FINDING A CONSENSUS ON EQUALITY:
THE HOMOSEXUAL AGE OF CONSENT
AND THE EUROPEAN CONVENTION
ON HUMAN RIGHTS

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INTRODUCTION*

The European Court of Human Rights,1 in Norris v. Ireland,2 recently renewed its commitment to protecting consensual adult homosexual relationships from the criminal sanctions of European governments. In reaffirming a homosexual's right to privacy, which it first recognized in its 1981 judgment, Dudgeon v. United Kingdom,3 the Court has made it plain that the Contracting States4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Conven-

* This Note is dedicated to achieving wider recognition for gay and lesbian rights as an integral part of international human rights. I hope that by making European human rights jurisprudence more accessible, I will provide to American legal scholars and law students an alternative frame of reference in which to explore sexual orientation issues. Had Chief Justice Burger known about Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981), the European Court of Human Rights' landmark decision establishing the right to privacy for homosexuals, perhaps he would not have asserted so cavalierly that "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) (upholding Georgia sodomy statute and refusing to find constitutional right to privacy for homosexuals).


4 The Contracting States are those European nations that have ratified the Convention. The Contracting States include Austria, Belgium, Cyprus, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. See Council of Eur., Convention for the Protection of Human Rights and Fundamental Freedoms, Chart of Signatures and Ratifications, No. 5 (Sept. 1990) (on file at New York University Law Review).
tion) can no longer criminalize consensual adult homosexual sodomy, even where the relevant statutes have fallen into desuetude.  

Although there is a widespread perception that the European Court is extremely progressive on issues related to sexual orientation, a closer examination of the judgments of the Court and of the European Commission of Human Rights (Commission) reveals that homosexuals have received little support for their rights beyond the Dudgeon and Norris decisions. In particular, the European Court and the Commission consistently have rejected challenges to laws that establish a higher age of consent for male homosexuals as compared to heterosexuals or lesbians. In reviewing laws that fix a higher age of consent for homosexuals, the European Court and the Commission utilize the concept of a "Euro-

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5 Nov. 4, 1950, 213 U.N.T.S. 222.

8 The Commission is a judicial tribunal which screens claims brought by individuals against the Contracting States for violating the Convention. For a more detailed description of the Commission's general role in human rights enforcement, see text accompanying notes 25-37, 46-50 infra.

9 This Note primarily addresses the treatment of male individuals sexually attracted to persons of the same gender and refers to these individuals as "homosexuals" or "male homosexuals." Although the term "gay" is preferred in the United States, the European legal and sociological materials do not use this term. Thus, it would be inappropriate to use the term when analyzing European developments in this area.

The treatment of lesbians is not separately addressed because, although they too have received unequal treatment under the Convention, the age-of-consent issues addressed in this Note do not arise with respect to lesbians; only Finland maintains a higher age of consent for lesbians than for heterosexuals. See note 356 and accompanying text infra.

10 See text accompanying notes 250-94 infra.
pean consensus” on human rights issues—the touchstone against which Convention violations are measured. The Court and Commission have identified an unduly narrow consensus on the issue of the age of consent for homosexuals. Their analysis has been inaccurate in failing to consider recent changes in the Contracting States’ criminal codes and international resolutions aimed at achieving a uniform age of consent for homosexuals, lesbians, and heterosexuals.

The existence or absence of a European consensus on issues of equality is critical because it determines the level of judicial scrutiny to be applied in challenges brought under Article 14, the Convention’s non-discrimination provision. Where no European consensus on equality can be discerned, the Court and Commission apply a standard of Article 14 review which gives extreme deference to the Contracting States and which has resulted in the finding of only one Article 14 violation. By contrast, where such a consensus exists, the tribunals use a heightened standard of discrimination review. This standard, which the Court and Commission have developed in three recent cases in which violations of the Convention were found, accords the Contracting States little deference and allows the tribunals to scrutinize carefully the justifications presented to support discriminatory legislation. This Note argues that the heightened standard of review under Article 14 is more consistent with the Court’s conception of the Convention as a whole and should be used as the framework for analyzing laws establishing a higher age of consent for homosexuals.

Part I of this Note discusses the structure of the Convention and

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12 In determining whether a Contracting State’s laws are compatible with the Convention, the Court and Commission look to rights-enhancing law reform trends on a European-wide basis. For a more detailed discussion of the European consensus analysis, see notes 87-94 and accompanying text infra.

13 Article 14 states:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured 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 or other status.

Convention, supra note 1, art. 14.

14 See The Belgian Linguistics Case, 6 Eur. Ct. H.R. (ser. A) (1968). Although several commentators have examined or critiqued the Court’s doctrinal development of Article 14, see, e.g., P. van Dijk & G. van Hoof, supra note 1, at 386-95 (arguing that Court’s interpretation of Article 14 is inconsistent); W. McKeen, Equality and Discrimination Under International Law 214-23 (1983) (discussing contours of Court’s Article 14 jurisprudence); J. Merrills, supra note 1, at 155-57 (discussing impact of consensus on Court’s recent Article 14 decisions), no comprehensive analysis of Article 14 jurisprudence ever has been attempted.


16 See text accompanying notes 194-200 infra.
how it provides human rights protection to individuals. It introduces the concept of a European consensus, used by the Court and Commission to evaluate actions by Contracting States which infringe on rights guaranteed by the Convention. It then shows how the Court has applied consensus analysis when faced with challenges to laws criminalizing adult homosexual conduct.

Part II analyzes the role of Article 14 in Convention case law. It examines the ambiguous test for measuring discrimination, articulated by the Court in the 1968 Belgian Linguistics Case, and the deferential application of this test by the Belgian Linguistics Court and its progeny. Part II then analyzes three recent cases in which the Court and Commission have relied on a European consensus analysis to apply the Belgian Linguistics test with greater rigor and less deference to the Contracting States. It argues that this standard is better able to measure discrimination and is consistent with the Court's more rights-protective jurisprudence in other areas of the Convention.

Part III exposes the limitations in the current age-of-consent analysis practiced by both the Court and the Commission. It reveals that the tribunals have mischaracterized the consensus on this issue as an agreement to restrict homosexual behavior. Thus, they have unnecessarily deferred to the Contracting States' justifications for imposing greater criminal sanctions on those involved in homosexual relationships where a partner is of an age below the homosexual age of consent. Part III then sets forth international legislative resolutions, European criminal codes, and criminological and sociological studies relating to the age of consent. These materials demonstrate that a consensus favoring a uniform age of consent has developed to a degree which requires the Court to apply the more searching Article 14 inquiry to laws which fix a higher homosexual age of consent. Finally, Part III explores in detail why the Contracting States' justifications for maintaining a higher age of consent should be rejected under heightened Article 14 scrutiny.

I

IMPLEMENTING THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A. Origin, Jurisdiction, and Enforcement

In the years following World War II, a newly formed Council of Europe was established to foster unity among European states and to promote economic and social progress. Member states of the Council

18 See Statute of the Council of Europe, May 5, 1949, art. 1(a), 87 U.N.T.S. 103 [hereinafter-
pursued these goals through the creation of the European Convention on Human Rights and Fundamental Freedoms,\textsuperscript{19} which entered into force in 1953.\textsuperscript{20} The Convention confirms the desire of those states that ratify it to uphold “those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained . . . by a common understanding and observance of . . . the Human Rights upon which they depend.”\textsuperscript{21} To date, all twenty-three member states of the Council of Europe have ratified the Convention,\textsuperscript{22} thus binding themselves to secure to individuals\textsuperscript{23} the substantive rights and freedoms it recognizes.\textsuperscript{24}

In addition to setting forth substantive legal provisions, the Convention also creates a complex judicial mechanism to review complaints lodged against the Contracting States by individuals.\textsuperscript{25} Three indepen-

\begin{footnotesize}
\textsuperscript{19} See note 1 supra.
\textsuperscript{20} See P. van Dijk & G. van Hoof, supra note 1, at 2.
\textsuperscript{21} Convention, supra note 1, preamble; see also R. Beddard, supra note 1, at 17-19 (Convention created to increase European unity).
\textsuperscript{22} See note 4 supra.
\textsuperscript{23} See Convention, supra note 1, art. 1.
\textsuperscript{24} 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 (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 protected rights without discrimination (Article 14).

A lesser number of Contracting States have ratified one or more of the eight protocols, or amendments, to the Convention that provide additional human rights guarantees to individuals. Of these eight protocols, Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262 [hereinafter Protocol No. 1], has been ratified by all of the Contracting States except Liechtenstein, Spain, and Switzerland. See Council of Eur., Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Chart of Signatures and Ratifications, No. 9 (Sept. 1990) (on file at New York University Law Review). It guarantees the peaceful enjoyment of property (Article 1) and the right to education (Article 2) and obliges the Contracting States to hold free elections (Article 3).

\textsuperscript{25} Convention, supra note 1, art. 25. All of the Contracting States, except Cyprus and Malta, have recognized the right of individuals to petition the Convention’s judicial bodies for alleged violations of the Convention. 1986 Eur. Y.B. (Council of Eur.) 68. Turkey recognized this right in 1987. See Turkey Accepts Compulsory Jurisdiction of European Court of Human Rights, PR Newswire, Oct. 5, 1989 (LEXIS, Nexis library, Current file).

The Convention also provides a mechanism for individual Contracting States to bring applications against other Contracting States to address violations of the Convention. See Convention, supra note 1, art. 24. The Court has construed this article to allow any Contracting State to bring an application for a violation of human rights occurring in the territory of another Contracting State, even where the applicant state can show neither injury to itself nor involvement of its nationals. See Ireland v. United Kingdom, 25 Eur. Ct. H.R. at 88-90 (ser. A) (1978). For a comprehensive analysis of a third state’s ability to enforce human rights treaties, see T. Meron, Human Rights and Humanitarian Norms as Customary Law 201-08 (1989).
dent bodies participate in this judicial process: the European Commission of Human Rights, the Committee of Ministers, and the European Court of Human Rights. The European Commission of Human Rights reviews all cases which ultimately may reach the Court. It receives "applications" from individuals, known as "applicants," who claim that their Convention rights have been violated. The Commission first determines whether the application discloses a prima facie violation of the Convention. If no such violation has occurred, the Commission dismisses the application. If a violation is clear, or if the application presents unresolved questions of interpretation, the Commission considers it "admissible." The Commission then tries to solve the dispute through informal conciliation. Only if that attempt fails does the application become a justiciable "case." The Commission then considers evidence from the parties and makes a report with a recommendation on "whether the facts disclose a breach by the State . . . of its obligations under the Convention." The report is sent to the Committee of Ministers, which is the executive and political arm of the Council composed of the ministers of foreign affairs, or their designees, from each of the Contracting States. If neither the Commission nor the respondent state refer the case to the European Court of Human Rights within three months of this transmission, the Committee of Ministers renders a final decision. Thus, cases reach the European Court only after repeated screenings.

Although all of the Contracting States "undertake to abide by the

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26 A fourth organization, the Parliamentary Assembly of the Council of Europe, is the legislative arm of the Council. The Assembly makes proposals and recommendations to the Contracting States on a number of subjects, including human rights. For a more detailed description of the Assembly's function, see text accompanying notes 295-301 infra.

27 See Convention, supra note 1, art. 25.

28 See R. Beddard, supra note 1, at 43-44; J. Merring, supra note 1, at 2-4. The applicant also must have exhausted all available and effective national remedies. See Convention, supra note 1, art. 26.

29 See id. art. 27.

30 See id. art. 28(b).

31 See id. art. 31.

32 Id.

33 Council Statute, supra note 18, arts. 13, 14.

34 Individuals may not refer a case to the Court for consideration and the Court may not refuse an application for review. See Convention, supra note 1, arts. 45, 48; R. Beddard, supra note 1, at 43.

35 See Convention, supra note 1, art. 32.

decision of the Court in any case to which they are parties,"38 the force that they grant to the Court's judgments varies.39 A few states, including Austria, the Federal Republic of Germany, Italy, and the Netherlands have incorporated the Convention into their national legal systems, thereby allowing applicants to obtain enforcement of the Court's judgments in their domestic courts.40 The remaining Contracting States accord the Convention less weight, refusing to allow challenges based on it to be adjudicated in their national courts.41 These states fulfill their Convention obligations by giving effect to specific judgments of the European Court.42 Although in most instances the Contracting States have agreed to introduce legislative amendments, reopen judicial proceedings, grant administrative pardons, and pay monetary damages to fulfill their Convention obligations to individual applicants,43 in a few cases they have failed to comply with the Court's judgments.44 On the whole, however, the Convention's judicial machinery is viewed as having strong enforcement powers which have significantly enhanced the protection of human rights in Europe.45

In contrast to this detailed adjudication and enforcement mechanism, the Convention contains relatively few provisions addressing the precedential weight to be afforded to the decisions of the European

38 Convention, supra note 1, art. 58.
42 The Court has interpreted the Convention to allow the Contracting States the power to choose appropriate measures for complying with their obligations under the Convention. See McGoff v. Sweden, 83 Eur. Ct. H.R. at 28 (ser. A) (1984).
43 See Sundberg, supra note 37, at 635-42 (describing manner in which Contracting States comply with Convention); see also J. Merrills, supra note 1, at 2 (Contracting States have only rarely failed to discharge Convention obligations); Note, Implementing the Convention, supra note 41, at 148 n.6 (describing United Kingdom's compliance with Convention).
44 See Sundberg, supra note 37, at 641. The Committee of Ministers is charged with ensuring that the Court's judgments are executed properly. See Convention, supra note 1, art. 54. The Committee's enforcement powers are relatively weak, however, and have been criticized. See Sundberg, supra note 37, at 641.
45 See W. McKean, supra note 14, at 204 (Convention is "most generally effective" international treaty for protecting human rights); J. Merrills, supra note 1, at 17 (Convention is most highly developed scheme of international human rights protection in the world).
Court, the European Commission, and the Committee of Ministers.\textsuperscript{46} It appears that the Court treats its own judgments as authoritative, although it does not preclude the possibility of overruling its earlier case law.\textsuperscript{47} Precedent is applied on an interstate basis, so that a judgment against one Contracting State may be invoked to justify a similar judgment against another.\textsuperscript{48}

Similarly, the Commission is not technically bound by either the Court's or its own decisions, although it views both as highly persuasive authority and, as a rule, has endorsed the interpretation of the Convention espoused by the Court.\textsuperscript{49} Since the Commission screens every application, it does have the power to determine which cases merit the Court's consideration. Once a case has been referred to the Court, however, the Court has jurisdiction to consider all issues of fact and law related to the dispute and thus may disagree with the Commission's analysis or address issues which the Commission ignored.\textsuperscript{50}

Lastly, the Committee of Ministers, which resolves disputes brought before the Commission but not referred to the Court, issues "resolutions"\textsuperscript{51} in which it usually adopts the opinion of the Commission in determining whether a violation of the Convention has occurred.\textsuperscript{52} In cases where the Commission finds a violation, however, either the Commission or the respondent Contracting State may appeal to the Court,\textsuperscript{53} allowing the Court to serve as the final arbiter of a Contracting State's responsibility.\textsuperscript{54} Thus, the interplay of these three branches of the Convention creates a "certain, albeit fragile, harmony" that acknowledges the European Court as the final interpreter of the Convention and the obligations it imposes on the Contracting States.\textsuperscript{55}

\textsuperscript{46} Article 53 of the Convention states that the Contracting States "undertake to abide by the decision of the Court in any case to which they are parties." Convention, supra note 1, art. 53. This article has been interpreted to bind a Contracting State only with regard to the specific facts of the case under review. See Sundberg, supra note 37, at 642.

