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

Ronnie Cohen*
Shannon O'Byrne**
Patricia Maxwell***

* Associate Professor, Christopher Newport University, Virginia, USA. Ronnie Cohen has a J.D. and LL.M. (tax) from the Marshall-Wythe School of Law of the College of William & Mary. She is an Associate Professor of Business Law and Legal Studies at the College of Business and Economics, Christopher Newport University in Virginia. Her publications are in the areas of European Law, feminism (including feminist perspectives on corporation law and tax) as well as law and literature. Her most recent article is forthcoming in the American Business Law Journal.

** Associate Professor, Faculty of Law, University of Alberta, Edmonton, AB, Canada. Shannon O'Byrne has an LL.M. (Contracts Law) and an M.A. (English Literature) from the University of Alberta, Canada. She is an Associate Professor with the Faculty of Law, University of Alberta, specialising in the area of contracts law, company law, constitutional law, as well as law and literature. She has numerous publications, including work on gay and lesbian human rights, economic justice in the global marketplace, liberal political theory, the Critical Legal Studies Movement from a law and literature perspective, the private law model of government contracts, and the history of contract law. Her recent article A Good Faith in Contractual Performance, is published by the Canadian Bar Review and has been cited with approval by the Supreme Court of Canada as well as several courts of appeal across the country. She has delivered papers to a number of professional organizations, including the Continuing Legal Education Society of British Columbia (Fiduciary Obligations Series), the Canadian Bar Association (Business Law Section), The Legal Education Society of Alberta (Advanced Business Law Series) and the Gay and Lesbian Rights Section of the Canadian Bar Association.

*** Lecturer, Faculty of Law University of Ulster, Belfast, Northern Ireland. Patricia Maxwell has an LL.B. (hons) from the University of Bristol, and an L.L.M. in Human Rights and Anti-Discrimination law from Queen's University, Belfast. She has taught at the University of Ulster for a number of years, specialising in Employment Law and the Law of Tort. Ms. Maxwell is published widely in the area of Anti-Discrimination law, including work on the rights of part-time workers, ex-offenders, and on equal pay and fair employment. Recently she secured research funding from the Standing Advisory Commission on Human Rights to undertake a comparative analysis of the law on equality of opportunity, as a contribution to the government review of the fair employment legislation in Northern Ireland. She has also undertaken work for the Equal Opportunities Commission in N.I., and for a leading public sector trade union.

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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” 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.

Parlee McLaws for their assistance and encouragement. The authors are also grateful to Sandra Wilkins, Research Librarian at the Faculty of Law, University of Alberta, for her research assistance and to Kim Cordeiro for her assistance in the preparation of this manuscript.

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. 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. Another bill, which sought to protect lesbians and gay men from employment discrimination, lost by a single vote in the Senate and was not introduced in the House. In June 1997, the bill was again introduced and referred to committees in both houses of Congress. 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." 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.

      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


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).


violence in the workplace. 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. 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.

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, warned: If we don't stand here against this [Defense of Marriage] bill, we will stand on the wrong side of history.

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.

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
shop” any gay employees whose presence offended customers. 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.” Another MP, Dr. Grant Hill, stated during debate on bill C-33 (a bill to amend the Canadian Human Rights Act 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. “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.”

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.

The homophobic attitudes of politicians like Hill and Hoeppner are also reflected in sexual orientation discrimination in the Canadian workplace. 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 percent believed that they had not been promoted, and 20.5 percent believed that they had been fired ... In 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

15. Id.
18. Id.
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.


24. See Senate Debates 552 (1996). The vote was 54 in favor; six opposed. See id.


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. 1 (Canadian Charter of Rights and Freedoms, § 15(1)).

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.  

C. The United Kingdom

While there is evidence that public opinion may be slowly turning towards a greater tolerance and acceptance of homosexuality, it is still easy to find examples of homophobic attitudes in government. 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.  

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. 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. Gay men and lesbians are also treated differentially in the armed forces: there is an absolute bar on their employment. 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.


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.

