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'An Essentially Private Manifestation of Human Personality': Constructions of Homosexuality in the European Court of Human Rights

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Abstract

This article explores the continuing evolution of the European Convention on Human Rights in respect of homosexuality. In considering the Court's case law as a mechanism through which homosexuality is discursively constructed, the article examines how this discourse both enables and constrains human rights in relation to sexual orientation in contemporary Europe. The discursive construction of homosexuality that underlies the Court's interpretation of the Convention in respect of sexual orientation produces a problematic outcome for sexual minorities: whilst it has been instrumental in socialising a pan-European consensus on intimate and sexual privacy, the Court's understanding of homosexuality ultimately sustains a separation between the rights associated with the private and public spheres and, in doing so, fails to address the ongoing social discrimination experienced by gay men and lesbians.

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1. Introduction

This article examines some of the ways in which homosexuality has been considered by the European Court of Human Rights ('the Court'). It is less concerned with the technical apparatus and judicial methods brought to bear by the Court in its adjudication of human rights issues in relation to homosexuality and more with an analysis of the discourse that the Court produces. It explores the continuing evolution of the European Convention on Human Rights ('the Convention') in respect of homosexuality in two separate but interlinked ways: first, it examines how the Court continues to develop its interpretation and application of the Convention in relation to a number of substantive concerns relating to homosexuality and how, as a result, it reproduces or refashions a discourse on and about sexuality; second, it considers the ways in which the production of this discourse by the Court is linked to, and impacts upon, social, cultural and legal formations in national jurisdictions across Europe. This second consideration is, by necessity, speculative since, as Sweet and Keller argue, there is no causal theory and only sparse empirical data on the impact of the Convention on contracting parties.[1]

An analysis of three decades of Strasbourg jurisprudence in relation to homosexuality and human rights[2] shows that the Convention continues to be used by the Court as a 'living instrument' that becomes subject to reinterpretation 'in the light of present-day conditions'.[3] This teleological aspect of the Convention is the basis for what Mowbray welcomes as the Court's creativity in interpreting and applying the Convention in respect of the radically different societies that make up contemporary Europe.[4] Yet, whilst the Convention is interpreted in relation to contemporary social relations, Strasbourg jurisprudence must also be seen as actively engaged in fashioning the landscape of 'present-day conditions'. Because the Convention applies to such radically different social and cultural contexts, and covers in excess of 800 million people, it must be regarded as one of the most important mechanisms through which normative ideas about 'present-day conditions' are both formulated

1 Sweet and Keller, *The Reception of the ECHR in the Member States* (Oxford: Oxford University Press, 2008) at 24.

2 This article is based on an examination of 27 judgments of the European Court of Human Rights, delivered between 1976 and 2008, that all 'discourse upon' homosexuality. The judgments, while concerned with a wide range of issues, all consider complaints brought primarily in relation to sexual orientation. The majority of cases that have reached the Court concern male homosexuality and this reflects the domestic legal arrangements of contracting states that have more often prohibited male homosexual practices. It is important to note that cases brought on the grounds of sexual orientation have been almost exclusively against the founding member states of the Council of Europe or those states that joined soon after. The Court's case law in this area has been built, therefore, on the consideration of complaints from a limited number of states whilst producing effects across all 47 contracting parties.

3 *Tyrer v United Kingdom* A 26 (1978); 2 EHRR 1 at para. 31.

4 Mowbray, 'The Creativity of the European Court of Human Rights', (2005) 5 *Human Rights Law Review* 1 at 57.

and applied. This is best expressed by the Court's own description of itself as 'the conscience of Europe'[5] which encapsulates its aim to both determine, and enforce, a collective standard of human rights across European nations.

Some commentators argue that the Court is most effective in this aim when it adopts the approach of determining the universal and objective moral principles that underlie Convention rights and, in applying them, allows contracting states no margin of appreciation or derogation.[6] Although the Court does continue to allow wide margins of appreciation by contracting parties in respect of a number of issues relating to homosexuality, the interpretation and application of the Convention continues to fundamentally shape the terrain of sexual politics across Europe. Whilst an early judgment by the Court claimed not to be 'concerned with making any value-judgment as to the morality of homosexual relations',[7] it is arguable that it has made one of the most important contributions to changing social and sexual morality and, furthermore, altered the ways in which such morality is enforced through domestic law. As Mowbray argues, judgments from Strasbourg have resulted in nothing short of 'the evolution of societies'.[8]

Table 1 shows the trajectory of the Court's most significant case law in respect of complaints pertaining to homosexuality. A central feature of this case law is, as Table 1 shows, that the majority of successful complaints brought before the Court on the grounds of sexual orientation relate to violations of Article 8 (right to respect for private and family life). In this article, I consider the special significance attained by matters of privacy in the Court's on-going interpretation of the Convention in relation to homosexuality. The clustering of successful complaints around Article 8 (and Article 14 taken in conjunction with Article 8) may seem largely unsurprising, since issues relating to discrimination on the grounds of sexuality are normatively understood to concern private life. However, as I explore below, the tendency of Strasbourg jurisprudence to reduce sexual orientation issues to questions of privacy produces significant limitations in respect of the 'evolution' of lesbian and gay human rights across Europe.

