THE TUG OF WAR BETWEEN FIRST AMENDMENT FREEDOMS AND ANTIDISCRIMINATION: A LOOK AT THE RISING CONFLICT OF HOMOSEXUAL LEGISLATION

*Abigail Jones Southerland**

I. INTRODUCTION

In November 2002, the London Metro Police Department raided 150 homes and arrested many people "on suspicion of making racist threats and of homophobic harassment."[1] The government's actions were justified by the Diversity Directorate who stated "people should not have to go through life being subjected to abuse because of who they are or what they believe in."[2]

The rising conflicts and moral debates surrounding the increase in the alternative lifestyle of homosexuality has led many Western nations to enact special legislation to accommodate its growing popularity.[3] The means by which nations have attempted to protect homosexuals as a minority group differs. The United States has chosen to regulate the problem by broadening anti-discrimination laws to include sexual orientation in the list of groups protected. In January 2006, a bill was presented to the House of Representatives by the Committee on Judiciary to amend the Civil Rights Act of 1964 and the Fair Hous-

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* Candidate for J.D. Regent University School of Law, B.A. from Carson Newman College. My love and thanks go to God who has carried me to where I am now, to my parents who have always served as my support and motivation in pursuing a law profession, and to my encouraging and loving husband, Wes.

1 Edwin Fuelner, *"Hate Crime" Legislation is an Assault on Free Speech*, CAPITALISM MAGAZINE, Dec. 19, 2002, http://www.capmag.com/article.asp?ID=2231 (emphasis added).

2 *Id.*

3 William D. Araiza, *Foreign and International Law in Gay Rights Litigation: What Claims, What Use, and Whose Law?*, 32 WM. MITCHELL L. REV. 455, 506 (2006) ("[M]omentum for gay rights continues to build in advanced industrial democracies, both at the international, national, and transnational level [and] [n]ational and transnational progress is also evident in westernized developing nations.").

ing Act to "prohibit discrimination on the basis of affectional or sexual orientation."[4] The bill defines sexual orientation to mean "male or female homosexuality, heterosexuality, and bisexuality by orientation or practice, by and between consenting adults."[5] In addition, the House has referred the Local Law Enforcement Hate Crimes Prevention Act of 2005 to the Senate.[6] The new bill provides that the Attorney General may assist (through financial or other means) state and local law enforcement to prosecute hate crimes,[7] thereby providing needed protection to homosexuals and other groups targeted for violence.[8]

Unlike the United States, other countries have enacted hate speech laws in addition to anti-discrimination laws to quell the growing controversy.[9] No matter what form the legislation takes to increase protection for homosexuals, the consequence has been the evolution of a new trend less protective of traditional free speech. While gay rights groups are not the first to seek refuge under antidiscrimination and hate speech laws, it is their movement and the success they have experienced in other countries that have brought to light the growing tension between First Amendment law and anti-discrimination laws.[10]

The purpose of this note is two-fold: (1) to evaluate the two main forms of legislation used to regulate the tension between gay rights

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4 H.R. 288, 109th Cong. (2005).

5 *Id.*

6 H.R. 3132, 109th Cong. (2005).

7 *Id.* The act establishes federal jurisdiction over violent crimes motivated by discrimination, enabling federal, state, and local authorities to work together as partners in the investigation and prosecution of such crimes.

8 *Id.*

9 Jonathan Cohen, *More Censorship or Less Discrimination? Sexual Orientation Hate Propaganda in Multiple Perspectives*, 46 MCGILL L.J. 69, 72 (2002). *See* Hans C. Clausen, Note, *The "Privilege of Speech" in a "Pleasantly Authoritarian Country": How Canada's Judiciary Allowed Laws Proscribing Discourse Critical of Homosexuality to Trump Free Speech and Religious Liberty*, 38 VAND. J. TRANSNAT'L L. 443, 448-49 (2005) (citations omitted).

> Ireland amended its Prohibition to Incitement of Hatred Act of 1989 to include sexual orientation among groups protected from "hate speech." Norway now also proscribes hate speech directed against sexual minorities. In 1994 the government of New South Wales, Australia, passed the Anti-Discrimination (Homosexual Vilification) Amendment Act .... Denmark similarly has made it a crime to "utter publicly or deliberately ... a statement or remark by which a group of people are threatened, derided or humiliated on account of their ... sexual orientation."*Id.*

10 *See generally* DAVID E. BERNSTEIN, YOU CAN'T SAY THAT! (Cato Institute 2004).

activists and the mainstream public, and (2) to expose the growing threat both may pose to First Amendment freedoms. The first part of this note examines the current application of antidiscrimination laws and the popular belief that antidiscrimination laws should trump free speech rights any time the two seem to compete. The second part evaluates the use of hate speech laws by other countries and the negative implications on expressive freedoms. The third part explains why the actions taken by foreign nations pose another threat to First Amendment freedoms due to the application of foreign law by United States courts.

