Lesbian and Gay Rights as Human Rights: Strategies for a United Europe

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INTRODUCTION

Human rights for European lesbians and gay men are at a crossroads. Although it is now taken for granted in nearly all Western European nations that private sexual relationships between consenting adults can no longer be criminalized, lesbians and gay men have had only partial success in convincing their governments, and the European public, to recognize their other important social concerns. Issues such as equality in employment, benefits for same-sex partners, gay marriages, punishment for bias-motivated crimes, and the ability to adopt and raise children have been recognized only in a few nations and only to a limited degree.

In both the domestic and international arenas, the achievements already forged by lesbian and gay rights advocates and the possibility for future reforms may be significantly altered by European integration. Although the anticipated legal effects of European unity under the auspices of the European Community (EC) have been well documented, the impact of integration on sexual minorities has rarely been explored. Legal developments in the lesbian and gay rights area are

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not limited to the EC, however. The Council of Europe, a multinational organization which functions as the clearinghouse for the creation of European-wide treaties and other international activities, has also been instrumental in devising legal innovations concerning sexual orientation. The Council’s Parliamentary Assembly will soon be the site for an historic event: a debate to amend the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the Convention) to protect lesbians and gay men from discrimination by European governments.

The amendment, or Protocol as it is known in the parlance of international law, is extremely comprehensive and would effectively place lesbians and gay men on an equal footing with their heterosexual counterparts. If ratified, the Protocol would provide an unprecedented opportunity for advancing the rights of sexual minorities in Europe. But precisely because the document, as currently drafted, goes such a long way toward eliminating all forms of discrimination on the basis of sexual orientation, it may, paradoxically, create unanticipated obstacles to achieving those rights. In fact, when examined in light of the Convention’s existing jurisprudence on discrimination issues, the Protocol has the potential to slow substantially the pace of reform in those European nations that fail to ratify the amendment.

This Article explores how these international developments could alter the strategy of the European lesbian and gay rights movement. Part I discusses the jurisprudence of the European Court of Human Rights and the European Commission of Human Rights, the two tribunals which interpret the obligations of the Contracting States to the Convention. It focuses on their use of a “European consensus” approach to resolving disputes. This approach emphasizes utilizing progressive law reform trends occurring across Europe as a means of continually expanding the Convention’s application to individual rights.

After examining the tribunals’ use of the European consensus

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4. For a discussion of the text of the Protocol, see infra text accompanying notes 175-81.
5. The Contracting States are those European nations which have ratified the Convention. They include Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey and the United Kingdom. Hungary and Czechoslovakia signed the Convention in 1990 and 1991 respectively, but had not ratified it as of March 1, 1991. Council of Eur., Convention for the Protection of Human Rights and Fundamental Freedoms, Chart of Signatures and Ratifications, No. 5 (Mar. 1991).
inquiry to interpret the Convention's privacy and non-discrimination guarantees, Part I discusses the Court and Commission's case law on issues related to homosexuality. Although the tribunals have ruled that private sexual relationships between consenting adults are protected by the Convention's right to privacy, they have failed to interpret the Convention as the charter of sexual equality which human rights scholars had once envisioned. This has occurred in part because the tribunals have limited human rights protection to adult consensual sodomy. Although numerous attempts have been made to extend the Convention to other issues related to homosexuality, the Court and Commission have consistently refused to do so.

With the limitations of Convention jurisprudence as a predicate, Part II examines legal developments related to sexual orientation which have occurred outside the Convention framework. It discusses changes to the domestic laws of individual European states which have evolved over the last decade. Although lesbians and gay rights advocates have made significant strides in some nations, other states have been extremely resistant to their efforts.

Part II then catalogues the political accomplishments which advocates for sexual minorities have already achieved in the international arena. It reviews legislation passed by the parliaments of the Council of Europe and the EC designed to promote greater equality for sexual minorities. Although the work of these organizations has been helpful, it has yet to result in any concrete improvement in the situation of European lesbians and gay men.

Part III is devoted to a detailed analysis of the Protocol and how it may affect Convention jurisprudence on sexual orientation issues. It first explores why the Protocol's text is at odds with the Convention's existing treatment of discrimination claims, and how this conflict may deter a significant number of Contracting States from ratifying the agreement. Part III then looks at the Protocol from a broader perspective, analyzing how the amendment could radically alter the rights-enhancing consensus approach which the Court and Commission use to analyze human rights issues. Although this approach has failed to work effectively for lesbians and gays in the recent past, the domestic and international developments identified in Part II may

6. See infra text accompanying notes 73-86.
8. See infra text accompanying notes 90-129 (discussing cases).
cause the tribunals to modify their narrow analysis of lesbian and gay concerns. Ratification would circumvent this slow evolutionary process and would unequivocally commit those nations which sign the agreement to afford completely equal treatment to heterosexuals and homosexuals.

Although this result appears unambiguously positive for the lesbian and gay rights movement, it may be outweighed by the unanticipated negative effect on those states which refuse to ratify the Protocol, especially if the Court concludes that such states are exempt from any obligations related to homosexuality except those which have already been established at the time the Protocol becomes effective.\textsuperscript{9} Such a construction would limit the possibility of creating a European-wide standard on homosexual equality and could reduce the opportunity for international judicial review of sexual orientation issues in many European states. Having identified the ambiguous future which the Protocol could create for the lesbian and gay rights movement, the Article concludes in Part IV by exploring two alternative strategies for reform.

I. THE EUROPEAN CONVENTION IN CONTEXT: LIMITED HUMAN RIGHTS PROTECTION FOR LESBIANS AND GAY MEN

A. The Convention's Rights-Enforcement Mechanism

Since its entry into force in 1953, the Convention has provided a framework which allows for independent international judicial review of the laws, policies, and practices of European governments. The Convention sets forth, in plain, unambiguous language, basic rights and freedoms which may not be proscribed by the Contracting States.\textsuperscript{10} To date, twenty-three European nations have ratified the

\textsuperscript{9} The issue here is the degree to which the Protocol will preempt an analysis of lesbian and gay issues under other rights guaranteed by the Convention, specifically articles 8 and 14. For a more detailed discussion of this issue, see infra text accompanying notes 199-235.

\textsuperscript{10} The Convention guarantees the following rights: to life (article 2); to freedom from torture, inhuman treatment (article 3); or enslavement (article 4); to liberty (article 5); to fair public hearings by an impartial tribunal (article 6); to freedom from retroactive criminal convictions (article 7); to respect for private and family life, home and correspondence (article 8); to freedom of thought, conscience and religion (article 9); to freedom of expression (article 10); to freedom of association (article 11); to freedom to marry and found a family (article 12); and to freedom to enjoy these rights without discrimination (article 14). Convention, supra note 3.

A lesser number of states have ratified one or more of the nine protocols to the Convention which provide additional human rights guarantees. See, e.g., Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262 (guaranteeing the right to peaceful enjoyment of property, education, and free elections).
Convention, which allows individuals who allege that one or more of these rights have been violated to bring claims against their national governments. 11

Claims are first presented to the European Commission of Human Rights, a quasi-judicial tribunal which screens them for a possible violation of the Convention. 12 The Commission dismisses the majority of claims as without merit. 13 For those cases in which a violation is apparent or which present unresolved questions of interpretation, the Commission receives additional evidence. If no amicable resolution can be reached between the parties, the Commission issues an opinion stating whether the Contracting State has breached its Convention obligations. 14

At this point, either the Commission or the defendant Contracting State may appeal the decision directly to the European Court. 15 An optional protocol permits individuals, groups of individuals, or nongovernmental organizations to appeal a decision of the Commission to a three-judge panel of the Court, which has the authority to dispose of the case if it “does not raise a serious question affecting the interpretation or application of the Convention and does not warrant consideration by the Court for any other reason”. 16 Once seized of an appeal, the Court reviews the evidence and legal arguments de novo and renders a final judgment. 17 Although these judgments are not self-executing, the overwhelming majority of European nations treat them as

11. See Convention, supra note 3, art. 25. Before filing a claim, an individual must exhaust all available and effective national remedies. Id. art. 26.
12. Id. art. 27.
13. Id.
14. See id. art. 31.
15. Id. art. 44.
17. See The Vagrancy Cases, 12 Eur. Ct. H.R. (ser. A) at 29 (1971) (Court may consider all questions of fact and law once case has been referred to it); Fredrik G.E. Sundberg, The European Experience of Human Rights Proceedings: The Precedential Value of the European Court’s Decisions, 20 Akron. L. Rev. 629, 630-31 (Court can render final judgment only if Commission or Contracting State brings case before Court).
binding and have complied with the Court’s rulings.\textsuperscript{18}

The Court’s interpretation of the Convention defines the scope of the Contracting States’ obligations.\textsuperscript{19} Although not strictly bound by precedent, the Court treats its judgments as authoritative, as does the Commission.\textsuperscript{20} Such precedent as exists is applied on an interstate basis, so that a judgment against one state may be invoked to justify a similar ruling against another state.\textsuperscript{21} As a means of ensuring basic rights and freedoms to all Europeans, the tribunals have been remarkably effective, and are regarded as a model for human rights protection throughout the world.\textsuperscript{22}

B. \textit{The European Consensus Inquiry and the Limits of International Judicial Review}

In interpreting the Contracting States’ obligations under the Convention, the Court and Commission weigh respect for national decision-makers against the need to interpret the Convention as a modern document responsive to current European conditions and attitudes. Striking the balance between these two competing goals is difficult, for although the tribunals have indicated that the Convention must be interpreted as a “living instrument”\textsuperscript{23} and “in light of present-day conditions,”\textsuperscript{24} they have also acknowledged that the Contracting States are entitled to a substantial degree of deference, or a “margin of

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\item[19.] The Contracting States comply with the Court’s judgments by, \textit{inter alia}, introducing legislative amendments, reopening judicial proceedings, granting administrative pardons, and paying monetary damages. See Sundberg, supra note 17, at 635-42.
\item[20.] See Cossey v. United Kingdom, 184 Eur. Ct. H.R. (ser. A) at 14 (1990) (Court “usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law”); see also Merrills, supra note 18, at 12 (“[T]he Court consistently seeks to justify its decisions in terms which treat its existing case-law as authoritative. In other words, it follows judicial precedent.”); Sundberg, supra note 17, at 631 (Court’s practice adheres to limited doctrine of stare decisis).
\item[22.] See Warwick A. McKeen, Equality and Discrimination Under International Law 204 (1983) (Convention is “most generally effective” international treaty for protecting human rights); Merrills, supra note 18, at 17 (Convention is regarded as most highly developed scheme of international human rights protection in the world).
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appreciation," for their actions.25

The justifications for respect and deference are considerable. The tribunals are keenly aware that the Convention exists solely by consent of the Contracting States.26 Their jurisdiction and enforcement powers are limited by the extent to which European governments abide by their rulings.27 In the extreme case, a state faced with an unfavorable judgment could withdraw from the Convention altogether, although it is would still be bound by the decision of the Court.28 Even where complete withdrawal is not attempted, a Contracting State can express its displeasure in other ways, by failing to comply with a judgment or by delaying its enforcement.29

It is a measure of the Court’s ability to judge accurately the limits of its powers that the Contracting States have almost never rejected its interpretation of the Convention.30 The Court has been mindful of the fact that it is not a national legislature or court with the ability to strike the balance between competing interests in complex areas of law and public policy.31 Thus, the Court will not require a Contracting State to provide what it considers to be the most comprehensive human rights protection possible. Rather, if the laws of a Contracting State are on the "margin" of compatibility with the Convention, the Court will defer to the judgment of the state in striking the balance between individual rights and the public interest.32


26. See Convention, supra note 3, art. 66.

27. Several Contracting States have incorporated the Convention into their national constitutions, thereby making a breach of the Convention a violation of domestic law. In such cases, the European Court’s judgments can be treated as self-executing. See, e.g., Drzeczewski, supra note 18, at 86-92, 189-99 (discussing domestic treatment of Convention in the Netherlands).

28. See Convention, supra note 3, art. 65 (Contracting State may denounce Convention upon six months notice, but remains subject to its provisions until denunciation becomes effective).

29. There have been remarkably few instances in which such dilatory tactics have been attempted. For a discussion of these cases, see Sundberg, supra note 17, at 641-42.

30. Id. at 633. That the Court gives the Contracting States deference to decide how they will comply with their Convention obligations is another reason for the virtually uniform adherence to European human rights law. See McGoff v. Sweden, 83 Eur. Ct. H.R. (ser. A) at 28 (1984) (Contracting States may choose appropriate measures for complying with Convention).


32. Perhaps the best definition of the deference inherent in the margin of appreciation
The Court has not, however, allowed these prudential concerns for deference to hamper its interpretation of the Convention as a document which is responsive to changing legal thought and practice across Europe. In fact, the Court has made it plain that the Contracting States must make more than a good faith effort to comply with the Convention.33 The discretion the Contracting States are afforded goes hand in hand with a “European supervision,”34 which empowers the Court to give a “final ruling” on whether interference with a protected right can be squared with the Convention.35

In striking the balance between deference and this “European supervision,” the Court analyzes the degree to which common practices or policies can be discerned among the Contracting States. To determine whether a statute, administrative regulation or other rule of law violates the Convention, it will measure the behavior of one nation against the practices of all the others, searching for a “European consensus” on the human rights issue at hand. Where a majority of states have expanded the scope of a right guaranteed by the Convention or broadened the class of individuals to whom it applies, the Court has been far more likely to find that a state has violated the Convention by enacting or retaining a law which restricts such an expanded right.36 The Court has relied on the consensus approach in many substantive areas of Convention jurisprudence, invalidating European domestic laws restricting family relations,37 private life,38

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34. Id.
freedom of speech, the right to marry, inheritance rights, and equal treatment under the law.

