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You've Built the Bridge, Why Don't You Cross It? A Call for State Labor Laws Prohibiting Private Employment Discrimination on the Basis of Sexual Orientation

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YOU'VE BUILT THE BRIDGE, WHY DON'T YOU CROSS IT? A CALL FOR STATE LABOR LAWS PROHIBITING PRIVATE EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

David E. Morrison*

The compelling interests, therefore, that any state has in eradicating discrimination against the homosexually or bisexually oriented include the fostering of individual dignity, the creation of a climate and environment in which each individual can utilize his or her potential to contribute to and benefit from society, and equal protection of the life, liberty and property that the Founding Fathers guaranteed to us all.¹

A kinder, gentler nation.² That is what the United States has offered to its 250 million citizens for the 1990s. The Americans with Disabilities Act³ (ADA) took effect in 1992 for covered entities including employers of twenty-five or more employees. It extends protection to "some 43,000,000 Americans [with] one or more physical or mental disabilities⁴ who previously had little legal recourse to address discrimination.⁵ In addition, certain Americans will have the benefit of the 1991 Civil Rights

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² President George Bush first adopted his "kinder, gentler" theme at the 1988 Republican National Convention, where he proclaimed, "I hope to stand for a new harmony, a greater tolerance. We've come far, but I think we need a new harmony among the races in our country. We're on a journey to a new century, and we've got to leave the tired old baggage of bigotry behind." Jack Nelson, Bush Promises New Caring Policies to Build on the President's Record, L.A. TIMES, Aug. 19, 1988, at 4, 7. Bush repeated his pledge to the nation in his Inaugural Address, where he said his goal was "to make kinder the face of the nation and gentler the face of the world." Julie Johnson, Tough Words to Translate: 'Kinder and Gentler,' N.Y. TIMES, Jan. 25, 1989, at A20.
⁴ Id. § 12101(a)(1).
⁵ Id. § 12101(a)(4).
Act, which also took effect in 1992. This legislation strengthens federal civil rights laws regarding a person's race, gender, religion, and national origin. Moreover, the Age Discrimination in Employment Act (ADEA), which prohibits employment discrimination based upon age, provides protection for the growing segment of our labor force that is over age forty. On the face of the law, therefore, one could conclude that America finally is beginning to eliminate arbitrary and prejudicial employment decisions which have prevented so many of our citizens from fully enjoying their lives as Americans.

These civil rights laws, however, have not ended senseless discrimination. The simple reason is that behind the civil rights laws is the common law, which recognizes the employment-at-will doctrine. This doctrine allows employers and employees mutually to retain the right to end their employment relationship without any explanation or notice.

9. Ronald E. Kutscher, New BLS Projections: Findings and Implications, 114 MONTHLY LAB. REV. No. 11, at 3, 6 (reporting that the numbers of men and women in the labor force aged 55 and over are projected to grow by 3.2 and 3.5 million, respectively, between 1990 and 2005).
11. Courts continue to apply the employment-at-will doctrine. In Piekarski v. Home Owners Savings Bank, the Court of Appeals for the Eighth Circuit reversed the district court's finding of liability against an employer for discharging the employee. 956 F.2d 1484, 1496 (8th Cir.), cert. denied, 113 S. Ct. 206 (1992). The court concluded, "Although [the employer] may have lacked 'good cause' to fire [the employee], Minnesota is an employment-at-will state. Thus, neither a court nor a jury can second guess [the employer's] decision unless [the employee] has proven all the elements of a recognized cause of action." Id. For other examples of the continuing vitality of the employment-at-will doctrine, see Crenshaw v. General Dynamics Corp., 940 F.2d 125, 128 (5th Cir. 1991) (finding the employee to be an "employee at will, subject to termination at any time with or without cause"); Wilmer v. Tennessee Eastman Co., 919 F.2d 1160, 1163 (6th Cir. 1990) ("Tennessee follows the employment-at-will doctrine."); Gilbert v. Tulane Univ., 909 F.2d 124, 126 (5th Cir. 1990) ("An at-will employee is free to quit at any time without liability to his or her employer and may be terminated at any time, for any reason or for no reason at all, provided the termination does not violate any statutory or constitutional provision."); Darlington v. General Elec., 504 A.2d 306, 309-10 (Pa. Super. Ct. 1986) (tracing the history of employment-at-will
At its inception, the common law provided employees with the option of pursuing the "American Dream" by accepting new jobs with different employers and climbing the ladder of success to the top. Under the employment-at-will common law, employees theoretically had the "freedom to quit" their job to pursue a better career elsewhere. The reality in the United States, however, is that employment-at-will allows employers to remove employees from their positions, or to deny applicants a position, based upon the employer's mood or whim, while employees rarely quit voluntarily.

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12. See Summers, supra note 10, at 485 (crediting the first announcement of the rule to a late 19th-century treatise writer).
13. See Epstein, supra note 10, at 966.
14. Professor Jack Steiber found that [some 60 million U.S. employees are subject to the employment-at-will doctrine, and about 2 million of them are discharged each year . . . . About 150,000 of these workers would have been found to have been discharged without just cause and reinstated to their former jobs if they had had the right to appeal to an impartial arbitrator as do almost all unionized workers.

Jack Steiber, Recent Developments in Employment-at-Will, 36 LAB. L.J. 557, 558 (1985) (emphasis added). The Labor Management Relations Act, 29 U.S.C. § 141 (1988), provides an important limitation on the employment-at-will doctrine. The Act prohibits an employer from discharging an employee for, among other things, engaging in union activities. See id. § 158a(3); Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983). In addition, most collective-bargaining agreements between management and unionized labor have express agreements that management "may not discipline or discharge an employee without cause, just cause, or . . . . for sufficient and reasonable cause." MATTHEW A. KELLY, LABOR AND INDUSTRIAL RELATIONS 47 (1987) (emphasis omitted); see also Groves v. Ring Screw Works, Ferndale Fastener Div., 498 U.S. 168, 169 (1990) (finding that the collective-bargaining agreement prohibited discharges except for "just cause"); Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 401 (1988) (finding that the collective-bargaining agreement protected the employees from "discharge except for 'proper' or 'just' cause"); McDonald v. West Branch, 466 U.S. 284, 286 n.2 (1984) (quoting the collective-bargaining agreement as providing "the right to . . . . suspend or discharge employees for proper cause"); Clayton v. International Union, United Auto., Aerospace & Agric. Implement Workers, 451 U.S. 679, 682 (1981) (finding that the plaintiff had sought grievance arbitration because his dismissal was not for just cause and therefore violated the collective-bargaining agreement); THEODORE KHEEL, LABOR LAW § 62.06(2) n.25 (1992) ("[A] collective bargaining agreement of a unionized employer . . . . often will provide that an employee may not be discharged without cause . . . ."). These just-cause provisions generally allow employees to challenge the employer's disciplinary decision under a grievance procedure for final arbitration. See KELLY, supra, at 47.

Eventually, state and federal laws began to chip away at this doctrine, providing protection for specific groups which were especially vulnerable to employers' whims. These civil rights laws prohibited employers from using protected statuses as the bases for employment decisions, thus narrowing the breadth of the employment-at-will doctrine. By limiting these laws to specific groups, however, the legislatures have allowed employers to continue to use the employment-at-will doctrine to justify arbitrary employment decisions which do not involve an employee's protected status. The need for expansion of the existing laws to include protection for groups currently subject to egregious discrimination therefore has not ceased.

Gay men and lesbians in particular are in need of protection because of unceasing prejudice. Early in 1991, William A. Bridges, the former vice president of human resources for Cracker Barrel Old Country Store (Cracker Barrel), distributed a memo to 106 stores in fourteen states declaring that Cracker Barrel would no longer "employ individuals in our operating units whose sexual preferences fail to demonstrate normal heterosexual values which have been the foundation of families in our society." Eager managers quickly adopted the policy, resulting in the firing of as many as twelve employees without warning or severance pay. On one termination notice, filed with the Georgia Department of Labor, the restaurant manager wrote:

Employee was terminated because his mannerisms do not reflect the behavior that we are looking for in a male employee. He has stated that he is homosexual and as a homosexual he does not fit into the traditional values that we beleive [sic] in and try to project as a company.

(9th ed. 1986) ("[M]ost workers regard resort to the market—that is, a change of employers—as a disaster rather than as an opportunity.").

16. See supra text accompanying notes 3–9. See generally KHEEL, supra note 14, §§ 62.04–05 (discussing the many federal and state statutes which have limited the employment-at-will doctrine). In addition to statutory protection, several common-law theories of wrongful discharge have emerged in many states. See id. § 62.06 (discussing the public policy exception, implied contracts, implied covenants of good faith and fair dealing, negligent discharge, libel and slander, intentional infliction of emotional distress, intentional interference with contract, and prima facie torts).


18. Id.

19. Id.
An even more concise termination notice stated that the employee was fired for being in “violation of company policy. The employee is gay.”  

Unquestionably discriminatory, the Cracker Barrel company policy outraged groups across the country.  

Cracker Barrel responded to pressure by rescinding the memo and stating that it no longer had a policy concerning gay men and lesbians.

