

GAY AND LESBIAN RIGHTS IN THE UNITED KINGDOM: THE STORY CONTINUED

Philip Britton*

I. INTRODUCTION

*It is impossible to be almost equal before the law. Equality is an absolute.
It is indivisible and it must be applicable to all.*¹

An earlier article in this Review² described the legal context in the United Kingdom (specifically, in the law of England and Wales³) within which claims for equality between gay men, lesbians, and the heterosexual majority come to be determined. These claims are broadly similar to those now being made in most Western legal systems—protection for lesbians and gay men against negative or less favorable treatment by reason of their sexual orientation. The article showed how, having neither a written constitution⁴ nor a catalogue of fundamental rights with special legal status,⁵ English law at present has no general principle enshrining such protection. Nor are there other relevant rights affirmatively guaranteed by law, like that of privacy, free expression, or of assembly, which would protect the assertion of sexual

* LL.B. 1968 University of Southampton, B.C.L. 1970 University of Oxford. Professeur associé, Faculté des Sciences Juridiques, Politiques et Sociales, Université de Lille II (France) and Director, Centre of Construction Law and Management, King's College London (e-mail: philip.britton@kcl.ac.uk). The author wishes to thank Professor James P. Nehf, Indiana University School of Law—Indianapolis, for continued encouragement in the writing and publishing of this and the earlier article, and Marie-Alice Budniok, Université de Lille II, for additional research into French law.

1. Lord Alli, speaking in the House of Lords on April 13, 1999 in the debate on the Sexual Offences (Amendment) Bill, where for the second time a proposal to equalize the age of consent between gay and straight couples was rejected. H.L. Off. Rec., vol. 599, col. 737. See also *infra* Part III.A.2.

2. Philip Britton, *The Rainbow Flag, European and English Law: New Developments on Sexuality and Equality*, 8 IND. INT'L & COMP. L. REV. 261 (1998).

3. "English law" will be used to refer to the law of both England and Wales, since—except for "legislation" recently adopted by the new National Assembly for Wales—the law in Wales is for most purposes identical to that in force in England, though under the Welsh Language Act 1993, ch. 38, §§ 22-24, court proceedings in Wales may take place in the Welsh language. No slight to the people, culture, or language of Wales is intended in the Article.

4. Few states are still without written constitutions—the United Kingdom of Great Britain and Northern Ireland (United Kingdom) and the Kingdom of Saudi Arabia are notable examples of this shrinking and anomalous class.

5. The Human Rights Act 1998, ch. 42, will bring the broad principles of the European Human Rights Convention into direct operation in English law for the first time when it enters force on October 2, 2000, but the approach adopted falls short of giving these principles (or the Act itself) a higher status than existing legislation. See *infra* Part III.A.5.

identity and assist the activities of gay or lesbian pressure groups by encouraging a strong public presence.

This absence of a "rights culture" comparable with that in North America is, the article argued, the result of two linked features: the supreme and all-powerful position accorded to Parliament as a source of law by the various laws and conventions which together form the British Constitution; and the prevailing ideology of the common law of England, as developed and interpreted by the judges of the superior courts.⁶ Fear of overly-visible creativity, which might be thought to trespass into the field of action which properly belongs to Parliament, has discouraged the courts from themselves inventing or developing rights couched in terms of sexual orientation. In addition, the courts have maintained their traditional focus on *individual* rights, especially those gained through contract or in property, and have been reluctant to disallow or weaken the effect of any of these rights by reference to questions of membership of a *group or class*, like a disadvantaged minority. Thus the English courts have found no acceptable route compatible with the common law by which to condemn or discourage discrimination, whether based on race, ethnic origin, gender, disability, or sexual orientation.

In relation to race, ethnicity, gender, and disability, Government and Parliament have together filled the gap by statute, making discrimination illegal in employment as well as in the provision of goods and services.⁷

6. For this purpose the superior courts, whose decisions are regularly reported and can thus "make law," are three: the High Court (hearing both civil and criminal cases at first instance, on appeal, and by way of review, with three Divisions according to subject matter: Queen's Bench, Chancery, and Family); the Court of Appeal (appeal only; cases divided between Civil and Criminal Divisions); and the House of Lords in its judicial capacity as supreme court of appeal for the United Kingdom (though not in criminal cases from Scotland, where the Court of Session in Edinburgh has the last word). The decisions of courts in England and Wales below these three are seldom reported and thus play little part in the development of the law. See RICHARD WARD, WALKER & WALKER'S ENGLISH LEGAL SYSTEM 73-87, 161-176 (8th ed. 1998).

7. Race Relations Act 1976, ch. 74 (direct or indirect discrimination based on race, nationality, national or ethnic origin made illegal); Sex Discrimination Act 1975, ch. 65 (similar rules for discrimination based on gender or marital status, now extended to cover transsexuals); see *infra* note 154 and accompanying text; Equal Pay Act 1970, ch. 41 (employer must justify differences of treatment between relevant employees of different gender). See GEOFFREY ROBERTSON, FREEDOM, THE INDIVIDUAL AND THE LAW 462-96 (7th ed. 1993). These statutes have now been joined by the Disability Discrimination Act 1995, ch. 50, and the Race Relations (Amendment) Bill currently in Parliament. As Robertson points out, the legal framework affecting sex discrimination in employment was transformed when the United Kingdom became a member of the European Economic Community (as it was then) on January 1, 1973, since Article 119 of the Treaty of Rome enshrines a principle of equal pay for equal work and since the European Community has exercised its power to legislate in terms broader than the existing U.K. law. See Council Directive No. 76/207, 1976 O.J. (L39/40) on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training, and promotion and working conditions. Both of these European rules—under different conditions—can be relied on in litigation before the English courts, taking precedence over any

However, they have done so piecemeal, in the process creating three separate monitoring and enforcement agencies.⁸ And in no case have they been *required* so to act by the courts: the scenario familiar to North American readers from the December 1999 judgment of the Supreme Court of Vermont in *Baker v. State*,⁹ which imposed a duty on that State to provide for recognition of same-sex relationships on an equal basis with those of heterosexuals, would be unthinkable in England. The English courts may—and frequently do—suggest in their judgments that legislation is needed to solve a problem which the judges feel goes beyond the court's scope for development of the law,¹⁰ but such a statement has no legal consequences.

As far as sexual minorities¹¹ are concerned, Government and Parliament have so far refused to recognize the need to articulate, then to legislate, new positive legal rights of a general kind, though a piecemeal dismantling of existing discriminations is taking place. Such discriminations are clearest in the field of criminal law as it affects gay men: an age of consent for gay male sexual activity which is higher than that for heterosexuals¹² and a series of specific offenses used only, or mainly, against expressions of gay male

English law in case of conflict. See also Britton, *supra* note 2, at 295-304. In January 1998 the Equal Opportunities Commission (E.O.C.), a public body with a statutory responsibility for enforcing and reviewing all the law on gender discrimination, published a consultation paper, *Equality in the 21st Century: A New Approach*, which proposed to roll the Sex Discrimination Act 1975 and the Equal Pay Act 1970 into a single new statute, together with other anti-discrimination measures, including protection for gay men, lesbians, and transsexuals. By the time the proposals became final and were presented to the Government, gay men, lesbians, and transsexuals were no longer part of the proposal. See Francis Gibb, *Call for New Laws to Banish Sex Bias*, TIMES (London), Nov. 6, 1998. A year later, in November 1999, the E.O.C. under a new Chairwoman had widened its approach and was once again calling for legislation against discrimination affecting gay men and lesbians. See <http://www.eoc.org.uk/html/press_releases_1999_23.html> (visited Jan. 10, 2000).

8. These agencies are the Equal Opportunities Commission, the Commission for Racial Equality, and (since April 2000) the Disability Rights Commission. The powers and funding of each of these agencies is different. For criticism of this "British model," see Robert Wintemute, *Time for a Single Anti-Discrimination Act (and Commission)? Review of Bob Hepple, Anthony Lester, Evelyn Ellis, Dinah Rose and Rabinder Singh, Improving Equality Law: The Options, Justice and the Runnymede Trust*, 26 INDUS. L. J. 259 (1997). For the new Human Rights Commission in Northern Ireland, see *infra* note 138.

9. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

10. A relevant example is in the judgments of the majority in the Court of Appeal in the *Fitzpatrick* case. See *infra* note 39 and accompanying text.

11. For this purpose sexual minorities include transsexuals, as well as gay men and lesbians. Transsexuals are outside the scope of this Article, except insofar as cases concerning them are also relevant to the position of gay men and lesbians. See *infra* Parts III.A.3, III.B.2.

12. The age of consent is 18, reduced from 21 by the Criminal Justice and Public Order Act 1994, ch. 33, § 145; the earliest legal age for heterosexual intercourse is 16 in Great Britain and 17 in Northern Ireland. Sexual Offences Act 1956, ch. 69, §§ 5-6.

sexuality.¹³ The result therefore is a legal impasse so far as litigation is concerned: few options are open to activists wanting to use test-cases as a lever for political and social, as well as legal, change.

In practice, as the article explained, this rather negative picture of English law, appearing still to uphold and enforce Victorian or pre-Industrial moral values, is not the whole story, in at least three respects. First, at least in civil courts and where questions of children, property, and family membership are at stake, the judiciary has in several landmark cases shown a more enlightened attitude and been willing to accept the injustice and inappropriateness of discrimination by law against same-sex couples or gay or lesbian parents or caregivers.¹⁴ The judges have, however, been able to give practical effect to these attitudes only where the question before them has turned on statutory provisions drafted in broad enough terms to permit such an interpretation or reinterpretation, according to the traditions which define the acceptable limits of such activity by the judges. Second, European law has been and will continue to be one of the main spurs for reforming English law, so far as discrimination based on sexual orientation is concerned. European law takes two relevant forms: the law of the European Convention for the Protection of Human Rights and Fundamental Freedoms (of which the United Kingdom is a signatory), which has no automatic self-executing effect within each signatory state¹⁵ but which may require law reform nationally if one of its catalogue of protected rights is violated, as determined by the European Court of Human Rights in Strasbourg;¹⁶ and the law of the European Community or Union (of which the United Kingdom is a member), which may

13. See Britton, *supra* note 2, at 261-63. See also SMITH & HOGAN, CRIMINAL LAW 455-84 (9th ed. 1999).

14. See *infra* Part II.A.

15. Although at the international level states undertake to respect all the rights and freedoms protected by the Convention and by any of the linked Protocols to which they have subscribed, individual signatory states may, according to the European Court of Human Rights, validly adopt a dualist approach to international law. Observer and Guardian v. United Kingdom, App. No. 13585/88, 14 Eur. H.R. Rep. 153 (1992) Eur. Ct. H.R. (ser. A, 216). Under this approach, international obligations on a state, or rights which international law gives to individuals against a state, have no immediate impact on domestic law; for them to have effect in domestic law requires legislation or some other form of translation of the rules from the international to the domestic sphere. This is the prevailing view which applies in the United Kingdom; its effect is to tie the hands of the judiciary, which will interpret domestic law—so far as they can—to conform with international law binding on the United Kingdom but may be forced to apply clear domestic law even though this conflicts with the United Kingdom's international obligations. See *R. v. Morrissey and R. v. Staines*, TIMES (London), May 1, 1997, discussed by Britton, *supra* note 2, at 289-90.