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.\(^\text{36}\)

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.\(^\text{37}\) Based on questionnaires and interviews with a random sample of homosexual, bisexual and heterosexual employees, the study concluded that the problem was widespread.\(^\text{38}\) 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.\(^\text{39}\) The study confirms that homophobic attitudes are endemic in British society.

\section*{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.

\section*{II. The Constitutional Status of Gay Men and Lesbians}

\subsection*{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

\begin{thebibliography}{9}
\bibitem{35} See Regina, [1996] Q.B. at 524.
\bibitem{36} Id.
\bibitem{38} See id. at 24.
\bibitem{39} See id. at 31.
\end{thebibliography}
people to determine the nature of their community 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." Similarly, in the United Kingdom, male homosexual sex was decriminalized in Great Britain in 1967 and in Northern Ireland in 1982.43 These changes in the criminal law followed the Dudgeon v. United Kingdom 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.44 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-

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41. For a scholarly review of constitutional protections for gay men and lesbians, see ROBERT WINTEMUTE, 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.).


tory of the equality struggle for gay men and lesbians.\textsuperscript{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.\textsuperscript{49} While the age of consent for private homosexual acts has been lowered to eighteen years,\textsuperscript{50} it is still higher than the age of consent for heterosexual acts, which is sixteen.\textsuperscript{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 \textit{Bowers v. Hardwick}.\textsuperscript{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.\textsuperscript{53} The Court went on to distinguish the right asserted in \textit{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.\textsuperscript{54} In a well-reasoned and vehement dissent, however, Justice Blackmun rejected the majority's analysis of the case:

\begin{quote}
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.'\textsuperscript{55}
\end{quote}

Fortified by the majority reasoning in \textit{Bowers}, nineteen states\textsuperscript{56} continue to

\begin{itemize}
\item \textsuperscript{49} Sanders has described the case as "the watershed event in international human rights law for lesbian women and gay men" in Douglas Sanders, \textit{Getting Lesbian and Gay Issues on the International Human Rights Agenda}, 18 HUM. RTS. Q. 67, 78 (1996).
\item \textsuperscript{50} See Sanders, supra note 48, at 79.
\item \textsuperscript{51} The unequal age of consent laws are currently being challenged before the European Commission on Human Rights. See Sanders, supra note 48, at 80.
\item \textsuperscript{52} See Sexual Offences Act, 1956, 4 & 5 Eliz. 2, ch. 69, § 6 (Eng.).
\item \textsuperscript{53} See \textit{id.} at 192.
\item \textsuperscript{54} \textit{Id.} at 191.
\item \textsuperscript{55} See \textit{id.} at 199 (Blackmun J., dissenting) (citing Herring v. State, 119 Ga. 709, 721 (1904)).
\end{itemize}
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 plaintiff's 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 plaintiff's 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 plaintiff's right to freely associate might well outweigh any interest the government could assert to justify discrimination on the basis of sexual orientation.


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.” 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.

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. Furthermore, since most civil rights plaintiffs who allege discrimination in the public sector rely on the Equal Protection Clause of the U.S. Constitution, 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. 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. Classifications based on gender are given an intermediate level of scrutiny, and the proponent of such a classification

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. Croset 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 launderers).
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.\textsuperscript{67} Classifications based upon sexual orientation have not been categorized as suspect,\textsuperscript{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 \textit{Romer v. Evans}\textsuperscript{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.”\textsuperscript{70}

Lesbians and gay men have recently received a measure of constitutional recognition in the United States through the \textit{Romer} decision, but this recognition has exceptionally limited precedential value for discrimination issues in the public workplace. In \textit{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.\textsuperscript{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.\textsuperscript{72}