The true outrage, however, is not merely what Cracker Barrel did, but rather that what Cracker Barrel did was legal in all but five states and the District of Columbia.  

A concern raised by this incident, and others like it, is that for the few employers that are caught with a “smoking-gun” memo and are forced to reform their policies because of public outrage, many more may discriminate against gay men and lesbians without public notice and therefore may fail to adopt such reforms. The Cracker Barrel incident demonstrated the need for legislation that protects an employee from discrimination on the basis of sexual orientation, bringing the promise of a kinder, gentler

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21. The group which seemed to voice the loudest opposition to Cracker Barrel’s policy was the gay-rights group Queer Nation, whose Atlanta chapter organized pickets and demonstrations outside Cracker Barrel establishments. See Johnson, supra note 17. The National Gay and Lesbian Task Force, an advocacy group based in Washington, D.C., formed a “telegram hotline” targeting Cracker Barrel’s chief executive officer, Dan W. Evins. Id. In addition to gay-rights groups, some stockholders expressed concern over the issue. New York City’s comptroller, Elizabeth Holtzman, and finance commissioner, Carol O’Cleireacain, wrote Cracker Barrel to express their objections to the policy because the municipal employees’ retirement fund, which they oversaw, controlled 88,000 shares of Cracker Barrel stock. Id.

22. Id. Despite its rescission, Cracker Barrel has refused to reinstate or provide back pay to any of the terminated employees. See id.; see also 20/20: Whom Do You Sleep With? (ABC television broadcast, Nov. 29, 1991) (transcript on file with the University of Michigan Journal of Law Reform).


24. Many other examples exist. Recently, a two-year-old internal memo surfaced from the C.J. Sergstrom & Sons company which outlined how the firm could legally continue to refuse to hire or promote based on sexual orientation. After this memo became public, the company announced that its written employee policies had been changed to specifically ban workplace discrimination against homosexuals. See Orange County Perspective; The Best Answer Is Legislation, L.A. TIMES, Oct. 24, 1991, at B10.

25. Throughout this Note, I will use the term “employee(s)” to refer to both employees and applicants.
nation to the substantial segment of the population who yearn for its fulfillment. The call for legal reform to prevent discrimination on the basis of sexual orientation has been prevalent since at least the 1970s. Part I of this Note examines sexual orientation as a protected status at the federal and state level. Tracing the development of case law interpreting Title VII, it is evident that current federal laws have been of little use to gay men and

26. Over 40 years ago, one study concluded that "37 per cent of the total male population has at least some overt homosexual experience to the point of orgasm between adolescence and old age." Alfred C. Kinsey et al., Sexual Behavior in the Human Male 650 (1948). It further reported:

10 per cent of the males are more or less exclusively homosexual . . . for at least three years . . .
8 per cent of the males are exclusively homosexual . . . for at least three years between the ages of 16 and 55 . . .
4 per cent of the white males are exclusively homosexual throughout their lives, after the onset of adolescence . . .

Id. at 651.

In 1989, the journal Science published a more contemporary study in order to estimate better the proportion of the U.S. male population with homosexual experiences. This report concluded that approximately 20.3% of all males had some homosexual experience in their lifetime. Among the respondents who related some same-sex experience, 11.9% indicated that their most recent contact was at age 15 or older; 6.7% reported their most recent contact at age 20 or older. See Robert E. Fay et al., Prevalence and Patterns of Same-Gender Sexual Contact Among Men, Science, Jan. 20, 1989, at 338, 346. "However, given the response biases that one can reasonably assume to operate, this new figure might be taken as a lower bound." Id. Assuming that the study is accurate, if the country's male population is approximately 125 million, then the gay male population is roughly between eight and 10 million. Studies of women have also found a significant level of same-gender sexual activity. See Alfred C. Kinsey et al., Sexual Behavior in the Human Female 474-75 (1953) (reporting that 13% of women had "overt contacts to the point of orgasm" with other women); see also Gay Rights Coalition v. Georgetown Univ., 536 A.2d 1, 33 (D.C. 1987) ("We know one basic fact—that homosexual and bisexual citizens have been part of society from time immemorial. These orientations, like that of heterosexuals, have cut across all diverse classifications—race, sex, national origin, and religion, to name but a few.")

27. Gays have shown their desire for a change by voting in large numbers for Bill Clinton in the 1992 presidential election. See Jeffrey Schmalz, The 1992 Elections: The States—The Gay Issues, N.Y. Times, Nov. 5, 1992, at B8 (reporting that 72% of those who identified themselves as gay or bisexual voted for Bill Clinton in the 1992 presidential election). President Clinton's efforts to make good on his campaign promise to lift the military's ban on homosexuals may hold out hope to the gay male and lesbian communities that the previous administration's promise for a kinder, gentler nation will have new vigor in the next four years. See Eric Schmitt, The Inauguration; Clinton Set to End Ban on Gay Troops, N.Y. Times, Jan. 21, 1993, at A1.

This Note, while referring explicitly to gay men and lesbians, contemplates and supports the proposition that protection against employment discrimination also should extend to those individuals who identify themselves as bisexual.

28. See infra notes 85-87 and accompanying text.
lesbians. As a result, employment discrimination against homosexuals has been widespread.

Part II of this Note discusses how the foundation for reform already has been created at the state level. This foundation began with state legislatures’ repeals of sodomy laws. This decriminalization, or “legalization,” of private sexual activity should be recalled by states considering a prohibition of employment discrimination on the basis of sexual orientation. State legislatures also should note recent state actions to protect the right of employees to engage in legal activities, such as smoking, outside of the workplace. These legislatures have voiced strong concerns for the right to privacy and the right to work, which are violated when an employer makes employment decisions based upon an employee’s legal activity conducted outside of work that does not affect his work performance.

Finally, Part III of this Note calls on the states that have legalized private homosexual activity and have protected legal activities conducted outside of the workplace to follow the internal logic of their laws and protect employees from employers who discriminate on the basis of sexual orientation in the same fashion that employees who smoke are protected from overintrusive employers. By requiring employers to focus more on on-the-job misconduct, and less on off-the-job, legal activities, states can bring more of us a little closer to realizing the promise of living in a kinder, gentler nation.

29. See infra notes 32–57 and accompanying text.
30. See infra notes 73–80, 90 and accompanying text.
31. There are, of course, many legal activities that an employee may engage in outside of the workplace which one could argue should not be the proper concern of an employer. Motorcycle riding, wind surfing, bungee jumping, and even having long hair may legally, under the employment-at-will doctrine, be the basis for an employer’s decision to fire or not to hire an employee. A proposal for protecting all legal activities from becoming an employer’s basis for an employment decision would mean a major modification, if not total eradication, of the employment-at-will doctrine; such a proposal is beyond the scope of this Note. Instead, this Note singles out an employee’s sexual orientation toward lawful sexual practices from all of the other potential off-the-job, legal activities because it is currently the basis for a large amount of employment discrimination. See infra notes 82–89 and accompanying text. The same cannot be said about all other legal activities.

Furthermore, this Note draws an important connection between sexual orientation and actual sexual practices. This connection is essential, for it is the very same connection which is drawn by employers who discriminate on the basis of sexual orientation: their disgust for an employee who potentially is sexually active with a person of the same sex is the reason why employers discriminate against gay men and lesbians. See supra text accompanying notes 17–20. This Note asserts, therefore, that protection for employees must not rest on their actual sexual practices, but rather their orientation to engage in those sexual practices.
I. SEXUAL ORIENTATION AS A PROTECTED STATUS

A. Federal Law

Title VII of the Civil Rights Act\textsuperscript{32} protects specific groups of employees from employment discrimination. While Title VII protects on the basis of race, color, religion, sex, and national origin,\textsuperscript{33} courts consistently have found that Title VII was not intended to protect sexual orientation. In \textit{Smith v. Liberty Mutual Insurance Co.},\textsuperscript{34} the plaintiff argued that Title VII prohibited an employer from considering an applicant's sexual orientation in hiring, and therefore prohibited the defendant employer from refusing to hire the plaintiff because of his "effeminate" characteristics.\textsuperscript{35} The court reasoned that there are many freedoms offered to United States citizens, among them the freedom "to do wrong."\textsuperscript{36} The court found that the intent of Congress in passing the Civil Rights Act of 1964 regarding sex discrimination in employment was "the guarantee of equal job opportunity for males and females."\textsuperscript{37} Congress, the court found, clearly had not forbidden discrimination based on sexual orientation;\textsuperscript{38} therefore firing the plaintiff because of

\begin{itemize}
  \item \textit{Id.} § 2000e-2(a).
  \item \textit{Id.} § 2000e-2(a).
  \item \textit{Id.} at 1099.
  \item \textit{Id.}
  \item \textit{Id.} at 1101 (quoting Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1091 (5th Cir. 1975)).
  \item The court supported its finding by noting that Congress was considering H.R. 5452, a bill forbidding discrimination based on sexual orientation. Until Congress enacted such protection, the court refused to limit employers' freedom to hire. \textit{Id.} at 1101 n.6. In \textit{Voyles v. Ralph K. Davies Medical Center}, a California federal district court was emphatic in its opinion that Title VII simply does not speak to sexual preference, "transsexual" discrimination, or any permutation or combination thereof. ... Situations involving transsexuals, homosexuals or bi-sexuals were simply not
his effeminate characteristics could be “wrong” only in a moral sense. Absent a statutory proscription, the employer’s actions were legal. The plaintiff’s complaint was dismissed for failure to state a claim of sex discrimination.\textsuperscript{39}