II. ANTIDISCRIMINATION LAWS VS. FIRST AMENDMENT FREEDOMS: THE ABANDONMENT OF FREE SPEECH

It is important to preface the following argument by stressing the importance and relevance of antidiscrimination laws which strive to promote equality. Antidiscrimination laws of the past sought to redress historical discrimination against minorities—a much needed protection for minorities suffering from severe discrimination in America. However, the present abusive application and excessive broadening of antidiscrimination laws may pose a threat to civil liberties.[11] Rather than policing the state's own actions to ensure equal protection is provided to all individuals, current legislation is broadening the laws thus placing America in the precarious situation of protecting individuals from any manner of offensive conduct classified as discrimination.

It has been suggested by some that the use of antidiscrimination laws is the best method for regulating the "third wave" of hate propaganda.[12] This reasoning stems from the consequences of censorship resulting from criminalizing hate speech in other countries. Nevertheless, the broadening of antidiscrimination laws has also led, in a more subtle manner, to the erosion of First Amendment freedoms.[13]

Setting aside the current application of the First and Fourteenth Amendments, the language provided in the Constitution would suggest both amendments were intended to co-exist without conflict.[14] Put

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[11] *Id.*

[12] Cohen, *supra* note 9, at 71. The first having been the rise of anti-Jewish and anti-Black hate propaganda in the 1960s, and the second expansion and prosecution of those efforts in the 1970s and 1980s. The third wave is characterized by the dissemination of cyberhate, the expansion of target groups, and the corresponding rise in hate crimes directed at women and members of minority groups. *Id.*

[13] BERNSTEIN, *supra* note 10, at 156.

[14] BERNSTEIN, *supra* note 10, at 12-13.

simply, the First Amendment prohibits government regulation of speech,[15] while the Fourteenth Amendment obligates states to provide equal protection of the laws.[16] Today, the guarantees of the First Amendment seem to be dependent upon the application of antidiscrimination laws. David Bernstein, an associate professor at the George Mason University School of Law and the author of over 60 scholarly articles, suggests the reason is "a shift in the primary justification for such laws from the practical, relatively limited goal of redressing harms visited upon previously oppressed groups, especially African Americans, to a moralistic agenda aimed at eliminating all forms of invidious discrimination."[17] Despite recent Supreme Court decisions which have held a government's interest in preventing discrimination is not a compelling interest that a state may justify to restrict free speech,[18] government bodies and a portion of the public continue to turn a blind eye to free speech regulations.[19]

For example, the Court has struck down attempts made by state governments to limit speech due to its viewpoint. In *R.A.V. v. City of St. Paul,* the Supreme Court concluded that a city ordinance—which made it a misdemeanor to "place[] on public or private property a symbol, object, appellation . . . including a burning cross which one knows arouses anger . . . in others on the basis of race, color, creed, religion or gender. . . ." - violated the Constitution's First Amendment.[20] Subsequently, in *Boy Scouts of America v. Dale*, the Court

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15 U.S. CONST. amend. I.

16 U.S. CONST. amend XIV. *See also* BERNSTEIN, *supra* note 10, at 12.

17 BERNSTEIN, *supra* note 10, at 4.

18 *See* Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (upholding the organization's right to exclude gay leaders because it would undermine the BSA's promotion of sexual morality); Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995) (preventing Massachusetts from forcing a privately sponsored St. Patrick's Day parade to accept a gay rights group to march with them).

19 For example, the Supreme Court in *Boy Scouts of America*, explained that New Jersey's definition of

> "public accommodation" was extremely broad . . . . As the definition of "public accommodation'" has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership of organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased.

530 U.S. at 657.

20 505 U.S. 377, 379 (1992).

upheld the organization's rights to maintain its policy in promoting sexual morality by excluding gay members.[21]

States, however, have not been so generous in their protection of free speech and expression. An Alaska court struck down a landlord's free exercise claim after the landlord denied housing to an unmarried couple.[22] The court held the landlord's religious motivations "trespass on the private right of unmarried couples not to be unfairly discriminated against."[23] Also, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,[24] the Supreme Judicial Court of Massachusetts held that a group of people organizing a St. Patrick's Day Parade were required to allow a homosexual club to march under its banner. The court rationalized that the government's interest in diminishing discrimination was sufficient to force the group to accept the homosexual club.[25]

Despite Supreme Court decisions banning hate speech ordinances listing specific words,[26] some of the most blatant restrictions of First Amendment free speech have taken place on school campuses. At Harvard University, college students who criticized homosexuality in their magazine were accused of "hate speech."[27] A student "tribunal" at Tufts University denied recognition and funding to an evangelical group because it refused to allow a bisexual to assume a leadership role in the group.[28] The bisexual was already a part of the group, and the group stated it had no problems with her exploration of sexuality and would not prevent her from being a part of the group.[29] However, the group explained it would not allow anyone to be a leader who "challenged the group's conclusion that homosexuality is incompatible with Scripture."[30] A student at Pioneer High School in Michigan was kicked off a panel on religion and homosexuality and was prevented from giving her speech because it included an adverse view of homo-

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21 530 U.S. 640, 656 & 661 (2000).

