusively by human rights legislation.³³¹ Further, to the extent that the discrimination claim is cast as an employment claim, judicial relief may be limited by the terms of a collective agreement³³² or by a legislative requirement for arbitration.³³³

Though there are lower court pronouncements to the contrary,³³⁴ the Supreme Court of Canada has probably not forbidden pursuit of the tort of discrimination under all circumstances. First, to the extent that the human rights code in question does not prohibit the kind of discrimination alleged, the *Seneca College* decision would apparently have no application. Second, even when the case does apply, there is a line of authority to permit the tort action to proceed notwithstanding.³³⁵ For example, *Seneca College* dealt

330. *Id.*

331. See *Mbaruk v. School Dist. No. 42 (Maple Ridge—Pitt Meadows)*, No. C956981 Vancouver, 1996 ACWSJ LEXIS 81256, at *9 (B.C.S.C. Oct. 21, 1996); *Haje v. College of Teachers*, No. C954280 Vancouver, 1996 ACWSJ LEXIS 78806, at *10-11 (B.C.S.C. Jun. 24, 1996); *Allen v. C.F.P.L. Broad. Ltd.*, No. 17892/94, 1995 Ont. C. J. LEXIS 484, at *7-8 (Ont. Gen. Div. Feb. 17, 1995).

332. See *Mbaruk*, 1996 ACWSJ LEXIS 81256, at *10-11 (relying on *St. Anne Nackawic Pulp & Paper Ltd. v. Canadian Paper Workers Union*, Local 219 [1986] 1 S.C.R. 704). Note that the Supreme Court of Canada has reconsidered privative clauses. See *Dayco (Canada) Ltd. v. CAW-Canada* [1993] 2 S.C.R. 230; *United Bhd. of Carpenters & Joiners of Am. v. Bradco Const. Ltd.* [1993] 2 S.C.R. 316.

333. See *Weber v. Ontario Hydro* (1995), 125 D.L.R. 583 (S.C.C.) (finding that a unionized employee did not have an action against his employer either in tort or under the Canadian Charter of Rights and Freedoms because the legislation granted exclusive jurisdiction to an arbitrator).

334. See, e.g., *Mbaruk*, 1996 ACWSJ LEXIS 81256, at *9; *Haje*, 1996 ACWSJ LEXIS 78806, at *10-11.

335. See *Lajoie v. Kelly*, No. CI 95-01-87469 Winnipeg, 1997 ACWSJ LEXIS 85490, at *11 (Man. Q.B. Feb. 6, 1997) (allowing a cause of action for tortious sexual harassment to proceed despite the human rights code); *Alpaerts v. Obront*, No. 92-CU-63002, 1993 Ont. C. J. LEXIS 717, at *2 (Ont. Gen. Div. Mar. 25, 1993). In *Alpaerts*, the plaintiff alleged that she had been constructively dismissed as a result of sexual harassment and other mistreatment. *Id.* at *1. The Court was able to distinguish *Seneca College* on the basis that the plaintiff in *Seneca* had no cause of action for a refusal to hire apart from the Ontario Human Rights Code, since a refusal to hire is not actionable at common law, whereas in *Alpaerts*, the plaintiff's action related to past and present treatment by her employer. *Id.* at *2-3. Accordingly, the court permitted the matter to proceed. See *id.* at *4. A similar analysis was utilized by the Ontario Court of Justice in *Lehman v. Davis* No. C22568/93, 1993 Ont. C.J. 2616, at *18-19 (Ont. Ct. Gen. Div.). The Ontario Court of Appeal also employed this analysis in *L'Attiboudeaire v. Royal Bank of Canada* (1996), 131 D.L.R. (4th) 445. But see *Mbaruk*, 1996 ACWSJ LEXIS 81256, at *9; *Haje*, 1996 ACWSJ LEXIS 78806, at *10-11.