Courts have refuted many arguments for extending Title VII’s protections to employment discrimination against gay men and lesbians. In \textit{DeSantis v. Pacific Telephone & Telegraph Co., Inc.},\textsuperscript{40} the plaintiffs alleged that their employer publicly stated that it would not hire homosexuals, and that their co-workers and supervisors harassed them because of their homosexuality.\textsuperscript{41} The court refused to read anything but the “traditional notions” of “sex” into Title VII\textsuperscript{42} and therefore refused to extend Title VII’s protection to homosexuality.\textsuperscript{43} The court dismissed a disproportionate impact argument that discrimination against homosexuals disproportionately affected men because homosexuality is more prevalent in men and because employers were more likely to discover homosexuality in men than in women.\textsuperscript{44} The court reasoned that to create protection for sexual orientation under the artificial bootstrap argument of protection for men in general would have frustrated Congressional intent because Title VII was not intended to protect sexual orientation.\textsuperscript{45} In addition, the

considered, and from this void the Court is not permitted to fashion its own judicial interdictions.” 403 F. Supp. 456, 457 (N.D. Cal. 1975), \textit{aff'd}, 570 F.2d 354 (9th Cir. 1978).

40. 608 F.2d 327 (9th Cir. 1979).
41. \textit{Id.} at 328.
42. \textit{Id.} at 329. The \textit{DeSantis} court cited \textit{Holloway v. Arthur Andersen & Co.}, 566 F.2d 659 (9th Cir. 1977), for its finding of the congressional intent behind Title VII. In \textit{Holloway}, the court refused to read “sex” as including protection for one who was undergoing a sex transformation. \textit{Id.} at 662-63. The \textit{DeSantis} court similarly held that discrimination because of effeminacy did not fall under Title VII protection. 608 F.2d at 332.
43. Because the court gave considerable deference to the Equal Employment Opportunity Commission’s (EEOC) interpretation of the statute which it was charged to enforce, it was persuaded by EEOC decisions which found “that when Congress used the word sex in Title VII it was referring to a person's gender and not to 'sexual practices.’” \textit{DeSantis}, 608 F.2d at 330 n.3 (quoting EEOC Dec. No. 76-75, 1976 Emp. Prac. Guide (CCH) ¶ 6495, at 4266 (Dec. 4, 1975)).
45. \textit{DeSantis}, 608 F.2d at 330-31. \textit{But see id.} at 333 (Sneed, J., concurring and dissenting) (arguing that if homosexual men make up a large portion of the male population then there would not be an improper “bootstrap,” and, therefore, the court should not have dismissed their claim).

DeSantis court rejected the plaintiffs' argument that an employer's preference for females who prefer male sexual partners over males who prefer male sexual partners was an illegal use of different employment criteria for men and women. Finally, the court rejected the plaintiffs' argument that their employer improperly considered the types of relationships that they had with their friends. This argument failed because the types of relationships which the plaintiffs sought to protect, homosexual relationships, were not protected by Title VII.

While the DeSantis court's dismissal of many plausible arguments for an extension of Title VII protection was a setback for gays, perhaps an even more damaging decision to gay rights was the Supreme Court's holding that the constitutional right to privacy does not encompass private consensual sexual activity between two adults of the same sex. In upholding the constitutionality of a Georgia law criminalizing sodomy, the Court refused to extend to homosexuals the same right to privacy granted for family relationships, marriage, procreation, and abortion. The Court further opined that the right to engage in consensual sodomy is not protected constitutionally as a fundamental right because it is neither

46. Id. at 331. For a discussion of the prohibition against applying different employment criteria for men and women, see Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (per curiam).

47. DeSantis, 608 F.2d at 331. Despite the ruling in DeSantis, the court in Wright v. Methodist Youth Services, Inc. held that a gay male employer who fired a male employee for refusing his sexual advances could be subject to a Title VII claim. The court found that if the employee were not male, he would not have been subject to the employer's sexual advances. 511 F. Supp. 307, 310 (N.D. Ill. 1981). While not on point with DeSantis, the Wright case indicates that same-gender sexual harassment may be covered by Title VII.


49. GA. CODE ANN. § 16-6-2 (Michie 1992) (prohibiting oral and anal sex between any two persons).

50. See Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (finding a liberty interest in the parental right to raise children).

51. See Loving v. Virginia, 388 U.S. 1, 12 (1967) (recognizing marriage as a fundamental right).

52. See Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (declaring unconstitutional a state law which prohibited the use of contraceptives); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (finding that procreation is a basic civil right).

53. See Roe v. Wade, 410 U.S. 113, 153 (1973) (recognizing a right to privacy in a woman's decision to have an abortion).
"implicit in the concept of ordered liberty" nor "deeply rooted in this Nation's history and tradition." The Court thus applied a rational basis test to the law and upheld Georgia's prohibition as rational because it was the sentiment of that state's majority. The Court's opinion could be the most significant reason that the gay male and lesbian population has not received legal protection at the federal level.

Not only have past federal legislative efforts to prevent employment discrimination on the basis of sexual orientation failed, but a national attempt to reform employment law arguably has left out protection for gay men and lesbians. The Committee for the National Conference of Commissioners on Uniform State Laws' Model Employment Termination Act (the Model Act), after four years of meetings, drafted a model statute protecting employees generally from employment decisions not based upon "good cause." This "good-cause" act

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55. Id. at 192 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).
56. Id. at 196.
57. The Court of Appeals for the D.C. Circuit has stated,

If the [Supreme] Court was unwilling to object to state laws that criminalize the behavior that defines the class [homosexuals], it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.

Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).

Although the Ninth Circuit later reversed the decision, a federal district court in California argued that Bowers did not require the application of only a rational basis test:

Given the absence of controlling authority in this area, this Court holds that classifications that disadvantage lesbians and gay men and impinge upon the right to engage in any homosexual activity must withstand either strict scrutiny because they impinge upon the right to engage in any type of homosexual activity or heightened scrutiny because they disadvantage a "quasi-suspect" class.


If the federal judiciary will not protect gay men and lesbians from the states, there seems little likelihood that it will protect them from private parties. Even if judges are beginning to recognize a homosexual's right to engage in "homosexual" activity, that recognition should supplement rather than preclude state prohibition of private employment discrimination.

58. MODEL EMPLOYMENT TERMINATION ACT prefatory note, at 4–6 (1991). Final, approved copies of this Act may be obtained by contacting the National Conference of Commissioners on Uniform State Laws, 676 North St. Clair Street, Suite 1700, Chicago, Ill. 60611.
would put an end to the employment-at-will doctrine. The Model Act, however, describes when off-duty conduct may be relevant to the employer—when the conduct is "relevant to the employee's performance on the job, to the employer's business reputation, or to similar concerns"—in which case it may be good cause for dismissal.

Valid reputational concerns, however, have been left undefined. Without any direction from the Model Act, a court or arbitrator likely would turn to existing law to determine the appropriate parameters. This approach, however, might validate employment decisions based on an employer's concern that its reputation for hiring gay men and lesbians will result in the loss of clients or customers. EEOC Guidelines state that a proper Bona Fide Occupational Qualification (BFOQ) under Title VII may not be based on "[t]he refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers." As Title VII only applies to race, color, religion, sex, and national origin, an employer's BFOQ would not be invalidated by a refusal to hire based on sexual orientation. Thus, it is currently legal for an employer to consider a client's or customer's preference regarding its employees' sexual orientation. The Model Act's vagueness severely weakens its attack on the employment-at-will doctrine, as it may offer protection only to employees already receiving statutory protection under Title VII, not to all employees. Gay men and lesbians, once again, may be faced with invidious workplace discrimination.

59. Id. prefatory note, at 6.
60. Id. § 1 cmt. (emphasis added).
62. The Model Act limits itself by the following comment: "An employer's discrimination in violation of applicable federal, state, or local law . . . is inconsistent with the requirement of good cause for termination." MODEL EMPLOYMENT TERMINATION ACT § 1 cmt. (1991). This limiting language strengthens the need for state laws prohibiting employment discrimination based on sexual orientation. An advisor to the Special Committee on Uniform Law Commissioners' Model Employment Termination Act, Mr. Eugene L. Hartwig, believes that the Model Act's language will be interpreted by courts to prohibit businesses from considering one's sexual orientation, permitting consideration only of concerns which affect an employee's on-the-job performance. According to Professor Theodore J. St. Antoine, Reporter for the Committee, however, the participants in the Conferences hesitated to afford protection for homosexual employees. Interview with Eugene L. Hartwig, American Bar Association, and Theodore J. St. Antoine, Professor of Law, University of Michigan Law School, in Ann Arbor, Mich. (Jan. 28, 1992).
In addition to federal civil rights legislation, most states provide civil rights protection through state statutes. Often, the state and federal statutes mirror one another in their scope, with major differences only in their procedural rules. To the extent that the Civil Rights Act of 1964 does not protect sexual orientation and has not been extended judicially to offer such protection, the same can be said of state statutes mirroring the Act.