A central feature of my consideration is an attempt to trace the development of the Court's discourse on homosexuality and privacy and use it to examine a number of key issues that are relevant to human rights and sexual orientation across contemporary Europe. This, by necessity, demands recognition of the relationship between the Convention and the legal arrangements of nation states and, in particular, the interaction between the standard of

5 See, for example, the Court's own promotional material, available at: http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/How+the+Court+works+(film)/ [last accessed 13 November 2009].

6 See, for example, Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007) at xi–xviii.

7 *Dudgeon v United Kingdom* A 45 (1981); 4 EHRR 149 at para. 54.

8 Supra n. 4 at 79.

Table 1. Key case law of the European Court of Human Rights in respect of sexual orientation

Convention article	Case name	Principle complaint	Judgment date	Decision
3—Prohibition of torture	Smith and Grady *v* United Kingdom	Degrading treatment	27 September 1999	No violation
	Ladner *v* Austria	Degrading treatment	03 February 2005	No violation
8—Right to respect for private and family life	Dudgeon *v* United Kingdom	Criminalisation of private consensual sexual activity	22 October 1981	Violation
	Norris *v* Ireland	Criminalisation of private consensual sexual activity	26 October 1988	Violation
	Modinos *v* Cyprus	Criminalisation of private consensual sexual activity	22 April 1993	Violation
	Smith and Grady *v* United Kingdom	Discrimination in employment (armed services)	27 September 1999	Violation
	Lustig-Prean and Beckett *v* United Kingdom	Discrimination in employment (armed services)	27 September 1999	Violation
	Salgueiro Da Silva Mouta *v* Portugal	Discrimination in custody of a child	21 December 1999	Violation (taken in conjunction with Article 14)
	A.D.T. *v* United Kingdom	Criminalisation of private consensual group sexual activity	31 July 2000	Violation
10—Freedom of expression	Handyside *v* United Kingdom	Prohibition on published educational material	07 December 1976	No violation
	Smith and Grady *v* United Kingdom	Prohibition on expression of opinions, ideas and information (armed services)	27 September 1999	Not considered
11—Freedom of assembly and association	Baczkowski and Others *v* Poland	Prohibition of assembly	03 May 2007	Violation
14—Prohibition of Discrimination	Fretté *v* France	Discrimination in adoption of a child	26 February 2002	No Violation
	L. and V. *v* Austria	Discrimination in legal age of sexual consent	09 January 2003	Violation (taken in conjunction with Article 8)
	Karner *v* Austria	Discrimination in housing provision	24 July 2003	Violation (taken in conjunction with Article 8)
	E.B. *v* France	Discrimination in adoption of a child	22 January 2008	Violation (taken in conjunction with Article 8)

human rights defined in the Court's case law and its influence on domestic law. There is a contradiction at the heart of this interaction because, whilst contracting states are bound to uphold Convention rights, the Court, as Sweet and Keller argue, 'does not possess the authority to invalidate national legal norms' and its 'command and control capacities are weak, at best'.[9] Sweet and Keller show, through an examination of the domestic legal arrangements of contracting states, the varying degrees to which the Court's jurisprudence is either implemented or ignored by national officials. It is not my intention to undertake such detailed empirical analysis here but, rather, to examine the nature of the Court's jurisprudence in relation to homosexuality, suggest that it discursively constructs homosexuality and homosexuals in particular ways, and make some remarks about both the positive and problematic nature of this in relation to lesbian and gay lives in contemporary Europe.

2. Why 'Constructions' of Homosexuality?

Considering homosexuality (and, latterly, heterosexuality) as a social construction, rather than as the innate biological or psychological condition of individuals, has been an on-going concern of the human sciences since the late 1960s.[10] A touchstone in the human science study of sexuality has been the work of Michel Foucault and, specifically, his idea that sexuality, far from being the innate property of individuals, is socially produced in and through discourse. Discourse, for Foucault, is both productive and constraining of sexuality: it is the mode by which sexuality is conceived across a proliferating number of sites—as a 'scientific' object to be studied and as a set of subjects to be scrutinised—and the mechanism that delimits the parameters to how it is conceptualised and understood. Through a historical analysis of key professional discourses, most notably medicine and psychology, Foucault sought to determine the constitutive elements through which both the object and subject of sexuality have been 'incited' into existence:

> Sexuality must not be thought of as a kind of natural given which power tries to hold in check, or as an obscure domain which knowledge tries gradually to uncover. It is the name that can be given to a historical construct: not a furtive reality that is difficult to grasp, but a great surface network in which the stimulation of bodies, the intensification of pleasures, the incitement to discourse, the formation of special knowledges, the strengthening of controls and resistances, are linked to one