16. This obligation arises from Article 53 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, under which signatory states undertake to abide by the judgment of the European Court of Human Rights in any case to which they are a party; under Article 54, execution of a judgment of the Court is supervised by the Committee of Ministers of the Council of Europe.

have such self-executing effect within national legal systems and override national law in case of conflict.¹⁷ Finally, though the Labour Government of Tony Blair elected in May 1997 has not moved far enough or fast enough for gay and lesbian organizations and lobbyists, it has been willing to support some changes reducing the scope and impact of legalized discrimination. However, despite its large majority in the House of Commons and its reforms of the House of Lords (the upper house of Parliament), which have reduced the impact of the hereditary element in its composition, none of the legislative changes promised whose main aim is to improve the position of gay men and lesbians has yet become law.

What follows seeks to amplify these points by considering developments which have affected the position of gay men and lesbians under English law in 1998 and 1999 under the broad headings of English law in action (Part II), which covers the courts, Parliament, and Government; and European law (Part III), which covers both European Human Rights law and European Community law. The aim is to record the changes, to see whether the events foretold in the earlier article have come true,¹⁸ and finally to examine how far the trends identified in the earlier article have been borne out by more recent changes and movements (Part IV).

II. ENGLISH LAW IN ACTION

A. *Example 1: Children and Their Relations with Gay or Lesbian Adults*

1. *Adoption by Gay Men or Lesbians*

The earlier article considered the position of would-be adopters and noted that, as a question of interpreting statutory frameworks which put the interests of the child as the primary consideration, the courts have clearly refused to rule out gay men or lesbians as would-be adopters.¹⁹ In July 1999 the leading Church of England children's charity, the Children's Society, announced that it was falling into line with other adoption agencies, local authorities, and the official guidance from the Department of Health²⁰ by

17. The term "may" is used because not all categories of legal rule with their source in the European Union or its predecessors have this effect of conferring rights and imposing obligations within the legal systems of member-states. See also Britton, *supra* note 2, at 295-304 and *supra* note 7.

18. See Britton, *supra* note 2, at 311.

19. *Re W (A Minor) (Adoption: Homosexual Adopter)* [1997] 3 WLR 768 (Fam.), following the Scottish cases of *Re AMT (Known as AC)* [1997] Scots Law Times 724 (Ct of Session) and *In re D (An Infant) (Parent's Consent)* [1977] App. Cas. 602 (H.L.), discussed by Britton, *supra* note 2, at 277-80.

20. For the English law regulating adoption, see S. M. CRETNEY & J. M. MASSON, *PRINCIPLES OF FAMILY LAW* 898 (6th ed. 1997).

lifting its ban on lesbians and gay men fostering and adopting children under its care.²¹ The reports suggest that this change of policy, though in conflict with the Church of England's officially negative line on homosexuality,²² was encouraged by the court judgments mentioned above.²³ The outcome is specially significant in light of the scale of operation of the Children's Society, whose annual budget is over fifty million dollars, and of the fact that since the Reformation in the sixteenth century the Church of England has been the established church of England.²⁴ As a result it enjoys a special relationship with the monarchy and the State and speaks with a semi-official voice on questions of morality and social policy.

In October 1999 the law's openness to the potential suitability of a gay or lesbian adoptive parent was clearly and authoritatively underlined. In widely-reported remarks, the new President of the Family Division of the High Court, Dame Elizabeth Butler-Sloss (at present one of only two women judges of Court of Appeal rank or above in England) strongly supported a non-discriminatory approach to cases where the sexual orientation of would-be adopters might be an issue.²⁵ She used the opportunity of an inaugural press conference to underline how the courts' views needed to reflect the results of research, which shows no negative effects when children are brought up in a gay or lesbian household.²⁶ It followed, she said, that in some cases this would be the best available solution.

21. See Ruth Gledhill & Alexandra Frean, *Church Charity Lifts Ban on Gay Adoptions*, TIMES (London), July 28, 1999, at 1.

22. See Ruth Gledhill, *Liberal Bishops Routed in Vote on Homosexuals*, TIMES (London), August 6, 1998, at 1 (reporting a meeting of the world-wide Lambeth Conference of leaders of those Episcopalian churches which are in communion with the Church of England). The assembled bishops adopted a resolution by a majority of 526 to 70 (with 45 abstentions) which held that "abstinence is right for those not called to marriage" and rejected homosexual practice as "incompatible with Scripture." *Id.*

23. See *Re W (A Minor) (Adoption: Homosexual Adopter)* [1997] 3 WLR 768 (Fam.); *Re AMT (Known as AC)* [1997] Scots Law Times 724 (Ct of Session); *In re D (An Infant) (Parent's Consent)* [1977] App. Cas. 602 (H.L.).

24. The Presbyterian Church of Scotland is the established church in Scotland; there is no longer an established church in Wales or Northern Ireland. See BRITAIN 1999: THE OFFICIAL YEARBOOK OF THE UNITED KINGDOM 239-48 (1999).

25. See *Gays Can Bring up Children—Judge*, GUARDIAN, Oct. 16, 1999.

26. See LESBIAN AND GAY FOSTERING AND ADOPTION: EXTRAORDINARY YET ORDINARY (Stephen Hicks & Janet McDermott eds., 1998). See also a report of research into gay fathers by Dr. Gill Dunne (London School of Economics Gender Institute) which suggests that "they are more committed to caring for their children, and get on better with their children's mothers, than many straight ones." Karen Gold, *A Better Breed of Dad*, GUARDIAN, Jan. 12, 2000, § G2, at 10.

The principles in the legislation²⁷ remain unchanged and no further relevant litigation on adoption has been reported; but a recent reported case and two others discussed in the press in closely related fields raise similar issues.

2. *Contact Between Children and Gay Men or Lesbians*

In *G. v. F. (Contact and Shared Residence: Applications for Leave)*²⁸ one member of a former lesbian couple applied to the court for contact rights and for a shared residence order in relation to the child which the other partner conceived by artificial insemination when they lived together, the baby then born being co-parented by them for the first three years of his life. Granting the orders sought, Mrs. Justice Bracewell in the Family Division of the High Court made clear that it was the quality of the relationship and the impact on the child that mattered:

The fact that the relationship between the applicant and the respondent was a lesbian relationship, in my judgment, is to be seen as background circumstances of the case and there is no basis for discriminating against the applicant in her wish to pursue these proceedings on the basis that she and the respondent lived together in a lesbian relationship.²⁹

It is likely that the English courts would take a similarly non-judgmental line about contact between children and a parent who had come out as gay or lesbian, though no reported case addresses this issue directly. Certainly, the sort of moralistic judicial approach criticized in the recent European Court of Human Rights judgment in *Salgueiro da Silva Mouta v. Portugal*³⁰ would be difficult to imagine in England.

3. *Other Recent Issues*

In a case reported only in newspapers,³¹ a gay teenager threatened a local authority's social services department with an application for judicial review, in order to challenge the unreasonableness and irrationality of the

27. There are separate statutes for England and Wales (Adoption Act 1976, ch. 36) and Scotland (Adoption (Scotland) Act 1978, ch. 28). Northern Ireland has the Children (Northern Ireland) Order 1995 (SI 1995/755).

28. *G. v. F. (Contact and Shared Residence: Applications for Leave)* [1998] 2 Fam. L. Rep. 799 (Fam.)

29. *Id.* at 805C.

30. See *infra* note 129 and accompanying text.

31. See *Teenager Wins Fight for Gay Fostering*, TIMES (London), June 26, 1998.

department's refusal to consider fostering him with gay caregivers. Since the defendant authority reversed its policy before the case came to court, the application was not proceeded with; however, the teenager's chances of success in court must have been good, though no reported case has yet dealt with this issue.

More recently (December 1999-January 2000) there has been the high-profile story of a couple of British gay men who were rejected by English authorities as would-be adoptive parents. Instead, each donated sperm to a surrogate mother based in California. When twin girls were then born, both men then successfully claimed in court in Los Angeles the right to joint registration by the U.S. authorities as the girls' fathers.³² English law at present treats the surrogate mother and her husband as the girls' parents,³³ though obviously factually inaccurate in the case, so it seems unlikely that the English authorities will be willing to recognize the two men's registration as the babies' fathers. It is therefore unclear how far English law will support the American willingness officially to recognize the purpose behind the surrogacy arrangement and the men's wish to make their fatherhood a joint experience, no matter which of them is the children's genetic father.³⁴ The affair is complicated by the children having U.S. nationality by virtue of their birth in California, which means that, in advance of the rights of their gay fathers being established in English law, their ability to acquire British citizenship and even enter the United Kingdom is in doubt. The girls were allowed temporary entry with their fathers, and the Home Office in the end decided to give them unlimited leave to stay in the United Kingdom "outside normal immigration law."³⁵ What the two fathers rights are as parents have yet to be determined—but may never become a live legal issue.

B. Example 2: Succession to a Tenancy on Death

1. Background

The earlier article³⁶ considered the case-law in which gay men and lesbians living with a tenant of residential property who had died have claimed statutory rights. In the version which applies to private sector rented

32. See Frances Gibb, *Gay Couple Will Be the Legal Parents of Twins*, TIMES (London), Oct. 28, 1999.

33. The Human Fertilisation and Embryology Act 1990, ch. 37. For the English law on surrogacy, see CRETNEY & MASSON, *supra* note 20, at 939-49.

34. DNA tests have been done to establish who the biological father is, but the two have refused to make the results public. See Gibb, *supra* note 32.

35. See Adrian Lee, *Straw to Decide on Gay Couple's Surrogate Twins*, TIMES (London), Jan. 3, 2000, at 9; *Gay Couple's Twins Win Right to Stay*, GUARDIAN, Jan. 26, 2000, at 9; Gold, *supra* note 26.

36. See Britton, *supra* note 2, at 280-86.

accommodations, someone living with the deceased "as his or her wife or husband" or who was "a member of the deceased tenant's family" living with the deceased can succeed to that tenancy.³⁷ If successful, such a claim gives the survivor the status of tenant by operation of law; this may carry with it a status of irremovability, except on limited statutory grounds, as well as forms of rent control.³⁸

In the latest case, *Fitzpatrick v. Sterling Housing Association*,³⁹ the gay survivor of a deceased tenant failed both at first instance in the County Court and in the Court of Appeal to convince the judges that either of these statutory formulae could now be interpreted to cover him, no reported case having yet applied them to the survivor of a same-sex couple. However, all of the Court of Appeal judges recognized the injustice of this result and its discriminatory effect; Lord Justice Ward, in a powerful dissent relying on North American case-law authorities,⁴⁰ argued that Martin Fitzpatrick should be held to qualify to succeed to the tenancy, primarily as a person living with the deceased John Thompson "as his wife or husband," but if he failed on that ground, Lord Justice Ward would have been equally ready to find Martin to be a member of John's family. Martin Fitzpatrick took the case on a further and final appeal to the House of Lords, the highest court in the English legal system, which announced its decision in October of 1999.⁴¹

2. *Decision of the House of Lords*

All five Law Lords viewed the issues as purely ones of statutory interpretation, rather than as raising questions about gay rights or about reversing legally sanctioned discrimination. The split between majority and

37. The legislation also imposes two distinct time conditions: all would-be successors must have been living with the deceased in the tenanted property immediately before the death, but a person claiming to succeed as a surviving member of the deceased tenant's family (rather than as a spouse or equivalent) additionally has to show two years' residence up to the date of death. Rent Act 1977, ch. 42, Sched. 1, paras. 2-3, as amended by Housing Act 1988, ch. 51, § 76. Martin Fitzpatrick clearly fulfilled both tests, as he lived with John Thompson uninterruptedly between 1976 and John's death in 1994, caring for him full-time since an accident in 1986.

