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## Proposals for Progress: Sodomy Laws and the European Convention on Human Rights

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# PROPOSALS FOR PROGRESS: SODOMY LAWS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Moral people, as they are termed, are simply beasts. I would sooner have fifty unnatural vices, than one unnatural virtue. It is unnatural virtue that makes the world, for those who suffer, such a premature Hell.\*

## INTRODUCTION

While both heterosexual and homosexual<sup>1</sup> people may often be prosecuted for consensual sodomy, these laws disproportionately affect the lives of gay and lesbian people,<sup>2</sup> often providing the justification for other discrimination, including employment, child custody, and housing.<sup>3</sup> Even unenforced sodomy laws permit the government to use the law as a weapon against gay and lesbian persons.<sup>4</sup> Despite the modera-

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\* Letter from Oscar Wilde (1897), *quoted in* JEFFREY WEEKS, *COMING OUT: HOMOSEXUAL POLITICS IN BRITAIN, FROM THE NINETEENTH CENTURY TO THE PRESENT* 33 (1977). In 1895, after Wilde was convicted of committing "indecent" acts in private with other men, he was sentenced to two years' imprisonment. *THE THREE TRIALS OF OSCAR WILDE* 85 (H. Montgomery Hyde ed., 1956) (examining the criminal proceedings against and the conviction of Oscar Wilde).

1. Some lesbian women and gay men may find the word "homosexual" objectionable due to its stigmatized association with mental disease. See VERN L. BULLOUGH & BONNIE BULLOUGH, *SIN, SICKNESS, AND SANITY: A HISTORY OF SEXUAL ATTITUDES* 197-212 (1977) (describing the interaction between the medical labeling and the stigmatization of homosexuality). However, since the European judicial system relies solely upon the word "homosexual" in its documents, the use of the word "homosexual" is appropriate when referring to these documents. Nevertheless, where possible, the words "homosexual," "lesbian," and "gay" are used as adjectives, rather than as nouns, to avoid reducing the identities of a significant population of women and men to their sexual acts and attractions.

2. David A. Catania, *The Universal Declaration of Human Rights and Sodomy Laws: A Federal Common Law Right to Privacy for Homosexuals Based on Customary International Law*, 31 AM. CRIM. L. REV. 289, 292 (1994).

3. See EDITORS OF THE HARVARD LAW REVIEW, *SEXUAL ORIENTATION AND THE LAW* 11 n.10 (1989).

4. RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 49-62 (1988). Many have argued that sodomy laws "effectively criminalize the 'status' of being a homosexual" since not all homosexual persons are sexually active, yet unenforced sodomy laws often continue to adversely affect them. Catherine E. Blackburn, Comment, *Human Rights in an International Context: Recog-*

tion of both penalties and enforcement, the threat and stigma<sup>5</sup> of sodomy laws still continue.

Sodomy laws must be challenged and invalidated in order to lay the groundwork for attaining equal rights for lesbian and gay people. Professor Mohr observed the paradox in aspiring to secure gay rights while sodomy laws are still enforced: "[a]s an invisible minority, gays cannot fight for the right to be open about being gay, unless gays are already open about it; and gays cannot reasonably be open about being gay, until gays have the right to be openly gay."<sup>6</sup>

While many legal systems have invalidated their sodomy laws,<sup>7</sup> the United States Supreme Court continues to lag behind since upholding Georgia's sodomy statute in 1986.<sup>8</sup> Re-

nizing the Right of Intimate Association, 43 OHIO ST. L.J. 143, 152 (1982).

5. Even if sodomy laws are not regularly enforced, their existence can significantly influence both societal attitudes towards homosexual persons, as well as the self-images of lesbian and gay persons themselves. See David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 1006-09 (1979). For a discussion of the effects of laws which attempt to enforce the state's perception of sexual morality, see H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 22 (1966). Additionally, the actual existence of sodomy laws can influence the way judges apply the laws in general. See MOHR, *supra* note 4, at 55-56. For a discussion of how sodomy laws can affect decisions under United States immigration law, see Shannon Minter, Note, *Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 CORNELL INT'L L.J. 771 (1993).

6. MOHR, *supra* note 4, at 187.

7. Although at one time, all states in the United States prohibited sodomy, currently, sodomy laws remain on the books in twenty-four states and the District of Columbia. EDITORS OF THE HARVARD LAW REVIEW, *supra* note 3, at 9. Furthermore, Bermuda, Estonia, Ireland, the Isle of Man, Latvia, Moldova, Russia, and Ukraine have all invalidated their sodomy laws within the last three years. *Moldova has Legalised Homosexuality*, July, 1995, available in >gopher://seta.fi; Julie Dorf, *Gay Activists: Think Globally, Act Globally*, N.Y. NEWSDAY, June 26, 1994, at A31, A32; Tony Faragher & John Arlidge, *Manx MPs Vote to Legalise Homosexuality*, INDEPENDENT (London), Apr. 1, 1992, at 2. In the Isle of Man, twenty-one men were arrested in February, 1992 for participating in sexual acts in a public lavatory. *Id.* Sadly, one man, a divorcee and father, was found dead in his fume-filled car shortly after he appeared in court. *Id.* The vote to abolish the sodomy law came two days before twenty men were to appear in court, charged with gross indecency. *Id.*

8. *Bowers v. Hardwick*, 478 U.S. 186 (1986) (consensual homosexual behavior does not fall within the protection of the United States Supreme Court's previously-articulated right to privacy). For a comparison of *Bowers* and the sodomy challenges in the European human rights legal system, see Jennifer F. Kimble, Note, *A Comparative Analysis of Dudgeon v. United Kingdom and Bowers v. Hardwick*, 5 ARIZ. J. INT'L & COMP. L. 200 (1988); see also Markus D. Dubber, Note, *Homosexual Privacy Rights Before the United States Supreme Court and the European*

cently, the United Nations Human Rights Committee<sup>9</sup> ruled sodomy statutes violate the International Covenant on Civil and Political Rights.<sup>10</sup> Further, the European Court of Human Rights (Court) has repeatedly ruled that statutes criminalizing private, consensual homosexual activity between adult men violate the European Convention for the Protection of Fundamental Freedoms and Human Rights (Convention), namely Article 8,<sup>11</sup> which protects the individual's right to privacy.

This Note will critique the Court's use of the right to privacy in invalidating sodomy statutes.<sup>12</sup> While the decriminalization of sodomy is a significant progressive step, the Court's use and understanding of Article 8 is flawed and ineffective in achieving for lesbian women and gay men the fundamental freedoms and human rights that the Convention aims to protect and maintain.<sup>13</sup>

Part I will explore the background and history of sodomy laws and describe the mandated guarantees under the Convention. Part II will analyze the change in treatment of sodomy laws under the Convention: initially being upheld and justified under the Convention; then later being deemed to violate the Convention's guaranteed right to privacy. Part III will examine

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*Court of Human Rights: A Comparison of Methodologies*, 27 STAN. J. INT'L L. 189 (1990).

9. Article 28(1) of the International Covenant on Civil and Political Rights establishes the Human Rights Committee to implement the Covenant's functions. DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 44 (1991).

10. The United Nations Human Rights Committee ruled that a sodomy law in Tasmania, the smallest state in Australia, violated Articles 2 and 26 of the Covenant, to which Australia is a signatory. See *Int'l Law Notes*, 1994 LESBIAN & GAY L. NOTES 49, 56. For a discussion of the need for the United States judicial system to reexamine *Bowers* in light of the Human Rights Committee's decision, see Brenda Sue Thornton, *The New International Jurisprudence on the Right to Privacy: A Head-On Collision With Bowers v. Hardwick*, 58 ALB. L. REV. 725 (1995). See also Laurence R. Helfer & Alice Miller, *Human Rights and Sexual Orientation: Developments in the United Nations, the United States and Around the World*, 9 HARV. HUM. RTS. J. (forthcoming 1996) (manuscript, on file with the author) (discussing the potential impact of the Human Rights Committee's decision on the global litigation and lobbying efforts for lesbian and gay rights).

11. See *infra* text accompanying note 45 for the text of Article 8.

12. Unless otherwise noted, this Note will imply consensual sexual acts when analyzing sodomy statutes.

13. See EUROPEAN CONVENTION ON HUMAN RIGHTS-COLLECTED TEXTS 4 (1987) [hereinafter COLLECTED TEXTS].

the enduring anti-gay discrimination in the Council of Europe<sup>14</sup> (Council) and demonstrate how the Convention has failed to fully protect lesbian and gay persons even after the invalidation of sodomy laws. Lastly, in Part IV, this Note will advance alternative methods for the European human rights legal system to use to invalidate sodomy statutes, as well as many other discriminatory restrictions on the lives of lesbian and gay persons, which will help to ensure the equal treatment and application of the Convention to lesbian women and gay men in the member states.<sup>15</sup>

## I. SODOMY LAWS AND THE CONVENTION

### A. *History of Sodomy Laws*

The word "sodomy" is derived from the Old Testament story in which the cities of Sodom and Gomorrah were once believed to have been destroyed because of "rampant" homosexuality.<sup>16</sup> Sodomy laws typically prohibit "copulation with a

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14. The 36-nation Council of Europe strives to promote democracy and human rights. All the states in Western Europe are members. PETER TATCHELL, *OUT IN EUROPE: A GUIDE TO LESBIAN AND GAY RIGHTS IN 30 EUROPEAN COUNTRIES* 9 (1990); D. LASOK & J.W. BRIDGE, *LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES* 9 (5th ed. 1991). Over the last three years, several Eastern European states have become members of the Council, while five others have applied and are currently awaiting membership. See *infra* note 40. Although two member states of the Council of Europe have not yet signed or ratified the Convention, the author refers to the entire Council since all members are obliged to eventually conform their laws with the mandates of the Convention. The term "member states" refers to the 33 ratifying parties of the Convention. See *infra* note 40.

15. The alternatives proposed in this Note are based upon rights which have already been incorporated into the Convention and upon prior case-law of the European Commission of Human Rights and the European Court of Human Rights. Urging improved protection against sexual orientation discrimination, other authors have advocated new protocols to the Convention aiming to specifically condemn such discrimination. See, e.g., ERIC HEINZE, *SEXUAL ORIENTATION: A HUMAN RIGHT* 291-303 (1995) (proposing a Model Declaration of Rights Against Discrimination on the Basis of Sexual Orientation); Laurence R. Helfer, *Lesbian and Gay Rights as Human Rights: Strategies for a United Europe*, 32 VA. J. INT'L L. 157 (1991-92) (advocating either enhanced Article 14 anti-discrimination protection of all rights or the creation of a new protocol aimed at prohibiting anti-gay discrimination of all rights already guaranteed in the Convention); Daniel J. Kane, Note, *Homosexuality and the European Convention on Human Rights: What Rights?*, 11 HASTINGS INT'L & COMP. L. REV. 447 (1988) (proposing the establishment of sexual self-determination as a fundamental freedom).

16. *Genesis* 18:20-19:29. However, it is now widely accepted by many biblical scholars that the sin committed by Sodom and Gomorrah was actually inhospitality to strangers. Edward Tivnan, *Homosexuals and the Churches*, N.Y. TIMES, Oct.

member of the same sex or with an animal."<sup>17</sup> With their history in the Old Testament, and in certain limited definitions of "natural" sexual behavior,<sup>18</sup> sodomy laws continue to criminalize the intimate acts of millions of people performed in the privacy of their homes.<sup>19</sup>

In Roman Europe, criminal sanctions were first established as punishment for male-male sexual relations.<sup>20</sup> After the fall of the empire, prohibitions for homosexual activity shifted to the religious domain.<sup>21</sup> However, during the Middle Ages, in Christian Europe, secular governments once again assumed a more significant role in condemning homosexual activity with the enactment and enforcement of criminal sodomy laws in several European states.<sup>22</sup> Yet, until the thirteenth century, tribal and common law treated sexual crimes

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11, 1987, § 6 (Magazine), at 84, 89. For an assessment of the different interpretations of the biblical story of Sodom and Gomorrah, see JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* 92-98 (1980).

17. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1120 (1986). However, other definitions do not distinguish between heterosexual and homosexual sodomy. For instance, one definition is "carnal copulation by human beings with each other against nature, or with a beast." BLACK'S LAW DICTIONARY 1247 (5th ed. 1979). Other definitions rely principally on the occurrence of penile penetration such as: "the penetration of the male organ into the mouth or anus of another." WEBSTER'S THIRD NEW INT'L DICTIONARY 2165 (1981).

18. "Intercourse is supposed to be natural and in it a man and a woman are supposed to show and do what each is by nature. . . . Society makes laws that say who will put what where when; and though folks keep getting it wrong, law helps nature out by punishing those who are not natural enough . . . ." ANDREA DWORKIN, *INTERCOURSE* 149 (1987); see also BOSWELL, *supra* note 16, at 303-32 (examining the origins of the "nature" arguments condemning homosexuality); BULLOUGH & BULLOUGH, *supra* note 1, at 24-40 (describing the "nature" argument against sodomy).