\textsuperscript{47} See J. Merrills, supra note 1, at 12-14 (Court treats its prior case law as authoritative but is not bound by its earlier decisions); see also Sundberg, supra note 37, at 631 (court frequently refers to its prior judgments in rendering decision).


\textsuperscript{49} Sundberg, supra note 37, at 632.

\textsuperscript{50} See The Vagrancy Cases, 12 Eur. Ct. H.R. at 29 (ser. A) (1971) (Court has full jurisdiction once case is duly referred to it and may hear all questions of fact and law).

\textsuperscript{51} See Sundberg, supra note 37, at 632.

\textsuperscript{52} See id.

\textsuperscript{53} See Convention, supra note 1, art. 48.

\textsuperscript{54} See Sundberg, supra note 37, at 630-31 (Court can render judgment only if Commission or Contracting State brings case before Court).

\textsuperscript{55} Id. at 633.
B. Margin of Appreciation Doctrine and European Consensus Inquiry

In developing a workable standard to measure each Contracting State's compliance with the Convention, both the Court and the Commission have developed the concept of a "margin of appreciation."\(^{56}\) The margin is essentially the degree of discretion which the tribunals allow to Contracting States in adhering to the human rights obligations imposed by the Convention.\(^{57}\) Since the Court and Commission are international judicial bodies whose jurisdiction and enforcement powers depend on the consent of the Contracting States,\(^{58}\) they are wary of risking their limited political influence if they attempt to act as national legislatures or courts when they determine if a Contracting State is providing the most comprehensive human rights protection to individuals.\(^{59}\) Rather, if the laws of a Contracting State are at the margin of compatibility with the Convention, the Court and Commission usually will defer to the judgment of the state and declare that no violation has occurred.\(^{60}\)

Although this doctrine appears to accord wide deference to the Contracting States in a manner that diminishes the Convention's effectiveness,\(^{61}\) the Court and Commission progressively have narrowed it to make more exacting demands on the Contracting States.\(^{62}\) The tribunals use three distinct analytical methods to achieve this goal. First, they are in the continuing process of creating a hierarchy of rights protected by the Convention. Second, they apply a similar ranking to the justifications

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57 For critical discussions of the margin of appreciation doctrine, see P. van Dijk & G. van Hoof, supra note 1, at 427-49; J. Murrells, supra note 1, at 136-57; Yourow, supra note 56, at 151-54.

58 See Convention, supra note 1, art. 46.


60 In an early argument before the Court, the president of the Commission explained the margin of appreciation doctrine as follows: The concept of the margin of appreciation is that a Government's discharge of [its] responsibilities is essentially a delicate problem of appreciating complex factors and of balancing conflicting considerations of the public interest; and that, once the Commission or the Court is satisfied that the Government's appreciation is at least on the margin of [its] powers . . . , then the interest which the public itself has in effective government and in the maintenance of order justifies and requires a decision in favour of the legality of the Government's appreciation.

Lawless Case, 1 Eur. Ct. H.R. at 408 (ser. B) (1960-1961); see also J. Murrells, supra note 1, at 148, 155-57 (describing use of European consensus to defer to Contracting States' decision); Yourow, supra note 56, at 118 (same).

61 The most ardent critics of the margin of appreciation doctrine claim that the Court and Commission have allowed far too much discretion to the Contracting States. See P. van Dijk & G. van Hoof, supra note 1, at 445-46.

62 See text accompanying notes 87-94 infra.
asserted by a Contracting State for limiting a Convention right. Finally, they search for the development of a European consensus on human rights issues in deciding how much discretion the Contracting States may exercise.

I. Hierarchy of Convention Rights

In the last decade, the Court has openly acknowledged the existence of a hierarchy of the Convention rights. The most elevated rights in this hierarchy are known in international law as "peremptory norms." The primacy of these rights is accepted universally by the international community, and they admit of no form of derogation by the Contracting States. The peremptory norms protected by the Convention include the right to life, the prohibition of torture, and the prohibition of slavery or forced labor. Next in the hierarchy are the right to an impartial and speedy trial, the right to liberty and security of person, and the right to respect for private and family life.

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64 See T. Meron, supra note 25, at 94-95 & n.37 (listing human rights regarded as peremptory norms under international law).
66 Convention, supra note 1, art. 2.
67 Id. art. 3.
68 Id. art. 4.
given strong protection from interference by Contracting States. By contrast, the right to freedom of expression, the obligation to hold free elections, the right to peaceful enjoyment of property, and the right to marry are afforded less protection. No bright line ranks the rights within these broad categories. The Court simply has stressed the importance of certain rights in isolated contexts while noting the breadth of discretion allowed to Contracting States in others.

2. State Interest Analysis

A Contracting State's margin of appreciation is modified further by a second factor: the reason it advances to justify its limitation of a guaranteed right or freedom. The Convention sets forth justifications for

bond between mother and illegitimate child interferes with their family life).


75 Convention, supra note 1, art. 12 ("Men and women of marriageable age have the right to marry... according to the national laws governing the exercise of this right."); see Johnston v. Ireland, 112 Eur. Ct. H.R. at 24-25 (ser. A) (1986) (right to marry does not imply right to divorce). But see F. v. Switzerland, 128 Eur. Ct. H.R. at 16-17 (ser. A) (1987) (Contracting States may not unduly delay an individual's right to remarry after divorce).

76 Conspicuously absent from this rights hierarchy is the freedom from discrimination, guaranteed by Article 14. The level of protection demanded by this article varies according to the other Convention right with which it is asserted. See notes 95-101 and accompanying text infra.

The Court's ordering of the rights protected by the Convention contrasts with the relative importance of certain constitutional rights in the United States, where the right to freedom of expression is construed extremely broadly while the right to privacy is rapidly being eroded by recent judicial decisions. See Lester, The Overseas Trade in the American Bill of Rights, 88 Colum. L. Rev. 537, 552-61 (1988).


One commentator has suggested that the Court may be creating a public-private rights dichotomy in which private aspects of life are afforded greater protection than actions in the public arena. See Yourow, supra note 56, at 156-57.

limiting each guaranteed right or freedom in tandem with the text of the right or freedom itself: one paragraph outlines the scope of the right, while a second paragraph lists limitations which Contracting States may impose on the enjoyment of that right.79 For example, the first paragraph of Article 8 provides that "[e]veryone has the right to respect for his private and family life."80 The second paragraph states that this right may be limited in the interest of public safety, public order, national security, the protection of health or morals, or the protection of the rights of others.81 However, a Contracting State’s power to impose these limitations is not absolute. Only limitations which are "prescribed by law"82 and "necessary in a democratic society" are permissible.83 Depending on which justification a Contracting State asserts to support a limitation, the Court broadens or narrows the margin of appreciation it allows the Contracting State.84 Where the Court can find a Convention-based or European-wide meaning for a justification, a particular Contracting State’s more restrictive use of that justification is given less deference.85 By contrast, justifications that the Court considers incapable of common definition are accorded more latitude.86 However, no clear ranking of justifications has evolved.

A) (1986) (same).

79 See Convention, supra note 1, arts. 8, 9, 10, 11.

80 Id. art. 8(1).

81 See id. art. 8(2). The same catalogue of limitations, with a few variations, applies to other personal freedoms guaranteed by the Convention: the right to freedom of thought, and religion (Article 9), the right to freedom of expression (Article 10), and the right to freedom of association (Article 11). Maintaining the authority and impartiality of the judiciary is a further justification which may be asserted only for limitations of Article 10. See id. art. 10.

82 See Convention, supra note 1, arts. 8, 9, 10, 11 (Articles 9, 10, and 11 each containing words "prescribed by law"; Article 8 containing words "in accordance with the law"). See Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. at 31 (ser. A) (1979) (phrase requires every law to be adequately accessible and formulated with sufficient precision to enable citizens to plan their behavior).

83 For a discussion of the Court’s "necessary in a democratic society" test, see text accompanying notes 106-11 infra.

84 See note 78 supra.


The Convention tribunals have stated that national government decisionmakers are entitled to more deference—or, to use their rubric, a "wider margin of appreciation"—regarding certain kinds of decisions that are traditionally consigned to a particular community’s power of self-determination.

Strossen, supra note 7, at 857.
3. European Consensus Inquiry

The third factor which has shaped the margin of appreciation doctrine is the degree to which common practices or policies can be discerned among the Contracting States. Using what this Note will refer to as "European consensus analysis," the Court and Commission measure the practice of one Contracting State against the practices of all the others. Where a majority of Contracting States have expanded the scope of a right guaranteed by the Convention or broadened the class of individuals to whom it applies, the Court and Commission are far more likely to find that a Contracting State has violated the Convention by enacting or retaining a law which restricts such an expanded right.\(^{87}\) This process of inquiry has allowed the tribunals to expand the protection which the Convention provides to individuals throughout Europe\(^{88}\) and to interpret the Convention as a modern document which is responsive to progressive European conditions and attitudes.\(^{89}\) The Court and Commission consistently have relied on consensus analysis as a means of extending the Convention's human rights guarantees to individuals whose protection was not conceived of by the Convention's drafters.\(^{90}\)

The Court and Commission's European consensus analysis considers three distinct elements: statutory consensus, which is demonstrated

\(^{87}\) See Rasmussen v. Denmark, 87 Eur. Ct. H.R. at 15 (ser. A) (1984) (scope of margin of appreciation varies according to existence of common ground in laws of Contracting States); Draper v. United Kingdom, App. No. 8186/78, 20 Eur. Comm'n H.R. Dec. & Rep. 72, 78 (1980) (distinguishing earlier ruling that refusal to allow prisoner to marry did not violate Article 12 because of general trend in European penal systems toward reduction of differences between life in prison and life at liberty and increasing emphasis on rehabilitation); see also J. Merrills, supra note 1, at 155-57 (discussing Court's use of consensus standard); Strossen, supra note 7, at 860 (Convention standards evolve with general European law reform trends regardless of whether particular state has altered its own laws); Yourow, supra note 56, at 111, 123-24, 134-35 (discussing Court's use of consensus analysis to enhance human rights protection in Europe); cases cited in notes 91-93 infra.

\(^{88}\) The Convention organs' assessment of rights-limiting measures in accordance with evolving, liberalizing trends across Europe as a whole, rather than in accordance with the parochial current judgment of the national government at issue, has the effect of moving all states parties in the direction of rights-enhancing reforms.

Strossen, supra note 7, at 862.

\(^{89}\) See Marckx v. Belgium, 31 Eur. Ct. H.R. at 19 (ser. A) (1979) (Convention is to "be interpreted in light of present-day conditions"); Tyrer v. United Kingdom, 26 Eur. Ct. H.R. at 31 (ser. A) (1978) (Convention must be interpreted as "living instrument"). Although the tribunals have assumed that law reform trends in Europe will allow them to develop an increasingly rights-protective jurisprudence, it is important to recognize the fickle potential of consensus analysis, which could easily be used to forge a more restrictive interpretation of the Convention should European thought and practice become more conservative.

\(^{90}\) See, e.g., Marckx, 31 Eur. Ct. H.R. at 19 ("[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 notes 113-16 infra (discussing use of consensus analysis to invalidate adult homosexual sodomy laws).
by modifications in the domestic laws of Contracting States;91 expert consensus, which focuses on the specialized knowledge of experts;92 and public consensus, which takes account of European public opinion.93 Consideration of these elements requires the Court or Commission to examine recent developments in state practice as well as expert and popular opinion across a broad spectrum of cultural, economic, and social communities. The result can place the tribunals in a quandary. Even where they identify a European-wide movement toward a certain viewpoint, the Court and Commission must balance their interest in shaping the law according to developing norms against a Contracting State’s interest in enforcing policies at odds with those trends.94

C. Margin of Appreciation Doctrine and Article 14

Conspicuously absent from the foregoing discussion is a consideration of the Convention right central to this Note: the right to non-discrimination enshrined in Article 14. Article 14 does not provide an

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The Court and Commission, however, do not cite specific statutes in their judgments, nor do they indicate how many Contracting States must alter their laws or policies before the requisite consensus will be found. See Yourow, supra note 56, at 147 n.133 (criticizing Court for failure to cite to statutes).

92 See, e.g., Winterwerp v. The Netherlands, 33 Eur. Ct. H.R. (ser. A) (1979). In Winterwerp, the Court construed the words “persons of unsound mind” under Article 5(1)(e), which outlines the right to liberty. The Court noted that the phrase’s meaning was “continually evolving as research in psychiatry progresses.” Id. at 16; see also F. v. Switzerland, 128 Eur. Ct. H.R. at 17 (citing report of Swiss Committee of Experts on Family Law Reform as evidence that law temporarily prohibiting remarriage after divorce is incompatible with Convention); Mareks, 31 Eur. Ct. H.R. at 20 (referring to opinion of lawyers opposed to discrimination against illegitimate families). The use of expert opinion has been applied most widely in cases involving the age of consent for homosexual acts. See text accompanying notes 241-44, 260-63 infra.

93 See, e.g., Winterwerp, 33 Eur. Ct. H.R. at 16 (“[A]n increasing flexibility . . . is developing [regarding] society’s attitude to mental illness . . . so that a greater understanding of the problems of mental patients is becoming more widespread.”); Mareks, 31 Eur. Ct. H.R. at 20 (“[P]ublic opinion [is] becoming increasingly convinced that the discrimination against [illegitimate] children should be ended.”).

94 See J. Merrills, supra note 1, 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.
independent right to the equal protection of the laws; rather, it provides protection from discrimination only with respect to the rights specifically set forth in the Convention and its protocols. To activate the Court's Article 14 scrutiny, an applicant must allege that a law violates Article 14 in conjunction with one or more of these other rights. For example, since the Convention does not provide a right to employment, a claim of discriminatory treatment in the work force would not be justiciable under Article 14.