The tribunals’ analysis involves three distinct elements: legal consensus, as demonstrated by modifications to European domestic laws, international treaties, and other regional legislation; expert consensus, which focusses on the specialized knowledge of experts;

38. Norris v. Ireland, 142 Eur. Ct. H.R. (ser. A) at 20 (1988) (recognizing the “better understanding” and “increased tolerance” of homosexual behavior in the member states); Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 23-24 (1981) (“[I]n the great majority of the member States ... it is no longer considered to be necessary or appropriate to treat homosexual practices ... as in themselves a matter to which the sanctions of the criminal law should be applied.”).


The Court and Commission generally do not cite specific statutes in their judgments, nor do they indicate how many states must alter their policies before the requisite consensus will be found. See Howard Charles Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence, 3 Conn. J. Int’l L. 111, 147-48 n.133 (criticizing the Court for failure to be specific in its evidence about a consensus on national paternity law).


and public consensus, which examines European-wide public opinion.\textsuperscript{46} Consideration of these elements requires the Court and Commission to examine both recent developments in state practice and expert and popular opinion across a broad spectrum of cultural, economic, and social communities. Hence, even where the tribunals identify a movement toward a common European viewpoint, they must weigh their desire to shape the law according to these evolving norms against the interest of an individual state in implementing policies which are at odds with a developing trend.\textsuperscript{47}

C. *Balancing Rights Through European Consensus*

Although the European consensus inquiry helps to harmonize the powers of the Court and Commission with those of the Contracting States, it has a far more practical function as well. In individual cases, it is a tool which the tribunals use to interpret the text of the Convention and balance protected rights against a state's ability to restrict those rights in the public interest.

1. *The Right to Respect for Private and Family Life*

The clearest expression of the role the European consensus inquiry plays in this context appears in the Court's analysis of articles 8, 9, 10,

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\textsuperscript{46} See, e.g., Winterwerp v. The Netherlands, 33 Eur. Ct. H.R. (ser. A) at 16 (1979) (noting that the term "persons of unsound mind" mentioned in the Convention has a continuously changing meaning as "society's attitude to mental illness changes"); Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) at 20 (1979) (noting a statement by the Belgian government recognizing that public opinion is becoming "increasingly convinced" that discrimination against illegitimate children should end).

\textsuperscript{47} See Merrills, supra note 18, at 157. Merrills notes:

Deciding whether European thought and practice has reached the stage at which conduct which might once have been regarded as unexceptional should now be condemned is never easy. If the Court is too conservative it will be accused of failing to uphold the objectives of the Convention. If it is too radical it will be accused of improper judicial legislation.

Id.
\end{quote}
and 11 of the Convention. Each of these articles is divided into two paragraphs. The first sets forth the scope of the protected rights, while the second provides specific restrictions which the Contracting States may impose on those rights.

The first paragraph of article 8, for example, states unambiguously that "[e]veryone has the right to respect for his private and family life, his home and his correspondence." The second paragraph allows for restrictions on these rights "in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

These restrictions are not unlimited, however. Only those which are "prescribed by law" and "necessary in a democratic society" are permissible under the Convention. Depending on which restriction a Contracting State asserts to support limiting a protected right, the tribunals broaden or narrow the margin of appreciation they will allow in reviewing the restriction. Where they can find a European-wide meaning for a restriction, a particular state’s overly broad application of that restriction is given less deference. By contrast, where no common interpretation is discernable, more deference to individual states is permitted.

48. Article 8 guarantees the right to private and family life; article 9 protects the right to freedom of thought, conscience, and religion; article 10 ensures the right to freedom of expression; and article 11 enshrines the right to freedom of association and peaceful assembly. See Convention, supra note 3.

49. Id. art. 8, para. 1.

50. Id. art. 8, para. 2.

51. Id. arts. 9, 10, 11. See also id. art. 8 ("in accordance with the law"). The phrase requires every restriction on a protected right to be adequately accessible to the public and formulated with sufficient precision to enable citizens to plan their behavior. See Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) at 31 (1979).

52. See Convention, supra note 3, arts. 8, 9, 10, 11. The Court has interpreted the words "necessary in a democratic society" as a three-part balancing test. First, the challenged law must satisfy "a pressing social need," rather than simply a useful, reasonable, or desirable governmental purpose. Second, the government has a "margin of appreciation" when determining a pressing social need, and the extent of the margin will depend on the goal of the restriction and the nature of the conduct involved. Finally, the law must be proportionate to the "legitimate aim pursued." See Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 21-22 (1981).


54. Compare Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) at 36-37 (1979) (uniformity of states' domestic law and practice as to notion of judiciary's "authority" leads to
The consensus inquiry has also been used to expand the protection afforded by article 8 to classes of individuals which were not conceived of when the Convention was drafted. Thus, family life now protects non-marital children and their parents while private life encompasses homosexual relationships between consenting adults. As Judge Gersing concluded in Rasmussen v. Denmark, "[o]ne should be careful not to attach too much importance to the intention behind [article 8] if later cultural and social developments justify a broader understanding of its words within their linguistic limits . . . "

2. The Right to Non-Discrimination

The European consensus inquiry has also been used by the Court and Commission to interpret the obligations which the Convention's non-discrimination provision imposes on the Contracting States. Article 14 states that "[t]he enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground . . . ," and then lists a non-exhaustive catalogue of traits upon which discriminatory treatment may not be premised. The tribunals' interpretation of this broadly worded commitment to equality has been characterized as "controversial in its interpretation and application."

Perhaps the most significant aspect of article 14 is its limited appli-

"less discretionary power of appreciation") with Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 22 (1976) (no uniform definition of morals can be found in the European states' domestic laws).

55. See Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) at 19 (1979) ("[A]t the time when the Convention . . . was drafted, it was regarded as permissible and normal . . . to draw a distinction in this area between the 'illegitimate' and 'legitimate' family."); see also text accompanying note 90 infra (discussing use of consensus analysis to invalidate homosexual sodomy laws). But see Cossey v. United Kingdom, 184 Eur. Ct. H.R. (ser. A) at 16 (1990) (no right for transsexuals to marry or have birth certificate altered notwithstanding changes in laws of certain Contracting States).


57. Id. at 17 (Gersing, J., concurring). While Judge Gersing recognized this concern, he found the discrepancy between the article's original intention and the majority's application to be very wide. Id.


59. These traits include race, color, sex, religion, political opinion, national or social origin, language, association with a national minority, property and birth. Id. The text also includes a reference to "other status," which the Court has broadly construed to "prohibit . . . discriminatory treatment having as its basis or reason a personal characteristic . . . by which persons or groups of persons are distinguishable from each other." Kjeldsen v. Denmark, 23 Eur. Ct. H.R. (ser. A) at 29 (1976).

60. McKean, supra note 22, at 214.
cation to discriminatory treatment generally. The article does not guarantee a right to equal treatment under the law. Rather, it protects against discrimination only with respect to the rights and freedoms enumerated in the Convention. Similarly, the Court has made it clear that once one of these rights has been violated, a subsidiary claim under article 14 will be considered only if "a clear inequality of treatment . . . is a fundamental aspect of the case." Under this doctrine, the Court has yet to reach the merits of an article 14 claim.

By contrast, where one of the enumerated rights has not been breached but an individual alleges that a Contracting State has applied the right in a discriminatory manner, the tribunals will consider the merits of an article 14 challenge, applying a three-part test for impermissible discrimination articulated in the 1968 Belgian Linguistics Case. In order to find a violation of article 14, the tribunals must determine that (a) the facts disclose a difference in treatment; (b) which difference does not have a "legitimate aim," or an "objective and reasonable justification;" and (c) that no "reasonable relationship


64. Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) at 16 (1979). The Court and Commission will also consider such claims where the discrimination at issue is closely related to a Convention right although not directly protected by it. For example, although the Convention does not guarantee the right to a judicial appeal, there is a right to "a fair and public hearing . . . by an independent and impartial tribunal established by law." Convention, supra note 3, art. 6, para 1. If a Contracting State goes beyond this requirement and provides for appellate review, it will not be permitted to bar a class of individuals from that remedy without a "legitimate reason." Belgian Linguistics Case, 6 Eur. Ct. H.R. (ser. A) at 33 (1968); see also Swedish Engine Drivers' Union v. Sweden, 20 Eur. Ct. H.R. (ser. A) at 16-17 (1976) (article 11 contains no right of trade unions to collective bargaining with the government, but discrimination among unions in granting collective bargaining raises an article 14 issue); National Union of Belgian Police v. Belgium, 19 Eur. Ct. H.R. (ser. A) at 17-18 (1975) (article 11 does not guarantee trade unions the right to be consulted by the state, but differences in treatment of trade unions as to consultation with the state raises an article 14 issue); N. v. Sweden, App. No. 10410/83, 40 Eur. Comm'n H.R. Dec. & Rep. 203, 207 (1985) (article 9 does not guarantee a right to conscientious objection, but discrimination among those protesting military service on moral grounds raises an article 14 issue).

of proportionality [exists] between the means employed and the [legitimate] aims sought to be realized."^{66}

As articulated, the test is capable of widely different applications. It establishes only that a Contracting State may not discriminate for no reason whatsoever. Rather, every difference in treatment must be objectively and reasonably justified by proportionate governmental measures. How objectivity, reasonableness, and proportionality are to be defined, however, is not specified.

In individual cases, the Court has vacillated on the degree of discretion the Contracting States may exercise in treating similarly situated groups differently. In the *Belgian Linguistics Case*, the Court stated that it would not second-guess national legislatures in determining how to achieve compliance with the Convention. It stressed that the legislatures "remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention."^{67} International review of discrimination would be limited to ensuring compliance with "principles which normally prevail in democratic societies."^{68}

Yet in other cases the Court has been far more exacting in its review of a Contracting State's discriminatory practices. In *Abdulateziz, Cabales and Balkandali v. United Kingdom*, for example, the Court noted that "advancement of the equality of the sexes is today a major goal in the member states of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference in treatment on the ground of sex could be regarded as compatible with the Convention."^{69} Similarly, in *Marcx v. Belgium*, the Court pointed to the existence of international treaties and changes in European domestic laws to find that Belgium had impermissibly discriminated against non-marital families.^{70}

The European consensus inquiry is thus a key element in determining how strictly the tribunals will review allegations of discrimination. Where a movement toward equality of treatment is demonstrated through legal, expert, or public consensus,^{71} the Court and Commission will narrow the margin of appreciation and require a substantial

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66. Id. at 34.
67. Id. at 35.
68. Id.
71. See supra notes 43-46 and accompanying text.
state interest before the discriminatory practice will be declared compatible with the Convention.  

D. Homosexuality and European Consensus

European consensus has also played a central role in the tribunals’ analysis of laws relating to homosexuality. The Contracting States have relied on the “protection of morals” clause contained in the second paragraph of article 8 as the primary means of limiting the Convention’s applicability to homosexuals. As the treatment of sexual minorities in Europe has improved over the last forty years, however, the tribunals have relied on a consensus-based approach to alter their analysis of morality-based restrictions on private sexual conduct.

1. Adult Homosexual Privacy

In the first decade after the Convention was ratified, several claims were presented to the Commission against the Federal Republic of Germany challenging article 175 of that country’s penal code which prohibited consensual adult homosexual sodomy. In all of these cases the Commission acknowledged that the statute interfered with the right of privacy guaranteed by the first paragraph of article 8. It also held, however, that the interference could be justified as necessary for the protection of health and morals and thus did not violate the Convention. To support its conclusion, the Commission noted that other nations in Europe also prohibited homosexual conduct and thus there could be no European consensus on decriminalizing sodomy.