19. Some punishments seem incredibly cruel. For instance, in Iran, a fourth offense for same-sex sodomy warrants the death penalty, while in China, convicted sodomists receive sexual orientation altering therapy, including electroshock treatment. Dorf, *supra* note 7, at A32; see also HEINZE, *supra* note 15, at 3-9 (describing reported incidents of violence and discrimination against lesbian and gay persons).

20. For a discussion of how Roman law treated homosexual sodomy, see MICHAEL GOODICH, *THE UNMENTIONABLE VICE* 75-77 (1979); see also *HOMOSEXUALITY: DISCRIMINATION, CRIMINOLOGY, AND THE LAW* viii (Wayne R. Dynes & Stephen Donaldson eds., 1992) [hereinafter *CRIMINOLOGY AND LAW*].

21. *CRIMINOLOGY AND LAW*, *supra* note 20, at viii. For a thorough examination of the church's treatment of homosexuality, see GOODICH, *supra* note 20, at 3-70.

22. *CRIMINOLOGY AND LAW*, *supra* note 20, at viii-ix.

relatively leniently, often imposing fines rather than capital punishment.<sup>23</sup> However, beginning in the thirteenth century, society once again began to view sodomy as a sin comparable to homicide deserving of the greatest dishonor and shame.<sup>24</sup>

While lesbian sexual activity was never explicitly a criminal offense,<sup>25</sup> male homosexual relations were completely prohibited in the United Kingdom by the Sexual Offenses Act of 1956 (Act).<sup>26</sup> In 1967, the Act was amended to decriminalize "private" homosexual activity between men over twenty-one-years old,<sup>27</sup> in response to the recommendations of the report

23. GOODICH, *supra* note 20, at 71; *see also* BOSWELL, *supra* note 16, at 169-266 (providing a detailed account of society's relative tolerance for homosexuality until the thirteenth century).

24. GOODICH, *supra* note 20, at 71; BOSWELL, *supra* note 16, at 276-302 (recounting society's tougher proscriptions against homosexuality beginning in the thirteenth and fourteenth centuries).

25. Although women who participated in same-sex sexual activity were ridiculed and often harassed, lesbian sexual activity was usually considered a less serious offense than male-defined sodomy. *See* Theo van der Meer, *Tribades on Trial: Female Same-Sex Offenders in Late Eighteenth-Century Amsterdam*, in *FORBIDDEN HISTORY: THE STATE, SOCIETY, AND THE REGULATION OF SEXUALITY IN MODERN EUROPE* 189, 201-02 (John C. Fout ed., 1992). For instance, during the eighteenth century in the Netherlands, women represented only five percent of the persons prosecuted for same-sex acts; while the average penalty for men was twelve years' imprisonment, the average punishment for women was six years and was always reduced. *Id.* at 190, 202. Furthermore, in London, sexual relations between women were never prosecuted. Randolph Trumbach, *Sex, Gender, and Sexual Identity in Modern Culture: Male Sodomy and Female Prostitution in Enlightenment London*, in *FORBIDDEN HISTORY: THE STATE, SOCIETY, AND THE REGULATION OF SEXUALITY IN MODERN EUROPE* 89, 94 (John C. Fout ed., 1992). Indeed, it has been reported that when Queen Victoria signed the Criminal Law Amendment Act of 1885 which originally sought to enforce penalties for both female and male homosexual conduct, she deleted all references to lesbianism since she believed that lesbians simply did not exist. Renee Graham, *An Overdue Addition to Lesbian History*, *BOSTON GLOBE*, Apr. 1, 1993, at 64.

26. TATCHELL, *supra* note 14, at 29; *see also* Sexual Offenses Act, 1956, 4 & 5 Eliz. 2, ch. 69, § 12 (Eng.). *See generally* BETWEEN THE ACTS: LIVES OF HOMOSEXUAL MEN 1885-1967 (Kevin Porter & Jeffrey Weeks eds., 1991) (interviews of gay men describing their lives when homosexual behavior was completely illegal in Britain).

27. Sexual Offenses Act, 1967, ch. 60, § 1 (Eng.). The Act states the following: "a homosexual act in private is not an offence provided that the parties consent to it and have attained the age of 21 years." *Id.* § 1(1). However, the Act continues by stating that:

(2) An act which would otherwise be treated for the purposes of this Act as being done in private shall not be so treated if done—

(a) when more than two persons take part or are present; or (b) in a lavatory to which the public has or is permitted to have access, whether on payment or otherwise.

of the Committee on Homosexual Offences and Prostitution (Wolfenden Report).<sup>28</sup>

Commissioned by the English Parliament to study and make recommendations on homosexuality and prostitution in the United Kingdom,<sup>29</sup> the Wolfenden Report urged the government that it was improper for the law to concern itself with what was done in private unless it could be shown to adversely affect the public.<sup>30</sup> Public moral conviction could not serve as a valid basis for overriding individual privacy and personal liberties<sup>31</sup> since the only time governmental power may be rightfully exercised over an individual is to prevent harm to others.<sup>32</sup>

The Wolfenden Report did not explicitly define the term "in private," but recommended the government use the same criteria for both heterosexual and homosexual activity.<sup>33</sup> Although the Wolfenden Report suggested the decriminalization of male homosexual acts in the limited private realm, it also aspired to eliminate any public expression of homosexual activity.<sup>34</sup> For instance, the Wolfenden Report recommended strict

*Id.* § 1(2)(a)-(b).

The Act, which still does not apply to those in the armed forces or the merchant navy, initially applied only in England and Wales, but was extended to Scotland in 1980, and Northern Ireland in 1982; even under the amendment, however, homosexual activity is still illegal if acts occur in a place where others could have access including hotel rooms and prisons. TACHELL, *supra* note 14, at 29. Because the Act explicitly does not apply to public lavatories, police often hide near toilets to "catch" homosexual men having sex. Kees Waaldijk, *The Legal Situation in the Member States, in* HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE: ESSAYS ON LESBIAN AND GAY RIGHTS IN EUROPEAN LAW AND POLICY 71, 89 (Kees Waaldijk & Andrew Clapham eds., 1993) [hereinafter HOMOSEXUALITY ISSUES].

28. SCOTTISH HOME DEPARTMENT, REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION, 1957, CMND 247 [hereinafter WOLFENDEN REPORT].

29. *Id.* ¶ 1.

30. *Id.* ¶ 14.

31. *Id.* ¶ 61.

32. See generally JOHN STUART MILL, ON LIBERTY (Currin V. Shields ed., 1956). Many scholars have debated the issue of whether the law can, and/or should be utilized to protect public morality. Compare PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 24 (1965) (maintaining that since society can, and should enforce public morality to preserve its own cohesion, the Wolfenden Report's main error was attempting to distinguish between sin and crime) with HART, *supra* note 5, at 82-83 (arguing that society does not have the right to enforce its own morality and related the Wolfenden Report's public/private dichotomy to Mill's theories on opposition to governmental interference with an individual's activities that do not adversely affect the public).

33. WOLFENDEN REPORT, *supra* note 28, ¶¶ 64, 355.

34. See generally GARY W. KINSMAN, THE REGULATION OF DESIRE: SEXUALITY

police surveillance of public areas, increased employment discrimination, and a higher age of consent for homosexual activity.<sup>35</sup>

The Wolfenden Report, in effect, established a public/private dichotomy, in which homosexual persons are protected only within the limited private sphere. This dichotomy subsequently influenced the European human rights legal system in its decisions affecting lesbian and gay persons.<sup>36</sup>

## B. *The European Convention on Human Rights*

Challenges to sodomy statutes in the member states have been based upon the Convention. Reaffirming the member states' belief in "[f]undamental [f]reedoms . . . [as] the foundation of justice and peace in the world," the Convention aims to secure the universal and effective recognition of human rights and fundamental freedoms, and to achieve "the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration."<sup>37</sup>

### 1. History of the Convention

The Council of Europe was established in 1949 as a peaceful association of democratic nations proclaiming their faith in the collective rule of law and the "spiritual and moral value of . . . [the member states'] heritage."<sup>38</sup> The Convention,<sup>39</sup>

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IN CANADA 139-43 (1987) (critiquing the Wolfenden Report's public/private dichotomy as a social, rather than natural distinction).

35. WOLFENDEN REPORT, *supra* note 28, ¶¶ 72, 114-21, 218-21.

36. *See infra* Part II.

37. COLLECTED TEXTS, *supra* note 13, at 4. Since its ratification, over 16,000 complaints have been received under the Convention. Kevin Boyle, *Europe: The Council of Europe, the CSCE, and the European Community*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 133, 135 (Hurst Hannum ed., 2d ed. 1992).

38. A. H. ROBERTSON & J.G. MERRILLS, HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS 2 (3d ed. 1993) (quoting the Preamble of the Statute of the Council of Europe).

39. One source for the Convention was the Universal Declaration of Human Rights, a non-legally binding agreement adopted by the General Assembly of the United Nations in 1948. *Id.* at 6. Although similar in language to the rights guaranteed in the Convention, there has never been any challenge to sodomy laws under the Declaration. While non-binding, the Declaration was intended as a moral authority for the rest of the world. *Id.* All member states are bound to respect the fundamental principles of the Convention; however, each signatory state determines its own rules to establish and maintain the guaranteed freedoms within its own territory. *Id.* at 8.

signed by the member states of the Council of Europe in 1950,<sup>40</sup> was entered into force in 1953.<sup>41</sup>

Under Article 1 of the Convention, an immediate obligation is placed upon the member states to "secure to everyone within their jurisdiction[s]" the rights defined in the Convention.<sup>42</sup> However, both the Convention and general international law are silent as to the appropriate procedures which member states must follow in conforming their own municipal laws to accommodate the mandates of the treaty.<sup>43</sup> Thus, since no uniform procedure exists, the Convention has the force of law in many countries, while in others, it does not. Where the Convention is not part of the domestic law, the Convention may appear much less significant, and a complainant wishing to rely upon the Convention's provisions must be prepared to take her case to the Council of Europe's judicial system in Strasbourg.<sup>44</sup>

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40. *Id.* at 11. Currently, the contracting states who have ratified the Convention are Andorra, Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Apr. 11, 1950, Europ. T.S. No. 5 (entered into force Mar. 9, 1953) (Chart of Signatures and Ratifications); AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 351 (1994); *see also Andorra Becomes 33rd Member of Council of Europe*, Agence France Presse, Nov. 10, 1994, available in LEXIS, News Library, CURNWS File; *Latvia Joins Council of Europe*, UPI, Feb. 10, 1995, available in LEXIS, News Library, UPI File; *European Convention on Human Rights Protection Ratified*, BBC, June 24, 1995, available in LEXIS, Asiapc Library, BBCSWB File. Estonia has signed, but has not yet ratified the Convention. AMNESTY INTERNATIONAL, *supra*. Additionally, Albania and Moldova have recently joined the Council of Europe. *Albania, Moldova Join Council of Europe*, Deutsche Presse-Agentur, July 10, 1995, available in LEXIS, News Library, CURNWS File. While Belarus, Croatia, the former Yugoslav Republic of Macedonia, and Ukraine have applied and are currently awaiting membership to the Council, Russia's bid to join was suspended after its attack on the republic of Chechnya. *Chechnya Situation Blocks Russia From Council of Europe*, Agence France Presse, Feb. 15, 1995, available in LEXIS, News Library, CURNWS File.

41. ROBERTSON & MERRILLS, *supra* note 38, at 13.

42. COLLECTED TEXTS, *supra* note 13, at 4.

43. ROBERTSON & MERRILLS, *supra* note 38, at 26.

44. *Id.* at 27. In countries where the Convention has been incorporated into the domestic law, a complainant may use the national legal system since the municipal court will directly apply the Convention's principles. *Id.* Recently, a bill seeking to incorporate the Convention into United Kingdom law cleared the House of Lords; however, because the government opposes the bill, it may be blocked in the House of Commons. Andrew Evans, *Rights Bill Clears Lords*, Press Ass'n

## 2. Guaranteed Rights Under the Convention

The Convention guarantees certain rights to all people within the jurisdiction of its member states. For instance, the Convention, like Article 12 of the Universal Declaration of Human Rights, provides a guaranteed right to privacy. Article 8 states:

1. Everyone has the right to respect for private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>45</sup>

Although Article 8 of the Convention explicitly guarantees a right to privacy for all individuals, it does not attempt to clearly define the notion of privacy. Instead, the judicial system of the Council of Europe, including the Court and the European Commission of Human Rights (Commission), is required to interpret the idea itself. For instance, the Commission has referred to private life as the right to live as one wishes, protected from publicity and "the right to establish and to

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Newsfile, May 1, 1995, available in LEXIS, News Library, CURNWS File. See generally DAVID KINLEY, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: COMPLIANCE WITHOUT INCORPORATION* (1993) (examining the incorporation debate in the United Kingdom and advancing alternative proposals to secure that United Kingdom legislation complies with the mandates of the Convention). Nonetheless, support for requiring incorporation is found, by analogy in the European Court of Justice's ruling that the community treaties, legislation, and decisions of the European Union may have direct effect within each member state regardless of a particular nation's legal system, based on a goal of effectiveness and the renunciation of sovereignty rights by the member states in favor of the European Union's legal system. P. VAN DIJK & G.J.H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 12-13 (2d ed. 1990). Under this dualistic system, an individual complainant derives her rights directly from international law and may invoke the Convention, which must then be applied by the municipal courts. *Id.* at 13.