22 *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 284 (Alaska 1994).

23 *See generally, id.*

24 636 N.E. 2d 1293, 1300 (Mass. 1994), *rev'd*, 515 U.S. 557 (1995).

25 *Id.*

26 *R.A.V.*, 505 U.S. at 396.

27 Walter Goodman, *Along the Battle Lines of 'Politically Correct,'* N.Y. TIMES, October 1, 1993, at D17.

28 John Leo, *Playing the Bias Card*, U.S. NEWS & WORLD REPORT, Jan. 13, 2003, at 41.

29 *Id.*

30 *Id.*

sexuality based upon a religious perspective.[31] The speech was prepared for Diversity Week at the high school. Officials claimed that her views would diminish the "positive" message of homosexuality the school was trying to convey.[32]

In addition to the abusive application by the government of anti-discrimination laws, these same laws have also been abused by people seeking to create a discriminated class and to obtain a remedy. For example, San Francisco enacted a city ordinance banning discrimination based on height and weight.[33] The development of the ordinance was a result of an outcry led by citizens who were offended by a billboard of a gym advertisement which referenced fat people.[34] Since the enactment of the ordinance, a California mother brought a suit claiming her daughter was a victim of height and weight discrimination after the San Francisco Ballet refused admission to her daughter. The mother claimed the modern ballet's standards were discriminatory in requiring dancers be tall and lithe.[35] In Denver, Colorado, American Indian activists convinced local officials that the celebration of Columbus Day would create "an illegal 'hostile public environment.'"[36] Citizens seeking the parade permit were forced to sign an agreement promising not to acknowledge Christopher Columbus during the parade.[37] No mention of his name, any references or depictions on any floats, and no speeches for Christopher Columbus were allowed,[38] even though the purpose of the parade was to celebrate the discovery of America by Columbus.

The First Amendment is also under attack by critical race theorists, feminists and scholars who claim the amendment is a "barrier to the government's ability to pursue sexual and racial equality."[39] Andrew Koppleman, the author of *Antidiscrimination Law and Social Equality*, advocates the censoring of speech is justified, if it is "exceedingly

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31 John Leo, *Bombarded By Bans*, U.S. NEWS & WORLD REPORT, Oct. 21, 2002, at 12.

32 *Id.*

33 BERNSTEIN, *supra* note 10, at 35.

34 *Id.*

35 *Id. See, e.g.*, Michelle Tauber, *Dancer's Image: Charging Body-size Bias, Krissy Keefer Fights to Have Her 9 year-old Daughter Admitted to Ballet School*, PEOPLE, March 5, 2001, at 79.

36 BERNSTEIN, *supra* note 10, at 2. *See also* Al Knight, *A City Disgrace, Again*, DENVER POST, Oct. 1, 2000, at L3.

37 *Id.*

38 *Id.*

39 BERNSTEIN, *supra* note 10, at 14; *see also id.*, note 12.

harmful," even though he recognizes that censoring speech can be "easily abused."[40] He reasons that "outlawing free speech critical of discrimination, or rather racism, would give the government power to decide whether such comments were 'worthless.'"[41] Even the American Civil Liberties Union (ACLU) seems to be confused on where it stands in its fight for civil liberties. The ACLU has increased its aggression to defend antidiscrimination laws even at the expense of other civil liberties.[42] For example, the ACLU was in the forefront of the Boy Scouts cases, advocating the organization should be forced to accept homosexual members.[43]

III. OTHER DEMOCRACIES: IMPLICATIONS OF ERODING CIVIL LIBERTIES

In addition to expansion of anti-discrimination laws, foreign law has found a voice in America's court systems in interpreting the Constitution.[44] Most countries responded to sexual minorities' claims of discrimination by passing strict hate speech laws in order to regulate hostile sentiments concerning homosexuality. Hate speech laws are in effect in Sweden, Norway, Ireland, Canada, the United Kingdom, and Australia.[45] Denmark simply made it a crime to "utter publicly or deliberately . . . a statement or remark by which a group of people are threatened, derided or humiliated on account of their . . . sexual orientation."[46] Other countries, such as New Zealand, are currently considering similar provisions.[47] As a result of hasty legislation, these countries have been engulfed in controversy and confusion. For example, in 2002 Sweden amended its hate speech law to include "sexual orientation" to the list of groups protected from hate speech.[48] Application of

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40 *Id.* at 18.

41 *Id.*

42 *Id.* at 145, 152.

43 *Id.* at 146.

44 *See* Roper v. Simmons, 543 U.S. 551, 575-76 (2005) for a list of cases using international law.

45 Antidiscrimination Act, 1977 (amended 1993), pt. 4C, div. 4, (N.S.W. ACTS) (Austl.); Canada Criminal Code, R.S.C., ch. C 46 § 810 (1985); CODE PENAL [C. PEN.] art. 266(b) (Den.); Prohibition of Incitement to Hatred Act, 1989 (Act No. 19/1989) (Ir.) *available at* http://www.irishstatutebook.ie/ZZA19Y1989.html (last visited November 12, 2006); CODE PENAL [C. PEN.] Act no. 10 § 135 (Nor.); Brottsbalken [BrB] [Criminal Code] 16:8 (Swed.).

