

# THE RAINBOW FLAG, EUROPEAN AND ENGLISH LAW: NEW DEVELOPMENTS ON SEXUALITY AND EQUALITY

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## I. INTRODUCTION

These are exciting times to be an observer of the legal scene in the United Kingdom, if your focus is on the rights and protections accorded to lesbians and gay men. During the last twelve months, there have been at least two significant legal victories for lesbians and gay men seeking legal protection: one on adoption and the other on equalizing the age of consent between homosexual and heterosexual young adults. At the governmental level, at least two major policy initiatives have led or will lead in the short term to significant improvements in the legal status of gay men and lesbians. Not only that, but these changes reflect in miniature wider movements within the English legal system, including a re-working of the relationship between the primary sources of law (which now include the ever-increasing scope of European law, as well as traditional legislation passed by Parliament) and the judiciary.

If you take the view that the way a country treats its minorities is an important test of its humanity and maturity as a society, then you will welcome these developments. But the United Kingdom has until this recent flurry of changes had one of the worst records within Europe,<sup>1</sup> not just of failure in legal terms to offer any protection to lesbians and gay men against discrimination and homophobia but of examples of both discrimination and homophobia inherent in both the law and the legal system.<sup>2</sup> Positively, these

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1. HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE (Kees Waaldijk & Andrew Clapham eds., 1992) [hereinafter HOMOSEXUALITY] reached this conclusion from a study of all European Community/Union countries.

2. As an example, official Home Office papers recently released at the Public Record Office show that gay male prisoners in England in the 1950s were routinely offered electric shock and estrogen treatment as a would-be cure, though apparently not under compulsion. Valerie Elliott, *How Homosexual Prisoners Were 'Cured'*, TIMES (London), Nov. 28, 1997, at 8. Some commentators suggest that a client's consent to an attempt to change his/her sexual orientation can never be real, so that an ethical therapist should refuse to cooperate. See, e.g., Charles Silverstein, *Homosexuality and the Ethics of Behavioural Intervention*, 2 J. HOMOSEXUALITY 205-11 (1977).

used to include the criminalizing of all forms of sex between men<sup>3</sup> including kissing in the street;<sup>4</sup> treating consensual S/M practices in private between adults as assault;<sup>5</sup> treating gay men and lesbians as unfit parents;<sup>6</sup> giving the gay or lesbian partners of U.K. citizens no immigration or residence rights;<sup>7</sup> and discriminating against gay men and lesbians in government employment, at least in the security, military and diplomatic spheres. More fundamentally, the law has so far failed to adopt or recognize any principles to protect lesbians and gay men generally against negative consequences resulting from their sexuality, and has refused to recognize long-standing gay or lesbian relationships as entitling one partner to any special status in relation to immigration, property rights in the home,<sup>8</sup> or to succession on the

3. The principal offenses are buggery (which carried the death penalty when first legislated in 1533); gross indecency, which covers any sexual act; persistently soliciting or importuning another man in a public place for an immoral purpose, which potentially includes just inviting a man back to your home for a drink and to spend the night (*R. v. Gray*, 74 Crim. App. 324 (C.A. 1982)); procuring an act of buggery, provided that the act itself is not covered by the Sexual Offences Act 1967, ch. 60, § 1 immunity, on which see *infra* text accompanying notes 18-21; and insulting behaviour or disorderly conduct under the Public Order Act 1986, ch. 64, §§ 4, 4A and 5. See also RICHARD CARD, CARD, CROSS & JONES—CRIMINAL LAW 242-47, 249-52, 399-408 (13th ed. 1995). There are also local Acts of Parliament and by-laws made under them which have been used against gay men, e.g. "threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace" under the Metropolitan Police Act 1839, ch. 47, § 54(13) (applicable to London only). Also discussed in Part II, *infra*, are the common law offenses of conspiracy to corrupt public morals, conspiracy to outrage public decency and blasphemy, all of which have been used against gay publications.

4. See Les Moran, *Sexual Fix, Sexual Surveillance: Homosexual in Law*, in COMING ON STRONG—GAY POLITICS AND CULTURE 180-81 (Simon Shepherd & Mick Wallis eds., 1989).

5. *R. v. Brown* (Anthony) [1993] 2 W.L.R. 556 (H.L.) (a 3-2 majority in the House of Lords); for the unsuccessful application under the European Human Rights Convention which followed, see *infra* text accompanying note 111.

6. See *Re C* [1991] 1 F.L.R. 223, where the Court of Appeal held that the judge below had been wrong to treat as irrelevant the fact that a mother was now living in a lesbian relationship in deciding which parent should have care and control of a child: this fact should not disqualify her but, as Balcombe L.J. said at 231C, should be an important factor in deciding which of the competing parents could offer the nearest approximation to the norm of a home with a mother, father, and siblings (if any). Glidewell L.J. agreed but added "[a] court may well decide that a sensitive, loving lesbian relationship is a more satisfactory environment for a child than a less sensitive or loving alternative." *Id.* at 229. See also *infra* text accompanying note 58.

7. See *B. v. U.K.*, App. No. 16106/90, 64 Eur. Comm'n H.R. Dec. & Rep. 278 (1990) (refusal to allow applicant to remain in U.K. with same-sex partner—declared manifestly unfounded, since states were justified in wishing to protect "family-based" relationships and hence in treating same-sex couples less favorably).

8. To be fair, the recognition by equity of informally created rights in land via concepts of implied, constructive or resulting trusts or via the doctrine of proprietary estoppel is not limited to heterosexual (or even couple) relationships. However, under English law, to have

death of the partner.<sup>9</sup> Gay and lesbian couples also suffer the discrimination in tax terms which is faced by all unmarried couples.<sup>10</sup> As Les Moran puts it:

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lived together as an economic unit, regarding income and outgoings (including mortgage payments) as shared, is unlikely to be enough to give both partners a share in the property, if the formal legal title is in the name of one partner alone. *See Burns v. Burns* [1984] Ch. 317, applying Lord Diplock's speech in *Gissing v. Gissing* [1971] App. Cas. 886 (H.L.), and S.M. CRETNEY & J.M. MASSON, *PRINCIPLES OF FAMILY LAW* ch. 4 (6th ed. 1997). Regarding "sexually transmitted debt," there is a strong indication from the House of Lords that those lending to one member of a gay or lesbian cohabiting couple, with the shared property as security, need to make sure that the other partner truly consents to guaranteeing the other partner's debts if the surety is to be enforceable. *Barclays Bank Plc. v. O'Brien* [1993] 3 W.L.R. 786, 800C (H.L.) (Lord Browne-Wilkinson). The moral for all unmarried couples, gay or straight, is to consider what form of co-ownership is appropriate and then create it formally, with the property transferred into joint names: but surprisingly few yet do this. Many gay men in Britain in the 1980s and 1990s have expressly chosen not to do so, because of their justified fear that a joint purchase by two single men would attract the suspicion of lenders and insurers that they were members of what institutions still like to call a "high risk" group for AIDS, with the resulting discrimination, possibility of being required to take an HIV test and higher insurance premiums. For possible future changes in the property rights of cohabitantes, see *infra* Part V.D.

9. On succession by the surviving partner to certain forms of tenancy, see *infra* Part III.B; on succession to the property of a deceased partner generally, English law maintains almost intact the principle that a testator has absolute freedom to do with his/her property what he/she wishes. The fall-back provisions which apply on partial or total intestacy (*Administration of Estates Act 1925*, ch. 23, § 46, amended by the *Law Reform (Succession) Act 1995*, ch. 41, § 1) completely exclude unmarried partners of either gender. Since the coming into force of the *Inheritance (Provision for Family and Dependents) Act 1975* (as amended by the *Law Reform (Succession) Act 1995*, ch. 41, § 2) a surviving spouse and a person cohabiting with the deceased in the same household and "as his/her husband or wife" for the two years immediately preceding the death may ask the court to make reasonable provision for him/her (if necessary varying the will, if there is one), surviving spouses being in a privileged position as to the level of provision they are likely to receive; as with the rules on succession to tenancies, a gay or lesbian surviving partner will surely attempt to qualify under these rules, though there is no record of this yet. Under the same 1975 Act, a non-relative who can show that the deceased was making a substantial contribution in money or money's worth towards his/her reasonable needs at the date of the death can also apply. Few non-relatives have succeeded under these provisions, though *Bishop v. Plumley* [1991] 1 W.L.R. 582 (C.A.) and *Graham v. Murphy* [1997] 1 F.L.R. 860 (Ch.) are two examples; again, no reported case under this head so far concerns a gay or lesbian surviving partner. As with rights to land during the lifetime of the partners, the lesson for gay or lesbian partners is to make proper provision by will for the survivor, for the law is very unlikely to do it for you.

10. Transfers of assets between spouses do not count as disposals for capital gains tax purposes (*Taxation of Chargeable Gains Act 1992*, ch. 12, § 58); and transfers of capital or assets on death between one spouse and the survivor are "exempt transfers" for inheritance tax purposes (*Inheritance Tax Act 1984*, ch. 51, § 18). Married couples also enjoy a higher personal allowance in relation to income tax (*Income and Corporation Taxes Act 1988*, ch. 1, § 257A, the actual value of the relief being established annually).

Where others might seek and realise rights and justice, the gay experience is victimization and discrimination. An everyday socially acceptable action becomes outlawed. A dismissal from work that otherwise would be unreasonable, unfair, becomes reasonable, fair.<sup>11</sup> An eviction, otherwise unlawful, becomes lawful. The *fundamental rights* embodied in these instances—the right to privacy, to a family relationship, to a sexual relationship, and others such as the right to freedom of speech, to freedom of assembly, to health care—are systematically denied.<sup>12</sup>

This is unlikely to be a surprise: after all, lesbians and gay men in almost every country of the world<sup>13</sup> face government policies, a set of legal rights, specific criminal offenses, and a justice system whose starting-point is that “we” (i.e. the establishment) comprise only straight people, so “you”—gay persons—are “other” and therefore need not be treated as we would treat “ordinary” people. At its extreme, this approach pathologizes lesbians and gay men as socially/sexually dangerous, as insatiably promiscuous, and as seeking to entice the weak and vulnerable (particularly children and adolescents) into their twilight worlds. On this construction of reality, gay men and lesbians must at all costs be restrained, as subversive of “normal family life,” if not also of the church and the other established institutions of the state, like the monarchy<sup>14</sup> and the armed services.<sup>15</sup> Of course, there are many lesbians and gay men who would enjoy being taken seriously as this sort of threat; but, at least in the United Kingdom, they have so far been in the minority. As in the United States, the arrival in the 1980s

11. For a modern example of the point Moran makes, see *Smith v. Gardner Merchant Ltd.* [1996] I.C.R. 790 (E.A.T.), where the alleged harassment and dismissal of a gay man on grounds of his sexuality were held not to be discriminatory under English or EC employment law. Virginia Harrison, *Using EC Law to Challenge Sexual Orientation Discrimination at Work*, in TAMARA K. HERVEY & DAVID O'KEEFFE, *SEX EQUALITY LAW IN THE EUROPEAN UNION* 271 (1996), records that the Equal Opportunities Commission once issued a non-discrimination notice under the Sex Discrimination Act 1975, ch. 65, § 67 against an airline (Dan Air) for limiting recruitment of cabin staff to females alone, Dan Air claiming in its defence that if it employed men they would be likely to be gay and a health risk in an accident(!). The airline no longer flies, its routes having been taken over by British Airways in 1993.

12. Moran, *supra* note 4, at 181.

13. See R. Tielman & H. Hammelburg, *World Survey of the Social and Legal Position of Gays and Lesbians*, in A. HENDRIKS ET AL., *THE THIRD PINK BOOK—A GLOBAL VIEW OF LESBIAN AND GAY LIBERATION AND OPPRESSION* 24 (1993).

14. The delight with which lesbians and gay men in Britain have shared, spread and embellished rumors about the sexuality of one of the heirs to the throne is a small act of rebellion against this attitude.

15. The continued strength of feeling for and against allowing gay men and lesbians openly to serve in the armed forces—see *infra* text accompanying notes 97-99 and 132-37—reflects the symbolic importance that “Queen and country” still seems to play in British life.

of the AIDS epidemic has provided extra food for bigotry and homophobia.<sup>16</sup>

The explanation for institutionalized discrimination against lesbians and gay men depends on your point of view: we could argue that gay people *do* represent a psychological threat to many straight people, not because of who or how they are, but because of the desires they invoke, these desires being threatening to heterosexual identity and thus needing to be repressed.<sup>17</sup> Rejection and victimization of the gay person or lesbian is a convenient way, through external conduct, of keeping at bay feelings with which some (perhaps many or most) heterosexual members of society are profoundly uncomfortable. If true, this seems to be much more marked of gay men and the effect they have on straight men than of lesbians and the effect they have on straight women. Almost all incidents of unprovoked attacks on gay people are by men against other men—which in the United Kingdom we call queer-bashing. In this context, where patriarchy seems also to be involved, it is small wonder that in England a male-dominated and predominantly single-sex, private-school-educated legislature, government, and judiciary have taken such a negative and repressive line. This has been primarily directed against (we could say obsessed by) the genital activities of men who have sex with men.

Could this well-built edifice, with foundations going back to Victorian times and beyond, now be crumbling? Has something truly significant happened to soften the unwelcoming, uncomprehending, and moralizing face that English law offers to lesbians and gay men? To answer these questions, this article looks first at the historical and legal background to questions of gay and lesbian rights in England (Part II below), then considers two recent English cases where gay rights have been at stake, in order to take the temperature of the contemporary legal system (Part III below). Part IV then looks at the significant impact on England of European developments from two separate sources: the law created by the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Human Rights Convention) and the law of the European Community/Union (EC law). Part V looks at initiatives taken by or under the Labour Government of Tony Blair since coming to power in May 1997 which affect (or will affect) gay and lesbian rights. Part VI, finally, brings these strands together by way of conclusion and looking to the future.

At the start, it should be made clear that most of the article focuses on *English* law, this term for convenience being used to refer to the law in force in England and Wales, including the Acts of Parliament referred to; it says

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16. See SIMON GARFIELD, *THE END OF INNOCENCE—BRITAIN IN THE TIME OF AIDS* (1995).

17. See Dominic Davies, *Homophobia and Heterosexism*, in DOMINIC DAVIS & CHARLES NEAL, *PINK THERAPY* 41-65 (1996).

little about Scotland—which has its own legal system, including criminal law and procedure—Northern Ireland, the Isle of Man, and the Channel Isles, where the law in practice also differs from England and Wales in many respects. Where, however, the United Kingdom is referred to, this means either all the constituent parts of the state officially called the United Kingdom of Great Britain and Northern Ireland or the state itself in its external international manifestation.

## II. ENGLISH LAW AND LEGAL REFORM

### A. *The Start of Legal Reform*

The modern era, in terms of the position of gay men, began more than thirty years ago, with—after nearly ten years of long, subtle and difficult campaigning—the passing of the Sexual Offences Act 1967.<sup>18</sup> This short Act gained Royal Assent on July 27, 1967 and came into effect the same day. It enacted, though in a more restrictive form, the principal conclusions of the Wolfenden Report of 1957,<sup>19</sup> an official enquiry into, amongst other subjects, the law and practice of what were then called “homosexual offences.”<sup>20</sup> Since genital acts between women were never specifically criminalized in English law, the report concentrated on male/male sexual conduct, recommending the decriminalizing of sex occurring in private between two men of twenty-one or over (i.e. the voting age at the time). This in essence is what happened in the 1967 Act.

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18. The campaign was kick-started in the traditional fashion by a letter to *The Times* (London) on March 7, 1958 under the heading “Homosexual Acts.” Thirty-three signatories called for reform of the law along the lines recommended by the Wolfenden report. The group of the “great and good” included two bishops and a prominent Methodist churchman (Rev. Donald Soper), three members of the House of Lords (the former Prime Minister Lord Attlee, together with Lords David Cecil and Russell), the intellectuals Noel Annan, A.J. Ayer, Isaiah Berlin, C.M. Bowra, Jacquetta Hawkes, Julian Huxley, A.J.P. Taylor, C.V. Wedgwood and Barbara Wootton, a pair each of poets (C. Day Lewis and Stephen Spender) and novelists (J.B. Priestley and Angus Wilson). The letter led to the formation of the Homosexual Law Reform Society on May 12, 1958, whose secretary for most of the campaigning period was Antony Grey. See also ANTONY GREY, *QUEST FOR JUSTICE—TOWARDS HOMOSEXUAL EMANCIPATION* (1992); HUGH DAVID, *ON QUEER STREET—A SOCIAL HISTORY OF BRITISH HOMOSEXUALITY 1885-1995* chs. 8-10 (1997); ALKARIM JIVANI, *IT'S NOT UNUSUAL—A HISTORY OF LESBIAN AND GAY BRITAIN IN THE TWENTIETH CENTURY* ch. 3 (1997); COLIN SPENCER, *HOMOSEXUALITY—A HISTORY* ch. 13 (1995); DEREK JARMAN, *AT YOUR OWN RISK* 41-68 (1992); and JEFFREY WEEKS, *COMING OUT* ch. 15 (1990).