Further support for implicitly required incorporation is found in the preamble of the Convention which states that the fundamental freedoms articulated within are best protected "on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend . . ." COLLECTED TEXTS, *supra* note 13, at 4.

45. COLLECTED TEXTS, *supra* note 13, at 7.

develop relationships with other human beings, especially in the emotional field, for the development and fulfillment of one's own personality."<sup>46</sup>

Article 10 of the Convention articulates the guaranteed right of freedom of expression for all people within the member states. It states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprise.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>47</sup>

The Convention also establishes a right to freedom of association. Article 11 states:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall

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46. *X. v. Iceland*, App. No. 6825/74, 5 Eur. Comm'n H.R. Dec. & Rep. 86, 87 (1976). In a resolution of the Parliamentary Assembly of the Council of Europe, the right to privacy was defined as "the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts . . . [and] protection from disclosure of [confidential] information . . . ." EUROPEAN CONVENTION ON HUMAN RIGHTS-COLLECTED TEXTS 911 (1979).

47. COLLECTED TEXTS, *supra* note 13, at 8.

not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.<sup>48</sup>

Article 14 of the Convention is a non-discrimination clause which can only be used to ensure non-discrimination with respect to the other rights guaranteed in the Convention. It states: "[t]he 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."<sup>49</sup>

### 3. Bringing a Complaint

The Convention also establishes the procedure by which applicants may complain of a member state's breach of the Convention. First, the complainant must apply to the Commission. Under Article 25, the Commission may receive petitions from any person or organization claiming to be a victim of a violation of the Convention by a member state, provided that the member state has recognized the jurisdiction of the Commission.<sup>50</sup> Under Article 26, the Commission will only entertain petitions after all domestic remedies have been exhausted.<sup>51</sup> According to Article 44, only the Commission or a member state may bring a claim before the Court.<sup>52</sup> First, the Commission must assess the admissibility of the application, and once the application is admitted, it must determine the facts and attempt to achieve a friendly settlement.<sup>53</sup> However,

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48. *Id.*

49. *Id.* at 9.

50. *Id.* at 12. All member states that have ratified the Convention have also recognized the competence of the Commission to receive individual petitions. AM-NESTY INTERNATIONAL, *supra* note 40, at 351. In 1994, the United Kingdom was the only member to refuse to agree to a Council proposal which would make an individual's right of appeal a mandatory part of the Convention. Michael Binyon & Alice Thomson, *Britain Rejects Human Rights Move*, THE TIMES (London), Mar. 19, 1994, at 2.

51. COLLECTED TEXTS, *supra* note 13, at 12. The Convention states that the exhaustion must be according to the generally recognized rules of international law; the complaint must then be filed with the Commission within six months of the member state's final decision. *Id.*

52. *Id.* at 16.

53. Boyle, *supra* note 37, at 136-37.

if the Commission finds that a state has not breached the Convention, an individual may not petition the Court.

Since its reports are not legally binding decisions, the Commission holds the view that it is not constrained by its prior reports and may reach different conclusions on similar cases. Nonetheless, the case law of the Commission has been relatively consistent.<sup>54</sup> Once the Commission concludes that there is a breach of the Convention, it may then refer the case to the Court.<sup>55</sup> Under Articles 52 and 53, the decision of the Court is final, binding on the parties and no appeal lies against it.<sup>56</sup>

Under Article 54, the execution of the judgment is overseen by the Committee of Ministers,<sup>57</sup> and is not completed until the violating member state supplies information of the measures it has taken to comply with the judgment.<sup>58</sup> Although the Committee does not have the legal means to force a breaching state to execute a judgment, it may attempt to secure compliance by placing extensive political pressure, along with the threat of expulsion from the Council of Europe, on such a state.<sup>59</sup>

## II. THE EUROPEAN COURT OF HUMAN RIGHTS AND SODOMY LAWS

Several complaints have been brought to the Commission and the Court, challenging sodomy laws. All applicants have challenged the legislation under Article 8 of the Convention, claiming that the laws interfere with their right to respect for

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54. VAN DIJK & VAN HOOF, *supra* note 44, at 117-18; J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 13-14 (2d ed. 1993).

55. Boyle, *supra* note 37, at 137. The Court consists of a number of judges equal to the number of states in the Council of Europe. *Id.*

56. COLLECTED TEXTS, *supra* note 13, at 18. Article 52 states that "[t]he judgment of the Court shall be final," while Article 53 states that "[t]he High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties." *Id.*

57. *Id.* The Committee of Ministers, whose members serve as government representatives of the Council, is the political and executive branch of the Council of Europe. Boyle, *supra* note 37, at 138.

58. COLLECTED TEXTS, *supra* note 13, at 18. Article 54 states that "[t]he judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution." *Id.*

59. VAN DIJK & VAN HOOF, *supra* note 44, at 157.

their private lives. Both the Commission and the Court have eventually concluded that sodomy laws unjustifiably interfere with the applicants' guaranteed right to privacy. However, the approach they have used has failed to adequately protect the fundamental freedoms and human rights of lesbian women and gay men in the member states.<sup>60</sup>

#### A. *Early Unsuccessful Challenges*

From 1955-78, the Commission repeatedly ruled inadmissible several applications challenging German sodomy laws, unequal age of consent laws, and their harsh punishment.<sup>61</sup> The Commission decided that sodomy laws did not interfere with the private lives of the applicants since any interference was lawful and necessary for the protection of public health or morals under Article 8(2), which restricts the right of privacy where the interference is lawful and necessary for a legitimate goal.<sup>62</sup>

Once an interference has been established under Article 8(1), the government may still prevail by proving that the interference was in accordance with the law, had a legitimate goal, and was "necessary in a democratic society" to achieve the stated goal.<sup>63</sup> In *X. v. United Kingdom*,<sup>64</sup> for example, the applicant was charged with two offenses of sodomy with two eighteen-year-old men. After his final domestic appeal of his two-and-a-half year sentence was dismissed, the applicant filed a claim with the Commission.<sup>65</sup> The Commission, although recognizing that "a person's sexual life is an important aspect of his private life" and that a conviction for sodomy violated the applicant's right to respect for his private life under Article 8, unanimously concluded that the law was necessary to protect the rights of others and to protect others from harm.<sup>66</sup>

60. See *supra* text accompanying note 37 for the goals of the Convention.

61. Kane, *supra* note 15, at 451-52; ROBERTSON & MERRILLS, *supra* note 38, at 373; see, e.g., *X. v. Federal Republic of Germany*, App. No. 5935/72, 3 Eur. Comm'n H.R. Dec. & Rep. 46 (1975); *X. v. Federal Republic of Germany*, App. No. 530/59, 1960 Y.B. Eur. Conv. on H.R. 184, 190 (Eur. Comm'n on H.R.).

62. See *X. v. Federal Republic of Germany*, 3 Eur. Comm'n H.R. Dec. & Rep. 46; *X. v. Federal Republic of Germany*, 1960 Y.B. Eur. Conv. on H.R. 184.

63. See *supra* text accompanying note 45 for the text of Article 8.

64. App. No. 7215/75, 19 Eur. Comm'n H.R. Dec. & Rep. 66, 71, 73 (1978).

65. *Id.* at 68.

66. *Id.* at 75.

The Commission used an extremely lax standard, finding that since there was a "realistic basis for the . . . Government's opinion that . . . young men [aged] eighteen to twenty-one who are involved in homosexual relationships would be subject to [detrimental] social pressures," the legislation was considered to be necessary in a democratic society under Article 8(2).<sup>67</sup>

The applicant further complained that as a result of this sodomy law, his freedom to express his love for other men within a sexual relationship was severely restricted.<sup>68</sup> The Commission, however, concluded that the sodomy law did not violate the applicant's right to freedom of expression, under Article 10,<sup>69</sup> since the "concept of 'expression' . . . concerns mainly the expression of opinion and receiving and imparting information and ideas."<sup>70</sup> According to the Commission, the Article 10 definition of freedom of expression could not be extended to encompass the notion of physical expression of feelings.

The right of privacy was also invoked in two applications by transsexuals who complained of the refusal by their national authorities to recognize their new status as a result of their sex conversion operations. In the first case, the Commission ruled the complaint admissible<sup>71</sup> and a "friendly settlement" was reached soon afterwards.<sup>72</sup> In the second, the Commission ruled that the complaint was admissible,<sup>73</sup> and then concluded that Belgium's refusal to "recognise an essential element of [the applicant's] personality, namely, his sexual identity resulting from his changed" physical, social, and emotional role amounted to a failure to respect his private life.<sup>74</sup> The

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67. *Id.* at 78.

68. *Id.* at 80.

69. See *supra* text accompanying note 47 for text of Article 10.

70. *X. v. United Kingdom*, App. No. 7215/75, 19 Eur. Comm'n H.R. Dec. & Rep. 66, 80 (1978).

71. *X. v. Federal Republic of Germany*, App. No. 6699/74, 11 Eur. Comm'n H.R. Dec. & Rep. 16, 25 (1977).

72. *X. v. Federal Republic of Germany*, App. No. 6699/74, 17 Eur. Comm'n H.R. Dec. & Rep. 21, 24 (1979). Specifically, the government decided that it would correct entries in the birth register to recognize sex-conversions in cases of irreversible transsexualism. *Id.*

73. *Van Oosterwijck v. Belgium*, App. No. 7654/76, 11 Eur. Comm'n H.R. Dec. & Rep. 194 (1978).

74. *Van Oosterwijck v. Belgium*, 36 Eur. Ct. H.R. (ser. B) at 26 (1980) (citing Report of the Commission, adopted on March 1, 1979). However, the applicant's

Commission's explicit recognition that one's sexuality is an important aspect of one's personal life of which undue interference would constitute a violation of Article 8, paved the road for successful sodomy challenges.

### *B. Successful Challenges*

In *Dudgeon v. United Kingdom*,<sup>75</sup> the applicant, Jeffrey Dudgeon, a thirty-five year-old homosexual man from Belfast, challenged Northern Ireland's laws which criminalized "buggery."<sup>76</sup> Although no prosecutions had been brought from 1972-1980, no official government policy existed. In fact, Northern Ireland had proposed a draft order to bring its sodomy laws into line with those of England and Wales,<sup>77</sup> but on July 2, 1979, the government had decided not to pursue the proposed legislation.<sup>78</sup> On January 21, 1976, the police went to Dudgeon's home with a warrant for illegal drug possession, eventually charging another man with the possession of illegal drugs.<sup>79</sup> Personal papers, including Dudgeon's diaries and correspondence describing his homosexual activities, were seized.<sup>80</sup> Dudgeon was then taken to the police station and

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complaint was ultimately unsuccessful because the Court ruled that he had not yet exhausted his domestic remedies. *Van Oosterwijck v. Belgium*, 1980 Y.B. Eur. Conv. on H.R. 490 (Eur. Ct. H.R.). See also *Rees Case*, 106 Eur. Ct. H.R. (ser. A) at 19 (1986) (contrary to the Commission's unanimous decision, the Court ruled 12 to 3 that the government's refusal to alter the applicant's birth certificate to reflect her sex conversion operation did not violate Article 8); *Cossey Case*, 184 Eur. Ct. H.R. (ser. A) at 18 (1990) (same by a vote of 10 to 8); *B. v. France*, 232-C Eur. Ct. H.R. (ser. A) at 53-55 (1992) (after distinguishing *Rees* and *Cossey* because birth certificates in France were intended to be continuously updated, the Court held that France's refusal to indicate applicant's true sexual identity in such documents violated Article 8). Recently, the Commission ruled admissible a claim that the government's refusal to recognize the applicant as a legal father because he was not born a biological male violated Article 8. *Clare Dyer, Sex-Op Father Wins Ruling*, GUARDIAN (Manchester), Dec. 3, 1994, at 7.

75. 45 Eur. Ct. H.R. (ser. A) at 7 (1981).

76. Under sections 61 and 62 of the 1861 Act, buggery, defined as "sexual intercourse *per anum* by a man with a man or a woman, or *per anum*, or *per vaginam* by a man or a woman with an animal," was punishable by a maximum of life imprisonment; consent was not a defense. *Id.* at 8. No measures comparable to the 1967 Act in the United Kingdom had ever been officially introduced in Northern Ireland. *Id.* at 11.

77. See Sexual Offenses Act, *supra* note 27.

78. 45 Eur. Ct. H.R. (ser. A) at 11-14.

79. *Id.* at 15.