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

\textsuperscript{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).
\textsuperscript{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.
\textsuperscript{69} 116 S. Ct. 1620 (1995).
\textsuperscript{70} Id. at 1634 (Scalia J., dissenting).
\textsuperscript{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.
\textsuperscript{72} See Romer, 116 S. Ct. at 1621.
\textsuperscript{73} See id. at 1628-29.
ing a specially protected class.\textsuperscript{74} Notwithstanding the court’s decision, some scholars believe that the \textit{Romer} decision means that \textit{Bowers v. Hardwick}\textsuperscript{75} would be overruled if another litigant were to bring “such sex crime laws before the Court.”\textsuperscript{76} Others, such as Professor Robert Wintemute, persuasively contend that the reasoning of the court in \textit{Romer} was so circumscribed that the judges in the majority “left themselves plenty of room to limit \textit{Romer}” and follow \textit{Bowers} in future cases.\textsuperscript{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 \textit{Romer}] and valid ‘sentiments about morality’ [the rationale of \textit{Bowers}].”\textsuperscript{78}

So far at least, \textit{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.

\textbf{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.\textsuperscript{79} In \textit{Egan v. Canada},\textsuperscript{80} Justice Cory determined that those of a same-sex orientation have suffered an “historic disadvantage”\textsuperscript{81} as a result of having been the chronic targets of crimes of violence, public harassment, verbal abuse and employment discrimination.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{84}

\begin{itemize}
\item \textsuperscript{74} See id. at 1629. According to Justice Scalia in his dissenting opinion in \textit{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. \textit{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. \textit{See id.} at 1634-35.
\item \textsuperscript{75} 478 U.S. 186 (1986).
\item \textsuperscript{76} Ian Loveland, \textit{Gay Rights in the USA?}, 146 NEW L.J. 1847, 1847 (1996).
\item \textsuperscript{77} Robert Wintemute, A “Fundamental Right to be Gay” in the USA? Not Yet, PUB. L., Autumn 1997, at 420, 420.
\item \textsuperscript{78} \textit{Id.} at 421.
\item \textsuperscript{79} \textit{See infra} notes 80-88 and accompanying text (discussing Constitutional protection in Canada).
\item \textsuperscript{80} [1995] 2 S.C.R. 513 (Can.).
\item \textsuperscript{81} \textit{Id.} at 600.
\item \textsuperscript{82} \textit{See id.} at 600-01.
\item \textsuperscript{83} \textit{See id.} at 514.
\item \textsuperscript{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. The decision in *Egan* very clearly means that governmental persons are prohibited from discriminating against gay men and lesbians. If such discrimination occurs which cannot be "demonstrably justified," the plaintiff is entitled under section 24 to "such remedy as the court considers appropriate and just in the circumstances.

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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.


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. As a general rule, legislation in the area applies equally to public and private employers, with only the most limited exceptions in the case of employment in the armed forces, if national security grounds apply. 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." 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.

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).
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. The Commission, however, has since ruled that homosexual relationships do not come within the right to respect for family life. The failed challenge in *Regina v. Ministry of Defence* 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. 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. The importance of this Bill is that provisions of the Convention will, for the first time, be enforceable directly in the domestic courts. 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.

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

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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.*
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”).
Directive.\textsuperscript{101} In the 1998 decision of \textit{Grant v South West Trains},\textsuperscript{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.\textsuperscript{103} In light of the \textit{Grant} decision, the reference of another sexual orientation case to the ECJ was withdrawn.\textsuperscript{104} These cases, mentioned here to illustrate the topicality of sexual orientation litigation, are discussed in more detail later in this Article.\textsuperscript{105}

Within the European Union, action to protect gay men and lesbians is also being taken at the level of the Council of Ministers.\textsuperscript{106} In October of 1997, a proposed revision to the Treaty Establishing the European Community\textsuperscript{107} was signed by the member states.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{110} Even then, it merely provides a legal base for the Council to initiate legislation or other measures at some future date.\textsuperscript{111} Given the great diversity that currently exists among the laws of member states of the European Union, it is unlikely


\textsuperscript{102} Case C-249/96, 1998 E.C.R. I-621.

\textsuperscript{103} See id. at I-653.


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


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

\textsuperscript{108} See Treaty of Amsterdam (last modified Feb. 27, 1998) \url{http://europa.eu.int/en/agenda/igc-home/index.html}.