States, however, have the power to go further than Congress in enacting stronger legislation to protect gay men and lesbians from employment discrimination. Five states have taken the lead in such legislation. Wisconsin was the first state to provide comprehensive protection to gay men and lesbians from employment discrimination. Since then, Connecticut, Hawaii, Massachusetts, and New Jersey have followed in protecting employees from discrimination based on sexual orientation. The battle does not end, however, when legislation is enacted, as pressure to repeal newly enacted statutes generally follows. These states are playing a leading role in

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63. See BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 743 n.23 (2d ed. 1983) (discussing how many state statutes closely parallel analogous federal statutes).

64. Id. at 740. State statutes of limitation may differ significantly from the statute of limitation under Title VII. Furthermore, nonpecuniary recovery under state law may be tax free to the claimant, while a Title VII back-pay award will be taxed fully. Id.

65. One state court relied on interpretations of the federal Civil Rights Act to refuse to extend protection to gay men and lesbians. See Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 595 P.2d 592, 611–13 (Cal. 1977) (refusing to extend protection to gays under the state Fair Employment Practices Act); cf. Harvard Law Sch. Coalition for Civil Rights v. President, 595 N.E.2d 316, 318 n.3 (Mass. 1992) (relying on case law interpreting Title VII and therefore refusing to extend the protection of a state civil rights statute to persons outside of the employment relationship); LaBore v. Muth, 473 N.W.2d 485, 488 & n.3 (S.D. 1991) (relying on federal court interpretations of the Civil Rights Act of 1964 to support its refusal to apply South Dakota's Human Relations Act to all forms of discrimination).


70. N.J. STAT. ANN. § 10:5-12 (West 1993).

71. William Rubenstein, director of the American Civil Liberties Union's Lesbian and Gay Rights Project, stated,

As long as there have been laws protecting gay people, efforts have sprung up to repeal them . . . . It's a consistent theme in the civil rights of gay people that we have to win twice. First we have to convince a legislature to protect our rights, then we have to stop the repeal efforts from overturning the legislative
building support for federal protection, but it most likely will not be politically feasible for Congress to take affirmative steps until a significant number of states have offered protection to gay men and lesbians.72 Because most state and federal courts have been unwilling to extend current civil rights laws to cover gay men and lesbians, and because Congress's hands will be tied until states have passed legislation protecting them, it is important that state legislatures take action now to stop the invidious discrimination against gay men and lesbians in the workplace.

The lack of protection for gay men and lesbians in private employment has resulted in a great deal of employment discrimination.73 Most companies that have strong equal-opportunity policies do not provide specific protection for gay men and lesbians.74 About two-thirds of gay men and lesbian women have reported witnessing "some form of hostility toward gay people on the job."75 A recent survey found that nearly fifteen percent of gay men and lesbians had experienced some form of job discrimination.76 The forms of discrimination vary but include termination, harassment, failure to promote, denial

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72. Massachusetts Representative Barney Frank, an openly gay member of Congress, believes that Congress "won't be able to pass federal legislation [protecting gays from discrimination] until a significant number of states [pass similar legislation]." Bunis, supra note 20, at 15.

73. See Rivera, supra note 10, at 805; see also Gay Rights Coalition v. Georgetown Univ., 536 A.2d 1, 35 (D.C. 1987) ("Despite its irrelevance to individual merit, a homosexual or bisexual orientation invites ongoing prejudice in all walks of life, ranging from employment to education, and for most of which there is currently no judicial remedy . . . .")

74. Keith H. Hammonds, Lotus Opens a Door for Gay Partners, BUS. WK., Nov. 4, 1991, at 80, 81 (reporting that "just 20% of companies with strong equal-opportunity policies explicitly cite sexual preference" as protected).


76. Martha Groves, Frequent Job Bias Leaves Little Recourse, Gays Say, L.A. TIMES, Oct. 5, 1991, at A1, A27 (reporting the results of a survey by Overlooked Opinion, a Chicago marketing research firm focusing on gay social and workplace issues, of 6500 gay men and lesbians). Gay rights advocates estimate that only one-tenth of gay employees are openly gay at work. See Hammonds, supra note 74, at 81. Thus, the 15% figure should be seen as a conservative representation of the actual discrimination which could be taking place.
of benefits for domestic partners, and job refusal. The "glass ceiling," above which few openly gay employees are able to climb, is as prevalent for gay men and lesbians as for any minority. Some gay employees, therefore, feel that they must go beyond what a heterosexual employee would do in order to succeed. As gay employees have no stereotypical professions, the playing field upon which gay and heterosexual employees compete is both vast and far from even.

II. LAYING THE FOUNDATION FOR REFORM AT THE STATE LEVEL

A number of states have laid the foundation for protecting the gay population from employment discrimination through two distinct legislative actions. The first is the repeal of state sodomy laws, thereby decriminalizing private, consensual sexual activity between adults and implicitly legalizing homosexual activity. The second is the enactment of laws prohibiting employers from considering whether an employee smokes tobacco outside of the workplace in employment decisions. This Note argues that those states that have undertaken these two actions should follow the internal logic of...
their laws and prohibit employers from basing employment decisions on whether or not an employee has engaged, and continues to engage, in private, consensual sexual activity with another adult of the same sex.\textsuperscript{31}

A. Repealing Sodomy Laws

The repeal of sodomy laws in some states has made possible the end of discrimination against gay men and lesbians in the workplace. As noted previously, \textit{Bowers v. Hardwick} established the continuing constitutional validity of states' sodomy laws.\textsuperscript{82} Historically, homosexuals have been the victims of state-sponsored, and church-endorsed, criminalization.\textsuperscript{83} Until 1961, same-gender sexual activity was prohibited in every state and the District of Columbia through various sodomy statutes.\textsuperscript{84} Illinois became the first state to decriminalize all private consensual sex between adults,\textsuperscript{85} adopting the relevant provision of the American Law Institute's Model Penal Code.\textsuperscript{86} Since then, twenty-one states have repealed their sodomy laws.\textsuperscript{87} The sodomy laws

\textsuperscript{31.} Because only sexual activity has been the subject of penal codes, decriminalizing this behavior is an important and logical step toward protecting sexual orientation (regardless of sexual activity) from being considered in an employment decision. This Note, therefore, argues for protection based on the most distinct homosexual characteristic, homosexual sex, but extends the protection for gay men and lesbians by prohibiting all employment decisions of an employer which are in any way based on sexual orientation. This protection should be extended beyond hiring and firing decisions to include promotion decisions and harassment claims as well.

\textsuperscript{82.} See supra notes 48–57 and accompanying text.

\textsuperscript{83.} For a historical treatment of homosexuality, see Joel W. Friedman, \textit{Constitutional and Statutory Challenges to Discrimination in Employment Based on Sexual Orientation}, 64 IOWA L. REV. 527, 529–31 (1979).

\textsuperscript{84.} See \textit{Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity}, 40 U. MIAMI L. REV. 521, 526 (1986) [hereinafter \textit{Right to Privacy Survey}] (providing committee reports, reports of legislative and committee hearings, penal code commission reports, etc., involving state legislation regarding sodomy statutes).


that remain on the books, though rarely enforced, still are used to support employment discrimination against gay men and lesbians.


89. See High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F. 2d 375, 382 (9th Cir. 1990) (Canby, J., dissenting) (arguing that sodomy laws are not enforced by the states); REPORT OF THE CONNECTICUT COMMISSION TO REVISE THE CRIMINAL STATUTES 128–29 (1967) [hereinafter CONNECTICUT COMM’N REPORT] (reasoning that because the Connecticut sodomy law was “substantially unenforced,” it should be repealed), reprinted in Right to Privacy Survey, supra note 84, app. at 646, 647; HAW. REV. STAT. § 707-730 to -742 (1976) (Part V. Sexual Offenses Introduction) (commenting that “the extremely limited enforcement that does exist raises the specter of discriminatory enforcement”), reprinted in Right to Privacy Survey, supra note 84, app. at 648; Sexual Orientation and the Law, supra note 78, at 1520–21 (noting that sodomy laws rarely are enforced).