19. REPORT ON HOMOSEXUALITY AND PROSTITUTION, 1957, Cmnd. 247.

20. On the functions and use of this concept, see Leslie J. Moran, *The Homosexualization of English Law*, in HERMAN & STYCHIN, *LEGAL INVERSIONS* 3-28 (1995).

As a step forward, this was as narrow and careful a reform as it sounds—all it did was create a specific and circumscribed immunity,<sup>21</sup> limited geographically to England and Wales and leaving the rest of the criminal law and its administration and enforcement completely unchanged. In *Knüller v. D.P.P.*, the publishers of an “underground” magazine, *IT* (International Times), discovered this the hard way in 1970. After a jury trial, they were convicted of two common law offenses of conspiracy, to corrupt public morals and to outrage public decency. All they had done was to include gay male contact advertisements in an edition of their magazine. Challenging the very basis of both offenses—as well as their applicability to the facts of the case—they appealed to the Court of Appeal (Criminal Division),<sup>22</sup> then to the House of Lords.<sup>23</sup> The Law Lords, by a 4-1 majority, re-affirmed its controversial approval in *Shaw v. D.P.P.*<sup>24</sup> of conspiracy to corrupt public morals as a valid offense, holding that it was for the jury to determine whether the publication would have the effect of depraving and corrupting those who saw it; but the publishers’ conviction for conspiracy to outrage public decency was quashed, again by 4-1. On the issue of conspiracy to corrupt public morals, counsel for the appellants argued that all the magazine was doing was making it easier for men over twenty-one who wished to have sex with other men in private to do so: how could a conspiracy to further aims now legal lead to criminal liability?<sup>25</sup> But “legal conduct” as a class proved to be too narrow to include “formerly illegal conduct” within it, as Lord Reid, the lone dissenter in *Shaw* but now in the majority in *Knüller*, put it:<sup>26</sup>

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21. The 1967 Act excluded some specific situations from the reform, in particular sex between male crew members on merchant ships (§ 2) and between or with male members of the armed forces (§ 1(5))—though both exclusions were ended in 1994 by the Criminal Justice and Public Order Act 1994, ch. 33, § 146; *see also infra* text accompanying notes 97-98. The definition in the Act of “private” is also very narrow (excluding, for example, a hotel room or party on private premises), which an applicant to the European Human Rights Commission unsuccessfully challenged in *Johnson v. United Kingdom*, App. No. 10389/83, 47 Eur. Comm’n H.R. Dec. & Rep. 72 (1986).

22. *Knüller (Publishing, Printing & Promotions) Ltd. v. D.P.P.* [1972] Q.B. 179 (C.A.).

23. *Knüller (Publishing, Printing & Promotions) Ltd. v. D.P.P.* [1972] 3 W.L.R. 143 (H.L.). The House of Lords in this judicial context is the highest court of appeal in the English legal system, consisting of Lords of Appeal in ordinary (i.e. full-time professional judges, ennobled with life peerages) sitting hearing appeals but within the Palace of Westminster rather than the Royal Courts of Justice. The House of Lords in its general sense is the upper house of Parliament, but its judicial and legislative functions are quite separate.

24. *Shaw v. D.P.P.* [1962] App. Cas. 220 (H.L.).

25. PAUL O’HIGGINS, *CENSORSHIP IN BRITAIN* 34 (1972) suggests that the publishers had in fact no adequate system for ensuring that advertisers and their contacts were all over 21.

26. *See Knüller (Publishing, Printing & Promotions) Ltd. v. D.P.P.* [1972] 3 W.L.R. at 149B.

[T]here is a material difference between merely exempting certain conduct from criminal penalties and making it lawful in the full sense . . . I find nothing in the [Sexual Offences] Act [1967] to indicate that Parliament thought or intended to lay down that indulgence in these practices is not corrupting. I read the Act as saying that, even though it may be corrupting, if people choose to corrupt themselves in this way that is their affair and the law will not interfere. But no licence is given to others to encourage the practice.<sup>27</sup>

Revealingly, there was no higher legal principle of freedom of the press or freedom of expression like the U.S. First Amendment on which the appellants could also rely before the English courts.

Despite limitations such as these, the symbolic importance of the 1967 Act was fundamental to those who had courted prosecution or stifled the expression of their sexuality in fear of the law, as well as to those who were newly sexual young adults at the time. It sent a signal that society believed that what happened in bed (or at least behind closed doors) between two men was no business of the criminal law. This cut the automatic link between the expression of gay male sexuality and the fear of a shameful and degrading appearance in court, with all the negative social and employment consequences that might follow; and it significantly reduced the risk of blackmail.<sup>28</sup> At a higher level, it showed that if this modest change was

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27. The charge of conspiracy to corrupt public morals was used again in 1971 (while the *Kneller* case was on its way through the appeal system) as one of the charges against the publishing company and the three publishers of Issue 28 of another underground magazine, *Oz*, in the longest ever obscenity trial at the Old Bailey. See TONY PALMER, *THE TRIALS OF OZ* (1971); JOHN SUTHERLAND, *OFFENSIVE LITERATURE—DECENSORSHIP IN BRITAIN 1960-1982*, at 117-26 (1982); and GEOFFREY ROBERTSON, *THE JUSTICE GAME* ch. 2 (1998). The accused were acquitted of the conspiracy charge but convicted under the Obscene Publications Act 1959 and the Postal Act 1953; the magazine went into liquidation two years later. Despite the real risk of a prosecution before 1967, suitably ambiguous gay contact advertisements were commonplace in some magazines, notably the stable which included *Plays and Players* and *Films and Filming*; even though the reasoning in the *Kneller* case suggested that the risk was not lessened by the 1967 Act, they have become widespread, not just in gay- or lesbian-oriented publications, e.g. the London listings weekly *Time Out*. When the law of conspiracy was reformed and turned into statutory form by the Criminal Law Act 1977, ch. 45, § 1 required the object of the agreement itself to be criminal; but § 5(3) specifically preserved the common law offenses of conspiracy to corrupt public morals and to outrage public decency. Only the exercise of prosecutorial discretion (in turn reflecting an assessment of a jury's willingness to convict) explains the greater freedom gay men, lesbians and their lifestyles now appear to enjoy.

28. The Criminal Law Amendment Act of 1885 (An Act to make further provision for the Protection of Women and Girls, the suppression of brothels, and other purposes) was the result of a campaign by journalist W.T. Stead in his *Pall Mall Gazette* exposing the traffic in

possible, other more fundamental shifts in society's values might follow, in which legal change would similarly lead and shape public opinion into more rational and less punitive attitudes. No doubt it was not the law alone that started the slow trend to greater openness and freedom—after all, the 1960s was a time of extraordinary social change, in London in particular, but in Britain the change in the law gave it a major boost. Since 1968, and against the wishes of those mostly heterosexual reformers who courageously supported implementation of the Wolfenden report, what had started as deviant sexual behavior blossomed into a publicly visible gay culture which simply did not exist before<sup>29</sup>—newspapers and magazines;<sup>30</sup> a published literature of novels<sup>31</sup> and “queer theory,”<sup>32</sup> with bookshops stocking them;<sup>33</sup>

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young girls in London. The Act raised the age of consent from 13 to 16, but also included § 11, which created the offense of gross indecency between men (not further defined) with a maximum penalty of two years' imprisonment. Section 11 was added in a sparsely attended House of Commons late in the night of August 6, 1885 via an amendment proposed by the Liberal MP for Northampton and investigative journalist Henry Labouchère (1831-1912). Labouchère and Stead appear as characters on stage in TOM STOPPARD, *THE INVENTION OF LOVE* (1997), Labouchère claiming near the start of Act II (at 63-64) that his amendment was really intended to force the Government to send the whole Bill to a Select Committee or to withdraw it altogether. In 1895 Oscar Wilde became the most famous early target of § 11 (he was sentenced to the maximum two years, with the added penalty of hard labor), which became known as “the blackmailer's charter”; one of the first British feature films to treat gay men as its central subject, the aptly entitled *Victim* (dir. Basil Dearden, 1961) has the impact of blackmail on a closeted (and married) gay barrister (Dirk Bogarde) as its main theme.

29. See generally JIVANI, *supra* note 18, ch. 4, and SPENCER, *supra* note 18, ch. 13.

30. The current tabloid weekly freesheet is *The Pink Paper*, but the longest gay publication in continuous print is the national monthly magazine *Gay Times*. This took the place of the pioneering fortnightly tabloid *Gay News*, founded in 1972, whose publishing company and editor Denis Lemon were in 1977 privately prosecuted by England's most famous campaigner for decency and Christian moral values in television and the press, Mrs. Mary Whitehouse. Lemon and Gay News Ltd. were convicted (on a 10-2 jury verdict) of publishing a “blasphemous libel,” a poem by James Kirkup suggesting that one of the Roman centurions at the crucifixion had sex with the crucified Christ and that Christ when alive regularly had sex with the disciples. See also SUTHERLAND, *supra* note 27, at 148-54; and ROBERTSON, *supra* note 27, ch. 6. As in the *Kruller* case (see *supra* text accompanying notes 21-26) this was an antique common law criminal offense newly dusted down for the occasion, apparently not used since 1922. See *R. v. Lemon* [1979] 2 W.L.R. 281 (H.L.), where the House of Lords traced the history of the offence and re-affirmed its modern existence, holding (by 3-2) that there was no need for the prosecution to prove a specific intent to blaspheme. Blasphemy came back into relevance in 1996 when the judges of the European Court of Human Rights held (by 7-2) that it was not a violation of article 10 of the Convention (freedom of expression) for the British Board of Film Classification to refuse a certificate to Nigel Wingrove's video *Visions of Ecstasy*, on the grounds that a jury might hold the work blasphemous, showing as it did both Christ and St. Teresa of Avila in an erotic light. The restriction pursued a legitimate aim (protecting Christians against serious offenses against their beliefs) and was not more than necessary in a democratic society to protect this aim. *Wingrove v. United Kingdom*, 23 Eur. H.R. Rep. 1 (1997).

31. It was notable in terms of visibility and acceptance that an English gay novel was one

bars, clubs, and cafés; gay pride marches<sup>34</sup>—and not just in London; therapy groups by and for gay men and lesbians; and social groups trying to build openness, trust, and a sense of community.<sup>35</sup> Much of this is a reflection nationally of events and trends in the United States, in particular of the post-Stonewall gay liberation movement,<sup>36</sup> for which those who pioneered cheap fares from London to New York and California in the 1970s should also share the credit.

Most important of all, though, gay people's beliefs in their own worth, identity, and specific culture, as well as in their power as a group, has grown immeasurably since 1968. This has had at least two important effects. First, it has become harder for those in authority to write off lesbians and gay men as perverted deviants. If "respectable" members of society like M.P.s (and now two ministers),<sup>37</sup> Q.C.s<sup>38</sup> and knights of the stage like Ian McKellen

of the short-listed six in 1994 for the United Kingdom's highest profile literary award, the Booker Prize. ALAN HOLLINGHURST, *THE FOLDING STAR* (1994). The winner that year, though, was JAMES KELMAN, *HOW LATE IT WAS, HOW LATE* (1994), controversial for its use of colloquial Glasgow dialect.

32. See, e.g., SIMON WATNEY, *POLICING DESIRE* (1987) and ALAN SINFIELD, *THE WILDE CENTURY* (1994).

33. In London, Gay's The Word was for many years the only bookshop that made an effort to stock all English-language gay literature and periodicals in print, including U.S. titles. In order to test the law, in 1986 it provoked a seizure by the U.K. Customs authorities of gay titles being imported from distributors in the Netherlands. Faced with an application in court by Customs for an order destroying the books, Gay's The Word relied on article 30 of the EC Treaty (freedom of movement of goods), but the Court of Appeal with tortuous reasoning held that article 36 of the Treaty (prohibitions on imports justifiable on grounds of public morality, etc.) made the statutory prohibition on the import of obscene goods compatible with European law, even though it applied a stricter test to imports than would apply to books newly published in the United Kingdom, where there was a "public good" defence: *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Noncyp Ltd.* [1989] 3 W.L.R. 467 (C.A.). Now, however, despite the law on obscenity and indecency remaining unchanged, most bookshops operated by major national chains (e.g. Dillons, Waterstone's) have gay and lesbian sections. The impact of the obscenity laws can still be felt; unlike many gay bookstores in the U.S., few in Britain risk openly showing books, magazines, or videos that include hard-core erotic imagery without going through the additional costly and uncertain step of applying for permission from the local authority to trade as a registered sex shop.

34. The Gay Liberation Front organized the first United Kingdom Gay Pride march, in London, in 1971.

35. See, e.g., *Over The Rainbow*, the newsletter of the Edward Carpenter Community, which since the 1980s has regularly held Gay Men's Weeks at Laurieston Hall in Scotland and at other rural locations.

36. For the impact of this in Britain, see LISA POWER, *NO BATH BUT PLENTY OF BUBBLES—AN ORAL HISTORY OF THE GAY LIBERATION FRONT 1970-1973* (1995). See also WEEKS, *supra* note 18, ch. 16, and JARMAN, *supra* note 18, at 71-74.

37. The two current ministers are Chris Smith M.P., Secretary of State for Culture, Media and Sport, who came out when an Opposition back-bencher in 1984; and Angela Eagle M.P., a junior Minister in the Department of the Environment, who came out in September

come out as lesbian or gay, the image of the lonely, bitter, sex-obsessed degenerate gets rather difficult to sustain. Different we may be—and glad to be so—but we are no longer “them” to the establishment’s “us.” Second, gay men and lesbians have been able to mobilize pressure for legal change through both lobbying and direct action and have created organizations to channel this energy. These groups include Stonewall (law reform), OutRage! (direct action), Rank Outsiders (gay men and lesbians in the military), GMFA (Gay Men Fighting AIDS), London Lighthouse, and Terrence Higgins Trust (services, care and health promotion relating to HIV and AIDS). We can now talk intelligibly of “a” or “the” gay movement in Great Britain—and of course adoption of the word gay is itself part of the emergence of this movement and a reflection of its origin in the U.S.

However, this trend has not only been in one direction, in favor of freedom and openness. In 1987, the Conservative government of Mrs. Thatcher reacted to reports of a gay-positive picture book in the resource center of one London education authority by adding what became universally known as “clause 28” to the Local Government Bill, then passing through Parliament. Gay and lesbian groups and individuals marched, rallied, and lobbied in their thousands. However, the Government’s majority saw the proposals through.<sup>39</sup> The result, the Local Government Act 1988 s. 28, provides that local authorities shall not “intentionally promote homosexuality or publish material with the intention of promoting homosexuality” or “promote the teaching in any maintained school of homosexuality as a pretended family relationship.” That legislation, which openly treats gay and lesbian relationships as second class, added insult to injury by having a “saving clause” in section 28(2), allowing anything whose purpose is for the “treating or preventing the spread of disease.” The equation “Gay men and lesbians = subversion of decent family life = disease (especially AIDS) = death” was complete. No matter that the law’s actual scope was limited and its drafting so bad that enforcement would always be unlikely;<sup>40</sup> it was the climate of fear, self-censorship, and discrimination that it could encourage, not the law itself, that did the damage. It was the ideology behind the 1988 Act that so enraged the gay and lesbian movement; and there were no judicial procedures available to challenge these rules, once they were enacted by Parliament.

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1997. *Minister “vindicated” by Lesbian Admission*, TIMES (London), Sept. 12, 1997, at 8.

38. Most notably Martin Bowley Q.C., President of the Bar Lesbian and Gay Group (1997).

39. See SPENCER, *supra* note 18, at 381-84.

40. MADELEINE COLVIN & JANE HAWKSLEY, SECTION 28—A PRACTICAL GUIDE TO THE LAW AND ITS IMPLICATIONS (1989); identical rules apply in the Isle of Man but to all public authorities. Sexual Offences Act 1992 (IoM) § 38.

### B. *The Claims by Gay Men and Lesbians*

Given the part that English law has played in legitimizing and perpetuating homophobia, legal change has always been top of the agenda for gay and lesbian activists, though the specific aims and techniques used have varied from time to time and place to place. For gay *men*, modification of the 1967 Act to lower what in England is called "the age of consent" below twenty-one has been an ongoing priority, made more urgent in 1969 when the voting age was lowered to eighteen<sup>41</sup> but the criminal law left unchanged. It took until 1994 for change to occur: after stormy scenes outside Parliament, M.P.s in a free vote (i.e. not along party lines) voted to lower the age of consent for gay men to eighteen, but not to sixteen, which would have equalized it with that for sex between young men and women.<sup>42</sup> Many would also argue for the abolition or the general recategorization of the criminal offenses typically used against gay men. HIV infection has added new weight to the argument that health promotion and saving lives is more important than enforcing outdated moral codes through crimes which in most cases have no victims. Repeal of the Local Government Act 1988 s. 28<sup>43</sup> would also be high on most activists' wish-list.