Over time, as European sodomy laws were slowly repealed, the tribunals modified their approach. First in Dudgeon v. United King-

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75. Early intimations that the tribunals were becoming increasingly sensitive to criminal restrictions on homosexual privacy can be found in the cases challenging the higher age of consent required for homosexuals, as compared to that required for heterosexuals or lesbians. See X. v. United Kingdom, App. No. 7215/75, 19 Eur. Comm’n H.R. Dec. & Rep. 66 (1978); X. v. Federal Republic of Germany, App. No. 5935/72, 3 Eur. Comm’n H.R. Dec. & Rep. 46 (1975).
dom 76 and later in Norris v. Ireland, 77 the Court held that the sodomy laws in force in Northern Ireland and the Irish Republic 78 violated the right to respect for private life contained in article 8 of the Convention. 79

The key question in both cases was whether the sodomy laws could be justified under the morality restriction contained in article 8. 80 Although acknowledging the great weight it had previously given to this clause, the Court refused to side with the governments of Northern Ireland and the Republic of Ireland. The Court noted that although national decision-makers “do enjoy a wide margin of appreciation in matters of morals, this is not unlimited.” 81 It reinforced its conclusion by noting that the sodomy laws affected “a most intimate aspect of private life” and therefore “particularly serious reasons” had to be advanced before the laws would be considered compatible with the Convention. 82

The Court also reasoned that the widespread changes in European attitudes towards homosexuality allowed for a further narrowing of the government’s discretion. Discerning the existence of an evolved European consensus, the Court stated that

there is now a better understanding, and . . . an increased

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78. The statutes at issue in Dudgeon and Norris were the Offenses Against the Person Act, 1861, 24 & 25 Vict., ch. 100, §§ 61, 62, and the Criminal Law Amendment Act, 1885, 48 & 49 Vict., ch. 69, § 11. Section 61 makes it a crime, subject to a maximum sentence of life imprisonment, for two males to engage in the act of sodomy. Section 62 prohibits the attempt to commit sodomy and imposes a maximum punishment of 10 years in prison. Section 11 prohibits “the commission by any male person of any act of gross indecency with another male person.”
80. In Dudgeon, the United Kingdom noted that public opinion against homosexuals and homosexual acts in Northern Ireland was more pronounced than in the rest of the United Kingdom. It argued that a significant portion of the population would view a repeal of the laws as damaging to the moral fabric of society. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 22-23 (1981). In Norris, the government did not claim that Irish society was intolerant of homosexual acts committed in private. Rather, it asked the Court to hold that Contracting States have unfettered discretion where the protection of morals are concerned. Norris v. Ireland, 142 Eur. Ct. H.R. (ser. A) at 19-20 (1988).
tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices [as] a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States.\(^{83}\)

Thus the formation of a European standard on the issue of homosexual sodomy was a determining factor in the outcome of these cases, convincing the Court that the challenged laws were incompatible with the Convention, even where a sizable portion of the local population\(^{84}\) believed that homosexuality was immoral.\(^{85}\) After these two judgments, similar laws in other Contracting States are unlikely to survive future challenges.\(^{86}\)

2. The Limits of a Consensus-Based Approach to Homosexuality

Dudgeon and Norris created a widespread perception that the European Court is extremely progressive on all issues related to sexual orientation.\(^{87}\) The cases were seized upon by scholars as an enlightened alternative to adverse decisions by courts in the United States\(^{88}\) and in individual European nations\(^{89}\) on the constitutionality of private

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84. The Dudgeon Court noted that opinion in Northern Ireland on amending the criminal code to legalize adult homosexual sodomy was approximately equally divided. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 14 (1981).

85. The Dudgeon Court stated: "Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved." Id. at 24.

86. The Isle of Man and Gibraltar are the only territories in Western Europe to maintain criminal proscriptions against adult homosexual relationships. See Keep Ban on Homosexuality, Say Manx MPs, Assoc. Press Newsfile, Feb. 27, 1991 (LEXIS, Nexis Library, CURRTN File).


87. See, e.g., Mark Barnes, Book Review, 89 Colum. L. Rev. 698, 711 n.42 (1989) ("On issues of sexual expression, the European Court of Human Rights has been exceptionally broadminded.").


89. See Prejudice in the Supreme Court of Ireland, Equality Now for Lesbians and Gay
homosexual conduct.
A more careful examination of the decisions handed down since Dudgeon, however, reveals that homosexuals have in fact received no additional judicial support for their rights. In fact, it is the European Commission of Human Rights which has been responsible for limiting the Convention’s applicability to lesbian and gay issues, as the Commission has been unwilling to extend the principles articulated in Dudgeon and Norris beyond the narrow confines of private adult consensual sodomy.

For example, the Commission has rejected challenges to a wide range of British laws which discriminate against sexual minorities.90 In particular, it has upheld statutes which prohibit homosexuals from serving in the armed forces;91 which deny the ability of same-sex partners to continue an apartment lease after one of them dies;92 which permit the deportation of one partner in a same-sex relationship if one of them is a foreign national;93 which impose a higher age of consent for male homosexuals as compared to heterosexuals or lesbians;94 and which prohibit two men from having sex in private where a third party takes part or is simply present.95

These rejected challenges can be divided into two categories: those where a law intrudes upon the right to privacy but can be justified by one of the restrictions contained in the second paragraph of article 8, and those where a Convention right is not even implicated because of the Commission’s view that it is not applicable to lesbians and gay men.96 In addition, in all but one of these cases,97 the Commission


90. None of these cases were reviewed by the European Court, since individuals whose claims were rejected by the Commission had no right of appeal until 1991. But see supra note 16 and accompanying text.
96. Although the Commission’s approach to homosexual age of consent statutes falls under the first category of cases, it will not be discussed in detail here. For an argument that the Commission has failed to apply the European consensus inquiry properly in such cases and thus has deferred unnecessarily to the Contracting States, see Laurence R. Helfer, Finding a
rejected the challenges to the laws brought under article 14.

a. "Justifiable" Interferences with Homosexual Privacy

In B. v. United Kingdom,98 the petitioner challenged the exception to the 1967 Sexual Offenses Act99 which permitted criminal prohibition of homosexual conduct in the British military. He had been dishonorably discharged from the army after it was revealed that he had sexual relations with an adult civilian and with a junior officer who had not attained the age of consent.100

The Commission's rather brief analysis gave considerable deference to the government. Although the Commission acknowledged that the United Kingdom had placed a clear restriction on the officer's private life, it distinguished Dudgeon and held that the exclusion of homosexuals from the military could be justified as a means of preventing disorder.101 It also rejected the claim that the law discriminated against homosexuals in violation of Article 14.102 To support its conclusion, the Commission relied on testimony of an official from the Ministry of Defense before a Select Committee of the House of Commons which concluded that homosexuals presented a security risk.103 The Commission made no mention of whether other European nations allowed homosexuals to serve in the armed forces.104

The Commission again upheld the Sexual Offences Act in Johnson v. United Kingdom.105 In that case, the petitioner challenged the provision of the Act which made it an offense to commit a homosexual act "when two or more persons take part or are present."106 On October 3, 1982, Johnson gave a private party at his home for some of his

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101. Id. at 72.
102. Id.
103. See id. at 70.
104. Had the Commission conducted a European consensus inquiry, it might have given more careful consideration to the case. As of 1990, at least twelve of the twenty three Contracting States had altered their military codes to allow homosexuals to serve in the armed forces. See Peter Tatchell, Out in Europe: A Guide to Lesbian and Gay Rights in 30 European Countries 12-27 (1990).
106. 1967 Act, supra note 99, § 1(2).
friends. During the early hours of the morning, the police raided the party and arrested Johnson and his guests, accusing them of violating the Act's age of consent provision.\textsuperscript{107} After questioning Johnson for several hours, the police declined to press charges after discovering that no one at the party was under the age of consent.\textsuperscript{108}

Johnson challenged the multiple party provision of the statute before the Commission.\textsuperscript{109} Although the law applied only to gay men and not to heterosexuals or lesbians, the Commission held that there was no violation of article 14.\textsuperscript{110} It noted simply that "heterosexuality and lesbianism do not give rise to comparable social problems. . . . [A]ny difference in treatment resulting from this legislation would also have an objective and reasonable justification in the need to protect the individual, particularly the young and vulnerable."\textsuperscript{111} The Commission did not consider whether other Contracting States criminalized similar behavior.

b. No Convention Protection for Same-Sex Couples

In \textit{X. and Y. v. United Kingdom}\textsuperscript{112} and \textit{S. v. United Kingdom},\textsuperscript{113} the Commission's analysis was even less rights-protective. Both cases concerned the ability of the United Kingdom to treat same-sex partners differently from heterosexual couples.

In \textit{X. and Y.}, two men, one British (Mr. X.) and the other Malay (Mr. Y.), applied for a permanent residence permit in the United Kingdom several years after they had established a "stable homosex-

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\begin{enumerate}
\item\textsuperscript{107} Twenty-one is the minimum age for legally participating in consensual homosexual conduct. Id. § 1(1).
\item\textsuperscript{109} Id. at 74. Johnson argued that the raid itself was an unjustifiable interference with his home and his private life, but the Commission ruled that this aspect of his claim could not be considered because it had not been timely filed. See id. at 75. He also challenged the unequal age of consent imposed by the 1967 Act. Although here the Commission reviewed the claim on the merits, it saw "no reason to depart from its previous decisions . . . ." Id. at 77. For an analysis of those decisions, see Helfer, supra note 96, at 1079-86.
\item\textsuperscript{110} Johnson v. United Kingdom, App. No. 10389/83, 47 Eur. Comm'n H.R. Dec. & Rep. 78 (1986). Although the Commission acknowledged that the law could theoretically interfere with Johnson's private life, it declined to review it under article 8 because Johnson had not alleged that he had previously had sex with two or more men or that he desired to do so in the future. See id. at 76.
\item\textsuperscript{111} Id. at 78. The Commission did not explain why sexual activity which involved consenting adults exclusively had any relation to those who are young and vulnerable.
\end{enumerate}
\end{footnotesize}
ual relationship.” 114 The government denied the request and the couple was forced to move to Sweden. 115

The Commission began its analysis by noting that “[d]espite the modern evolution of attitudes towards homosexuality, ... the applicant’s relationship does not fall within the scope of the right to respect for family life ensured by Article 8.” 116 It acknowledged, however, that “certain restraints on homosexual relationships could create an interference with an individual’s right to respect for his private life ... .” 117

The Commission then referred to an established line of case law holding that the Convention does not guarantee a right to enter or remain in a particular country, but that where “a close member of a family is excluded from the country where his family resides, an issue may arise under Article 8.” 118 The Commission’s approach in such cases is to examine “the extent of the family links and also the ties with the country concerned ... .” 119

Having already defined gay relationships as being outside of any family structure, the Commission’s application of this test to Mr. X. and Mr. Y. was simply facetious. Although the tribunal gave careful consideration to the couple’s links to the United Kingdom, it made no mention whatsoever of the strength of their emotional attachment or any other indicia of commitment. That the two men were “professionally mobile” and had lived together in other countries was viewed by the Commission only as evidence of a weak link to the United Kingdom. It was not cited as evidence of the strength of their relationship. 120

S. v. United Kingdom 121 confirmed the force of the Commission’s

115. Id.
116. Id.
117. Id.
118. Id.
119. Id. at 221-22 (citing Upsal v. United Kingdom, App. No. 8244/78, 17 Eur. Comm’n H.R. Dec. & Rep. 145 (1980)). The Court and Commission’s jurisprudence on immigration issues is different than the analysis applied in the other privacy or family life cases discussed in this article. The tribunals have held that, in the immigration context, article 8’s reference to “respect” for private and family life imposes certain “positive obligations” on the Contracting States. The restrictions which the Contracting States may place on these obligations are not limited to those listed in the second paragraph of article 8. See Rees v. United Kingdom, 106 Eur. Ct. H.R. (ser. A) at 15 (1986) (discussing scope of positive obligations doctrine); Abdulaziz, Cabales and Balkandali v. United Kingdom, 94 Eur. Ct. H.R. (ser. A) at 33-34 (1985) (discussing application of doctrine to immigration).
opposition to recognizing homosexual couples as families. Ms. S. had lived with her partner, Ms. R., for over three years in publicly assisted housing and their relationship was widely acknowledged in the local community.\footnote{122} After Ms. R.’s death, the local borough council attempted to evict Ms. S. from the apartment, citing a provision in the Housing Act of 1980\footnote{123} which allowed only members of a tenant’s family to continue the lease.\footnote{124}

The Commission upheld the Act and Ms. S.’s eviction. With respect to Ms. S.’s article 8 challenge to the statute, the Commission concluded that lesbian relationships were excluded from the right to respect for family life. It then held that although the right to respect for her home had been interfered with, the interference was necessary to protect the landlord’s property interest.\footnote{125}

Ms. S. also brought a challenge under article 14. The Commission gave short shrift to this claim, concluding that:

\begin{quote}
the family (to which the relationship of heterosexual unmarried couples living together as husband and wife can be assimilated) merits special protection in society . . . . [There is] no reason why a High Contracting Party should not afford particular assistance to families. The Commission therefore accepts that the difference in treatment between the applicant and somebody in the same position whose partner had been of the opposite sex can be objectively and reasonably justified.\footnote{126}
\end{quote}

As in its earlier decision, the Commission made no reference to how other European states treat homosexual couples.

The Commission’s failure to extend Convention protection to lesbians and gay men in these cases belies its reputation as a human rights institution devoted to the protection of sexual minorities. More disturbing than the simple denial of these claims, however, is the Commission’s eagerness to distinguish the Court’s reasoning in \textit{Dudgeon} and \textit{Norris} and to defer to the Contracting States’ various arguments for maintaining laws which treat homosexuals differently from hetero-

\begin{itemize}
\item \footnote{122} Id. at 275.
\item \footnote{123} Housing Act, 1980, ch. 2 (Eng.).
\item \footnote{124} The statutory definition of family included blood relatives, spouses, stepchildren, and illegitimate children. Id. at § 50(3).
\item \footnote{125} S. v. United Kingdom, 47 Eur. Comm’n H.R. Dec. & Rep. 274, 277-79 (1986). The Commission rejected the argument that the law interfered with the couple’s private life on the curious ground that Ms. R. had died prior to the eviction. See id. at 278.
\item \footnote{126} Id. at 279. For a discussion of the tribunals’ standard for measuring discrimination, see supra text accompanying notes 65-66.
\end{itemize}
osexuals. The Commission’s rejection of challenges to these laws on the ground that “the family merits special protection in society”127 and that heterosexual relationships do not give rise to “comparable social problems”128 appears overly simplistic and therefore unconvincing. Particularly where substantial evidence to the contrary exists in European legal thought and practice, the Commission’s approach is disingenuous and unfair to the Convention’s rights-enhancing, consensus-driven methodology.129

II. HOMOSEXUAL (IN)EQUALITY IN EUROPEAN SOCIETY: DOMESTIC AND INTERNATIONAL REFORMS

The disposition of the cases just discussed must be viewed in light of the rapidly changing approach to homosexual equality that is occurring across Europe. The Commission’s approach can be explained, at least in part,130 by the fact that a consistent European viewpoint on lesbian and gay rights has yet to emerge, for although on some issues a coherent continental perspective can be gleaned from the Contracting States’ legal codes and other indicia of consensus, on others there are widely varying standards of treatment across the region.