46 Clausen, *supra* note 9 at 449.

47 *Id.*

48 Dale Hurd, *Swedish Pastor Sentenced for 'Hate Speech,'* CBN.COM, Sept. 10, 2004, http://www.cbn.com/cbnnews/cwn/091004sweden.asp.

the new law resulted in the arrest of Reverend Ake Green[49] who was accused of hate speech after printing one of his sermons in the newspaper on the subject of homosexuality from a biblical perspective.[50] The article expressed views of homosexuality including the belief that homosexuality is a "cancerous tumor in the entire society," but that "[w]e cannot condemn these people."[51] Reverend Green was sentenced to jail time by the lower court.[52] A Swedish appeals court overturned his conviction in February 2005.[53] In its reasoning, the court stated the law was never intended to deprive a pastor of his right to preach or to prevent open discourse on homosexuality.[54] Despite obvious violations of free expression, homosexual activists expressed discontentment with the pastor's release. A spokesperson for Sweden's national gay and lesbian organization (RSFL) claimed "hatred and defamation is not to be accepted just because it's based on religious beliefs" and that there are "some limits when it comes to the freedom of speech."[55] The actions of the government, despite the appeals court's decision, have stirred skepticism and fear among citizens due to the obvious "balancing act" between gay rights and the right to freedom of religion and expression.[56]

Thus far, it has been Canadian legislation that has taken the most comprehensive approach in order to protect homosexuals by enacting aggressive anti-discrimination and hate speech laws.[57] Most recently, Canadian lawmakers enacted the C-250 Bill.[58] The bill adds "sexual orientation" to the list of groups protected under Canada's *Criminal Code*, heightening the penalty of hate speech by enforcing criminal punishment, such as jail time.[59] Canada justified the new bill as providing needed protection to homosexuals; however, powerful sanctions proscribing hate propaganda existed prior to the passage of C-250. Together with this new bill, homosexuals are given more protec-

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49 *Id.*
50 *Id.*
51 *Id.*
52 *Id.*
53 Keith B. Richburd, *Swedish Hate-Speech Verdict Reversed,* CONTRA COSTA TIMES, Feb. 13, 2005, at F4.
54 *Id.*
55 *Id.*
56 Hurd, *supra* note 48.
57 Clausen, *supra* note 9, at 452.
58 Canada Criminal Code, R.S.C., ch. C-49 § 318.1 & 318.4 (2004).
59 Clausen, *supra* note 9, at 455.

tion than other "vulnerable groups" such as women or elderly people.[60]

Two of the criminal sanctions enacted prior to C-250 served to deter hate crimes, while leaving speech unregulated. Section 718.2 of the Criminal Code allowed stricter punishment to be applied for hate crimes committed against homosexuals, and Section 820 served as a prevention measure by extending protection to individuals who fear harm to their person or property through a court order which threatens imprisonment to any defendant who violates the peace order.[61] In addition, Section 22 of the Criminal Code holds anyone criminally liable who "counsels or advocates violence against any person when that counsel is acted upon."[62]

Because of the existence of the protection prior to the passage of C-250, many feel this new bill will target specific groups morally opposed to homosexuality.[63] Pete Winn, an associate editor for the *Citizen*, is concerned religious rights will be sacrificed to accommodate sexual orientation rights, like other laws promoting sexual orientation rights.[64] These concerns expressed by many religious groups are also the same concerns expressed by others who are worried about the ramifications of C-250 and the power it gives Canadian judges to strictly and easily limit speech.[65] Some academic scholars suggest it is already illegal to oppose homosexuality from a traditional Christian standpoint in Canada.[66] Members of Parliament have even expressed concerns about the new bill, including John McKay—a member of the Liberal Party—who called the bill a "chill bill," suggesting "[a]nybody who has views on homosexuality that differ from Svend Robinson's will be exposed rather dramatically to the joys of the Criminal

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60 *Id.* at 457.

61 *Id.* at 456. *See, e.g.*, R.S.C., ch. C-46, 718.2 (1985); R.S.C., ch. C-46, 810 (1985).

62 Clausen, *supra* note 9, at 456.

63 *Id.* at 457.

64 Pete Winn, *Now You're Looking at Jail Time*, CITIZEN, May 6, 2004, http://www.family.org/cforum/feature/a0031938.cfm.

65 Clausen, *supra* note 9, at 457-60.

66 *Homosexuality and Hate Speech: Defending Moral Principles is Getting Riskier*, ZENIT NEWS AGENCY, Feb. 14, 2004, http://www.zenit.org/english/visualizza.phtml?sid=49050.