38. The surviving spouse (or person assimilated to a surviving spouse) steps into the shoes of the deceased tenant exactly, and one further succession from that person to a third is legally possible; a survivor who succeeds "as a member of the original tenant's family" gets a tenancy with fewer statutory protections than the deceased tenant had and such survivors have nothing that can be passed on further. Rent Act 1977, ch. 42, Sched. 1, as amended by the Housing Act 1980, ch. 51, § 76. Nothing turned on this distinction in the *Fitzpatrick* case.

39. *Fitzpatrick v. Sterling Hous. Ass'n Ltd.*, [1997] 4 All E.R. 991 (C.A.). The first-instance County Court judgment is not reported.

40. Britton, *supra* note 2, at 285-86 nn.83-85.

41. Now reported as *Fitzpatrick v. Sterling Hous. Ass'n Ltd.*, [1999] 3 W.L.R. 1113 and [1999] 4 All E.R. 705 (H.L.).

minority was thus fundamentally about the legitimacy of interpreting the relevant statutory rules in one way rather than another and the proper scope for judicial creativity, set against the powers and position of Parliament. This may of course simply reflect the way in which the case was argued in the House of Lords; it also allowed the judges to refuse to grapple directly with any wider questions of principle.

Echoing the previous case-law for tenancies from public sector landlords,⁴² the judges were unanimous that Martin Fitzpatrick could not succeed as equivalent to a spouse, holding that the words in the statute which talk of "as his or her wife or husband"⁴³ are gender-specific and so apply only to a heterosexual unmarried couple. If Parliament had wanted same-sex survivors to be capable of qualifying under this head, it would have used a different—and clearer—form of words. Since these words were added as recently as 1988,⁴⁴ there was no room for argument that this was a phrase whose meaning could be said to have changed since its adoption. As will be obvious already, there was no broader or higher principle available in law which could be brought in to argue that such gender specificity was unjustifiably discriminatory against gay and lesbian couples. As it was, the most that could be said was that these words could reasonably bear a meaning wide enough to include a same-sex survivor. However, no member of the House of Lords was willing to go so far.

By contrast, on Martin Fitzpatrick's alternative claim, that he was a member of John Thompson's family and should succeed to the tenancy on that basis, the Lords held by a 3-2 majority that he did satisfy this statutory test. That was his personal victory and the vehicle for a significant extension of rights to gay men and lesbians.

42. Harrogate Borough Council v. Simpson, 17 Hous. L. Rep. 205 (C.A. 1984), discussed by Britton, *supra* note 2, at 280-81.

43. The same words are also used in the Inheritance (Provision for Family and Dependents) Act 1975, ch. 63, § 1A, inserted by the Law Reform (Succession) Act 1995, ch. 41, § 2, under which a de facto spouse living with a person who has died may ask the court for provision out of the estate without proof of dependency. See Britton, *supra* note 2, at 263 n. 9. Same-sex survivors are presumably excluded, in the same way that the House of Lords refused Martin Fitzpatrick the right to succeed under the "spouse" rules for tenancies. For another statutory example and proposals for reform, see *infra* notes 83-85 and accompanying text.

44. See Housing Act 1988, ch. 51, § 76.

3. *The "Member of the Family" Issue: The Majority*

Since each judge who found in Martin Fitzpatrick's favor (Lords Slynn, Nicholls, and Clyde) gave an individual speech,⁴⁵ there are divergences of approach between them, though there are many points in common. Each chose to consider the circumstances in which it is legitimate for the judges to apply an unchanging statutory formula to new circumstances. Lord Slynn took the view that where, as here, the statute is itself not clear either that the formula is to be given a wide scope or that it is to be given a narrow scope, the judges must simply interpret the words in their statutory context: "To do so is not to usurp Parliament's function; not to do so would be to abdicate the judicial function. If Parliament takes the view that the result is not what is wanted, it will change the legislation."⁴⁶

Lord Slynn clearly dealt with the question of Parliament's intention in 1920—the original source of the rules about succession to tenancies—as follows:

It is not an answer to the problem to assume (as I accept may be correct) that if in 1920 people had been asked whether one person was a member of another same-sex person's family the answer would have been "No." That is not the right question. The first question is what were the characteristics of a family in the Act of 1920 and the second whether two same-sex partners can satisfy those characteristics so as today to fall within the word "family."⁴⁷

Answering his own questions, Lord Slynn said that the hallmarks of those relationships recognized in the existing case-law⁴⁸ as satisfying the test of "family" were: a degree of mutual interdependence, of the sharing of lives, of caring and love, of commitment and support.⁴⁹ And current public attitudes were relevant in applying the test. As a matter of law it was now acceptable to hold that same-sex survivors could satisfy the test, but it was a question of fact (easily satisfied by Martin Fitzpatrick) whether an individual actually did.

45. Because the House of Lords in its judicial capacity is technically also a committee of the upper house of Parliament, convention dictates adherence to the pretense that the prepared and pre-printed judgments of the Law Lords are delivered orally and extempore: which is why they are properly called speeches, though functionally they are judgments.

46. Fitzpatrick, [1999] 3 W.L.R. at 1117H-1118A.

47. *Id.* at 1119B.

48. For a summary of the cases, see Britton, *supra* note 2, at 282 n.74. Three cases omitted from that summary are Chios Property Investment Co. v. Lopez, 20 Housing L. Rep. 120 (C.A. 1987); Hawes v. Evenden, [1953] 1 W.L.R. 1169 (C.A.); Jones v. Whitehill, [1950] 2 K.B. 204 (C.A.).

49. Fitzpatrick, [1999] 3 W.L.R. at 1122C.

Posing the problem in those terms made it possible to say that the meaning itself of the word "family" had not changed; it was those who could satisfy the statutory test who had.

Lords Clyde and Nicholls echoed Lord Slynn's flexible approach to the meaning of the word "family." Lord Clyde referred to the adoption cases discussed above and in the earlier article⁵⁰ as showing that the concept of the family has already undergone a transformation recognized by the law. Lord Nicholls came close to using the language of non-discrimination:

[T]he courts have given a wide and elastic meaning to family in the present context. Rightly so, because the legislation would fail to cover the whole of the target intended to be protected if family were given a narrow or rigid meaning. Such a meaning would fail to reflect the diverse ways people, in a multicultural society, live together in family units. . . . A man and a woman living together in a permanent and stable sexual relationship are capable of being members of a family for this purpose. Once this is accepted, there can be no rational or other basis on which the like conclusion can be withheld from a similarly stable and permanent sexual relationship between two men or between two women.⁵¹

As this extract shows, the route by which gay and lesbian relationships in this case acquire legal parity with unmarried heterosexual relationships is by sharing characteristics in common with those heterosexual couple relationships which already attract the protection of survivorship under the statute. Sexual activity,⁵² love, affection, and a long-term commitment appear to be essential; however, it is less clear what degrees of economic interdependence and sexual exclusivity between the partners are also necessary.

4. *The "Member of the Family" Issue: The Minority*

The dissenters (Lords Hutton and Hobhouse) took their stand on two main points, both technical (some might say legalistic) in nature. First, they regarded the House of Lords as bound by existing case-law on the meaning of

50. See *supra* Part II.A.1; Britton, *supra* note 2, at 277-80.

51. Fitzpatrick, [1999] 3 W.L.R. at 1127G-H.

52. As the facts of the case illustrate, the relationship does not have to be continuously sexual, nor sexual at the moment of the partner's death; but if it is enough for it once to have been sexual (or sexual at the start of the cohabitation), this gives former sexual partners preferential treatment over non-sexual friends, which it is hard to justify in principle.

“family,”⁵³ according to which a relationship of marriage, blood, or adoption—or a link broadly recognizable as creating, *de facto*, such a relationship—was necessary. This was a test which a same-sex partner could never satisfy. Second, they thought that the meaning of “family” had to be defined by reference to what Parliament had in mind in 1920, which would not have included a same-sex couple. Lord Hutton put it like this:

In 1920 the fact of homosexuals living together in permanent relationships was known to Parliament, and if a homosexual couple was not intended by Parliament to come within the term “family” at that date I do not consider that changed public attitudes towards homosexuality mean that a new state of affairs has come into existence which extends the meaning of the term.⁵⁴

According to this approach, the courts had no authority to change the meaning of the term “family”; only Parliament could do so. This was also appropriate since there were policy choices involved in deciding which types of relationships should give a right to survivorship, which the courts were in no position to weigh and decide. If same-sex couples were to be included, then why not non-sexual cohabitive relationships, based on friendship, as well?

5. *Comments*

Despite the narrow terms in which the speeches of the majority are framed, the outcome does establish a point of principle which undoubtedly improves the legal position of gay men and lesbians in the specific context of rented housing but perhaps also more widely. It was given extensive press coverage as such.⁵⁵ References to “family” and “members of a family” occur

53. See *Joram Developments v. Sharratt*, [1979] 1 W.L.R. 928 (H.L.), where Lord Diplock in his speech incorporated with approval part of the judgment to this effect of Lord Justice Russell in *Ross v. Collins*, [1994] 1 W.L.R. 425 (C.A.). Even if this were binding, the House of Lords could of course decide to exercise its power to depart from existing authority, if a good enough case were shown, under the powers it accorded itself under the Practice Statement (Judicial Precedent) of 1966, [1966] 1 W.L.R. 1234 (H.L.).

54. Fitzpatrick, [1999] 3 W.L.R. at 1147D.

55. See, e.g., *Gay Couples' Rights Are Strengthened*, GUARDIAN, Nov. 6, 1999.

in many other statutes,⁵⁶ and although a court will always have to bear the specific statutory context in mind, the lead given by the House of Lords will undoubtedly influence judges in later cases where similar questions of the legal position of a same-sex partner are raised.

Negatively, the case suggests that, in a statute, the term "living . . . as his or her wife or husband"⁵⁷ (*a fortiori* "husband," "wife," "spouse," "widow," or "widower") cannot yet be interpreted to cover an unmarried same-sex partner or the survivor of one. For this to change, the most direct route would be new primary legislation: that might introduce a general principle of equality between heterosexual and gay and lesbian relationships; or it could extend the concept of marriage to cover all couple relationships; or, along the recent French lines, it could create a new kind of legal status available to same-sex couples which would have most or all of the same consequences as marriage.⁵⁸ Given that none of these is at present politically unimaginable, the only available ways forward towards that goal are (a) by looking to legislation from the European Union;⁵⁹ and (b) by applying to existing English law the evolving principles of the right to family life and protection against discrimination in the European Human Rights Convention, which will be available as an integral part of English law once the Human Rights Act 1998

56. See, e.g., Social Security Contributions and Benefits Act 1992, ch. 4, § 137(1), which defines family by using the words "couple" and "household," then going on to define couple as "a man and woman." STROUD'S JUDICIAL DICTIONARY OF WORDS AND PHRASES (5th ed. 1986 & Supp. 12 1997) under the entry "family" quotes Vice-Chancellor Kindersley as saying that the word "is itself a word of most loose and flexible description." *Green v. Marsden*, 1 W.R. 512, 513.