The three elements of the margin of appreciation doctrine are also present in the jurisprudence interpreting Article 14. Because an Article 14 challenge is always linked to another guaranteed right, the position of that right on the developing hierarchy may influence the scope of the margin of appreciation given to a Contracting State whose laws are alleged to be discriminatory. Similarly, the justification advanced by the Contracting State to support its claim that its laws are not discriminatory also appears relevant. However, the most important factor in evaluating the margin of appreciation accorded under Article 14 review is the existence or non-existence of consensus among the Contracting States'

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96 See Rasmussen, 87 Eur. Ct. H.R. at 12. In addition, where the Court concludes that another right has been violated, its Article 14 scrutiny will be activated only where "a clear inequity of treatment is ... a fundamental aspect of the case." Airey v. Ireland, 32 Eur. Ct. H.R. at 16 (ser. A) (1980).

Subject to these limitations, an applicant's ability to invoke Article 14 is virtually unlimited. Although the text of the article lists particular characteristics which are protected from discrimination, including race, color, religion, political opinion, national or social origin, association with the national minority, property, and birth, the list is not meant to be exhaustive and includes a reference to "other status." Convention, supra note 1, art. 14. The Court has construed this phrase broadly, holding that it "prohibits ... discriminatory treatment having as its basis or reason a personal characteristic ... by which persons or groups of persons are distinguishable from each other." Kjeldsen, Bisk, Madsen & Pedersen v. Denmark, 23 Eur. Ct. H.R. at 28-29 (ser. A) (1976).

97 See notes 98-101 and accompanying text infra.

98 In Inze v. Austria, 126 Eur. Ct. H.R. at 18 (ser. A) (1987), the Court stated that the scope of the margin under Article 14 varies "according to the circumstances, the subject matter and its background." See also Abdulaziz, Cabales & Balkandali v. United Kingdom, 94 Eur. Ct. H.R. at 37-38 (ser. A) (1985) (listing same factors); Rasmussen, 87 Eur. Ct. H.R. at 15 (same). The method for defining the scope of the margin is rather vague, however, because the Court has yet to articulate a precise distinction between the terms "circumstances," "subject matter," and "background."

laws and policies. Thus, where a significant movement toward equality of treatment for the applicant’s class can be discerned, the Court and Commission have narrowed markedly the margin of appreciation accorded to the respondent Contracting State and, as a result, have found a violation of Article 14.

D. European Consensus and Adult Homosexual Privacy

The complex interplay of the three factors influencing margin of appreciation analysis—the importance of the right under review, the Contracting State’s justification for limiting that right, and the presence (or absence) of a European consensus—was illustrated in Dudgeon v. United Kingdom and Norris v. Ireland. In each case, the Court held that laws criminalizing adult homosexual sodomy were incompatible with the Convention’s guarantee of the right to respect for private life.

A significant feature of these cases was the Court’s use of European consensus analysis to deny states’ attempts to limit a preferred right (privacy) in the interest of public morality, a justification that the Court previously had accorded extreme deference. The Court in both cases used consensus analysis as part of a balancing test to determine whether the sodomy laws of Northern Ireland and the Irish Republic were

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101 For a more detailed discussion of the use of consensus analysis in the Court’s Article 14 jurisprudence, see notes 191-93 and accompanying text infra.


103 142 Eur. Ct. H.R. (ser. A) (1988). Norris did not add anything new to the Court’s analysis of adult homosexual sodomy laws articulated in Dudgeon. In fact, the Court characterized Norris’s claim as “indistinguishable” from Dudgeon’s. Id. at 17, 18. Norris is significant only in that the Court held that the mere existence of sodomy laws, without any measure of enforcement, violated Norris’s right to privacy. Id. at 16.

104 In both Dudgeon and Norris, the Court described the right under review as “a most intimate aspect of private life” for which “particularly serious reasons” had to be advanced before a limitation on that right would be acceptable under the Convention. Norris, 142 Eur. Ct. H.R. at 20; Dudgeon, 45 Eur. Ct. H.R. at 21.


106 The statutes at issue in Dudgeon and Norris were the Offences Against the Person Act,
“necessary in a democratic society" and thus ultimately compatible with the Convention. The Court expounded the test as follows: First, the law must satisfy “a pressing social need,” rather than simply a useful, reasonable, or desirable governmental purpose. Second, the limitations imposed by the law must be proportionate to the objectives they are designed to achieve and must not impose an extremely heavy burden on the applicant. Finally, “two hallmarks of a democratic society—tolerance and broadmindedness”—must influence the Court’s analysis.

In Dudgeon, the United Kingdom argued that moral and public opinion against homosexuals in Northern Ireland constituted a pressing social need for limiting homosexuals’ right to privacy, noting that the region generally was more conservative than the rest of the United Kingdom. Although acknowledging that a Contracting State has a margin of appreciation to determine the seriousness of the pressing social need in each case, the Court held that moral considerations alone were insufficient to justify interfering with a homosexual’s right to privacy.

Whereas in prior cases the public morality justification had swayed the Court, here the existence of competing, liberalized attitudes throughout Europe towards homosexuality caused the Court to narrow the discretion it accorded to the government. In a statement clearly recognizing the existence of a European consensus, the Dudgeon Court (and later the Norris Court) noted that

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.”

107 Convention, supra note 1, art. 8(2). The “necessary in a democratic society” test was first used by the Court in Handyside, 24 Eur. Ct. H.R. at 22, as a means of restricting the ability of Contracting States to impose limitations on personal rights. This test applies to limitations on the right to respect for private and family life, the right to freedom of thought, conscience, and religion, freedom of expression, and freedom of association. See Convention, supra note 1, arts. 8, 9, 10, 11 (each containing words “necessary in a democratic society” before listing limitations Contracting State may assert against right); see also text accompanying note 81 supra (listing limitations).


110 Norris, 142 Eur. Ct. H.R. at 18, 21; Dudgeon, 45 Eur. Ct. H.R. at 21-22. The Court noted that the extremely long sentences which could be imposed against homosexuals made the statutes disproportionate to the Governments’ asserted morality-protection goals. See Norris, 142 Eur. Ct. H.R. at 18; Dudgeon, 45 Eur. Ct. H.R. at 21-25.


112 See id. at 22-23.

113 The Court noted that “the moral attitudes towards male homosexuals in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant’s private life.” Id. at 24.
there is now a better understanding and . . . an increased tolerance of homosexual behavior 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.\textsuperscript{114}

Thus, the formation of a European consensus on the issue of homosexual sodomy was determinative in the Court’s decision in both cases that the laws were incompatible with the Convention, even where a sizable portion of the local population\textsuperscript{115} believed that homosexuality was immoral.\textsuperscript{116}

In carving out an area of private morality into which the views of the local majority could not intrude,\textsuperscript{117} the Court, in Dudgeon and Norris, modified the margin of appreciation doctrine in two important ways. First, it relied on statutory developments and public opinion among the Contracting States concerning matters of personal morality to support a less deferential treatment of rights violations, despite having decided in an earlier case that there was no uniform European conception of morals.\textsuperscript{118} Second, it confirmed the high priority of privacy rights protected by the Convention.\textsuperscript{119} After these two judgments, other Contracting States’ laws criminalizing sodomy between consenting adults are not likely to survive.\textsuperscript{120} Moreover, the decisions, which reject the prior


\textsuperscript{115} The Dudgeon Court noted that the popular view in Northern Ireland on amending the criminal code to legalize adult homosexual sodomy was approximately equally divided. See Dudgeon, 45 Eur. Ct. H.R. at 11-14.

\textsuperscript{116} 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.

\textsuperscript{117} See note 113 supra.


\textsuperscript{119} See Norris, 142 Eur. Ct. H.R. at 20; Dudgeon, 45 Eur. Ct. H.R. at 21 (distinguishing prior deference to morals because interference with private life requires "particularly serious" justifications).

\textsuperscript{120} Notwithstanding the Court’s recent decisions, investigation and prosecution of adult homosexuals for engaging in consensual sodomy continues in certain areas. In 1989, for example, the Island of Jersey reinstated its sodomy laws after a three-year hiatus. An application challenging the laws was brought before the Commission, see Wockner, Change the Channel, Out Week, Sept. 24, 1989, at 24, and in July 1990, the Jersey Parliament repealed the laws, see International Briefs: Jersey-U.K., Philadelphia Gay News, Oct. 5-11, 1990, at 23. The Isle of Man and Cyprus still criminalize adult homosexual sodomy. See Stuart, Isle of Man Will Attempt to Legalize Homosexuality, Fin. Times, Mar. 17, 1990, at 4; note 342 and accompanying text infra. Since neither Cyprus nor the Isle of Man have recognized the right of their nationals to bring an application before the Commission, their sodomy laws are beyond the Convention's reach, unless another Contracting State challenges the laws under the interstate application procedure provided by Article 24 of the Convention. See Convention, supra note
practice of according complete deference to justifications based on public morality, indicate that the Court has significantly increased its ability to review other issues related to a homosexual's right to privacy.

II

JURISPRUDENCE OF NON-DISCRIMINATION:
THE APPLICATION OF ARTICLE 14

In the nearly forty years since the Convention was first ratified by the Contracting States, the Court and the Commission have had numerous opportunities to construe Article 14's guarantee that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground."121 In articulating a workable judicial doctrine from this anti-discrimination principle, the Court and Commission have developed two standards of review, both issuing from a test articulated in the 1968 Belgian Linguistics Case.122 The first standard of review, applied in the Belgian Linguistics Case and its progeny, is highly deferential to justifications advanced by the Contracting States to support classifications which treat similarly situated individuals differently.123 Under this weak standard of discrimination review, the Court has, with the sole exception of the Belgian Linguistics Case,124 never found a violation of Article 14, although it has been presented with numerous allegations of discrimination.125

The tribunals recently have developed a second standard of review. This standard is a more exacting interpretation of the Belgian Linguistics test, which, by incorporating European consensus analysis as the touchstone for measuring discrimination, accords far less deference to the Contracting States. The tribunals' rationale for developing this heightened standard is in harmony with their goal of providing the Convention with a contemporary, consensus-based meaning.126 It is also consistent with the increasingly stringent level of review which the Court and the Com-

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1 Conventional, supra note 1, art. 14.
122 See text accompanying notes 139-52 infra.
124 See notes 144-52 and accompanying text infra.
125 See text accompanying notes 87-94 supra.
mission have implemented in other areas of the Convention.\textsuperscript{127}

This Part first examines the Court's deferential standard for reviewing Article 14 claims, as applied in the \textit{Belgian Linguistics Case} and the cases following it. It then explores the development of a heightened standard of Article 14 review and argues that this method of measuring discrimination is consistent with the Court's development of a more rights-protective interpretation of the Convention.

\textit{A. Deferential Article 14 Review}

\textit{I. The Belgian Linguistics Case}

The source of both standards of Article 14 review is the 1968 \textit{Belgian Linguistics Case},\textsuperscript{128} in which, after examining the Convention's English and French texts,\textsuperscript{129} the Court set forth a three-part test for finding a violation of Article 14. The Court must determine (a) that the facts disclose a difference in treatment; (b) that the difference does not have a "legitimate aim" or an "objective and reasonable justification"; and (c) that no "reasonable relationship of proportionality [exists] between the means employed and the [legitimate] aims sought to be realized."\textsuperscript{130}

So articulated, the test is vague and malleable. Although establish-

\textsuperscript{127} See text accompanying notes 201-14 infra.


\textsuperscript{129} An examination of both texts of Article 14 reveals that the \textit{Belgian Linguistics Court}'s application of a deferential standard of Article 14 review was not mandated by the text. The French version states that the rights and freedoms protected by the Convention must be secured "sans distinction acerne" ("without distinction"), while the English version uses the phrase "without discrimination." Convention, supra note 1, art. 14.

The Court correctly held that "absurd results" would be achieved by a literal application of the French text, which would require absolutely equal treatment no matter how strong the policy considerations at issue and regardless of whether legitimate differences existed between the groups under comparison. \textit{The Belgian Linguistics Case}, 6 Eur. Ct. H.R. at 34. Moreover, such an interpretation would defeat the use of state policies that affirmatively remedy discrimination through a difference in treatment. See id. The Court therefore was persuaded that the English text should be the starting point for determining impermissible discrimination. See id. See generally Vienna Convention on the Law of Treaties, May 23, 1969, UN Doc. A/Conf. 39/27 art. 33 (setting forth general principles of interpretation for treaties ratified in more than one language), reprinted in 8 Int'l Legal Materials 679.

Yet it remains unclear why the Court's emphasis on deference to the Contracting States was required by the English text, since the Court could have referred to the preparatory work of the Convention to support a more exacting analysis of when differential treatment rises to the level of impermissible discrimination. An examination of the preparatory work reveals that the French text of Article 14 remained unchanged throughout the numerous revisions of the Convention, while the precise English wording fluctuated and was more frequently "without distinction" than "without discrimination." See I Collected Edition of the "Travaux Préparatoires" 168-69, 178-79, 208-09 (1975) ("distinction"); id. vol. II, at 134-35 ("distinction"); id. vol. III, at 288-89, 294-95 ("discrimination"). Thus, there was at least some textual support for the Court to apply a more restrictive standard of review in the \textit{Belgian Linguistics Case}.

\textsuperscript{130} \textit{The Belgian Linguistics Case}, 6 Eur. Ct. H.R. at 34.
ing the basic principle that every difference in treatment must be objectively and reasonably justified by proportionate governmental measures, the test says nothing about how objectivity, reasonableness, or proportionality are to be defined. As applied to the facts of the Belgian Linguistics Case, however, the Court clearly demonstrated its intention to give the Contracting States broad deference.131

The principal issue in the case was whether a law prohibiting children of French-speaking families residing in a predominantly Dutch-speaking suburb from attending French language schools violated Article 14 in conjunction with Article 2 of Protocol No. 1.132 The law had been enacted to promote linguistic unity within two primarily unilingual regions of Belgium. Rather than examining the government's motives, the Court accepted this goal as reasonable.133 Therefore, it held that the legislation did not violate Article 14's prohibition of discrimination on the grounds of language.134

The Court was more sympathetic, however, to the applicants' second, narrower allegation of discrimination. The French-speaking families lived near a region which was governed by special language instruction rules.135 In this region, both French and Dutch language education was available. But the applicants were denied access to these special schools and, moreover, were unable to obtain French-language instruction for their children in their own district.136 By contrast, Dutch families residing outside the special region, in predominantly French-speaking regions, were granted access to the Dutch language schools within the special region.137 On these narrower facts, the Court found a violation of Article 14 since the Belgian government's purported goal of linguistic unity could not conceivably be furthered by this arbitrary distinction.138

In analyzing the applicants' claims, the Court nevertheless noted that it could not ignore "legal and factual features" peculiar to individ-

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131 At least one scholar has argued that the test for discrimination is itself highly deferential to the Contracting States. See F. Jacobs, supra note 1, at 191-93. But this assertion is undermined by the Court's use of the test as the starting point for its more stringent level of discrimination review. See note 154 and accompanying text infra. Thus, the test does not require per se deference to the Contracting States. Rather, the facts of each case determine the level of discrimination review to be applied by the Court.