More generally, though, the claim of lesbians and gay men has become a broader one—to be treated fairly in comparison with straight people, or at least not to be treated less favorably on grounds of their sexuality. Leaving aside all the difficulties of definition of this principle, it is no less than a claim to legal equality across the board, since it covers treatment by employers (potential, present, and past), all the apparatus of the state (central and local government, plus all the agencies which in any way exercise any public power to decide rights or confer benefits), contact with any supplier of goods or services, the criminal law, and, last but not least, all the issues linked to legal and family status (children and reproduction, health care, land or housing rights and inheritance). It is therefore as great a challenge to the established order as the claims that racial minorities and women have been making over a much longer timescale; like them, lesbians and gay men want substantive rights that they can assert in their day-to-day dealings with individuals and organizations, as well as the effective protection of the law against ill-treatment, victimization, and actual or threatened violence. It is a demand to be taken seriously as a coherent minority with a history (hidden though much of it is)<sup>44</sup> of being oppressed and discriminated against.

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41. Representation of the People Act 1969, ch. 15, § 1(1).

42. Criminal Justice and Public Order Act 1994, ch. 33, § 145, which changed the law at the same time for Scotland and Northern Ireland; *see also infra* text accompanying notes 102 and 105.

43. *See supra* text accompanying notes 39-40.

44. For a recent attempt to reclaim this history, principally through photographs relating

### C. *English Law's Response: Background*

English law is particularly ill-equipped to deal with a claim on as broad a front as this; it is worth examining why. England likes to imagine itself as the pioneer and architect of democratic traditions and institutions—"the mother of Parliaments" and so on—and likes to believe that the law guarantees the liberties necessary for us to call ourselves a free society in which the Rule of Law applies. So in a general sense English common law undoubtedly does. But English law, developed as it has over a long timescale by a combination of judicial activity and parliamentary intervention, has as its frame of reference remedies made available to individuals rather than groups. The focus of the common law has always been on the particular claim and the righting of particular wrongs, rather than grand statements of principle. This is partly the natural tendency of a case-based legal system—let the principles emerge slowly, if at all, out of a mass of decided cases—but it is also a consequence of the limits judges impose on their own creativity out of respect for the British constitution, one of whose (unwritten) principles is that Parliament has primary legitimacy to make law and can (legally speaking) do anything, short of limiting its own power for the future. Simply stated, the English courts and judges will give priority to a later statute in conflict with an earlier one, even if the earlier apparently attempts to forbid precisely what the later statute then provides.<sup>45</sup> In a judicial context, English law has no developed concept of unconstitutionality at all and no experience whatsoever of the judicial review of legislation.<sup>46</sup>

This situation came about following the great democratic triumph in English history in the seventeenth century, in which Parliament successfully asserted its dominance over the formerly unlimited powers of the monarchy. In Victorian times this was blessed by the influential constitutional theoretician, Arthur Venn Dicey,<sup>47</sup> who claimed that the unfettered power of

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to London, see JAMES GARDINER, *WHO'S A PRETTY BOY THEN?* (1996); *see also* the publications of DAVID, JIVANI, and SPENCER, *supra* note 18.

45. See JOHN F. MCELDOWNEY, *PUBLIC LAW* ch. 1 (2d ed. 1998).

46. As Lord Reid said in *Madzimbamuto v. Lardner Burke* [1969] 1 App. Cas. 645, 723, a case following the Unilateral Declaration of Independence in Rhodesia:

It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But this does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid.

*Id.*

47. A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (1885), *discussed in* PAUL CRAIG, *PUBLIC LAW AND DEMOCRACY IN THE UNITED KINGDOM*

the House of Commons, to which the Government of the day was responsible, was the best (or only) way to ensure protection of rights and liberties against the Crown and the executive. This vision found no place for a written constitution with superior legal force or for U.S.-style catalogues of entrenched fundamental rights left to the courts to apply and interpret, especially if the sovereign will of the people, as expressed through Parliament, might thus be questioned or overruled. Nor did it encourage the development of special principles of law by which the exercise of executive or administrative power could be tested in court.

In the English context, the Diceyan view, which gave judges a secondary and interstitial role in the scheme of things, encouraged them to enunciate limits on their scope for judicial inventiveness; their growing awareness of the undemocratic way in which they are appointed and of their highly selective and elite social background may have further encouraged this self-denial.<sup>48</sup> At the present day, it would be fair to say that English judges will create or recognize no rights which conflict with anything contained in legislation, nor rights which need administrative as well as judicial support to be effective; nor will they create new criminal offenses, this too being thought to be "a question for Parliament, not the courts."<sup>49</sup> And these self-imposed limitations have come into greater prominence in the twentieth century, where the intervention of Parliament has been more far-reaching and more detailed than ever before. This does not reduce the courts' work, but it shifts the focus into interpretation of fixed texts, rather than the development of principles from the inherently more open-textured raw material of previous cases. The traditional scope of "pure" common law, untainted by legislative intervention, thus becomes ever smaller; and it has become more reasonable for judges to say of a given type of case that Parliament rather than the courts is now the proper forum for the weighing of competing policies, claims or values.

It is thus in the areas that we tend to think of as "lawyers' law"—tort, contract, trusts, property—that the courts can still innovate most openly. Here the interventions by Parliament, though significant, have built upon, and assume the existence of, the basic principles established by case-law.

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AND THE UNITED STATES OF AMERICA (1990); Dicey became Vinerian Professor at Oxford in 1882, the same year his friend Oliver Wendell Holmes became a Professor at Harvard.

48. See J.A.G. GRIFFITH, *THE POLITICS OF THE JUDICIARY* (3d ed. 1985); see also MARCEL BERLINS & CLARE DYER, *THE LAW MACHINE* ch. IV (4th ed. 1994).

49. As we have seen in the case of conspiracy to corrupt public morals (see *supra* text accompanying notes 21-26), in *Shaw v. D.P.P.* the judges came close to the creation of a new offence; but in *Knulier* in 1971, all five members of the House of Lords disavowed any general power to make conduct punishable of a type not hitherto subject to punishment; and the reason why those judges who thought *Shaw* was wrong refused to overturn it was precisely that this was a job for Parliament, not the courts.

These aspects of law are of course all primarily focused on the relations between private persons as individuals. Even here, though, the English courts operate a self-denying principle; in contrast to U.S. courts, this has prevented them from recognizing the "right to be let alone" as the foundation of a new tort of invasion of privacy.<sup>50</sup> The argument the courts have used is that there are too many policy issues needing to be balanced here—notably the rights of individuals versus the rights of the media and the rights of the public to know—for purely judicial development to be appropriate. Since a right to privacy would be one of the claims lesbians and gay men want to make as part of a proper structure of legal protection, campaigners' focus here has been on lobbying Government and Parliament, rather than on continuing to knock at the fairly closed doors of the courts. As we shall see in Part V, the courts will shortly be given a mandate to develop a law of privacy, which will no doubt bring a change of tactic from lesbian and gay campaigners.

As for relations between individuals and *public* power, the courts have, despite what Dicey said, very creatively developed the remedy of judicial review,<sup>51</sup> which allows a challenge to the procedure or substantive legality of a public-law rule or decision. However, the available grounds for challenge do not include violation of fundamental human rights,<sup>52</sup> nor do the courts insist generally that administrative decisions be accompanied by reasons, to make judicial review easier.<sup>53</sup> Here too, therefore, the scope for

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50. See *Bernstein v. Skyviews Ltd.* [1978] Q.B. 479, where in the Queen's Bench Division the plaintiff had to frame his claim (unsuccessfully, as it turned out) in the law of trespass to land to get a remedy against a company which had allegedly flown over his land in order to take photographs of it. See also *Khorasandjian v. Bush* [1993] 3 W.L.R. 476 (C.A.), where a majority of the Court of Appeal was willing to use the land-based tort of nuisance as a starting point in order to give a civil right, protectable via injunction, to prevent harassing telephone calls made by the defendant, even though the plaintiff had no proprietary interest in the property where the calls were received; in *Hunter v. Canary Wharf Ltd.* [1997] 2 W.L.R. 684 (H.L.), the House of Lords re-established the orthodoxy, saying that to widen the tort of nuisance beyond its protection of rights in land was wrong. Luckily for plaintiffs in the position of Claire Khorasandjian, there is now a statutory alternative in the Protection from Harassment Act 1997, ch. 40.

51. See MCELLOWNEY, *supra* note 45, chs. 5 and 15; for examples of applications for judicial review, see *infra* note 53 and *infra* text accompanying notes 97-99 and 132-37, where the attempt of four gay and lesbian ex-servicemen to rely on both the European Convention and EC law in *R. v. Ministry of Defence*, *ex parte* Smith is discussed.

52. See *infra* text accompanying notes 97-99 (discussing *R. v. Ministry of Defence*, *ex parte* Smith).

53. Two recent successful applications for judicial review illustrate this point. The first, *R. v. Secretary of State for the Home Department*, *ex parte* Fayed [1997] 1 All E.R. 228 (C.A.), is part of the long campaign for British citizenship by the Egyptian brothers who own the House of Fraser stores group (including Harrods). In that case, the Court of Appeal held that under neither general administrative law nor the statute in question did the Home Secretary have to give reasons for rejecting an application for citizenship; but a majority held

reform by judicial law-making seems limited: it would be hard, for example, to imagine the courts adopting a general principle of equality to require public authorities to deal even-handedly with gay men and lesbians in comparison with straight people. The campaigners' focus has once again been on Government and Parliament, rather than on mounting or defending test-cases in the courts.

One of the few areas where the courts have become active in a new way is the enforcement of rights derived from EC law—or, as we could call it since the treaty signed after the 1991 European Summit at Maastricht,<sup>54</sup> the law of the European Union. Insofar as this body of law improves the position of lesbians and gay men over English law pure and simple—and we shall see that it now offers the chance of doing so dramatically—then the English courts have the primary job of giving effect to it, including offering remedies against the state for failure to implement into English law rights derived from European legislation. So the judges, even if they cannot or will not create substantive rights, have a role and can still make an impact. This is sometimes true even where only English law is involved, as the two recent examples below seek to show.

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that where his decision involved the exercise of discretion, this had to be done reasonably, so he had to act fairly in reaching his decision. In this context, fairness required him to give the applicants enough information about the subject-matter of his concern (including material which the public interest justified him in refusing to disclose) to allow the applicants to make representations on those aspects of an application. This not having been done, the decision refusing citizenship was quashed; the present Home Secretary has announced that this decision will not be appealed to the House of Lords, the Government now reconsidering the Fayed's application for citizenship and saying that reasons will henceforth be given for all refusals of such applications. Richard Ford, *Al Fayed nearer to British citizenship*, *TIMES* (London), Dec. 23, 1997, at 1. In the second case, *R. v. Ministry of Defence, ex parte Murray*, a Divisional Court of the Queen's Bench Division held that though decision-making bodies in general were under no duty to give reasons, a court-martial was subject to the duty of fairness: given all the circumstances, it should have given reasons for rejecting the evidence of the accused, a soldier of long and exemplary service, that the effects of an anti-malaria drug had induced him to commit an offence of wounding, and for then giving him a sentence of imprisonment which automatically caused his dismissal from the service. *Fairness often demands reasons*, *TIMES* (London), Dec. 17, 1997, at 33.

54. The Treaty on European Union, signed at Maastricht on Feb. 7, 1992, 31 I.L.M. 247; now further amended by the Treaty of Amsterdam (not yet in force), signed on Oct. 2, 1997 (visited Mar. 22, 1998) <<http://alf.ci.uc.pt/CDEUC/CDEUC133.HTM>>.

### III. ENGLISH LAW IN ACTION

#### A. *Example 1: Adoption and the Rights of Lesbians*

##### 1. *Background*

Under the present English Adoption Act, which dates from 1976, the social services departments of local authorities play an important role in reviewing children's suitability for adoption and placing them with the would-be adoptive parent or parents. It is a court which takes the first formal steps towards adoption—an order freeing the child from his or her legal links to the birth parent or parents. Under the 1976 Act, that order can be made even if either or both parents refuse consent, if the court finds that to make the order would safeguard and promote the welfare of the child. In April 1997, a case called *Re W*<sup>55</sup> was heard in the Family Division of the High Court, where the local authority had already placed a child with a lesbian couple who had been together ten years. The local authority asked the court for a freeing order in favor of one of the couple as the first step towards adoption.<sup>56</sup> But the parents objected, saying that the law did not ever allow, or in this case should not allow, a child to be freed for adoption in favor of a single woman living in a lesbian relationship with another.

##### 2. *The Choices Open*

If there already existed in English law a general principle of equality between lesbians, gay men and others, it would have been easy for the judge to reach a conclusion that the parental objections were groundless: but of course we have so far no such principle, nor—perhaps to the North American reader's surprise—did the issue appear to have ever been raised in this form before an English court. The judge, therefore, had to use the words of the Adoption Act as the peg on which to hang an answer to the question of principle posed by the case. The Act, though, was completely unhelpful, in the sense that all it said about single prospective adopters was that they must be at least twenty-one years old.<sup>57</sup>

On one view, this was the best argument in favor of lesbians and gay men that could be devised—for if Parliament had wished to insist upon only

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55. *Re W (A Minor) (Adoption: Homosexual Adopter)* [1997] 3 W.L.R. 768 (Fam.).

56. It had to be only one of the couple, as only married couples can adopt jointly: Adoption Act 1976, ch. 36, § 14. In *Re A.B. (Adoption: Joint Residence)* [1996] 1 Fam. 227, Cazalet J. granted a joint residence order to the adoptive father of the child and to the father's long-term partner, but this fell short of creating for all legal purposes (e.g. succession) the relationship of parent to child between the partner and the child.

57. Adoption Act 1976, ch. 36, § 15(1)(a).

straight adoptive parents or to exclude lesbians or gay men in living together relationships, it could have said so. It would stretch interpretation too far, so the argument went, to read these limitations into the words of the statute. But counsel for the child's natural parents argued that Parliament in 1976 *did* intend to exclude people in gay relationships, going on to suggest that since the only couple who can jointly adopt is a married one, Parliament must have intended single adopters *not* to be in a couple relationship, straight or gay, since adoption in these circumstances would achieve the same result as joint adoption, but by those not qualified to do so. That neatly avoided having to attack the cases where *custody* of a child had been awarded to a parent now living in a lesbian relationship.<sup>58</sup>

### 3. *The Judge's Approach*

The judge, Singer J., agreed that the drafters of the 1976 Act probably never imagined a lesbian or gay man as a would-be adoptive parent but, equally clearly, did not rule this out in the words of the Act. But the practice of placing children for fostering or possible adoption with lesbians or gay men was well-established, he said; it had been recognized implicitly in an official review of adoption law and policy,<sup>59</sup> which recommended no change in the qualifications for prospective adopters. There was also a reported case from Scotland, where there is a different statutory framework from England and Wales but identical qualifications for single adopters.<sup>60</sup> In *Re AMT*<sup>61</sup> the Inner House of the Court of Session in Edinburgh firmly said that to allow adoption by a gay man in a couple relationship posed no fundamental question of principle and was clearly reconcilable with the words of the Scottish Act. Also relevant was a case called *In re D.*<sup>62</sup> from the House of Lords—the highest court of appeal in civil cases for England and Wales, Scotland and Northern Ireland—where the court refused to agree that a parent's consent to adoption should be dispensed with simply on the grounds that he (the parent) was a gay man. Giving judgment, Lord Kilbrandon said:

It is not possible to generalise about homosexuals or fair to treat them as other than personalities demanding the assessment appropriate to their several individualities in exactly the same

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58. *E.g.*, *In re P. (A Minor) (Custody)* [1983] 4 F.L.R. 401 (C.A.); *see also supra* note 6.

59. DEPARTMENT OF HEALTH AND WELSH OFFICE, REVIEW OF ADOPTION LAW: REPORT TO MINISTERS OF AN INTER-DEPARTMENTAL WORKING GROUP (1992).

60. Adoption (Scotland) Act 1978, ch. 28, § 6.

61. *Re AMT* (Known as AC) [1997] Scots Law Times 724 (Lord Hope); the Scottish equivalent legislation is the Adoption (Scotland) Act 1978, ch. 28, § 6.

62. *In re D. (An Infant) (Adoption: Parent's Consent)* [1977] App. Cas. 602.

way as each heterosexual member of society must be regarded as a person, not a member of a class or herd.<sup>63</sup>

After all, said the judge in our case, the statutory framework makes the welfare of the child the primary concern of the whole adoption process—to rule out adoption from *any* person, whatever their sexuality or living situation, would risk jeopardizing this goal. And he went on to conclude that if there was to be a line drawn as a matter of policy to prevent homosexual cohabiting couples or single persons with homosexual orientation applying to adopt, Parliament could do so, but would have to do so more clearly than the 1976 Act did. The child's birth parents, therefore, were not entitled under the 1976 Act to object as a matter of principle to the order in favor of one of the lesbians.