57. For other statutory examples of virtually the same phrase, see *supra* note 43 and *infra* note 85.

58. Charles Bremner, *France Makes Unwedded Bliss Official*, TIMES (London), Dec. 18, 1999, at 9 (discussing the legislation which adds the *pacte civil de solidarité* (PACS) into the French Civil Code as a new Title XII in Book I). Law No. 99-944 makes this new status available to couples who choose to opt into it via a formal contract jointly registered at their local court. Law No. 99-944 of November 15, 1999, J.O., Nov. 15-16, 1999, p. 16959. A PACS is available only to couples, neither of whom is currently married and who are not so closely related that they could not marry, but the law expressly includes same-sex couples. The consequences of registering a PACS are primarily financial and fiscal, relating to liability for each other's debts, community of property, the tax treatment of gifts between the partners and of their individual incomes and capital, their position in social security, their right to inherit the estate and to succeed to a tenancy on the death of a partner. In all these areas the couple will be treated almost identically to a married couple. In England, the Law Society (the statutory body regulating and representing 70,000 solicitors) has unexpectedly backed proposals from its own Family Law Committee to give cohabitants a new legal status short of marriage. See Frances Gibb, *Law Society to Support Gay Reforms*, TIMES (London), Sept. 20, 1999, at 2.

59. See *infra* Part III.B.3.

comes into force.⁶⁰ Note in this connection Lord Nicholls's disclaimer at the end of his speech:

The decision [in this case] leaves untouched questions such as whether persons of the same sex should be able to marry, and whether a stable homosexual relationship is within the scope of the right to respect for family life in article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms [the European Human Rights Convention].⁶¹

The relevance of European law, and of authorities from other legal systems, is therefore a significant theme in the case. Despite wanting to see the issues as purely of statutory interpretation, the majority had to confront the unhelpful fact that, by mid-1999, neither European Union law nor the law of the European Human Rights Convention had recognized gay men and lesbians as being entitled to equal treatment within employment law;⁶² nor were same-sex relationships entitled to equality with heterosexual relationships as a matter of European law more generally.⁶³ Lord Nicholls, as the quotation above suggests, avoided the issue entirely and did not refer to any European material in his speech. Lord Slynn, having discussed the state of European law, chose to write it off as "in an early stage of development . . . attitudes may change as to what is acceptable throughout Europe."⁶⁴

Lord Clyde, having similarly considered the European authorities, found that some recognition of same-sex relationships had already been attained and that to interpret "family" in English law as including same-sex partners would not be in conflict with European law. Like Lord Justice Ward in the Court of Appeal, Lords Slynn and Clyde were happy to follow in the footsteps of the New York Court of Appeals in *Braschi v. Stahl Associates*⁶⁵ and other similar judgments. Unsurprisingly, for the dissenting minority the current state of

60. See *infra* Part III.A.5.

61. Fitzpatrick, [1999] 3 W.L.R. at 1130F. For the text of Article 8, see *infra* note 90.

62. Case C-249/96, *Grant v. South-West Trains Ltd.*, 1998 E.C.R. I-636, discussed *infra* Part II.B.2; but see *infra* Part III.A.3 (discussing the European Court of Human Rights judgment in *Lustig-Prean and Beckett v. United Kingdom*, handed down after the oral hearings in the House of Lords in the *Fitzpatrick* case).

63. *A.D.T. v. United Kingdom*, 47 Eur. Comm'n H.R. 274 (1985); but see also *X., Y. and Z. v. United Kingdom*, 4 Eur. Ct. H.R. Rep. at 143 (1997). Both are discussed by Britton, *supra* note 2, at 294-95.

64. Fitzpatrick, [1999] 3 W.L.R. at 1123H-1124A. It may be relevant to note that Lord Slynn is also a former Advocate General and judge of the European Court of Justice, the only Law Lord ever to have served in Luxembourg.

65. *Braschi v. Stahl Associates*, 544 N.Y.S.2d 784, 788-89 (N.Y. 1989), in which the majority held that "family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence." *Id.*

play at the European level supported their unwillingness to extend the meaning of "family" to cover same-sex survivors: Lords Hutton and Hobhouse refused to follow *Braschi*, regarding it as inconsistent with English authorities binding on the House of Lords.

Finally, despite the apparent progressiveness of the majority in the House of Lords, it is worth bearing in mind that not all cohabitive gay or lesbian relationships yet qualify the survivor for residential protection, when the partner who was the tenant dies. First of all, the rules for survivorship where the landlord is a local authority or other public body effectively exclude a gay or lesbian partner, by giving a limited definition of those relationships which the law recognizes as making a person a member of the deceased tenant's family;⁶⁶ so the new rights recognized in *Fitzpatrick* are in practice available only in cases where the landlord is in the private or semi-public sectors.⁶⁷ Even there, a same-sex survivor can qualify only if the tenant who has died was a "protected tenant," which is a specific and increasingly rare category;⁶⁸ same-sex survivors must also satisfy the residence test⁶⁹ and then go on successfully to claim to be a "member of the deceased tenant's family." The *Fitzpatrick* case shows that there are significant hurdles to be overcome in completing this last step, not all of which will become clear until further cases involving same-sex survivors are litigated and reported. From the guidance so far available, the longer, the more committed, and the more dyadic the relationship, the better the chances the court will recognize it for these purposes. It should also be remembered that the right of succession available to surviving family members is still a lesser form of protection than that given to surviving spouses and their heterosexual equivalents.⁷⁰ To call

66. The Housing Act 1985, ch. 68, §§ 87, 113, now restated and slightly modified in the Housing Act 1996, ch. 52, § 62, gives a closed list of those who can qualify for survivorship to the deceased person's tenancy as a member of that person's family. The only category potentially applicable to same-sex couples is "liv[ing] together as husband and wife," which *Harrogate Borough Council v. Simpson*, 17 Hous. L. Rep. 205 (C.A. 1985), now approved in *Fitzpatrick*, has held applies only to heterosexual couples.

67. "Semi-public" covers non-profit-making organizations supported with public funds, like the Housing Association which was the landlord in the *Fitzpatrick* case.

68. See ANDREW ARDEN & CAROLINE HUNTER, *MANUAL OF HOUSING LAW* chs. 3-5 (6th ed. 1997).

69. See *supra* note 37.

70. See *supra* note 38. In his speech, Lord Slynn recognized that for the law to give greater rights or opportunities to heterosexual couples than to same-sex couples could be said to be discriminatory against same-sex couples. This might therefore be challengeable in England on the basis of Article 8 of the European Human Rights Convention, under the Human Rights Act 1998—but only when the Act entered into force. *Fitzpatrick*, [1999] 3 W.L.R. at 1118F. For the text of Article 8, see *infra* note 90; see also *infra* Part III.A.5.

1999 “the year that same-sex couples win equal rights”⁷¹ is therefore an obvious exaggeration.

C. *Example 3: Harassment of Gay Men at Work*

Smith v. Gardner Merchant Ltd.,⁷² which reached the Court of Appeal in July 1998 via the Employment Appeal Tribunal,⁷³ raised the question whether English law at present gives any protection against discrimination and harassment of a gay or lesbian employee by reason of their sexual orientation. Paul Smith claimed that he had been fired from his job as a barman because he was gay. His employer had chosen to believe the version of an incident of threatening and aggressive behavior told by a woman fellow-employee, who in turn previously had been hostile and critical to him because of his sexuality. He had not been in the job long enough to complain of unfair dismissal, so he brought a complaint under the Sex Discrimination Act 1975.

The principal plank in Paul Smith’s argument was that, though the Act spoke only of treating someone less favorably “on ground of his sex”⁷⁴ and did not mention sexual orientation at all, he had been treated less favorably than a lesbian would have been. The comparator was therefore a gay person of the opposite gender. Thus he had been discriminated against because he was a (gay) man. The judges in the Court of Appeal were willing to accept that the negative treatment which he claimed he had suffered was because he was gay, but that was the nub of the legal difficulty. As Lord Justice Ward put it, “there is a difference between discrimination on the ground of sex and discrimination on the ground of sexual orientation.”⁷⁵ For Paul Smith to succeed under English law as it is, he had to show that he had been treated less favorably *because he was a man*. The Employment Appeal Tribunal, though correctly saying that discrimination based on sexual orientation was not of itself illegal, had not gone on to consider whether the acts alleged had come about because of Paul Smith’s gender, for which the right comparator was indeed a lesbian. This issue was therefore remitted back for a further hearing, though Lord Justice Beldam reached the same outcome without agreeing on the comparator point. (Paul Smith’s additional arguments from European Community law were closed off because of the decision of the European Court of Justice in *Grant v. South-West Trains Ltd.*⁷⁶)

71. Martin Bowley QC, *The Year that Same-Sex Couples Win Equal Rights*, TIMES (London), Jan. 11, 2000, Law Supp. at 9.

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

73. *Smith v. Gardner Merchant Ltd.*, [1996] I.C.R. 790 (E.A.T.).

74. Sex Discrimination Act 1975, ch. 65, § 1(1).

75. *Gardner Merchant Ltd.*, [1998] 3 All E.R. at 863e.

76. See *infra* Part III.B.2.

This judgment breaks new ground in accepting for the first time that negative treatment of a person, based around their sexuality, can constitute discrimination based on sex. However, it falls far short of a general legal protection against harassment or negative treatment by reason of sexual orientation, and in many situations making a comparison with a gay person of the other gender will make little sense.

D. *Reform of English Law*

1. *By Legislation*

Since the earlier article, the main focus of attempts to improve the legal position of gay men and lesbians through legislation has remained twofold: to reduce the age of consent for sex between men to sixteen and to repeal section 28 of the Local Government Act 1988, which 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 presented family relationship."⁷⁷ Additional goals have been to acquire protection for gay men and lesbians against discrimination in employment and pensions, though attempts to add these to relevant Bills in Parliament have not yet been successful.

The idea of legislating to reduce the age of consent for sex between men has been driven by European pressure under the Human Rights Convention and is therefore discussed in that connection.⁷⁸ The repeal of section 28 similarly requires primary legislation, but achieving this is complicated by the fact that, since the earlier article, the Scotland Act 1998⁷⁹ has been passed and implemented, bringing the Scottish Parliament into existence as a working legislature in Edinburgh. The devolved powers given to the new Parliament are limited, so that, for example, Scotland cannot go its own way on the law affecting employment or equal opportunities, which is defined to include the prevention or elimination of discrimination on grounds of sexual orientation.⁸⁰ These areas, among many others, remain "reserved matters" within the

77. Local Government Act 1988, ch. 9, § 28, which inserted § 2A into the Local Government Act 1986, ch. 10. "Maintained school" has a different meaning in England and Wales and in Scotland. *Id.* § 2A(4). For the background to its enactment, see Britton, *supra* note 2, at 271.

78. See *infra* Part III.A.2.

79. Scotland Act 1998, ch. 46. For the background, see Britton, *supra* note 2, at 306-07; Alexandra Frean, *Return for Gay Family Book if Section 28 Goes*, TIMES (London), Jan. 26, 2000, at 4.

80. See Scotland Act 1998, ch. 46, § 30 and Sched. 5, Part II, Sections H1 and L2. Under § 28(7), Westminster retains the power to legislate for Scotland, even in matters not reserved to it by § 30. However, the Scottish Parliament may need to assent. See *infra* note 100 and accompanying text.

exclusive power of Westminster to legislate. However, section 28 of the 1988 Act principally looks to the powers of local authorities, which in Scotland are clearly within the competence of the Scottish Parliament. There are now therefore parallel campaigns going on north and south of the border to encourage the two legislatures to repeal the same words.