90. Georgia Attorney General Michael J. Bowers revoked an offer of employment to attorney Robin J. Shahar after learning that she planned to wed her lesbian partner. The Attorney General explained that he was “not going to hire someone who holds themself out to the public by their [sic] own admission as being engaged in a homosexual marriage.” Georgia Denies Gay Lawyer a Job, N.Y. TIMES, Oct. 6, 1991, § 1, at
While not all sodomy statutes were directed on their face at homosexual activity, sodomy laws traditionally have been intended to criminalize this activity. The effect of the repeal of these laws, therefore, has been to "remove criminal sanctions for acts among consenting adults." Generally, states which repealed their sodomy laws adopted the position of the Model Penal Code\(^\text{94}\) that a secular penal code should not be used to enforce purely moral or religious standards. The Connecticut legislature, for example, specifically adopted the principle that "sexual activity in private, whether hetero- or homosexual, between consenting, competent adults, not involving corruption of the young by older persons, is no business of the criminal law." Similar- ly, the Hawaii legislature commented that "problems, if any, presented by homosexual behavior between consenting mature persons in private are not likely to be cured by the continued use of the criminal sanction and the sanction ought to be eliminated in this context."\(^\text{97}\) The New Jersey sodomy law was repealed only after its Criminal Law Revision Commission arrived at the conclusion that "private homosexuality between consenting adults not involving force, imposition or corruption of the young

\(^\text{28.}\) Mr. Bowers previously had defended the state's sodomy law successfully before the Supreme Court in \textit{Bowers v. Hardwick}. Id. The concerns of discrimination were exemplified by another case, in which a woman in Dallas, Texas was denied a position with the Dallas Police Department because she is a lesbian. Gay-rights groups challenged the Texas sodomy law for encouraging discrimination against gay men and lesbians. \textit{Texas Appeals Court Rules Sodomy Law Is Unconstitutional}, N.Y. TIMES, Mar. 1, 1992, at A10.

\(^\text{91.}\) See Right to Privacy Survey, supra note 84, at 524–25. Only six of the jurisdictions which have sodomy laws specifically prohibit private homosexual conduct. See ARK. CODE ANN. § 5-14-122 (Michie 1987); KAN. STAT. ANN. § 21-3505 (1988); KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merrill 1990); MO. ANN. STAT. § 566.090(3) (Vernon 1979); NEV. REV. STAT. § 201.190 (1991); TEX. PENAL CODE ANN. § 21.06 (West 1989).

\(^\text{92.}\) See Rivera, supra note 10, at 942–45.

\(^\text{93.}\) CONCURRENCE IN SENATE AMENDMENTS, AB 489 (May 1, 1975) (amending in relevant part CAL. PENAL CODE § 286 (West Supp. 1986)), reprinted in Right to Privacy Survey, supra note 84, app. at 646.


\(^\text{95.}\) See CONNECTICUT COMM'N REPORT, supra note 89, app. at 646; HAW. REV. STAT. § 707-730 to -742 (1976) (Part V. Sexual Offenses Introduction), supra note 89, app. at 647; OREGON SENATE COMM. ON CRIMINAL LAW & PROCEDURE, MINUTES OF SB 40, ARTICLE 13, SEXUAL OFFENSES 1–3 (Feb. 24, 1971) [hereinafter OREGON SENATE COMM. MINUTES], reprinted in Right to Privacy Survey, supra note 84, app. at 655.

\(^\text{96.}\) CONNECTICUT COMM'N REPORT, supra note 89, app. at 646.

\(^\text{97.}\) HAW. REV. STAT. § 707-730 to -742 (1976) (Part V. Sexual Offenses Introduction), supra note 89, app. at 649.
should not be an offense." The Oregon legislature also expressed its intent specifically to decriminalize private consensual activity between competent adults, whether homosexual or heterosexual. Based on these states' legislative histories, any legislature which repealed the sodomy law of its state must have understood that it was legalizing, though not necessarily condoning, private sexual behavior between consenting gay male and lesbian adults.

B. Smokers' Protection

The argument that states should prohibit antihomosexual employment discrimination draws support from an analogy to laws prohibiting workplace discrimination against smokers. Citizens of a state, as expressed through respective legislative bodies, no longer may feel that a penalty should be enforced against a person who engages in same-gender sexual activity in private. Nevertheless, employers have penalized these individuals through discriminatory employment practices. Similarly, smoking (for those of proper age) outside of the workplace traditionally has been

99. OREGON SENATE COMM. MINUTES, supra note 95, app. at 656.
100. OHIO CRIMINAL LAW TECHNICAL COMM., MINUTES 6 (Jan. 8, 1968), reprinted in Right to Privacy Survey, supra note 84, app. at 655. The Ohio committee agreed that consensual homosexual acts should not be criminalized. The motion to consider this proposition was made by Judge Duffey, who had agreed with another committee member that homosexuality might pose a threat to the moral stability of society and the participants, but felt that problems with enforcement outweighed this concern. See id.
101. See supra notes 73–90 and accompanying text.
102. Restrictions on smoking at work are common. See Restrictive Workplace Laws Reduce Smoking, Protect Workers, Surgeon General Report Says, Daily Lab. Rep. (BNA) No. 50, at A-3, A-4 (Mar. 13, 1992) [hereinafter Restrictive Workplace Laws] (reporting that 31 states have restricted smoking at public work sites); Fred Williams, Burning Issue at Work; Firms' Rules Put Smokers Under Fire, USA TODAY, May 1, 1990, at 1B ("Surveys by the American Society for Personnel Administration found 54% of companies restricted smoking in 1987, up from 36% a year earlier. Today, 60% of companies restrict smoking—and 24% of those ban it from the workplace . . . . "). The Department of Health and Human Services has set a goal of having smoking restricted at 75% of U.S. workplaces by the year 2000. Restrictive Workplace Laws, supra, at A-3.
Despite the legality of smoking at home, many employers took it upon themselves to enforce a penalty against smokers for engaging in this activity through discriminatory employment practices.

Civil rights groups recently became outraged at the thought that an employer could base an employment decision on an employee's participation in a legal activity (smoking) outside of the workplace. Such employer conduct evoked thoughts of Henry Ford's management style in the early part of the twentieth century. Visions of Big Brother following an employee home from work finally forced the issue upon many state legislatures. While the tobacco industry generally has led the charge against these discriminatory policies, such unusual bedfellows as the American Federation of Labor-Committee for Industrial Organizations (AFL-CIO), the Communications Workers of America, and the American Civil

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103. Except for the period between 1895 and 1927, during which as many as 14 states had banned its use, the use of tobacco in the United States always has been legal. See Steven Jonas, Solving the Drug Problem: A Public Health Approach to the Reduction of the Use and Abuse of Both Legal and Illegal Recreational Drugs, 18 HOFSTRA L. REV. 751, 772 & n.156 (1990).


105. See id.

106. Henry Ford took a keen interest in the off-duty activities of his employees. He "used to send spies to his workers' homes to check they were not drinking, or to make sure they had been to church on Sunday." Id.

107. Twenty-seven states have responded by passing legislation which provides protection for either off-the-job smoking or general off-the-job legal activities. See infra note 119.

108. According to one report,

The tobacco industry is a major player when it comes to campaign contributions and lobbying. In New Jersey, 1990 lobbying expenditures by five tobacco manufacturers and the Tobacco Institute amounted to about $265,000; the tally for 1991, when the smokers' rights bill has stoked lobbying activity, will presumably be higher.

Paula Span, Smokers' New Hazard: No Work; Health Costs Behind Job Bias Issue, WASH. POST, Nov. 12, 1991, at A1, A14. While critics charge the tobacco industry with controlling the swelling smokers' rights movement, Tom Lauria, spokesperson for the Tobacco Institute, an industry-funded lobbying group, said, "It's a fight for individual rights. It's wrong to say we're behind it all." Julia Lawlor, Smokers Losing Battle but Continue to Fight, USA TODAY, Nov. 21, 1991, at 1B; see also Peter Kerr, Bill Shielding Smokers Wins Support, N.Y. TIMES, Mar. 22, 1991, at B2 (discussing the lobbying efforts behind the New Jersey law).
Liberties Union (ACLU) have joined the fight. These groups, supported by the results of recent surveys, claim that restrictions by employers on the employees' right to privacy are unjust and unfair. "We don't think your employer owns you," argues the ACLU's Lewis Maltby. "Your employer has a right to expect you to do your job well and respect the rules, but they don't have a right to run your private life."

Employers' advocates argue that the smokers' lifestyle has become too costly for corporate America. Estimates of the cost to employers vary widely. The Surgeon General estimates that employees who smoke cost employers approximately $1000 per year in extra medical costs and lost productivity. Others claim "that it costs an employer $4,000 more per year—in hospitalization insurance, lost work time and health effects on non-smoking coworkers—to hire a smoker" rather than a non-smoker. While many companies have begun to invest in health-promotion programs to reduce rising medical costs, others have charged smokers (and other "high-risk" workers) more for health insurance.

109. Interview with Theodore J. St. Antoine, Professor of Law, University of Michigan Law School, in Ann Arbor, Mich. (Feb. 16, 1993). Lewis Maltby, head of the ACLU's workplace discrimination office, believes that "the problem of employer nosiness has got [sic] out of hand." Robinson, supra note 104, at 17. The ACLU, however, remains uncomfortable with the new partnership with the tobacco industry which this right-to-privacy effort has spawned. Id.; see also ACLU Spearheading Privacy Legislation, UPI, Mar. 22, 1991, available in LEXIS, Nexis Library, UPI File (citing the unusual alliance between the ACLU and labor unions).