#### 4. *Comment*

This was a victory, then, for lesbians and gay men seeking to adopt a child and an example of a judge clearly taking note of current social work practice and thinking and—within the limits allowed by Parliament—seeking to avoid discrimination against lesbians and gay men. Not for the first time the judiciary were out of step with—or perhaps in advance of—general public opinion, since a poll in 1987 showed that eighty-six percent of the public were against lesbians ever adopting: the figure against gay men adopting was ninety-three percent.<sup>64</sup> It was, however, good luck that the 1976 Act said so little about the qualifications for adoptive parents: had the Act clearly said that only straight people can apply, the judge would have been unable to appeal to any higher principle of equality or non-discrimination to strike this down or to waive it in this case. His only option would have been loyally to apply it, perhaps at the same time adding a plea that the law should be reconsidered. What if the formula in the statute had been more detailed, but still capable of interpretation either for or against lesbian and gay single people as a class? Here the judge would, in our opinion, have made an effort to keep the category of acceptable adoptive parents as wide as possible, not only in light of the overall aims of the Adoption Act but also to avoid discriminating unfairly against lesbians and gay men.

Note finally that, though this judgment holds that it will be unlawful for parents and courts to refuse adoption on the ground alone that the would-be adoptive single parent is lesbian or gay, it says nothing about how the fact of that sexual orientation should be addressed and assessed as a part of the administrative and legal process leading towards an adoption order. So the outcome stops far short of a general guarantee of fair treatment to lesbians

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63. *Id.* at 641.

64. SPENCER, *supra* note 18, at 381.

and gay men in adoption. The case thus illustrates how far an enlightened but traditional judicial approach to problem-solving can go—but how short this is always likely to fall of the demands for equality now made by pressure groups from the gay movement.

## B. *Example 2: Succession to a Tenancy on Death*

### 1. *Background*

Our second example of recent English case-law and the courts' approach to lesbian and gay rights within exclusively English law comes from housing law—or more precisely the law of landlord and tenant, as we in England more often call it. Given the scarcity of residential accommodation, relations between residential tenants and their landlords have since 1920 been heavily regulated by statute in England and Wales. The legislation has ebbed and flowed in the scope of its protection, according to the political color of the current Government, but at present some tenants paying modest rent have controlled levels of rent; they also have a degree of security of tenure.<sup>65</sup> Under the version of this security which applies to *private and semi-public landlords*, tenants have a statutory right to remain in occupation when their contractual right to do so would otherwise terminate (i.e. when a fixed term tenancy comes to an end or a notice to quit served by the landlord expires). A similar, but differently expressed, scheme of security applies to tenants of *public sector landlords* (i.e. mostly local authorities). Whatever the type of landlord, he or she must prove one or more of the grounds on the relevant statutory list in court to get the tenant out. A special form of security applies when the tenant dies: the surviving spouse of the deceased tenant (if there is one) acquires the tenancy by operation of law. By definition, lesbian or gay survivors cannot qualify as surviving spouses; for them the legislation offers alternative possibilities, but there are unhelpful and hard-to-justify differences of detail between the rules that apply to public sector tenants and those affecting tenants in the private sector. It will be obvious that success or failure in a claim to succeed to a tenancy is a major issue for any survivor after the death of a partner; the AIDS epidemic has added extra relevance to the issue so far as gay men are concerned.

In the *public* sector, the second route to succession requires the survivor to prove that he or she was a member of the original tenant's family residing with him or her for twelve months immediately before the tenant's

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65. For an overview, see TONY HONORÉ, *THE QUEST FOR SECURITY: EMPLOYEES, TENANTS, WIVES* 34-37, 51-60 (1982); for the current law, see ANDREW ARDEN & CAROLINE HUNTER, *MANUAL OF HOUSING LAW* chs. 3-5 (6th ed. 1997).

death.<sup>66</sup> The concept "being a member of the tenant's family" is statutorily defined as "liv[ing] together as husband and wife"<sup>67</sup> or as having one of a list of specific relationships to the deceased—parent, child, brother, sister, and so on. A gay or lesbian survivor does not fit within any of the prescribed relationship categories, but could he or she fulfill the "living together as husband and wife" test? There is authority from a 1984 Court of Appeal case, *Harrogate Borough Council v. Simpson*,<sup>68</sup> that s/he could never do so. In the *Simpson* case the defendant was a lesbian who had lived as a lover with the tenant who had died. The court held that she could not succeed to the tenancy, even though the relationship had all the outward appearances of a marriage, because the partners could not have been married at law and were of the same gender. These differences were decisive for the judges. Watkins L.J. agreed with the argument for the landlords, stating as follows: "[I]f Parliament had wished homosexual relationships to be brought into the realm of the lawfully recognised state of a living together of man and wife for the purpose of the relevant legislation, it would plainly have so stated in that legislation, and it has not done so."<sup>69</sup> (Note in passing that this is the exact opposite of the argument Singer J. used in the adoption case, *Re W*,<sup>70</sup> to include gay and lesbian couples within potential adopters.) The surviving lesbian was refused leave to appeal to the House of Lords and started an action against the U.K. Government under the European Human Rights Convention, but the European Human Rights Commission held this inadmissible.<sup>71</sup>

## 2. Recent Case: Introduction

In July 1997, the Court of Appeal issued its judgment in *Fitzpatrick v. Sterling Housing Association Ltd.*<sup>72</sup> *Fitzpatrick* concerned a tenancy under the regime for private sector landlords, slightly different from that applying in the *Harrogate* case discussed above. Here, as in the public sector, a

66. Housing Act 1985, ch. 68, §§ 87 and 113, now re-stated and slightly modified in the Housing Act 1996, ch. 52, § 62.

67. Housing Act 1996, ch. 52, § 62. For the effectively identical statutory test which applies where a surviving cohabiting partner asks the court to make provision for him/her after a death, see *supra* note 9; and for the right to claim under the Fatal Accidents Act, see *infra* Part V.D.

68. *Harrogate Borough Council v. Simpson*, 17 Hous. L. Rep. 205 (C.A. 1985).

69. *Id.* at 210.

70. See *supra* Part III.A.

71. *S. v. United Kingdom*, App. No. 11716/85, 47 Eur. Comm'n H.R. Dec. & Rep. 274 (1985). See also *infra* text accompanying notes 109-10.

72. *Fitzpatrick v. Sterling Hous. Ass'n Ltd.* [1997] 4 All E.R. 991 (C.A.); pre-publication transcript of the judgment kindly provided by William Rolt of John Ford (London), solicitors to Martin Fitzpatrick.

surviving spouse is the primary category to succeed. But the applicable statute, the Rent Act 1977 Schedule 1,<sup>73</sup> extends the definition of the word "spouse" to include "living with the original tenant as his or her wife or husband" (once again that difficult word: *as*); if there is no one in that primary category, someone who is a member of the original tenant's family and living with the tenant in the two years up to his or her death qualifies instead. Note that this second category requires the claimant actually to *be* a member of that family (as determined by the court from all the evidence), not merely to *live as* such a member: a subtle distinction which limits the qualifying class.

A surviving lesbian or gay partner would thus seem to have two potential chances under these rules, either as a spouse in its specially extended sense or as a member of the deceased tenant's family—though before this case there is no record of one ever having succeeded under either head. What the voluminous and confused case-law on who can or cannot be counted as "family"<sup>74</sup> does establish, however, is that the word family has to be defined by reference, not to a fixed or formalist legal view, but to its popular contemporary meaning, as determined by the court or judge<sup>75</sup> from time to time.<sup>76</sup> The question is the same in each case, but the answer even

73. As amended by the Housing Act 1980, ch. 51, § 76.

74. *Brock v. Wollams* [1949] 2 K.B. 388 (C.A.) (child informally adopted did qualify); *Gammans v. Ekins* [1950] 2 K.B. 328 (C.A.) (unmarried heterosexual partner who lived with woman tenant as man and wife, adopting her surname, did not qualify); *Ross v. Collins* [1964] 1 W.L.R. 425 (C.A.) (sub-tenant who cared for deceased tenant in old age failed to qualify); *Dyson Holdings Ltd. v. Fox* [1976] 1 Q.B. 503 (C.A.) (woman partner of unmarried heterosexual couple who lived "as man and wife" for 21 years, woman taking man's name, did qualify); *Helby v. Rafferty* [1979] 1 W.L.R. 13 (C.A.) (male partner of unmarried heterosexual couple who had lived together for five years did not qualify, since woman did not take man's name and wished not to marry in order to keep independence); *Joram Dev. Ltd. v. Sharrratt* [1979] 1 W.L.R. 928 (H.L.) (widow of 75 shared apartment with man of 25 with whom she enjoyed close but platonic relationship; House of Lords held that "family" connotes more than "household," so he failed to qualify); *Watson v. Lucas* [1980] 1 W.L.R. 1494 (C.A.) (man could qualify though married to other woman at the time and couple made no pretence of being married); and *Sefton Holdings Ltd. v. Cairns* [1988] 2 F.L.R. 109 (C.A.) (young woman taken in as orphan during the Second World War and treated as daughter by deceased tenant; held not to qualify, even though she had lived as member of family).

75. Note that under the Supreme Court Act 1981, ch. 54, § 69, a jury trial in the Queen's Bench Division of the High Court, which was the normal method until 1883, can be claimed only in a handful of rare types of cases such as defamation or malicious prosecution; even where the parties have a *prima facie* right to a jury, the court may refuse this if "the trial requires any prolonged examination of documents or accounts or any scientific local examination which cannot conveniently be made with a jury." *Id.* § 69(1)(c). See *Taylor v. Anderton* (Police Complaints Authority Intervening) [1995] 1 W.L.R. 447 (C.A.). Note also that most cases raising questions of succession to tenancies will be heard at first instance in the county courts, where juries have never been available.

76. In *Dyson Holdings Ltd. v. Fox* [1976] 1 Q.B. 503 (C.A.), James L.J. said: "The

on identical facts may not always be the same, depending as it does on what the court or judge finds society's views to be. That approach, while hard to reconcile with the classical doctrine of precedent and the principles of interpretation of statute, may be thought to improve the chances of a lesbian or gay man to succeed in a claim to a tenancy under these rules, insofar as society's attitudes are slowly moving towards greater acceptance of gay men, lesbians and their relationships.

### 3. *Factual Background*

The story is simple. John Thompson became the tenant of an apartment in London W.6. (Hammersmith) in 1972. Martin Fitzpatrick moved in with him as his lover in 1976 and remained there until John's death in 1994. For the last eight years, John was paralyzed following a head injury and Martin cared for him at home. It was Martin's claim to succeed to the tenancy, or rather the landlord's refusal to accept this claim, which triggered the litigation.

In the light of *Harrogate Borough Council v. Simpson*,<sup>77</sup> counsel for Martin made no more than a token argument that he could succeed to the tenancy as "living with the original tenant as his/her wife or husband." The main argument was, therefore, on the second possible issue: was Martin "a member of the original tenant's family"?

### 4. *The Response of the Courts: The Majority*

Attempting to synthesize the existing case-law, the judge at first instance considered that, as a matter of law, where a sexual relationship between those who were not blood relations was relied on, it had to be recognizably *like* marriage; the legislation and existing case-law clearly covered unmarried heterosexual partners, but he thought that a man and woman were essential, so no lesbian or gay relationship could ever qualify. The judge said this despite taking judicial notice of changing attitudes in favor of homosexuality, though he did refuse to hear the expert and other evidence which counsel for Martin Fitzpatrick wanted to call in order to document public opinion more fully.<sup>78</sup> In the Court of Appeal, the majority (Waite and Roch L.JJ.) agreed—but the language used is careful to acknowledge the injustice of this result and to give a moral stamp of approval

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popular meaning given to the word 'family' is not fixed once and for all time. I have no doubt that with the passage of years it has changed." *Id.* at 511D.

77. *Harrogate Borough Council v. Simpson*, 17 Hous. L. Rep. 205 (C.A. 1985); see *supra* text accompanying note 68.

78. The Court of Appeal backed this refusal.

to the gay relationship terminated by John's death. By English standards, it is a remarkable performance.

The following is Waite L.J. effusively describing the relationship of the two men: "Mr. Fitzpatrick and Mr. Thompson lived together for a longer period than many marriages endure these days. They were devoted and faithful, giving each other help and support in a life which shared many of the highest qualities to be found in heterosexual attachments, married or unmarried."<sup>79</sup> The tone of this alone shows how far the judiciary has moved since the old days of Lord Reid in *Kneller*,<sup>80</sup> who suggested that corruption and depravity were inseparable from sex between men and whose world view would have been severely challenged by the very notion (and vocabulary) of "gay relationships." But after that purple passage, why then find against Martin Fitzpatrick's claim to succeed to the tenancy? As in the lesbian adoption case above, it all comes down to what it is or is not appropriate for judges to do, rather than Parliament, in a context set by Parliament via legislation. The two judges who found for the landlord accepted openly that to limit "family" in this sort of case to unmarried heterosexual relationships is to discriminate against lesbians and gay men: it fails to give these relationships the respect society now accords them. In other words, were there a general principle of non-discrimination in the law, here was the perfect case to apply it. However, in the absence of that, and remembering that the legislation takes away landlords' traditional rights of property in the interests of social justice, the decision to extend the meaning of "family" should be left to Parliament.

### 5. *The Dissenting Judge*

Accepting the outcome as understandable, if legally conservative, is perhaps easier in light of the views of the majority that this area of the law is both arbitrary and discriminatory. The third judge, Ward L.J.,<sup>81</sup> made it both better and worse by dissenting and finding in Martin Fitzpatrick's favor—better, by showing that a judge *could* find a way to reinterpret "family" broadly enough to include lesbian and gay male partners; worse, because if he thought *he* could legitimately do so, why could the other two have not taken the same course?

The main thrust of Ward L.J.'s judgment was to note the legal changes happening throughout the world—but in North America in particular—to recognize and legitimize gay relationships, including extending the meaning

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79. *Fitzpatrick v. Sterling Hous. Ass'n Ltd.* [1997] 4 All E.R. at 1003j.

80. See *supra* text accompanying note 26.

81. Significantly perhaps, he was a judge of the Family Division of the High Court before becoming a member of the Court of Appeal.

of family to reflect its *function*, not its nearness to the traditional married model. Given that "family" should rightly be given its contemporary meaning and that Parliament should be presumed not to wish to attack the constitutional right to equal treatment enjoyed by all citizens, he said that to refuse recognition to lesbians and gay men in this context was an unacceptable result. This is a remarkable approach, given that there really are no rights yet recognized as having constitutional (i.e. special) status in English law. He went on to paint the outcome favored by the majority in these unflattering terms: "It proclaims the inevitable message that society judges their [i.e. gay or lesbian] relationships to be less worthy of respect, concern, and consideration than the relationships between members of the opposite sex. The fundamental human dignity of the homosexual couple is severely and palpably affected by the impugned distinction."<sup>82</sup>

What this judge would therefore have done was to go two steps beyond the majority. Step one was to recognize Martin Fitzpatrick as living with John Thompson as husband and wife; step two, as a fall-back alternative, was to hold Martin to be a member of John's family.

## 6. *Comment*

What then does either the outcome or the reasoning do for gay rights? The outcome on its own, very little of course: but the case is being appealed further to the House of Lords, so the fact that all three judges in the Court of Appeal thought that to discriminate against gay relationships was wrong will carry significant weight at that final stage. It is also noteworthy that comparisons with developments in other jurisdictions played such an important part in the arguments—in particular two North American judgments. First is the 1989 decision of the majority in the New York Court of Appeals in *Braschi v. Stahl Associates Co.*<sup>83</sup> In that case, the meaning of "family" was held as a matter of law not to exclude a surviving gay male partner. Equally significant, at least for Ward L.J., the dissenting judge, was the decision of the Canadian Supreme Court in *Egan v. The Queen*<sup>84</sup> from 1995, where the issue was whether state pension legislation (the Old Age Security Act) was contrary to the non-discrimination rule in the Canadian Charter of Rights and Freedoms in giving rights to spouses and opposite-sex partners alone. The court, though split in a complex 4-1-4 pattern overall, unanimously held that discrimination on grounds of sexual orientation was included within section 15 of the Charter, even though the

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82. *Fitzpatrick v. Sterling Hous. Ass'n Ltd.* [1997] 4 All E.R. at 1021h.

83. *Braschi v. Stahl Assoc. Co.*, 543 N.E.2d 49 (N.Y. 1989).

84. *Egan v. The Queen* [1995] 124 D.L.R. (4th) 609 (Can.), with case note by Robert Wintemute, 74 Can. B.R. 682 (1995).

words of the section cover only "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." By 5-4, the court went on to hold that a distinction between same-sex couples and unmarried opposite-sex couples in relation to a benefit provided by Government was "discrimination" contrary to section 15(1) of the Charter; but, again by 5-4, this violation of section 15(1) could be justified, at least temporarily, under section 1 of the Charter. The point that Ward L.J. in *Fitzpatrick* quoted approvingly came from Iacobucci J., who would have found for the plaintiffs on all issues: "[T]he definition of 'spouse' as someone of the opposite sex reinforces the stereotype that homosexuals cannot and do not form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as heterosexual couples."<sup>85</sup>

It is clear, therefore, that some judges in the common law world, though not yet a majority in England, are beginning to favor a view of family that looks at the essence of a relationship rather than the presence or absence of conformity to the married (and thus presumed heterosexual) state. Welcome though this recognition is of the realities and qualities of some lesbian and gay relationships, it naturally favors and supports those monogamous couple relationships which—but for the same-sex element—are most like that ever-diminishing institution, the traditional marriage. We may wonder perhaps whether the long-term care which Martin Fitzpatrick gave to John Thompson before he died increased the sympathy the judges obviously felt for Martin's position, for their moral approval is obvious.