A. Domestic Reforms Relating to Sexual Orientation

Advocates for homosexual rights, buoyed by their two victories in the European Court, have been working to secure equal rights for lesbians and gay men within each of their countries over the last dec-

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127. Id. at 279.
130. Another possible explanation for the Commission’s actions can be traced to its style of judicial reasoning. Rather than attempting to articulate a coherent principle of decision-making in which subsequent fact patterns can be included or distinguished, the Commission (as well as the Court) tends to rely on a “bright line” approach. Where an infringement with a protected right is severe and absolute, as in Dudgeon and Norris, the tribunals will find it incompatible with the Convention and will articulate a sweeping and broad principle of rights-protection. But in subsequent cases, where the infringement is only partial or tangential, no violation will be found, even if the facts fall squarely within the rubric of the principle. For a critique of this mode of analysis, see Colin Warbrick, Coherence and the European Court of Human Rights: The Adjudicative Background to the Soering Case, 11 Mich. J. Int’l L. 1073, 1076-85, 1096 (1990).
ade. In some nations, their efforts have been extremely effective and have resulted in substantial legal protection for sexual minorities.

The most general form of protection has come from national antidiscrimination statutes which expressly include sexual orientation. Such laws, which prohibit discrimination in employment, the provision of public services, and access to public facilities, were enacted in Norway in 1981, France in 1985, and Denmark and Sweden in 1987.131 The Netherlands, Belgium, and Spain are also considering legal reforms to provide explicit and comprehensive anti-discrimination rights to lesbians and gay men.132

Incitement to hatred against homosexuals was made a criminal offense in Norway in 1981, Sweden and Denmark in 1987, and Ireland in 1989.133 Article 266a of the Danish Criminal Code, for example, provides that “[a]ny person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their . . . sexual orientation, shall be liable to a fine . . . or to imprisonment for any term not exceeding two years.”134

On several of the specific issues considered by the Commission, it is becoming increasingly clear that European states treat gay men and lesbians on par with their heterosexual counterparts. For example, Spain allowed homosexuals to serve in the armed forces in 1985,135 joining the dozen or so other states which have allowed gay men and lesbians equal access to the military.136 Similarly, the legal minimum age for consenting to homosexual relations has been lowered in numerous countries so that homosexuals and heterosexuals now face a uniform age in the vast majority of Contracting States. Specifically, Belgium, France, Greece, and Iceland equalized the minimum age within the last nine years, and Germany and Switzerland are expected to follow shortly.137

131. Tatchell, supra note 104, at 15, 16, 23, 26. For example, article 349a of the Norwegian Penal Code states that it is an offense to “refuse a person or group of persons the sale of goods or the provision of facilities on the grounds of homosexual orientation or way of life.” Id. at 23.
133. Id. at 15, 20-21, 23, 26.
134. Id. at 15.
136. See supra note 104.
Recognition of same-sex relationships has also been gaining ground, albeit more slowly. Denmark effectively acknowledged the right of lesbians and gay men to marry in 1989. Austria, Finland, Liechtenstein, Luxembourg, and the Netherlands recently afforded benefits to same-sex relationships analogous to those available to unmarried heterosexual couples and are expected to adopt same-sex marriage legislation in the near future. In the Netherlands, these benefits include property rights, tax advantages, and familial visiting rights in hospitals and prisons. In Sweden, they include inheritance rights as well.

The experience in other states has been less favorable, however. Cyprus retains its complete prohibition on gay sex, although a challenge to its sodomy laws is pending before the European Commission. The Irish Government has yet to implement the Court’s judgment in Norris by decriminalizing homosexual sodomy, while Austria, Finland, Liechtenstein, Luxembourg, and the United Kingdom still maintain a higher age of consent for homosexuals.

Perhaps the most significant criminal restrictions still used to perpetuate discrimination against homosexuals are laws that prohibit any person from advocating or promoting homosexual conduct or a homosexual lifestyle. Such laws are especially perverse, since they

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see French Senators Vote to Recriminalize Homosexuality, Gay Times (UK), July 1991, at 18 (proposing amendment to criminal code to create higher age of consent for gay men).

138. See Danish Registered Partnership Act (1989). This act permits a lesbian or gay couple, if one of the partners is Danish, to enter into a registered partnership which has the same legal consequences of marriage, with some exceptions. For example, the couple cannot adopt non-related children, each other’s children, nor can there be common custody of children. The couple cannot have an official church wedding, nor is the partnership recognized in other countries. Id. at §§ 2, 4.


140. See Tatchell, supra note 104, at 22.

141. Id. at 26.


144. See Tatchell, supra note 104, at 4, 12, 16, 22.

145. Id. at 12, 16.
prohibit the encouragement of conduct which is itself entirely legal in many countries.

In Finland, section 20:9.2 of the Penal Code prohibits any person from “publicly encourag[ing] or induc[ing] homosexuality,” defined as fornication or indecent behavior between members of the same sex.146 In the 1960s and 1970s, the law was used to prevent authors, journalists, artists, and performers from even mentioning homosexuality in a positive light. Although the statute fell into disuse during the 1980s, the onset of the AIDS virus in Finland may lead to its revival in the next few years.147

In Austria, two provisions of the Austria Penal Code discriminate against homosexuals. Article 220 prohibits public promotion of “homosexual obscenities,” which is broadly defined and “pertains especially to printed matter and films showing a noble aura and cultural value to homosexual dispositions and activities in which the latter is praised over and above heterosexuality.”148 The statute, which also states that lesbianism “contradict[s] the heterosexual structure of our society and culture,”149 has been relied on by the Austrian police as a justification for disrupting a non-violent protest commemorating homosexuals who were killed by the Nazis, and for confiscating gay and lesbian newspapers.150 Article 221 bans the formation of groups that advocate “homosexual indecency,” and membership in and solicitation for such groups is punishable by up to six months in prison.151

In the United Kingdom, under section 28 of the Local Government Act, it is illegal for local authorities to “intentionally promote homosexuality,” publish material promoting homosexuality, and “promote the teaching in any . . . school of the acceptance of homosexuality as a pretended family relationship.”152 This law has inhibited government funded schools and arts organizations from sponsoring programs that

147. See id. at 8-9. In November, 1990, members of the Finnish gay activist group, SETA, distributed leaflets promoting homosexuality in Helsinki’s main shopping square. They were taken into custody by police, questioned, and later released. They hope to bring a test case before Finnish courts, arguing that the underenforced law still censors lesbian and gay issues in the print and broadcast media. See Rex Wockner, International Briefs—Finland, Philadelphia Gay News, Dec. 21-27, 1990, at 10.
149. Id.
portray gay themes approvingly.153

B. The International Politics of Lesbian and Gay Liberation

During the 1980s, then, wide differences in the treatment of lesbians and gay men began to develop across Europe; while some nations accelerated the pace of law reform, others imposed new restrictions on homosexuality or increased the enforcement of existing discriminatory laws. Faced with this uneven level of rights-protection, supporters of homosexual equality began to develop an international political strategy. Since that time several international developments have occurred which have added force to the European lesbian and gay rights movement.

I. The Council of Europe

International attention was first focused on lesbian and gay concerns in 1981 by the Parliamentary Assembly of the Council of Europe. The Assembly, composed of representatives appointed by the Parliaments of each nation which has ratified the European Convention, is empowered to make recommendations related to human rights issues.154 Although these recommendations are not binding, they do have some influence on policy development.155

On October 1, 1981, the Assembly’s Committee on Social and Health Questions presented a report on discrimination against homosexuals. The Committee proposed that the Assembly adopt a recommendation ensuring the human rights of homosexuals, noting that “despite some efforts and new legislation in recent years . . . [homosexuals] continue to suffer from discrimination and oppression.”156 To remedy this state of affairs, the Committee proposed that all individuals be guaranteed the “right to sexual self-determination.”157 This would be accomplished by modifying the Convention’s non-discrimination provision to include the words “sexual preference.”158

The Committee also proposed several more specific practices for individual European states to follow. These included: abolishing police record-keeping on homosexual activity; ensuring equal treat-
ment for homosexuals in employment; ending all medical research
designed to alter sexual orientation; guaranteeing homosexual parents
the right to custody of their children; and reducing the risk of rape
and violence against homosexuals in prisons.\textsuperscript{159}

The Assembly approved nearly all of these proposals in Recom-
mandation 924,\textsuperscript{160} sending a strong message to the Contracting States
that discrimination against lesbians and gay men would not be toler-
ated in the international arena. However, the Assembly decided not
to begin the process of modifying the text of the Convention to pro-
tect homosexuals explicitly, thus weakening the force of its recom-
mandations. The Assembly concluded that the case law of the
European Court and Commission of Human Rights should be
allowed further time to develop before such a significant step would
be attempted.\textsuperscript{161}

2. \textit{The European Economic Community}

Three years later, the European Parliament took the next step
toward ensuring equal rights for homosexuals. The Parliament is the
legislative arm of the EC\textsuperscript{162} which has functions similar to the Parlia-
mentary Assembly, although unlike the Assembly, it is elected by a
direct popular vote.\textsuperscript{163} The Parliament has certain supervisory pow-
ers over the EC Commission, which drafts proposals for legislation to
be considered by the Council of Ministers. The Council is the execu-
tive body of the EC which enacts rules binding on its member
states.\textsuperscript{164}

In 1984, the Parliament's Committee on Social Affairs and
Employment proposed a resolution on "Sexual Discrimination at the
Workplace"\textsuperscript{165} which was adopted by the Assembly on March 13,

\textsuperscript{159} Id. In addition, the Committee also asked the Assembly to draft a Resolution to the
World Health Organization asking them to delete homosexuality from its International
Classification of Diseases. This proposal was adopted by the Assembly. See Resolution 756,


\textsuperscript{162} See Treaty Establishing the European Economic Community, Mar. 25, 1957, 298
U.N.T.S. 11 [hereinafter "EEC Treaty"].

\textsuperscript{163} See Stanley Budd & Alun Jones, The European Community: A Guide to the Maze 36-

\textsuperscript{164} The EC member states are Belgium, Denmark, France, Germany, Greece, Ireland,
Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. Budd, supra
note 163, at 24. All these states are also Contracting States to the European Convention.

1984. The resolution requested the EC member states to legalize homosexual relationships between consenting adults; introduce a common age of consent for heterosexuals and homosexuals; ban special record-keeping on homosexuals by the police; reject the classification of homosexuality as a mental illness; and outlaw discrimination in the workplace on the basis of sexual orientation.

Although the resolution was initially welcomed by the EC Social Affairs Commissioner, no further action has been taken. The Commission now claims that since there was nothing specific in the EC treaty about lesbian and gay rights, it has no competence to take action on any matter related to sexual orientation. Advocates for such rights argue that there can be no freedom of movement within the Community, one of the “four freedoms” protected by the original EEC treaty, while varying levels of discrimination still exist in the member states.

Recently, however, there are signs that the EC governing authorities are beginning to take the demands of lesbians and gay men more seriously. In November 1989, in a debate on the European Social Charter, the Parliament reiterated its support for equal treatment for homosexuals by recommending that the Charter ensure the right of all workers to equal protection regardless of their sexual preference. Moreover, last December the Commission agreed to finance a report on the extent of discrimination against sexual minorities and how the single market in 1992 will affect them. A conference on this report’s findings will be held sometime in 1992.

Even if the report’s findings are favorable and legislation is introduced to ban discrimination against lesbians and gay men, the impact of this legislation will limited in two important ways. First, it will only apply in those twelve states which are EC members. This is far fewer than the twenty-five nations which are signatories to the Convention. Second, the legislation will likely be extended to employment practices first, and only later to other social issues as the EC begins to expand the scope of its jurisdiction after 1992.

167. See Tatchell, supra note 104, at 7.
168. See EEC Treaty, supra note 162, arts. 48, 49, 100, 101, 117.
169. See Tatchell, supra note 104, at 7.
European unification under EC auspices poses a dilemma for gay rights activists: Since there are extremely wide differences in the treatment of homosexuals within the EC, there is no guarantee concerning which countries' standards will become the norm to be enforced in all member states. While issues such as employment discrimination seem likely to be resolved in favor of homosexual equality, it will be far more difficult politically to create and enforce a uniform policy on such divisive subjects as same-sex marriage and lesbian and gay foster parenting.\(^\text{172}\)

Assuming a fairly tolerant standard is applied throughout the EC, another problem may develop. Europe will be divided into two legislative camps, EC and non-EC, with individuals residing inside the Community afforded one level of protection and those outside its boundaries receiving another, and likely lesser, degree of support from their national governments.

III. DRAFTING A GAY-RIGHTS PROTOCOL TO THE EUROPEAN CONVENTION

Given the limitations of EC reform, advocates for the international protection of lesbian and gay rights have turned to the Council of Europe, the organization which was formed in the late 1940s to draft the European Convention on Human Rights. In addition to having a more broad-based membership than the EC, the Council has begun to admit several Eastern European states to its ranks.\(^\text{173}\) It is thus in a better position to create a European-wide standard for the treatment of lesbians and gay men.

In late December 1990, a resolution was introduced to the Council’s Parliamentary Assembly to amend the European Convention to protect explicitly against all forms of discrimination based on sexual orientation.\(^\text{174}\) The amendment, or Protocol, would be the first binding international agreement to address lesbian and gay concerns directly. It was drafted by lawyers for the International Lesbian and Gay Association to overrule the decisions of the European Commission on Human Rights discussed above.