110. For example, a survey in Georgia showed that 97.5% of those surveyed oppose employment policies which deny jobs to persons who smoke away from work. Georgians Overwhelmingly Oppose Job Discrimination Against Smokers, PR NEWswire, Mar. 4, 1991, available in LEXIS, Nexis Library, Omni File and in WL, PRNews database. "They didn't see the matter as one of smoking or not smoking," said Claibourne H. Darden, Jr., president of Darden Research Corporation. "They looked at it as a question of protecting an individual's right to privacy." Id.


112. See generally Zachary Schiller et al., If You Light Up on Sunday, Don't Come In on Monday, BUS. WK., Aug. 26, 1991, at 68 (discussing how companies are trying to curb their employees' after-hour activities).

113. Lawlor, supra note 108, at 1B.


116. Lawlor, supra note 108, at 1B; Schiller et al., supra note 112, at 69.
While some commentators argue that this policing of lifestyles is one reason to change fundamentally the way that the United States finances health care, advocates for privacy rights respond to the employers' health-care arguments by saying that they are a pretext for violating employees' rights. This concern for the employees' right to privacy has led to the passage of twenty-seven state statutes prohibiting employers from considering the legal off-duty conduct of employees when making employment decisions.

In New Jersey, for example, Francis J. McManimon, the main sponsor of the law which prohibited employers from discriminating against employees in hiring, pay, and working conditions "unless the employer has a rational basis for doing so," said that he was moved by a desire to protect the right

117. Malcolm S. Forbes, Jr., No to Workplace Nannies, FORBES, Sept. 30, 1991, at 26 ("Employees, not employers, should get the tax breaks for health insurance premiums. That way, individuals could make their own choices.").

118. See Robinson, supra note 104, at 17. Lewis Maltby argues that the health-care costs are often bogus justifications: "We don't care if these policies save costs, it's the principle we are fighting. Almost anything done in free time, from eating junk food or red meat, to riding a motor-cycle [sic] or lying on a beach, could be said to affect your health." Id.


After the passage of the New Jersey law, Thomas Lauria of the Tobacco Institute said, "It's good news for anyone who enjoys a legal, off-duty activity that their boss may not approve of . . . . The bill intends to protect the right to privacy, not just for smokers, but for drinkers, the non-athletic and overweight people." New Jersey Is Latest State to Address Smokers' Rights, GANNETT NEWS SERVICE, May 27, 1991, available in LEXIS, Nexis Library, Omni File.


121. Id.
New Jersey Governor Jim Florio also “expressed concern over the issue of smokers’ privacy, worrying that an employer’s ability to inquire about legal after-work activity as a basis for employment violated privacy rights.” Earlier in the year, however, consideration of the negative health effects resulting from smoking persuaded Governor Florio to veto a similar bill which would have provided civil rights to smokers in the same way that civil rights laws protect against job discrimination on the basis of race, religion, and sex. Moreover, the New Jersey Senate Labor, Industry, and Professions Committee stated that employers may continue to differentiate between smokers and nonsmokers regarding insurance premiums for life and health insurance benefits.

The desire to protect employees’ privacy rights was an important reason why New York enacted its own law protecting employees’ participation in legal activities outside of the workplace. Senator James Lack, Chairman of the Senate Labor Committee and a sponsor of the bill, opined, “What you


126. N.Y. LAB. LAW § 201-d (McKinney Supp. 1993) (effective Jan. 1, 1993). New York Governor Mario Cuomo vetoed a more sweeping bill in 1990 because it could have posed problems for employers concerned with employee conflicts of interest and worker discipline. The most recently incorporated provisions “protect employers against violations of conflict-of-interest policies, revealing of trade secrets or habitually poor performance or misconduct of a worker.” See Dena Bunis, Rights Bill Fights Antismokers; Cuomo Gets a Measure to Protect Workers' Liberties Away from Work, NEWSDAY, July 26, 1991, at 45.
do in terms of legal activity outside of the workplace is really not your employer's concern." As this was a primary concern for other legislators as well, the privacy arguments won out over arguments supporting an employer's right to reduce health-care costs. The New York law, however, allows employers to make distinctions in health insurance premiums where the protected activity increases the insurance risk. Importantly, this adjustment must "reflect a differential cost to the employer."

In Illinois, a smokers' "right-to-work" bill survived despite an earlier veto by Governor Jim Edgar of a similar bill protecting alcohol drinkers' rights. The drinkers' rights bill was designed to prevent employers and labor unions from asking applicants questions about their drinking habits. Governor Edgar rejected the bill because he thought that an employer's need to know about an employee's drinking behavior was essential in some circumstances. In supporting the smokers' rights law, however, Edgar made sure that employers maintained the ability to handle misconduct problems relating to drinking or smoking; 

\[ \text{"[e]mployers should base discipline and discharge decisions on conduct in the workplace,"} \]

not on the off-duty

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127. Suzanne Bilello, Snuff Out "Lifestyle" Bill, Smoking Opponents Say, NEWSDAY, Aug. 23, 1991, at 26. Senator Lack also asserted, "Political correctness seems to be spreading itself into the workplace, or at least what an employer decides is correct behavior for its employees. And that is absolutely wrong . . . ." Bunis, supra note 126, at 45.

128. Assemblyman Peter Abbate, sponsor of the House version, expressed similar concerns: "I just don't feel [that discriminating against smokers is] proper . . . . I look at it as any other discrimination." H.J. Cummins, Lawmakers Move to Protect Smokers' Right to Hold a Job, NEWSDAY, May 19, 1991, at 87. Assembly Labor Committee Chairman Frank Barbaro, another bill sponsor, stated, "The purpose of this bill is to protect employees against arbitrary and capricious employers . . . ." Bunis, supra note 126, at 45.

129. New York business leaders argued that the creation of a healthier workplace would help control health insurance costs. Bunis, supra note 126, at 45.


131. Id.; see also Michael Starr, NY Legal Activities Law Protects Employees, N.Y. L.J., Sept. 3, 1992, at 5, 6 (discussing the meaning and ramifications of the new law).


133. In his veto letter, Governor Edgar asked, "Should we prohibit an airline from asking a pilot candidate questions about alcoholic and drug abuse? . . . . Is the Legislature prepared to say it is irrelevant and illegal to initiate an inquiry of a bus driver's alcoholic consumption patterns?" Id.

134. Id. Al Grosboll, executive assistant to the governor, further explained, "There is a substantial difference between the state telling employers—especially ones involved in public safety operations—that they cannot ask questions about drinking behavior and the state permitting an employer to fire somebody because that employee smokes or drinks at home . . . ." Id.
behavior of the worker. In addition, the Illinois law allows employers to classify workers "based on their drinking and smoking habits for health and life insurance coverage purposes."\textsuperscript{135}

The Indiana law\textsuperscript{136} protecting workers' private lifestyles was introduced after the Indiana-based Ford Meter Box Company fired an employee after a urine test revealed traces of nicotine.\textsuperscript{137} The bill's author, Representative Vernon G. Smith, described the issues surrounding the bill as essentially related to privacy: "This situation is not a health issue. It is an issue of whether Indiana citizens have a right to privacy . . . . Our employers rent our time, they do not buy our lives. We cannot allow employers to control our lives 24 hours a day."\textsuperscript{138} The depth of concern for protecting privacy rights, not the right to smoke per se, was accented when Indiana Governor Evan Bayh reminded the state that the law was to protect workers' privacy, "not to glorify smoking or to give it any privileged status."\textsuperscript{139} To this extent, Bayh agreed with the legislators who pressed the health insurance concern,\textsuperscript{140} and assured companies

\textsuperscript{135} See id. at 1487–88.
\textsuperscript{138} James Grass, GANNETT NEWS SERVICE, Feb. 25, 1991, available in LEXIS, Nexis Library, Omni File. Representative Brad Bayliff commented, "I think this [bill] takes a reasonable step to establishing a policy that says what you do out of the workplace cannot be regulated." Id. State Senator Joseph V. Corcoran felt that the legislation would present a minimal intrusion into employers' rights, while preventing greater restrictions on workers' rights: "The extent of government intervention is to say that your employer can't intervene in your life after you get off the job . . . . If that's government intervention, it's good intervention. It's minimal intervention." James Grass, GANNETT NEWS SERVICE, Apr. 15, 1991, available in LEXIS, Nexis Library, Omni File. Governor Evan Bayh stated that "the law is intended to protect the privacy of workers and to prohibit employment discrimination." Indiana Law Will Protect Smokers from Employment Discrimination, Daily Lab. Rep. (BNA) No. 106, at A-9 (June 3, 1991).
\textsuperscript{140} Representative Kent J. Adams argued, "Smoking is a detriment to one's health and does affect the job productivity of an employee . . . . I think a company should have that right (to monitor off-duty activity) from a health insurance standpoint." James Grass, GANNETT NEWS SERVICE, Feb. 25, 1991, available in LEXIS, Nexis Library, Omni File. State Senator Louis J. Mahern expressed concern that the state was "about to take the leading cause of death in this country and enshrine it in the pantheon of civil rights." James Grass, GANNETT NEWS SERVICE, Apr. 15, 1991, available in LEXIS, Nexis Library, Omni File.
that they could set different rates for employees based on the employees' outside activities.\textsuperscript{141} Indiana workers received even more support from the state appellate court in \textit{Best Lock Corp. v. Review Board},\textsuperscript{142} which held that an employer who fired an employee for off-duty drinking, pursuant to a long-standing employer rule, acted unjustly.\textsuperscript{143}

III. THE CALL FOR LEGAL REFORM

In taking steps to protect an employee's right to engage in legal activity outside of work, state legislatures favor the employee's right to privacy over the employer's right to control its workforce outside of the workplace.\textsuperscript{144} The slippery slope argument, which portends riding motorcycles, sunbathing, eating junk food, or any other legal off-the-job activity as potentially disfavored by employers, has been used to support these privacy laws.\textsuperscript{145} In many states, private sexual activity between consenting adults of the same sex is also a legal activity.\textsuperscript{146} As invidious discrimination based on sexual orientation continues to threaten the job security of many employees, the concern of potential discrimination no longer

\textsuperscript{141} As Governor Bayh issued the law, he explained, "It is not discrimination against people to require them to bear their fair share of higher costs resulting from their own voluntary actions . . . ." Stattmann, \textit{supra} note 139.