A related approach seeks to limit *Seneca College* to those human rights codes which contain privative clauses. See, e.g., *McKinley v. B.C. Tel*, No. C952949 Vancouver, 1996 ACWSJ LEXIS 77304, at *19 (B.C.S.C. May 1, 1996), *appeal dismissed*, No. CA021941 Vancouver, 1997 ACWSJ LEXIS 91415 (B.C.C.A. Sept. 22,

with refusal to hire, not unjust dismissal or employee harassment.³³⁶ In addition, courts may be sympathetic to common law claims when the statutory remedy takes too long³³⁷ or when the commission administering the law is part of the problem.³³⁸

4. Conclusion

Based on existing authority, creating common law challenges to discrimination faces considerable, and at this time, perhaps insurmountable obstacles in Canada. To the extent that the applicable human rights code prohibits discrimination based on sexual orientation, which functionally is the case in all Canadian jurisdictions,³³⁹ courts may limit the complainant to human rights legislation remedies. Even if courts were willing to allow common law challenges, there are few causes of action in tort or contract to ad-

1997). This narrow approach to *Seneca College* may be justifiable because, as the Court in *McKinley* states: "[i]t would be contrary to the modern trend of expedition and openness in the justice system to decline to exercise a very broad jurisdiction of this Court except in the clearest of cases." *Id.* Therefore, a complainant in a jurisdiction prohibiting discrimination based on sexual orientation may be able to pursue a tort remedy, particularly where it could be shown that any statutory remedy would take a very long while to secure. It was observed in *McKinley* that:

[a]s noted in the *Lehman* line of cases, human rights complaints are often characterized by a lack of dispatch. The movement of the complaint through the necessary procedures is beyond the control of the complainant, as well as the respondent. In this case, the plaintiff's complaint . . . is at the preliminary stage In these circumstances, the delay resulting from a stay of proceedings is likely to be significant. The prejudice to the plaintiff if the stay is granted far outweighs any possibility of prejudice to the defendants."

Id. at *26-27. Similarly, the plaintiff may have success to the extent that the human rights commission in the relevant jurisdiction was otherwise part of the problem. See *Smith v. New Brunswick (Human Rights Comm'n)* (1996), 137 D.L.R. (4th) 76 (N.B.Q.B.) (allowing a claim of tortious discrimination based on sex to proceed against a university when the New Brunswick Human Rights Commission had dismissed his complaints against the university). In *Smith*, the Court also refused an application to strike out a statement of claim against the Human Rights Commission alleging that, in dismissing his complaints of sex discrimination and in refusing to accept his complaint against the Commission itself based on sex discrimination, his fundamental justice rights under Section 7 of the charter were violated. See *id.* at 77. On appeal, this ruling was reversed on the narrow ground that the Commission was not a suable entity. See *Smith v. New Brunswick (Human Rights Comm'n)* (1997), 143 D.L.R. (4th) 251, 252 (N.B.C.A.), leave to appeal dismissed, No. 25902, 1997 Can. S.C.R. LEXIS 2161 (Jun. 26, 1997).

336. See *supra* note 313 and accompanying text (describing the holding of *Seneca College*).

337. See *McKinley*, 1996 ACWSJ LEXIS 77304, at *26-27.

338. See *Smith*, 137 D.L.R. (4th) at 78-79.

339. See *supra* notes 121-125 and accompanying text (explaining that the majority of Canadian provinces prohibit discrimination on the grounds of sexual orientation); see also *supra* notes 130-131 and accompanying text (discussing how the Supreme Court of Canada has "read-in" sexual orientation to Alberta's human rights legislation). It would appear that the analysis in *Vriend* would have equal application to the Northwest Territories.

dress sexual orientation discrimination in the workplace.

Given the uncertain, even negative, state of the common law for someone alleging the tort of discrimination, it is essential to ask whether legislation might not be a better, or at least a more assured route, to secure the enforcement of human rights.

D. *The United Kingdom*

1. Introduction

Until very recently, British law has allowed employers to discriminate on grounds of sexual orientation with impunity.³⁴⁰ Prior to the enactment of specific statutory protection against a variety of other forms of discrimination, a number of alternative legal actions were attempted to test whether there was any effective control of discrimination through the common law.³⁴¹ Despite two notable early successes,³⁴² the common law has proven to be a weak instrument and has not been developed to afford any real degree of protection.³⁴³ Of most serious concern is that no independent tort for invasion of privacy is recognized by British common law,³⁴⁴ although this situa-

340. There has been only one reported case in the United Kingdom which resulted in an award of compensation to a person suffering employment discrimination on the grounds of sexual orientation. See *Bell v. Devon & Cornwall Police Auth.*, [1978] I.R.L.R. 283 (Eng.).