80. *Id.*

questioned for over four hours about his sexual life.<sup>81</sup> The police sent the investigative file to the Director of Public Prosecutions, who, along with the Attorney-General, decided it would not be in the best interest of the general public to prosecute.<sup>82</sup>

Although Dudgeon was never prosecuted, he still felt victimized by this statute and applied to the Commission to challenge the law under the Convention.<sup>83</sup> The Commission accepted the application, affirming Dudgeon's status as a victim because he had experienced fear, suffering, and psychological distress due directly to the law's existence, concluding that the "threat hanging over [the applicant] was real."<sup>84</sup>

The Commission decided that maintenance of the sodomy law constituted an interference with Dudgeon's right to respect for his private life, under Article 8.<sup>85</sup> According to the Commission, "either [the applicant] respect[s] the law and refrains from engaging . . . in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution."<sup>86</sup> Unlike the earlier sodomy challenges,<sup>87</sup> the Commission ultimately decided this interference with the applicant's privacy could not be justified. Although neither party contested that the interference was "in accordance with the law" since the police acted according to the existing legislation, the Commission ruled the law was not necessary in a democratic society to achieve the government's goal of protecting the public's health or morals.<sup>88</sup>

The Court agreed with the Commission's findings and ruled that Article 8 of the Convention had been breached.<sup>89</sup> The Court decided the word "necessary" did not have the flexibility of expressions such as "useful, reasonable, or desirable," but instead implied a "pressing social need" must exist to justify the interference.<sup>90</sup> Because the Court concluded that a bet-

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81. *Id.*

82. *Id.*

83. *Id.* at 16.

84. *Id.*

85. *Id.*

86. *Id.* at 18.

87. See cases cited *supra* notes 61, 64.

88. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 19 (1981) (quoting Article 8 of the Convention).

89. *Id.* at 27.

90. *Id.* at 21. This analysis was first articulated in an earlier case where the

ter understanding of homosexuality was developing, along with an increased tolerance for homosexual behavior in the United Kingdom, and in the majority of member states of the Council, no pressing need existed for the statute and it therefore must be invalidated.<sup>91</sup> The Court additionally concluded the risk of harm to the public was not sufficient justification, and nonetheless, that any such justification was outweighed by the detrimental effects which the very existence of the legislation could have on the lives of homosexual persons.<sup>92</sup>

Furthermore, the Court cautioned that public notions of morality are not conclusive in assessing the necessity of maintaining such interfering legislation, stating that "[a]lthough 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 alone cannot warrant the criminalization of consensual adult sexual behavior.<sup>93</sup> However, the Court was emphatic that decriminalization of sodomy did not imply approval of homosexuality and that "some degree of regulation of male homosexual conduct . . . [is] necessary in a democratic society . . . [which] may even extend to consensual acts committed in private."<sup>94</sup>

Unfortunately, significant questions were left unresolved since the Court refused to reach the question of whether this particular sodomy law or unequal age of consent laws for homosexual activity violated Article 14, the non-discrimination clause, in conjunction with Article 8.<sup>95</sup> For instance, although

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meaning of the phrase "necessary in a democratic society" was explored. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 22 (1976) (agreed that the word "necessary" was not synonymous with the words "indispensable," "useful," "reasonable," or "desirable" and that instead, the government must show a "pressing social need"). Although the state does have a certain margin of appreciation in assessing such a pressing need, such definitional power is not unlimited and the Court is "empowered to . . . [decide] whether a 'restriction' or 'penalty' is reconcilable . . . ." *Id.* at 23. See DR. RALPH BEDDARD, *HUMAN RIGHTS AND EUROPE* 183-85 (3d ed. 1993) (describing the protection of the state's permissible area of discretion through the margin of appreciation).

91. 45 Eur. Ct. H.R. (ser. A) at 23-24.

92. *Id.* at 24.

93. *Id.*

94. *Id.* at 20, 24.

95. Laurence R. Helfer, Note, *Finding a Consensus on Equality: The Homosexual Age of Consent and the European Convention of Human Rights*, 65 N.Y.U. L. REV. 1044, 1055, 1076-78 (1990). Article 14 prevents the Convention's otherwise permissible limitations of guaranteed rights from being imposed in a discriminato-

the applicant had also alleged a breach of Article 14, based on the differing treatment of homosexual men and that of homosexual women, the Court concluded that due to its decision that the legislation violated Article 8, it did not need to examine the claim under Article 14.<sup>96</sup> Moreover, although both the Commission and the Court decided that the legislation, as applied to men over twenty-one-years old, violated Article 8, they concluded that the higher age of consent for homosexual activity was not a violation of Article 8.<sup>97</sup>

In *Norris v. Ireland*,<sup>98</sup> the applicant, David Norris, complained about the existence of Irish laws criminalizing consensual male homosexual activity in private. While Norris was not charged with any criminal offense, the Court decided he was still legally at risk of being prosecuted, and was thus directly affected by the law since a "law which remains on the statute book, even though it is not enforced in a particular class of cases for a considerable time may be applied again in such cases at any time."<sup>99</sup> Unlike Dudgeon, Norris was not the subject of a police investigation. However, the Court ruled by eight votes to six that the statute violated Norris' privacy rights, concluding his case was virtually indistinguishable from *Dudgeon*.<sup>100</sup>

Most recently, in *Modinos v. Cyprus*,<sup>101</sup> the applicant challenged a Cypriot statute which criminalized all male homosexual activity.<sup>102</sup> The applicant successfully argued that the statute violated his right to privacy guaranteed under Article 8 of the Convention and Article 15 of the Constitution of the Re-

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ry manner. For text of Article 14, see *supra* text accompanying note 49.

96. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 26 (1981). In a 1984 magazine article, Dudgeon claimed that the Court's paltry monetary award to cover legal expenses was to punish him for his repeated efforts to force the Court to analyze his complaint under Article 14. STEPHEN JEFFREY-POULTER, PEERS, QUEERS, & COMMONS: THE STRUGGLE FOR GAY LAW REFORM FROM 1950 TO THE PRESENT 154 (1991).

97. 45 Eur. Ct. H.R. (ser. A) at 26.

98. 142 Eur. Ct. H.R. (ser. A) (1988).

99. *Id.* at 16.

100. *Id.* at 17, 23.

101. 259 Eur. Ct. H.R. (ser. A) at 7 (1993).

102. Section 171 of the criminal code of Cyprus states that "any person who . . . has carnal knowledge of any person against the order of nature; or . . . permits a male person to have carnal knowledge of him against the order of nature is guilty of a felony and is liable to imprisonment for five years." *Id.*

public of Cyprus.<sup>103</sup> Although there were no recent prosecutions under the sodomy law, Modinos could still claim to be a victim of the law because the Commission found the challenged provisions had not yet been abolished and Modinos could be affected by the Cypriot prohibition of homosexual acts.<sup>104</sup> The Court further held that the existence of this regulation of sexual life "continuously and directly effects [Modinos'] private life."<sup>105</sup>

Evidently, the Court and the Commission have been fairly consistent in their decisions affecting sodomy laws. While providing limited protection for the sexual activity of two homosexual men in the privacy of a bedroom, this approach has failed to protect gay men in other important aspects of their lives.

### *C. The Restricted Judicial Interpretation of the Right to Privacy*

In deciding that sodomy statutes violate Article 8 of the Convention, the Court has accepted a limited definition of the word "privacy." Instead of using Article 8 to invalidate all statutes criminalizing consensual sexual activity, the Court and the Commission have limited the potential scope of Article 8 to protect only those acts which occur within a restricted definition of spatial privacy.<sup>106</sup>

103. Article 15 of the Cyprus Constitution was identical to Article 8 of the Convention. *Id.*

104. *Modinos v. Cyprus*, App. No. 15070/89, 67 Eur. Comm'n H.R. Dec. & Rep. 295, 299 (1991).

105. 259 Eur. Ct. H.R. (ser. A) at 12. Because the government relied solely upon its argument that there was no interference with the applicant's privacy, the Court did not examine whether the prohibition was legitimate under Article 8(2). *Id.*

106. Upholding the conviction of five gay men for taking part in consensual sado-masochistic acts in their homes, one judge in the United Kingdom stated that although "sexual activities conducted in private between no more than two consenting adults of the same sex . . . are now lawful . . . [acts] performed in [other] circumstances . . . remain unlawful . . . [since] Parliament has retained criminal sanctions against the practice, dissemination and encouragement of homosexual activities." *R v. Brown*, [1993] 2 All E.R. 75, 81 (Eng. H.L.). However, in his dissent, relying upon the decisions of the Court, Lord Mustill expressed the belief "that the European authorities, balancing the personal considerations invoked by art 8(1) against the public interest considerations . . . clearly favour the right of the appellants to conduct their private lives undisturbed by the criminal law . . ." *Id.* at 115.

For instance, in *Johnson v. United Kingdom*,<sup>107</sup> the Commission decided the limited definition of privacy in the United Kingdom's Sexual Offenses Act of 1967<sup>108</sup> did not violate the applicant's right to privacy under Article 8 of the Convention. On October 3, 1982, the applicant had a party in his home with forty other homosexual men, in which no one under the age of twenty-one<sup>109</sup> was invited or believed to have been present.<sup>110</sup> The police arrived and arrested the applicant for permitting prohibited homosexual acts to take place in his home.<sup>111</sup>

Although no charges were actually brought, the applicant challenged the law, claiming to be a victim of the legislation as a result of his fear and anxiety due to this arrest and possible future incidents.<sup>112</sup> The Commission decided the provision in the Sexual Offenses Act of 1967, which continued to criminalize consensual homosexual acts if more than two persons were present or participating, did not violate the applicant's right to privacy.<sup>113</sup> Although the acts occurred in the applicant's private dwelling, the Commission decided the applicant could not prove that the legislation continuously and directly affected his private life since he was not more predisposed to homosexual activity when more than two people were present or participating.<sup>114</sup> The Commission, therefore, con-

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Recently, the Commission agreed to consider a complaint filed by three of the men. Clare Dyer & John Carvel, *Jailed Gays Win Right to Europe Case*, GUARDIAN (Manchester), Jan. 19, 1995, at 5. In accepting the case, the Commission acknowledged the applicants' argument that the fact that their acts "may have shocked or offended certain members of the public, when publicised through prosecution . . . is not . . . sufficient reason for criminalising consensual private adult sexual activities." *Id.* However, the Commission declared inadmissible separate complaints brought by three men and two women who claimed that the risk of prosecution for taking part in sado-masochistic behavior violated their rights under the Convention. *Id.*

107. App. No. 10389/83, 47 Eur. Comm'n H.R. Dec. & Rep. 72 (1986).

108. The Sexual Offenses Act of 1967 criminalizes consensual male homosexual acts if more than two persons are participating, or are present. For text of the Act, see *supra* note 27.

109. Twenty-one was the homosexual age of consent in the United Kingdom. 47 Eur. Comm'n H.R. Dec. & Rep. at 73.

110. *Id.*

111. *Id.*

112. *Id.* at 73-74.

113. *Id.* at 76.

114. *Id.* at 74, 76.

cluded that the law did not violate Article 8 of the Convention.<sup>115</sup>

The Commission's restricted notion of privacy under Article 8 has apparently failed to protect both the sexual and other expressive activities of lesbian and gay persons which occur any place other than in the most confined definition of privacy.<sup>116</sup> This restricted analysis makes little sense in achieving the Convention's stated goal of striving for the fundamental freedoms and human rights that the Convention aims to protect.<sup>117</sup>

### III. THE CONTINUING IMPACT OF THE PUBLIC/PRIVATE DICHOTOMY

The decisions of the Court that laws criminalizing consensual homosexual activity between two adult men in private violate the Convention<sup>118</sup> were declared by scholars to be "enlightened alternative[s] to adverse decisions by courts in the United States and in individual European nations . . . ."<sup>119</sup> Nevertheless, lesbian women and gay men in the Council have been relatively unsuccessful in achieving acknowledgement of their other important social concerns such as employment discrimination, domestic partnership benefits, legalization of same-sex marriages, hate crime statutes, and recognition of lesbian and gay family life, due to the Commission's refusal to extend the principles articulated in previous cases beyond the constricted boundaries of private adult consensual sodomy.<sup>120</sup>

115. *Id.*

116. *See infra* Part III.

117. *See supra* text accompanying note 37.

118. *See supra* Part II.B.

119. Helfer, *supra* note 15, at 173.

120. *Id.* at 174; *see also* Helfer, *supra* note 95, at 1044, 1055. Indeed, these types of restrictions have been cited by one author as more damaging than more overt discrimination:

Liberal toleration instructs us that society ought not punish the commission of certain acts but ought to remain free to make indulgence in such acts difficult when such acts are believed . . . to offend or contradict public . . . sexual conduct norms . . . . This form of punishment, mostly in the form of indirect conduct coercion, will ultimately be more debilitating than the older, cruder, and more direct traditional control of sexual conduct.

Larry Catá Backer, *Exposing the Perversions of Toleration: The Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration*, 45 FLA. L. REV. 755, 797-98 (1993).