9 Supra n. 1 at 21–2.
10 See, for example, McIntosh, 'The Homosexual Role', (1968) 16 *Social Problems* 182.

> another, in accordance with a few major strategies of knowledge and power.[11]

Law can be seen as an integral aspect of the 'great surface network' through which sexuality is socially produced. It is both an important site at which the 'formation of special knowledges' about sexuality are interpreted and reproduced and a vital nexus at which 'controls and resistances' around sexuality are negotiated. Whilst the relationship between Foucault's work and law has been the subject of academic commentary and critique,[12] it is useful for illuminating the ways in which law is a powerful site at which discourses of sexuality are cited, mobilsied, deployed and normalised.

Law is especially significant because it is one of the most important mechanisms through which the normative 'truths' of sexuality are established.[13] The development of case law, and the incremental process of legal citation, produces a 'sedimenting' effect in relation to discourses of sexuality that entrench and normalise ideas about what homosexuality 'is' and who homosexuals 'are'. This does not prohibit law from being a site at which the discursive construction of sexuality is contended, disrupted and changed—on the contrary, as I will explore below, this is central to the process of law—but rather that the law is instrumental in the production of a discursive regime through which sexuality is conceived and, furthermore, through which sexual subjects are regulated. Stychin argues that law 'plays a role in constituting and maintaining coherent sexualities' and this is especially true in relation to the Strasbourg Court.[14] The case law of the Court shows the progressive development of a discursive framework through which nothing short of a 'European homosexual subject' has been conceived. Because of this, and with the caveat that the power of the law does not make it 'all powerful',[15] the Court must also be regarded as one of the most important performative sites from which discourse becomes transformed into ontological effect.[16]

Moran has argued that the earliest judgments from the Court show a specific concern with the ontological and aetiological aspects of homosexuality through which the homosexual subject is imagined as possessing a true, authentic and congenital self.[17] As such, the Court has contributed to what Foucault termed the 'specification of individuals', a process through which the

11 Foucault, *The History of Sexuality: Volume 1* (London: Penguin, 1979) at 105–6.
12 For example, Hunt and Wickham, *Foucault and Law: Towards a Sociology of Law as Governance.* (London: Pluto Press, 1994). See also Golder and Fitzpatrick, *Foucault's Law* (Abingdon: Routledge-Cavendish, 2009).
13 Patterson discusses this more generally in relation to the realist properties of law: see Patterson, *Law and Truth* (New York: Oxford University Press, 1996).
14 Stychin, *Law's Desire: Sexuality and the Limits of Justice* (London: Routledge, 1995) at 1.
15 Smart, *Feminism and the Power of Law* (London: Routledge, 1989).
16 For a discussion of the relationship between discourse, performativity and effect, see Butler, *Bodies that Matter: On the Discursive Limits of Sex* (London: Routledge, 1993).
17 Moran, *The Homosexual(ity) of Law* (London: Routledge, 1996) at 176.

homosexual subject becomes materialised as 'a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscrete anatomy and possibly a mysterious physiology'.[18] Whilst Grigolo argues that the 'homosexual as a legal subject was introduced into the Convention using traditional essentialist narratives',[19] it is important to recognise that sexual essentialism is itself a recently invented tradition. The contemporary concern with the ontological nature of 'the homosexual', as opposed to the pre-twentieth century concern with the aberrant perversions of 'the sodomite', reflects the ongoing and fluid development of a social discourse on sexuality.[20]

The Court's case law demonstrates this discursive evolution and fluidity because homosexuality appears in various ontological guises at different times: as fleeting aberrations in the form of 'homosexual tendencies' which 'are often temporary';[21] as expressions of an inner essence realised before or during puberty, as demonstrated by one applicant's 'own evidence' that he has 'been consciously homosexual from the age of 14',[22] or by another who 'began to be aware of his sexual orientation' at eleven or twelve and 'was sure of his homosexuality' at age fifteen;[23] as the 'lifestyle' of one applicant who 'separated from his wife [. . .] and has since been living with a man';[24] as an 'orientation' that expresses the 'innate personal characteristics' of a human being;[25] or as 'sexual practices and preferences'.[26]

These various appearances of homosexuality show that the Court's discourse is both multifarious and unstable. It reflects the longer social and cultural history in Europe in which a number of discursive formations around sexuality have come to both coalesce and compete. As such, it is unsurprising to find that in the late 1990s, the Court was still considering cases in which homosexuality could be described as 'deviant sexual practices'.[27] However, within this 'whirl-of-words',[28] the notion that homosexuality is an expression of 'personality' has become recurrent and has ascended to significant