Code."[67] Svend Robinson is the Member of Parliament who sponsored the new bill.[68]

In addition to criminal sanctions, many provinces of Canada have already enforced civil laws protecting homosexuals by categorizing homosexuality as a human rights issue, which if violated, invokes a punishment of money fines in order to deter discriminatory behavior.[69] As a result, the courts of Canada have been flooded with cases involving one party invoking the right to freedom of expression and the other party claiming discrimination.

In the Canadian province of Saskatchewan, a man, Owen, was fined by a human rights tribunal after he placed a newspaper ad in the local newspaper referencing Scripture in the Bible opposing the gay lifestyle.[70] The ad was accompanied by a picture of two figures holding hands encompassed by a red circle with a diagonal bar across it.[71] The advertisement was for the sale of bumper stickers.[72] The appeals court affirmed the board's ruling that Owen violated provision 14 of the Saskatchewan Human Rights Code.[73] What the court failed to acknowledge was that in order for provision 14 to be applicable, the message conveyed must cause others to participate in a discriminatory act.[74] In this case, no one presented evidence to show any event took place due to the advertisement or that anyone committed a discriminatory act as a result of the ad. The board merely claimed it was certain some of the "biblical quotations suggest more dire consequences" and the ad could be seen as a hateful gesture towards homosexuals.[75]

Even more disconcerting is that Canadian courts are also sacrificing individual rights to the rights of organizations. For example, in 2000, the Ontario Human Rights Commission found a print shop

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67 Art Moore, *Bible as Hate Speech Bill Passes*, WORLDNETDAILY, Sept. 18, 2003, http://www.worldnetdaily.com/news/printer-friendly.asp?ARTICLE_ID=34671.

68 *Id.*

69 The Ontario Human Rights Commission found a citizen guilty of homosexual discrimination for refusing to print homosexual material and fined him $5,000. The award was affirmed by the District Court. Clausen, *supra* note 9, at 475-78. Again, in Saskatchewan, the Board imposed a fine of $1,500 on a citizen after he was determined guilty of discrimination for selling bumper stickers advocating the marriage of only one man and one woman. *Id.* at 478-80.

70 Moore, *supra* note 67.

71 Clausen, *supra* note 9, at 478.

72 *Id.*

73 *Id.* at 480.

74 *Id.*

75 *Id.* at 479.

owner guilty of discrimination against homosexuals when he turned down a request from the Canadian Gay and Lesbian Archives group to print its materials.[76] Scott Brockie, the owner, had never refused any individual his printing services regardless of their sexual orientation; but in this case, Brockie stated his Christian beliefs "compelled him to reject the group's request to print materials."[77] The Human Rights Commission, in justifying his conviction, admitted it was limiting Brockie's freedom of religion but it was reasonable to do so in order to "prevent the very real harm to members of the lesbian and gay community."[78] The legal counsel for the Human Rights Commission stated: "[S]uch groups [as the Gay and Lesbian Archives] are so imbued with the identity of character of their members that they must be accorded the same protection as individuals."[79] Here, Scott Brockie was forced to provide printing services to an organization advocating a cause which his religion prohibits.

While there are not many cases available for review under the new C-250 bill, the cases discussed above already raise grave concerns as to what type of protection will remain for religious organizations, or any group or individual exercising rights to free expression—even when that expression is a mere opinion. More censorship in Canada "seems inevitable."[80]

There are additional concerns arising from Canada's newly adopted hate speech legislation. One concern is the seeming failure by the courts and Parliament to construe the statute narrowly. Both the Criminal Code and the Human Rights Commission in Saskatchewan failed to define "sexual orientation."[81] This could pose a problem since sexual orientation may be defined as 24 different behaviors including polygamy, bestiality, and pedophilia.[82] Unless the term is defined, it would seem pedophilia and other behaviors are currently protected from hate speech under the new law. Secondly, this type of legislation confuses the line once drawn between discrimination and speech motivated by hate and the mere expression of differing opin-

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[76] Art Moore, *Freedom of Conscience Debated in Ontario*, WORLDNETDAILY, Dec. 17, 2001, http://www.worldnetdaily.com/news/article.asp?ART ICLE_ ID=25673.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] David E. Bernstein, *Defending the First Amendment From Antidiscrimination Laws*, 82 N. C. L. REV. 223, 244 (2003).

[81] Moore, *supra* note 76.

[82] *Id.*

ions. What was once considered offensive speech is now criminalized and forbidden.

IV. "AS GOES CANADA . . . SO GOES THE UNITED STATES"[83]

The First Amendment to the United States Constitution provides "Congress shall make no law . . . abridging the freedom of speech, or of the press."[84] Unlike other nations,[85] the First Amendment prohibits the censorship of speech in the United States. The speech denied protection under Canada's freedom of expression guarantees currently would be protected by the First Amendment in the United States. However, the current state of First Amendment protection is criticized by many scholars who suggest free speech guarantees should "yield" to "hate speech" laws because the offense taken by listeners—especially those who are a target—is a "serious moral harm."[86]

In addition to the strong support for the use of foreign law in American courts, the view that hate speech laws are more important than free speech laws could mean devastating results for the First Amendment. Further, the Supreme Court's willingness to look to foreign law to find constitutional rights[87] may have the affect of accelerating the speed at which the interpretation of the Constitution is broadened to accommodate new rights. As a result, the application of the First Amendment would become narrower, diminishing its protection. Justice Ginsburg has encouraged the practice of becoming more open

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[83] Andrea Vinley Jewell, *As Goes Canada . . . So Goes the United States*, FOCUS ON THE FAMILY MAGAZINE, June 2001, at 14.