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172. Id.
A. The Text of the Protocol

Although nearly all of the decisions of the European Commission have concentrated on the right to privacy and have addressed non-discrimination only tangentially, the Protocol approaches lesbian and gay rights squarely from the perspective of equality. Article 1 defines "discrimination on the ground of sexual orientation" as "any distinction, exclusion, restriction or preference based on sexual orientation which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other fields of public or private life."175

Articles 2 and 3, which form the core of the Protocol's substantive rights,176 provide that "[e]veryone has the right to establish and to develop relationships with other human beings, without discrimination on the ground of sexual orientation,"177 and that "[n]o one shall be subjected to discrimination on the ground of sexual orientation in the content or application of the law."178 This latter provision "outlaws all discrimination both in the subject matter of the law and the way in which it is applied. It would apply to civil and criminal law, as well as public and private law."179

It seems beyond dispute that the Protocol, if enforced as written, would provide exhaustive discrimination protection to lesbians and gay men. But precisely because the rights guaranteed by the document are so comprehensive, they may deter even the most liberal European nations from ratifying the agreement. Although lesbian and gay rights advocates have assumed that at least five nations180 among the twenty-three Convention signatories will commit them-

175. Draft Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the elimination of discrimination based on sexual orientation, art. 1(b) [hereinafter "Draft Protocol"], reprinted in Study Conference, supra note 129, at 55. The Protocol defines sexual orientation as "sexual attraction towards a person of the same sex or the opposite sex, whether this is manifested in physical or in emotional form." Id. art. 1(a).

176. A prior draft of the document provided homosexual parents with a right to equal custody rights over their children, but this provision was removed at the 1990 conference. Study Conference, supra note 129, at 28-29, 49.

177. Draft Protocol, supra note 175, art. 2.

178. Id. art 3.


180. To become effective, the Protocol must be ratified by a minimum of five Contracting States, which must abide by its provisions as "additional articles to the Convention." Draft Protocol, supra note 175, arts. 6, 8.
selves to the international protection of homosexual equality,\textsuperscript{181} a more realistic prognosis of the Protocol's chances for ratification will depend on the scope of the obligations that it creates for the Contracting States.

B. \textit{The Case Against Ratification: Three Problems of Interpretation}

A proper point of departure for delineating these responsibilities is the tribunals' jurisprudence on article 14, which defines the boundaries of the Contracting States' current non-discrimination pledge. When viewed in light of the narrow interpretation which the Court and Commission have given this article,\textsuperscript{182} the Protocol's sweeping equality guarantees seem strikingly out of step not only with the Contracting States' current commitments under article 14, but also under the Convention generally.

First, the Protocol would provide to lesbians and gay men a right which no other group of individuals protected by the Convention currently possesses: an independent guarantee to equal treatment under the law. Under the Protocol, discrimination against a lesbian or gay man in employment, public accommodation, and indeed in \textit{any other field} of public or private life\textsuperscript{183} would be reviewable by the Court and Commission. Discrimination in these areas on the basis of race, gender, ethnicity or other minority status would not be justiciable,\textsuperscript{184} however, since article 14 prohibits discrimination only with regard to the rights and freedoms specifically guaranteed by the Convention.\textsuperscript{185}

Expanding the reach of the Convention to these broad social and economic rights may itself be questionable,\textsuperscript{186} but expanding them

\begin{itemize}
\item\textsuperscript{181} See Background Explanation, in Study Conference, supra note 129, at 42 (indicating that Contracting States with national sexual orientation non-discrimination laws "would have no difficulty in ratifying th[e] Protocol").
\item\textsuperscript{182} See supra notes 62-70 and accompanying text.
\item\textsuperscript{183} Draft Protocol, supra note 175, art. 1(b) (emphasis added).
\item\textsuperscript{184} This problem was noted by one of commentators on the Protocol. See Letter of Robert Wintemute to Steffen Jensen, May 12, 1990, reprinted in Study Conference, supra note 129, at 51-52; see also Helfer, supra note 96, at 1099 n.403. But cf. East African Asians v. United Kingdom, 1970 Y.B. Eur. Conv. H.R. 928, 944 (Eur. Comm'n on H.R.) (certain aspects of race discrimination may be considered degrading treatment within the meaning of article 3).
\item\textsuperscript{185} See supra note 62 and accompanying text.
\item\textsuperscript{186} The European Convention covers rights that are essentially civil and political in nature. The European Social Charter, 529 U.N.T.S. 89, Oct. 18, 1961, by contrast, protects economic and social rights in such areas as employment, compensation, medical assistance, and the rights of children. The Steering Committee for Human Rights (CDDH), which is charged by the Council of Europe with developing additional human rights instruments for the Contracting States, has stated that not all social and economic rights are appropriate for inclusion in the Convention's optional protocol framework. See Council of Eur. Doc. H(84) 5, at 6 (1984), discussed in Theodor Meron, Human Rights Law-Making in the United Nations
exclusively to one status group alone without considering the broader implications for other individuals and groups is an unwise legal and social policy. In fact, ratification of the Protocol could even increase anti-homosexual animus, as other groups may properly interpret the Protocol to confer a privileged legal status on lesbians and gay men. Although critics of this analysis might argue that the Protocol applies to heterosexuality as well as to homosexuality, it is difficult to imagine a Contracting State that currently provides less favorable treatment to heterosexuals.

A second problem with the Protocol concerns the ability of the Contracting States to distinguish among individuals on the basis of their sexual orientation. The Protocol’s language on this point is extremely precise, prohibiting “any distinction, exclusion, restriction or preference” based on sexual orientation. This phrase would mandate absolute equality, removing any trace of difference in laws which merely have “the effect” of creating even a minor difference in treatment. It would also seem to prohibit any attempt at affirmative action on behalf of lesbians and gay men.

The Court has rejected such an expansive approach in its interpretation of the text of article 14. Although the English version of the

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187. Draft Protocol, supra note 175, art. 1(b).

188. Id. The following hypothetical illustrates the difficulty with this approach. Assume that municipality A, located in a densely populated urban region, requires all of its public employees to reside within the boundaries of the city as a condition of employment. Assume further that this law was enacted to enhance employee performance due to greater knowledge of city conditions and greater personal stake in the city’s progress, to reduce absenteeism, to maintain rapid availability of a trained labor force during a crisis, and to increase the economic benefits resulting from local expenditure of employee wages.

When initially adopted, the law had no disparate effect on lesbians or gay men. Over time, however, a large lesbian and gay community developed in municipality B, located in the same region as municipality A. The area’s transportation network made possible a daily commute between the two cities. Although private employers in municipality A had hired some workers who lived in municipality B, the local government continued to adhere to its residency requirement, even though the inhabitants of municipality B had the same skills as those of municipality A.

At what point would the disparate effects of such a policy nullify or impair the enjoyment or exercise of human rights? At least in theory, the Protocol’s definition of discrimination could be read to prohibit even moderate disparate effects caused by such a distinction. From the perspective of Contracting States considering ratification, it is worth noting that the Court has twice rejected allegations that article 14 is violated by a law that has disparate effects. See Swedish Engine Drivers’ Union v. Sweden, 20 Eur. Ct. H.R. (ser. A) at 16-17 (1976); National Union of Belgian Police v. Belgium, 19 Eur. Ct. H.R. (ser. A) at 19-21 (1975).
article prohibits "discrimination," the French version requires that the protected rights and freedoms must be secured "sans distinction aucune" (without distinction).\textsuperscript{189} In the \textit{Belgian Linguistics Case}, the Court reconciled the discrepancy between the translations as follows:

[O]ne would reach absurd results were one to give Article 14 an interpretation as wide as that which the French version seems to imply. One would, in effect, be led to judge as contrary to the Convention every one of the many legal or administrative provisions which do not secure to everyone complete equality of treatment in the enjoyment of the rights and freedoms recognised. The competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions; moreover, certain legal inequalities tend only to correct factual inequalities.\textsuperscript{190}

The Protocol's mandate of absolute equality would interject the Court and Commission into an almost continuous parsing of national laws and procedures whenever even slight differential treatment could be discerned. Although ensuring equality for lesbians and gay men may compel this increased level of judicial involvement, such a result is anathema to the margin of appreciation doctrine's requirement of discretion to national decision-makers. The Contracting States may hesitate before signing an agreement which would essentially eliminate the deference to which they have grown accustomed in over forty years of Convention jurisprudence.

Equally problematic from the standpoint of garnering the requisite number of signatures from European governments is the enlarged zone of state responsibility that the Protocol would create for ratifying states. While the Convention's admonition that the Contracting States "shall secure"\textsuperscript{191} protected rights and freedoms to everyone with their jurisdiction imposes some affirmative duties on European governments to redress human rights violations by non-governmental actors,\textsuperscript{192} it is well established that "the rights and freedoms guaranteed in the Convention are rights which can only be protected by state

\textsuperscript{189} Convention, supra note 3, art. 14. English and French are both official languages of the Convention.
\textsuperscript{191} Convention, supra note 3, arts. 1, 14.
\textsuperscript{192} The Court has addressed the scope of state responsibility under article 1 on only two occasions. See Young, James and Webster v. United Kingdom, 44 Eur. Ct. H.R. (ser. A) at 20 (1981) (private contract between employer and union that violated right to freedom of association attributed to government, where contract authorized by domestic statute); Ireland
action."193

The text of the Protocol goes well beyond this boundary, mandating positive governmental measures on behalf of lesbians and gay men to remedy any de facto or de jure discrimination which is perpetuated by private parties within the territory of a ratifying state. That the Court might interpret the Protocol to require states to write into their domestic legislation effective and enforceable guarantees against discrimination in "any . . . field [ ] of . . . private life"194 could deter even the most progressive state from ratifying the agreement.195

C. Partial Ratification of the Protocol: The Consensus Inquiry Paradox

Even if these problems of interpretation can be resolved,196 it is still highly probable that only those nations that have already developed a domestic legislative framework to redress lesbian and gay discrimination will be most willing to ratify the agreement.197 States such as England, Ireland, Cyprus, and Turkey, however, which have been the least amenable to legal reforms related to homosexuality and whose populations are often hostile to sexual minorities, are unlikely to sign such a document. Under international law, the Protocol can never be applied directly against such states because to do so would bind them

193. McKeen, supra note 22, at 211.
194. Draft Protocol, supra note 175, art. 1(b).
195. Cf. Meron, supra note 186, at 62 (criticizing human rights instruments which impose "state regulation of interpersonal conduct [which] may violate the privacy and associational rights of the individual and conflict with the principles of freedom of opinion, expression, and belief").
196. The law-making bodies within the Council of Europe may view the broad scope of the Protocol as an opening bargaining position for negotiations aimed at achieving a more moderate document acceptable to a majority of European states.

Alternatively, even if the contracting states are unwilling to bind themselves to a supplementary treaty, they may still be committed in principle to promoting lesbian and gay equality. In that event, the Committee of Ministers, the Council's executive arm, may issue a recommendation to the states encouraging them to adapt their laws to this goal. See Statute of the Council of Europe, supra note 2, art. 15(b) (Committee may make recommendations to achieve greater European unity on matters of common interest). Such a recommendation, which might contain specific practices and guidelines for states to follow, would not be directly enforceable through the convention's adjudicatory framework. It could, however, influence the evolution of convention case law. The existence of such a document might convince the Court and Commission to modify their rights-limiting approach to sexual orientation issues, relying on the recommendation and the state practice it engenders as evidence of an evolution in the formation of a European consensus.
197. See Background Explanation, in Study Conference, supra note 129, at 42.
to an international treaty without their consent. 198

Partial adoption of the Protocol across Europe, therefore, seems at first glance to be a proper balance between rights-protection and respect for state sovereignty. Those nations who wish to create more comprehensive equality guarantees for lesbians and gay men may do so while states that are unwilling to provide such blanket protection can adhere to the existing Convention framework, whose more moderate evolutionary course will slowly provide additional human rights to homosexuals as a social and legal consensus builds across the continent. Moreover, as a hortatory statement that human rights and lesbian and gay rights are coterminous, the mere existence of the Protocol may increase political pressure on non-ratifying states to amend their domestic laws or to reconsider their decision to forego signing the agreement.

1. Consensus Preemption for Non-Ratifying States

A crucial assumption underlying this approach is that after the Protocol becomes effective, the Court and Commission will continue to apply the European consensus inquiry when reviewing the laws of all Contracting States, allowing the international human rights baseline to evolve with general European law reform trends rather than with the less enlightened judgment of a single national government. This assumption, however, is flawed. Ratification of the Protocol by only a handful of European nations would create a fundamental shift in the interplay between legislative and judicial policy-making that would severely limit the opportunity that non-ratifying states would have to respond fully to progressive advances in human rights protection for lesbians and gay men. 199

Specifically, the Protocol's entry into force will throw the Convention's delicate mechanism of consensus-based rights-enhancement out

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199. This assumes that the Commission's failure to recognize anything other than core privacy rights for homosexuals is premised on an insufficient degree of European consensus and that, but for the Protocol, the Commission would have eventually reconsidered its position when a more consistent viewpoint had developed. There is support for this in the case law. See, e.g., Johnson v. United Kingdom, App. No. 10389/83, 47 Eur. Comm'n H.R. Dec. & Rep. 72, 77 (1986) ("[T]he Commission, while recognizing the changing and developing views on the issue of the age of consent for male homosexuals, sees no reason to depart from its previous decisions and is of the opinion that the test of proportionality is satisfied in the facts of the present application.") (emphasis added); see also Cossey v. United Kingdom, 184 Eur. Ct. H.R. (ser. A) at 37 (1990) ("In [sexuality and family law] cases the Court's policy seems to be
of balance for gays and lesbians. As the most comprehensive international agreement related to sexual orientation, the Protocol could effectively preempt a consensus-driven analysis of gay rights under articles 8 and 14. Issues related to sexual orientation which might have been included in an expanding construction of these two Convention rights may be blocked by the broad sweep of the Protocol's all-encompassing language.