For England and Wales, a Local Government Bill is now before the Parliament in Westminster, which includes as its clause 68 the repeal of section 28 of the 1988 Act. In tactics reminiscent of the age of consent issue, Baroness Young and allies in the House of Lords successfully tabled amendments to strike this clause from the Bill (and it seems as if the Conservative Party, after initial hesitation, is now officially against repeal). Meanwhile, in Scotland, where the Ethical Standards in Public Life Bill does the same, Cardinal Winning, Catholic Archbishop of Glasgow, has spoken publicly against repeal, supported by the Anglican Bishop of Liverpool.⁸¹ A fighting fund to oppose reform has been supported with £500,000 from one of Scotland's wealthiest businessmen, Brian Souter of Stagecoach, who is the major funder for a private referendum in Scotland taking place in May 2000.⁸² Since this has developed into a major news story, it is hard to predict what the outcome will be, though a compromise may be imaginable in which section 28 is repealed but replaced by new legal guidelines for schools on bullying and on issues of sexuality and personal relationships. Only the detail of these guidelines, if adopted by Parliament, will show whether the result takes the law forward or backward.

Other reforms likely to be legislated come from a report of the Law Commission, the permanent statutory law reform body of England and Wales, on the rights of survivors of wrongful death. As described in the earlier article,⁸³ the Commission has been considering the tests which allow a person to claim damages for loss on the death of another person. Their provisional views were confirmed in 1999 in the definitive report, *Claims for Wrongful Death*.⁸⁴ This proposes extending the definition of "dependant" in the Fatal Accidents Act 1976;⁸⁵ at present, relatives by blood and marriage apart, this limits the right to damages for financial loss to those living in the same household as the deceased as his or her husband or wife for the two years preceding the death. This test is almost identical to the "spouse" test in

81. See Jason Allardyce, *Cardinal Calls for Action Against Gay Law*, TIMES (London), Jan. 18, 2000, at 1, 2, 6; James Meek, *Straight-Talking Bishop*, GUARDIAN, Jan. 25, 2000, § G2, at 5.

82. See Allardyce, *supra* note 81, at 6; Mark Nicholson, *Section 28 Poll Starts for Scots*, FIN. TIMES (London), May 3, 2000, at 7.

83. See Britton, *supra* note 2, at 309.

84. Law Commission, *Claims for Wrongful Death* (Law Com No. 263, HC 807) (1999). The report is available on the Law Commission website at <<http://www.lawcom.gov.uk>> (visited May 8, 2000).

85. Fatal Accidents Act 1976, ch. 30, § 1(3)(b).

Fitzpatrick, which the House of Lords said only the survivor of a heterosexual couple could satisfy.⁸⁶ Under the proposals, there would be an additional factual test of dependency, which a same-sex partner could satisfy. The Law Commission further proposes that the class of those who qualify for "bereavement damages"—a statutorily-fixed sum for the distress of a wrongful death—should be extended specifically to include a same-sex cohabitee, if that person would qualify under the "spouse" test, but for their being of the same gender as the deceased. This spells it out clearly: a gay or lesbian survivor living with the deceased for the two years before the death will come within the new class. The record of implementation of reports of the Law Commission is good, though it does depend on a sponsoring Government department getting space in what is usually a crowded legislative timetable. The report discussed above is one of a series on aspects of the law of damages, five of which are awaiting legislation, all including draft Bills ready for presentation to Parliament.

2. *By Administrative Changes*

As noted in the earlier article,⁸⁷ in 1997, a major change was made to immigration policy to allow, for the first time, the same-sex partners of those already settled in the United Kingdom a right to join and live with them. In June, 1999, following an internal review, the Home Office announced further relaxation of the conditions under which a same-sex partner can benefit from this right. Instead of having to show four years of cohabitation before entry into the United Kingdom, two years is now sufficient to give a right of entry to join the partner, but the length of the initial probationary period has been doubled from one to two years, during which the arriving partner will have the right to work and other rights of a lawful immigrant. Once the probationary period is over, the partner can apply for the status of permanent resident; the partner may even gain that status earlier, if the relationship ends on the death of the other partner or by reason of domestic violence. The rules apply identically to all unmarried couples—heterosexual, gay, or lesbian—and have immediate effect, including to those who may have entered the country illegally.⁸⁸

86. See *supra* Part II.B.2.

87. See Britton, *supra* note 2, at 308.

88. See *Immigration Victories*, 8(1) STONEWALL (July 1999), at 4.

III. EUROPEAN LAW

A. *The Law of the European Human Rights Convention*

1. *Background*

The earlier article explained the key features of the international system of judicial protection of human rights and fundamental freedoms centered on the European Court of Human Rights in Strasbourg.⁸⁹ Under it, an individual affected can start legal action against any signatory State or States, alleging a violation of any of the rights and freedoms protected by the original Convention of 1950, or any of the linked additional Protocols. This legal action can lead, following an investigative stage, then written and/or oral procedures before a bench of internationally-appointed but independent judges, to a binding and final judgment, publicly announced, against the State in question. The judgment determines whether a violation of one of the protected rights has occurred and may also award compensation to a successful applicant against the State concerned.

Issues involving gay men, lesbians, and transsexuals have been featured regularly in the case-law of the European Court of Human Rights, principally under Article 8 of the Convention, which establishes the right to private life and to family life.⁹⁰ Many of these cases have been actions brought against the United Kingdom,⁹¹ and every outcome favorable to an applicant has been important in forcing the U.K. Government to change its law or administrative practice to bring it into conformity with the Convention, as interpreted by the Strasbourg court.

2. *Implementation: The Age of Consent*

The first (investigative) stage of *Sutherland v. United Kingdom* was decided in Strasbourg in October 1997, shortly before the earlier article was

89. See Britton, *supra* note 2, at 287-89.

90. Article 8 reads:

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

European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 221.

91. See Britton, *supra* note 2, at 293-95.

completed.⁹² Here Euan Sutherland, a gay man over sixteen (the age of consent for heterosexual sexual activity) but under eighteen (the current age of consent for sexual activity between men) challenged this disparity between English criminal law's treatment of sexual activity by young adults. He alleged a violation of both his right to private life under Article 8⁹³ and his right to protection against discrimination under Article 14.⁹⁴ His success on both grounds was enough for the United Kingdom Government to propose legislating, on the basis of a free vote in the House of Commons, to equalize the age of consent at sixteen; in reliance on this undertaking, the gay rights pressure group, Stonewall, that was supporting Sutherland, agreed not to move the case toward its judicial phase in Strasbourg, though it, and a similar case brought by Chris Morris, remain on the Court roll.

Implementing this undertaking has proved a struggle for the Government, largely because of opposition from the political and Christian Right in the House of Lords. At the first attempt in 1998, via a clause in the Home Secretary's Crime and Disorder Bill, the clause was passed by the Commons, but rejected via an amendment proposed by Baroness Young in the House of Lords, which was passed by a majority of 169. Rather than risk losing the whole Bill, the Government dropped the clause, promising to bring in a new and amended proposal in due course. This then materialized in 1999 as a separate Sexual Offences (Amendment) Bill; the essential clauses were as before, but in response to concerns about adult sexual exploitation of young men, the new Bill also included provisions criminalizing the making of sexual advances to sixteen and seventeen year-olds by those in a position of authority.⁹⁵ The Bill was passed in the Commons by 313 votes to 130, but was lost in the Lords again, 222 peers (of whom 120 were hereditary) voting for

92. *Sutherland v. United Kingdom*, App. No. 25186/94, 24 Eur. H.R. Rep. 22 (1997) (Commission report). The decision here was of the European Commission of Human Rights, a body separate from the Court which formerly undertook a preliminary investigative review of each new application under the Convention; its work has, since November 1, 1998, been transferred to an expanded and restructured Court under Protocol 11 to the Convention. See DONNA GOMIEN ET AL., *LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER* 91-92, 441-42 (1996).

93. For the text of Article 8, see *supra* note 90.

94. Article 14 reads: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, 213 U.N.T.S. 221.

95. See Jill Sherman, *Ministers Add Safeguards to Gay Sex Bill*, *TIMES* (London), Nov. 6, 1998, at 2. A similar addition to the central proposals had been proposed by Joe Ashton MP—but not accepted—in the Commons earlier; he said that he was happy with the additional clauses. See Philip Webster, *MP Agrees Age of Consent Deal*, *TIMES* (London), Jan. 25, 1999.

Baroness Young's amendment and 146 against (a majority of 76).⁹⁶ Under the bicameral system of the Westminster Parliament, the elected Commons is able to overrule the unelected Lords as a matter of legal right only under the Parliament Acts 1911 and 1949.⁹⁷ These Acts allow the Commons to pass a second time a Bill introduced in the Commons and then rejected by the Lords, but only after a year's delay since its original Second Reading in the Commons, and if necessary to make the Bill law without the Lords' approval. This means that the Sexual Offences (Amendment) Bill could be reintroduced on or after January 25, 2000 and be virtually guaranteed to become law. Easing its passage further, the first phase of the Government's plan to reform the House of Lords has now taken effect: under the House of Lords Act 1999,⁹⁸ only ninety hereditary peers remain members of the House of Lords with voting rights. As the figures above show, removing all or most of the hereditary peers would have allowed the Bill lowering the age of consent for gay men to pass in 1999. In April 2000 the Conservative group in the Lords decided not to oppose the retabled Sexual Offences (Amendment) Bill in principle, but to attack it clause by clause, so its passing may need the extra support of the Parliament Acts.⁹⁹ The delay has added one procedural innovation: because criminal law for Scotland has been devolved to the Scottish Parliament,¹⁰⁰ legislation from Westminster changing criminal law in Scotland requires the formal assent by the Parliament in Edinburgh. It was initially uncertain whether a majority could be found at Edinburgh, the Scottish National Party MSP¹⁰¹ resenting legislative intervention from Westminster, but the necessary assent has now been given.

3. Cases Newly Decided in Strasbourg

Pending when the earlier article was completed in February 1998, two significant groups of cases from the United Kingdom have now reached final judgment. In the first pair, *Sheffield and Horsham v. United Kingdom*¹⁰² in

96. The quotation from Lord Alli in the Introduction of this Article is from the debate in the House of Lords on Baroness Young's amendment, on the second attempt to change the law.

97. See JOHN F. MCELLOWNEY, PUBLIC LAW 57-59 (2d ed. 1998).

98. House of Lords Act 1999, ch. 34. Under the second stage, the whole composition of the House will be restructured, a Royal Commission under the chairmanship of Lord Wakeham having in January, 2000 proposed a mixture of appointed and elected members. *A House for the Future*, Cm. 4534 (2000). Legislation to implement the second stage is not expected until after the next general election.

99. See *Tory Peers Vow to Stall Gay Age of Consent Bill*, TIMES (London), Apr. 12, 2000, at 16.

100. See *supra* notes 79-80 and accompanying text.

101. This designates Members of the Scottish Parliament.

102. *Sheffield and Horsham v. United Kingdom* (Case no. 31-32/1997/815-816/1018-1019) 27 Eur. H.R. Rep. 163 (1999). See also Frances Gibb, *Sex Change Pair Lose Their Fight for Recognition*, TIMES (London), July 31, 1998.