\textsuperscript{109} Id. (emphasis added).

\textsuperscript{110} See EC Treaty, supra note 107, at Art. 189 (b), § 2.

\textsuperscript{111} See Catherine Barnard, \textit{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 hatred 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. 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. 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. 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).


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 orienta-
tion,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 pro-
hibiting 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,
and as mentioned earlier, the federal Human Rights Act has recently been amended to forbid such discrimination. 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. 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.

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, so as to prohibit marketplace discrimination based on sexual orientation. The majority of the Alberta Court of Appeals, in *Friend v. Alberta*, ruled that this refusal did not violate the constitutional guarantee of equality contained in the Canadian Charter of Rights and Freedoms. This ruling has recently been reversed by the Supreme Court of Canada.

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. The Supreme


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

125. See id. at 21-22.


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


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


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. Canada’s highest court defended the constitutionally-mandated judicial role of scrutinizing legislative and executive conduct for compliance with constitutional values. 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.

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. Writing for a unanimous court on this point, Justice Cory stated that the legislative exclusion at bar sent a message:

[It] 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.

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. 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
government caucus has stated that this option would not be exercised. 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.

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. 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, and as such unlawful under the Sex Discrimination Act of 1975 and the Equal Treatment Directive.

The first reported decision raising this argument was Regina v. Ministry of Defense ex parte Smith, in which four gay and lesbian members of the armed forces challenged their dismissals as unlawful under the Equal Treatment Directive. 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. 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.


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.).


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.\footnote{148} The English court refused to refer the case to the ECJ on the grounds that European law was sufficiently clear in this area.\footnote{149} As indicated earlier, however, the matter will proceed to review before the European Court of Human Rights.\footnote{150}

In the second case, \textit{Smith v. Gardner Merchant},\footnote{151} a gay barman challenged his dismissal under the Sex Discrimination Act of 1975.\footnote{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.\footnote{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.\footnote{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.\footnote{155} The court found that a person's sexual orientation is not to be treated as an aspect of his or her sex.\footnote{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.\footnote{157} The case was remitted to the Tribunal to consider whether such an employee would have been treated any

\footnote{148} In Case 283/81, \textit{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. \textit{See} Case C-177/88, Dekker v. Stichting Vormingscentrum voor Jong Volwassenen Plus, 1991 E.C.R. I-3941.

\footnote{149} \textit{See} Regina, [1996] Q.B. at 560, 565.

\footnote{150} \textit{See} id.


\footnote{152} \textit{See} id. at 791.

\footnote{153} \textit{See} id. The Industrial Tribunal refused to hear the case based on lack of jurisdiction under the Sex Discrimination Act of 1975. \textit{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. \textit{See} Commission Recommendation 24/292 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.


\footnote{156} \textit{See} id. at 863.

\footnote{157} \textit{See} id. at 865.
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.*, 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.

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*.

As discussed earlier, *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. 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. 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.” Regrettably, however, the Court declined to follow the Advocate General’s recommendation.

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

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158. See *id.* at 867.
160. See *id.* at I-2165.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{170}

Second, the court deferred to the value of permitting divergent views within the EU.\textsuperscript{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.”\textsuperscript{172} In this context the Court observed that when the Treaty of Amsterdam enters into force,\textsuperscript{173} the Council of Ministers

\begin{itemize}
\item[167.] See id. at I-633.
\item[168.] See Grant, 1998 E.C.R. at I-645 to I-647.
\item[169.] Id. at I-646.
\item[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.
\item[172.] Id. at I-648.
\item[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
\end{itemize}
would be able to take measures with a view to eliminating various forms of
discrimination, including that based on sexual orientation.\textsuperscript{174}