[84] U.S. CONST. amend. I.

[85] BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, 2005 Country Reports on Human Rights Practices § 2 a (2005) *available at* http://www.state.gov/g/drl/rls/hrrpt/2005/61612.htm (addressing the freedom of speech violations in the Democratic People's Republic of Korea); Homer E. Moyer, Jr., *American Bar Association Section of International Law and Practice Reports to the House of Delegates: II. Bill of Rights for Hong Kong,* 25 INT'L LAW. 791 (Feb. 1991) ("The banning of a Taiwanese documentary by government officials under a film **censorship** ordinance last year has heightened sensitivities of television producers and publishers. The implications for freedom of expression are obvious and ominous.").

[86] BERNSTEIN, *supra* note 10, at 155.

[87] For a list of Eighth Amendment cases demonstrating the Supreme Court's approach in looking to foreign law to interpret constitutional rights *see* Atkins v. Virginia, 536 U.S. 304, 316 (2002); Thompson v. Oklahoma, 487 U.S. 815, 830-31 (1988); Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977); Trop v. Dulles, 356 U.S. 86, 102-03 (1958).

to international law perspectives.[88] In an article written on this very issue, she explained "our 'island' or 'lone ranger' mentality is beginning to change."[89] Justice Breyer has, without qualms, expressed his belief that the use of comparative law is relevant to enforcing human rights and to changing "constitutions."[90] Ironically, the Court - comprised of these same Justices who advocate the use of international law - claims that the "task" of interpreting the Constitution, particularly the Eighth Amendment, remains the responsibility of the Court.[91] This was the Court's reasoning in *Roper v. Simmons*. However, the Court proceeded with a lengthy discussion of international law principles and the history of its use and stated: "[T]he Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"[92]

While the homosexual rights movement was obviously not the first group to seek refuge under international law principles,[93] it is the use of foreign law by the courts in recent homosexual rights cases that has received the most criticism and caused controversy. In November of 2003, the Supreme Judicial Court of Massachusetts, in *Goodridge v. Department of Public Health*,[94] cited a decision by the Court of Appeal for Ontario in support of its decision for the constitutional right to same-sex marriage.[95] In its decision, the court suggested that "Canada, like the United States[,] adopted the common law of England that civil marriage is the voluntary union for life of one man and one woman, to the exclusion of all others," and that the Court of Appeals for Ontario had decided to "redefine the common-law meaning of marriage."[96]

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88 Ruth Bader Ginsburg, *Sherman J. Bellwood Lecture: Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1, 8 (2003).

89 *Id.* at 8.

90 Roger P. Alford, *The United States Constitution and International Law: Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L. L. 57, 57 (Jan. 2004) (Justice Breyer concluded "nothing could be 'more exciting for an academic, practitioner, or judge than the global legal enterprise that is now upon us'").

91 Roper v. Simmons, 543 U.S. 575 (2005).

92 *Id.*

93 Araiza, *supra* note 3, at 456.

94 798 N.E.2d 941 (Mass. 2003).

95 *Id.* at 966 & n.3, 969 (quotation omitted).

96 *Id.* at 969.

Also, in *Lawrence v. Texas*,[97] the Supreme Court relied heavily upon the European Court of Human Rights' decision of *Dudgeon v. United Kingdom* which struck down legislation outlawing sodomy in the United Kingdom[98] when deciding the U.S. Constitution afforded all adults a right to "exercise their liberty under the Due Process Clause of the Fourteenth Amendment."[99] This decision overturned the Court's earlier decision in *Bowers v. Hardwick*,[100] which held laws against sodomy have "ancient roots" in America and the Fourteenth Amendment does not afford a fundamental right to homosexuals to engage in acts of consensual sodomy.[101]

In *Lawrence*, the court focused on liberty interests contained in the Fourteenth Amendment, something it claimed the court in *Bowers* failed to "appreciate,"[102] due to the *Bowers* court's focus on whether the Constitution "confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates laws of the many States that still make such conduct illegal."[103] It is the Court's focus on liberty, rather than right to privacy which some suggest has set the precedent for the use of foreign law in "defining the content of substantive due process."[104] Unlike the closely-held right to privacy which is only familiar in American constitutional law, the term "liberty" has "global meaningfulness,"[105] and this "frees the court from the need to rely on . . . American tradition."[106] Justice Kennedy provides the justification for this shift:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later

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97 Lawrence v. Texas, 539 U.S. 558 (2003).

98 Alford, *supra* note 90, at 64; Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981).

99 *Lawrence,* 539 U.S. at 565.