July, 1998, the European Court of Human Rights held eleven votes to nine that for English law to refuse a new birth certificate to a post-operative transsexual, hence to require for some official purposes disclosure of the person's pre-operative birth gender, was not an actionable breach of the right to respect for a private life under Article 8 of the European Human Rights Convention.¹⁰³ The Court went on to hold unanimously that there was no violation of the protection against discrimination in Article 14¹⁰⁴ and to decide eighteen to two that signatory States may legitimately restrict marriage to unions between two partners whose biological origins are male and female, respectively. Therefore, there was no violation of Article 12 (right to marry and found a family).¹⁰⁵ It is this last finding which is of special importance to gay men and lesbians, for it fails to provide any support for arguments that same-sex couples should be treated on an equal legal basis with heterosexual married couples. The Court did however warn all signatory States to keep the area under close review; three other transsexual cases from the United Kingdom are waiting in line in Strasbourg.

In the second two pairs of cases, in September 1999, *Lustig-Prean and Beckett v. United Kingdom*¹⁰⁶ and *Smith and Grady v. United Kingdom*,¹⁰⁷ the Court found a violation of Article 8 in the policy and practice of the armed forces of the United Kingdom in relation to four applicants, three gay men and a lesbian. This is the dramatic sequel to an unsuccessful attempt by the same four applicants, all of whom had been administratively discharged from the Army and Navy by reason only of their sexual orientation, to challenge this by a public law action for judicial review in the English courts.¹⁰⁸ Like Euan

103. See *Sheffield and Horsham*, 27 Eur. H.R. Rep. at Judgment paras. 40-61, 71-77. For the text of Article 8, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 221, *supra* note 90.

104. See *Sheffield and Horsham*, 27 Eur. H.R. Rep. at Judgment paras. 71-77. For the text of Article 14, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, 213 U.N.T.S. 221, *supra* note 94 art. 14.

105. Article 12 reads: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right." European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 12, 213 U.N.T.S. 221.

106. *Lustig-Prean and Beckett v. United Kingdom*, App. Nos. 31417/96 & 32377/96; judgment of the European Court of Human Rights dated September 27, 1999, available from the Court's website at <<http://www.echr.coe.int>> (visited Jan. 10, 2000).

107. *Smith and Grady v. United Kingdom*, App. Nos. 33985/96 & 33986/96; judgment of the European Court of Human Rights dated September 27, 1999, available from the Court's website at <<http://www.echr.coe.int>> (visited Jan. 10, 2000).

108. *R. v. Ministry of Defence, ex parte Smith*, Q.B. 517 (Q.B. and C.A. 1996), discussed by Britton, *supra* note 2, at 290-92, 299-300. After they had lost their case at the Court of Appeal, the applicants were refused leave to appeal to the House of Lords, which meant that they had exhausted domestic remedies and could then start a separate action in Strasbourg. In England, their action relied on grounds drawn from European Community law as well as the Human Rights Convention, which is why the procedure in Strasbourg was later suspended

Sutherland before them, their action in Strasbourg was made possible by support from gay and lesbian pressure groups, notably Stonewall¹⁰⁹ and Rank Outsiders, a group supported by Stonewall but specifically for gays and lesbians in or discharged from the military. Like Sutherland, they were relying on both Articles 8 and 14,¹¹⁰ though Smith and Grady also relied on Articles 3 (inhuman and degrading treatment),¹¹¹ 10 (freedom of expression),¹¹² and 13 (absence of effective domestic remedy).¹¹³

In its judgments, the Third Section of the European Court of Human Rights noted how successful the careers of the four applicants had been and described the questioning they had undergone which led to their dismissals, as well as the Homosexuality Policy Assessment Team (HPAT), set up in 1996 by the Ministry of Defence to review the rationale for the general policy of automatically discharging all known gay men and lesbians from the service. The HPAT review concluded that operational effectiveness required the present policy to be continued and that homosexuality posed problems greater than that of gender and race (where the services already had a public commitment to equal opportunities and to prevent and punish harassment). These conclusions had in turn been approved by a Select Committee of the House of Commons in 1996, and the House, in a vote, rejected any change to the present policy.

The Court went on to find that the rights of all four applicants to a private life had been violated:

[T]he investigations by the military police into the applicants homosexuality, which included detailed interviews with each of them and with third parties on matters relating to their sexual orientation and practices, together with the preparation of a final report for the armed forces' authorities on the investigations, constituted a direct interference with the applicants' right to respect for their private lives. Their consequent administrative discharge on the sole ground of

pending the E.C.J. ruling in the *Perkins* case. See *infra* note 158 and accompanying text.

109. Stonewall's Executive Director, Angela Mason, was awarded an O.B.E. (Order of the British Empire) by the Queen—on the proposal of the Prime Minister—in the New Year's Honours List 1999.

110. For the text of Article 8, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 221, *supra* note 90; for the text of Article 14, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, 213 U.N.T.S. 221, *supra* note 94.

111. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221.

112. See *id.* art. 10.

113. See *id.* art. 13.

their sexual orientation also constituted an interference with that right¹¹⁴

The Court then went on to consider whether this interference was justified under paragraph 2 of Article 8, which meant assessing whether the interferences (a) were in accordance with the law; (b) had an aim legitimate under Article 8; and (c) were necessary to achieve that aim in a democratic society. The Court agreed that (a) and (b) were satisfied, at least to establish the sexual orientation of an individual,¹¹⁵ since the policy was clear, public, and had been upheld by the English courts and was aiming to safeguard the services' operational effectiveness, which fell under "the interests of national security" and "the prevention of disorder" in paragraph 2 of Article 8. However, the Court was unconvinced that these aims justified such intrusive invasions into the applicants' intimate private lives and such disastrous consequences for their careers, which followed not from their conduct but from "innate personal characteristics"¹¹⁶ (their sexual orientation). This was all the more true, since the risks to discipline and effectiveness of having gay men and lesbians in the armed services were asserted rather than proved and rested on the results of an internal review which gave determining weight to the existing negative attitudes of heterosexual service personnel against gay men and lesbians. As the measures already taken to deal with women and ethnic minorities in the services showed, it was possible to deal with prejudice, harassment, and bullying through clear statements of acceptable behavior backed by disciplinary sanction and training: gay men and lesbians were simply a comparable problem. The Court therefore held that the present policy and its implementation went outside the United Kingdom's "margin of appreciation" under the Convention and did not justify the breach of paragraph 1 of Article 8.¹¹⁷ In *Lustig-Prean and Beckett*, the Court finally considered the linked claim under Article 14, holding that this ground was in effect a restatement of the complaint under Article 8, so gave rise to no separate legal issue.¹¹⁸

The Court came to the same conclusions on these issues in relation to *Smith and Grady*, but in the second pair of cases had to look at the additional Convention articles relied on. It rejected the claim on Article 3, holding the

114. *Lustig-Prean and Beckett*, at Judgment para. 64.

115. The judgment doubted whether any further investigations, once sexual orientation had been established, could be justified, but in view of its ultimate conclusion did not finally decide this point. *See id.* Judgment paras. 99-103.

116. *See id.* Judgment para. 86.

117. Judge Loucaides dissented from this finding and gave a separate Opinion in both cases; he agreed with other aspects of both judgments, which were otherwise unanimous. *See Lustig-Prean and Beckett*.

118. *See id.* Judgment paras. 106-09.

way the homosexual applicants had been dealt with insufficiently severe to constitute a breach of the protection against inhuman or degrading treatment, and the Court refused to consider the claim based on Article 10, holding the real essence of the claim to be about private life.¹¹⁹ On Article 13, however, the Court accepted the applicants' claim, holding that the scope open to the English courts for challenging public authorities through an action for judicial review was too limited to constitute an effective domestic remedy for violations of the Convention.¹²⁰ By placing the threshold of irrationality so high, the English rules prevented the courts from considering the issues relevant under the Convention to the question of justifying the policy under paragraph 2 of Article 8.¹²¹

Implementation of the main points of these two judgments has been swift and complete. On the day the judgments were announced, all current disciplinary action against service men and women on the basis of their sexual orientation was suspended¹²² and work began, in consultation with the four successful applicants, on new rules for the services. In January 2000 the whole policy was formally reversed through an announcement by the Defence Secretary in the House of Commons. As a result, the rule barring gay men and lesbians from serving in the military has now been lifted.¹²³ Alongside, there is, as suggested by the Court in Strasbourg, a new code of conduct, which on the Australian model defines inappropriate sexual behavior and makes it a disciplinary offense. The short code makes clear that no harassment or bullying of individuals on grounds of gender, race, or sexual orientation will be tolerated and limits intervention in the personal lives of service personnel to situations where their actions or behavior have impacted or could impact the service's efficiency or effectiveness. Sexual orientation will not be required to be disclosed, nor will any consequences necessarily follow from individuals disclosing their sexual orientation. So unlike the American "Don't Ask, Don't Tell" approach, the new British stance is "Don't Ask, Can Tell."¹²⁴ There has even been talk of those dismissed under the old policy being encouraged to re-enlist; what the four applicants will certainly get from the

119. See Smith and Grady, at Judgment paras. 117-28.

120. See *id.* at Judgment paras. 129-39.

121. For the the English litigation in question, see *R. v. Ministry of Defence, ex parte Smith*, Q.B. 517 (Q.B. and C.A. 1996), discussed by Britton, *supra* note 2, at 290-92, 299-300.

122. See Richard Norton-Taylor & Clare Dyer, *Historic Ruling Ends Services Gay Ban*, *GUARDIAN*, Sept. 28, 1999, at 3.

123. See Alexander Nicoll, *Military's Sexual Orientation Rules Set to Change*, *FIN. TIMES*, Jan. 12, 2000, at 3; Michael Evans, *Guthrie Regrets Gay Inquisition*, *TIMES* (London), Jan. 13, 2000, at 8.

124. These rules may acquire statutory force if they are included in the new Armed Forces Bill, due in 2001.

Ministry of Defence is an offer of compensation, which those dismissed recently from the services on identical grounds can also apply for.¹²⁵

More broadly, the judgment clearly establishes, for public employment generally, that discrimination against gay men and lesbians is unlikely ever to be justified and that there is a need for recruitment and disciplinary codes in the rest of the public service to reflect the principles which have now been adopted by the military. And if public sector rules need tightening up, why not do the same for private sector employment? The Equal Opportunities Commission and Trades Union Congress¹²⁶ have said that the Government now needs to look urgently at extending the Sex Discrimination Act¹²⁷ to prevent discrimination based on sexual orientation.¹²⁸ If it did so, then four ex-servicemen and women would have been the catalyst for far-reaching improvements in the legal protection of gay men and lesbians. Also needing reform, following the Court's ruling on Article 13 in *Smith and Grady*, are the principles which govern challenges to administrative acts through applications for judicial review in the courts. In the Court's view, an applicant wishing to show irrationality in litigation within the United Kingdom should be more able to raise issues of the balance between rights and their restriction under the European Human Rights Convention than at present. It would be hard to draft legislation to achieve this, and such an isolated and limited statutory intervention into a purely case-law area would not necessarily work well. As it is, the Government is likely to take the view that all rights under the Convention are about to be directly enforceable in English law, including in proceedings for judicial review, via the Human Rights Act discussed immediately below. This "domestic remedy" problem should disappear with the change.