In the context of legal rules which start from marriage and inch their way painfully outwards to less formal and less conventional relationships, that approach is understandable; but, many radical lesbians and gay men would criticize the whole process. It does, after all, rest on an "equal because similar" analysis, when some would say that "equal but different" more closely matches what lesbians and gay men *should* be striving for.

#### IV. THE IMPACT OF EUROPE

##### A. *Introduction*

The two cases discussed above both exclusively concern English law—but we must also look beyond the English Channel and consider the two separate European systems of law which overlap in different ways with English law.

First in time is the European machinery whose function is specifically the protection of human rights. In 1953 the U.K. ratified its signature of the European Human Rights Convention. Since 1966, individuals within the

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85. *Egan v. The Queen* [1995] 124 D.L.R. (4th) 609, at para. 180.

jurisdiction of the U.K. have had the "individual right of petition" to the regional Human Rights institutions in Strasbourg (France), claiming a violation by the U.K. Government of any of the articles of the Convention, as amended or added to by its linked Protocols. The decisions and judgments which have resulted have had a real, but so far entirely indirect, impact on English law, since the Convention and case-law under it are not yet part of English internal law, though they bind the state in the international arena. Despite the tortuous procedure, cases under the Convention have delivered significant victories for gay men (though not yet for lesbians) within Europe and forced changes in the law within the U.K.; these are discussed in Section B below, followed in Part V by an assessment of the significance for English law of the Human Rights Bill (1997), which will achieve incorporation of most of the Convention and Protocol 1 into English law.

Later in time than the U.K.'s accession to the European Human Rights Convention, but more immediately momentous in legal, political, and constitutional terms, was the U.K.'s 1973 accession to membership of the European Communities (at that time grouping eight other nations, now fourteen). The law which has its source either directly in the constituent treaties founding and developing the Community or in legal instruments made by Community institutions under the legislative powers contained in those treaties has a unique and powerful status; gay men and lesbians have effectively exploited its possibilities, encouraged by the bold approach of the judges in the Luxembourg courts to interpretation of the basic texts and of the legislation coming from Brussels. Section C below looks at the track record of EC law to date, with a special focus on recent case-law.

## B. *The European Human Rights Machinery*<sup>86</sup>

### 1. *Introduction*

The European Human Rights Convention dates from 1950, so by a long way pre-dates the creation of the European Economic Community (EEC) (later to become the European Community/European Union (EC/EU)) in 1957; institutionally it is quite separate from the European Community or Union, running under the auspices of the Council of Europe in the complex of buildings in Strasbourg which include the *Palais de l'Europe*.<sup>87</sup> It is one

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86. DONNA GOMIEN ET AL., LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER (1996); the U.K. Government White Paper, BRINGING RIGHTS HOME: THE HUMAN RIGHTS BILL, CM 3782 (1997) [hereinafter BRINGING RIGHTS HOME] also includes a useful brief summary of how the Convention works.

87. Confusingly, the same complex also houses most sittings of the European Parliament, which *is* an EU institution. Even reputable newspapers in Britain —and TV news

of the first results of a post-war determination to protect at an international level democratic institutions, the rule of law and human rights after the horrors of the Second World War. It operates like a traditional international treaty, open for signature by all states within Europe (and in fact the Convention is now in force in almost all European states, including those newly democratic in central and eastern Europe). The special feature of the Convention is that it gives, for states willing to opt in to this system, a mechanism whereby individuals can take legal action against governments before special international bodies (a Commission and a Court<sup>88</sup>) to allege violations of the catalogue of rights which it protects.<sup>89</sup>

The essential focus is therefore on actions, rules, or procedures for which a state can properly be called to account. So where the right to a fair trial is concerned, the rights of the accused, his or her access to a lawyer, the speed of being brought before a court, the possibility of challenging the result on appeal—all these are things for which the state might be challenged under the Convention; but the quality of legal representation provided by a lawyer engaged by the accused would not.

This system is therefore the most well-established and long-lasting international form of protection of human rights: the Convention started practical operation in 1953 and the European Court of Human Rights in 1959, so its accumulated case-law is now voluminous and wide-ranging. In European terms, it is the closest we have to the U.S. Supreme Court. The Convention was used to provide a charter of fundamental rights for many former British colonies when they gained independence, so its significance is not limited to the current European states which are its signatories.

The Convention requires each state which accedes to it (and to any or all of the linked Protocols) to guarantee to all those within its jurisdiction the protection of the rights listed: these include the right to life (article 2), to liberty and personal security (article 5), to a fair hearing in the determination of rights and obligations (article 6), to respect for family and private life and

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programs—regularly talk about “the European court” without making it clear whether they mean the European Court of Justice/Court of First Instance (Luxembourg) or the European Court of Human Rights (Strasbourg); even when they make clear which institution they mean, they often get its geographical base wrong.

88. Following adoption in May 1994 of Protocol 11 to the Convention, this provides for replacement of the Commission and Court by a new single Court, whose jurisdiction will become mandatory rather than optional and will include a committee of judges to review the admissibility of applications by individuals: GOMIEN ET AL., *supra* note 86, at 91-92 and 441-42. This Protocol will come into force on November 1, 1998.

89. In fact, the Convention also provides mandatorily for actions by one signatory *state* against another under article 24, but actions brought by individuals have provided the vast majority of applications reaching the Human Rights Commission and all but one of the cases so far reaching the European Court of Human Rights. See GOMIEN ET AL., *supra* note 86, at 39-42.

the right to found a family (articles 8 and 12), and to freedom of expression (article 10) and of association (article 11). There is also a general principle of non-discrimination which states must respect in the protection of the rights guaranteed by or under the Convention (article 14). It is articles 8, 12 and 14 that have been principally relied on in cases concerning sexuality and gender identity.<sup>90</sup>

States have to provide an effective remedy nationally to protect each of these rights (article 13), but the Human Rights Court has said that there is no requirement that this take the form of incorporating the text into national law.<sup>91</sup> Most states have in fact done so; some do not need to, since under their constitutional arrangements international law is automatically part of (and superior to) national law.<sup>92</sup>

## 2. *The Convention's Status in English Law*

The U.K. has, until May 1997 and the arrival in power of the new Labour Government, firmly resisted incorporation, claiming—against all the evidence—that there was no need to do so since English law already adequately protected all the rights guaranteed by the Convention. Until now, therefore, the Convention and its case-law have had no formal legal authority at all in U.K. courts, let alone a force superior to national law. Judges can use the Convention and Protocols as an aid to interpretation where English law is ambiguous—on the basis that internal English law should be assumed to be consistent with the U.K.'s international obligations; but, where an English statute is clear, even clearly contrary to the rules or the case-law of the Convention, the courts have no choice but to apply it.

A good example of this “offshore” legal status of the Convention is the recent pair of criminal appeals, *R. v. Morrissey* and *R. v. Staines*.<sup>93</sup> The appellants sought to challenge their convictions for insider trading in the City of London by relying on the 1996 judgment of the European Human Rights Court in the *Saunders* case.<sup>94</sup> There the Human Rights Court held that the duty to give information to inspectors under the Financial Services Act 1986 s. 177, this evidence then being capable of being used against the informant in a criminal prosecution,<sup>95</sup> violated the right to a fair trial under article 6 of

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90. See *infra* Part IV.B.4.

91. *Observer and Guardian v. United Kingdom*, App. No. 13585/88, 14 Eur. H.R. Rep. 153 (1992) (Eur. Ct. H.R. (ser. A, no. 216)).

92. ANDREW DRZEMCZEWSKI, *EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW* (1983).

93. *R. v. Morrissey*, *R. v. Staines*, *TIMES* (London), May 1, 1997 (C.A.).

94. *Saunders v. United Kingdom*, App. No. 19187/91, 23 Eur. H.R. Rep. 313 (1997) (Eur. Ct. H.R.).

95. Subject only to a discretion given to the trial judge to refuse to allow the evidence

the Convention. In the newer cases in the Court of Appeal (Criminal Division), the Lord Chief Justice, giving the judgment of the court, said that the words of the Financial Services Act clearly imposed the duty to provide information, creating at least a statutory presumption that information obtained in this way was fair. That being the law in England, the judgment of the European Court of Human Rights was strictly irrelevant, unfortunate though this was for the appellants. The appeals were consequently dismissed.

This lack of success does not mean that it is illegitimate or futile to rely on the European Human Rights Convention in litigation within England, as parties have done with increasing frequency over recent years;<sup>96</sup> but, it does mean that arguments based on the Convention rarely win cases on their own.

### 3. *Recent Examples*

The limited influence of the European Convention is exemplified for questions of gay and lesbian rights within English law by *R. v. Ministry of Defence, ex parte Smith* from 1994.<sup>97</sup> In that case, four gay men and lesbians formerly in the armed forces in Britain went to court in London to argue that their dismissal for being gay or lesbian was unlawful. *Ex parte Smith* was an application for judicial review, a public law challenge to the exercise of discretion by the Crown via the Ministry of Defence which had (and still has) a policy under which homosexual orientation, if disclosed or discovered, constitutes a bar to continued membership in the services. The ground relied on was irrationality: no reasonable minister could adopt such a policy, they asserted. In order to add extra force to their claim, the four relied on European rules from both the two different sources already described: from the European Human Rights Convention, articles 8 on family and private life and 14 on non-discrimination; and from EC law the Equal Treatment Directive. (The EC law claim is discussed separately under section C(3) below.)

In reply to the applicants' reliance on the European Human Rights Convention, the Government argued that the policy under attack was authorized by statute, the Criminal Justice and Public Order Act 1994 s. 146(4). As we have seen from the *Morrissey* and *Staines* cases above, if this were the case, it would have ended the argument conclusively in the Government's favor. What section 146 did was to extend the scope of

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to be given on grounds of unfairness. Police and Criminal Evidence Act 1984, ch. 60, § 78(1).

96. MURRAY HUNT, USING HUMAN RIGHTS LAW IN ENGLISH COURTS (1997), lists 473 cases in which the European Human Rights Convention was referred to in English litigation between 1953 and the end of 1996, more than half of these from 1991 or later.

97. *R. v. Ministry of Defence, ex parte Smith* [1996] 2 W.L.R. 305 (Q.B.).

section 1 of the Sexual Offences Act 1967, granting the same immunity from criminal sanction to two gay servicemen having sex in private as applies to two civilians; but section 146(4) was inserted in an effort to protect what were thought to be the needs of service discipline in two ways. First, it preserved the right of the internal regulations of the three services to retain "homosexual acts" as grounds for discharge from the service altogether. Second, section 146(4) provided that the same acts could continue to be offenses against the codes of discipline of each service, but only "if committed in conjunction with other acts or circumstances." The four argued successfully that the way the statute was worded could not make legal what was not already so—if therefore the policy of administrative discharge of any gay or lesbian service person was illegal, the statute would not save it. They went on to argue that such a policy must be irrational which was concerned with sexual *orientation*, not with inappropriate (let alone illegal) sexual *behavior*, with which they had not been charged and for which other less draconian rules would have been perfectly acceptable.

In the Queen's Bench Division of the High Court, Simon Brown L.J. showed that his heart, if not his head, was on the side of the four applicants. In a now famous passage, he said:

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.<sup>98</sup>

But he and Curtis J. held that the policy, despite the weighty evidence from other countries and its impact on the careers of the four applicants, was not—or not yet—so clearly illogical as to justify the court quashing it. To reach this result involved recognizing both the strength of the human rights considerations in issue and the special sensitivity which the court should show when asked to review questions of policy so intimately linked to the defense of the country. As Simon Brown L.J. said, the fact that the European Human Rights Convention was not incorporated into English domestic law made all the difference:

If the Convention for the Protection of Human Rights and Fundamental Freedoms were part of our law and we were accordingly entitled to ask whether the policy answers a pressing social need and whether the restriction on human rights involved

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98. *Id.* at 319G.

can be shown proportionate to its benefits [i.e. the tests that would be applied by the European Human Rights Court], then clearly the primary judgment (subject only to a limited "margin of appreciation" [reserved to the Government]) would be for us and not others: the constitutional balance would shift. But that is not the position.<sup>99</sup>

The Court of Appeal (Sir Thomas Bingham M.R. and Henry and Thorpe L.JJ.) took exactly the same line both on irrationality and on the relevance of the Convention. That is not, however, the end of the story, since the four have now challenged the outcome by applications against the U.K. Government under the European Human Rights Convention; these are still at a preliminary stage of investigation in Strasbourg.

As this example shows, the failure to incorporate the European Human Rights Convention into English law has serious negative consequences for litigants. Under article 26 of the Convention, they must first exhaust all "domestic" (i.e. national) remedies, then have six months to start an application in Strasbourg. This means they may have to go through three tiers of the English courts, losing at every turn, then start a separate action against the U.K. Government under the Convention. The Strasbourg stage alone is likely to cost at least £30,000 per case<sup>100</sup> and take up to five years between the date of application and a hearing before the European Court of Human Rights. As the negligible effect of the *Saunders'* judgment in the *Morrissey* case shows, even if an individual applicant wins in Strasbourg, the judgment of the European Human Rights Court does not by itself change English law: all that happens is that the court finds a violation of the Convention to have occurred at a defined moment in the past. This in turn puts the U.K. Government under an international obligation, by legislation or otherwise to modify the offending rule or practice within English law for the future. The European Human Rights Court may also order a government to pay monetary reparation to a successful applicant by way of "just satisfaction" under article 50 of the Convention. Proceedings in Strasbourg expose the U.K. Government to the full glare of international publicity when—as has happened more than fifty times up to the end of 1997—the court in Strasbourg finds it guilty of a violation of the Convention or of one of the Protocols.

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99. *Id.* at 327E.

100. Figure taken from BRINGING RIGHTS HOME, *supra* note 86. There is a system of legal aid for proceedings under the Convention: see GOMIEN ET AL., *supra* note 86, at 52-53.

#### 4. *Sexuality and Gender in Applications Against the U.K. Under the Convention*<sup>101</sup>

Actions brought by gay men, lesbians, and transsexuals have figured regularly in Strasbourg. Three times the European Court of Human Rights has held that to criminalize consensual sexual relations in private between men over twenty-one contravenes article 8 on the right to respect for private life: in the *Dudgeon* case (Northern Ireland),<sup>102</sup> the *Norris* case (Ireland),<sup>103</sup> and the *Modinos* case (Cyprus).<sup>104</sup> It may have only been by a whisker that a similar outcome was avoided in relation to Scotland, where the law had been left unchanged by the Sexual Offences Act 1967, so sex in private between two men was theoretically still criminal; however, enforcement in Scotland had effectively stopped being concerned with such situations and in 1980 a Labour-proposed amendment to the Criminal Justice (Scotland) Bill formalized the position.<sup>105</sup> In both *Dudgeon* and *Norris*, the court recognized that the protection of young people justified some criminalization of sexual activity,<sup>106</sup> but did not lay down any age limit for this; nor did it address the separate claims brought under article 14 of the Convention—the principle that rights under the Convention must be available without discrimination.

In October 1997 the European Human Rights Commission—at present the first-stage investigative human rights body in Strasbourg<sup>107</sup>—made public its decision in the *Sutherland* case,<sup>108</sup> brought by an under-eighteen gay man against the United Kingdom. By a majority (14-4), the Commission found that the Criminal Justice and Public Order Act 1994 s. 145, which reduced the age of consent for sex between men to eighteen for the whole of the U.K., violated both article 8 on private life and article 14 on non-discrimination. The Commission found that there was no objective

101. Pieter Van Dijk, *The Treatment of Homosexuals Under the European Convention on Human Rights*, in *HOMOSEXUALITY*, *supra* note 1, at 183-206.

102. *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149 (judgment of Oct. 22, 1981) (Eur. Ct. H.R. (ser. A, no. 45)); the law was changed to be in line with that of England, Wales, and Scotland by the Homosexual Offences (Northern Ireland) Order 1982 (SI 1982/1536) (N.I. 19). The position in the Isle of Man is similar. Sexual Offences Act 1992 (IoM) §§ 9-10.

103. *Norris v. Ireland*, 13 Eur. H.R. Rep. 186 (judgment of Oct. 26, 1988) (Eur. Ct. H.R. (ser. A, no. 142)).

104. *Modinos v. Cyprus*, 16 Eur. H.R. Rep. 485 (judgment of Apr. 22, 1993) (Eur. Ct. H.R. (ser. A, no. 259)).

105. Criminal Justice (Scotland) Act 1980, ch. 62, § 80, now extended by the Criminal Justice and Public Order Act 1994, ch. 33, § 148; it was the present Foreign Secretary, Scottish M.P. Robin Cook, who proposed the amendment in 1980.