Finally, the Court addressed whether, in light of its earlier decision in
\textit{P v. S}, concerning gender reassignment, discrimination based on sexual ori-
etination could be treated as discrimination based on sex.\textsuperscript{175} The Court
adopted a very restrictive approach to the earlier case, taking the view that
the reasoning in \textit{P v. S} must be "limited to the case of a worker's gender re-
assignment and does not therefore apply to differences of treatment based on
a person's sexual orientation."\textsuperscript{176} Thus, the court declined to follow the step
based purely on traditional comparisons between male and female employ-
ees, thereby permitting continued discrimination against persons based
solely on their sexual orientation.\textsuperscript{177}

Another important case in this area is \textit{R. v. Secretary of State}, which
challenges the validity of the governmental policy barring gays and lesbians
from the armed forces.\textsuperscript{178} More specifically, it asks whether this policy can
be justified under Article 2(2) of the Equal Treatment Directive,\textsuperscript{179} on the
grounds that homosexuality is incompatible with service in the armed
forces.\textsuperscript{180} Unfortunately, in light of the ECJ's decision in \textit{Grant}, the court
found that the policy did not violate the Equal Treatment Directive.\textsuperscript{181}
The introduction of a statutory action for unfair dismissal\(^\text{182}\) 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.\(^\text{183}\) 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.\(^\text{184}\) 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."\(^\text{185}\)

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.\(^\text{186}\) 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.\(^\text{187}\) 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
them. 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. 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. 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. 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. 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.

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 Hefler & 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

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. Although judges tend to resist extending the law beyond its existing boundaries, 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. 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. 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. 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). For example, many courts have adapted the principles of the UCC to non-Code cases involving real estate, insurance and service contracts. 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.

In most states, the covenant of good faith is associated with a contract-
tual relationship. 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. These, in turn, may create a subsidiary contractual arrangement that changes the "at-will" nature of the initial relationship. However, the presumption in favor of at-will employment is still quite strong in a number of jurisdictions. 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. 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.

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. 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).


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. 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. However, the employee would have to show that his or her reliance on the promise was reasonable, 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.

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. 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. For example, damages could be awarded to an employee who was fired for filing a workers' compensation claim or reporting a safety violation to the Occupational Safety and Health Administration, or filing a charge of unfair labor practices under the National Labor Relations Act. 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).


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.

above-mentioned statutes prohibit retaliatory firings, courts have held that they do not create a private right of action for damages. Rather, these statutes are judicially regarded as articulating an important public policy. 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. 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,” 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. 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
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.\textsuperscript{228} The Supreme Courts of Maryland\textsuperscript{229} and New Jersey \textsuperscript{230} have adopted this view, while the California Supreme Court has taken the opposite view that common law remedies are still available to plaintiffs.\textsuperscript{231}

As noted earlier, a minority of states have specific statutory protections against discrimination based on sexual orientation.\textsuperscript{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 \textit{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 \textit{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 \textit{White v. Bay-Shep Restaurant & Tavern Ltd.} (1995), 16 C.C.E.L. (2d) 57 (Ont. Ct. Just. Gen. Div.).

\textsuperscript{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.


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

\textsuperscript{231} See Rojo v. Kliger, 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).

\textsuperscript{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, the Age Discrimination in Employment Act and the Americans With Disabilities Act. 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. 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.

However, in two recent cases, the courts have expanded the notion of what public policy entails. In Painter v. Graley, 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.

Likewise, in Sarff v. Continental Express, 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-

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.
EMPLOYMENT DISCRIMINATION

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.\(^\text{248}\)

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.

\textit{b. Breach of privacy}

Over one hundred years ago, Justice Brandeis defined the constitutional right of privacy as "the right to be let alone."\(^\text{249}\) This right is protected in the Constitution as well as in legislative provisions.\(^\text{250}\)

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 \textit{Hank}, 512 N.W.2d at 614 (left for good cause); \textit{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 \textit{Hank}, 512 N.W.2d at 615-18.

\textit{248. Estlund, supra} note 225, at 1682.