An even more recent judgment of the European Court of Human Rights, *Salgueiro da Silva Mouta v. Portugal*,¹²⁹ from December, 1999, has considered the rights of gay and lesbian parents. It establishes that their rights as parents cannot be limited simply because either or both of them are gay or lesbian. The decision of the Lisbon Court of Appeal, which gave parental responsibility for the applicant's daughter to his ex-wife, did so mentioning as one of its reasons (but in fact with decisive force) that he was gay and now

125. This includes the naval chef dismissed two days before the European Court of Human Rights judgment. See Richard Norton-Taylor, *Is This the Last Gay Man to Be Fired from the Forces?*, GUARDIAN, Sept. 25, 1999.

126. See *supra* note 8; Michael White, *Public Support "Growing" for Gay Worker Equality*, GUARDIAN, Apr. 19, 2000, at 11.

127. See *supra* note 7.

128. See Equal Opportunities Commission Press Release, *EOC Urges Government to Take This Opportunity to Create Equality for All*, Sept. 27, 1999, accessible via <http://www/eoc.org.uk/html/press_releases_1999_19.html> (visited Jan. 10, 2000).

129. *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96 (1999), available from the Court's website at <<http://www.echr.coe.int>> (visited Jan. 25, 2000).

living with a male partner. This limited his right to family life under Article 8: the Portuguese court was legitimately seeking to protect the interests of the child, but gave too much weight to the fact of his sexual orientation. Such discrimination was contrary to the Convention if it had no objective or reasonable justification, had no legitimate aim, or was disproportionate to the aim sought to be achieved. Because that was the case here, there was a violation of Article 8 taken together with Article 14.¹³⁰

4. *Case Pending in Strasbourg*

In the case of *A.D.T. v. United Kingdom*,¹³¹ a gay man challenged a criminal conviction which followed after police found videotapes at his house recording consensual sex between him and several other men in his bedroom. He argued unsuccessfully in the English court that these acts were covered by section 1 of the Sexual Offences Act 1967,¹³² which decriminalized consensual sex between men. But the 1967 Act protects only sex between two men in private, defining "private" as to exclude situations where there is a third person taking part or present.¹³³ As a result, he was convicted of gross indecency under section 13 of the Sexual Offences Act 1956,¹³⁴ he then went to Strasbourg, arguing that English law did not respect his private life under Article 8 and that the law was discriminatory under Article 14 in applying this offense to him, which could not be used against lesbians or to heterosexual couples.¹³⁵ Though an earlier application to Strasbourg on similar grounds

130. For the text of Article 8, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 221, *supra* note 90. For the text of Article 14, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, 213 U.N.T.S. 221, *supra* note 94.

131. *A.D.T. v United Kingdom*, App. No. 35765/97, summary by Court Registrar of hearing on Nov. 30, 1999, available from the Court's website at <<http://www.echr.coe.int>> (visited Jan. 25, 2000). The case was originally known as *S. v. United Kingdom*.

132. Sexual Offences Act, ch. 60. For the background to this legislative watershed, see Britton, *supra* note 2, at 266-70.

133. Sexual Offences Act 1967, ch. 60, § 1(2). Interpreted broadly, this provision means that a situation where two men have sex but a third person is elsewhere in the same building is not necessarily private, indicating that hotels and roommates may be subject to liability.

134. This is the modern incarnation (unchanged) of the Criminal Law Amendment Act 1885 § 11; see Britton, *supra* note 2, at 268 n.28. A group of gay men called the Bolton Seven have also been in the news following their convictions, on a similar basis, from a private videotape. After an unsuccessful appeal to the Court of Appeal (Criminal Division) in March 1999, one of the seven, Terry Connell, planned to start an action in Strasbourg but died in March 2000.

135. For the text of Article 8, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 221, *supra* note 90. For the text of Article 14, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, 213 U.N.T.S. 221, *supra* note 94.

was rejected at the investigation stage,¹³⁶ in November, 1999, A.D.T.'s case had a hearing before the European Court of Human Rights;¹³⁷ judgment is now awaited.

5. *The European Convention in English Law: The Human Rights Act 1998*

This legislation, which comes into effect on October 2, 2000,¹³⁸ was only a bill at the time the earlier article was completed. It transforms the legal landscape of domestic English law by "incorporating" into it the law of the European Convention (meaning the positive treaty rules themselves which bind the United Kingdom, plus all relevant case-law, past and future, from the institutions in Strasbourg). This means that, under the Human Rights Act, all public authorities¹³⁹ are required to act in ways which respect the catalogue of rights in the Convention and its linked Protocols, with the judges required to interpret English law, as far as possible, in such a way as to be consistent with these rights.¹⁴⁰ Courts are to give redress (including awards of damages and the usual remedies against unlawful administrative action) and will do so both where an incidental question about a Convention right is raised within traditional litigation and where a separate action is brought under the Human Rights Act itself.¹⁴¹

However, in line with the traditions of the British Constitution, which hold that any Parliament can undo the work of any previous Parliament, the Act has no special standing in English law. It is not therefore like a Bill of Rights, which might have constitutional, superior, or entrenched status; under it, judges are not empowered to invalidate or to refuse to apply future primary legislation which violates any of the Convention rights which the Act

136. See *Johnson v. United Kingdom*, App. No. 10389/83, 47 Eur. Comm'n H.R. Dec. & Rep. 72 (1986).

137. See Julia Hartley-Brewer, *Gay Briton Goes to Europe in Fight over Indecency Charge*, GUARDIAN, Dec. 1, 1999.

138. The legislation is already in effect, in the sense that the "Convention rights" defined in the Human Rights Act 1998, ch. 42, § 1, provide one of the limits to the exercise of legislative and executive power by the newly-devolved bodies for Scotland (the Scottish Parliament and Scottish Executive), Wales (the National Assembly for Wales), and Northern Ireland (Northern Ireland Assembly). See Scotland Act 1998, ch. 46, §§ 29(2)(d), 57(2), 126(1); Government of Wales Act 1998, ch. 38, § 107; Northern Ireland Act 1998, ch. 47, §§ 6(2)(c), 24, 98(1). In Northern Ireland there is now a new Human Rights Commission, one of whose tasks is to review proposed local legislation for its conformity to the Convention and to take and support legal proceedings involving human rights questions. See Northern Ireland Act 1998, ch. 47, §§ 68-70.

139. Widely, but vaguely, defined, in of the Human Rights Act 1998, ch. 42, § 6.

140. See *id.* §§ 2-3.

141. See *id.* § 7.

protects,¹⁴² nor does its introduction even affect pre-existing primary legislation which infringes a Convention right.¹⁴³ And where secondary legislation (rules adopted by Ministers or other Government bodies within a framework laid down by Parliament) is challenged on Convention grounds, it will be an absolute bar to such challenge that the secondary legislation was compelled to take the form it does by its empowering statute.¹⁴⁴ The most that judges in the higher courts can do in such situations is to make a “declaration of incompatibility” between the statute in question and one or more Convention rights, which has no legal effect either on the statute so impugned or on the parties in the case.¹⁴⁵ The only consequence is to empower (but not compel) the Government to ask Parliament for authorization to modify the offending legislation by regulation, without needing to go through the full Parliamentary process.¹⁴⁶

Two immediate effects of this new legislation will be: (1) to save many litigants who want to raise points based on the Convention from wasting time and money by litigating through the English legal system, losing in the end, then starting a separate action against the United Kingdom in Strasbourg (but they will still be able to do so if they fail to get satisfaction domestically); and (2) to force English judges to be more aware of the accumulated interpretative material from Strasbourg than they have needed to be until now, but also to have to back their own judgment where such material provides no clear answer to a concrete case before them. In situations where the law of the Convention is in a state of evolution, however slow—the rights of sexual minorities are a good example—English judges will have to “take the temperature” of this evolution and even perhaps anticipate its next stages. To do this will require a radical shift of approach from the English judiciary, involving a focus on rights defined much more broadly than in the traditions of English law and a willingness to undertake the balancing of individual rights against State power. This new activity will bring judges into the spotlight by “judicializing” many disputes and areas of regulation which hitherto have been resolved purely by the political process or by legislation, over whose shape and principles the judges have traditionally had no control and in whose drafting they have little say. In that sense, the English judiciary and the common law will never be the same again. This extended role for the

142. But Ministers proposing legislation after the Act comes into force will have to certify to Parliament either their belief in the Bill’s compatibility with the Convention rights or the Government’s wish to proceed with the Bill despite its uncertainty on compatibility. *See id.* § 19.

143. *See id.* § 3(2).

144. *See id.* § 3(2)(c).

145. *Id.* § 4. Only the higher courts (High Court or above) can make such a declaration, and the Crown has the right to intervene, where a party requests the Court to make such a declaration. *See id.* § 5.

146. *See id.* § 10.

courts will create a new kind of dialogue (though an indirect one) between the judges of the European Court of Human Rights and those in the English courts, which will give each set of judges a new influence on the others and may accelerate the pace of legal change.

As far as gay men and lesbians and their rights are concerned, the Human Rights Act 1998 will have a real practical impact: the risk, cost, time, and effort at stake in order to raise issues of fundamental rights in court will all be dramatically reduced. Campaigning organizations may thus shift their focus from a concentration on persuading Government and Parliament to change the law through legislation towards a renewed strategy of encouraging and supporting carefully chosen test cases in the English courts. Such litigation will have as its eventual prize recognition of extended rights for gay men and lesbians linked to private life and family life under Article 8 of the Convention¹⁴⁷—even perhaps rights linked to marriage and the founding of a family under Article 12¹⁴⁸—and acceptance of a free-standing principle of non-discrimination between heterosexual and gay and lesbian people and relationships under Article 14.¹⁴⁹ Insofar as these contradict existing legislation, or the current interpretation of existing legislation—as in most part they do—then this will be a test both of the judiciary's willingness to embrace a European purposive approach to statutory interpretation and of the Government's willingness to use its powers under the Act to change the law quickly and simply, if it proves incompatible with rights under the Convention. To reduce the risk of being caught out in court, many Government departments have been undertaking a human rights audit of their rules and procedures;¹⁵⁰ this explains the long delay between the enactment of the new law and its entry into force, as does the training program for judges introduced by the Lord Chancellor's Department.

147. For the text of Article 8, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 221, *supra* note 90.

148. For the text of Article 12, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 12, 213 U.N.T.S. 221, *supra* note 105.

149. For the text of Article 14, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, 213 U.N.T.S. 221, *supra* note 94. On the impact of the Human Rights Act on sexual minorities, see also Ian Karsten QC, *Atypical Families and the Human Rights Act: The Rights of Unmarried Fathers, Same Sex Couples and Transsexuals*, EUR. HUM. RTS. L. REV. 195 (1999).

150. Other agencies have been involved in this process. For example the Law Commission, the permanent statutory law reform body for England and Wales, has been reviewing the English law on bail, to assess its compatibility with Article 5 of the Convention and the case-law under it, in order to avoid future actions under the Human Rights Act. The Commission's consultation paper, *Bail and the Human Rights Act 1998*, recommends changes in the law but also additional training and guidance for magistrates and judges. Consultation Paper No. 157 *Bail and the Human Rights Act 1998* (1999). The report is available on the Law Commission website at <<http://www.lawcom.gov.uk>> (visited May 8, 2000).