18 Supra n. 11 at 43.
19 Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject', (2003) 14 *European Journal of International Law* 1023 at 1027.
20 For a consideration of pre-20th century legal discourses on sexuality, see McCormick, *Secret Sexualities: A Sourcebook of 17th and 18th Century Writing* (London: Routledge, 1997).
21 *Handyside v United Kingdom* A 24 (1976); 1 EHRR 737 at para. 35.
22 Supra n. 7 at para. 32.
23 *S.L. v Austria* 2003-I at para. 9.
24 *Salgueiro da Silva Mouta v Portugal* 1999-IX; 31 EHRR 47 at para. 9.
25 *Lustig-Prean and Beckett v United Kingdom* 29 EHRR 548 at para. 86.
26 *Smith and Grady v United Kingdom* 1999-VI; 29 EHRR 493 at para. 91.
27 *Osman v United Kingdom* 1998-VIII; 29 EHHR 245 at para. 12.
28 Kristeva, *Desire in Language: A Semiotic Approach to Literature and Art* (New York: Columbia University Press, 1980) at 239.

prominence in the Court's judgments.[29] Underpinned by ontological ideas about how the human body or psychology determines the sexual and/or social expression of homosexuality, the concept of personality has been used to essentialise homosexuality as an innate property of individuals and, subsequently, defend its expression as a human right. Personality, as Loukaidēs argues, has become fundamental to the ontological basis of rights discourse[30]—something that is expressed most clearly in the Universal Declaration of Human Rights.[31]

In the remaining parts of this article, I consider the Court's discursive construction of homosexuality and, in particular, its focus on homosexuality as 'an essentially private manifestation of the human personality'.[32] I trace the development of the Court's discourse in order to explore how ontological ideas about homosexuality both enable and restrict the scope of the freedoms afforded under the Convention. The discursive construction of homosexuality as an aspect of personality that becomes manifest in private is important, I argue, because it provides the basis for determining and delimiting the rights that may be afforded to those who appeal to the Convention. Whilst national law conceives of (homo)sexuality and (homo)sexual subjects in differing ways, the Court must be regarded as one of the most important discoursing machines in the world since it produces a pan-European legal framework for adjudicating on matters of sexuality. More than that, the Court also fashions ideas about the very subjects of the Convention and, as such, contributes to nothing short of the ongoing making of the 'modern homosexual'.

3. From Sexual Privacy to Homosexual Privatisation: the Limits of Article 8

The earliest judgments from Strasbourg in relation to homosexuality concerned contestations around the rights ensured by Article 8(1) of the Convention which provides that 'everyone has the right to respect for his private and family life, his home and his correspondence'. Article 8(2) prohibits interference with this right by a public authority except where it is in

29 The concept of homosexual 'personality' first appeared in *Dudgeon v United Kingdom*, supra n. 7. However, the Court had previously used the concept of personality to consider the relationship between 'sexual identity' and transsexualism: see *Van Oosterwijck v Belgium* A 40 (1980); 3 EHRR 557, at para. 8.

30 Loukaidēs, *Essays on the Developing Law of Human Rights* (Leiden: Martinus Nijhoff Publishers, 1995) at 83–107.

31 The European Convention on Human Rights does not use the word 'personality', but it appears three times in the Universal Declaration of Human Rights 1948, Res. 217A(III), A/810 91: Article 22 protects 'the free development of his personality'; Article 26 states: 'Education shall be directed to the full development of the human personality'; and Article 29 states: 'Everyone has duties to the community in which alone the free and full development of his personality is possible.'

32 Supra n. 7 at para. 60.

'accordance with the law', is 'necessary in a democratic society', and has the legitimate aim of ensuring the 'national security, public safety or the economic well-being of the country', 'the prevention of disorder or crime', the 'protection of health or morals', or 'the protection of the rights and freedoms of others'. The Court has held that 'private life' is 'a concept which covers the physical and moral integrity of the person, including his or her sexual life'[33] and that there must be 'particularly serious reasons' for a state to interfere with matters of sexuality.[34]

Early considerations by the Court in relation to non-heterosexual sexual orientation concerned the existence and enforcement of national laws that criminalised male homosexual activity in private. Specifically, the Court considered whether such laws were necessary in a democratic society (to meet a pressing social need), addressed a legitimate aim specified by Article 8(2), and were a proportionate response in respect to meeting that aim. Since the earliest point that alleged violations of Article 8 rights relating to sexual orientation were deemed admissible for hearing by the Court,[35] and the first successful application in 1981,[36] the Court has consistently upheld complaints against contracting parties that criminalise private, consensual homosexual sexual activity, deeming such laws to disproportionately violate private life. Early judgments from the Court were instrumental in establishing a discursive framework relating to homosexuality and human rights and remain foundational to the Court's construction of the homosexual subject entitled to these rights. They were (and continue to be) decisive in enabling non-heterosexuals to claim Article 8 rights through the domestic law of contracting parties. Following *Dudgeon v United Kingdom*,[37] the first successful use of Article 8 in this way, the United Kindgom was forced to partially decriminalise private male homosexual acts in Northern Ireland and this produced, as Wintemute argues, a 'domino effect' resulting in partial decriminalisation in Guernsey, Jersey, the Isle of Man, Gibraltar and Bermuda.[38] A number of subsequent judgments by the Court in similar facts cases have affected a significant shift across contracting states in relation to the legal regulation of private homosexual acts.[39]

33 *X and Y v Netherlands* A 91 (1985); 8 EHRR 235 at para. 22.