\textit{249. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).}

\textit{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 \textit{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." \textit{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." \textit{Id.} at 485.}

For a statutory example of privacy protection, see the Electronic Communications Privacy Act of 1986, 18 U.S.C. \S 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. \textit{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.\textsuperscript{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.\textsuperscript{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 \textit{Bowers v. Hardwick} decision, that lesbians and gay men are not entitled to expect privacy with regard to their "criminal activities."\textsuperscript{253} Moreover, some argue that the risk of HIV infection, for example, makes disclosure of private facts reasonable.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{257} Greenwood
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.
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. 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.

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. 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. Electronic surveillance may also be in violation of federal law. 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."  

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. Other authors dispute this

272. See Borquez, 923 P.2d at 172-73.
273. See id. at 173.
275. See id.
277. Dunlap, supra note 194, at 5-38.6.
contention, arguing that creative lawyers should be able to fashion causes of action based on cases in other areas of law. Mary Dunlap, writing from an American perspective, suggests possible actions in tort, but does concede that counsel “may need to invent a tort name to encompass the wrong and the remedy sought.” She also puts forward several contract actions, including breach of an implied covenant of good faith and fair dealing, but is unable to cite any case where such a claim was successful. 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. As a result, a competent employee who is not terminated in accordance with these rules can bring an action for unjust dismissal.

There is only one reported case involving an unjust dismissal claim based on sexual orientation discrimination. In *Damien v. Ontario Racing*...
Commission, 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. 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. 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," he died without the matter having proceeded to trial.

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 case as well as in MacDonald v. 283076 Ontario Inc. In the latter case, the Court of Appeal held, in obiter, that dismissal on the basis of sex alone would not be just "cause," 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. 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 which held that there is no action either in contract or in tort for "bad faith discharge" in indeterminate...
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.
302. See supra notes 296-97 and accompanying text (discussing Wallace v. United Grain Growers).
Furthermore, the Supreme Court of Canada has recently dismissed the possibility of suing for the tort of bad faith discharge. 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.

Canadian common law might permit an action for nervous shock, such as when the conduct of the employer has been confrontational and aggressive, or for the tort of intentional interference with economic interests. 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.

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. 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 . . ." Indeed, the Supreme Court of Canada stated in Christie v. York Corporation 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." 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." 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

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305. See infra notes 123-25 and accompanying text (discussing the administrative procedures required by human rights legislation).
308. See id. at 66-67.
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.
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

316. Id. at 634.
317. Id. at 619.
318. See TARNOPOLSKY & PENTNEY, supra note 278, at 1-1 to 1-26.

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." 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." Given the Supreme Court of Canada's decision in Egan, 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, 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." In short, the right to be free from discrimination existed independently of the human rights legislation which fixed standards and remedies concerning it. 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. Unfortunately, this view was rejected by the Canadian Supreme Court. It questioned Madam Justice Wilson's conclusion that a right to be free of discrimination existed apart from a statute according that protection. Further, the Court accused Madam Justice Wilson of overreaching:

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.
329. See id. at 194-95.
plaintiff respondent did not see fit to use.\textsuperscript{330}

As a result of \textit{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.\textsuperscript{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 agreement\textsuperscript{332} or by a legislative requirement for arbitration.\textsuperscript{333}

Though there are lower court pronouncements to the contrary,\textsuperscript{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 \textit{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.\textsuperscript{335} For example, \textit{Seneca College} dealt

\begin{itemize}
  \item \textsuperscript{330} \textit{Id.}
  \item \textsuperscript{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).
  \item \textsuperscript{334} See, e.g., \textit{Mbaruk}, 1996 ACWSJ LEXIS 81256, at *9; \textit{Haje}, 1996 ACWSJ LEXIS 78806, at *10-11.
  \item \textsuperscript{335} See \textit{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 \textit{Alpaerts}, the plaintiff alleged that she had been constructively dismissed as a result of sexual harassment and other mistreatment. \textit{Id.} at *1. The Court was able to distinguish \textit{Seneca College} on the basis that the plaintiff in \textit{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 \textit{Alpaerts}, the plaintiffs action related to past and present treatment by her employer. \textit{Id.} at *2-3. Accordingly, the court permitted the matter to proceed. \textit{See id.} at *4. A similar analysis was utilized by the Ontario Court of Justice in \textit{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 \textit{L'Attiboudeaire v. Royal Bank of Canada} (1996), 131 D.L.R. (4th) 445. \textit{But see Mbaruk}, 1996 ACWSJ LEXIS 81256, at *9; \textit{Haje}, 1996 ACWSJ LEXIS 78806, at *10-11.