100 478 U.S. 186, 192 (1986); *See also Lawrence*, 539 U.S. at 578.

101 *Bowers,* 478 U.S. at 192.

102 *Lawrence,* 539 U.S. at 567.

103 *Id.*

104 Araiza, *supra* note 3, at 460.

105 *Id.* at 459-60.

106 *Id.* at 491.

> generations can see that the laws once thought necessary and proper in fact serve only to oppress.[107]

Perhaps the best lesson learned from *Lawrence* is that the Constitution can only be stretched so far before the creative use of foreign law is necessary to broaden its reach and applicability. This arbitrary application of international law is considered to be potentially more of a "haphazard" than an "empirical" approach which poses serious threats to the autonomy of the Constitution.[108]

In addition to the Supreme Court majority's willingness to use international law, human rights organizations and activist groups add further pressure to accelerate the use of foreign law because of the realization that deference given to foreign law by the courts means the abandonment of American traditions that stand in the way of new human rights. For example, the ACLU, at a conference two years ago, stated its "goal is no less than to forge a new era of social justice where the principles of the United Nation's Universal Declaration of Human Rights are recognized and enforced in the U.S."[109] The conference served as a training ground to help lawyers develop "legal and organizing strategies" in using international law in areas like criminal and economic justice, rights of non-citizens and women's rights.[110] As previously mentioned, other groups in addition to the ACLU are searching for strategies to "bypass" the democratic process altogether through the use of the court systems on a large scale in order to satisfy their own political agendas.[111] This was the focus at a gathering in London at Kings College in 1999.[112] Homosexual activists, lawyers, and professors held training sessions with the intention of applying this strategy internationally.[113] American judges were also there to

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107 *Lawrence*, 539 U.S. at 578-79.

108 Alford, *supra* note 90, at 57.

109 ACLU, *ACLU Convenes First National Conference on the Use of International Human Rights Law in the U.S. Justice System*, October 8, 2003, http://www.aclu.org/International/International.cfm?ID=13994&c=36.

110 *Id.*

111 Alan Sears, Foreign Law in American Domestic Jurisprudence, Adapted from remarks to a group of people interested in law & justice issues in San Diego (March 2004), www.alliancedefensefund.org/issues/religiousfreedom/internationallaw.apx?cid=3233 (last visited Sept. 7, 2006).

112 *Id.*

113 *Id.*

support this plan, including United States District Judge Deborah Batts.[114]

There is some irony in the claims made by these human rights groups seeking more freedom through the integration of international law. America is considered, in many respects, to be the world's leader in the protection of civil liberties, affording more freedom and protection of human rights than other countries.[115] Therefore, the use of international law to protect human rights is obviously very selective, chosen carefully by these groups to serve only their agenda. This opens the door for the misuse of international law. It is for this reason many scholars suggest the use of international law is inadvisable.[116]

Interpreting international law principles is an overwhelming task that is forced by this "grab bag" approach. This task, Justice O'Connor admits, is one the court is not always equipped to handle. Justice O'Connor explained that international and foreign law is being "raised in our courts more often and in more areas than our courts have the knowledge and experience to deal with. There is a great need for expanded knowledge in the field, and the need is now."[117] Many scholars express this same concern.[118] Proper application of international law would require a "comparitivism" the Court does not have the "capacity to engage in," leaving the Court to primarily rely on the information provided by the legal advocate.[119] Alford suggests that "in the international legal arena where the Court has little or no expertise , [it] is duly susceptible to selective and incomplete presentations of the true state

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[114] *Id.* Judge Batts is the first openly gay federal judge. She was appointed by President Bill Clinton in 1994 for the Southern District of New York. Joan Biskupic, *Amid Debate Over Rights, Number of Gay Judges Rising; Most Report Sexual Identity Not an Issue, but Conservative Groups Wary*, USA TODAY, Oct. 18, 2006, at 5A.

[115] Jack Goldsmith, *Should International Human Rights Law Trump U.S. Domestic Law?*, 1 CHI. J. INT'L L. 327, 334 (2000).

[116] Alford, *supra* note 90, at 57.

[117] Sandra Day O'Connor, Keynote Address, 96 ASIL. PROC. 348, 351 (2002). *See also* Alford, *supra* note 90, at 66.

[118] Alford, *supra* note 90, at 65. Professor Alford is currently a professor at Pepperdine University School of Law. Prior to joining the faculty in 2000, Professor Alford served as a legal advisor with the Claims Resolution Tribunal for Dormant Accounts that analyzed inheritance laws to resolve Holocaust claims against Swiss banks. *See* Richard Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952, 957 (2003). "Realists about the limited intellectual capacities and knowledge bases of Supreme Court Justices . . . advise hesitancy in invalidating statutory and other official action on the basis of constitutional interpretation . . . . The realist insight is based precisely on the institutional limitations of the courts." *Id.*

[119] Alford, *supra* note 90, at 65.