341. See *Nagle v. Feilden*, [1966] 2 Q.B. 633 (Eng. C.A.) (involving refusal by the Jockey Club to grant a trainer's license on the grounds of sex); see also *Constantine v. Imperial Hotels, Ltd.*, [1944] 1 K.B. 693 (involving refusal of an innkeeper to provide lodgings on the grounds of color).

342. See *Nagle*, [1966] 2 Q.B. at 633; *Edwards v. Society of Graphical and Allied Trades*, [1971] Ch. 354 (Ch. Div'l Ct.) (finding that a specialized tradesman was entitled to damages when, because of an administrative error, he was released from his employment).

343. The best account of the inadequacy of the common law to deal with the problem of discrimination, especially in the context of race, is provided by ANTHONY LESTER and GEOFFREY BINDMAN, *RACE AND LAW IN GREAT BRITAIN* (1972). They conclude:

[T]he impotence of the English Judiciary in the face of racial discrimination is an extreme illustration of the limitations of the Common Law . . . in recent decades, when racial equality has become embedded in the public philosophy, the English Bench have displayed a marked insensitivity to the manifestations of racial discrimination. Again and again, their decisions have either implicitly or overtly condoned the unfair treatment of racial groups, when they could instead have secured a more genuine equality before the law . . .

Id. at 69-70.

344. The possibility of a claim in tort for breach of privacy is unlikely to get very far in the UK at present. The case of *Malone v. Commissioner of Police of the Metropolis* effectively put an end to the possible development of such a tort by the common law. [1979] 2 All E.R. 620 (ch.). In a case involving telephone tapping, the court ruled that English law recognized no general right of privacy. See *id.* at 620. Further, the court stated that Article 8 of the European Convention on Hu-

tion may be ameliorated in the near future with the enactment of the Human Rights Bill.³⁴⁵ British common law acquired much of its present shape during the height of *laissez-faire*, a time when the protection of property and commercial rights were the dominant concerns of the courts.³⁴⁶ Consequently, the common law has demonstrated an undue deference to the principle of freedom of contract, often to the detriment of the weak in society.³⁴⁷ Furthermore, courts have been reluctant to expand traditional concepts of public policy in accordance with changing social attitudes.³⁴⁸

2. Breach of Contract

a. Dismissal

The key concept of British employment law is the contract of employment, and the theory of freedom of contract is subject only to statutory restriction and to common law doctrines such as restraint of trade and public policy.³⁴⁹ There are, however, some isolated examples of judicial intervention to ensure freedom from arbitrary, capricious or unreasonable rules which operate to prevent a person from earning a living.³⁵⁰ Over thirty years

man Rights (the right to respect for private and family life) "did not confer a direct right on the plaintiff to obtain a declaration that his human rights and freedoms had been violated because the convention was a treaty and not part of the law of England and as such was not a matter which was justiciable." *Id.* at 621.

345. See *supra* notes 98-99 and accompanying text (discussing the Human Rights Bill 1997).

346. See DAVID FARNHAM, *THE CORPORATE ENVIRONMENT* 247-68 (1995) (explaining how *laissez-faire* economics affected British common law).

347. In *Printing & Numerical Registering Co. v. Sampson*, Sir George Jessel declared:

[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.

19 L.R.-Eq. 462, 465 (M.R. 1875); see also PATRICK SELIM ATIYAH, *INTRODUCTION TO THE LAW OF CONTRACT* 4-9 (3d ed. 1981) (discussing the factors that promote free and voluntary exchanges in contracts.).

348. See J. A. G. GRIFFITH, *THE POLITICS OF THE JUDICIARY* (1997) (suggesting little has changed).

To some the judicial view of the public interest appears merely as reactionary conservatism. It is not the politics of the extreme right. Its insensitivity is clearly rooted more in unconscious assumptions than in a wish to oppress. But it is demonstrable that on every major social issue which has come before the courts in the last thirty years, the judges have supported the conventional, established and settled interests. And they have reacted strongly against challenges to those interest.

Id. at 340.