These constraints have severely restricted same-sex relationships. Beyond their homes, homosexual persons in the Council of Europe regularly experience second-class legal status,<sup>121</sup> along with widespread public loathing and animosity.<sup>122</sup> The current legal, political, and social status of homosexual women and men in the Council is little better than that of their counterparts in the United States since *Dudgeon* and its successors have failed to provide a suitable framework on which equal rights and fundamental freedoms for homosexual persons can be built.<sup>123</sup>

The interpretation of the right to privacy, used by the Court and the Wolfenden Report, has established the foundation for the unfair treatment of homosexual persons in the member states. The public/private dichotomy they have relied upon is based on an individual liberty theory. Since the fact that some may dislike what others do in private is not considered harmful to society, the government cannot interfere with that activity.<sup>124</sup> However, these privacy requirements are

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For an argument on why restrictions on homosexual behavior beyond the narrow confines of spatial privacy are acceptable, see John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11 (1995) (arguing that the tolerance of private homosexual conduct does not imply general acceptance of that conduct). *But see* Michael J. Perry, *The Morality of Homosexual Conduct: A Response to John Finnis*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 41 (1995) (reasoning that the state need not discourage public homosexual expression since such behavior is not always morally wrong).

121. Claiming that gay people in the United Kingdom suffer severe discrimination in every area of their lives, one civil rights group leader accused British politicians of "widespread homophobia." *UK Gay Rights Record 'Worst in Europe,'* INDEPENDENT (London), June 29, 1994, at 3. Further, Andrew Lumsden, the editor of a major gay newspaper in England, noted the persistent discrimination against lesbian and gay persons: "[i]t's incomparably a better country in which to be gay or come out as gay than in 1972 . . . . There's now an acceptance of the reality of gay people . . . . [However] [t]he great conservative institutions, the legislature, the judiciary and the press are the exceptions to this improved climate." JEFFREY-POULTER, *supra* note 96, at 164.

122. Lisa Bloom, *We Are All Part of One Another: Sodomy Laws and Morality on Both Sides of the Atlantic*, 14 N.Y.U. REV. L. & SOC. CHANGE 995, 998, 1015 (1986) (arguing that in order to fully protect lesbian and gay persons, the state must replace the present rights-oriented legal paradigm with a feminist model based on social cohesion and mutual concern).

123. See Kane, *supra* note 15, at 448 (notes that the right to privacy itself "give[s] subtle credence to the notion that homosexuality is inherently immoral"); see also Helfer, *supra* note 15, at 173-74; Helfer, *supra* note 95, at 1045.

124. Bloom, *supra* note 122, at 997; see generally MILL, *supra* note 32. For feminist critiques of the public/private distinction, see sources cited *infra* note 169.

based upon (and also help to perpetuate) the myths and stereotypes of homosexuality, by forcing all homosexual persons to remain "in the closet" since the expression of their sexuality is still considered immoral by the majority of the public. Therefore, "only when same-sex lovers are behind closed doors, out of sight of the still-disgusted majority, may they live freely."<sup>125</sup>

### A. *Family Life and Privacy*

The public/private distinction which the Court and Commission has relied upon to invalidate sodomy laws has not been useful or effective in protecting the families and relationships of homosexual women and men in the Council. The Commission has repeatedly determined that the notion of family life under Article 8 does not include lesbian and gay families<sup>126</sup> since a "family" has been limited to include only a man and a woman with all their possible offspring.<sup>127</sup>

While continually excluding the families of homosexual women and men, the Court and the Commission have recognized other non-traditional families, including: brothers, sisters, and other relatives; unmarried heterosexual couples sharing a common household; polygamous families; and a parent with a child born outside of marriage, or after divorce.<sup>128</sup> For instance, in the case of a Malaysian-English gay couple, their relationship was not considered to fall within the scope of family life under Article 8, allowing the British government to

125. Bloom, *supra* note 122, at 999 (arguing that the individual liberties approach traditionally used in sodomy challenges is unsatisfying for long-term progress since it still assumes that homosexuality is immoral, leaving the resolution of the morality question up to the individual and instead advocates for a feminist morality approach made up of mutual concern and social cohesion).

126. Andrew Clapham & J.H.H. Weiler, *Lesbians and Gay Men in the European Community Legal Order*, in *HOMOSEXUALITY ISSUES*, *supra* note 27, at 7, 43.

127. Evert van der Veen et al., *Lesbian and Gay Rights in Europe: Homosexuality and the Law*, in *THE THIRD PINK BOOK: A GLOBAL VIEW OF LESBIAN AND GAY LIBERATION AND OPPRESSION* 225, 230-32 (Aart Hendricks et al. eds., 1993).

128. *Id.* at 232; see, e.g., Kroon v. The Netherlands, App. No. 18535/91, 19 Eur. H.R. Rep. 263 (1995) (Eur. Ct. H.R.) (Article 8's notion of family life encompasses other family situations including a father's relationship with his child born as a result of an extramarital relationship); Keegan v. Ireland, 290 Eur. Ct. H.R. (ser. A) at 21 (1994) (government's refusal to recognize an unmarried father as the child's legal guardian violated Article 8's protection of family life); see also Pieter Van Dijk, *The Treatment of Homosexuals Under the European Convention on Human Rights*, in *HOMOSEXUALITY ISSUES*, *supra* note 27, at 179, 189-92.

deny the Malaysian partner a work permit in the United Kingdom.<sup>129</sup> An Australian-British lesbian couple and their child, conceived through alternative insemination, were similarly denied the family status necessary for their protection under immigration law.<sup>130</sup> Additionally, in Italy and Switzerland, the private and family lives of gay men are even further restricted since both governments have been reported to compile lists recording intimate details about the sexual lives of gay men.<sup>131</sup>

### *B. Threat of Criminal Sanctions*

Private consensual homosexual activity is still illegal in some of the newer parties to the Convention. For instance, in Romania, "sexual relations between persons of the same sex" are punishable by one to five years in prison.<sup>132</sup> Furthermore, in a report delivered to the 1994 Conference on Security and Cooperation in Europe,<sup>133</sup> the International Lesbian and Gay

129. *X. & Y. v. United Kingdom*, App. No. 9369/81, 32 Eur. Comm'n H.R. Dec. & Rep. 220, 221 (1983).

130. Evert van der Veen et al., *supra* note 127, at 231-32 (citing *X. & Y. v. United Kingdom*, App. No. 14753/89 (1989) (unpublished)).

131. HEINZE, *supra* note 15, at 6.

132. Deborah Claymon, *Gays in Romania Still Living in Fear*, S.F. CHRON., July 11, 1994, at A9. Additionally, Amnesty International has noted that gay Romanian men are targeted for ill-treatment and torture. AMNESTY INTERNATIONAL, *BREAKING THE SILENCE: HUMAN RIGHTS VIOLATIONS BASED ON SEXUAL ORIENTATION* 15 (1994); see also HEINZE, *supra* note 15, at 3. The International Human Rights Law Group recently submitted an amicus brief to the Romanian Constitutional Court, urging that it apply international human rights standards to decriminalize homosexuality. See Legal Memorandum of the International Human Rights Law Group Submitted to the Romanian Constitutional Court, On the Application of International Human Rights Standards to the Constitutionality of Article 200 of the Romanian Criminal Code (on file with the author); see also Duc V. Trang, *Beyond the Historical Justice Debate: The Incorporation of International Law and the Impact on Constitutional Structures and Rights in Hungary*, 28 VAND. J. TRANSNAT'L L. 1, 29 n.114 (1995). Although the court ruled that the sodomy provision was unconstitutional as applied to private consensual homosexual conduct, it concluded that such restrictions were valid as applied to acts which created a "public scandal" or were "perpetrated in public." Helfer & Miller, *supra* note 10, manuscript at 42 & n.13. In response, the Romanian legislature proposed replacing the phrase "public scandal" with "acts perpetrated in public" in an exception to a draft of a law which would decriminalize private homosexual activity. *Id.* at 40-42. However, the legislature will likely retain the other provision of the law which would criminalize "propaganda, actions, association or any other proselytizing activities" related to prohibited homosexual activity. *Id.* at 40, 42.

133. The 53-member Conference on Security and Cooperation in Europe aims to

Association noted Belarus and Moldova still imprison people for private consensual homosexual activity.<sup>134</sup>

The public/private dichotomy similarly affects the daily lives and existence of lesbian and gay persons in other nations in the Council. For instance, in most European countries, "public indecency" is still a criminal offense. Although usually worded neutrally, like sodomy statutes, these laws are more often used to penalize the sexual activities of homosexual men rather than those of heterosexual persons.<sup>135</sup> In England, two men were convicted for cuddling and kissing in front of two heterosexual couples on a London street late at night.<sup>136</sup> The court stated that "[o]vert homosexual conduct in a public street, . . . may well be considered by many persons to be objectionable . . . [and] may well be regarded by another person, particularly by a young woman, . . . [as insulting] by suggesting that she is somebody who would find such conduct in public acceptable herself."<sup>137</sup> In 1988, a thirty-seven-year old man was given a nine-month suspended sentence for gross indecency, and later arrested and jailed for "fondling and kissing" a man in a churchyard late at night.<sup>138</sup> In Italy, two men were also imprisoned for the same offense.<sup>139</sup>

According to section 32 of the Sexual Offenses Act of 1967, it is unlawful for men to "persistently solicit or importune in a public place for an immoral purpose," and since homosexual behavior is still deemed by the law to be an immoral purpose, it is a crime in the United Kingdom for a homosexual man to have any contact with another man in a public place with a view to engaging in otherwise lawful sexual activity.<sup>140</sup> Thus,

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protect human rights by developing democratic institutions through local officials, activities, and non-governmental organizations. President Clinton, 1994 Summit of the Council on Security and Cooperation in Europe, Remarks at Plenary Session (Dec. 5, 1994), in 5 DEPT ST. DISPATCH, Dec. 12, 1994 at 813, 815.

134. *Policy Spectrum*, WARSAW VOICE, Apr. 23, 1995, at 19. Lithuania has also been reported to imprison adult males for committing homosexual acts. HEINZE, *supra* note 15, at 5.

135. Waaldijk, *supra* note 27, at 71, 88-89.

136. *Masterson v. Holden*, [1986] 3 All E.R. 39 (Eng. Q.B.).

137. *Id.* at 44.

138. TATCHELL, *supra* note 14, at 29-30.

139. *Id.* at 21.

140. Waaldijk, *supra* note 27, at 71, 118-19. The term "persistently" has been interpreted to mean more than once and "solicit or importune" covers a vast range of words or gestures typically used by homosexual men while "cruising" to meet other homosexual men. *Id.* Similarly, Finland criminalizes people who "publicly en-

it is a criminal offense for homosexual men to meet other men in bars, restaurants, parks, beaches, or any other public place for the purpose of later engaging in otherwise lawful sexual relations.<sup>141</sup> In 1988, in the United Kingdom, 699 men were convicted for soliciting or other offenses; from 1980-1988, there were 10,476 prosecutions.<sup>142</sup>

### C. *Restrictions on Freedom of Expression and Association*

Reports about police raids on lesbian and gay bars and discos are numerous. Although the official reason given for these raids is usually the breach of licensing or drug laws, the frequency of such raids suggest these laws are more severely enforced against homosexual establishments.<sup>143</sup> Associations between homosexual men are further restricted in Cyprus, Italy, Greece, Portugal, and the United Kingdom, since openly homosexual men cannot serve in the military.<sup>144</sup> Specifically,

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gag[e] in an act violating sexual morality," or who "publicly encourage[ ] indecent behavior between members of the same sex." Helfer & Miller, *supra* note 10, manuscript at 16 n.41.

141. TATCHELL, *supra* note 14, at 29-30.

142. *Id.*

143. Waaldijk, *supra* note 27, at 71, 117-18. In its 1994 report, the Department of State noted that in Greece, police harass gay bar owners and gay men by detaining them at police stations and sometimes physically abusing them. DEPARTMENT OF STATE, 104TH CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1994 at 835 (Joint Comm. Print 1995). In England, one gay rights activist noted:

These are not just incidents; they are part of a long and sordid history of persecution and discrimination which most gay people thought was coming to an end . . . . Police harassment tells us once more the lessons we so tediously unlearned: gays ought to feel guilty, ashamed, ought to keep quiet and invisible . . . and ought not to be able to organise and meet together . . . . Our rights are being systematically taken from us, most importantly our right to life with dignity and self-respect.

JEFFREY-POULTER, *supra* note 96, at 169.

144. TATCHELL, *supra* note 14, at 14, 24, 29-30; Waaldijk, *supra* note 27, at 71, 112. Although in 1991 the British Prime Minister announced that the military would no longer prohibit homosexual persons from receiving security clearances, the Ministry of Defense has continued to dismiss lesbian and gay service members based on "incompatibility with the military services." DEPARTMENT OF STATE, *supra* note 143, at 1029. Recently, after the United Kingdom Ministry of Defence admitted that since 1990, it dismissed 260 service members because of their sexual orientation, two legal opinions suggested that such discrimination could violate the Convention. Alan Travis, *Axed Gays May Claim Millions*, GUARDIAN (Manchester), Aug. 5, 1994, at 1. In England, after being dismissed for revealing their sexual orientation, four service members filed suit seeking to repeal the military ban. *Gay Military Officers Challenge Ban*, Agence France Presse, May 15, 1995, available in

in Portugal, the penal code outlaws, "acts against nature," and the military code excludes those who have been involved in such acts from the armed forces.<sup>145</sup> Furthermore, these Portuguese laws have been used effectively to deny gay parents custody of their children following divorce.<sup>146</sup> In Turkey, after the first gay pride conference was banned on July 2, 1993, members of the foreign delegation were arrested and detained.<sup>147</sup> Amnesty International noted detention of the foreign delegation was "solely by reason of their advocacy of homosexual equality and their real or presumed sexual orientation."<sup>148</sup> In Poland, forty examples of discrimination against homosexual persons have been reported to occur in schools, workplaces, the army, church, and by the police.<sup>149</sup>

In Austria, Finland, and Liechtenstein, it is illegal to approve of or promote homosexuality.<sup>150</sup> The Austrian Supreme Court relied upon its law to rule that all representations of homosexuality were illegal since they were deemed to constitute hard-core pornography.<sup>151</sup> A similar law in the United Kingdom has been used by some local authorities as a reason to refuse subsidies to lesbian and gay organizations.<sup>152</sup> Furthermore, lesbian and gay persons in the European Union

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LEXIS, News Library, CURNWS File. Unfortunately, England's High Court upheld the ban, concluding that it did not violate European or British domestic law. *Homosexuals Fail in Historic Challenge Over Armed Forces Ban*, Deutsche Presse-Agentur, June 7, 1995, available in LEXIS, News Library, CURNWS File.