106. The court did not address this issue in *Modinos* since the Government of Cyprus did not argue justification.

107. *See supra* note 88.

108. *Sutherland v. United Kingdom*, App. No. 25186/94 (1997) (not yet reported).

justification for a different age of consent between gay men and straight couples, and the interference with human rights was serious enough to be beyond the "margin of appreciation" which each signatory state enjoys, free from review by the European human rights institutions. The case now goes to the European Court of Human Rights, which may likewise take the non-discrimination point for the first time, thus greatly strengthening the protections available to gay men and lesbians under the Convention. This reasoning echoes the view of the European Human Rights Commission in the earlier case *S. v. United Kingdom*,<sup>109</sup> where the lesbian who had been unsuccessful in claiming to succeed to a tenancy on the death of her lover in *Harrogate Borough Council v. Simpson*<sup>110</sup> started an action in Strasbourg relying on articles 8 and 14. On article 8, the decision of the Commission declaring her application inadmissible applied to her its earlier position that "despite the modern evolution of attitudes to homosexuality, a stable homosexual relationship between two men does not fall within the scope of the right to respect for family life ensured by article 8 of the Convention"; that was therefore that, but the Commission apparently accepted, as it has done again in the *Sutherland* case, that "sex" in article 14 includes sexual orientation. All this is only partly relevant to Euan Sutherland and the gay law reform group, Stonewall, who are supporting him: the procedure in Strasbourg is really aimed at persuading the present Government in London to lower the age of consent for gay men from eighteen down to sixteen. This is likely to occur whatever the ultimate judgment in Strasbourg, since the Government has undertaken to make parliamentary time available as part of consideration of the new Crime and Disorder Bill 1998; the strong likelihood is that, even on a free vote, a majority of members of the House of Commons will approve the change.

This account shows that it is the *private life* part of article 8 which the Strasbourg institutions have used as the justification for findings of violation of the Convention in relation to gay men. The Court has recognized limits on the scope even of that right, based on its reading of article 8(2), which permits restrictions on this right if in accordance with law and necessary in a democratic society for the protection of one or more of a list of competing interests, including the protection of health and morals. It was this "health" qualification of article 8 that the Court relied on in *Laskey, Jaggard and Brown v. U.K.*<sup>111</sup> to hold unanimously that for English law to classify as an

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109. *S. v. United Kingdom*, App. No. 11716/85, 47 Eur. Comm'n H.R. Dec. & Rep. 274 (1985).

110. See *supra* text accompanying notes 68-69.

111. *Laskey, Jaggard and Brown v. United Kingdom*, App. Nos. 21627/93, 21826/93, 21974/93, 24 Eur. H.R. Rep. 39 (1997). This is the sequel to *R. v. Brown (Anthony)* [1993] 2 W.L.R. 556 (H.L.).

assault the consensual S/M practices of gay male adults in private was not a violation of article 8.

Under the same article, gay men and lesbians' right to *family life* may separately deserve protection, but no case on this basis involving these groups has yet been accepted by the institutions in Strasbourg. However, the case-law from the Human Rights Court already includes examples of the sort of definitional difficulties about what a family is and who is a member of one with which we saw the English Court of Appeal struggling in the *Fitzpatrick* case.<sup>112</sup> In the latest of the series of cases to refuse to protect transsexuals, the European Court of Human Rights has re-affirmed unanimously that the notion of "family" includes *de facto* relationships as well as marriage, the relevant factors including living together, the length of the relationship and whether the partners had demonstrated their commitment (e.g. by having and raising children).<sup>113</sup> It was, in part, fear that British immigration rules and practices, by denying the partners of same-sex couples rights of entry and residence, might contravene this part of article 8, that encouraged the Labour Government to change its approach to unmarried couples generally, as described in Part V, Section C below.

Neither the Commission nor Court has yet been called on to decide if gay men and lesbians have rights under article 12 in relation to the right to marry and found a family: but it is easy to imagine cases on all these issues in the near future.

### C. *European Community Law*

#### 1. *Basic Principles*

Though apparently the work of an international institution, of which states become members by the traditional route of accession under a treaty, EC law has four important special features:

- (1) It confers rights and duties not only on states but also on individuals. Take, for example, an employment dispute between an English employee and employer. If the principle of equal pay

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112. On the *Fitzpatrick* case, see *generally supra* Part III.B. On the notion of "family" under the Convention, see GOMIEN ET AL., *supra* note 86, at 239-40, 252-53.

113. X., Y. and Z. v. United Kingdom, App. No. 21830/93, 4 Eur. H.R. Rep. 143 (1997). The Court went on to hold, by a majority of 14-6, that the United Kingdom refusal to register a female-to-male transsexual as the father of the child his long-standing female partner had by A.I.D. was not a violation of article 8 since in the present transitional state of the law and public opinion in Europe about transsexuals, signatory states should be given a wide margin of appreciation. For the previous case-law on transsexuals, see GOMIEN ET AL., *supra* note 86, at 232-34.

under article 119 of the Treaty of Rome<sup>114</sup> may be in issue, the idea is that an employee should be able to rely on this article in litigation against the employer in England: this is the doctrine usually labelled *direct effect*.<sup>115</sup>

(2) Where EC law has this "direct effect" it must also, to achieve its aims, take priority over national law (statute law, case-law, or other law) where the two are in conflict, whatever the traditional constitutional position in the member state in question.<sup>116</sup> In its own terms and in its own areas, *EC law is therefore supreme*.

(3) This supremacy and the unified interpretation and development of the law are ensured not just by a pair of special supra-national courts in Luxembourg, the European Court of Justice (E.C.J.) and under it the Court of First Instance (C.F.I.), but also via the existing judicial machinery in each member state. Thus, our employment law dispute between English employee and employer would start as usual before the labor courts in England (usually a special body called the industrial tribunal), with the court expected to apply and interpret article 119 (and the case-law on it from the E.C.J.), just like the relevant rules of English law. In that sense, *most aspects of EC law are an integral part of English law*, though with a special higher status.

(4) National courts and judges are helped in this task by the fourth special feature of EC law: *a direct procedural link between national litigation and Luxembourg* under article 177 of the Treaty of Rome,<sup>117</sup> since significant questions of Community law raised in cases before the courts of member states can—in some cases must—be referred to the E.C.J. for prior decision before the hearing of the case is completed back before the national judge or court.

For the U.K., the past and future transfer of sovereignty from Westminster to Brussels represented by membership in the Community continues to be politically controversial, twenty-five years after, as the current debates about future membership of European Monetary Union

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114. About to become article 141, when the Treaty of Amsterdam (1997), *supra* note 54, enters into force.

115. Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] E.C.R. 1 (E.C.J.); see generally STEPHEN WEATHERILL & PAUL BEAUMONT, *EC LAW* 337-67 (2d ed. 1995).

116. Case 6/64, *Costa v. ENEL* [1964] E.C.R. 585 (E.C.J.), [1964] C.M.L.R. 425 (1964); see also WEATHERILL & BEAUMONT, *supra* note 115, at 367-82.

117. About to become article 234, when the Treaty of Amsterdam (1997), *supra* note 54, enters into force.

clearly show. At the judicial level, the revolution has been quieter and more complete, the English courts now clearly accepting that, even though for all other purposes legislation passed by Parliament is an unchallengeable and superior source of law, the same legislation must give way if it conflicts with a relevant principle of EC law having direct effect.<sup>118</sup> In two important respects this falls short of a general power to review legislation for unconstitutionality. First, it exists only where the conflict is between English law and EC law: so, for example, one litigant may be able to claim the protection of Community law (e.g. as a national of a member state) where another might not. Second, the minimum a court has to do to discharge its duty under EC law is to *disapply* the national legal rule to the concrete case, since that is enough to guarantee the supremacy of Community law: it does not have to go further and declare the national rule invalid, though it *may* of course do so if its own constitutional position so empowers it. That is far from being the case in Britain.<sup>119</sup>

## 2. *Relevance to Gay Men and Lesbians*

It will be obvious from the points made above about EC law in general that it offers a source of principles, some of which, if they conflict with national law, take priority over it. If gay rights could therefore find any support within EC law, it might be possible to short-circuit all the problems we have already described of the reluctance of English judges and courts to recognize in an effective way notions of equality or protection against discrimination. It might also avoid the need to persuade the British government to legislate specifically, since some aspects of EC law are, as we have seen, equivalent to but higher in status than any national piece of legislation.

Could the Community itself legislate (via a regulation or directive) to specifically extend a principle of equality or non-discrimination to lesbians and gay men? It has not yet done so, though five reports to the European Parliament have urged it to act.<sup>120</sup> However in a written answer on behalf of the Commission on November 29, 1988, its then President, M. Jacques Delors, took a limited view of the EC's powers in the area:

The Community has no powers to intervene in respect of possible discrimination by the member states against sexual minorities. The powers deriving from the treaties enable it to

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118. *Factortame Ltd. v. Secretary of State for Transport* [1989] 3 W.L.R. 997 (H.L.).

119. See *supra* Part II.C.

120. See Frances Russell, *Sexual Orientation, Discrimination and Europe*, 145 NEW L.J. 374 (1995).

intervene only in the event of discrimination because of nationality and to ensure equal treatment of male and female workers in employment relationships and with regard to social security.<sup>121</sup>

Though others take a different line,<sup>122</sup> any attempt to legislate would be likely to be challenged (politically, if not also legally) by those member states reluctant to be forced into a significant change of social policy which might also have far-reaching financial consequences.

It is also important to remember that, though it is tempting to think of the Community as a super-state in the offing, the Community's ability to act is limited. Not only do the founding treaties concentrate on *economic* activity (after all, the main original Community was called the EEC—the European *Economic* Community), but there is also the famous principle of subsidiarity,<sup>123</sup> which means that initiatives should be taken at the *lowest* level possible to reach the desired result. Supra-national legislation via a regulation or directive is therefore the technique of last resort, if coordinated actions at the national or even regional level clearly would not work better. Member states have automatic standing under article 173<sup>124</sup> of the Treaty of Rome—which they exercise frequently—to challenge directly before the E.C.J. the legality of secondary legislation adopted by the Community. There are also the political realities to bear in mind, especially within the Council of Ministers.<sup>125</sup> Finding a consensus to allow approval of plan A in return for consensus on plan B is the name of the game; proposals for legislation can be won, lost, or delayed for reasons quite separate from their merits or the actual support they generate.

Therefore, in the absence of Treaty articles or secondary legislation referring specifically to lesbians and gay men, what hope exists for gay rights at the Community level? It is via employment law, which is clearly within Community competence, that recent developments have shown that EC law has a dynamic life of its own and that bold judicial creativity can

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121. 1989 O.J. (C103/19); quoted by Simon Brown L.J. in *R. v. Ministry of Defence, ex parte Smith* [1996] 2 W.L.R. 305 (Q.B.). See also *infra* text accompanying notes 132-37.

122. Russell, *supra* note 120, reports that the Commission has acknowledged that it has the power to act but denies that it has a duty. Legislation to protect gay men and lesbians might have to be under the catch-all article 235 of the Treaty (to become article 308, when the Treaty of Amsterdam (1997), *supra* note 54, enters into force), which requires unanimity in the Council of Ministers.

123. Article A of the Treaty on European Union (1992) (to become article 1 when the Treaty of Amsterdam (1997), *supra* note 54, enters into force). See also Francis Snyder et al., *Subsidiarity: an Aspect of European Community Law and its Relevance to Lesbians and Gay Men*, in *HOMOSEXUALITY*, *supra* note 1, at 225-46.

124. About to become article 230, when the Treaty of Amsterdam (1997), *supra* note 54, enters into force.

125. See WEATHERILL & BEAUMONT, *supra* note 115, at 69-92, 136-54.

extend the meaning of static texts far beyond the likely intentions of their drafters.<sup>126</sup> Discussion of the recent cases which concern the U.K. follows.

### 3. *Using EC Law: Recent Examples*

Employment law includes article 119 of the Treaty of Rome: a good example of a rule recognized as having direct effect<sup>127</sup> and therefore available within national litigation. This article lays down the principle that men and women should receive equal pay for equal work. This principle is wide enough—or has been held by the E.C.J. to be wide enough<sup>128</sup>—to cover all benefits which flow from an employment relationship and to ban indirect as well as direct discrimination. There are also three directives (i.e. legislation adopted by the Community): the first ensures that equal pay for work of equal value can be guaranteed;<sup>129</sup> the second goes beyond pay to adopt a broader principle of equal *treatment* of men and women by potential, actual, and past employers (“Equal Treatment Directive”);<sup>130</sup> and the third, adopted at the end of 1997 and due for national implementation by January 2001, makes proof of discrimination easier by requiring the employer to justify differences of treatment between men and women.<sup>131</sup>

We have already explained the background and some of the issues of the 1994 case about gay men and lesbians in the military, *ex parte Smith*.<sup>132</sup> As well as attempting (unsuccessfully) to rely on litigation in England on the European Human Rights Convention, the four gay men and lesbians also invoked the EC Equal Treatment Directive in order to argue that the policy under which they had been discharged from the service for being gay or lesbian was unlawful. It is significant that their legal action was against a central government department (i.e. against an arm of the State), for

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126. See Virginia Harrison, *Using EC Law to Challenge Sexual Orientation Discrimination*, in HERVEY & O'KEEFE, *supra* note 11, at 267-80.

127. Case 43/75, Defrenne v. SABENA [1976] E.C.R. 455 (E.C.J.), [1976] 2 C.M.L.R. 98 (1976).

128. *E.g.*, Case 12/81, Garland v. British Rail Eng'g Ltd. [1982] E.C.R. 359 (E.C.J.), [1982] 1 C.M.L.R. 696 (1982) (travel facilities after retirement), and Case C-262/88, Barber v. Guardian Royal Exchange [1990] E.C.R. I-1889 (E.C.J.), [1990] 2 C.M.L.R. 513 (1990) (employer's pension scheme, including where replacing state pension scheme); see also WEATHERILL & BEAUMONT, *supra* note 115, at 613-29.

129. Council Directive No. 75/117/EEC, 1975 O.J. (L45/19), on the approximation of the law of the member states relating to the application of the principle of equal pay for men and women.

130. Council Directive No. 76/207/EEC, 1976 O.J. (L39/40), on the implementation of the principle of equal treatment for men and women regarding access to employment, vocational training and promotion, and working conditions.

131. Council Directive No. 97/80/EC, 1998 O.J. (L14/6), on the burden of proof in cases of discrimination based on sex.

132. See *supra* text accompanying notes 97-99.

directives are addressed to member states and require translation by local legislation or regulation into national law, usually giving a time limit within which this is to occur.<sup>133</sup> No individual can complain in court until this time limit has passed.<sup>134</sup> If by then the directive is unimplemented, so that the member state is in default, it can be relied on by an individual but only against the state or "an emanation of the state."<sup>135</sup> Therefore, had the action by the four service personnel been brought against a *private* employer, the Equal Treatment Directive could not have been relied on and the only recourse then would have been an action for damages under the *Francovich* principle<sup>136</sup> against the U.K. Government for the loss caused by failure to implement it—a much more circuitous and less certain route.

There was no argument in court about the ability of the four applicants to rely on the Equal Treatment Directive, nor on its force superior to English law: had therefore its words or the case-law from the E.C.J. interpreting those words clearly protected against discrimination on grounds of sexuality, the court would have been bound to find for the four and quash the policy as illegal. However, both the Divisional Court and the Court of Appeal held that the words of the Equal Treatment Directive were clear, speaking only about discrimination on the basis of gender. The court drew a clear distinction between this and discrimination based on sexual orientation, holding that the Equal Treatment Directive was historically and legally an extension and application of article 119, which was (only) about equal pay between men and women. This distinction echoes the views of M. Delors quoted above.<sup>137</sup>

What might have seemed the obvious and only possible view on the scope of the Equal Treatment Directive no longer looks so solid, since others have taken up the baton to use EC law as a lever for change in U.K. law and policy. *P. v. S. and Cornwall County Council*<sup>138</sup> concerned Mr. P., a man working at the time for Cornwall County Council. He was dismissed in December 1992 for telling his manager that he was a male-to-female transsexual and about to go through gender reassignment procedures. Under purely English law, the dismissal appeared not to be unfair; but was it

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133. Treaty of Rome, Mar. 25, 1957, art. 189(2), 298 U.N.T.S. 11 (to become article 249(2), when the Treaty of Amsterdam (1997), *supra* note 54, enters into force).

134. Case 148/78, *Pubblico Ministero v. Ratti* [1979] E.C.R. 1629 (E.C.J.), [1980] 1 C.M.L.R. 96 (1979).

135. Case 41/74, *Van Duyn v. Home Office* [1974] E.C.R. 1337 (E.C.J.), [1975] 1 C.M.L.R. 1 (1974). For further information on what is meant by "the state," see WEATHERILL & BEAUMONT, *supra* note 115, at 350-52.