34 *K.A. and A.D. v Belgium* Application Nos 42758/98 and 45558/99, Judgment of 17 February 2005. See Mowbray, *Cases and Materials on the European Convention on Human Rights*, 2nd edn (Oxford: Oxford University Press, 2007) at 497.

35 *X v United Kingdom* 19 DR 66 (1978); 3 EHRR 63.

36 *Dudgeon v United Kingdom*, supra n. 7.

37 Ibid.

38 Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Oxford: Clarendon Press, 1995) at 93.

39 *Modinos v Cyprus* A 259 (1993); 16 EHRR 485, for example, was instrumental in facilitating the repeal of Section 171 of the Cypriot Criminal Code that criminalised a 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'.

In upholding the applicant's complaint in *Dudgeon*, the Court, as Moran argues, made the unprecedented judgment that not only should consensual adult homosexual acts in private be free from interference but, additionally, the freedom to engage in such acts constituted a matter of human rights.[40] In reaching this judgment, however, one of the central concerns of the Court was to determine the nature and extent of the homosexual sexual privacy that is protectable under Article 8. The Court expressed the view, consistent with that outlined in the 1957 'Wolfenden Report' on which it drew,[41] that whilst it was a 'legitimate necessity in a democratic society' to exercise 'some degree of control over homosexual conduct',[42] such control was not necessary in cases which involved 'consenting adults alone'.[43] In emphasising the need for this spatial dimension in social control practices, the Court reiterated an established view that the legal regulation of 'public' homosexuality was necessary in order to prevent the 'exploitation and corruption of those who are specially vulnerable by reason, for example, of their youth' to its influence.[44] The protection afforded to 'private acts', therefore, was afforded within a discursive landscape dominated by ideas about homosexual men as deviant sexual predators and homosexuality as a 'germ' in need of domestic quarantine. In reiterating the view that 'exploitation and corruption' is the potential outcome of unregulated homosexual conduct in contexts where consenting adults are not 'alone'—that is, outside of private dwellings and/or in the presence of (heterosexual) others—the Court legitimated the view of dissenting Judge Zekia that the 'great majority of . . . people . . . are completely against unnatural immoral practices'.[45]

The view of sexual privacy outlined in *Dudgeon* emphasised ontological understandings of homosexual sexuality as 'an essentially private manifestation' and this 'manifestation' has continued to be deemed protectable precisely because of its relationship with the private, and not the public, sphere. In *Norris v Ireland*, the Court reiterated the view that although 'members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved'.[46] Whilst this view of privacy has been subject to some evolution and expansion, as I explore below, the Court has consistently maintained this formal distinction between private and public 'manifestations' of homosexuality in its jurisprudence. For example, in 2000, in *A.D.T. v United Kingdom*, the Court ruled that while the group sexual

40 Supra n. 17 at 175.
41 *Report of the Committee on Homosexual Offences and Prostitution* (1956) Cmnd. 247.
42 Supra n. 7 at para. 62.
43 Ibid. at para. 60.
44 Ibid. at para. 62.
45 Ibid. at dissenting opinion, para. 3.
46 A 142 (1988); 13 EHRR 186 at para. 46.

activities of five men were protectable under Article 8, despite being criminalised by national law, this was because such activities involved a 'restricted number of friends' who had ensured that their conduct posed no 'risk' of entering the public domain and was 'genuinely "private"'.[47]

The Court's approach to distinguishing between private and public manifestations of homosexuality reflects a long-standing legal preoccupation with balancing the competing demands of individual and social morality[48]—something that is framed by the Article 8 requirement that individual rights be balanced with 'the protection of the rights and freedoms of others'. A criticism of this approach is that the 'cost' of protecting the individual privacy of non-heterosexuals has been the institutional reproduction of a moral discourse through which homosexuality has been imagined as antithetical to the common good of 'others'. Furthermore, it can be argued that this discourse has been, and often continues to be, a basis on which public authorities in contracting states justify mechanisms of social control designed to suppress the leakage of homosexuality into the public sphere.

However, in adopting this approach the Court has also imagined homosexuality within the private sphere in novel ways. It has, for instance, deemed the private manifestation of homosexual sexuality to be the 'most intimate aspect of private life'.[49] In this sense, the Court was instrumental in moving away from the earlier idea, exemplified by Wolfenden,[50] that the decriminalisation of private homosexual behaviour constitutes a (grudging) social tolerance for private sexual acts publically regarded as immoral. Instead the Court has propagated the view that homosexual sex is a socially valuable expression of human intimacy. In imagining homosexual sex this way, early judgments by the Court can be seen to significantly reconfigure a pervasive aspect of social discourse that emphasise homosexual sex as the pathological[51] and potentially criminal expression of a deviant personality.[52] Instead, the Court has imagined

47 2000-IX at para. 7.