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

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, 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: "it 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.


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.\textsuperscript{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.\textsuperscript{341} Despite two notable early successes,\textsuperscript{342} the common law has proven to be a weak instrument and has not been developed to afford any real degree of protection.\textsuperscript{343} Of most serious concern is that no independent tort for invasion of privacy is recognized by British common law,\textsuperscript{344} although this situa-

\begin{itemize}
  \item \textsuperscript{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.).
  \item \textsuperscript{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).
  \item \textsuperscript{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).
  \item \textsuperscript{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:
    
    \[ \text{The impotence of the English Judiciary in the face of racial discrimination is an extreme illustration of the limitations of the Common Law... in recent decades, when racial equality has become embedded in the public philosophy, the English Bench have displayed a marked insensitivity to the manifestations of racial discrimination. Again and again, their decisions have either implicitly or overtly condoned the unfair treatment of racial groups, when they could instead have secured a more genuine equality before the law...} \]
    
    \textit{Id.} at 69-70.
  \item \textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{347} Furthermore, courts have been reluctant to expand traditional concepts of public policy in accordance with changing social attitudes.\textsuperscript{348}

2. Breach of Contract

\paragraph*{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.\textsuperscript{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.\textsuperscript{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." \textit{Id.} at 621.

\textsuperscript{345} \textit{See supra} notes 98-99 and accompanying text (discussing the Human Rights Bill 1997).


\textsuperscript{347} In \textit{Printing \\& Numerical Registering Co. v. Sampson}, Sir George Jessel declared:

\begin{quote}
[If 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.]
\end{quote}

\textit{19 L.R.-Eq. 462, 465 (I.R. 1875); see also} Patrick Selim Atiyah, \textit{Introduction to the Law of Contract} 4-9 (3d ed. 1981) (discussing the factors that promote free and voluntary exchanges in contracts.).


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.

\textit{Id.} at 340.


\textsuperscript{350} \textit{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." \textit{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*, a case which concerned sex discrimination in the granting of a trainer's licence by the Jockey Club. 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. 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.

Recent years have witnessed a significant expansion of the implied terms of the employment contract. This has had some impact in a case of age discrimination in Scotland, 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. 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.

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*.


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.\textsuperscript{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.\textsuperscript{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 \textit{Shahar v. Bowers}.\textsuperscript{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.\textsuperscript{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.\textsuperscript{370} In addition, the limited application of the decision in \textit{Romer v. Evans} and the continuing validity of \textit{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.\textsuperscript{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.\textsuperscript{372} Tarnopolsky states “[i]t is no wonder, then, that the legislatures, with no aid from the judiciary,

\textsuperscript{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).

\textsuperscript{367} See, e.g., Vriend v. Alberta (1998), 156 D.L.R. (4th) 385, 404-05 (1998) (analysis by Mr. Justice McClung); see also \textit{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).

\textsuperscript{368} See supra note 57 and accompanying text (discussing the issues and holding of \textit{Shahar v. Bowers}.)

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

\textsuperscript{370} See supra notes 52-53 and accompanying text (discussing the \textit{Bower} decision).

\textsuperscript{371} See supra notes 76-77 and accompanying text (attempting to reconcile \textit{Romer}’s ruling with \textit{Bower}’s holding and the impact of both cases on future cases.)

\textsuperscript{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.\footnote{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\footnote{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."\footnote{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."\footnote{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.\footnote{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.\footnote{378}

\footnote{373. Id.}
\footnote{375. Id.}
\footnote{377. See June Ross, New Developments in Human Rights Law with Implications for Employees and Employers, WRONGFUL DISMISSAL 95-96 (1994).}
\footnote{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

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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.