349. See, e.g., *Regina v. Ministry of Defense*, [1996] Q.B. 517, 541 (Eng. C.A.).

350. See, e.g., *Edwards v. Society of Graphical and Allied Trades*, 1971 Ch. 354, 382 (Ch. Div'l Ct.). Sachs, L.J. maintained that: "The courts have always protected a man against any unreasonable restraint on his right to work." *Id.*

ago, the possibilities afforded by the common law doctrines of restraint of trade and public policy were illustrated in the case of *Nagle v. Fielden*,³⁵¹ a case which concerned sex discrimination in the granting of a trainer's licence by the Jockey Club.³⁵² Again, the fertile ground for the development of the principles has not been judicially attempted, probably because of the emergence of the statutory discrimination actions shortly afterwards.³⁵³ The principles have not, however, been developed nor has the potential of these cases been fully explored, because of reliance on statutory provisions outlawing specific types of discrimination.³⁵⁴

Recent years have witnessed a significant expansion of the implied terms of the employment contract.³⁵⁵ This has had some impact in a case of age discrimination in Scotland,³⁵⁶ and could undoubtedly be used to assist victims of workplace harassment on grounds of sexual orientation where an employer fails to take action. Additionally, a recent case has held that an employer's equal opportunities policy may be legally binding as an implied term of the contract.³⁵⁷ This is an important ruling, as there is evidence that increasing numbers of employers, particularly in the public sector, are including sexual orientation in their equal opportunities statements.³⁵⁸

351. [1966] 2 Q.B. 633 (Eng. C.A.). In this case, Lord Denning asserted:

[T]he common law of England has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whim of those having the governance of it. If they make a rule which enables them to reject his application arbitrarily or capriciously, not reasonably, that rule is bad. It is against public policy. The courts will not give effect to it.

Id. at 644-45.

352. *See id.*

353. *See supra* notes 142-43 and accompanying text (citing various anti-discrimination statutes)

354. *See id.*

355. *See, e.g.,* *Waltons & Morse Dorrington*, [1997] I.R.L.R. 488 (E.A.T.); *Wilson v. Racher*, [1974] I.C.R. 428, 430 (Eng. C.A.). Both cases demonstrate that the area of implied terms has proved a fruitful field for judicial creativity. *See* [1997] I.R.L.R. at 488; [1974] I.C.R. at 430. Of particular significance is the implied term that an employer will treat his employees with respect, first propounded by Edmund Davies, L.J. in *Wilson*. [1974] I.C.R. at 430. Additionally, it is implied that the employer will ensure the employee's health, safety and well-being at work. *See Waltons*, [1997] I.R.L.R. at 488. For a recent example of this, *see Waltons* where the implied term was used to establish the right of an employee not to have to work in a smoke filled room. *Id.*

356. *See Smyth v. Croft Inns Ltd.*, [1996] I.R.L.R. 84 (N. Ir. C.A.). The employer's total lack of concern for the well-being of an employee, who had been the subject of sectarian threats from customers, amounted to a breach of the implied duty of trust and confidence, and as such, was a constructive dismissal. *See id.*

357. *See Secretary of State for Scotland v. Taylor*, [1997] I.R.L.R. 608 (E.A.T.).

358. *See Equality for Lesbians and Gay Men in the Workplace*, EQUAL OPPORTUNITY REV., Jul.-Aug. 1997, at 20, 22 (citing a survey carried out by the Association of Metropolitan Authorities in June 1995, which found that 90% of the 48 respondents included sexual orientation explicitly in their equal opportunities policies).

3. Challenging Sexual Orientation Discrimination in Tort

In general, the law of tort has not been used as an avenue to challenge dismissals on the ground of sexual orientation. In the United Kingdom, there is no tort which corresponds with the American tort of abusive discharge. As in Canada, however, various forms of harassment have been recognized as discriminatory and unlawful under the anti-discrimination legislation.³⁵⁹ Without exception, the actions have been brought under the statutory provisions and not as common law actions in tort.³⁶⁰

As noted above, there is no action for breach of privacy in the U.K.³⁶¹ It remains to be seen what impact the incorporation of the European Convention on Human Rights will have once the Human Rights Bill 1997 becomes law. However, the limitations on the use of Article 8 of the Convention (the right to private and family life) to establish rights for gay people have been identified earlier.³⁶²

There are no cases in the U.K. which directly raise discrimination on the grounds of sexual orientation in this context, and it is necessary to consider the question of the potential of the common law from a wider perspective. The closest comparison in tort appears in the case of *Constantine v. Imperial London Hotels Ltd.*,³⁶³ where Learie Constantine, a well-known international cricketer, succeeded in a claim in tort for damages when he and his family were refused lodgings at the Imperial Hotel, solely on account of their color.³⁶⁴ However, despite a finding that they had suffered "much distress and humiliation," only nominal damages of five guineas were awarded.³⁶⁵ Perhaps because of the inadequacy of the remedies, no other similar cases appear to have been brought, and the tort has again been superseded by the statutory actions for discrimination.