If the Protocol is construed to be the primary international obligation that European states can undertake related to homosexuality, the Court and Commission may conclude that only those nations which have signed it should be subject to international judicial review on expanding European conceptions of lesbian and gay human rights. To expose other nations to such enhanced international scrutiny would permit the legislative and judicial reforms engendered by the Protocol to be applied against states which had not ratified that agreement. This would effectively violate the principle that a nation must affirmatively assent to its international obligations.200

To determine how the tribunals will construe the Protocol and the evolving regional norm of non-discrimination on the basis of sexual orientation, the general principles of treaty construction used to harmonize overlapping and sometimes conflicting provisions of the Convention and its Protocols must be examined. The Court and the Commission have developed a substantial body of case law in this

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to adapt its interpretation to the relevant societal change only if almost all member States have adopted the new ideas."

(Martens, J., dissenting).

These cases illustrate that the Court and Commission have been painfully slow to adjust their reasoning to legal and social developments relating to sexual orientation, demanding a high degree of uniformity before the requisite consensus can be achieved. The tribunals do not, as of yet, appear to have abandoned the consensus methodology entirely, making it likely that the few hard-core states opposed to lesbian and gay rights will eventually be called on to respond to progressive trends in European law reform.

If, however, the tribunals choose to ignore the consensus inquiry entirely on issues related to homosexuality, then an amendment to the Convention would be required, but one that is more moderate in scope and thus more likely to be widely accepted by the Contracting States. For a discussion of two alternative ways to construct such an agreement, see infra text accompanying notes 245-79.

200. See supra note 198. The likelihood that the Court will refrain from applying an enhanced consensus inquiry against non-ratifying states is supported by principles of customary international law. Although the formation of custom for the entire international community may bind a state which has acquiesced or failed to object to the formation of that custom, where regional customary law between a more limited grouping of states is concerned, the custom is binding only if can be shown that the state alleged to be bound has affirmatively accepted it as a matter of legal obligation. See Asylum Case (Columbia v. Peru) [1950] I.C.J. Rep. 266, 276-77; see also Restatement, supra note 198, at § 102 comment e.
area which is useful in projecting how they might analyze the draft Protocol.

2. Consensus Preemption Case Law

Since its earliest judgments, the Court has made it plain that the Convention "must be read as a whole;" thus "a matter dealt with mainly by one of its provisions may also, in some of its aspects, be subject to other provisions."\(^{201}\) Where two protected rights implicitly overlap, the Court and Commission are "reluctant to draw inferences from one text which would restrict the express terms of another."\(^{202}\) Delineating an appropriately wide interpretation of these overlapping obligations becomes politically sensitive, however, where a Contracting State has ratified the Convention only, but a Protocol appears to be more closely on point. In such cases, the tribunals must be especially careful to interpret the documents in a manner that respects the state's decision not to ratify the supplementary instrument but which allows the compulsory rights enshrined in the Convention to be given an interpretation commensurate with evolving European norms.\(^{203}\)

In Abdulaziz, Cabales and Balkandali v. United Kingdom,\(^{204}\) for example, the Court construed the overlap between the article 8 requirement of respect for family life with Protocol No. 4,\(^{205}\) which guarantees certain rights relating to entering and leaving the territory of a Contracting State.\(^{206}\) The case concerned the British government's refusal to permit the husbands of three women who were lawfully settled in the United Kingdom to enter the country and join

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203. This problem was noted by Lord Rawlinson in his argument before the Court in Abdulaziz, Cabales and Balkandali v. United Kingdom, 77 Eur. Ct. H.R. (ser. B) at 175 (1990) ("It would be ... wholly perverse for the High Contracting Party which has, as it is entitled to, declined to ratify a Protocol which purports to introduce additional elements into categories of rights, to have those excluded rights ... artificially imposed by a labored construction of an original convention.").


206. Id. art. 2, para. 1 (guaranteeing liberty of movement to everyone lawfully within the territory of a state); id. art. 2, para. 2 (guaranteeing right to emigrate); id. art. 3 (guaranteeing nationals the right to enter the territory of their home state).
their wives.\textsuperscript{207}

The United Kingdom argued that the Protocol, which it had not ratified, was the only text that had any relevance to immigration control. To support this position it cited to the preamble of the Protocol, which states that the document was drafted "to ensure the collective enforcement of certain rights and freedoms other than those already included in . . . the Convention.\textsuperscript{208} To allow issues related to immigration to be included within article 8, in the government's view, "would be false to the very words of th[e] Protocol."\textsuperscript{209}

The Court rejected this approach, holding that although the right of foreigners to enter the territory of a Contracting State was not \textit{per se} guaranteed by the Convention, each state's immigration policies had to be carried out consistently with its protected rights and freedoms. Thus, if a non-national was excluded from a state where members of his or her family resided, an issue under article 8 might arise.\textsuperscript{210} In this way, the Court was able to harmonize the obligations of the two instruments consistently with the United Kingdom's decision not to ratify the Protocol.

A more complex problem of interpretation arises where a right guaranteed in the Convention has expanded through subsequent state practice into the primary subject matter of one of the Protocols. In such a situation, the development of a clear European consensus that the scope of the protected right should be enlarged must be construed together with the acceptance of the Protocol by the Convention's signatories. Where less than all of the Contracting States have ratified the supplementary agreement, a question arises as to whether the more rights-protective view adopted by a majority of European nations should be applied against the non-ratifying states. This is precisely the issue which the tribunals may be required to address if partial ratification of the sexual orientation Protocol occurs.

\begin{footnotesize}

\textsuperscript{208} Protocol No. 4, supra note 205, preamble. See also id. art. 6, para. 1 ("As between the High Contracting Parties the provisions . . . of this Protocol shall be regarded as additional Articles to the Convention . . . .”).


\textsuperscript{210} Abdulaziz, Cabales and Balkandali v. United Kingdom, 94 Eur. Ct. H.R. (ser. A) at 31 (1985). When the Court reached the merits of the article 8 claim, however, it refused to find a violation of the Convention, holding that "Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country.” Id. at 34.
\end{footnotesize}
The Court faced this issue directly in *Soering v. United Kingdom*.\(^{211}\) Jens Soering was a German national accused of committing capital murder while in the United States.\(^{212}\) Arrested on an unrelated charge in the United Kingdom, he confessed to the crime, after which the United States requested his extradition under a treaty between the two countries.\(^{213}\) After exhausting his domestic remedies in the United Kingdom, Soering filed an application with the Commission, which was then appealed to the Court.\(^{214}\)

The central issue in the case was whether the United Kingdom would breach its Convention obligations by extraditing Soering to a country where he would be exposed to the death penalty and to the “death row phenomenon.”\(^{215}\) Although the death penalty had been abolished in the United Kingdom, it was actively applied in Virginia, where Soering had committed the murder. Under the extradition treaty, the United Kingdom requested an assurance that even if Soering was sentenced to death, he would not in fact be executed.\(^{216}\) It acknowledged, however, that the United States federal government did not have the power to prevent the execution where a violation of a particular state’s criminal law had occurred.\(^{217}\) The United Kingdom, therefore, accepted an assurance from the state prosecutor that the trial judge would be informed that the British government did not wish the death penalty to be imposed or carried out.\(^{218}\)

The complex issue of interpretation was created by the fact that article 2, paragraph 1 of the Convention expressly permits use of the death penalty.\(^{219}\) The Council of Europe, however, had proposed a Protocol to the Convention to abolish the death penalty except during wartime.\(^{220}\) Although sixteen Contracting States had signed and

\(^{212}\) Id. at 11.
\(^{213}\) Id. at 12-13.
\(^{214}\) Id. at 30-31.
\(^{215}\) Id. The “death row phenomenon” consists of the harsh conditions of detention on death row, the fear of violence perpetrated by other inmates while confined there, the psychological trauma caused by knowledge of the impending execution, and the long delays in the review procedures after a sentence of death has been imposed. See id. at 41, 43.
\(^{216}\) Id. at 12.
\(^{217}\) Id. at 28.
\(^{218}\) Id. at 19.
\(^{219}\) “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.” Convention, supra note 3, art. 2, para. 1.
thirteen had ratified the Protocol by 1989,221 the United Kingdom was not among them. It had nevertheless abrogated all executions by statute,222 as had nearly all other European governments.223 The specific question facing the Court was whether this consensus against capital punishment had achieved such a degree of consistency and strength that executions would not be permitted under the Convention, the text of article 2 notwithstanding.224 In particular, it was argued before the Court that extraditing a suspected criminal to a state which used the death penalty should be viewed as an inhuman and degrading punishment within the meaning of article 3 of the Convention.225

The Court initially acknowledged that it “cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe.”226 It noted that there was a “virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards of justice.”227 The majority of Contracting States had formally abolished the death penalty, and those few nations that retained capital punishment for some peacetime offenses did not carry out death sentences even when imposed. The Court characterized this as a de facto abolition of capital punishment in Europe.228 The existence of Protocol No. 6 provided further evidence that European states would not tolerate use of the death penalty in peacetime.229

The Court noted, however, that these indicia of consensus alone did not resolve the issue of whether the death penalty was per se prohibited as an inhuman punishment under article 3. This problem could only be solved by construing article 2 in harmony with the language of article 3. Accordingly, the Convention’s drafters could not have intended to include a general prohibition of the death penalty, since

222. See Murder (Abolition of Death Penalty) Act, 1965, ch. 71, § 1 (Eng.).
224. Id. at 40-41.
225. Id. Article 3 states: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Convention, supra note 3, art. 3.
227. Id. (quoting brief of Amnesty International).
228. Id.
229. Id.
that would nullify the clear wording of article 2. But subsequent developments, including the creation of Protocol No. 6, could have altered the Convention's clear textual meaning, as the Court explained in a key passage:

Subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 [paragraph 1] and hence to remove a textual limit on the scope for evolutive interpretation of Article 3. However, Protocol No. 6, as a subsequent written agreement, shows that the intention of the Contracting Parties as recently as 1983 was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. In these conditions, . . . Article 3 cannot be interpreted as generally prohibiting the death penalty.231

Applied to lesbians and gay men, the Court's reasoning in Soering creates the possibility that, in the absence of a sexual orientation Protocol, the textual restrictions relied on by the Contracting States to limit the human rights of homosexuals would be effectively written out of the Convention over time, allowing a more far-reaching European consensus on sexual orientation issues to form. Thus, the fact that same-sex partners were not considered families by the Convention drafters or that article 12 guarantees marriage rights only to men and women232 would not bar the Court or the Commission from relying on more recent developments to expand the Convention's reach to lesbian and gay partnerships.233 Similarly, as an ever increasing

230. Id.
231. Id. at 40-41. Compare the majority's approach with that of Judge De Meyer, who stated that "so far as [Article 2] still may seem to permit, under certain conditions, capital punishment in time of peace, it does not reflect the contemporary situation, and is now overridden by the development of legal conscience and practice." Id. at 51 (De Meyer, J., concurring). In the judge's view, "[n]o State Party to the Convention can in that context, even if it has not yet ratified the Sixth Protocol, be allowed to extradite any person if that person thereby incurs the risk of being put to death in the requesting State." Id. at 52.
232. Convention, supra note 3, art. 12 ("Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.").
233. For such a result to occur, however, the European consensus would need to be exceptionally clear and well-developed, amounting to a "general abandonment of the
majority of European nations allow lesbians and gay men to serve as active members of the armed forces, the tribunals might conclude that the "protection of disorder" clause contained in the second paragraph of article 8 would no longer be valid as a textual basis for prohibiting their military service.\textsuperscript{234}

But the Court's message in \textit{Soering} is unequivocal: these evolutionary or expansive readings of the Convention's primary text can be blocked by the creation of an optional agreement which permits Contracting States to provide additional human rights guarantees to individuals only when and if they choose to do so. With the establishment of a sexual orientation Protocol, each state will be given the opportunity, outside of the Convention's existing evolutionary framework, to choose the precise moment when it will acquiesce to additional human rights protection for lesbians and gay men. Those less enlightened states that decide not to do so in the foreseeable future may take comfort in the Court's statements that a European consensus, however advanced, will never apply directly to them absent ratification.\textsuperscript{235}

3. \textit{Consensus Preemption and Overlapping Obligations}

The Protocol's ability to hinder the formation of a European consensus applicable to non-ratifying states does not resolve the question of precisely which human rights obligations will continue to be secured by the Convention. Whereas in the passage of the \textit{Soering} case quoted above, the Court attempted to reconcile two articles of the Convention's primary text, the Court also examined what appears to be an implicit overlap between article 3 and Protocol No. 6, noting that the manner in which [a death sentence] is imposed or executed,

\textsuperscript{234} A more difficult textual limitation to overcome is the "protection of morals" clause contained in articles 8, 9, 10 and 11. For the Court to eliminate entirely the Contracting States' ability to protect their conception of morality would effectively overrule Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 22 (1976), in which the Court stated that deference should be given to the Contracting States' use of morality-based restrictions on human rights, as the States were in a better position to make a judgment than the Court. A far more likely result is that the Court would slowly limit the states' discretion to invoke morality where there is a strong European consensus in favor of protecting the right or freedom at issue.