134 See id. at 43-44.

135 See id. at 61-64.

136 See id. at 69-70.

137 See id.

138 See id.
ual Contracting States, nor could it usurp the role of national legislatures in determining how compliance with the Convention would be achieved. Citing the "subsidiary nature" of the Contracting States' obligations under the Convention, the Court stressed that the "national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention."

The Court concluded that its function was limited to evaluating whether a Contracting State's policies were compatible with "the requirements of the Convention" and with "principles which normally prevail in democratic societies," leaving to future cases the question of how to define compatibility. Other than emphasizing the need to defer to the Contracting States, the Court thus provided little meaningful guidance on how to achieve a principled standard of discrimination review.

2. The Belgian Linguistics Progeny

The ambiguities in the deferential standard applied in the Belgian Linguistics Case have resulted in the creation of an unmanageable standard for evaluating discrimination. The Court's use of deferential review in Article 14 cases which adopt the reasoning of Belgian Linguistics has resulted in the application of different and frequently inconsistent standards.

Despite the Court's reliance in other areas of its jurisprudence on the presence or absence of a European consensus, only two cases decided under the deferential standard of Article 14 review have noted the absence of a consensus on an issue of equality to support a conclusion that no violation existed. The vast majority of cases make no reference

\[139\] Id. at 34-35.
\[140\] See id.
\[141\] Id. at 35.
\[142\] Id. at 34, 35.

Judge Wold, dissenting in part, criticized the Belgian Linguistics majority's reasoning on this issue and foreshadowed the use of a European consensus analysis to develop a heightened review standard, writing:

"We cannot have different conceptions of Human Rights in different member states. . . . The concept of "discrimination" must be interpreted in the same way for all European States. We must find a "European" interpretation. . . . It is for the Court after having interpreted the concept of discrimination in the Convention then to decide if in the concrete case a discrimination has taken place."

\[144\] See text accompanying notes 145-52 infra.
\[145\] See notes 87-94 and accompanying text supra.

Arguably, the most confusing legacy of the Belgian Linguistics Case, however, is the tendency of the Court and Commission to vacillate between using the test’s intent and means-ends elements as the appropriate measure of discrimination. The Belgian Linguistics test requires that discriminatory laws have an “objective and reasonable justification.”\footnote{The Belgian Linguistics Case, 6 Eur. Ct. H.R. at 34; see also Rasmussen v. Denmark, App. No. 8777/79, 6 Eur. Hum. Rts. Rep. 94, 97, 99 (1984) (Commission Report) (referring to justifications raised by Denmark as source of its intent analysis).}

Based on this language, both tribunals have evaluated intent by the justifications a Contracting State advances to defend laws that treat similarly situated individuals differently. This practice makes a close examination of intent extremely difficult. A Contracting State could easily advance legitimate justifications after the fact to support a statute that was originally passed with a discriminatory purpose. Under this interpretation, the intent prong of the test only requires consideration of whether a Contracting State explicitly manifests a desire to disadvantage an applicant or the status group to which he belongs. In a few cases, the tribunals have concluded that, since the justifications presented by a Contracting State were not overtly “ill-intentioned,” discriminatory treatment of the applicant is acceptable under the Convention.\footnote{National Union of Belgian Police, 19 Eur. Ct. H.R. at 21; see Mathieu-Mohin \& Clerfayt, 113 Eur. Ct. H.R. at 25-26 (method of appointing representatives to Flemish Council from particular voting district not motivated by intent to disadvantage French-speaking residents); Swedish Engine Drivers’ Union, 20 Eur. Ct. H.R. at 17 (exclusion of union from collective bargaining not motivated by improper intentions); A. v. Federal Republic of Germany, App. No. 9792/82, 34 Eur. Comm’n H.R. Dec. & Rep. 173, 176 (1983) (same).}

In effect, this deferential application reads the intent element out of the test entirely.

In other instances, the tribunals simply presume a legitimate aim and focus instead on whether the classification drawn by the statute is proportional to the government’s policy objectives.\footnote{Compare Gillow, 109 Eur. Ct. H.R. at 26 (law restricting residency on Island of Guernsey primarily to long-term residents not disproportionate to goals of regulating housing market and limiting population, since it provided for flexible consideration of other relevant factors unrelated to length of residency) with James v. United Kingdom, 98 Eur. Ct. H.R. at 45 (ser. A) (1986) (although it failed to provide for individual determinations of landlords' financial resources, leasehold reform law transferring property rights from landlords to tenants did not “transgress the principle of proportionality”).} In fact, proper application of the Belgian Linguistics test requires both intent and means-ends analyses, since the Contracting State’s law must both “pursue a le-
igitmate aim” and strike a “reasonable relationship of proportionality between the means employed and the aim sought to be realized.” As they have applied the test in post-Belgian Linguistics Case decisions, however, even when the tribunals have nominally considered both elements, they have emphasized deference to the Contracting States and have avoided a searching analysis of discriminatory legislation.

B. Heightened Article 14 Review

Since the Belgian Linguistics Case, the Court has found only three violations of Article 14. In each of these cases, however, the Court and Commission have measured discrimination by a far more exacting standard than that applied in the Belgian Linguistics Case and its progeny. Although beginning with the same bare-bones test created by the Belgian Linguistics Court, the tribunals have looked to an emerging European consensus on issues of equality to apply this test with greater rigor. In particular, the existence of consensus has triggered a more careful review of the government’s motives for discriminating against the applicant. It also has prompted a searching inquiry into how closely a Contracting State’s policy goals are supported by the classification drawn by the impugned legislation.

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151 The Belgian Linguistics Case, 6 Eur. Ct. H.R. at 34. In one seemingly anomalous case, however, the Commission, applying the Belgian Linguistics test, confined its analysis to determining whether the government’s goals were legitimate without discussing whether the classification was a proportionate means of achieving these goals. See N. v. Sweden, App. No. 10410/83, 40 Eur. Comm’n H.R. Dec. & Rep. 203, 208 (1985) (law granting exemption from military service to Jehovah’s Witnesses but denying exemption to conscientious objectors reasonably justified because membership in organized religion creates objective standard for determining sincerity of beliefs; no such basis for unaffiliated individuals).


155 See text accompanying notes 194-200 infra.
1. Heightened Article 14 Review Case Law

In *Markx v. Belgium*,156 decided in 1979, a single mother and her illegitimate child complained that they had been denied respect for family life and the right to enjoyment of property by a Belgian law requiring a court declaration to establish a legally recognized relationship between a mother and her illegitimate child,157 and by special restrictions on inheritance rights affecting only illegitimate families.158 Belgium claimed that these laws properly favored traditional families and were necessary to preserve morality and public order.159 It also argued that unwed mothers were less likely to care adequately for their children.160 The Court rejected these justifications, noting that there was no evidence indicating that unmarried women were less effective guardians than married women.161 The Court found that the government’s laws legitimately were designed to encourage the traditional family but held that this purpose could not be accomplished with measures “whose object or result” was to prejudice non-marital families.162

To support its holding, the Court referred to the fact that the European view of illegitimate families had changed since the adoption of the Convention.163 The Court noted that the laws of a majority of the Contracting States were evolving toward legal recognition of biological maternity164 and also pointed to two regional treaties—the Convention Concerning the Establishment of Maternal Filiation of Children Born Out of Wedlock165 and the European Convention on the Legal Status of Children Born Out of Wedlock166—to support its analysis of changing European opinion.167

The Court noted, however, that the degree of consensus discernable from these treaties was less than clear, since only four of the nineteen

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157 Id. at 8, 10.
158 Id. at 9.
159 Id. at 13.
160 Id.
161 See id.
162 See id. at 19. The Court further noted that an interest in “tranquility” of the legitimate family is not a motive that justifies depriving a child of fundamental rights. Id. at 22.
163 See id. at 19.
164 See id. Although the Court did not indicate how many Contracting States had revised their laws, it quoted from a Belgian legislative report which stated that France, the Federal Republic of Germany, Italy, the Netherlands, Switzerland, and the United Kingdom had recognized the rights of illegitimate children. See id. at 20.
166 Oct. 15, 1975, E.T.S. No. 85 [hereinafter Legal Status Convention] (establishing common rules to reduce differences between legitimate and illegitimate children in areas of paternal filiation, family support, and inheritance).
Contracting States had ratified the two conventions.\textsuperscript{168} Notwithstanding the small number of ratifications, the Court stated that the conventions demonstrated an "evolution" in the development of a European consensus which could not be overcome by the government's justifications.\textsuperscript{169} The Court thus found a breach of the right to respect for family life and the right to property in conjunction with Article 14.\textsuperscript{170}

Eight years later, in Inze v. Austria,\textsuperscript{171} the Court reaffirmed its commitment to protecting illegitimate families when it considered an application by an illegitimate son who was unable to inherit his mother's farm under an Austrian inheritance statute giving preference to legitimate children.\textsuperscript{172} The Court again referred to the European Convention on the Legal Status of Children Born Out of Wedlock, then in force in nine Contracting States.\textsuperscript{173} The Court noted that Austria had ratified the convention in 1980 and that, therefore, "[f]or very weighty reasons would . . . have to be advanced before a difference in treatment on the ground of birth out of wedlock could be regarded as compatible with the Convention."\textsuperscript{174}

Austria advanced several arguments to support the law, including hostile public opinion in rural Austria, the need to protect legitimate families, the desirability of having only one child inherit the estate, and that illegitimate children rarely are raised on their parents' farm.\textsuperscript{175} These justifications failed to satisfy the Court's more rigid standard of review. Since Austria did not advance specific reasons why Inze, who was raised on his mother's farm, should be treated differently than legitimate children,\textsuperscript{176} the Court held that the law violated Article 14 in conjunction with the right to property.\textsuperscript{177}

The Commission's report in Inze contained a strong condemnation of the first two justifications raised by Austria. The Commission rejected the notion that public opinion could serve as the basis for imposing discriminatory inheritance laws on non-marital children, holding instead that Article 14 was intended to protect against the "traditional contempt

\textsuperscript{168} See id. Four additional states had signed the Maternal Filiation Convention, and six states had signed the Legal Status Convention, but none of these states had yet ratified the respective conventions. See id. In addition, the Legal Status Convention contained an article allowing any state to make a reservation to its maternal filiation provisions. See id.

\textsuperscript{169} Id.

\textsuperscript{170} See id. at 29-30.


\textsuperscript{172} See id. at 8-12.

\textsuperscript{173} See id. at 18.

\textsuperscript{174} Id. (emphasis added).

\textsuperscript{175} Id. at 18-19.

\textsuperscript{176} Id.

\textsuperscript{177} See id. at 19.
of all kinds of minorities.”178 The Commission also rejected the Government’s assertion that the law in question was designed to protect legitimate families, stating that “this is an argument traditionally invoked to justify the discrimination of children born out of wedlock.”179

A similar rejection of outdated discriminatory conceptions of a status group was invoked to find an Article 14 violation in Abdulaziz, Cabales & Balkandali v. United Kingdom.180 There, three permanently-settled aliens in the United Kingdom had petitioned the government to allow their husbands to join them from abroad.181 Immigration laws in force in the United Kingdom made it far more difficult for husbands to enter the country to join their wives than for wives to join their permanently-settled husbands.182 After the women had exhausted all local remedies, they presented petitions to the Commission claiming a lack of respect for their family life in violation of Article 8 and discrimination based on race, birth, and sex in violation of Article 14.183

The Court first examined whether, taken alone, the law restricting migration constituted a breach of Article 8’s right to respect for family life. It reasoned that the United Kingdom’s right to control the entry of non-nationals into its territory was sufficient to uphold the law.184 In particular, it held that Article 8 did not require Contracting States to respect the decision of married couples to live together in the country in which they had been married.185

The Court adopted an entirely different posture when examining the law under Article 14, however. The Court first discussed the level of review to be applied, noting 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 of treatment on the ground of sex could be regarded as compatible with the Convention.186

Although the Court did not cite evidence of a changing European statutory or other concrete consensus to support its decision to heighten the standard of review, the Commission’s report was more specific. It referred to the advancement of sexual equality in “domestic legislation”

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179 Id. at 507.
181 Id. at 11-14.
182 Id. at 15.
183 Id. at 29.
184 See id. at 33-34.
185 See id. at 34. Two of the applicants had been married in the United Kingdom.
186 Id. at 38 (emphasis added).
and in “international treaties,” noting that “the elimination of all forms of discrimination against women is an accepted general principle in the member States of the Council of Europe.”

The government claimed that the gender distinctions in the law were designed to protect the labor market at a time of high unemploy-
ment. It presented statistics showing that the law had reduced the number of men who had settled in the United Kingdom and argued that its cumulative effect was to reduce the rate of unemployment. The Court found this argument unpersuasive, questioning whether men were more likely than women to seek employment given the changed economic status of women in modern European society.

2. Articulating a Heightened Standard of Review

In the three heightened review cases just discussed, the Court and Commission developed a standard that gives far less deference to the Contracting States. They utilized a more searching inquiry, focusing on both intent and means-ends relationship to analyze and ultimately invalidate discriminatory treatment. Although this new standard has been applied in only three cases, certain common principles already have emerged.

The starting point for the heightened analysis is the discernment of a European consensus on the particular issue under review. Although the

187 Abdulaziz, Cabañas & Balkandali v. United Kingdom, App. Nos. 9214/80, 9473/81, 9474/81, 6 Eur. Hum. Rts. Rep. 28, 39 (1983) (Commission Report). Noting further that the word “sex” in Article 14 headed the list of status groups to be protected against discrimination, the Commission held that “classifications based on sex are to be carefully scrutinized, in order to eliminate invidious disadvantages.” Id.

Significantly, neither tribunal cited any specific examples of statutory consensus to justify its conclusion. One reason for this omission may have been that the laws of the Contracting States relating to the equality of the sexes were not sufficiently advanced at the time the case was heard to support such a claim. See T. Meron, Human Rights Law-Making in the United Nations 55 (1986) (citing Recommendations of Committee of Ministers as evidence of widespread sexual inequality in European statutes).

188 Abdulaziz, 94 Eur. Ct. H.R. at 36. The government also argued that the law was a legitimate means of preserving public tranquility, controlling immigration, and maintaining good race relations. Id. at 36-37. Although the Court indicated that the Commission had rejected these additional justifications, its own review was limited to the issue of the protection of the labor market. See id. at 37, 39.

The United Kingdom raised the race relations issue because the applicants were Malawian, Filipino, and Egyptian, and the government feared that allowing them into the country would upset British citizens opposed to the settlement of non-whites. Id. at 36-37. Although both tribunals rejected the applicants' claim that the law discriminated on the basis of race, the Commission noted that the racial tranquility argument advanced by the government was an insufficient justification, since it failed to consider the non-white immigrant population which viewed the law as unfair. See Abdulaziz, App. Nos. 9214/80, 9473/81, 9474/81, 6 Eur. Hum. Rts. Rep. at 41.