\textsuperscript{142} 572 N.E.2d 520 (Ind. Ct. App. 1991).

\textsuperscript{143} The court explained, "[I]n order for an employer rule which regulates an employee's off-duty activity to be considered reasonable, the activity sought to be regulated must bear some reasonable relationship to the employer's business interest." \textit{Id.} at 525. South Dakota has codified a similar restriction involving tobacco use; the law prohibits restrictions on the use of tobacco by employees during nonworking hours unless such a restriction "[r]elates to a bona fide occupational requirement and is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer." \textit{S.D. CODIFIED LAWS ANN.} § 60-4-11 (Supp. 1992).

\textsuperscript{144} In addition to the states previously discussed, see \textit{supra} notes 119-43 and accompanying text, Tennessee, Virginia, Kentucky, South Carolina, Oregon, Rhode Island, and Colorado all have cited violations of individual privacy in passing laws prohibiting employers from enacting discriminatory employment policies against smokers. \textit{See Floridians Overwhelmingly Oppose Job Discrimination Against Smokers, PR NEWSWIRE}, Apr. 24, 1991, \textit{available in LEXIS}, Nexis Library, Omni File and in WL, PRNews database (citing the findings of Citizens Advocating Privacy).


\textsuperscript{146} See \textit{supra} part II.A.
should be considered a mere potential—it has become a reality. This Note, therefore, calls on the legislatures of Illinois, Indiana, Maine, New York, Oregon, South Dakota, West Virginia, and Wyoming (all of which have repealed their sodomy laws and have passed right-to-privacy laws prohibiting employers from considering employees' off-duty legal activities such as smoking) to follow the internal logic of their laws and prohibit employers from discriminating against employees oriented toward lawful homosexual activity engaged in outside the workplace.

There are many existing and potential internal consistencies within these states' laws which support a law protecting an employee's right to engage in legal homosexual activity outside the workplace. First, the fundamental right to engage in legal activities, as expressed by these legislatures, should be extended to protect adults' lawful sexual practices. The policy underlying the smokers' rights laws—that employees should be able to live their lives without intrusion from their employers—also applies to one's lawful sexual practices, the most intimate aspect of one's private life. In addition, the policy that employers should be concerned only with employees' on-the-job misconduct, rather than with off-the-job legal activities, directly supports a prohibition on employment discrimination based on one's orientation toward private, same-gender sexual activity.

147. The people of Oregon already have expressed their views on this subject in the last election. A ballot initiative would have amended the Oregon Constitution to classify homosexuality as "abnormal, wrong, unnatural or perverse," and would have prevented the government from taking any action that could be seen as promoting homosexuality. See The Oregon Trail of Hate, N.Y. TIMES, Oct. 29, 1992, at A26. Fifty-seven percent of the Oregon voters rejected the proposed amendment. See Bill McAllister, Gay Rights Groups Applaud Clinton's Win, WASH. POST, Nov. 5, 1992, at A30.

While gay-rights advocates hailed the victory in Oregon as "a rite of passage from the margins to the center," the measure's supporters have vowed to return in two years with a milder amendment, similar to the amendment that passed in Colorado. Id. The Colorado amendment specifically prohibited "minority status, quota preferences, protected status or claim of discrimination" for gays. Dirk Johnson, 'I Don't Hate Homosexuals,' N.Y. TIMES, Feb. 14, 1993, § 1, at 24. Three Colorado cities with antidiscrimination laws challenged the amendment in the Denver district court, however, and Judge Jeffrey Barless found the amendment unconstitutional as violating a fundamental right to protection by "'endorsing' and 'giving effect' to 'private biases.'" In Colorado, a Correct Decision, L.A. TIMES, Jan. 19, 1993, at A10. The Oregon legislature should take the initiative before the next election and act to protect gay men and lesbians in the state from discrimination.

148. See supra note 138 and accompanying text.

149. See supra notes 133–34 and accompanying text.
Second, by disallowing workplace discrimination against tobacco users, these state legislatures indicated that the law is no place for moral musings. By protecting smokers' rights, state governments denied employers' attempts to determine in which "politically correct" legal activity employees could engage. Yet, while these states were protecting employees' rights to smoke tobacco out of the workplace, surely these states were not enshrining tobacco use as a morally correct action. In fact, these states consistently refrained from condoning what they had determined to be a lawful activity. More specifically, through the smokers' rights laws, these states have established that they do not intend to condone all legal activities that are protected from private employment discrimination. If these legislatures were to follow this internal logic, therefore, they could protect those people oriented toward same-gender sexual activity, without morally condoning the activity.\(^{150}\)

Another factor favoring the protection of homosexuals from private employment discrimination relates to the frequency of such discrimination directed toward both smokers and homosexuals. As noted from the watershed of legislation across the country in the last few years protecting the right of employees to smoke outside the workplace,\(^{151}\) the increasing interest of employers in off-duty smoking\(^{152}\) created the need to protect the many victims of private employment discrimination by law. Employers' discriminatory interests have not been limited solely to an employee's off-duty smoking habits. In fact, this discriminatory conduct has perhaps been centered as much on people oriented toward homosexual behavior as on any people who would engage in a nonstatutorily protected, legal activity. The fact that gay men and lesbians constitute a sizeable portion of the country\(^{153}\) and can be found in many employment fields\(^{154}\) underscores how widespread a problem private employment discrimination against homosexuals has become. While employment discrimination based on sexual

\(^{150}\) See supra note 100 and accompanying text (recounting Ohio's repeal of its sodomy statute as based on concerns with criminal enforcement, not with civil liberties).

\(^{151}\) See supra note 119 (listing the 27 states that have passed such legislation).

\(^{152}\) See Robinson, supra note 104, at 17 (finding that 6000 businesses ban smokers from the workplace).

\(^{153}\) See supra note 26.

\(^{154}\) See supra note 80 (citing statistics on the diversity of gay employment). See generally Stewart, supra note 75 (containing interviews with and descriptions of more than one hundred gay men and lesbians in corporate America).
orientation has been recognized and addressed by five states, invidious discrimination continues to trouble gay men and lesbians in the remaining states, and they, like smokers, are in need of protection.

In addition, to be logically consistent, these state legislatures should acknowledge that smoking is more dangerous than homosexual conduct. These state governments were able to overcome the profoundly negative statistics concerning smoking to protect the right to smoke in the privacy of one's home. Because smoking effectively kills many more people than does homosexual activity, this Note argues that it would be inconsistent and incomprehensible for the legislatures of these states to distinguish employer discrimination against homosexuals based on the negative effects relating to same-sexual activity from discrimination against smokers.

155. Compare the more than 400,000 people in the U.S. who die annually from smoking-related diseases with the total number of reported deaths resulting from the acquired immunodeficiency syndrome (AIDS) virus—approximately 133,500. Center for Disease Control, The Second 100,000 Cases of Acquired Immunodeficiency Syndrome—United States, 267 JAMA 788 (1992) [hereinafter The Second 100,000 Cases]. By 1991, there were a total of 206,392 reported cases of AIDS in the United States, id., with 45,506 cases reported to the Center for Disease Control during 1991. Center for Disease Control, Acquired Immunodeficiency Syndrome—1991, 268 JAMA 713 (1992) [hereinafter AIDS—1991]. Transmission of AIDS is still most common among gay and bisexual men. See The Second 100,000 Cases, supra, at 788 (reporting that 59% of all reported AIDS cases occurred among gay or bisexual men). The proportion of reported AIDS cases resulting from homosexual transmission, however, has been decreasing. Sixty-one percent of the first 100,000 reported AIDS cases occurred among gay or bisexual men, while 55% of the second 100,000 reported cases occurred in this group. Id.; see also AIDS—1991, supra, at 713 (reporting that in 1991, 52.7% of the reported cases occurred among gay or bisexual men, a decrease from 1990). An increasing proportion of the reported AIDS cases has resulted from heterosexual transmission. See The Second 100,000 Cases, supra, at 788 (reporting that among the second 100,000 reported cases, seven percent were attributed to heterosexual transmission, compared to five percent in the first 100,000 reported cases—a 44% increase). To put these statistics in context, one should note that in 1991, nicotine killed “more people than cocaine, crack, heroin, alcohol, homicide, suicide, fires, car accidents, and AIDS combined.” Herb Robinson, It’s Your (Cough, Gasp) Bill of Rights, SEATTLE TIMES, July 22, 1991, at A6 (quoting Dr. Robert Jaffe, head of the Washington state chapter of Doctors Ought to Care) (emphasis added).