\textsuperscript{235} Even the Protocol's drafters acknowledge this point. See Background Explanation, in Study Conference, supra note 129, at 42 ("It is understood, of course, that . . . those member states of the Council of Europe who wish to continue to discriminate against their homosexual citizens [may] do so by not signing or ratifying the Protocol.").
the personal circumstances of the condemned person and a
disproportionality to the gravity of the crime committed, as
well as the conditions of detention awaiting execution, are
eamples of factors capable of bringing the treatment or
punishment received by the condemned person within the
proscription under Article 3. 236

In the Court's view, states which had not ratified the death penalty
amendment would nevertheless be prohibited from imposing death
sentences unless they complied with the standards of humane treat-
ment sanctioned by article 3. By deporting Soering to a jurisdiction
where he would be exposed to the "death row phenomenon," the
Court concluded that the United Kingdom had breached its obliga-
tions under article 3, even though his actual execution would not be a
violation of the Convention. 237

The overlap between the sexual orientation Protocol and articles 8
and 14 of the Convention is also a complex question. As in the Bel-
gian Linguistics Case, Abdulaziz, and Soering, the Court must deline-
ate the precise scope of the documents for both ratifying and non-
ratifying states. This task will also require the Court to decide the
degree to which the Convention alone continues to protect the rights
of lesbians and gay men. Because those sexual orientation issues that
remain within the ambit of articles 8 and 14 will continue to evolve
with the human rights baseline of all European states, 238 the boundary
that is set between the two agreements will be crucial for achieving
uniform enforcement of human rights guarantees for European lesbi-
ans and gay men.

With respect to article 8, three degrees of overlap are possible.
First, the Court could interpret any obligation concerning sexual ori-
entation to be the exclusive province of the Protocol, leaving no
human rights protection for homosexuals remaining within the scope
of article 8. This interpretation is unlikely, given that the Court has
twice ruled that article 8 prevents the Contracting States from

237. Id. at 44-45.
238. See Abdulaziz, Cabales and Balkandali v. United Kingdom, 94 Eur. Ct. H.R. (ser. A)
at 35-39 (1985) (Court applied evolving European conceptions of sexual equality under article
14 together with article 8, after having found that some aspects of immigration were protected
by article 8 notwithstanding the United Kingdom's failure to ratify Protocol No. 4); see also
"death row phenomenon," although not prohibited by Protocol No. 6, was inconsistent with
article 3, since "[p]resent-day attitudes in the Contracting States to capital punishment are
relevant for the assessment of whether the acceptable threshold of suffering or degradation has
been exceeded.").
criminalizing consensual adult homosexual relationships. Thus, even if Cyprus, the only Contracting State which still prohibits homosexual conduct, fails to ratify the Protocol, its sodomy laws should still be incompatible with the right to respect for private life.

Second, the Court may determine that constraints on homosexual privacy that fall within the first paragraph of article 8 but which are justified by a restriction listed in the article’s second paragraph are still within the ambit of the Convention in a post-Protocol Europe. Such a construction would permit those issues which are nominally included within the scope of article 8 at the time the Protocol becomes effective to evolve with Europe’s human rights base line. As a consensus in favor of homosexual equality continues to build across Europe, the ability of non-ratifying states to rely on the restrictions listed in the second paragraph would be curbed, allowing the Court to find incompatible with the Convention such practices as prohibiting homosexuals from serving in the armed forces or requiring a higher age of consent for gay men. Issues that are currently entirely outside of scope of article 8, such as the familial status of same-sex partners, would not apply to non-ratifying states.

Although this interpretive approach would allow the consensus inquiry to be applied against all European states in many areas related to homosexual privacy, its validity is undercut by the Court’s statement in Soering that textual modifications will not be lightly inferred where the Contracting States have “adopt[ed] the normal method of amendment of the text”—that is, where they have drafted an optional Protocol to provide additional human rights obligations for European states. Thus, non-ratifying states can point to the fact that they did not sign the Protocol as evidence that they are neither bound by its provisions nor by the growing consensus which the provisions purport to embody.

Finally, the Court may look to the developments engendered by the Protocol itself in determining the obligations of non-ratifying states, allowing article 8 to take on an expanded construction commensurate with the scope of the Protocol. Although one judge in Soering argued

239. See supra text accompanying notes 75-86.
240. Alternatively, the Court may conclude that only adult consensual sodomy is protected under article 8 after the Protocol becomes effective. At present, such protection is only theoretical, since every Contracting State except Cyprus has already legalized this form of sexual conduct. It would, however, prohibit Contracting States from recriminalizing adult consensual sodomy in the future.
241. See supra note 98; see also supra text accompanying notes 99-111.
that an extremely clear and uniform European consensus could be applied even against states that had refrained from ratifying any relevant supplementary instruments,\textsuperscript{243} this view did not persuade a majority of the Court or the Commission and is unlikely to become an authoritative interpretation of the Convention in the near future.

Although it seems plausible that the Court will chart a centrist course, allowing for some overlap between the Protocol and the Convention's primary text, precisely where it will draw the boundary is unclear. The Court's task will be made even more difficult since the Protocol effectively trumps article 14 on all issues related to sexual orientation. Because discrimination on the basis of sexual preference has never been held to violate this clause, the Court is more likely to conclude that there is little room for overlap between the Protocol and article 14 on issues of lesbian and gay equality, thereby eroding the possibility of defining an area of overlap between the Protocol and article 8.\textsuperscript{244} In short, there is no sure strategy for predicting precisely how the tribunals will harmonize the Protocol and the Convention, making the achievement of European unity on issues of sexual expression and identity extremely problematic.

\textsuperscript{243} See id. at 51-52 (De Meyer, J., concurring).

\textsuperscript{244} There is no case law that predicts how the Court and Commission will resolve an overlap between article 14 and a Protocol that deals directly with an issue of equality. The nearest precedent is Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, reprinted in 24 I.L.M. 435 (1985) [hereinafter Protocol No. 7]. Article 5 of the Protocol states: "Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from such measures as are necessary in the interests of the children."

Since Protocol No. 7 only entered into force on November 1, 1988, there have been no cases construing the scope of this provision or its overlap with article 14. In Rasmussen v. Denmark, App. No. 8777/79, 6 Eur. H.R. Rep. 94 (1983), however, the Commission, in language remarkably similar to the Protocol, stated that "equality between parents or spouses in marriage, and after its dissolution, is an important aspect of sexual equality [guaranteed by article 14]." Id. at 97; see also Rasmussen v. Denmark, 71 Eur. Ct. H.R. (ser. B) at 76-77 (1988) (public hearings of June 26, 1984) (Statement of Mr. Opsahl, Commission Delegate) (arguing that there is an "obvious" overlap between article 14 and article 5).

On appeal, the Court reversed the Commission's holding that Denmark's different regulations for mothers and fathers to dispute the paternity of a child violated Article 14. Rasmussen v. Denmark, 87 Eur. Ct. H.R. (ser. A) at 14-16 (1984). Nor did the Court endorse the Commission's reading of the article's applicability to spousal equality, stating rather cryptically that "[t]here is no call to determine on what ground this difference [of treatment] was based, the list of grounds appearing in Article 14 not being exhaustive." Id. at 13.

If the Commission's approach were adopted, there would be substantial room for overlap between article 14 and article 5, portending a similar result for article 14's interaction with the sexual orientation Protocol. The Court's approach, however, indicates that the area of overlap between the two provisions may be substantially more meager.
IV. Strategies for Uniting a Divided Europe

To avoid the difficulties associated with the current draft of the Protocol, alternative approaches should be considered. In developing alternative strategies, however, careful attention must be paid to balancing the desire for a common human rights baseline against the danger that that baseline will contain substantive standards so meager that they fail to provide useful protection for individual rights. Professor Theodor Meron has noted this tension between "higher standards" and "more ratifications."245 He counsels organizations involved in human rights law-making to be wary of an approach which favors the creation of additional rights at the expense of widespread acceptance of those rights: "If an organization has overreached and States are not willing to ratify a treaty that establishes high standards, the organization may have to be less ambitious and prepare a treaty with lower substantive standards or less demanding implementation provisions."246

The Parliamentary Assembly of the Council of Europe has established guidelines for drafting new human rights obligations for European states which address this concern and facilitate the process of human rights law-making. "[I]n order to be incorporated in the convention, any right must be fundamental and enjoy general recognition, and [be] capable of sufficiently precise definition to lay legal obligations on a state, rather than simply constitute a general rule."247 The Council's Steering Committee for Human Rights (CDDH) has distilled these guidelines to their essence. To be considered for inclusion in a Protocol, a right must be fundamental, universal, and justiciable.248

Applying these criteria to the principle of equality for lesbians and gay men in the context of the Convention's existing approach to issues of non-discrimination, two options appear promising. First, the European lesbian and gay rights movement could work toward extending article 14 to prohibit all forms of discrimination, not merely unequal treatment with respect to the particular rights and freedoms specifically set forth in the Convention and its Protocols. Second, a specific optional instrument addressing homosexual equality could be developed, but made more moderate in scope so as to secure an increased number of ratifications from the Contracting States.

245. Meron, supra note 186, at 165.
246. Id.
Separating out these two proposals highlights a key problem in the current draft of the sexual orientation Protocol: the combination of an independent right to equal treatment under the law with the extension of that right to lesbians and gay men alone. Individually each of these proposals is controversial. When placed together in a single instrument, they create obligations too stringent for most of the Contracting States to undertake.

A. An Independent Right to Equal Protection of the Laws

Since its inception, human rights scholars have questioned the Convention's limited approach to issues of equality.\textsuperscript{249} Rather than allowing for protection against invidious discrimination wherever it may appear, the Convention places equality in a subordinate position in the Convention's hierarchy of rights.\textsuperscript{250} Other global and regional human rights treaties, by contrast, place a premium on equal treatment under the law, and have not attempted to confine impermissible discrimination to particular substantive issues.\textsuperscript{251}

Recently, the Parliamentary Assembly asked the Committee of Ministers, the executive arm of the Council of Europe, to consider extending article 14 “to prohibit all forms of discrimination.”\textsuperscript{252} In June 1990, at the Seventh International Colloquy on the European Convention, the question of equality in European human rights law was extensively examined.\textsuperscript{253} The colloquy’s general report did not make any specific recommendations, but after examining many other human rights treaties, it concluded that “the Council of Europe system is falling behind other instruments in the area of equality and non-discrimination.”\textsuperscript{254} One way to remedy this situation, the report concluded, was to follow the Assembly’s suggestion and create an independent right to equality.\textsuperscript{255}

\textsuperscript{249} See, e.g., P. van Dijk & G. van Hoof, Theory and Practice of the European Convention on Human Rights 386-87 (1984); McKean, supra note 22, at 207-12.
\textsuperscript{250} See supra text accompanying notes 61-64.
\textsuperscript{254} Id. at 26.
\textsuperscript{255} Id. at 28.
The report noted, however, that previous attempts to extend article 14 had failed. Several Contracting States had expressed concerns about the unpredictable scope of such an addition to the Convention and the possibility of an overwhelming increase in the number of petitions to the Commission. The report responded to these concerns by noting that other international human rights tribunals had developed clearly defined standards for reviewing differential treatment which limited state responsibility to instances where a challenged distinction was not based on "reasonable and objective criteria." Such an approach has also allowed the tribunals to screen meritless claims and prevent overburdening of the treaties' judicial review mechanisms.

Given the strong precedent in other human rights instruments for creating a general right to equal treatment, it may be possible to pressure the Contracting States to commit themselves to modifying article 14 to a form similar to article 26 of the International Covenant on Civil and Political Rights. In the process, the list of traits upon which the Contracting States may not discriminate could be extended to include sexual preference and any other characteristic that is not

256. Id. at 25. Efforts within the Council of Europe to create an independent right to equality reveal a tension among the Parliamentary Assembly, the Steering Committee for Human Rights, and the Committee of Ministers. After the Assembly had issued Recommendation 1089 to amend article 14, the Ministers instructed the Steering Committee to examine the question. See Reply by the Committee of Ministers to Recommendation 1089 (1988), reprinted in Info. Sheet No. 27, supra note 16, Appendix No. 26. The Steering Committee rejected the Assembly's proposal, concluding that [the consequences of a ban on all forms of discrimination] are potentially so broad that it would be difficult to know the exact implications. Indeed, discriminations could be alleged in many fields going far beyond the civil rights framework, such as in social benefits, subsidies, pension or retirement schemes, all areas of tax law, property law, competition and regulations governing the media. This would provoke such a number of applications that the efficiency of the organs of the Convention would be endangered.


Undaunted, the Assembly responded with Recommendation 1134, Eur. Parl. Ass. 42nd Sess. (1990), which asks the Committee of Ministers to "draw up a Protocol to the European Convention on Human Rights or a special Council of Europe convention to protect the rights of minorities ... ." Id. para. 17. Such an agreement, the Assembly directed, should include a general right to non-discrimination. Id. para. 10 (ii).

257. Eide & Opsahl, supra note 253, at 26, 28.

258. Id. at 20. Note the similarity between this approach and the test for discrimination articulated by the Court in the Belgian Linguistics Case, 6 Eur. Ct. H.R. at 34 (ser. A) (1968). To avoid violating article 14, differential treatment must have an objective and reasonable justification and the means employed must be proportionate to the aims sought to be realized. See supra text accompanying note 66.

expressly listed in the current version of article 14. A draft of this new right to equality might read:

All persons are equal before the law and entitled to the equal protection of the law. The High Contracting Parties shall secure this right to everyone within their jurisdiction without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation or other status.