of international and foreign affairs."[120] Since the Court is to evaluate both sides of the argument, reliance upon one side's international law analysis undermines the Court's purpose.[121] This dilemma can be demonstrated through the Court's analysis in *Lawrence*. The Court in *Lawrence* recognized the "emerging recognition" of legal homosexuality in other countries, relying on the amicus brief filed by human rights organizations which heavily quoted the *Dudgeon* case.[122] The amicus brief argued the "United States is not the world's only civilized society" therefore it would be "folly to ignore foreign practice and precedent at a time when courts across the world are increasingly caught up in a process of cross-fertilization among legal systems."[123] This view - that support for homosexual rights is abundant in all countries - seems to have been adopted by the Court, which provided that engaging in sodomy was a constitutional right encompassed in liberty and "tradition" under the Fourteenth Amendment.[124]

Contrary to the claims stated in the amicus brief, 74 of 172 countries surveyed have actually outlawed homosexuality.[125] At the time of the *Lawrence* decision, the same source indicated homosexuals are treated worse in the former British colonies compared to other countries and "a majority in only eleven countries favors equal rights for homosexuals, [and] that only six countries legally protect gays and lesbians against discrimination."[126] Amnesty International reports "many governments at the UN have vigorously contested any attempts to address the human rights of lesbian, gay, bisexual and transgender people."[127] The reality is there are more countries that are either morally or legally opposed to homosexuality than are supportive of it. The decision by the Court in *Bowers*, which was overruled by *Lawrence*, more accurately represents the view held by the majority of "civiliza-

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120 *Id.*

121 *Id.*

122 *Lawrence*, 539 U.S. at 576-77.

123 Brief of Mary Robinson et al. as Amicus Curiae Supporting Petitioners at 11-12, *Lawrence*, 539 U.S. 558 (No. 02-102).

124 *Lawrence*, 539 U.S. at 574.

125 Alford, *supra* note 90, at 66 (citing Rob Tielman & Hans Hammelberg, *World Survey on the Social and Legal Position of Gays and Lesbians*, *in* THE THIRD PINK BOOK: A GLOBAL VIEW OF LESBIAN AND GAY LIBERATION AND OPPRESSION 250-251 (1993)).

126 *Id.*

127 *Id.* at 65 - 66. *See* Press Release, Amnesty International, U.N. Commission on Human Rights: Universality Under Threat over Sexual Orientation Resolution (Apr. 22, 2003), http://web.amnesty.org/ library/Index/ENGIOR410132003?open&of=ENG-347.

tion."[128] Among the population in 144 countries, "there is 'hardly any support for gay and lesbian rights.'"[129]

Justices on the Court have also expressed their displeasure with the use of international law. The dissent in *Thompson v. Oklahoma* argued that the majority's assessment of other nations' policies was "totally inappropriate as a means of establishing the fundamental beliefs of this Nation."[130]

V. CONCLUSION

This note does not seek to suggest homosexuality should be criminalized, because it should not be. The government should not be forced to monitor what goes on between two consenting adults in the privacy of their own home. This note does, however, suggest that defining homosexuality as a constitutional right under the Fourteenth Amendment, and giving it special status, endangers other freedoms under the Constitution. It opens the door for similar arguments to be made by other groups engaging in "private activities" such as bestiality or polygamy. Defining homosexuals as a discriminated class, in and of itself, may not be dangerous. However, today, the precedent that has been set in considering almost any group a discriminated class is dangerous. Overly broad antidiscrimination laws, made applicable by state government, prevent private citizens from expressing an opposing view to a moral issue, from establishing or maintaining a private organization with rules and guidelines prohibiting certain behaviors, or from choosing carefully new tenants to live in a neighboring home which the private citizen owns. Those who benefit the most from First Amendment freedoms are those advocating its demise. It is the radical views held by a minority or a group differing from the views held by the public at large, that benefit from such liberal freedoms of expression and speech.[131]

The use of international law further threatens the extensive protection the Constitution provides Americans compared to other countries.

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128 Alford, *supra* note 90, at 65-66.

129 *Id.*

130 *Thompson*, 487 U.S. at 869, n. 4 (Scalia, J., dissenting). *See also* Roper v. Simmons, 543 U.S. 551 (2005). Justice Scalia wrote one of the dissenting opinions, which was joined by Chief Justice Rehnquist and Justice Thomas, and said, in disapproving of the majority's use of international law, that "the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand." *Id.* at 624.

131 BERNSTEIN, *supra* note 10, at 21.

The use of international law could undermine liberal freedoms, rather than guarantee them, as the Constitution seeks to do.[132]

> We must never forget that it is a Constitution for the United States of American we are expounding . . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution . . . .[133]

The dissent's argument in *Thompson* asserted that the Constitution, years of judicial precedent, and democratic processes have all sought to maintain the scope of the law and the balance of powers in order to maximize individual freedom and prevent any one branch of the government from making and interpreting the law. By allowing international law to set the standards for American domestic law, we risk our nation's sovereignty.

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132 Alford, *supra* note 90, at 57.

133 *Thompson*, 487 U.S. at 880 (Scalia, J., dissenting).