359. See *Porcelli v. Strathclyde Reg'l Council*, [1986] I.C.R. 564, 564 (Sess.). The Lord President of the Court of Session expressed the view that sexual harassment is a "particularly degrading and unacceptable form of treatment which it must be taken to have been the intention of Parliament to restrain." *Id.* at 569.

360. See, e.g., *Strathclyde Reg'l Council v. Porcelli*, [1986] I.R.L.R. 134, 134 (Sess.). Damages in the two actions are awarded on identical principles. See *Sex Discrimination Act*, 1975, ch. 65, §§ 65 (1) (b), 66 (Eng.). However, the discrimination action is heard by the relatively cheap and informal Industrial Tribunal (whose decisions are fully binding), whereas a tort claim must go to the ordinary courts. See *id.* § 63 (1).

361. See *supra* note 344 and accompanying text (noting the court's refusal to recognize a general right to privacy.)

362. See *supra* notes 94-95 and accompanying text (discussing court-implied limitations imposed on the use of Article Eight for prevention of sexual orientation discrimination).

363. [1944] 2 All E.R. 171, 172 (K.B.). This case turned upon the specific common law duty of an innkeeper to receive and lodge in his inn all bona fide travelers, unless he has a reasonable ground for refusal. See *id.* at 173.

364. See *id.* at 172.

365. *Id.* at 178.

4. Conclusion

Common law in the United States, Canada and the U.K. acquired much of its present shape during the heyday of economic and political *laissez-faire*, when the protection of property and contract rights were dominant concerns of the courts.³⁶⁶ Consequently, the common law grants an undue deference to freedom of contract in the face of marketplace discrimination and is inherently reluctant to expand traditional concepts of public policy in accordance with changing social attitudes.³⁶⁷ Concomitantly, there is a marked judicial reticence — more pronounced in the United States given the absence of legislative or policy directives — to update common law principles in order to impeach unfair discrimination on irrelevant grounds.

This reticence is poignantly revealed in the U.S. Supreme Court's refusal to hear the appeal of *Shahar v. Bowers*.³⁶⁸ The importance of constitutional protections in the public employment domain, and as an expression of the equality of all citizens has already been noted.³⁶⁹ The U.S. Supreme Court, unlike the high courts in Canada and the U.K., continues to countenance the criminalization of homosexual conduct, and thus contributes to the stigma placed on the gay community.³⁷⁰ In addition, the limited application of the decision in *Romer v. Evans* and the continuing validity of *Bowers* illustrate the absence of judicial will at the highest levels to squarely face the issue of discrimination based on sexual orientation and remedy it.³⁷¹

While Canadian courts have been active in protecting gay and lesbian rights by reading such protection into several of the human rights codes across the country, the Canadian common law has proven to be tepid and ineffectual. Indeed, it is the failure of the common law to address discrimination that led to the creation of statutory protections.³⁷² Tarnopolsky states "[i]t is no wonder, then, that the legislatures, with no aid from the judiciary,

366. See *supra* note 346 and accompanying text (advocating the importance of maintaining a free and voluntary nature of dealing in contracts); HUGH COLLINS, *THE LAW OF CONTRACT* 14-15 (2nd ed. 1993) (discussing and critiquing the persistence of this nineteenth century concept of contract law).

367. See, e.g., Vriend v. Alberta (1998), 156 D.L.R. (4th) 385, 404-05 (1998) (analysis by Mr. Justice McLung); see also *Shahar v. Bowers*, in which the U.S. Supreme Court declined to hear an appeal from the lower court on the issue of whether an employer's interest may outweigh an applicant's right of free association under the First Amendment. 114 F.3d 1097 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998).

368. See *supra* note 57 and accompanying text (discussing the issues and holding of *Shahar v. Bowers*.)

369. See *supra* notes 40-114 and accompanying text (examining the constitutional status of gay men and lesbians).

370. See *supra* notes 52-53 and accompanying text (discussing the *Bower* decision).

371. See *supra* notes 76-77 and accompanying text (attempting to reconcile *Romer's* ruling with *Bower's* holding and the impact of both cases on future cases.)