B. *The Law of the European Community*

1. *Background*

Community law has two features which make it specially attractive to gay and lesbian pressure groups seeking ways to improve the specific legal protections available within national legal systems. First, if European Community law has, or adopts, a rule affecting a situation across the Community, this rule may have "direct effect," meaning that judges in national courts are obliged to give effect to it and that individuals can rely on such a rule in national litigation. The doctrine of "direct effect" is a complex one, invented and refined by the European Court of Justice in Luxembourg, but it is a key weapon in the fight for legal uniformity in all member-states and for the efficacy of Community law as a legal order integrated into the legal systems of the member-states.¹⁵¹ Second, and relatedly, Community law requires judges and courts within national legal systems to give priority to rules of Community law where they are in conflict with national rules, whatever the national constitutional position. This similarly is designed to ensure that no member-state (or national judge) has any excuse for failing to implement or respect rules whose source is in Community law. It follows, therefore, that any Community law rules which already exist, or could be legislated at Community level, and which improve the position of gay men and lesbians over the situation in English law, will in effect modify English law from without. Thus, there would be no need to persuade Government, Parliament, or judiciary of the good sense behind the changes because their European pedigree would short-circuit the whole debate.

2. *Case-Law on the Rights of Gay Men and Lesbians*

Decided as the earlier article was in the course of publication, *Grant v. South-West Trains Ltd.*¹⁵² in the European Court of Justice (E.C.J.) was a major disappointment to gay and lesbian pressure groups in England, in particular, to Stonewall, which had supported the case. The Court refused to follow the proposals of its own Advocate General and to hold that discrimination based on sexual orientation in relation to pay in employment fell within the principle of equality under Article 119 of the Treaty of Rome.¹⁵³ Instead, the Court held that Article 119 protected only equality between women and men: to deny a lesbian employee's partner a financial

151. STEPHEN WEATHERILL & PAUL BEAUMONT, *EEC LAW* 392-453 (3d ed. 1999).

152. Case C-249/96, *Grant v. South-West Trains Ltd.*, 1998 E.C.R. I-636. See also Mark Bell, *Shifting Conceptions of Sexual Discrimination at the Court of Justice: From P. v. S. to Grant v. SWT*, 5 EUR. L.J. 63 (1999).

153. Now Article 141, since the entry into force of the Treaty of Amsterdam.

benefit because she was of the same sex as the employee was not discrimination "on grounds of sex," when the male partner of a gay male employee would have been treated in exactly the same way. This effectively put a stop to the movement which had been gathering force, encouraged by the European Court of Justice in *P. v. S. and Cornwall County Council*,¹⁵⁴ which held employment discrimination against a transsexual to be contrary to the Equal Treatment Directive,¹⁵⁵ leaving transsexuals with greater protection under Community law than lesbians and gay men. There were only two crumbs of comfort in *Grant*. First, the European Court specifically mentioned the European Human Rights Convention and the fact that discrimination against gay men and lesbians is not yet recognized as an automatic breach of the Convention (*a contrario*, were this to be the case, it would encourage the E.C.J. to look again at *Grant*); second, it mentioned the possibility of legislation at the European level, under Article 6(a) of the Treaty of Amsterdam.¹⁵⁶ Though Lisa Grant failed in her attempt to get travel privileges for her lover as a matter of law, the train operating companies in the United Kingdom have now agreed to a common policy of extending such privileges to same-sex partners.¹⁵⁷

An immediate effect of the judgment in *Grant* was on a case pending at the time of the earlier article, *R. v. Secretary of State for Defence, ex parte Perkins*.¹⁵⁸ Terry Perkins, fired from his job in the Navy when his sexuality came to light, hoped to use the Equal Treatment Directive¹⁵⁹ to attack the discriminatory policy of the armed forces in the United Kingdom in discharging gay men and lesbians.¹⁶⁰ The Community law aspects of the issue had already been referred to the European Court of Justice by the Queen's

154. Case C-13/94, *P. v. S and Cornwall County Council*, 1996 E.C.R. I-2143. For sources discussing this judgment, see Bell, *supra* note 152, at 63 n.2. Following the judgment, the Sex Discrimination (Gender Reassignment) Regulations were introduced for the United Kingdom (SI 1999/1102), extending the Sex Discrimination Act 1975, ch. 65, and giving the Equal Opportunities Commission the brief to develop Codes of Practice to assist employers in complying with their new responsibilities.

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

156. See *infra* Part III.B.3.

157. See Colin Blackstock, *Gays Win Rail Travel Perk*, GUARDIAN, Oct. 5, 1999.

158. *R. v. Secretary of State for Defence ex parte Perkins*, TIMES (London), Apr. 8, 1997 (Q.B.), discussed by Britton, *supra* note 2, at 302-03, 315.

159. See Council Directive No. 76/207, *supra* note 155.

160. For the successful use of the European Convention to achieve this result, see *supra* Part III.A.3. The proceedings in *Lustig-Prean and Beckett v. United Kingdom* were suspended in Strasbourg while the outcome of the *Perkins* case was awaited in Luxembourg and began again once the case was withdrawn from the roll there.

Bench Division in London when judgment was given in *Grant*.¹⁶¹ In an unusual move, the European Court contacted Mr. Justice Lightman, the English judge who had made the reference in *Perkins*, suggesting that he should withdraw it, the implication being that *Grant* had now made the position clear. He did so, with reported reluctance, on July 13, 1998,¹⁶² with the result that Terry Perkins's action could go no further and fell to be determined by English law alone, which was not willing to overturn the policy of the armed forces.¹⁶³

3. Implementation of Treaty of Amsterdam: Future Legislation

The Treaty of Amsterdam was the tangible legal outcome of the Amsterdam meeting of heads of government of EU member-states in October 1997; after a typically lengthy ratification process in those countries where this was necessary,¹⁶⁴ the Treaty entered into force on May 1, 1999. Apart from integrating into one document, with virtually all Articles thus re-numbered, all the existing rules from the Treaty of Rome and those newly added, the Treaty of Amsterdam also brings in new principles and powers. Of these one is directly relevant to gay men and lesbians: Article 6(a) of the Treaty of Amsterdam (now Article 13 of the renumbered Treaty establishing the European Community) specifically makes provision for legislation at Community level:

Without prejudice to other provisions of this Treaty and within the limits of powers conferred on it by the Community, the Council, acting unanimously on a proposal by the Commission, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.¹⁶⁵

161. Case C-249/96, *Grant v. South-West Trains Ltd.*, 1998 E.C.R. I-636. See also Mark Bell, *Shifting Conceptions of Sexual Discrimination at the Court of Justice: From P. v. S. to Grant v. SWT*, 5 EUR. L.J. 63 (1999).

162. See Stonewall Press Release, July 13, 1998.

163. See Bell, *supra* note 152, at 78-79. As Bell points out, factual distinctions could have been made between *Grant*, which was about benefits for an employee's partner, and *Perkins*, which was about the more fundamental right to work; but the European Court was clearly reluctant to re-open the debate around sexual orientation. See *id.*

164. In the United Kingdom, see the European Communities (Amendment) Act 1998, ch. 21.

165. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, art. 6(a), O.J. C 340/1 (1997) (entered into force May 1, 1999).

This makes clear what had previously been in doubt—the Community's legislative competence in the area of discrimination—and also frees discrimination questions from the narrow field of employment, which is the context within which most cases about sexual orientation in Community law have so far been argued. In November 1999, the Commission announced plans for a Directive which will prohibit discrimination—including on grounds of sexual orientation—in employment, also a Directive prohibiting discrimination on grounds of race or ethnic origin in a wider range of areas. The setback of *Grant* and *Perkins* should therefore prove temporary, provided that the complex legislative machinery of the Community can be successfully mobilized to deliver new laws improving the protection given to gay people and lesbians.

IV. CONCLUSIONS—AND THE FUTURE

There are two opposing tendencies within the gay movement in England. In the first, whose origins lie in the radical gay liberation movement of the 1960s, there is acute mistrust of established institutions, which mirrors its rejection of conventional relationships and morality. For those at this end of the spectrum, concessions won from the heterosexual majority through reason and dialogue are dangerous illusions, masking the real, oppressive nature of the State and fear and hate of gay people. Direct action is what counts. The other tendency, by contrast, believes in the rationality of politicians, Ministers, and judges. It holds the law and its personnel capable of delivering real justice to gay men and lesbians in the long term, through a slow but sure process of incremental change fueled by persistent and skilled advocacy. Its members think that because the gay and lesbian cause is right, it must ultimately win over (in both senses) politicians and judges, and that it is appropriate to use the vocabulary and styles of argument of the law at every opportunity.

It will be obvious to anyone who has read this far that the victories recorded in this Article are those which campaigners of the second tendency just described would want to claim as theirs, and as vindicating their approach. But what do the judgments and changes recorded above really amount to? Readers from outside the English version of the common law tradition will certainly have noticed in the account of the English judgments in this Article how careful judges are *not* to engage with what might be thought the big questions of fairness, justice, equality, or discrimination. In that sense, they are not landmark cases, even though they do change the law. It is as if, having had food rationing in the Second World War, a hungry people still thought it socially unacceptable to enjoy talking about and eating food, even though it is now widely available: any bananas getting eaten do so in private and without any appreciative remarks.

This rhetoric of reticence in the English judiciary encourages those involved in the law—which includes gay and lesbian activists of the second tendency—to count as momentous events changes which to an outsider look like tinkering at the edges of the law as it affects gay men and lesbians. This might be said of both *Fitzpatrick*¹⁶⁶ and *Smith v. Gardner Merchant*,¹⁶⁷ though perhaps not of *Lustig-Prean and Beckett*.¹⁶⁸ In any event, change (however small) is always more visible than stasis, and the context of overwhelming detail, within which judges have to find the freedom to innovate, encourages observers to celebrate decisions which are remarkable only because of the narrow and unpromising context from which they spring. In that sense, English law encourages an obsession with the micro level and a collective forgetfulness that a more macro level exists at all.

It is Europe which forces us to remember the macro level, since the Continental legal tradition, which influences both European human rights law and European Community law, is happy to think in terms of generalities and principles—and the legal integration of the United Kingdom into Europe means that this tradition can no longer be ignored by British Governments or English judges. An understandable sense of bewilderment, in a landscape without recognizable landmarks, characterizes some English reactions to the prospect of the Human Rights Act 1998 entering into force;¹⁶⁹ this development may well be the most important this century (or next century, depending on how one counts, not only for gay men and lesbians but for the evolution, reasoning, and methods of English law.

If predictions were the name of the game, it would be safe to guess that the age of consent for gay sex will be reduced to sixteen in England and Wales (seventeen in Northern Ireland) and that section 28 of the Local Government Act 1988 will be repealed, in both England and Wales and Scotland, before the end of the year 2000. Whether, and when, English law will acquire a general principle of non-discrimination available to gay men and lesbians is harder to be sure about. Smaller victories, in the English style, are likely to precede it: greater rights for same-sex couples in property and inheritance and repeal or reform of some of the criminal offenses used against gay men. If no single conclusion about how English law deals with the claims of gay men and lesbians emerges at the end of this account of the last two years' activities and events, that is in itself significant. Where the law comes from and how it changes is too complex to allow for simple summaries. Like the gay men and lesbians who are its subjects, objects, clients, and consumers, the law does not speak with one voice. Nor, perhaps, should it.

166. See *supra* Part II.B.

167. See *supra* Part II.C.

168. See *supra* Part III.A.3.

169. See *supra* Part III.A.5.