190 See id.
precise nature of this consensus is somewhat ambiguous, properly con-
ceived, each consensus identified in these cases appears to fall along a
spectrum which informs Convention jurisprudence as a whole.

At one end of this spectrum are cases such as Dudgeon and Norris,
which specifically refer to modifications of the Contracting States' do-
mestic statutes. In such cases, discerning a European consensus is easy
because the overwhelming majority of Contracting States have altered
their national laws.191

Toward the middle of this spectrum are cases such as Marckx and
Inze, where a substantial number of Contracting States have altered their
domestic laws or have ratified multilateral treaties to provide equal treat-
ment to a class of individuals. International instruments are used by the
tribunals to confirm evolving movement toward equality on the domestic
level.192

Abdulaziz falls at the outer limits of this consensus spectrum. In
that case, even though a majority of the Contracting States had not modi-
ﬁed their laws to provide equal protection to women, the Court and
Commission perceived a collective desire by these states to promote the
equality of the sexes and to eliminate discrimination at some point in the
future.193 This type of consensus analysis can be described as aspira-
tional, since it looks to a shared goal of achieving equality in the Council
of Europe, even where that equality has yet to be ofﬁcially mandated by a
majority of states.

Any consensus favoring equality that falls somewhere along this
spectrum provides the Court and the Commission with a motive to apply
the Belgian Linguistics test with far less deference to the Contracting
States. The tribunals engage in a systematic intent and means-end in-
quiry. They ﬁrst consider whether the justiﬁcations offered by the Con-
tracting State to support the challenged laws are illegitimate, that is,
whether they raise an inference that the government intended to disad-
vantage a status group. Impermissible justiﬁcations are those which tra-
ditionally have been used to support past discrimination, including the
maintenance of public morality,194 the reinforcement of public resent-

191 See Norris v. Ireland, 142 Eur. Ct. H.R. at 20 (ser. A) (1988); Dudgeon v. United King-
also considered by the Court and Commission at this end of the consensus spectrum. See notes
92-93 and accompanying text supra.
193 See Abdulaziz, 94 Eur. Ct. H.R. at 38 (citing importance of achieving sexual equality to
member states of Council of Europe).
morality insufﬁcient to justify restrictions on homosexual privacy).
ment for a status group,\textsuperscript{195} and the need to protect a way of life practiced by a majority of the local population.\textsuperscript{196} Where such impermissible justifications are proffered, the tribunals will reject them in evaluating the challenged legislation.\textsuperscript{197}

For those legitimate justifications which remain, the tribunals examine the nexus between the classification created by the statute and the justification advanced by the Contracting State to support that classification. Where the classification is not narrowly tailored to further substantially a legitimate government policy, the tribunals will find the statute in violation of the Convention. Thus, in \textit{Marcx}, the Court found no evidence to support Belgium’s assertion that laws discouraging single motherhood bore a rational relationship to the legitimate goal of ensuring proper care for children.\textsuperscript{198} Similarly, in \textit{Inze}, the Court held that Austria’s interest in promoting family farms was not significantly served by a classification excluding all illegitimate children from inheritance.\textsuperscript{199} In \textit{Abdulaziz}, the Court rejected the argument that the United Kingdom’s immigration law substantially furthered the legitimate state policy of controlling the domestic labor market. Even when presented with statistics which demonstrated that the exclusion of husbands achieved this objective, the Court was “not convinced that the difference . . . between the respective impact of men and women on the domestic labor market is sufficiently important to justify the difference of treatment[ ] complained of by the applicants.”\textsuperscript{200}

3. \textit{Heightened Article 14 Review as an Integral Component of Modern Convention Jurisprudence}

The Court’s articulation of a heightened standard of review in \textit{Marcx, Inze, and Abdulaziz} is consistent with its longstanding policy of interpreting the Convention in light of contemporary conditions and progressive European attitudes.\textsuperscript{201} By extending the European consensus inquiry to cases decided under Article 14, the Court has harmonized its Article 14 jurisprudence with the consensus analysis used under other articles of the Convention.\textsuperscript{202} More importantly, however, the tribunals’ detailed examination of both intent and the means-ends nexus provides a more searching standard for discerning discrimination, which is consis-


\textsuperscript{196} See id.

\textsuperscript{197} See id.


\textsuperscript{200} \textit{Abdulaziz}, 94 Eur. Ct. H.R. at 38.

\textsuperscript{201} See note 89 and accompanying text supra.

\textsuperscript{202} See text accompanying notes 87-94 supra.
tent with the Court’s increasingly exacting level of review in other areas of the Convention.

For example, the Court’s conception of its role as an independent arbiter of other rights guaranteed by the Convention has substantially increased since its articulation of the Belgian Linguistics test. In a key decision in 1979, the Court rejected the assertion that a Contracting State need only make a good faith effort to comply with its Convention obligations. Rather, the Court held that the discretion granted to the Contracting States under the margin of appreciation doctrine must be complemented by a “European supervision.” The Court recently has taken an even more assertive view of its ability to review the actions of the Contracting States, holding that it retains independent “supervisory jurisdiction” and is “empowered to give [a] final ruling” on whether a Contracting State’s interference with a protected right is compatible with the Convention.

This increasingly active judicial role has been complemented by the Court’s heightened protection for those personal rights on which the Contracting States may impose limitations which are “necessary in a democratic society.” The Court has construed this phrase to require the existence of a “pressing social need” before a limitation on a guaranteed right will be upheld. Since the Court makes the final evaluation of what limitations rise to the level of a pressing social need, it has significantly increased its ability to restrict the limitations the Con-

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203 See Strossen, supra note 7, at 857 n.252 (“When they first began to function, the Convention organs may well have exercised more self-restraint in order to encroach less on national sovereignty, but as their power has become more firmly entrenched, such self-restraint has become less important for maintaining their legitimacy.”).

204 See Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. at 36 (ser. A) (1979). The Court’s decision to reject a good faith standard of review was highly controversial, with nine out of nineteen judges dissenting from the Court’s interpretation of the Convention. See id. at 50-51 (dissenting opinion).

205 Id. at 36.


207 For a discussion of the “necessary in a democratic society” test, see text accompanying notes 106-11 supra. The test applies to limitations on the right to respect for private and family life and the right to freedom of thought, conscience, religion, expression, and association. See Convention, supra note I, arts. 8, 9, 10, 11.


tracting States may impose on these rights.210

The Court also has developed an increasing awareness of the need to protect minorities, emphasizing that the goals of “pluralism, tolerance and broadmindedness”—which it considers to be hallmarks of every democratic society—will inform its analysis of the Contracting States’ obligations.211 These three goals require increased judicial sensitivity for minority groups, since “democracy does not simply mean that the views of a majority must always prevail; a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.”212

The Belgian Linguistics Case, decided nearly a decade before the Court began to articulate these views and before the first case established the importance of European consensus inquiry as the means of providing the Convention with contemporary meaning,213 is out of date with the Court’s increasingly rights-protective jurisprudence. In applying the test for discrimination in 1968, the Belgian Linguistics Court emphasized the subsidiary nature of the Convention and the importance of granting broad deference to the Contracting States.214 The Court now has repeatedly shown that this deference is no longer required in other areas of the Convention. By applying a heightened standard of discrimination review, the Court has taken an important step in creating a more powerful and independent system of human rights protection. For this analysis to be applied correctly, however, the Court must carefully evaluate European consensus to determine when its heightened Article 14 scrutiny should be activated.

III

HEIGHTENED ARTICLE 14 REVIEW OF HOMOSEXUAL AGE-OF-CONSENT LAWS

This Part argues that heightened Article 14 review should be ap-


214 See text accompanying notes 139-41 supra.
plied to laws which fix a higher age of consent for homosexuals than for lesbians or heterosexuals. It first examines the analytical shortcomings of the Court’s conclusion that a European consensus exists on the need to restrict adolescent homosexual relationships. Had the Court focused its inquiry on Article 14 instead of on Article 8, it would have discerned a consensus on the need to equalize the age of consent. Secondly, this Part critiques age-of-consent case law as developed by the European Commission, which has become progressively more deferential to the Contracting States, even as both tribunals have become more rights-protective in other areas of the Convention and have explicitly extended privacy rights to adult homosexuals. Next, international legislation, criminal codes of the Contracting States, and expert opinion are presented, demonstrating the existence of a European consensus on the need to equalize the age of consent. Finally, this Part argues that the justifications offered by the Contracting States for maintaining a higher age of consent for homosexuals cannot withstand a heightened standard of review under Article 14 and that the laws should be declared incompatible with the Convention.

A. Mischaracterizing Consensus: The Dicta in Dudgeon v. United Kingdom

A significant issue left unresolved by the Court in Dudgeon v. United Kingdom was whether a law that establishes a higher age of consent for homosexuals violates the Convention. The Court noted that, because Northern Ireland had not fixed an age of consent for homosexual conduct, the issue was not justiciable.215 Although indicating that some regulation of homosexual conduct would be permissible to protect the rights of young people, it stressed that such regulation extends to “other forms of sexual conduct” as well.216 Thus, the Court left for future review whether the age of consent must be uniform among homosexuals, lesbians, and heterosexuals. Nevertheless, the Dudgeon Court’s few references to the age-of-consent issue demonstrate its considerable confusion over how the issue should be analyzed under the Convention.

In dicta, the Court noted that a question under Article 14 might arise once Northern Ireland fixed an age of consent in complying with the Court’s judgment.217 The Court thus seemed to suggest that it might

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215 See Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. at 24-26 (ser. A) (1982). The Court also refused to consider Dudgeon’s claim that the sodomy laws as applied to adults violated Article 14 as well as the right to privacy protected by Article 8. The Court found that there was no need to examine Article 14 because a violation of Article 8 had already been established. See id. at 26.

216 Id. at 20, 25.

217 Northern Ireland later set the age of consent for homosexuals at twenty-one, decriminalizing consensual adult homosexual sodomy and bringing its laws in line with the Sexual Offences Act, 1967, ch. 60. See The Homosexual Offences (Northern Ireland) Order, 1982, No.
properly entertain an Article 14 challenge to laws fixing a higher homosexual age of consent. However, the Court's only reference to the European statutory consensus necessary to support this analysis was inconsistent with this statement. In evaluating Dudgeon's Article 8 claim, the Court referred to the age-of-consent laws in force among the Contracting States, noting that "[i]n practice there is legislation on the matter in all the member States of the Council of Europe." The Court thus discerned a European consensus on the need to restrict homosexuality. If true, this fact would likely defeat a challenge to a statute establishing a higher age of consent for homosexuals than for heterosexuals or lesbians.

The Court's use of consensus analysis in this way is misleading and begs the ultimate question that must be resolved in making such an inquiry. For the Court might just as accurately have noted that there is a consensus on the need to restrict heterosexuality because all of the Contracting States maintain an age of consent for heterosexuals. The discrimination caused by a higher homosexual age of consent does not result from the difference between the ages of consent among the Contracting States. Rather, the relevant comparative question to consider is whether there are differences in the homosexual, heterosexual, and lesbian ages of consent within each Contracting State. It is this disparate treatment which is discriminatory, creating a restriction on homosexual privacy which similarly situated heterosexuals and lesbians within that society do not suffer.


219 Id. at 20; see also X v. United Kingdom, App. No. 7215/75, 19 Eur. Comm’n H.R. Dec. & Rep. 66, 76 (1980) (Commission Report) ("While there is consensus among most European countries that legislation controlling homosexual behavior is necessary there appear to be differing views as to the age of consent, if any, that is appropriate.").


221 See text accompanying notes 321-43 infra (listing heterosexual ages of consent in Contracting States).

222 Significantly, no challenge to a heterosexual age of consent has ever been attempted, notwithstanding the fact that the Contracting States have fixed a range of heterosexual ages of consent.

223 In each of the challenges to laws fixing the homosexual age of consent at twenty-one years, the applicants alleged that they were the victims of discrimination because homosexuality was restricted more than heterosexuality and lesbianism in their respective countries, not because the age of consent was higher than in the rest of Europe. See X v. Federal Republic of Germany, App. No. 5935/72, 3 Eur. Comm’n H.R. Dec. & Rep. 46, 52 (1976) (applicant complained that higher age of consent in Federal Republic of Germany applied only to male
Because the Court confined its analysis of this issue to Article 8's privacy right, this comparison was impossible, since Article 8 review focuses exclusively on the homosexual ages of consent fixed by the other Contracting States. This limited consensus inquiry revealed that, while a homosexual age of consent well below twenty-one is in force in the vast majority of Contracting States, no single age has emerged. Finding a higher homosexual age of consent invalid under Article 8 therefore would have required the Court to fix a lower age of consent itself. This approach would conflict with the margin of appreciation doctrine, since the Court would have been acting in a legislative role if it imposed a uniform homosexual age of consent throughout Europe when in fact divergent views existed on the proper age of consent for all sexual activity. Rather than embark on this difficult course, the Dudgeon Court construed European thought and practice to uphold the restrictions on adolescent homosexual conduct in Northern Ireland.

Yet, in doing so, the Court virtually ignored an area of relevant jurisprudence which effectively could have resolved the age-of-consent problem: the non-discrimination jurisprudence of Article 14. Heightened Article 14 analysis would have allowed the Court to compare each country's homosexual, lesbian, and heterosexual ages of consent and to determine whether these groups are equally restricted under the laws of the Contracting States, regardless of the age at which restrictions are set.

Recasting and applying the consensus inquiry in this manner reveals that, in fact, there has been a significant movement among Contracting States to equalize the age of consent—a movement that has been supported by international legislation in the Parliamentary Assembly of the Council of Europe, in the European Parliament for the European Economic Communities, and by the concurring opinions of European criminological and social protection experts.

By reexamining consensus under Article 14, the Court could have resolved the discrimination problem by requiring a Contracting State to equalize the age of consent at the lower age set for heterosexuals and lesbians. This approach is appropriately respectful of each Contracting State's margin of appreciation, since it allows the age of consent which each state has already established for people of other sexual orientations


224 See notes 321-43 and accompanying text infra.
225 See id.
226 See text accompanying notes 302-20 infra.
227 See text accompanying notes 350-55 infra.
228 See text accompanying notes 357-76 infra.
to serve as the benchmark for the age to be fixed for male homosexuals.