136. Cases C-6/90 & 9/90, *Francovich v. Italy* [1991] E.C.R. I-5357 (E.C.J.), [1993] 2 C.M.L.R. 66 (1991).

137. See *supra* text accompanying note 121.

138. Case C-13/94, *P. v. S. and Cornwall County Council* [1996] E.C.R. 795 (E.C.J.), [1996] 2 C.M.L.R. 247 (1996).

unlawful under the Equal Treatment Directive? That question was referred to the European Court of Justice by the industrial tribunal (labor court) hearing the action for unfair dismissal; and on April 30, 1996, the E.C.J., in a bold move, held that the Directive is an expression of a more general principle of equality in Community law: it is not limited to discrimination on grounds of present gender but is wide enough to cover discrimination arising from gender reassignment. Put another way, Mr. P. was dismissed because of the sex he was about to become; therefore, a direct discrimination based on sex.

This approach to discrimination in turn raised again the possibility so firmly rejected in *ex parte Smith*:<sup>139</sup> if discrimination against transsexuals was covered, might not Community law also be wide enough to protect gay men and lesbians, at least in the employment context which is one of its areas of concern? That is one of the questions raised in a further case currently before the E.C.J., *Grant v. South-West Trains Ltd.*<sup>140</sup> *Grant* is about travel concessions for the partners of employees of one of the private companies that now operate the train services in the mainland of Great Britain. These have, since 1996, replaced what was marketed as British Rail but legally was the British Railways Board, a statutory corporation.

Our employee, a lesbian, Lisa Grant, was in fact first employed while the railways were still in public ownership, but nothing turns on this change of status. Under the terms of Lisa's employment, spouses of employees had a right to reduced rate tickets on the railway; but, under the section headed "spouses" in the published regulations, an employee could make a declaration of a meaningful relationship of two years or more with what was quaintly called a "common law spouse" (i.e. an unmarried partner). If a person made such a declaration, the partner also qualified for the travel privileges. But, the regulations specifically covered only opposite sex partners. As a result, Lisa Grant's male predecessor in the same job had been able to get travel concessions for his unmarried female partner. When Lisa applied, declaring in due form that the relationship with her female partner had already lasted the necessary two years, the company stood behind the rules and said that she did not qualify. Lisa then took South-West Trains Ltd. to an industrial tribunal.<sup>141</sup> Her principal claim was that under European law these travel concessions, being a benefit linked to her employment, counted as "pay"; that part of her pay (about \$1600 a year) was therefore being denied her because she was a lesbian and her partner was of the same sex; and that this was a violation of article 119 of the Treaty

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139. See *supra* text accompanying notes 132-37.

140. Case C-249/96, *Grant v. South-West Trains Ltd.* (Opinion of Advocate General, E.C.J.) (not yet reported).

141. The decision is not reported.

of Rome—the equal pay principle. She also relied, in case they proved to be relevant, on the two other equality directives already in force, mentioned earlier.<sup>142</sup>

On the substance of the Community law issue, we do not yet know the final outcome, since the E.C.J. has yet to give judgment. But a strong hint can be gleaned from the Advocate General in the case, a member of the court whose job it is to summarize the issues, discuss the law at stake and in a neutral and objective way propose a solution in a public document called an Opinion. The court is not obliged to follow either the outcome or the reasoning of this Opinion, but the court does both in more than eighty percent of all cases. In *Grant v. South-West Trains Ltd.*, Advocate General Elmer delivered his views on September 30, 1997, recalling first of all that the E.C.J. had clearly held in the *Garland* case<sup>143</sup> that travel concessions offered to employees form part of “pay.” It therefore followed that the present case was likewise about pay, so only article 119 of the Treaty was relevant and the Equal Treatment Directive was not. Quoting from the *P. v. S. and Cornwall County Council*<sup>144</sup> judgment, the Advocate General said that the reasoning in that case applied equally to claims under article 119. Thus, according to the Advocate General, both the equal pay and equal treatment principles prohibited discrimination based exclusively or essentially on gender—not just of the employee but of relevant family members. But was such discrimination present? Was it not really gay or lesbian sexual orientation that the company’s regulations were discriminating against? No, said the Advocate General: the travel concessions were for the employee’s household, and it was the gender of the unmarried partner that ruled them out—gender was the only objective factor at work, so the discrimination was based on gender. Nor could the employer justify this discrimination on moral grounds of disapproving of a gay or lesbian lifestyle, since article 119 does not allow direct discrimination ever to be justified.

In the light of the tantalizing possibilities which these most recent two cases raise, the English courts have now realized that it was too simplistic to hold in *ex parte Smith*<sup>145</sup> that EC law could never protect against discrimination based on sexual orientation. In *R. v. Secretary of State for*

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142. For the directives, see *supra* notes 129-30. The great advantage to her of bringing her case under the umbrella of “pay,” and hence article 119, was that it made no difference whether her employer was “an emanation of the State” (i.e. in the public sector) or not. See *supra* text accompanying notes 133-36.

143. Case C-249/96, *Grant v. South-West Trains Ltd.* (Opinion of Advocate General, E.C.J.) (not yet reported) (citing Case 12/81, *Garland v. British Rail Eng'g Ltd.* [1982] E.C.R. 359 (E.C.J.), [1982] 1 C.M.L.R. 696 (1982)).

144. *P. v. S. and Cornwall County Council* [1996] I.C.R. 795 (E.C.J.), [1996] 2 C.M.L.R. 247 (1996).

145. *R. v. Ministry of Defence, ex parte Smith* [1996] 2 W.L.R. 305 (Q.B.).

*Defence, ex parte Perkins*,<sup>146</sup> a test case brought by Terry Perkins, a gay man challenging his discharge from the Navy because of his sexuality, Lightman J. was willing to accept that there was now a real possibility that the Equal Treatment Directive might protect the sailor and thus make his dismissal unlawful. To resolve this uncertainty required that the issue be referred to Luxembourg, so that the E.C.J. could pronounce on it by way of preliminary ruling. The outcome will not be known until at least mid-1998.

#### 4. *Comment*

As this sequence of cases shows, EC law appears to be moving, slowly but steadily, down a road which leads toward recognition that, in an employment context, discrimination based on sexual orientation can be seen as a violation of the equal pay and equal treatment provisions of Community law. *Grant*, as we have seen, is essentially about the way the *partners* of gay or lesbian employees are treated by employers, in comparison with the partners of heterosexual unmarried employees. This is of course important in itself, given that "pay" includes occupational pensions<sup>147</sup> and that the effects of the final judgment are not likely to be limited to claims already lodged; the final bill may run into millions of pounds in Britain alone, as well as requiring pension schemes to rewrite their rules to avoid discrimination against same-sex couples. However, even if Lisa Grant wins, neither EC nor English law is likely (yet?) to force South-West Trains Ltd. to treat married and unmarried couples on an equal footing: the travel concession regulations could validly be limited to married couples, as long as they did so in a gender-neutral way. Additionally, even if the E.C.J. follows the lead of the Advocate General, this will not necessarily protect the gay or lesbian employee, seen as an individual, against discrimination based on sexual orientation. That goal has not yet been attained, at least as a matter of general Community or English law, though the *Perkins* case raises this issue more nearly head-on, if the E.C.J. chooses to approach it that way.<sup>148</sup>

What these cases also clearly show is the dynamic and creative power wielded by the judges in the E.C.J.: their interpretive energies are not

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146. *R. v. Secretary of State for Defence, ex parte Perkins*, TIMES (London), Apr. 8, 1997 (Q.B.).

147. Case C-262/88, *Barber v. Guardian Royal Exchange* [1990] E.C.R. I-1889 (E.C.J.), [1990] 2 C.M.L.R. 513 (1990).

148. For the view that discrimination against someone because of the gender of the partner they choose should properly be classed as direct sex discrimination, needing no special intellectual sophistry to fit within article 119, the Equal Treatment Directive, and the (English) Sex Discrimination Act 1975, see Robert Wintemute, *Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes*, 60 MOD. L. REV. 334 (1997).

limited by a consideration of what the drafters of the Treaty of Rome might have meant back in 1957 or of the Equal Treatment Directive back in 1976. Their job is to realize the objectives *behind* the Community's rules, so they take a purposive approach to interpretation. The contrast with the frame of reference of English judges in the cases we considered earlier is striking—and gay men and lesbians look to be the winners, given the trend that seems to be emerging.

## V. INITIATIVES ON GAY AND LESBIAN RIGHTS SINCE THE MAY 1997 GENERAL ELECTION

### A. *Incorporation of the European Human Rights Convention into English Law*

It was a pledge of the Labour Party before the May 1997 General Election to incorporate the Convention into English law, so as to make it possible for litigants to rely on its provisions in the English courts. The party consultation document *Bringing Rights Home* was followed in government by a White Paper, *Rights Brought Home: The Human Rights Bill*,<sup>149</sup> the text of the Human Rights Bill being published on the same day. This Bill, to incorporate most articles of the Convention and Protocol 1 into English (and Scottish and Northern Irish) law is presently passing through Parliament.

The Bill makes unlawful the acts of public authorities<sup>150</sup> which infringe any of the Convention rights listed in Schedule 1 to the Bill and empowers the courts to offer relief, including by way of negative injunction to prevent the unlawful act. The main remedy may be a traditional one, like an application for judicial review against a public law decision or rule or an appeal against a challenged decision of a court or tribunal, but the courts will become authorized to offer victims any relief within their power, including awards of damages.<sup>151</sup> In exercising their new powers, clause 2 of the Bill requires courts and tribunals to have regard to the whole body of case-law from Strasbourg from time to time; and clause 3 requires them to interpret

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149. BRINGING RIGHTS HOME, *supra* note 86.

150. Clause 6 of the Human Rights Bill defines "public" widely, to include courts, tribunals, and any person whose functions are of a public nature. The White Paper explains that this is intended to cover central and local government (including executive agencies), the police, immigration officers, and privatised utilities. It is likely also to cover broadcasting authorities, since all these are established by public licensing and have a shared monopoly of allocated frequencies. It will also cover churches and other religious bodies, who are hoping for exemption via an amendment to the Bill. *Id.*

151. Clause 8(4) of the Human Rights Bill requires courts to take into account the principles applied by the European Court of Human Rights in relation to compensation in awarding damages. *Id.*

U.K. legislation (both primary and secondary) so far as possible to be compatible with rights under the Convention. What if this cannot be done? The Bill contains no power to override provisions of primary legislation which violate the Convention, though it does for secondary (delegated) legislation. Thus rights derived from the Convention will not have a status of supremacy equivalent to the directly effective provisions of EC law, nor will any statutory rules already in force when the Human Rights Bill becomes law be impliedly repealed.<sup>152</sup> Instead, in case of conflict between protected Convention rights and an English statute, the court or tribunal will make a formal declaration of incompatibility under clause 4, which will have no impact on the validity or enforceability of that provision but which will then empower (but not oblige) the Government to take what is called "remedial action": exercising a power to amend the offending legislation under clauses 11 and 12 of the Bill, by ministerial order approved by both Houses of Parliament. In order to minimize the chance of this occurring in relation to future legislation, clause 19 of the Human Rights Bill also requires a Minister in charge of a Bill to make a statement to Parliament of his/her belief in its compatibility with the Convention rights. This requirement of course does not guarantee that compatibility but ensures that the risks of incompatibility are at least considered at the drafting stage.<sup>153</sup>

Many details of how this will work remain unclear until the Bill completes its passage through Parliament—but the press and broadcasting authorities are very concerned at the "judicialization" of what has hitherto been left to self-regulation, with non-statutory complaints bodies as the long-stop. Whatever the detailed result, the Bill is sure to pass and to transform the human rights landscape within English law. Of the cases in the English courts discussed above, *Morrissey* and *Staines*<sup>154</sup> would certainly have led to a declaration of incompatibility between English law and the Convention, with perhaps an award of compensation, had this Bill been in force at the time; *ex parte Smith*<sup>155</sup> might well have been determined in the applicants' favor without the need to go to Strasbourg, as might *Sutherland*;<sup>156</sup> and in the light of the developing case-law from Strasbourg on protection for de facto

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152. The Government's justification for this limit on the effect of incorporation is twofold: first, unlike EC law, the Convention does not itself *require* its provisions to take automatic precedence over domestic law, provided that there is some other form of effective remedy; and second, to empower English courts to strike down statutes would tip the balance too far away from the sovereignty of Parliament and in favor of judicial power.

153. Since incompatibility with Convention rights (and also rights under EC law) is also one of the limits on the legislative powers of the proposed Scottish Parliament, clause 30 of the Scotland Bill imposes a similar duty on the member of the Scottish Executive in charge of a Bill before that new Parliament.

154. *R. v. Morrissey*, *R. v. Staines*, TIMES (London), May 1, 1997 (C.A.).

155. *R. v. Ministry of Defence*, *ex parte Smith* [1996] 2 W.L.R. 305 (Q.B.).

156. *Sutherland v. United Kingdom*, App. No. 25186/94 (1997) (not yet reported).

family relationships under article 12,<sup>157</sup> *Fitzpatrick*<sup>158</sup> might also have gone in the plaintiff's favor (and might yet, if the Bill is in force by the time the appeal to the House of Lords comes to a hearing). In addition, there will be litigation in English courts on areas that have so far not been regarded as justiciable at all. The right to private life under article 8 of the Convention may bring about the creation of something close to a tort of invasion of privacy in English law, at least so far as interference by public authorities is concerned, with difficult balances being drawn between the rights of individuals and the right of expression of the media under article 10 of the Convention. That the media can for the first time assert substantive rights to gather and disseminate information may also lead to challenges to the criminal offenses which potentially hang so dangerously over gay publications, their publishers and distributors.<sup>159</sup> An obvious further effect should be fewer U.K. cases ending up in Strasbourg.

### B. *The Impact of Devolution*

Approved in a two-question referendum in Scotland on September 11, 1997, the Government's plans for devolution will lead to the creation of a directly-elected Scottish Parliament, with a new Scottish Administration responsible to it, in May 1999. The 1997 White Paper *Scotland's Parliament*<sup>160</sup> proposed to transfer all law-making powers from Westminster to the newly elected body, so far as Scotland is concerned, subject to a list of "reserved powers" to be retained by Westminster. The Scotland Bill, which had its first reading in the House of Commons on December 17, 1997, gives effect to these plans and is at present still going through Parliament. Although the new Scottish Parliament in Edinburgh will have powers to deal with all questions of civil and criminal law and the administration of justice in Scotland (which are already uniquely Scottish), the Bill makes clear in clause 28(2)(d) that an Act of the Scottish Parliament will be outside its competence insofar as it is incompatible with any rights under the European Human Rights Convention or EC law.<sup>161</sup> Additionally, employment and industrial relations law, health and safety at work law, and equality legislation (sex, race and disability) will be reserved to Westminster.<sup>162</sup> This reservation of power to the English Parliament protects gay men and lesbians from any inroads into their existing rights under all these heads; but it also seems to prevent the Scottish Parliament from adopting any general non-

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157. See *supra* text accompanying notes 112-13.

158. *Fitzpatrick v. Sterling Hous. Ass'n Ltd.* [1997] 4 All E.R. 991 (C.A.).

159. See *supra* text accompanying notes 27, 30 and 33.

160. SCOTTISH OFFICE, SCOTLAND'S PARLIAMENT, CM 3658 (1997).

161. Scotland Bill, cl. 28.

162. Scotland Bill, cl. 29 and Schedule 5 (Head 8, § 1, and Head 11, § 2).

discrimination principle, since this would change employment law. Respect for these limits on the Scottish Parliament's powers will be assured at three stages: (1) via pre-legislative checks, where the Presiding Officer (Speaker) of the new Parliament will have primary responsibility;<sup>163</sup> (2) via a pre-Royal Assent four-week delay, which will allow the U.K. Government to refer the Scottish Bill to the Judicial Committee of the Privy Council for judicial determination of its validity;<sup>164</sup> and (3) post-Royal Assent challenge as an issue in litigation in the ordinary courts, such challenges potentially coming ultimately before the Judicial Committee of the Privy Council, by reference from a lower court or on appeal.<sup>165</sup>

Momentous as these changes are for the constitutional arrangements of the United Kingdom, their likely impact on the rights of gay men and lesbians is slight, except perhaps in relation to the services provided by Scottish public authorities, where there appears scope for legislation to protect gay men and lesbians affirmatively, if the new Parliament or Executive so decides.

For the sake of completeness we should also mention the equivalent proposals for Wales, explained in a bilingual White Paper entitled *A Voice for Wales*,<sup>166</sup> which were approved in principle by a narrow majority in a referendum in Wales on September 18, 1997. The Government of Wales Bill had its first reading in the House of Commons on November 26, 1997 and is still continuing its path through the legislature. In contrast to the plans for Scotland, this Bill does not create an elected body with primary legislative powers; instead, the new directly elected National Assembly for Wales will take over responsibility for all the public services in Wales currently under the Secretary of State for Wales, including the appointment of members to unelected bodies and the funding of local government. It will have the power to adopt secondary legislation within the framework of statutes from Westminster and will be consulted on proposals for legislation at Westminster which affect Wales. The new Assembly, likely to be based in Cardiff or Swansca, will probably make little positive impact on gay men and lesbians living in Wales, although, as in Scotland, clause 105 of the Bill makes clear that the Assembly may do nothing which contravenes any rights under the European Convention which are incorporated into U.K. law or

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163. Scotland Bill, cl. 31.