This provision satisfies the three criteria of the Committee of Experts discussed above. Its existence in many other human rights treaties demonstrates its universal and fundamental nature, while tracking the language of the International Covenant allows the Court and Commission to develop standards for measuring discrimination that are clearly justiciable.

An autonomous right to equality would also resolve the three problems of interpretation highlighted above. First, unlike the current draft of the Protocol, it would allow anyone to contest general discriminatory treatment before the Court and Commission, not only lesbian and gay men. Second, the tribunals would be given discretion to craft their own rules for measuring discrimination, rather than be forced to apply a standard of absolute equality. This is more consistent with the approach of other international human rights enforcement organs and would be acceptable to a larger number of European states. Finally, the suggested text avoids the problem of state responsibility for purely private transactions by leaving intact the existing language of article 14 that rights and freedoms shall be “secured” without discrimination. In this way, the Court and Commission can determine on a case by case basis the scope of the Contracting States’ affirmative obligations to remedy private discrimination.

260. The addition of sexual preference to the list of protected characteristics will force the Court and Commission to reexamine their approach to laws that treat homosexuals differently than heterosexuals. Where states expressly agree in plain language that lesbian and gay equality is a protected right, the tribunals will be hard pressed to permit the same degree of deference as they did when the Convention’s applicability to homosexuals was merely implicit. See Vienna Convention, supra note 198, art. 31, para. 1 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

261. See supra text accompanying notes 182-95.

262. See Eide & Opsahl, supra note 253, at 20.

263. There is also a strong possibility that such a Protocol will be adopted by a very large number of European states, since many different advocacy and interest groups across the
Although such a wholesale modification of the Convention's non-discrimination guarantee is the most inclusive way to provide greater equality for European lesbians and gay men, the coalition-building and the additional time required to develop sufficient political pressure to implement such a broad-based measure may make it a long-term aspiration rather than an immediate tactic to remedy the inadequacies in the tribunals' current privacy and equality jurisprudence.

The Colloquy's general report, recognizing this problem, advocated as an alternative the use of a sectoral approach to non-discrimination. Such an approach encourages the creation of "international instruments which develop rules against discrimination in a context which is more specific in one respect, e.g. criteria, but perhaps more comprehensive or wide-ranging in other respects, e.g. as regards subject matter." 264 A Protocol focusing exclusively on sexual orientation issues is representative of this trend.

B. A Revised Sexual Orientation Protocol

Although a specific focus on lesbian and gay concerns is entirely appropriate as a subject for human rights law-making, the danger of consensus preemption makes it essential to create a document that will be acceptable to as many European nations as possible—including those that may not have rushed to protect lesbian and gay rights in the past. The goal of more ratifications can be accomplished by lowering the Protocol's substantive standards, while simultaneously making clear in the agreement that those standards will continually evolve as the continent moves in the direction of more comprehensive and more widely accepted rights-enhancing law reforms. 265

This can be done in several ways. First, the Protocol should be limited to prohibiting discrimination only with respect to those rights and freedoms specified in the Convention and its existing Protocols. This would eliminate the possibility of allowing only a lesbian or gay man to allege discrimination in employment, for example, while that right is still denied to women, racial minorities or other groups. Second, as noted above, the "shall secure" clause contained in articles 1 and 14 of the Convention should be retained in the text to allow the

continent will view it as a beneficial addition to the Convention's existing framework. If all Contracting States adopt the agreement, the consensus preemption dilemma can be avoided entirely, allowing for the development of a uniform equality jurisprudence.

264. Eide & Opsahl, supra note 253, at 17.

265. Such reforms can come from within the Council of Europe framework, as in Recommendations and Resolutions of the Parliamentary Assembly, or outside of that framework, as in EC directives or modifications to the Social Charter.
tribunals to develop principles of state responsibility on an *ad seriatim* basis. Third, the preamble to the Protocol should be expanded. Rather than referring to the past changes that have occurred in the law, the Protocol should make any future reforms pertinent to an interpretation of the text itself. Finally, the Protocol should contain only a single right to equality rather than one article for privacy and one for non-discrimination. This will simplify the agreement considerably. Since, even under the current draft, the Protocol will apply to all the rights already protected by the Convention, there is no need for a special provision to ensure non-discrimination for lesbian and gay relationships.

More importantly, the definition of discrimination should be modified. Advocates of the current Protocol, wishing to "overturn the European Commission's interpretation on 'permissible discrimination'" and wary of a homophobic international judiciary, have attempted to draft around any discretion or ambiguity in the law.

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266. As currently drafted, the preamble states: "Considering that the evolution that has occurred in several member states of the Council of Europe expresses a general tendency in favour of eliminating discrimination based on sexual orientation . . . ." Draft Protocol, supra note 175, preamble.

267. Established principles of treaty construction require that the text of an international agreement be given an ordinary meaning in its context. Vienna Convention, supra note 198, art. 31, para. 1. That context includes the words contained in the preamble. Id. art. 31, para. 2.

268. Draft Protocol, supra note 175, arts. 2, 3.

269. Plenary Session on the Drafting of the Protocol, reprinted in Study Conference, supra note 129, at 26. The drafters identified a normative tension inherent in the Protocol:
- a. that if the consequences for full non-discrimination in relation to all laws are spelt out in the protocol . . . , then the chances of the protocol being passed become very small;
- b. that on the other hand if the protocol would only contain a general norm like that contained in articles 1 and 3, an unwilling European Commission and European Court might continue to consider various kinds of discrimination permissible.

Id. As shown above, however, the generality of the non-discrimination norm which is undermined by an extremely precise definition of discrimination in article 1(b) could be interpreted to prohibit even inconsequential differential effects. See supra notes 188-91 and accompanying text.

270. The draft Protocol's definition of sexual orientation discrimination appears to have been borrowed from the definition of gender discrimination contained in the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 194, U.N. Doc. A/34/46 (1979), reprinted in 19 I.L.M. 33 (1980) [hereinafter CEDAW]. Article 1 defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political economic, social cultural, civil or any other field." CEDAW's legal incursion into private interpersonal relations has been criticized as an infringement of privacy and associational rights. See Meron, supra note 186, at 62. The Protocol's text, however, is even
While this approach might be acceptable if a majority of the Contracting States were entirely open to creating additional international protection for sexual minorities, it is overly ambitious in a climate in which some European nations have taken only tentative, faltering steps toward addressing lesbian and gay concerns. Such states should not be discouraged from adopting further rights-enhancing measures because they are confronted with a document that requires an "all or nothing" decision.

A less extreme approach would be to use the word "discrimination" without defining it, thereby allowing the Court and Commission to apply the Belgian Linguistics test to distinctions based on sexual preference, but in a manner that is consistent with the agreement's clear object and purpose to protect sexual minorities. This method may attract the ratifications of a greater number of Contracting States, both because it allows for the continuation of a case by case application of the margin of appreciation doctrine and because it follows the advice of the Parliamentary Assembly's Committee on Social and Health Questions, which over a ten years earlier recommended modifying article 14 to include the words "sexual preference."  

Alternatively, by analogy to Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning Civil and Political Rights, the text could mandate "equality" between heterosexuals and homosexuals. This phrase suggests, in addition to equality of opportunity, "material equality, or justice . . . in the sense of equal distribution of rights and benefits," and might more exacting on this point, making explicit that non-discrimination extends to "any other fields of . . . private life." Draft Protocol, supra note 175, art. 1(b).

271. Even in such a case, reliance on CEDAW's all-encompassing definition of discrimination may be too intrusive in a human rights regime with broad enforcement powers. Indeed, the CEDAW definition may only have been possible because that Convention's control organ, the Committee for the Elimination if Discrimination Against Women, has such weak enforcement powers. See Andrew C. Byrnes, The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women, 14 Yale J. Int'l L. 1, 6 (1989) (discussing CEDAW enforcement). To garner a wide number of ratifications, a Protocol with strong enforcement mechanisms may require somewhat lower substantive standards. See Meron, supra note 186, at 165 (noting the tradeoff between substantive standards and implementation provisions).


273. Protocol No. 7, supra note 244, art. 5 ("Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from such measures as are necessary in the interests of the children.").

274. Eide & Opsahl, supra note 253, at 19.
be construed by the tribunals to require more compelling justifications for permitting a ratifying state to create differences based on sexual orientation.

Following these suggestions, the substantive provisions of a revised sexual orientation Protocol might read:\textsuperscript{275}

\textit{Preamble}

The member States of the Council of Europe, signatory to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms on 4th November 1950 (hereinafter referred to as "the Convention");

Considering that modern European views on homosexuality emphasize social tolerance and equality of treatment rather than prejudice;

Considering that giving effect to these evolving views is an important task for the member States;

Have agreed as follows:

\textit{Article 1}

For the purpose of this Protocol, the expression "sexual orientation" shall mean sexual attraction towards a person of the same sex, whether this is manifested in physical or emotional form.\textsuperscript{276}

\textit{Article 2} (first version)

The enjoyment of the rights and freedoms set forth in the Convention and its Protocols shall be secured without discrimination on the ground of sexual orientation.

\textit{Article 2} (second version)

The member States shall secure to everyone within their jurisdiction equality in the enjoyment of the rights and freedoms set forth in the Convention and its Protocols without regard to sexual orientation.

The premise underlying these modifications is that the tribunals' approach to equality jurisprudence is theoretically sound, but misguided in its application to discrimination against lesbians and gay men. Both in the assertion that legal distinctions must have an objective and reasonable justification and that the means employed must be proportionate to legitimate governmental aims,\textsuperscript{277} the Court and the Commission have created a workable analysis for measuring invidious

\textsuperscript{275} The enabling provisions of the current draft Protocol need not be altered. Id. arts. 4, 5, 6, 7, 8.

\textsuperscript{276} Id. art. 1(a).

discrimination. They have, however, been hesitant to apply this analysis with force to distinctions based on sexual orientation, at least in part because of the disharmony among the Contracting States with regard to the many practices adversely affecting sexual minorities. As Judge Martens has recently noted,

one gets the impression that the Court, at least as far as family law and sexuality are concerned, moves extremely cautiously when confronted with an evolution which has reached completion in some member States, is still in progress in others but has seemingly left yet others untouched. In such cases the Court's policy seems to be to adapt its interpretation to the relevant societal change only if almost all member States have adopted the new ideas.278

If this is in fact the Court's approach, application of the consensus inquiry under the existing Convention framework will be seriously deficient, and will result in only incremental human rights enhancements for lesbians and gay men. Drafting a supplementary agreement to speed the process of consensus formation is a proper response to this inadequacy. But such an agreement should strive to embrace as many Contracting States as possible, including those currently in a preliminary or transitional phase of maturation on lesbian and gay human rights issues.279 As an increasing number of European nations agree to protect sexual minorities, greater domestic and international pressure can be brought to bear on those recalcitrant states that have yet to ratify the agreement. This will solidify the evolving norm of sexual orientation non-discrimination and may even convince the tribunals to scrutinize more carefully the justifications of non-ratifying states in those areas of the Convention that overlap with the Protocol.

The current draft, with its exacting definition of discrimination, would create a major revision of the Convention's equality jurisprudence that could deter such transitional or lagging states from ratification. It is with such states, rather than with the most liberal nations that have already implemented domestic legislation to protect lesbians and gay men, that the more pressing need for protection lies.

The draft also fails to recognize the careful balancing of rights

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279. This includes those Eastern European states that are becoming members of the Council of Europe. While such nations have a limited record on lesbian and gay rights, they should be encouraged to accept the sexual orientation Protocol if and when they decide to ratify the Convention and the other extant Protocols.
against state discretion that is a vital part of Convention jurisprudence. In an effort to increase states’ willingness to accept an ever-expanding diet of human rights obligations, the Court has developed the margin of appreciation doctrine to permit states to adapt gradually to societal and legal changes across the continent. By failing to appreciate the delicate nature of this balance, the Protocol’s drafters may have created unintended problems for lesbians and gay men in nations that are not yet ready to commit themselves so forcefully to equality.

CONCLUSION

This Article has attempted to identify the ambiguous and often perplexing results that may occur if the current draft of the sexual orientation Protocol is opened for signature. Both in terms of the new human rights obligations it creates and in its secondary impact on states which refrain from ratification, the Protocol will leave a decidedly mixed legacy for the achievement of lesbian and gay rights in Europe. By developing an instrument that is so comprehensive in scope, the Protocol’s drafters have virtually ensured a rift among European states on sexual orientation issues.

In its present form, ratification by only a handful of Contracting States is likely. For those states, the Court and Commission will become enmeshed in the pervasive process of removing any trace of sexual orientation distinction from their legal systems. For states that refrain from ratification, however, the tribunals will be reluctant to engage in anything other than the most basic rights protection for sexual minorities, with little opportunity for the dynamic enhancement of jurisprudential principles that has become a hallmark of its approach in other areas. At a time when the nations of Europe are striving toward greater legal, social, and economic unity, this result poses serious problems for those lesbians and gay men who reside in nations with less advanced notions of human rights, and raises the specter of a schism in European human rights law. To avoid these difficulties, alternative strategies should be considered.

The purpose of discussing these strategies here is to suggest additional areas of exploration which may assist human rights scholars and activists who are involved in publicizing the Protocol and taking it through the complicated political process from initial debate in the Parliamentary Assembly to final ratification by the Contracting States. It is hoped that this Article will facilitate the process of lawmaking and result in the creation of an instrument that will provide significant enhancement of human rights for all of Europe’s lesbians and gay men.