372. See TARNOPOLSKY & PENTNEY, *supra* note 278, at 24.

had to move into the field and start to enact anti-discrimination legislation, the administration and application of which have largely been taken out of the courts.”³⁷³

V. Conclusion: A Call for Legislative Reform in the United States

The U.S. Court for the Southern District of Texas is notable for eloquently speaking against discrimination, including discrimination based on sexual orientation.³⁷⁴ According to United States District Court Judge Kent, such discrimination is “profoundly wrong” and “violates the fundamental and essential right of individuals to engage in the full rights and privileges of citizenship.”³⁷⁵ Despite this example of judicial resolve to protect human rights, the U.S. has not enacted legislative protection against sexual orientation discrimination. This failure is even more egregious given the lack of constitutional protection, and the very limited common law protection available. Legislative silence in this area serves “to reinforce negative stereotyping and prejudice thereby perpetuating and implicitly condoning its occurrence.”³⁷⁶ Allowing employers to terminate employees because of sexual orientation speaks with blunt eloquence to the manner in which the legislative branch of government can exacerbate and validate homophobia by failing to accord homosexuals a legal voice.

It remains to be seen whether a statutory approach to human rights protection would be effective in the U.S. as well as in the U.K. Certainly, a statutory scheme whereby a complaint of harassment can be made before a human rights board has potential advantages, including lower costs in pursuing a complaint, a greater range of remedies and better over-all access when compared with traditional court proceedings.³⁷⁷ On the other hand, it is no solution when governments enact human rights legislation with incomplete prohibitions on discrimination, tepid enforcement measures, and ones which produce low damage awards for complainants. This means that the outcome for those making human rights complaints is tied entirely to the political will of those entrusted to address such concerns, be they members of the judiciary or members of a human rights commission. There is no quick fix or simple answer. That said, there is a profound and compelling argument to favor a statutory remedy, namely that a governmental refusal to legislate protection for gay men and lesbians can be seen as validating or condoning homophobia.³⁷⁸

373. *Id.*

374. *See* Sarff v. Continental Express, 894 F. Supp. 1076, 1081 (S.D. Tex. 1995).

375. *Id.*

376. *Vriend v. Alberta* [1994] 6 W.W.R. 414, 431 (Q.B.).

377. *See* June Ross, *New Developments in Human Rights Law with Implications for Employees and Employers*, *WRONGFUL DISMISSAL* 95-96 (1994).

378. *See generally* KARST, *supra* note 112 and accompanying text (discussing the

Whereas legislative silences condone prejudice against gay men and lesbians, inclusive human rights legislation can be a palliative to the walls which exist between and among groups within society. This Article has demonstrated that Canada, and to a much lesser extent, the U.K., have taken the lead in protecting against sexual orientation discrimination. The U.S. has a long way to go, but a first step would be to act on the words of Senator Hatfield:

The time has arrived to take the next logical step toward equality of opportunity in the workplace. Senate bill 2056, the Employment Nondiscrimination Act which would prohibit discrimination in employment on the basis of sexual orientation is such a step While we will not be able to wash this type of deep-seeded hatred from our society merely by enacting a Federal statute, employment relations is narrowly focused and appropriate for a Federal statement of national policy, as we have demonstrated many times As this Nation turns the corner toward the 21st century, the global nature of our economy is becoming more and more apparent. If we are to compete in this marketplace, we must break down the barriers to hiring the most qualified and talented person for the job. Prejudice is such a barrier. It is intolerable and irrational for it to color decisions in the workplace.³⁷⁹

problem of social stigma created through law). Writing prior to any judicial review of Amendment 2 in *Romer*, Karst states:

[A] court that reviews the constitutionality of the Colorado amendment will not be doing its job unless it takes account of the amendment's harmful expressive effects: not just effects on the freedom of expression, but the stigmatizing effects of the amendment's own expression. Stigma — especially stigma propagated by government — produces harms that are both immediate and consequential. The immediate harms are psychic: insult, humiliation, indignity for the people stigmatized. But the amendment's separation of gay and lesbian Coloradans from the rest of the citizenry also expresses the legitimacy of antigay fears — and helps to translate those mental states into a wide range of privately inflicted harms, from insults to employment discrimination to physical attacks.

Id. at 185-86.

379. 142 CONG. REC. S10,133 (daily ed. Sept. 10, 1996) (statement of Sen. Hatfield) (supporting the Employment Non-Discrimination Act of 1996).