48 See, for example, Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965); and Hart, *Law, Liberty and Morality* (Oxford: Oxford University Press, 1963).

49 Supra n. 7 at para. 52.

50 Supra n. 41.

51 For example, *Dudgeon*, supra n. 7, was issued five years before the removal of homosexuality from the *Diagnostic and Statistical Manual of Mental Disorders* published by the American Psychiatric Association. Until 1986, the Manual contained the pathological sexual condition of 'ego-dystonic homosexuality' that diagnosed a persistent lack of heterosexual arousal in patients.

52 The discursive construction of the male homosexual as criminal has not disappeared from legal debates. For example, Baldwin argues that 'overwhelming evidence supports the belief that homosexuality is a sexual deviancy often accompanied by disorders that have dire consequences for our culture' and that '[r]esearch confirms that homosexuals molest children at a rate vastly higher than heterosexuals, and the mainstream homosexual culture commonly promotes sex with children'. See Baldwin, 'Child Molestation and the Homosexual Movement', (2002) 14 *Regent University Law Review* 268.

a homosexual 'personality' that both desires, and is capable of, intimate, loving human relationships.[53]

In *Laskey, Jaggard and Brown v United Kingdom*, the Court made clear its commitment to same-sex intimacy as a human right when it clearly delimited group, sado-masochistic practice outside of the protection afforded by Article 8.[54] Considering the prosecution of a group of adult men for engaging in sexual practices in private homes that involved a number of activities deemed harmful under English law, the Court ruled that such practices did not constitute a form of 'private morality' protectable by Article 8. In his concurring opinion, Judge Pettiti ruled that not 'every aspect of private life automatically qualifies for protection under the Convention', the 'fact that the behaviour concerned takes place on private premises does not suffice to ensure complete immunity and impunity', and that 'not everything that happens behind closed doors is acceptable'.[55] He went on to suggest that an appropriate use of Article 8 was one that enabled, regardless of sexual orientation, the 'protection of a person's intimacy and dignity'.[56] The Court's judgment in *Laskey* has most often been read, and criticised, as a conservative indictment of private homosexual acts, but it should also be seen as evidence of a more general willingness to extend the normative concepts of 'intimacy' and 'dignity' to (some) homosexual private behaviours and deem them protectable.

Nevertheless, the continuing focus on privacy in adjudicating on matters of homosexuality has provoked a number of criticisms. These have centred on the tendency of the Court to maintain, as Grigolo argues, 'an obvious split between a legitimate "private" decriminalized homosexual subject and his/her unacceptable "public" demands'.[57] One criticism of Strasbourg jurisprudence, therefore, is that its focus on the protection of private sexual activity has limited a consideration of the social, structural and institutional processes through which social exclusion and discrimination are maintained on the grounds of sexual orientation. One outcome of this, as Wintemute argues, is a 'gap' between the protection that is afforded to 'sex rights' and the 'love rights' that are sought by same-sex partners.[58] For Wintemute, the sex rights afforded by Article 8 form an earlier stage in a progressive movement towards the

53 The Court had previously used the term 'intimate relations between husband and wife' to describe the nature of long-term love relationships: see *Airey v Ireland* A32 (1979); 2 EHRR 305 at para. 11.
54 1997-I; 24 EHRR 39.
55 Ibid.
56 Ibid.
57 Supra n. 19 at 1038.
58 Wintemute, 'From "Sex Rights" to "Love Rights": Partnership Rights as Human Rights', in Bamforth (ed.), *Sex Rights: The Oxford Amnesty Lectures 2002* (Oxford: Oxford University Press, 2005).

demand for social rights associated with the legal recognition of homosexual partnerships, homes and families.[59]

Whilst Wintemute is correct to recognise this progression in terms of rights demands, it is not the case that such demands have been met by the evolution of Article 8. While, as I explore below, the Court has ruled that discrimination on the grounds of sexual orientation in some social contexts, such as employment and housing provision, violates Article 8, there remain significant 'gaps' in social rights for non-heterosexuals. These 'gaps' result, in large part, from a continuing fixation by the Court on the 'private manifestations' of homosexuality that fails to envision the Convention in relation to the full range of social issues associated with 'gay citizenship' in contemporary Europe. This means that the Court's preoccupation with privacy is somewhat 'out of step' with broader citizenship issues across Europe where, as Stychin argues, non-heterosexuals are attempting not simply to establish or maintain private 'sex rights' but to 'construct meaningful categories of belonging' in their national contexts and to 'challenge and undermine the fixity of boundaries' through which they have often been excluded.[60]