B. Age-of-Consent Case Law in the European Commission

The European Court of Human Rights has not been alone in inaccurately characterizing consensus. The European Commission, the forum in which the majority of challenges to higher homosexual ages of consent have occurred, also has taken a skewed view of European consensus to uphold Contracting States’ restrictions of sexual relationships involving homosexual adolescents. The Commission has used a highly deferential strain of the Belgian Linguistics test to evaluate these claims. While this approach seems reasonable for those cases decided before the Dudgeon Court held that total prohibitions of homosexual relationships violated the Convention, and before the development of heightened Article 14 review, it is less persuasive in cases postdating these events, particularly in light of the strong European consensus supporting a uniform age of consent.229

1. X v. Federal Republic of Germany230

In 1969, the Federal Republic of Germany (FRG) legalized homosexual relations between consenting adult males by amending Article 175 of its criminal code.231 However, the FRG maintained an age of consent of twenty-one for homosexual acts, as compared to an age of consent of fourteen for heterosexuals and lesbians.232

The applicant, a sixty-four-year-old male, had been convicted of sodomy with boys under the age of sixteen.233 After his constitutional challenge to the conviction was rejected by a German federal appeals court, he brought a petition before the Commission alleging a violation of Articles 8 and 14.234 The Commission asked the FRG to submit written comments on whether the difference in treatment between lesbians and male homosexuals violated these articles.235

The FRG responded that the difference in treatment was justified by “a policy of deterrence,” since young men were exposed more frequently to the risk of homosexual relations with adults than were young wo-

229 See text accompanying notes 295-376 infra.
231 Id. at 54.
232 Id.
233 Id. at 52, 55. The applicant was sentenced to two and one-half years in prison for these offenses. Id. at 52.
234 Id. at 52, 55.
235 See id. at 52-53. The applicant alleged that he was a “victim of discrimination based on sex because only male homosexuality constituted a criminal offence.” Id. at 52. By invoking Article 14 in this manner, the applicant placed himself in the awkward position of having to prove that the lesbian age of consent should be raised.
men. The government also focused the Commission’s attention on the greater visibility of male homosexuals, which exposed gay male adolescents to “social isolation and conflicts with society.”

The Commission first examined the application under Article 8’s protection of private life, concluding that the laws were necessary to prevent homosexual adults from having an “unfortunate influence on the development of heterosexual tendencies in minors” and to allow adolescents to “achieve true autonomy in sexual matters.” It noted, however, that the issue was under reconsideration throughout Europe and that several Contracting States had commissioned studies on the decriminalization of homosexuality.

The Commission then used the same “social protection” argument to justify the difference in treatment between male homosexuals and lesbians under Article 14. The Commission applied the Belgian Linguistics test to determine whether there were “objective and reasonable” justifications for the law and whether these justifications were proportionate to the means used to achieve that goal.

Objectivity, in the Commission’s view, required the “concurring analyses” of social protection experts. The Commission referred to German psychological and sociological studies on homosexual behavior. Although the Commission did not cite to the studies’ sources, it concluded that they provided “convincing conclusions” that male homosexuals constituted “a distinct socio-cultural group with a clear tendency to proselytise adolescents.” These German studies confirmed the social protection rationale’s objectivity, according to the Commission. Finally, the Commission noted that the importance of protecting adolescents made the use of criminal sanctions a proportionate means for achieving the FRG’s social protection goals.

The significance of X v. Federal Republic of Germany is twofold.

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236 Id. at 53.
237 Id.
238 Id. at 54, 55. The Commission essentially found that the need to protect the rights of adolescents justified the higher age of consent for homosexuals. But see text accompanying notes 384-86 infra.
239 Id. at 54. The Commission also referred to a Council of Europe study on the complete decriminalization of homosexuality. See id.
240 Id. at 55. The confusion in applying the Belgian Linguistics test is apparent here. Although the Commission appears to have omitted the intent inquiry by failing to consider whether the justification had a “legitimate aim,” its determination that the justification was reasonable may have satisfied this part of the test.
241 Id. at 56.
242 See id.
243 Id.
244 See id.
245 See id.
First, the Commission acknowledged the role of consensus in determining whether a higher age of consent was compatible with the Convention.246 The Commission's reference to the changing views on the age of consent247 seemed to demonstrate a willingness to re-examine the issue as consensus in favor of a lower age evolved. Second, and equally important, was the Commission's use of expert opinion to ensure the objectivity of the restriction required by Article 14.248 If objectivity does in fact turn on expert consensus, then the Commission should re-examine its conclusions as new and contrary evidence on homosexuality emerges. Unfortunately, it has failed to do so.249

2. X v. United Kingdom250

In 1975, X, a twenty-six-year-old man, was charged with committing consensual sodomy with two eighteen-year-old men in violation of the Sexual Offenses Act of 1967 (1967 Act).251 To avoid a local scandal, X pled guilty and was sentenced to two and one-half years in prison.252 He then challenged his conviction before the Commission under Articles 8 and 14.253 X also brought a facial challenge to the 1967 Act, which made it a criminal offense for a male of any age to engage in sodomy with another consenting male under the age of twenty-one.254 By contrast, no restrictions were imposed for heterosexual255 or lesbian sexual acts256 in

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246 See id. at 54.
247 See id. at 55.
248 See id. at 56.
249 See text accompanying notes 283-87 infra.
251 Sexual Offenses Act, 1967, ch. 60, § 1(1) [hereinafter 1967 Act].
253 Id. X also challenged his conviction under Article 10 of the Convention, which guarantees the right to freedom of expression. See id. This challenge was rejected by the Commission. See X v. United Kingdom, App. No. 7215/75, 19 Eur. Comm’n H.R. Doc. & Rep. 66, 80 (1980) (Commission Report).
254 Section 1(1) of the 1967 Act provides that “a homosexual act in private shall not be an offense provided that the parties consent thereto and have attained the age of twenty-one years.” 1967 Act, supra note 251, § 1(1). Section 1(1) amended the Sexual Offenses Act, 1956, 4 & 5 Eliz. 2, ch. 69, § 12 [hereinafter 1956 Act], which made it a crime for consenting adults to engage in sodomy. Section 3 of the 1967 Act provides that the maximum penalty for sodomy shall be 10 years, five years where it is consensual. 1967 Act, supra note 251, § 3. Where the accused is under 21, the maximum penalty in consensual cases is two years, regardless of his partner's age. Id. Consent is not a complete defense to a charge of sodomy, and where consent is proved, the younger partner is guilty of sodomy as a principal offender. Id.
255 Section 6 of the 1956 Act makes it an offense to have sexual intercourse with a female under the age of 16, except where the accused is under the age of 24 and reasonably believes that his partner is over 16. Section 5 imposes strict criminal liability for sexual intercourse with a female under the age of 13. Neither of these crimes admits the defense of consent. The maximum penalty for intercourse with a female under the age of 13 is life imprisonment. 1956 Act, supra note 251, § 6.
which the consenting partner was over sixteen. X argued that the homosexual age of consent should be lowered to eighteen, the age of legal majority in the United Kingdom.257

Although the Commission summarily rejected X’s as-applied attack on the 1967 Act,258 it gave greater consideration to his facial challenge.259 The Commission’s 1978 report260 reveals that, in undertaking its consensus analysis, it relied in part on expert consensus in the form of two reports: the Wolfenden Report on Homosexual Offenses and Prostitution261 and the Speijer Committee Report.262 In this regard, it also gave significant weight to the fact that the 1967 Act was under review in the United Kingdom by the Criminal Law Revision Committee and the Policy Advisory Committee on Sexual Offences.263

Apart from expert consensus, the Commission also considered the issue of statutory consensus on the age of consent issue, noting that “[w]hile there is consensus among most European countries that legisla-

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257 Although there is no statutorily defined age of consent for lesbians, § 14(1) of the 1956 Act makes it an offense for any person to assault indecently another woman. Although consent is a defense to this crime, females under the age of 16 are incapable of giving consent. Id. § 14(2). The maximum penalty for indecent assault is two years. Id. § 14, sched. 2.


261 Wolfenden Report: Report of the Comm. on Homosexual Offenses and Prostitution (1963) [hereinafter Wolfenden Report]. Although recommending the decriminalization of adult consensual sodomy, the Wolfenden Committee concluded that the age of contractual responsibility, which at that time was 21, was an acceptable place to define adulthood for purposes of the age of consent. See id. at 51. Since, by 1978, the age of contractual responsibility had been reduced to 18, X argued that the age of consent should similarly have been reduced. See X v. United Kingdom, full report, supra note 260, at 16.

262 Speijer Comm. Report of the Council of Health: Advice Concerning Homosexual Relations with Minors 22-25 (1969) [hereinafter Speijer Committee Report] (recommending uniform age of consent of 16 in the Netherlands) (English translation on file at New York University Law Review). The Speijer Committee concluded that contact between adult homosexuals and predominantly heterosexual adolescents would not result in an adolescent’s conversion to homosexuality, nor would it have a damaging effect on his or her personality. See id. at 21-22. The Committee also found that homosexual contacts were beneficial to younger homosexuals, reducing their sense of isolation, stress, and frustration. See id.

tion controlling homosexual behaviour is necessary[,] there appear to be differing views as to the age of consent, if any, that is appropriate."264 But rather than comparing the 1967 Act with statutory policy in other Contracting States, the Commission stated that

what is important is not the balance struck in other European countries but the reasonable and objective nature of the arguments adduced in favour of the actual age limit chosen. The Commission does not share the applicant's view, in this regard, that because the majority of European States have an age of consent that is fixed at eighteen or below, the age of twenty-one established by the United Kingdom Government must therefore not be "necessary in a democratic society."265

Notwithstanding this disclaimer, the Commission then proceeded to look to the lower ages of consent set by other European states and to their tendency to emphasize tolerance and understanding in the treatment of homosexuals.266 Then, the Commission added an ironic twist: after acknowledging that the private consensual homosexual relationships of eighteen-year-old men "ought to be a matter of legitimate personal choice beyond the reach of the criminal law,"267 it upheld the Act.268 To support this result, the Commission emphasized that the 1967 Act was being reviewed by two committees of criminal law experts.269 Thus, it explained, the United Kingdom had not, at that point in time, improperly struck a balance between individual privacy and social protection.270 Eighteen to twenty-one-year-old males, the Commission concluded, could be exposed to "substantial social pressures which could be harmful to their psychological development"271 if allowed to have sexual relations with other men.272

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265 Id. at 76-77 (emphasis in original).
266 See id. at 77. The Commission wrote that it considers that the age limit of twenty-one may be regarded as high in the present era, especially when contrasted with the current position in other member states of the Council of Europe. The Commission is also aware that current trends throughout Europe in relation to private consensual homosexual behavior tend to emphasize tolerance and understanding as opposed to the use of criminal sanctions.
267 Id.
268 Id. at 78.
269 See id.
270 See id.
271 Id. The Commission seemed to suggest that contact with adult homosexuals might induce adolescents to alter their sexual orientation. The Wolfenden Committee, however, had noted that adopting a lower age of consent for homosexuals would not engender a greater tendency in adolescents to become homosexuals, since sexual orientation was fixed by the age of 16. See Wolfenden Report, supra note 261, at 50, 52 (majority of medical witnesses believed main sexual pattern is fixed by age of 16); see also Speijer Committee Report, supra note 262, at 21-22 (same).
272 In a concurring opinion, a member of the Commission emphasized that, while the 1967
Having decided that Article 8 had not been violated, the Commission completed its review of the 1967 Act for all practical purposes. Although X had also alleged that the Act’s differential treatment of homosexuals, lesbians, and heterosexuals violated Article 14, the Commission noted that this issue had been thoroughly examined under Article 8. Citing the Belgian Linguistics test, it concluded that there was an objective and reasonable justification for the differing ages of consent.

The Commission’s analysis in X v. United Kingdom was not entirely out of step with Convention jurisprudence at that time. By 1978, there had been only one case in which the Court had used a European consensus analysis to invalidate a less progressive Contracting State’s laws. More importantly, the Court had not yet asserted its more aggressive role as an independent arbiter of human rights guarantees, nor had it held that adult homosexual relationships were protected by the Convention. Finally, domestic and international consensus on equalizing the age of consent had yet to develop fully. It is noteworthy, however, that, even when all of these factors had come into play, the Commission continued to uphold more restrictive age-of-consent laws for homosexuals.

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273 Id. at 78. The Commission’s decision was later approved by the Committee of Ministers. See id. at 82-83 (Resolution DH (79) 5, adopted June 12, 1979).

274 See id. at 79.

275 See id.


277 See text accompanying notes 203-14 supra.


3. Desmond v. United Kingdom

In 1982, a seventeen-year-old homosexual, Richard Desmond, brought another challenge under Articles 8 and 14 against section 1 of the 1967 Act. Desmond claimed that, as an adolescent with a fixed homosexual orientation, he was harmed by the law, which forced him to live a secret life and caused him emotional and psychological distress. Desmond urged the Commission to consider the modern views of psychological and sociological experts in evaluating the compatibility of the Act with the Convention. He cited to the Policy Advisory Committee on Sexual Offenses, which had concluded in 1981 that the homosexual age of consent in the United Kingdom should be lowered to eighteen.

The Commission did not find the recommendation controlling, although it had, in X v. United Kingdom, given significant weight to the fact that the Committee was reviewing the 1967 Act. The Commission found that the government had an interest in protecting the “moral interests and the welfare of young people.” That Desmond was entirely prohibited from engaging in any form of meaningful sexual relationship until he reached the age of twenty-one did not alter the Commission’s conclusion.

In essence, the Commission abdicated its power to review the issue in favor of the Contracting States when it stated that “in fixing the borderline between lawful and unlawful conduct the State is entitled to assert its [margin] of appreciation in a difficult and sensitive area of the criminal law.” In support of this statement, the Commission quoted from the Court’s language in Dudgeon that “it falls in the first instance to the national authorities to . . . fix the age under which young people should have the protection of the criminal law.”

The Commission thus characterized Dudgeon as holding that the age-of-consent issue should be left to the sole discretion of the Con-
tracting States. In reality, the Dudgeon Court had noted that Northern Ireland's sodomy laws were "silent" regarding the age of consent, concluding that it could not "pronounce upon an issue which does not arise at the present moment."\footnote{Dudgeon, 45 Eur. Ct. H.R. at 26 (issue under Article 14 can only arise when Northern Ireland has fixed an age of consent).}

The Commission construed Dudgeon's language to avoid any meaningful review of the statutory consensus or expert opinion, which previously had been central aspects of its analysis.\footnote{See text accompanying notes 241-44, 260-66 supra.} Rather than evaluating the new evidence presented, the Commission saw "no reason to depart from its previous decisions."\footnote{Desmond, App. No. 9721/82, at 8.} Whereas both X v. Federal Republic of Germany and X v. United Kingdom were at least partially defensible as good faith efforts by the Commission to come to grips with developing expert opinion and statutory law, Desmond is unfaithful to those decisions' clear commitment to work toward a consensus-based methodology. It also reveals a Commission all too willing to sacrifice rights in favor of mechanical deference. Thus, Desmond signals the Commission's intransigence toward examining the age-of-consent issue consistently with the modern views implemented in other areas of the Convention.

C. The Evolution in International Legislation, Domestic Statutes, and Expert Opinion Toward Equalizing the Age of Consent

Notwithstanding the Commission's failure to recognize a changing consensus, numerous developments in European society in the 1980s helped to shape strong agreement on the need to establish a uniform age of consent. Recommendations by two international legislative bodies, amendments to the Contracting States' criminal codes, and reports by several criminal law commissions have demonstrated that homosexual adults pose no greater threat to adolescents than their heterosexual counterparts.