156. See OFFICE ON SMOKING & HEALTH, U.S. DEPT OF HEALTH, EDUC. & WELFARE, REDUCING THE HEALTH CONSEQUENCES OF SMOKING, at v (1989) (stating that “approximately 390,000 Americans died in 1985 as the result of smoking, even after two decades of declining smoking rates”); Lawlor, supra note 108, at 1B ("Evidence pointing to the dangers of second-hand, passive smoke is mounting. The Environmental Protection Agency says it's a Class A carcinogen and kills an estimated 53,000 people a year.").

157. Some may argue that a community that tolerates homosexuality is harmed by the inclusion of homosexuals. For example, one could argue that it is more difficult to raise a family according to particular values and beliefs if the society tolerates a person’s right not to have her sexual orientation considered in employment decisions.
Furthermore, having established that these internally logical consistencies exist within these states' laws, that there exist common characteristics between these two legal activities, and that the existing pervasive discrimination against homosexuals

This argument carried great weight with the Supreme Court when it upheld the constitutionality of state sodomy laws based on the "presumed belief of a majority of the electorate... that homosexual sodomy is immoral and unacceptable." Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

The Court's reasoning, however, supports the converse conclusion in states where sodomy has been decriminalized. The majority sentiments about the morality of homosexuality should be equally compelling: homosexual conduct is acceptable. Therefore the moral corruption argument accepted by the Court is not compelling in states which have repealed their sodomy laws, because it is not supported by the majority view. See Ronald Dworkin, Liberal Community, 77 CAL. L. REV. 479, 481 (1989). For a thorough discussion of morality and law, see Symposium, Law, Community, and Moral Reasoning, 77 CAL. L. REV. 475 (1989).

Moreover, any discussion of harm to society resulting from the toleration of gay citizens' right to be free from employment discrimination is unpersuasive because the harm to a community resulting from the toleration of homosexuality is speculative, if existent at all. See Bowers, 478 U.S. at 209-11 (Blackmun, J., dissenting) (arguing that there was no evidence in the record that private, consensual sodomy was endangering anyone); Philip Selznick, Dworkin's Unfinished Task, 77 CAL. L. REV. 505, 510 (1989) (posing the argument that "specific harms are not shown or are speculative"). The argument against toleration asserts that toleration "will cripple a community's ability to perform some crucial function." Dworkin, supra, at 487. But the most critical social need that the community must provide is "security and the economic benefits of division of labor." Id. Not only is society's ability to provide these crucial needs unaffected by the moral diversity of its citizens, see id. at 488, but to provide those needs to society successfully, the community must respect moral diversity. The quest for moral homogeneity is an element that currently is crippling society's ability to provide economic benefits to all of its citizens. As long as there is the ability to discriminate against members of society based on their sexual orientation, society as a whole, and select individuals in particular, are denied those fundamental economic benefits.

When Dworkin's view of community is expanded, one understands that "participation in communities is mediated by participation in families, localities, personal networks, and institutions. This 'core' participation preserves the identity and rationality of the participants... What we prize in community is not unity of any sort, but unity that preserves the integrity of persons, groups, and institutions." Selznick, supra, at 507. Within this framework is the difficult task of "holding in tension the often conflicting values of autonomy and integration." Id. at 508. This Note espouses a policy of preserving toleration in order to preserve the moral community. Those parents who want their children raised according to particular values must be allowed to do so. Selznick crystallized this ideal when he wrote, "Moral, aesthetic, religious, and political pluralism must reject the idea of one right way, one right perspective, but should leave open how many and what kinds of choices and tradeoffs are valid or justified." Id. at 511. Within this communitarian ideal, a religious society that abhors homosexuality should be granted the autonomy to follow its religious precepts and not to employ gay men and lesbians in their society. Parents in a religious society similarly can raise their children according to these precepts. But religion is just one part of our society, and when such children wander into our society, we may teach them toleration.

Thus, states which prevent private employers from considering sexual orientation in employment decisions should exempt religious organizations from these laws. In so doing, society can hold true to toleration, autonomy, and the moral community.
not only distinguishes homosexual activity from other legal activities which states could protect from employment discrimination, this Note submits not only that these state legislatures should follow the internal logic of their laws by prohibiting private employment discrimination against homosexuals, but also that these state legislatures should feel compelled to do so. 158

158. As many states have taken into account employer concerns over the rising health-care costs of smoking by permitting employers to set different premiums for employees based on employees’ outside activities, the same employer concerns certainly may be expressed concerning health-care costs related to homosexual activity. This issue recently was thrust into the national spotlight when the Supreme Court let stand a Fifth Circuit decision in which an employer was permitted to cancel almost all health insurance coverage for an employee with AIDS. See McGann v. H & H Music Co., 946 F.2d 401 (5th Cir. 1991), cert. denied, 113 S. Ct. 482 (1992). The ADA did not apply in this case because the discrimination took place before it was in effect. The courts have not determined whether the ADA prohibits this type of discrimination.

Adding fire to the debate, Lotus Development Corporation recently announced that it would offer its gay male and lesbian employees the same benefits for their long-term partners as it does for the spouses of its heterosexual employees. See Thomas A. Stewart, A Cutting Edge Issue: Benefits, FORTUNE, Dec. 16, 1991, at 50. The company cited data from a "confidential insurance company study that says committed homosexual couples are at no greater risk of catastrophic illness than are married heterosexual pairs. Moreover, with few children in gay families, there are few claims for Caesarean sections or routine pediatric illnesses such as ear infections and strep throats." Id. Lotus convinced its insurance carrier that the cost of caring for an AIDS patient was approximately equivalent to treating a coronary. See Hammonds, supra note 74, at 81. Lotus’s offer is limited to gay male and lesbian couples because heterosexual couples have the option to marry, whereas gay men and lesbians do not. To qualify, gay male and lesbian couples must sign marriage-like contracts with Lotus stating that they “live together, intend to stay together, and are responsible for one another.” Stewart, supra, at 50. The contract is a legal document which binds the couples and their assets. Bruce D. Butterfield, Gay Couples Get Family Benefits at Lotus, BOSTON GLOBE, Sept. 6, 1991, at 1, 8. If the couple breaks up, the employee must wait a year before registering a new partner. Hammonds, supra note 74, at 81. “Lotus’ research, which involved contacting virtually every municipality that offered spousal-equivalent benefits, indicated that there was no major surge in benefit expenses, even in areas with a higher incidence of AIDS.” Butterfield, supra, at 8.

A state truly concerned with the AIDS crisis could concentrate on identifying the prevention of AIDS without enforcing morality on society by encouraging and supporting safe, protected sex. The voluntary activity with which states and employers should be concerned is unprotected sex, not same-gender sexual activity. A program centered on education could keep legislatures from legislating morality and prevent employers from engaging in the Big Brother detection tactics which the states have disapproved of in the privacy laws protecting smokers.

A full discussion of health-care issues related to homosexuals is beyond the scope of this Note, however, and deserves the attention of another, more substantive article. See generally Joan Vogel, Containing Medical and Disability Costs by Cutting Unhealthy Employees: Does Section 510 of ERISA Provide a Remedy?, 62 NOTRE DAME L. REV. 1024, 1024–41 (1987); Karen A. Clifford & Russel P. Iuculano, AIDS and Insurance: The Rationale for AIDS-Related Testing, 100 HARV. L. REV. 1806 (1987); Benjamin Schatz, The AIDS Insurance Crisis: Underwriting or Overreaching?, 100 HARV. L. REV.
The employment-at-will doctrine severely jeopardizes the job security of most workers in America. State and federal laws offer protection to many who may be affected by the arbitrary nature of an employer's decision making. These laws recently have been supplemented by many state legislatures which sought to prohibit employers from considering their employees' off-duty engagement in lawful activities when making employment decisions. One group left unprotected from these existing laws, however, is the gay male and lesbian population. In states which have repealed their sodomy laws, private homosexual practices are as legal as smoking, yet are less threatening to society from a health-care standpoint. If the privacy rights so eloquently advocated by these state legislatures are to be applied consistently, they should be extended to prohibit employers from considering their employees' sexual orientation when making employment decisions. The legislatures, therefore, should amend their states' labor laws to add sexual orientation as another factor that employers may not consider when making employment decisions. These state legislatures would not stand for anything less when smokers were the target of discrimination, and they should take the same position with regard to gay men and lesbians.