This is not to ignore the evolution of the Court's interpretation of the 'ill-defined and amorphous'[61] concept of privacy contained in Article 8. *Niemietz v Germany*, for example, shows an attempt to smooth the hitherto sharp division between the domestic and public spheres:

> The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of 'private life'. However, it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.[62]

However, whilst this recognition of the link between one's 'inner circle' and the social context of 'other human beings' is important in attempting to deconstruct the separation of the private from the public, it contains a crucial qualification: while respect must be given to the right to establish and develop relationships with other human beings, this must only be granted 'to a certain degree'. It is often the decisions by public authorities about the 'degree' to

59 Fairfield argues that the essence of the gay rights movement is founded on the aim to replace the 'philosophy of concealment' associated with sexual rights with one of 'equality and freedom' associated with civil rights: see Fairfield, *Public/Private* (Lanham: Rowman and Littlefield, 2005) at 82.

60 Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Oxford: Hart, 2003) at 23.

61 Moreham, 'The Right to Respect for Private Life in the European Convention on Human Rights: a Re-examination', (2008) 1 *European Human Rights Law Review* 44 at 45.

62 A 251-B (1992); 16 EHRR 97 at para. 29.

which private and public rights should meet (or, more precisely, not meet) that form the basis on which contracting states continue to discriminate against non-heterosexuals in relation to a number of civil arrangements. The most obvious example is that, although an increasing number of states have introduced limited arrangements for the legal recognition of 'civil partnerships', only four contracting parties allow non-heterosexuals access to the full legal rights of marriage (Belgium, Netherlands, Norway and Spain).[63]

The repetitive emphasis in the Court's judgments on a formal distinction between the rights associated with private sexual practice and the rights associated with social, public and institutional participation has legitimised a framework that is often used to continue and justify discriminatory practices on the grounds of sexual orientation in nation states across contemporary Europe. An example of this can be seen in the decision by the President of Latvia, in 2005, to sign an amendment to Article 110 of the Latvian constitution to explicitly define marriage as 'the union between a man and a woman' (a direct result of parliamentary efforts to enforce legal discrimination in marriage on the grounds of sexual orientation) which she justified with recourse to a distinction between private and public rights:

> The debates which took place in the Saeima [the Latvian parliament] when discussing this amendment, in my view, very often demonstrated very explicit intolerance and explicit homophobia, which I believe, in a democratic nation neither should be [expected] or encouraged. People can have their own religious beliefs, their own understanding of what is sin and what is not, what is appropriate and what is not appropriate behaviour. However, as a president, I would like to remind, that in a democratic nation as we are, a private life is separated from a public sphere and what people do in their intimacy is no one's business, unless it contradicts our[s] . . . I would like to remind everyone, that we want to see our nation where democracy, in its most deepest and true expression, prevails, which means each and everyone is equally valued as a human being, before the state and not only before the God. Everyone is equal in their rights . . . We all want to enjoy freedom provided by our constitution

63 It can be argued that if participation in marriage is regarded as fundamental to the 'establishment' and 'development' of 'private and family life' then discrimination from this socially normative convention on the grounds of sexual orientation should constitute a violation of Article 8 in conjunction with Article 14. The Court's own interpretation of the Convention shows a reluctance to recognise same-sex marriage as a human right. In *Cossey v United Kingdom* A 184 (1990); 13 EHRR 622 the Court ruled that the scope of Article 12 of the Convention, which provides that 'Men and women of marriageable age have the right to marry', is limited to a 'traditional concept of marriage' founded on the 'biological criteria' of sex difference. Therefore, the Court's interpretation of Article 12 restricts the right of marriage to those of the same biological sex: *Cossey v United Kingdom* (ibid. at para. 46). See infra n. 97 for a discussion of the evolution of 'family' life in respect to sexual orientation and the adoption of a child.

> and our democracy. Please, let us be tolerant towards other people's freedom of choice!" [64]

The 'freedom of choice', the rights that we are all 'equal in', and the 'tolerance' required to ensure these, are presented here in relation to 'private manifestations' of homosexuality. It is on the basis of extending 'freedom' and 'equality' to homosexuals through a 'tolerance' of private sexuality that a claim is made to the limits of these rights in relation to the public sphere. By making the private sphere ('what people do in their own intimacy') separate from the public sphere, the Latvian President also reiterated the heteronormativity of the public sphere—where, it is claimed, homosexuality becomes 'our' business—as a legitimate basis for discriminating against homosexuals in civil society.[65]