164. Scotland Bill, cl. 32.

165. Scotland Bill, cl. 91 and Schedule 6.

166. WELSH OFFICE, *A VOICE FOR WALES/LLAIS DROS CYMRU*, CM 3718 (1997).

under EC law.<sup>167</sup> According to the Government's timetable, the new Assembly will be at work in May 1999.

### C. *Immigration Rights*

On October 10, 1997, Mike O'Brien, the U.K. Parliamentary Under-Secretary of State in the Home Office (a junior Minister), announced a concession outside the Immigration Rules to give unmarried partners of either sex a right of settlement in the United Kingdom, to accompany or join someone who is already settled in the United Kingdom. To be admitted under these new principles, the partners must show, *inter alia*, that they are legally unable to marry; that they have lived together for four years in a stable relationship "akin to marriage" and that they intend to continue to do so; and the partner without the right of settlement will gain this only after an additional year's residence in the United Kingdom.<sup>168</sup>

For the first time, the immigration authorities are now expected to treat gay and straight unmarried relationships on an equal footing, although under conditions much more restrictive than for those who are married. It is also to be noted that the form of the policy change does not make it part of the published Immigration Rules, which can be relied on before the administration and the courts if need be; it is merely a concession with an uncertain legal status and could probably be withdrawn (e.g. by a future Government of a different political color) without notice, formality or legal challenge. It therefore remains uncertain whether individual cases considering and determining what is meant by "stable" or "akin to marriage" will reach the law reports. These new "rights" will be of most benefit to partners who wish to enter the United Kingdom with passports from countries outside both the European Union and European Economic Area (EEA).<sup>169</sup> Nationals of the EU and EEA have in principle a right to seek and take up work, to establish themselves as self-employed persons, or to offer or receive services within any country which is a member of the EU or EEA.<sup>170</sup>

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167. The sanction for this under clause 107 of the Bill is an order from the Secretary of State directing that the proposed action not be taken (or requiring specific action to be taken to give effect to an international obligation), combined with the power to raise devolution questions in ordinary litigation (cl. 108 and Schedule 6) along lines very similar to the provisions in the Scotland Bill.

168. The press release and further information are obtainable from the Family Section, Immigration Policy Directorate, Apollo House, 38 Wellesley Road, Croydon CR9 2BY, U.K.

169. The EEA now in 1998 consists of only Liechtenstein, Norway, and Iceland, since Austria, Finland, and Sweden became full EU members at the start of 1995.

170. TREATY ON EUROPEAN UNION, Feb. 7, 1992, 1992 O.J. (C224/1), [1992] 1 C.M.L.R. 573 (1992), arts. 8, 8a, 48, 52 and 59 (about to become articles 17, 18, 39, 42 and 49, when the Treaty of Amsterdam (1997), *supra* note 54, enters into force). See also

D. *The Rights of Cohabitees: The Law Commission*<sup>171</sup>

In September 1997, the Law Commission, the permanent statutory law reform body for England and Wales, published a Consultation Paper on damages for fatal accidents,<sup>172</sup> reviewing the scope and operation of the Fatal Accidents Act 1976, which determines who is able to claim if they have suffered pecuniary loss as a result of another's death. Under this Act, a cohabitee of the deceased has no right to sue, unless s/he lived in the same household as the deceased as his/her husband or wife for the two years immediately before the deceased's death—a rule almost identical to that which applies for claims against the estate of a deceased<sup>173</sup> and for succession to the tenancy of a deceased.<sup>174</sup> Unless *Fitzpatrick*<sup>175</sup> goes in favor of the surviving gay partner in the House of Lords, it is doubtful if a same-sex partner could ever qualify under the rules as they stand. Such a survivor is certainly excluded from suing for bereavement damages,<sup>176</sup> where only the deceased's spouse or parents (if the deceased was unmarried and under the age of eighteen) at present qualify. The Commission provisionally recommends replacing all the tests which determine who can claim damages for financial loss by a single new criterion: partial or total dependency on the deceased (including dependency that would have existed, but for the death). This would make it much easier for unmarried partners, *a fortiori* same-sex partners, to qualify for compensation. The report goes on to seek views on extending the right to bereavement damages to de facto partners. The report asked for responses by the end of 1997, the Commission intending to publish its final report (which will have a draft Bill annexed) on this and linked issues of tort law by the end of 1998. Legislation embodying the proposed changes will follow only after this report is accepted by the relevant departments within the Government, in this case probably the Lord Chancellor's Department. Finally, the Government has to make Parliamentary time available; however, there is a special fast-track procedure within Parliament for Bills having their origin in Law Commission reports.

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WEATHERILL & BEAUMONT, *supra* note 115, at 543-612. These rights were extended to the territory of the EEA by the European Economic Agreement, 1992, arts. 1, 28, 31-34, 36-37 (modified in 1993 after the withdrawal of Switzerland). See DENIS MARTIN AND ELSPETH GOULD, FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION 235-249 (1996).

171. Law Commission information can be accessed at *U.K. Law* (visited Mar. 22, 1998) <<http://www.gtnet.gov.uk/lawcomm/homepage.htm>>.

172. LAW COMMISSION, CLAIMS FOR WRONGFUL DEATH (Consultation Paper No. 148, 1997).

173. See *supra* note 9.

174. See *supra* Part III.B.

175. *Fitzpatrick v. Sterling Hous. Ass'n Ltd.* [1997] 4 All E.R. 991 (C.A.).

176. Currently fixed at £7,500; the Commission recommends raising it to £10,000 and index-linking the figure for the future.

The Law Commission is also at present part-way through a review of the (mostly case-law) rules of English law which determine unmarried partners' rights to a share of the family home. Like the report on fatal accidents, this is part of its own rolling program of topics for consideration, so this does not come from a specific reference from the current Government. As mentioned in Part I,<sup>177</sup> partners who do live together but do not formalize their property relations often discover upon breakdown of the relationship or upon the death of one partner that the partner whose name is not on the legal title has few (if any) rights to a share of the proceeds on sale or to any security in the accommodation. Gay and lesbian partners are especially vulnerable since their chances of inheriting from a deceased partner without a will are negligible.<sup>178</sup>

The options under consideration may include allowing unmarried couples to register their relationships officially, which would then trigger a new judicial power to apportion assets fairly upon breakdown of the relationship, by analogy to the powers which the courts already have upon divorce.<sup>179</sup> Such a power could be made available more generally, perhaps conditional on a minimum period of cohabitation (say two years). The Consultation Paper surveying the present law and canvassing the options for change, with the Commission's own provisional preferences highlighted, is due for publication before the end of 1998.<sup>180</sup>

Any changes in the law which result from these two areas of review by the Law Commission are likely to significantly improve the position of gay men and lesbians, although they may well fall short of putting unmarried cohabitantes on an exactly equal footing with married couples.

## VI. CONCLUSIONS—AND THE FUTURE

The cases and changes discussed above build a picture of a legal system in transition. From an insular, case-based structure of courts and judges who are sure of their position in reflecting society's views, as well as embodying its prejudices, with Parliament occasionally intervening through legislation, we are moving toward a legal system where legislation (or its equivalent) is the central fact of life. But this legislation appears in broader

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177. See *supra* notes 8-9.

178. See *supra* note 9.

179. Matrimonial Causes Act 1973, ch. 18, Part II, *modified by* Family Law Act 1996, ch. 27, Sched. 2. See also CRETNEY & MASSON, *supra* note 8, ch. 15.

180. Under reports headed "Property Rights for Partners" (Jan. 5, 1998, at 1-2) and "Sums and Lovers" (Jan. 10, 1998, at 64), the TIMES (London) summarized what it claimed would be options included in the Law Commission Consultation Paper; however, the Commission has refused to confirm these reports, saying that the process of drafting is simply not advanced enough for any possible reform proposals yet to be identified.

and more principled terms than allowed by our traditions and brings with it interpretation and case-law from international and foreign courts. These courts, like the E.C.J. or the European Court of Human Rights, include a majority of judges from countries whose approach to legal and social questions may be very different from our own. They bring to the task of interpretation their own traditions of scholarship and a view of the judicial process which embraces a commitment to further the goals of integration and social solidarity more openly than English judges have traditionally felt able to do. The paradox of this is that Continental jurists have in the past sometimes been shocked at the overt law-making which English courts undertake, many of their legal systems preferring or requiring their courts to hide creativity and change behind a facade of logical deduction of the outcome of a case from a fixed statutory text. Now in the 1990s, the positions are reversed: English law looks by instinct not at its past glories but across the Channel to the world beyond. English judges know, like U.K. Governments, that internationalism is the future and that Britain cannot be out of step with its European neighbors.

Showing the speed of change, a number of cases discussed by this article are already awaiting their next stage or further decision. These outcomes will add new elements to the topics considered. Developments for which to look out include:

- (1) *Fitzpatrick*<sup>181</sup> reaching the House of Lords (if and when it does);
- (2) The judgment of the European Court of Justice on the references of the EC law issues in *Grant v. South-West Trains Ltd*<sup>182</sup> and *ex parte Perkins*;<sup>183</sup>
- (3) The decision of the European Commission of Human Rights on the case of the four gay and lesbian ex-servicemen,<sup>184</sup> and
- (4) The judgment of the European Court of Human Rights on the age of consent in the *Sutherland* case.<sup>185</sup>

It is safe to predict that EC law will continue to provide the motor for change in employment law as it affects gay men and lesbians. This in turn is likely to force the abandonment of the policy against having gay men and

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181. *Fitzpatrick v. Sterling Hous. Ass'n Ltd.* [1997] 4 All E.R. 991 (C.A.).

182. Case C-249/96, *Grant v. South-West Trains Ltd.* (Opinion of Advocate General, E.C.J.) (not yet reported).

183. *R. v. Secretary of State for Defence, ex parte Perkins*, TIMES (London), Apr. 8, 1997 (Q.B.).

184. See *supra* text accompanying notes 97-99.

185. See *supra* text accompanying notes 107-10.

lesbians in the armed services, as well as to require employers generally to deal more fairly with gay or lesbian would-be, actual, or ex-employees. The law of the European Human Rights Convention is likely to evolve slowly in favor of greater protection for individuals (in both private life and the criminal law); for same-sex couples; and for gay or lesbian parents (in family life). The principle of non-discrimination might be transformed into a substantive protection for gay men and lesbians in its own right.

Within Parliament, it seems certain that the age of consent for gay men will soon be reduced to sixteen; it is also likely that the Local Government Act 1988 s. 28<sup>186</sup> will be repealed and that cohabitantes generally will be given greater rights in relation to property and the death of a partner. Once the Human Rights Bill is enacted for the United Kingdom, it is inevitable that litigants will use arguments drawn from the Convention more frequently and confidently, and English judges will find themselves having to become familiar with new concepts and a substantial body of new case-law. This will draw the courts into controversial new areas, in particular privacy and press freedom; this may in turn force legislative change to keep English law in step with Strasbourg. The litigation which will be created by the legislation implementing devolution in Scotland and Wales may also involve questions of the rights of gay men and lesbians as fundamental areas protected from interference by the new bodies in Edinburgh and Cardiff, although this new category of case-law is not likely to appear until the year 2000.

This survey clearly shows how much legal activity there is presently in England concerning the rights of gay men and lesbians, much of it supported and encouraged by pressure groups who see the law as an important vehicle for their claims. Their relative success in these cases seems to stem from two main factors: (a) a willingness on the part of the English judiciary, at least in the civil courts, to recognize the realities of the lives of gay men and lesbians and of ongoing same-sex relationships and the indefensibility of discrimination against them, and (b) the increasing impact on English law of rules, principles, and approaches which come from outside England, in the form of EC law and the law of the European Human Rights Convention. The cases provide the raw data from which an answer can be attempted to the questions posed at the start: has English law left behind its homophobic, moralistic and discriminatory past? Should lesbians and gay men now look upon the law as their ally, rather than as their enemy?

For all the victories already won, the modest skirmishes recorded here leave out of reach the real prize: the creation or recognition within English law of a general principle of equality and non-discrimination on which gay

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186. See *supra* text accompanying notes 39-40.

men and lesbians can rely, in court if need be.<sup>187</sup> That principle would extend the scope of legal rights to areas where this survey has been able to record no significant changes—health care, reproduction and succession—and might even challenge the primacy the law accords to heterosexual marriage for so many legal purposes. Nor do the recent moves chronicled above have any significant impact on the arsenal of criminal offenses potentially available against expressions of same-sex desire, from those used against gay cruising to those preventing the sale of erotica. If English society and its law enforcers have become more tolerant, so that gay men and lesbians can have a visible place in society, meet and form relationships, communicate with each other freely, and exercise their ‘rights’ of assembly and free expression like other groups, these freedoms still depend not on positive enforceable rights but on the continued willingness of officials to allow this to happen. No gay or lesbian campaigner would be so naive as to regard the good sense of the Government and of chief police officers as an adequate safeguard against moves backwards to “the bad old days” of Mrs. Thatcher and clause 28<sup>188</sup> or even pre-1967. Reforming the criminal law and its enforcement as it affects gay men and lesbians is a whole enterprise barely begun; it may prove a harder fight than claiming rights in civil law.

The law remains, and should remain, an important area for the repeated expression by gay men and lesbians of their aspirations and claims and of their demands for the specificity of their lives and needs to be taken seriously. The pronouncements of the courts, along with legislation and statements by Ministers, are the primary symbolic vehicle through which the state expresses its official views: the inherent uncertainty of the law, hence its susceptibility to change, makes it open to dialogue through cases in court and the putting of pressure on Members of Parliament and Ministers. The lobbying group, Stonewall, is running an Equality 2000 campaign, focusing on five distinct areas, three of which this article has discussed above: protection for young lesbians, gays, and bisexuals at school (and repeal of clause 28<sup>189</sup>); reform of the criminal law; protection from discrimination in the workplace and elsewhere; recognition and respect for same-sex partners and for lesbian and gay parents and their children. None of these objectives

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187. The Equal Opportunities Commissioner, a statutory watchdog and enforcer of sex and race discrimination law, has proposed such a principle in a consultation paper published in January 1998: *EQUALITY IN THE 21ST CENTURY: A NEW APPROACH*.

188. *Id.*

189. *Id.*

can be attained without legal change; and most require legislation.<sup>190</sup> In this context, as Les Moran has put it:

To abandon law as a political objective would be to contribute to the legitimacy of discrimination and victimization already practised in law. It would be to condone the myth of impartiality, the myth of objectivity, the myth of universality. It would be to abandon a terrain of politics to the forces of reaction and oppression.<sup>191</sup>

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190. The only goal which may not require legislation is eliminating discrimination in the workplace, if EC law proves broad enough to regard discrimination based on sexual orientation as equivalent to direct discrimination based on sex. See *supra* Part IV.B.3.

191. Moran, *supra* note 4, at 197.

## POSTSCRIPT

On February 17, 1998, after the main body of this article was complete and type-set, the European Court of Justice delivered judgment in the case of *Grant v. South-West Trains Ltd.*<sup>192</sup> Unexpectedly refusing to follow the Opinion of Advocate General Elmer, the court in a not yet reported judgment held that to refuse benefits to same-sex couples that were available to opposite-sex couples was not direct sex discrimination contrary to the principle of equal pay in article 119 of the Treaty of Rome, since the company's policy treated the same-sex partners of lesbian employees on exactly the same basis as those of gay male employees. Nor did either Community law or the European Human Rights Convention at present require employers to treat the same-sex partners of employees in the same way as their spouses or unmarried opposite-sex partners. The court went on to hold that article 119 could not be interpreted so broadly as to cover discrimination based on sexual orientation, though the judgment notes that when the Treaty of Amsterdam (1997) comes into force, article 6a will empower the Council to take action to eliminate *inter alia* discrimination based on sexual orientation.

This judgment is clearly a major setback for those who looked to the judicial interpretation of existing principles of EC law to ensure better protection of gay and lesbian rights in the workplace. The reasoning openly limits the scope of the principle of equality relied on to find in favor of the transsexual employee in *P. v. S. and Cornwall County Council*<sup>193</sup> to gender reassignment cases alone and must make the chances of winning of Terry Perkins<sup>194</sup> in Luxembourg nearly non-existent.

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192. Case C-249/96, *Grant v. South-West Trains Ltd.* (not yet reported; transcript kindly supplied by Stonewall (London)). See *supra* text accompanying notes 141-44.

193. *P. v. S. and Cornwall County Council* [1966] I.C.R. 795 (E.C.J.), [1966] 2 C.M.L.R. 247 (1996). See *supra* text accompanying note 138.

194. *R. v. Secretary of State for Defence, ex parte Perkins*, TIMES (London), Apr. 8, 1997 (Q.B.). See *supra* text accompanying note 146.