1. The Parliamentary Assembly of the Council of Europe

The Statute of the Council of Europe,\footnote{Council Statute, supra note 18.} to which all of the Contracting States are parties, provides for the creation of the Parliamentary Assembly (Assembly), composed of representatives appointed by each state's national Parliament.\footnote{Id. art. 25.} The Assembly is empowered, among other things, to "discuss and make recommendations upon any matter within the aim and scope of the Council of Europe,"\footnote{Id. art. 23.} which it does by
establishing committees to consider particular issues of concern.298 Once these committees report their findings, the Assembly may propose recommendations and resolutions.299 Although these measures are not binding on the Contracting States, they do influence policy development.300 The Assembly is widely regarded as "a mouthpiece of European public opinion" and has an important role in developing and shaping public sentiment.301

On October 1, 1981, the Committee on Social and Health Questions, headed by Chairman Voogd from the Netherlands, reported to the Assembly on Document 4755—"Discrimination Against Homosexuals."302 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 even . . . from oppression."303 The Committee noted that discrimination against homosexuals stems from "old and deep-rooted sentiments of fear and aversion which are not supported by scientific facts and are unjustified."304 Proceeding from the view that homosexuality is an immutable characteristic acquired very early in life,305 the Committee proposed that "all individuals, male or female, having attained the legal age of consent provided by the law of the country they live in, and who are capable of valid personal consent, should enjoy the right to sexual self-determination."306 The Committee also proposed modifying Article 14 of the Convention to include the words "sexual preference" in the article's list of protected characteristics.307

299 An Assembly recommendation is addressed to the Committee of Ministers to take particular action. A resolution does not call for such action and may be directed to any organization. See A. Robertson, European Institutions 45 (3d ed. 1973).
300 See id.
301 Id.
303 Id.
304 Id. at 14.
305 See id. at 4.
306 Id. at 1-2.
307 See id. at 2. In keeping with the spirit of equality for homosexuals, the Committee also proposed that some specific practices be implemented by member states. These included: destroying existing special records on homosexuals and abolishing the practice of keeping records on homosexual activity by the police; ensuring the equality of treatment for homosexuals with respect to employment, pay, and job security, particularly in the public sector; terminating all medical research and activity designed to alter the sexual orientation of adults; guaranteeing the equal rights of homosexual parents to custody and visitation of their children; and taking measures to reduce the risk of rape and violence against homosexuals in prisons. Id.

The Committee also proposed a resolution to the World Health Organization, asking it to delete homosexuality from its "International Classification of Diseases," since the theory of
When the Committee presented its recommendations to the Assembly, a remarkable debate ensued on the need to ensure equality for homosexuals.\textsuperscript{308} As the first statements of their kind by an international political organization, they are worthy of significant consideration.

The Assembly, like the Committee, recognized the fundamental importance of homosexual equality. Mr. Voogd's opening statements set the tone for the entire debate. He argued that homosexuals are discriminated against "not because they do wrong or are a threat to society, not because they are a threat to traditional family life . . . but because . . . their pattern of life [is] different."\textsuperscript{309} While several representatives expressed reservations about certain aspects of Mr. Voogd's views\textsuperscript{310} and a few even criticized the recommendation as improper,\textsuperscript{311} the majority of the Assembly supported the resolutions, acknowledging that fear of difference and imposition of majoritarian moral views were the principal reasons for continued discrimination.\textsuperscript{312} Support for the report was so strong, in fact, that the recommendation was amended by adding language urging all member states to apply the "same minimum age of consent" for homosexual and heterosexual acts.\textsuperscript{313} This was a logical extension of the Committee's desire to ensure to all persons a right of sexual self-determination.

homosexuality as a "mental disturbance has no sound scientific or medical basis and has been refuted by recent research." Id. at 3. This proposal was adopted by the Assembly as Resolution 756, Eur. Parl. Ass., 33d Sess. (1981).


\textsuperscript{309} Id. at 258.

\textsuperscript{310} See id. at 261 (statement of Mr. Guntern of Switzerland) (arguing that recommendation went beyond existing social norms and improperly disregarded minority opinion that homosexuality is anomalous); id. at 262-63 (statement of Mr. Cavaliere of Italy) (homosexuality is deviant and abnormal but still entitled to protection from discrimination to same extent as heterosexuality); id. at 263-64 (statement of Mr. Bizet of France) (disagreeing with immutable nature of homosexuality and urging further research into its causes so as to prevent its development); id. at 264 (statement of Mr. de Azevedo of Portugal) (urging policy of non-discrimination against homosexuals which nevertheless favors heterosexuality); id. at 266 (statement of Ms. Hubinek of Austria) (arguing that interests of homosexuals conflict with protection of children and that greater consideration should be given to protecting children); id. at 271 (statement of Mr. Grussemeyer of France) (disagreeing with immutable nature of homosexuality and degree of prejudice which homosexuals experience).

\textsuperscript{311} See id. at 267 (statement of Mr. Margue of Luxembourg) ("The real reason why there is discrimination against homosexuals is that they bring it on themselves by behaving in a way which [is] unnatural."); id. at 270-71 (statement of Mr. Page of United Kingdom) (opposing recommendation for giving homosexuality too much respectability).

\textsuperscript{312} See, e.g., id. at 264-65 (statement of Mr. Cox of United Kingdom) (protection of children frequently used as pretext for discrimination); id. at 268 (statement of Mr. Lopez of Spain) (emphasizing society's social and moral discrimination against homosexuals); id. at 269-70 (statement of Mr. Delehedde of France) (likening discrimination against homosexuals to racial discrimination); id. at 272 (statement of Ms. Rosolen of Italy) (homosexuals have experienced "intolerance, masquerading as moral rectitude and scientific objectivity").

The most widely debated provision of the Committee’s recommendation was the proposal to modify Article 14 of the Convention. Several members of the Assembly indicated that such explicit protection for homosexuals was unnecessary given the broad interpretation of Article 14’s “other status” clause, and the possibility of interpreting the word “sex” to include sexual orientation. Others maintained that the need to ensure equality required the proposed modification. The Assembly ultimately decided not to approve the change, pending the Court’s decision in Dudgeon.

The Committee’s report was then adopted as Recommendation 924 and submitted to the Committee of Ministers, which transmitted it to the Contracting States without comment. Two years later, the Assembly, in a resolution urging the member states to investigate the cause of the AIDS virus, “reaffirm[ed] its unshakable attachment to the principle that each individual is entitled to have his privacy respected and to self-determination in sexual matters.”

The Assembly’s proposals have not fallen on deaf ears. The following chart documents the ages of consent in the Contracting States in 1990, the footnotes showing recent modifications, including those made after the Committee’s report in 1981.

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315 See note 96 supra.
316 See, e.g., Eur. Parl. Ass. Deb. 33d Sess. 265 (statement of Mr. Berrier of France); id. at 274 (statement of Mr. Griev of United Kingdom).
317 See, e.g., id. at 262 (statement of Mr. Stoffelen of the Netherlands).
318 The judgment actually was handed down on September 23, 1981, one week before the debate in the Assembly. It appears, however, that the Assembly was not yet aware of the Court’s decision. See Eur. Parl. Ass. Deb. 33d Sess. 274 (statement of Mr. Griev of United Kingdom) (opposing Article 14 modification because Dudgeon still sub judice).
319 The Assembly’s well-intentioned proposal to amend Article 14 provided a strong message of support for homosexual equality, but probably would have had little effect. Given the degree of deference the Court and Commission extend to Contracting States to create distinctions based on sexual orientation, the addition of the category of sexual preference to Article 14 might not have achieved its intended result. Moreover, the Commission had already acknowledged that the “other status” clause nominally included discrimination based on sexual orientation. See X v. United Kingdom, App. No. 7215/75, 19 Eur. Comm’n H.R. Dec. & Rep. 66, 79 (1980) (Commission Report).
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322 Sexual relations with adolescents between the ages of 12 and 16 are an offense if the younger person is tricked or pressured. Id. at 25.

323 Sexual relations with adolescents between the ages of 14 and 16 are punishable if the younger person is "sexually innocent" and "morally pure" and if he or she complains to the police. Id. at 21.

324 Uniform age of consent introduced in 1976. Id. at 15.

325 Homosexual age of consent reduced from 21 to 18 in 1978 and to 15 in 1982. Id. at 16.

326 Until 1987, the age of consent was 16 for heterosexuals and lesbians, and 17 for gay men. Id. at 17.

327 Uniform age of consent introduced in 1978. Id. at 26.

328 Homosexual age of consent reduced from 18 in 1985. Id. at 13.

329 Uniform age of consent introduced in 1971. Id. at 22.

330 Uniform age of consent introduced in 1972. Id. at 23.

331 Uniform age of consent introduced in 1852. Id. at 24.

332 In Switzerland, it remains an offense for an adult male to "seduce" any adolescent between the ages of 16 and 20. A government commission has recommended that this section of the penal code be repealed. Id. at 26–27.

333 There is no specific age of consent for any form of sexual orientation. In practice, however, the age of majority is treated as the age of consent. Id. at 22.

334 Homosexuality has never been banned in modern times. Id. at 27.

335 Higher age of consent for homosexuals imposed in 1971 when total prohibition of homosexual acts was ended. Id. at 12.

336 Discriminatory age of consent imposed in 1971. Id. at 16.

337 Homosexual age of consent reduced from 21 to 18 in 1973. The German Democratic Republic maintains a uniform age of consent at 14, which was introduced in 1989. Id. at 17, 27. The GDR's territory became subject to the Convention as part of the new, united Germany in October 1990. See Colitt, Pastor Helps to Forge the Future of a New Germany, Fin. Times, May 12, 1990, at 2.
Legislation supporting homosexual equality in other areas has also been adopted in numerous Contracting States. General anti-discrimination laws were adopted by Norway in 1981, France in 1985, and Denmark and Sweden in 1987. Incitement to hatred against homosexuals was made a criminal offense in Norway in 1981, Sweden and Denmark in 1987, and Ireland in 1989. Proposals for similar laws are under consideration in Belgium and the Netherlands.

2. The European Parliament

The European Parliament is the legislative arm of the European Economic Communities (EEC) analogous to the Parliamentary Assembly. It has certain supervisory powers over the Commission of the EEC, which drafts proposals for legislation to be considered by the Council of Ministers. The Council is the executive body of the EEC which enacts rules binding on the Member States.

In 1982, two motions entitled “Sexual Discrimination in Employment” and “Statutory and Other Discrimination Against Homosexuals” were passed by the European Parliament.

338 A bill to remove all distinctions between heterosexuality and homosexuality from the penal code is under consideration by the Icelandic parliament and is expected to become law soon. P. Tatchell, supra note 321, at 20.

339 Discriminatory age of consent introduced in 1971. Law reform to equalize the age of consent is currently under consideration. Id. at 22.


342 The island of Cyprus currently is divided between Greeks and Turks. In the Greek area, all homosexual acts between men are outlawed. Id. at 14.

343 Law Reform Comm'n, Consultation Paper on Child Sexual Abuse 54, 58 (1989). In June, 1990, David Norris, the Irish senator who challenged Ireland's sodomy laws before the European Court of Human Rights, initiated a late-night proposal to repeal the laws after the Senate had refused to consider reforming the law for over a year. Although only two other senators were present—the minimum number required to take such action—the law reform was adopted. See World Gay News: Irish Sodomy Law Dies After Parliamentary Maneuver, Au Courant, Sept. 10, 1990, at 20.


345 Id. at 15, 20-21, 23, 26.

346 Id. at 13, 22.


348 See M. Palmer, supra note 347, at 31.

349 S. Budd & A. Jones, supra note 347, at 39. The EEC Member States are Belgium, Denmark, France, the Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. Id. at 24. All of these states are also Contracting States to the European Convention. See note 4 supra.

als\textsuperscript{351} were submitted for consideration to the European Parliament's Committee on Social Affairs and Employment. In response, that committee proposed a resolution on “Sexual Discrimination at the Workplace,”\textsuperscript{352} which was adopted by the European Parliament on March 13, 1984.\textsuperscript{353} The resolution requested the Commission to submit proposals to the Council of Ministers to ensure equal treatment of homosexuals in employment and to urge the Member States to establish the same minimum age of consent for homosexuals and heterosexuals.\textsuperscript{354} If the Commission makes these proposals, the Council of Ministers will determine whether any legislative action is required.\textsuperscript{355}

3. Experts' Studies Related to the Age of Consent

The European Commission has acknowledged that the views of criminologists and social protection experts are an important factor in considering whether a higher homosexual age of consent violates Article 14.\textsuperscript{356} These experts now uniformly agree on the advisability of a lower age of consent for homosexual activity, and the majority has proposed an equal age of consent for people of all sexual orientations.