145. TATCHELL, *supra* note 14, at 24.

146. *Id.*

147. James D. Wilets, *International Human Rights Law and Sexual Orientation*, 18 HASTINGS INT'L & COMP. L. REV. 1, 86 (1994).

148. *Id.* (footnotes omitted). Amnesty International has further noted that gay rights activists in Turkey are regularly subjected to harassment, intimidation, and abuse. AMNESTY INTERNATIONAL, *supra* note 132, at 17. Moreover, arrests and detentions of lesbian and gay persons based solely on their sexual orientation have been reported in Romania, Russia, and Turkey. *Id.* at 31. In Romania, police were reported to have physically abused detainees, who were charged with committing unlawful homosexual acts, to force them to confess. DEPARTMENT OF STATE, 103D CONG., 2D SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993 at 1014 (Joint Comm. Print 1994).

149. Zbigniew Idziakowski, *Anti-Homosexual Discrimination: The Shadows Outside the Closet*, WARSAW VOICE, Apr. 23, 1995, at 19.

150. *Policy Spectrum*, *supra* note 134. Relying upon these laws, police have occasionally confiscated AIDS-awareness brochures. *Id.*

151. TATCHELL, *supra* note 14, at 12.

152. Waaldijk, *supra* note 27, at 71, 116-17. Additionally, Austria and Liechtenstein officially forbid the establishment of gay rights organizations. *Policy Spectrum*, *supra* note 134.

regularly encounter significant employment disadvantages.<sup>153</sup>

#### D. Unequal Ages of Consent

Although nearly all member states have repealed their total prohibitions on homosexual acts, and private consensual homosexual activity has not been officially prosecuted since 1974, many states still enforce unequal ages of consent for homosexual and heterosexual activity.<sup>154</sup> For instance, in the United Kingdom, the homosexual age of consent is eighteen,<sup>155</sup> while the heterosexual and lesbian age of consent is sixteen in Great Britain and seventeen in Northern Ireland.<sup>156</sup> Similarly, laws with unequal ages of consent still exist in Austria, Cyprus, Finland, Iceland, Germany, and Greece.<sup>157</sup> Few states have equalized their ages of consent for sexual activity even though in 1984, the European Parliament urged member states to apply the same ages of consent for homosexual acts and heterosexual acts, as well as to abolish laws making homosexual acts between consenting adults liable to punishment.<sup>158</sup>

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153. See David A. Landau, Note, *Employment Discrimination Against Lesbians and Gays: The Incomplete Legal Responses of the United States and the European Union*, 4 DUKE J. COMP. & INT'L L. 335, 341 (1994) (citing ANYA PALMER, LESS EQUAL THAN OTHERS: A SURVEY OF LESBIANS AND GAY MEN AT WORK 1-20 (1993)). Landau describes that in Palmer's recent survey in Great Britain, half of the gay and lesbian people interviewed reported that they had experienced harassment in the workplace ranging from vicious gossip to death threats; two-thirds of those surveyed currently hide their sexual orientation from their colleagues. *Id.* Additionally, a survey in Italy found that one-fourth had been dismissed because of their homosexuality. *Id.* Furthermore, in Ireland, 58 percent of lesbian and gay persons believed they would face discrimination if they were open about their sexual orientation. Mary Cummins, *Guide to be Published on Employee's Rights*, IRISH TIMES, Apr. 1, 1993, at 4.

154. Waaldijk, *supra* note 27, at 71, 83-84.

155. In February 1994, while Parliament voted to lower the homosexual age of consent from twenty-one to eighteen, it rejected a proposal to equalize the age of consent for homosexual and heterosexual activity. Alan Travis, *Peers Support Consent Age of 18*, GUARDIAN (Manchester), June 21, 1994, at 6. In June, 1994, the House of Lords voted 176 to 113 to reject an attempt to restore the homosexual age of consent to twenty-one. *Id.*

156. Waaldijk, *supra* note 27, at 71, 86. Recently, however, the Commission required the United Kingdom government to justify its reasons for setting a higher homosexual age of consent. Severin Carrell, *Policy on Teenage Gays May be Illegal*, SCOTSMAN, Jan. 28, 1995, at 4.

157. TATCHELL, *supra* note 14, at 12-21; Waaldijk, *supra* note 27, at 71, 85-86.

158. Waaldijk, *supra* note 27, at 71, 82-83.

In 1988, in England and Wales, twenty-three men over the age of twenty-one were convicted, under the Sexual Offenses Act of 1967, of having sexual relations with men aged sixteen to twenty-one.<sup>159</sup> In fact, overall, the number of men prosecuted for expressing their homosexual attraction is greater today than before the 1967 Amendment, which decriminalized private, consensual homosexual behavior.<sup>160</sup> In the four years after the 1967 reform was passed, the conviction rate for homosexual offenses rose 160 percent.<sup>161</sup> Moreover, one police officer was reported, by an observer, to have stated: "now that you are legal, this should be done in your homes."<sup>162</sup>

In November, 1989, the European Parliament reiterated its support for equal rights for homosexual persons after the European Commission recommended legislation which would include job protection for homosexual persons.<sup>163</sup> In February, 1994, the European Parliament adopted a non-binding resolution, stating that member states should abolish all legal provisions that criminalize and discriminate against sexual acts between persons of the same sex.<sup>164</sup> However, because the

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159. TATCHELL, *supra* note 14, at 29. In the United Kingdom, until 1994, twenty-one was the homosexual age of consent as compared to sixteen for heterosexual and lesbian age of consent. See *supra* note 155.

160. *Id.*

161. *Id.*

162. KINSMAN, *supra* note 34, at 143.

163. TATCHELL, *supra* note 14, at 7.

164. John Carvel, *MEPs Back Gay and Lesbian Right to Marry*, GUARDIAN (Manchester), Feb. 9, 1994, at 10. Originally, the European Parliament had asked the European Commission on instruction of the European Union, to draft a binding directive on combatting sexual orientation discrimination. However, the final version of the resolution instead asked the European Commission to establish a recommendation based on the notion of equal treatment for all persons regardless of their sexual orientation. *Id.* Furthermore, the resolution specifically called "on the [European] Commission and the Council [of Ministers] to accede to the" Convention as "a first step towards more vigorous protection for human rights." Resolution on Equal Rights for Homosexuals and Lesbians in the EC, 1994 O.J. (C 61) 40, 41. The resolution further recommended that member states of the European Union apply equal ages of consent for homosexual and heterosexual acts; work to decrease the number of acts of anti-gay hate violence; combat all forms of social discrimination; and ensure that lesbian and gay social organizations have equal access to national funds as other social and cultural organizations. *Id.* at 42. Additionally, Parliament asked that the European Commission draft a recommendation seeking to end discriminatory ages of consent; criminalization of homosexuality, all forms of discrimination; and any restrictions on the ability of lesbian and gay persons to marry or become parents. *Id.* In May 1995, the European Parliament once again expressed its support for a ban on sexual orientation discrimination,

European Parliament has little more than a consultative role and is relatively powerless, the European Union took no further action on the Parliament's urgings, and the European Commission's recommendations were never acted upon.<sup>165</sup>

Apparently, lesbian women and gay men still face frequent and persistent discrimination and adverse treatment. Within the member states, although homosexual persons are protected within the limited private realm, their other fundamental freedoms and rights remain unprotected.

#### IV. ANALYSIS

The fact that the criminal law in many member states of the Council still discriminates against homosexuality can serve as justification for other forms of discrimination by both public authorities and private organizations and individuals. Although the Court has invalidated sodomy laws, its approach has failed to provide adequate protection for the lives of homosexual persons. Instead of interpreting the Convention in a manner consistent with its stated goals, the Court has only established an arbitrary distinction based on spatial privacy which has been futile for recognizing many other fundamental rights of homosexual persons in the member states.

##### A. *New Methods for Invalidating Sodomy Laws*

Although sodomy laws are not always criminally enforced, their invalidation is necessary to effectively lay the groundwork for the achievement of human rights for lesbian women and gay men.<sup>166</sup> However, different approaches or methodolo-

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adopting a resolution which states "[t]he treaty [of the European Union] should contain a clear rejection of racism, xenophobia, sexism, discrimination on grounds of a person's sexual orientation, anti-semitism, revisionism and all forms of discrimination, and guarantee adequate legal protection against discrimination for all individuals . . . in the European Union." *Sexual Orientation a Non-Discrimination Area in EU?*, July, 1995, available in >gopher://seta.fi.

165. LASOK & BRIDGE, *supra* note 14, at 251-53. The European Parliament was designed to serve more as a deliberative body than as a true parliament, and therefore, its functions are as a supervisory and advisory body. *Id.* After receiving reports from its committees, the European Parliament will submit final versions to the Council of Ministers, which is not bound by any of Parliament's opinions. *Id.* at 255.

166. Although this Note primarily focuses on the invalidation of sodomy statutes, the proposed analysis can also effectively be used to challenge other discrimi-

gies to the invalidation of sodomy statutes can create even more problems. A new legal analysis must be constructed in order to both invalidate sodomy statutes (and any other similar restrictions on consensual adult sexual behavior) and better protect homosexual relationships. A continuous reliance upon the severe limitations of "the right to respect for private life" under Article 8, as interpreted by the Court and the Commission, will not ensure the fundamental freedoms and human rights for homosexual women and men in the member states.

Many authors have criticized the notion of the right to privacy because the right of privacy, due to its homophobic nature, only limits the degree of interference with homosexual persons' privacy, rather than providing a legal guideline for the total elimination of that interference.<sup>167</sup> Others criticize the inherent heterosexist notions of sexual privacy.<sup>168</sup> Some feminists have argued that viewing the family as part of the private, rather than the public, domain of society can discourage the government from taking affirmative steps to change the structures within the actual family, which traditionally have disadvantaged women.<sup>169</sup>

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natory restrictions on the lives of lesbian and gay persons. Thus, even after the invalidation of all sodomy laws, the advocated proposals can be used to eradicate "gross indecency," "public scandal," or other similar discriminatory provisions. See *supra* Part III.B for examples of such discriminatory laws. Additionally, these proposals can be used to invalidate unequal age of consent laws, as well as other government-imposed or-sanctioned discrimination against homosexual persons. See *supra* Parts III.A, C-D for examples.

167. Kane, *supra* note 15, at 473-74; see David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319 (1994); see also Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 199 (1994) (describing how the rights arguments often require their proponents to carry the heavy burden of proving that justification does not exist for anti-gay discrimination).

168. RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* 63 (1992). Professor Robson also criticizes the privacy right as being dependent upon the "legally sacred concept" of physical property, and thus "[s]exual privacy . . . must exist as an appendage to private property." *Id.* at 69.

169. DAVID FELDMAN, *CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES* 354 (1993). See generally Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992) (examining the feminist critique of the right to privacy). Moreover, one author has noted that "[t]he concept of sexual privacy [is] rooted in the rule of men over women and over property." ROBSON, *supra* note 168, at 70; see also Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1177 (1986) (describing the way men's power over women can often be seen as part of the private realm).

While the many critiques of the right of privacy are vastly different, and often irreconcilable, it is clear that the interpretation of the privacy right relied upon by the Court and the Commission is not protecting homosexual relationships, outside of the limited confines of the bedroom, or other protected coupling places. Because the restricted interpretation of the word privacy relied upon by the Court has not fully provided protection for the lives of homosexual men in the member states, many other aspects of their lives are adversely affected.

*B. Proposed Alternatives to Invalidate Sodomy Statutes Using the Convention*

When a member state signs on to the Convention, the Convention's only capacity to insure compliance is through the Council of Europe's judicial system. Since the Court and Commission are the principal enforcement mechanisms of the Convention, and are looked to as tribunals of last resort for interpreting human rights in the Council, they are entrusted to fully and adequately ensure those freedoms and rights. Since the earlier sodomy decisions have not ensured the Convention's guaranteed freedoms and rights for lesbian and gay persons in the member states, the Court and the Commission must construct an analysis which will safeguard the mandates of the Convention.<sup>170</sup>

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Intercourse has never been comprehended by law as a private act of personal freedom except in one limited sense: those who belong to men as chattel property or who are used by them as sexual objects . . . can be encompassed in a man's privacy such that they disappear altogether inside it.