In the United Kingdom, the Policy Advisory Committee on Sexual Offenses published its “Report on the Age of Consent in Relation to Sexual Offences” in 1981.\textsuperscript{357} On the basis of expert medical and psychological evidence, a ten-member majority of the Committee recommended that the age of consent for homosexuals be reduced to eighteen.\textsuperscript{358} A

\begin{footnotesize}
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\item[356] See S. Budd & A. Jones, supra note 347, at 26-37. Although initially the proposals were received favorably, the Commission now claims that, since there is nothing specific in the EEC Treaty about homosexual rights, it has no legal competence to take action on matters of sexuality. Advocates for such rights argue that there can be no freedom of movement within the EEC, one of the “four freedoms” protected by the EEC Treaty, while there are varying levels of protection and discrimination in the Member States. See Treaty Establishing the European Economic Community, 298 U.N.T.S. 11, Mar. 25, 1957, arts. 48, 49, 100, 100A, 101, 117. They also have proposed amending the Treaty to protect homosexuals explicitly. See P. Tatchell, supra note 321, at 7-8.
\item[357] See text accompanying notes 241-44, 260-63 supra.
\item[359] Id. at 22. For a criticism of the majority's failure to recommend a uniform age of consent, see Hindley, The Age of Consent for Male Homosexuals, 1986 Crim. L. Rev. 595, 596-600. The majority's recommendations were subsequently adopted by the Criminal Law Revision Committee in 1984 without additional discussion. See Criminal Law Revision Comm., 15th Report on Sexual Offenses, 1984, Cmdn. No. 9213, at 53-55.
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five-member minority suggested that the age be reduced to sixteen.\footnote{Policy Advisory Committee Report, supra note 357, at 27-28. Both groups agreed that a reduction to eighteen was required to comply with the Wolfenden Committee's recommendation that the homosexual age of consent be fixed at the age of legal majority. See id. at 13-15.} Two additional members of the majority would have favored the lower age had the Committee been empowered to suggest special restrictions on homosexual relationships between adolescents and older men in positions of authority.\footnote{Id. at 17-18. By way of example, these members cited Article 248 of the Dutch Penal Code, which makes it an offense for a person to have sexual contact with a "pupil, anyone committed into his charge, education or protection, or his servant or subordinate" when the subordinate, pupil, or charge is below 21. Id. at 18.} 

The principal point of dispute within the Committee centered on when sexual orientation becomes fixed in an individual. The majority concluded that, because the physical and emotional development of males is about two years behind that of females, the age of consent should be two years higher.\footnote{See id. at 16-17.} Although the majority noted that logic would therefore require a higher age of consent for males in heterosexual relationships as well, it concluded that the additional societal stigma attached to homosexuality made setting a higher age for homosexuals defensible.\footnote{See id. at 17. The majority's conclusion that societal stigma was the principal basis for imposing a higher homosexual age of consent should be rejected by the Court under a heightened Article 14 analysis. See text accompanying notes 383-402 infra.} 

The minority members maintained that an individual's sexual identity is fully developed by the age of sixteen.\footnote{See id. at 27-28.} While acknowledging that homosexual relationships may be difficult because of societal disapproval, the minority emphasized that, because the need for counseling on sexual matters arises at the same age in people of all sexual orientations, a uniform age of consent was required.\footnote{See id. at 28.} It found the majority's reasoning insufficient to justify a higher age of consent for male homosexuals alone.\footnote{See id.}

In 1982, the Legal Affairs Committee of the Council of Europe held a conference on the criminal law's influence on sexual behavior.\footnote{See Sexual Behaviour and Attitudes and the Implications for Criminal Law, in 21 Collected Studies in Criminological Research 127-203 (1984) [hereinafter Sexual Behavior].} Two of the reports presented at the conference concerned the homosexual age of consent. The first report, submitted by the Director of the Institute of Criminology, University of Cambridge, focused on psychological and sociological perspectives on homosexual relationships between adults and
adolescents.\textsuperscript{367} Drawing on a wealth of European and American expert opinion, the report concluded that homosexuals pose no more of a threat to children or adolescents than their heterosexual counterparts.\textsuperscript{368} Noting that psychological studies had concluded that sexual orientation is fixed early in life,\textsuperscript{369} it argued against the need for maintaining a higher age of consent for homosexuals.\textsuperscript{370} The report cited studies documenting the tremendously harmful emotional and psychological impact of a higher age of consent on homosexual teenagers and their partners, even where the younger partner is not subject to criminal prosecution.\textsuperscript{371} The report concluded that Article 14 should be amended to include sexual orientation as an appropriate first step toward promoting homosexual equality.\textsuperscript{372}

The second report, presented by Mr. H. Horstkotte, a judge from the Federal Republic of Germany, concerned legal and criminological arguments used to support differing ages of consent.\textsuperscript{373} Judge Horstkotte highlighted that the dual purpose of such legislation is to protect victims against unwanted sexual interference and to impose morality-based restrictions on consenting private sexual actors.\textsuperscript{374} He noted three factors which supported the recent movement for criminal law reform in Europe: the desire to alleviate the burden placed on minorities by discriminatory penal legislation, the need to decriminalize “victimless” offenses, and the growing agreement among Contracting States that the criminal law caused more harm than benefit to the “victim.”\textsuperscript{375} Horstkotte concluded that these decriminalization goals could be achieved most effectively by equalizing the age of consent at fourteen.\textsuperscript{376}

\textsuperscript{367} See West, Homosexuality and Social Control, in Sexual Behavior, supra note 366, at 127.

\textsuperscript{368} In analyzing sexual contact with prepubescent children, the report concluded that there was “no rational justification for stricter measures to protect children from homosexual than from heterosexual molesters.” Id. at 150. As for sexual interaction between adults and adolescents, West acknowledged the problems associated with homosexual prostitution but concluded that “[l]aws directed specifically at such abuses might be more pertinent and fairer than controls based on the investigation of private sexual habits.” Id. at 152.

\textsuperscript{369} See id. at 144-48 (current psychological studies favored multi-factor cause for sexual orientation based on experiences in early childhood).

\textsuperscript{370} See id. at 159.

\textsuperscript{371} See id. at 158-59.

\textsuperscript{372} See id. at 156-60.

\textsuperscript{373} See Horstkotte, Ages and Conditions of Consent in Sexual Matters, in Sexual Behavior, supra note 366, at 167.

\textsuperscript{374} See id. at 174-75.

\textsuperscript{375} Id. at 176-77.

\textsuperscript{376} See id. at 202.
D. Rejecting Unequal Age-of-Consent Laws Under Heightened Article 14 Analysis

The first step in applying heightened Article 14 review is to identify the existence of a European consensus on equalizing the age of consent. Both the Court and Commission have thus far identified the relevant consensus as one restricting homosexual activity, partially because there is no single age of consent in force in the majority of Contracting States. But neither tribunal has focused on the proper question: whether the Contracting States have imposed within their borders a uniform age of consent for people of all sexual orientations. Recharacterizing the tribunals’ consensus inquiry under Article 14 would make this more precise analysis possible.

The last decade has seen a commitment to equalizing the age of consent by both the Parliamentary Assembly and the European Parliament. In addition, a majority of the Contracting States now maintain the same age of consent for all their nationals, many of these states having altered their laws in part because of the concurring views of criminological and social protection experts. Such a strong manifestation of common ground among the Contracting States falls toward the more concrete Dudgeon/Norris end of the consensus spectrum identified in Part II. Far from merely declaring their intention to equalize the age of consent at some uncertain date in the future, the Contracting States have taken concrete steps in both the domestic and international arenas to guarantee an equal age of consent to homosexuals. Such measures have now reached the stage that requires the Court and Commission to acknowledge the existence of this European consensus and to apply heightened Article 14 review to laws that fix a higher age of consent for homosexuals.

The morality and social protection justifications raised by the Contracting States cannot survive this more searching inquiry. Indeed, these justifications, when closely scrutinized, are indistinguishable from irrational fear of and prejudice against homosexuals.

377 See notes 321-43 and accompanying text supra.
378 Id.
379 See notes 302-20, 350-55 and accompanying text supra.
380 See notes 357-76 and accompanying text supra.
381 See notes 191-93 and accompanying text supra.
382 An additional justification for applying a more stringent standard of discrimination review is provided by the strong protection which the tribunals give to individual privacy rights. See note 71 and accompanying text supra.
383 Professor David Richards has argued that the government’s moral interest in deterring homosexuality is inextricable from prejudice against homosexuals. See Richards, Constitutional Legitimacy and Constitutional Privacy, 61 N.Y.U. L. Rev. 800, 854 (1986). Heterosexist morality, he concludes, serves as the basis for denying homosexuals their rights in much the
Moreover, these justifications have no basis in fact. Decriminalization has not increased the number of homosexuals in Europe, nor has it led to a decline in moral standards. The concurring views of experts have also shown that adult homosexuals pose no greater threat of harm to minors than do adult heterosexuals. Nor is there a danger that adolescents will be enticed to become homosexuals by being exposed to them, since sexual orientation is fixed early in life.

Thus, the only justification remaining for enforcing the laws is the government's belief that homosexuals are inferior and that homosexuality ought to be discouraged, a premise which has been implicit in the Contracting States' arguments before the Commission. These justifications are similar to those struck down as illegitimate in *Marcx v. Belgium* and *Inze v. Austria*. If protection of majoritarian views concern for negative public opinion, and a desire to uphold conventional morality are invalid grounds for upholding laws disadvantaging illegit-

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385 See R. Geier, *Hidden Victims: The Sexual Abuse of Children* 75 (1979); Hindley, supra note 358, at 597; Speijer Committee Report, supra note 262, at 22; West, supra note 367 at 150.


389 See id.

imate children, then the need to "protect" adolescents from exposure to homosexuality and to guard against a decline in moral standards should similarly be unacceptable reasons for imposing disproportionate criminal sanctions on homosexuals.

Even assuming that the Contracting States somehow could be seen as having legitimate interests in protecting the present moral make-up of their societies and in determining the sexual orientation of their nationals, those interests cannot survive the more exacting means-ends analysis required by heightened Article 14 review.\textsuperscript{391} As shown in Part I, the Contracting States' ability to impose majoritarian moral standards on adult sexual actors was rejected conclusively by the Court in \textit{Dudgeon}.\textsuperscript{392} Thus, the issue which now must be resolved is not whether morals are an appropriate basis for proscribing non-traditional sexual conduct, but rather the point at which individual liberty—the right to choose one's sexual partners and maintain a non-traditional sexual identity—must be limited by the need to protect others from harm.\textsuperscript{393} If the Court is to follow the teachings of \textit{Dudgeon} and \textit{Norris} and continue to protect a sphere of privacy from the moral sentiments of the majority, it must make a more precise evaluation of who is being harmed and when harm actually occurs. The careful means-ends analysis required by heightened Article 14 review would make this evaluation possible.

A Contracting State's interest in controlling an individual's sexual orientation cannot be achieved by high age-of-consent laws which impose restrictions on homosexual adolescents whose sexual identity has been fixed in early childhood.\textsuperscript{394} Such an objective can be accomplished only by intervention at the earliest stages of childrearing, if at all.\textsuperscript{395} Moreover, a higher age of consent serves only to injure homosexual adolescents,\textsuperscript{396} who are denied the ability to engage in meaningful sexual

\textsuperscript{391} See text accompanying notes 193-200 supra.
\textsuperscript{393} See J. Bentham, supra note 392, at 159; J. Mill, supra note 392, at 93.
\textsuperscript{394} See note 386 supra.
\textsuperscript{395} See Richards, supra note 386, at 1335.
relationships with the partners of their choice after the period when government intrusion could have had an effect on their sexual orientation.\textsuperscript{397} Thus, the laws force homosexual adolescents to repress a central and intimate aspect of identity\textsuperscript{398} at a time when they most need support.\textsuperscript{399} They also encourage anti-homosexual animus.\textsuperscript{400}

The Contracting States' legitimate concern about harmful sexual contact between adults and adolescents can be addressed adequately by imposing criminal sanctions on adults who engage in non-consenting or violent sexual activity.\textsuperscript{401} Legislation to prevent adults in positions of authority from unduly influencing minors also can be used.\textsuperscript{402} Such narrowly tailored legislation will achieve the Contracting States' purpose just as effectively as the use of overbroad laws fixing a higher age of consent for homosexuals.

Unequal age-of-consent laws are, for these reasons, incompatible with the Convention. Accordingly, the Court and the Commission should, at the first opportunity, set the age of consent for homosexuals at the age in force for heterosexuals and lesbians in the Contracting State under review. The tribunals would thus protect homosexuals' Article 14 rights while respecting each Contracting State's margin of appreciation to impose restrictions on all forms of sexual identity.

CONCLUSION

The European Court and Commission have made significant strides towards providing effective human rights protection to homosexual adults during the last decade. In \textit{Norris v. Ireland} and \textit{Dudgeon v. United Kingdom}, the European Court and Commission declared that laws prohibiting adult consensual sodomy were incompatible with the Convention's right to privacy. Yet the tribunals have not taken the further step of requiring the Contracting States to impose equal age-of-consent laws for homosexuals, lesbians, and heterosexuals.

This failure has occurred in part because the Court and Commission have analyzed the age-of-consent issue solely under the right to privacy

\textsuperscript{397} This is particularly true for the 1967 Act, which prohibits homosexual relations between consenting males under the age of 21. See 1967 Act, supra note 251, § 1.

\textsuperscript{398} See Richards, supra note 386, at 1327-28 (sexual identity is fundamental aspect of human experience).

\textsuperscript{399} See Speijer Committee Report, supra note 262, at 22 (homosexual adolescents benefit from positive reinforcing contacts with homosexual adults).

\textsuperscript{400} See West, supra note 367, at 157-59.

\textsuperscript{401} See Policy Advisory Committee Report, supra note 357, at 27 (minority members) (unwilling victims can be adequately protected by laws on assault).

\textsuperscript{402} See id. at 17; Hindley, supra note 358, at 596-97 (arguing that restrictions on certain relationships can be imposed if age of consent is equalized at 16); Horstkotte, supra note 373, at 202 (same, but advocating age of 14).
guaranteed by Article 8, taking a narrow view of the European consensus which is central to finding a violation of the Convention. In particular, the tribunals simply have noted that there is a European-wide agreement on the need for some homosexual age of consent. But the tribunals have thus far ignored the possibility of analyzing consensus under Article 14, the Convention's non-discrimination article. This analysis would require the Court and Commission to compare the homosexual, lesbian, and heterosexual ages of consent in force in the Contracting States. This more precise consensus analysis reveals that there has been a significant movement to equalize the age of consent in the last decade, a movement which has been supported by international legislation and the concurring opinions of European criminological and sociological experts.

By failing to acknowledge this evolving consensus, the tribunals have permitted outdated ideas about homosexuality to serve as legitimate bases for upholding higher age-of-consent laws. This failure to recognize the progressive views on homosexuality in Europe is inconsistent with the tribunals' commitment to interpreting the Convention in light of contemporary European mores. Moreover, it allows a fundamental wrong to go unredressed.403

A doctrinally sound position does exist, however, within the context of the Convention, to provide protection to homosexuals. By applying the heightened Article 14 standard to the higher homosexual age of consent in the manner proposed by this Note, the Court and Commission could effectively rebut the arguments used by the Contracting States to

403 European advocates for homosexual rights have realized the intransigence of the Commission's position on the age of consent and are currently working on a protocol to the Convention. See Danish Nat'1 Org. for Gays and Lesbians, Study-Conference on the Possibilities of Expanding the European Convention on Human Rights to Eliminate Discrimination Based on Sexual Orientation, May 26-27, 1990 (on file at New York University Law Review). The protocol would prohibit 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 . . . of human rights." Id. at 49.

Although the protocol would provide strong discrimination protection to homosexuals, several fundamental problems severely threaten its efficacy. First, the protocol would be the only Convention right guaranteeing equal protection of the laws. It thus would conflict with the Court's interpretation of discrimination as subsidiary to the Convention's other rights and freedoms. See notes 95-96 and accompanying text supra. Second, the protocol would provide homosexuals with rights which no other minority groups possess. Thus, it may increase animosity toward homosexuals by other groups who rightly could view the protocol as making homosexuality a privileged status. Finally, even if the protocol is ratified by the requisite number of Contracting States, it is unlikely to provide substantially more protection to homosexuals then presently exists, since those states which are likely to ratify it already have national legislation prohibiting discrimination on the basis of sexual orientation.

This Note's theory of providing protection to homosexuals under the existing Convention framework would be a far less drastic and ultimately more broad-based method of discrimination protection, since heightened Article 14 review could be applied to any Contracting State's actions consistently with the Convention's developing jurisprudence.
support such legislation. Having applied heightened Article 14 review in this context, the Court and Commission would then have the means to deal more effectively with other forms of discrimination, both against homosexuals and other disadvantaged minorities.