DWORKIN, *supra* note 18, at 148.

[I]n the so-called private sphere of domestic and family life . . . there is always the selective application of law . . . [which] invokes "privacy" as a rationale for immunity in order to protect male domination . . .

The rhetoric of privacy that has insulated the female world from the legal order sends an important ideological message to the rest of society. It devalues women and their functions and says that women are not important enough to merit legal regulation.

Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 977-78 (1991); see also Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENTARY 319 (1993).

170. Case law establishes that the Convention is to be viewed as "a living instrument" which must be "interpreted in light of present-day conditions." See, e.g., *Sigurjónsson v. Iceland*, 264 Eur. Ct. H.R. (ser. A) at 16 (1993); *Inze v. Austria*, 126 Eur. Ct. H.R. (ser. A) at 18 (1987).

## 1. Recognition of Autonomy-Based Privacy

The Court has based its interpretation of the privacy right under Article 8 on limited physical and spatial boundaries. This definition of privacy only protects homosexuality which occurs in private, thereby maintaining the concept of homosexuality as immoral and improper for public view. Moreover, by placing unreasonable emphasis on the occurrence of sexual activity, the Court has failed to protect the other legitimate needs and concerns of lesbian and gay persons in the member states.

Since the privacy right can encompass both autonomous choices as well as protection of the domestic sphere, the focus tends to be limited to whether there has been governmental interference with the familial sphere, rather than whether the government has interfered with the individual's right to autonomy.<sup>171</sup> Nevertheless, the privacy right must be re-articulated to protect from governmental interference activities occurring outside the familial environment.

The right to privacy has yet to acquire a sufficient definition in both the Council and the United States.<sup>172</sup> The early right to privacy laws in the United States and in the member states of the Council were based on the proverb, "an Englishman's dwelling house is his castle,"<sup>173</sup> but that definition of privacy was expanded in the United States by early cases like *Griswold v. Connecticut*<sup>174</sup> and *Roe v. Wade*,<sup>175</sup>

171. Riane Eisler, *Human Rights: Toward an Integrated Theory for Action*, 9 HUM. RTS. Q. 287 (1987). The author further notes that "the principle of noninterference with 'family autonomy' . . . [has] been applied . . . to maintain a particular type of familial (and social) organization: a male headed, procreation-oriented patriarchal family in which women have few if any individual rights." *Id.* at 293. Similarly, as a result of this traditional articulation of the privacy right, lesbian and gay rights are also inadequately protected.

172. Privacy, as a "concept and a right, stands in great need of the few certainties and limitations that definition affords us." Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 296 (1977); see also Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989) (arguing that the right to privacy is the freedom not to have one's life "too-totally determined by a progressively more normalizing state," and that the right to privacy must exist because democracy must impose certain limits on the extent of the state's control on individual lives, although recognizing that there is no such sphere of an individual's private life with which the state has nothing to do).

173. This adage has formed the basis for the definition of privacy relied upon by the Court, the Commission, and many other judicial systems, which only includes those incidents which occur at home with the doors locked.

174. 381 U.S. 479 (1965).

which involved individual decision-making processes, not confined to physical boundaries such as homes and bedrooms.<sup>176</sup> Unfortunately, in the United States, other decisions since *Griswold* and *Roe* have still refused to recognize privacy rights where certain "self-regarding" choices of individuality have been involved.<sup>177</sup> Although the U.S. Supreme Court had regarded activities such as choosing a spouse, using contraceptives, and bearing children as protected by the U.S. Constitution, the Supreme Court refused to extend the right to privacy to safeguard private homosexual activity.<sup>178</sup>

An early United States decision called "the possession and control of [one's] own person" a sacred right protected from undue "interference of others."<sup>179</sup> One New York court has stated that the right of privacy is "a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental restraint."<sup>180</sup> Another definition was advocated by the Nordic Conference of Jurists in 1967, stating privacy means "the right to be let alone, to live one's own life with the minimum degree of interference."<sup>181</sup>

The Council of Europe's legal system has recognized certain autonomous choices can fall under the protection of the right to respect for private life, under Article 8(1). For in-

175. 410 U.S. 113 (1973).

176. See Stephanie Ridder & Lisa Woll, *Transforming the Grounds: Autonomy and Reproductive Freedom*, 2 YALE J.L. & FEMINISM 75 (1989) (arguing for recognition of a right to autonomy for women and men since women's attempt at fitting into other legal constructions, such as the right to privacy, is not succeeding because these constructions were not developed to deal with issues affecting women).

177. Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1396-1420 (discussing "fundamental-decision privacy" as a byproduct of technological advances which have created a sphere of personal choice never previously imagined).

178. See Daniel J. Langin, Note, *Bowers v. Hardwick: The Right of Privacy and the Question of Intimate Relations*, 72 IOWA L. REV. 1443 (1987) (arguing that the narrow approach used in *Bowers* is erroneous because it disregarded the protection of individual self-identity and significantly narrowed the scope of privacy rights); see also *Bowers v. Hardwick*, 478 U.S. 186 (1986). Curiously, in *Bowers*, the United States Supreme Court chose to ignore the Court's decision in *Dudgeon*, although it was mentioned in an amicus brief to the court. *Id.*

179. *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891).

180. *People v. Onofre*, 415 N.E.2d 936, 939 (N.Y. 1980).

181. Louise Doswald-Beck, *The Meaning of the "Right to Respect for Private Life" Under the European Convention of Human Rights*, 4 HUM. RTS. L.J. 283, 285 (1983) (quoting the Nordic Conference of Jurists).

stance, the Commission has recognized both obligatory haircutting<sup>182</sup> and required uniforms<sup>183</sup> did interfere with the applicants' right to respect for their private lives. Thus, these decisions establish that the protection of the right to privacy under Article 8 must also encompass the individual's decision to engage in self-identifying activities. Protection of this right must be ensured regardless of whether the activities occurred in the presence of other consenting adults or whether they occurred in the Court's limited definition of privacy.

Autonomy, in the sense of fundamental human rights, is an assumption that all persons possess a range of capacities enabling them to develop plans of actions for their own lives and the way they are lived.<sup>184</sup> Instead of protecting only the sexual act itself, employing the right to autonomy to invalidate sodomy laws will safeguard and protect lesbian and gay relationships, ensuring that the Convention is adequately maintaining and securing the fundamental rights of all people.

Although the right to personal autonomy is implicit in both the Convention and the decisions of both the Commission and the Court, the Council of Europe's judicial system still has been unwilling to extend the notion of privacy when it involves homosexual relationships. However, it is necessary that the Court and the Commission recognize the personal autonomy rights inherent in the Convention's protections.

Without recognizing the right under Article 8 to personal autonomy, along with the right to spatial privacy, in invalidating sodomy statutes, the Convention makes little sense in achieving human rights and fundamental freedoms for lesbian and gay persons within the member states.<sup>185</sup>

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182. *Sutter v. Switzerland*, App. No. 8209/78, 16 Eur. Comm'n H.R. Dec. & Rep. 166 (1979). Here, the applicant complained of his obligation to cut his hair for military courses. Although the Commission recognized that this may interfere with his private life, it was necessary under the second paragraph of Article 8. *Id.*

183. *McFeeley v. United Kingdom*, App. No. 8317/78, 20 Eur. Comm'n H.R. Dec. & Rep. 44, 90-91 (1980). The Commission recognized that the "requirement that the applicant[s] wear prison uniform[s] constituted an interference with their right to respect for their private lives," but justified the interference under Article 8(2). *Id.*

184. Richards, *supra* note 5, at 964-65; see also Schneider, *supra* note 169, at 994-98 (describing the "more affirmative dimension of the right to privacy" which encompasses the concepts of liberty, autonomy, and freedom of choice).

185. See *supra* text accompanying note 37 for the goals of the Convention.

## 2. Freedom of Expression under Article 10<sup>186</sup>

Invalidation of sodomy statutes can also be accomplished through the freedom of expression clause, thereby helping to insure more of the freedoms and rights articulated in the Convention for lesbian and gay persons in the member states. Freedom of expression under Article 10 has been interpreted broadly by the Court, and has not been restricted to the written or spoken word.<sup>187</sup>

While in *X. v. United Kingdom*,<sup>188</sup> the Commission ruled sodomy statutes, as applied to men under twenty-one years old, do not violate either Article 8, or Article 10, since the notion of "expression" under Article 10 was not deemed to encompass the sexual expression of emotions, none of the later successful challenges under Article 8, have mentioned Article 10.<sup>189</sup> Because *X. v. United Kingdom* has effectively been overruled by the Court's later successful sodomy challenges,<sup>190</sup> a complaint based on Article 10 is still viable.

Certain physical activities as a means of expression have been recognized as worthy of protection under the right to freedom of expression. The U.S. Supreme Court has extended the right to freedom of expression under the First Amendment to include wearing of certain articles to protest government action,<sup>191</sup> alleged abuse of the flag,<sup>192</sup> live nude dancing<sup>193</sup> and possessing "obscene" material in the privacy of one's

186. See *supra* text accompanying note 47 for text of Article 10.

187. ROBERTSON & MERRILLS, *supra* note 38, at 148.

188. App. No. 7215/75, 19 Eur. Comm'n H.R. Dec. & Rep. 66, 75, 80 (1978). For a description of the Commission's conclusion, see *supra* text accompanying notes 64-70.

189. See *supra* Part II.B.

190. See *supra* Part II.B.

191. *Cohen v. California*, 403 U.S. 15 (1971) (criminalizing the public display of an expletive on a jacket violated the First Amendment); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (wearing of armband is a symbolic act protected within the free speech clause of the First Amendment).

192. See, e.g., *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning as a means of expression is fully protected by the First Amendment); *Texas v. Johnson*, 491 U.S. 397 (1989) (state's interest in preventing breaches of peace did not justify defendant's conviction for flag burning); *Spence v. Washington*, 418 U.S. 405 (1974) (defendant's freedom of expression was violated when he was convicted for hanging a flag, upside down, with a peace symbol affixed).

193. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

home.<sup>194</sup>

Similarly, in the member states, the prosecution of an artist for displaying paintings which were allegedly obscene raised an issue under Article 10.<sup>195</sup> The Court concluded that artistic expression fell within the ambit of Article 10, although it is not specifically stated, since the Convention does not distinguish between the various forms of expression. Moreover, the Court emphasized that the right to freedom of expression is made applicable "not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State . . . [because] [s]uch are the demands of that pluralism, tolerance, and broadmindedness without which there is no 'democratic society.'"<sup>196</sup> More recently, in *Scherer v. Switzerland*, the Commission relied upon Article 10, rather than Article 8, to conclude by twelve votes to five that the applicant's conviction for showing an "obscene" gay film in the back room of his store violated the Convention.<sup>197</sup>

Since expression of same-sex affection and intimacy embodies deep communicative significance, public display of that intimacy has been cited as an important critique of gender assumptions and gender roles.<sup>198</sup> By restricting the ability of homosexual men to engage in consensual physical relationships, the state is interfering with their right to freedom of expression.

Because the references under Article 10(2) to national security, public safety and the prevention of disorder or crime

194. *Stanley v. Georgia*, 394 U.S. 557 (1969).

195. *Muller v. Switzerland*, 133 Eur. Ct. H.R. (ser. A) at 23 (1988). However, the Court concluded that under Article 10(2), the conviction and fines were justifiable, even though it recognized that public conceptions of sexual morality had changed in recent years. *Id.* at 22-23.

196. *Id.* at 22.

197. 287 Eur. Ct. H.R. (ser. A) at 7, 20 (1994). After the applicant died, however, the Court dismissed the case, concluding that the applicant had effectively lost his standing to challenge both the conviction and the law. *Id.* at 15.

198. Cole & Eskridge, Jr., *supra* note 167, at 328; Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9 (1991) (maintaining that same-sex marriage would reconstruct the current parameters of the institution since the gender imbalances, evident in traditional concepts of marriage, would be unavoidably different in same-sex marital unions); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 197 (the "historical justifications for condemnation of homosexuality are based on patriarchal cultural arrangements and value structures that are no longer defensible").

correspond to the limitations found in other provisions,<sup>199</sup> the same "pressing social need" as required in *Dudgeon* would be required to justify the state's interference with an applicant's freedom of expression.<sup>200</sup> It would be difficult for the government to meet the burden of showing that severe restrictions on consensual physical expression between homosexual men and women are necessary in a democratic society for the maintenance of public safety or morals.<sup>201</sup> In *Muller v. Switzerland*,<sup>202</sup> the Court recognized the intent of the freedom of expression clause is to foster open-mindedness and diversity. A member state should not be permitted to justify its interference with freedom of expression by claiming it is protecting the public from objectionable conduct. Based on Article 10 alone, sodomy statutes can both be invalidated, as well as provide a rational framework which could be later employed to protect the relationships of lesbian and gay persons in the member states.

Furthermore, although the Convention permits certain limitations on the guaranteed rights, Article 14 prevents those limitations from being imposed in a discriminatory manner. While some claims succeed because the state cannot show the distinction has a legitimate aim,<sup>203</sup> others succeed because the restriction is not proportional to the state's otherwise legitimate aim.<sup>204</sup> Although the issue of discrimination can sometimes be resolved solely by applying the same criteria as had

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199. For the text of other articles of the Convention with similar provisions, see *supra* text accompanying notes 45, 47-48.

200. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 21 (1981).

201. The only restrictions that would easily survive under this justification argument would be those that are similarly based on heterosexual relationships.

202. 133 Eur. Ct. H.R. (ser. A) at 22 (1988); see also text accompanying notes 195-96.

203. See *Darby v. Sweden*, 187 Eur. Ct. H.R. (ser. A) at 15 (1990) (Article 14, in conjunction with Article 1, was breached since the government could not articulate a legitimate interest for the distinctions it created when taxing residents and non-residents).

204. See *Case of James and Others*, 98 Eur. Ct. H.R. (ser. A) at 44-45 (1985) (concluding that different treatment of property leaseholds did not violate Article 14, since the government could articulate a reasonable and objective justification for the distinction which was therefore, not discriminatory). Additionally, Judge Brian Walsh of the Court has noted that although "a particular measure may be objectively justified, [it] may not be acceptable because the means adopted are disproportionate to the ends sought to be achieved." Brian Walsh, *The European Court of Human Rights*, 2 CONN. J. INT'L L. 271, 282 (1987).

already been applied in analyzing the claim under the substantive law,<sup>205</sup> Article 14 sometimes introduces an entirely new element to be considered.<sup>206</sup>

For instance, in *Case of Abdulaziz*,<sup>207</sup> Article 14 was applicable, even though the Court had decided Article 8 had not been violated. Under the challenged immigration rules, a man could obtain permission for his non-national spouse to enter the country much easier than could a woman.<sup>208</sup> While the Court accepted that the government's goal of protecting the domestic labor market was legitimate, the Court still decided that the measures violated Article 14, in conjunction with Article 8.<sup>209</sup> The Court articulated a heightened standard for sex discrimination claims, stating 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."<sup>210</sup>

Article 14 was also invoked in a complaint by two magazine editors, who were prosecuted for publishing a poem and an illustration depicting fellatio with the body of Christ.<sup>211</sup> The Commission ruled the complaint inadmissible, stating there was no proof that the applicants had been singled out based on their homosexual tendencies. Moreover, there was no

205. See *Hoffmann v. Austria*, 255 Eur. Ct. H.R. (ser. A) (1993) (after the court ruled that Article 8, in conjunction with Article 14, had been violated, there was no need to examine the government's discriminatory denial of the applicant's petition for child custody under Article 8 alone).

206. See *X. v. The Netherlands*, 1973 Y.B. Eur. Conv. on H.R. 274, 296 (Eur. Comm'n on H.R.) (holding that Article 1 of Protocol No. 1 was not applicable, but nevertheless applied Article 14 and examined whether the challenged legislation was discriminatory in its application). Previously, the Commission had stated in its Report of June 24, 1965, that an inquiry under Article 14 was not limited to cases in which an accompanying violation of another article of the Convention was present. *Belgium Linguistics Case*, 1 Eur. Ct. H.R. (ser. B) at 305 (1967).

207. 94 Eur. Ct. H.R. (ser. A) at 34-35 (1985).

208. *Id.*

209. *Id.* at 37, 39.

210. *Id.* at 38. The Court used analogous reasoning to conclude that a Swiss law prohibiting a husband from using his pre-marital surname before his wife's surname as his marital family name violated Article 14 in conjunction with Article 8. See *Burghartz v. Switzerland*, 280 Eur. Ct. H.R. (ser. A) (1994). Similarly, Switzerland violated Article 14 when, without a hearing, it terminated a woman's disability benefits shortly after she gave birth on the assumption that she would not return to work. *Schuler-Zraggen v. Switzerland*, 263 Eur. Ct. H.R. (ser. A) at 5 (1993).

211. *Gay News Ltd. v. United Kingdom*, App. No. 8710/79, 5 Eur. H.R. Rep. 123, 126 (1982) (Commission report).

evidence suggesting that the poem would not have been restricted in exactly the same way had it been published by persons without homosexual tendencies.<sup>212</sup> In this ruling, the Commission has implicitly recognized discrimination based on sexual orientation could violate Article 14. Although unsuccessful,<sup>213</sup> this case provides the framework for later complainants to argue they are being discriminated against based on their homosexual orientation, rather than based on their gender.

For instance, in analyzing sodomy laws,<sup>214</sup> because the state places no similar restrictions upon the freedom of physical expression of heterosexual men, Article 14,<sup>215</sup> along with Article 10, is breached when the state penalizes only homosexual activity. The state is thereby treating a homosexual man differently by restricting his physical expression towards other men, simply based on his sexual orientation, or, alternatively, his gender.<sup>216</sup> Such discriminatory restrictions on the rights of homosexual men under Article 10 clearly violate Article 14 since the rights of heterosexual men are not similarly restricted.<sup>217</sup>

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212. *Id.* at 131.

213. Recently, a film maker successfully challenged United Kingdom's blasphemy law, claiming that the banning of his film violated his right to freedom of expression. Simon Perry, *Europe Rejects Ban on Erotic Christ Film*, EVENING STANDARD (London), Mar. 24, 1995, at 15. Agreeing with the complainant, the Commission has referred the case to the Court, which is expected to decide the case later this year. *Id.*

214. Article 14 can also be used in conjunction with Article 8 to invalidate unequal age of consent laws. See generally Helfer, *supra* note 95.

215. See *supra* note 49 and accompanying text.

216. Since Article 14 does not explicitly prohibit sexual orientation discrimination, relying upon *Gay News*, an applicant may attempt to convince the Commission and the Court that discrimination based on sexual orientation is similarly proscribed under Article 14. See *supra* text accompanying notes 211-13 for a description of the Commission's holding in *Gay News*. Once sexual orientation is recognized under Article 14, the applicant's rights have been violated if he has been treated differently based on his sexual orientation, and that distinction is either illegitimate, or disproportionate to an otherwise legitimate aim. See *supra* notes 203-04 and accompanying text.

Additionally, because Article 14 explicitly prohibits gender discrimination, a complainant's rights have been violated if he has been treated differently solely because of his gender. See generally Koppelman, *supra* note 167 (maintaining that discrimination based on sexual orientation can and should be recognized as sex discrimination prohibited under the United States Constitution).

217. Although one may also argue that there is a discriminatory difference between the treatment of homosexual women and homosexual men, this argument

Once the Court recognizes the right to freedom of expression as encompassing the right to engage in homosexual activity, other laws resulting in differential treatment can be similarly invalidated. By using Article 10, more protection is guaranteed to homosexual relationships outside of the limited confines of bedrooms.

### 3. Freedom of Association under Article 11<sup>218</sup>

Article 11 is triggered when people are prevented from joining or forming their chosen associations.<sup>219</sup> For instance, in *Young v. United Kingdom*,<sup>220</sup> the Court ruled compulsory union membership violated the applicants' right to freedom of association under Article 11. The Court decided that Article 11 incorporated a "negative right" not to be compelled to join unions. Similarly, the Court stated: "[a]n individual does not enjoy the right to freedom of association if in reality the freedom of . . . choice which remains available to him is either non-existent or so reduced as to be of no practical value."<sup>221</sup> The government's interference with the applicants' freedom of association was not justified since it was not considered "necessary in a democratic society."<sup>222</sup> The Court reiterated that "necessary" is not as flexible as "useful" or "desirable," and that all member states' restrictions on an individual's Convention rights must be proportionate to the legitimate aim pursued.<sup>223</sup>

This logic was restated recently in *Sigurjónsson v. Ice-*

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may backfire since the member state can simply criminalize lesbian sexuality as well. A member state wishing to comply with a ruling which concluded that its laws discriminated because only the behavior of homosexual men was criminalized could simply enact legislation criminalizing lesbian sexuality as well. Moreover, the Court and the Commission had stated in previous rulings, including *Dudgeon*, that the state has more interest in protecting the public from homosexual men, since they were considered to be more dangerous to public morality and health. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981); see also *X. v. United Kingdom*, App. No. 7215/75, 19 Eur. Comm'n H.R. Dec. & Rep. 66 (1978); *X. v. Federal Republic of Germany*, App. No. 5935/72, 3 Eur. Comm'n H.R. Dec. & Rep. 46 (1975).

218. See *supra* text accompanying note 48 for text of Article 11.

219. ROBERTSON & MERRILLS, *supra* note 38, at 160.

220. 44 Eur. Ct. H.R. (ser. A) at 8, 23-26 (1981).

221. *Id.* at 23.

222. *Id.* at 25.

223. *Id.*

land.<sup>224</sup> The Court ruled a law making membership in a taxi-drivers' union a prerequisite to acquisition of a taxi-cab driver's license, violated the applicant's right to freedom of association.<sup>225</sup> Although the Court agreed with the government's position that membership served the occupational interests of its members, as well as provided for the public interest, the Court decided this did not make the membership "necessary in a democratic society," since other conceivable methods existed to protect the same interests.<sup>226</sup>

The provision under Article 11 protecting freedom of peaceful assembly has been interpreted to include protection for personal opinions. Recently, in *Ezelin v. France*,<sup>227</sup> the Court decided the applicant's right to freedom of peaceful assembly was violated when he was reprimanded under the French Bar Council's professional rules of conduct for participating in a demonstration against two judgments during which graffiti was painted on buildings and insulting remarks were made about the judiciary.

Freedom of association can also be interpreted to include intimate association with whomever one chooses. The European case law has not been very expansive in defining which other types of associations are protected, since nearly all of the cases have involved trade unions and other economic groupings.<sup>228</sup> In the United States, however, the right to intimate association was introduced in 1980 and was defined as "a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship."<sup>229</sup> This freedom requires "a serious search for justifications by the state for any significant impairment of . . . intimate association."<sup>230</sup> The right to freedom of intimate association was first articulated by the U.S. Supreme Court in 1984 in

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224. 264 Eur. Ct. H.R. (ser. A) (1993).

225. *Id.* at 12, 20.

226. *Id.* at 18.

227. 202 Eur. Ct. H.R. (ser. A) at 6, 11, 24 (1991).

228. Nevertheless, although the United Kingdom's common law offense of conspiracy to corrupt public morals was unsuccessfully challenged under Article 11, the Commission stressed that the law should not be applied to criminalize the "mere existence" of homosexual advocacy groups. *X. v. United Kingdom*, App. No. 7525/76, 11 Eur. Comm'n H.R. Dec. & Rep. 130-31 (1978).

229. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 629 (1980).

230. *Id.* at 627.

*Roberts v. United States Jaycees*.<sup>231</sup> The Supreme Court recognized that the judiciary must "afford the . . . preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."<sup>232</sup> The degree of that judicial protection would depend on where the particular relationship existed along the spectrum from the most intimate to the most detached. That point would be determined by looking at numerous relevant factors including size, purpose, selectivity, and congeniality.<sup>233</sup>

A complainant can use the same ideology to argue that sodomy statutes violate his freedom of intimate association since they interfere with his right to form a highly personal and intimate relationship. The member state must then attempt to argue that its action is justified by the limitations on freedom of association in Article 11(2).<sup>234</sup> However, the Court has already ruled these are narrowly constructed restrictions which must be narrowly tailored to a legitimate goal pursued.<sup>235</sup> Alternatively, the complainant can argue that by limiting his right to freedom of association without similarly restricting the rights of heterosexuals, Article 14 has been breached.<sup>236</sup>

It is clear that freedom of association can and must be expanded to recognize social and intimate relationships, as well as economic and financial ones. By recognizing that the freedom of association protects homosexual relationships, the Council would be similarly recognizing the goals of self-realization and self-identity for all people within the member states.

## CONCLUSION

The Council of Europe's legal system must begin to adopt and utilize another method for the invalidation of sodomy statutes and for the recognition of lesbian and gay relationships in order to best achieve the ideals and goals of the Con-

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231. 468 U.S. 609 (1984).

232. *Id.* at 618.

233. *Id.* at 620.

234. For text of Article 11(2), see *supra* text accompanying note 48.

235. See, e.g., *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 21 (1981); *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 22-23 (1976).

236. For an analysis of how Article 14 can be used in conjunction with other articles of the Convention to establish a violation of the Convention, see *supra* notes 203-17 and accompanying text.

vention, namely the maintenance and security of fundamental freedoms for all people within the member states. While the Convention has been used to protect homosexual activity within the limited private realm, the Commission and the Court have ignored other important aspects of the lives of lesbian and gay persons. In fact, the Convention's explicitly stated mission of protecting the human rights and fundamental freedoms of all people will be achieved only after the Commission and the Court recognize the freedom of expression, freedom of intimate association, and right to autonomy of many lesbian and gay persons are violated by even unenforced sodomy statutes. Instead, by continuously depending on traditional, outdated notions of privacy, the Court is constantly jeopardizing the stable and significant relationships of lesbian and gay persons within the member states, by failing to recognize their fundamental rights outside of the closet in which the court has locked them.

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