Because this position closely resembles the Court's own interpretation of Article 8 in relation to homosexuality, it is unlikely that a challenge to civil discrimination of this type (discrimination that is mirrored across many contracting states which, in various ways, delimit civil rights on the grounds of sexual orientation) would succeed in the Court. Rather, as I explore below, the Strasbourg preoccupation with homosexuality as a 'private manifestation' can be seen to support the continuation of discrimination across a number of key areas of social life. Whilst these are often in relation to rights associated with access to civil institutions and processes (such as the legal recognition of relationships) they also involve continuing discrimination on the grounds of sexual activity where such activity is less than 'private'. For instance, when in 2003 the United Kingdom removed its statutory offences in England and Wales that made special provision for the criminalisation of male homosexual acts in public places,[66] it simultaneously introduced a new offence of 'sexual activity in a public lavatory' in order to deal with, as one member of Parliament put it, the 'offensive public nuisance of homosexuals'.[67]

Whilst it is important to recognise that the emphasis of Article 8, to protect 'minimal forms of civil society and basic forms of social plurality',[68] has been effective in securing some social rights for non-heterosexuals in some contracting parties, it is also important to recognise that the Court's delimitation

64 Available at: http://www.ilga-europe.org/europe/guide/country.by.country/latvia/latvian_president.signs.homophobic.constitutional.amendment [last accessed 16 Novernber 2009].

65 Ball discusses how a now common political strategy of opponents of gay civil rights is to concede that, whilst homosexuals have the right to be 'left alone' in private, there should be limits on forms of public expression: see Ball, *The Morality of Gay Rights* (New York: Routledge, 2003).

66 The Sexual Offences Act 2003 repealed the male offences of 'buggery', 'gross indecency' and male soliciting from English law that were established by the Sexual Offences Act 1956.

67 For a full discussion of this offence, and how it is used to police male homosexual acts, see Johnson, 'Ordinary Folk and Cottaging: Law, Morality and Public Sex', (2007) 34 *Journal of Law and Society* 520.

68 Gearey, Morrison and Jago, *The Politics of the Common Law: Perspectives, Rights, Processes, Institutions* (London: Routledge, 2009) at 218.

of homosexuality as a 'private manifestation' continues to provide a framework through which such discrimination comes to be imagined as legitimate. The Court's discursive construction of homosexuality across three decades has produced a powerful device through which homosexual rights, and the subjects who claim them, continue to be privatised. In the next part of this article, I consider how this privatisation is exacerbated by the Court's unproblematic appropriation and use of an inside/outside distinction in relation to sexual identity that fails to address how social participation and recognition in civil life is vital to the establishment of private life and, as a consequence, how it reproduces the discursive and material relations of 'the closet'.

4. Coming Out of the Closet: What Protection from 'Degrading Treatment'?

Eve Sedgwick proposes that '[t]he closet is the defining structure for gay oppression'[69] because it is the mechanism through which gay lives are rendered invisible in the social world and erased from public life. She goes on to argue that

> for many gay people [the closet] is still the fundamental feature of social life; and there can be few gay people, however courageous and forthright by habit, however fortunate in the support of their immediate communities, in whose lives the closet is not still a shaping presence.[70]

The Court can be seen to contribute to this 'shaping presence' in a number of ways. This was evident most recently in *Wolfmeyer v Austria,* which concerned the complaint of a 37-year-old man who had been convicted, and then subsequently acquitted on appeal, of sexual offences under Article 209 of the Austrian Criminal Code which, until its repeal subsequent to proceedings against the applicant, criminalised 'fornication' between a male over the age of 19 with another male aged between 14 and 18 (a framework that did not hold in respect of heterosexual sex).[71] The applicant complained that as a result of proceedings against him he had suffered 'humiliation' and 'public exposure' in the small provincial town where he resided and that, as a result, he had lost his employment.[72] In considering the applicant's complaint the Court acknowledged that where details of applicants' 'most intimate private life' are 'laid open to the public' this must 'be considered as a profoundly destabilising event' in their lives.[73] Therefore, as well as reiterating its previous

69 Sedgwick, *Epistemology of the Closet* (Harmondsworth: Penguin, 1990) at 71.
70 Ibid. at 68.
71 42 EHRR 3.
72 Ibid. at para. 27.
73 Ibid. at para. 33.

judgment that the unequal 'age of consent' contained in the Austrian Criminal Code unacceptably discriminated against the applicant under Article 14 of the Convention taken in conjunction with Article 8,[74] the Court also advanced the view that the making public of the applicant's sexual orientation, rather than simply his criminalisation for it, produced a 'destabilising' effect.

In one sense, the Court's willingness to acknowledge the effects of homophobia shows a positive development in relation to Article 8 taken in conjunction with Article 14—specifically the recognition that social discrimination on the grounds of sexual orientation produces negative subjective and private effects. Yet the discursive construction of the 'destabilising event' by the Court is also problematic because it fails to notice (or at least make explicit) that it is not the visibility of the applicant's sexuality that produces this 'destabilising event' but the social reaction to it once it has been 'laid open'. Rather than address these social reactions directly, and their role in maintaining the symbolic and material relations through which some private lives are 'laid open' or remain closed, the ruling deals only with the right to maintain the privacy of sexual orientation in a social context that is hostile to it rather than with the hostility itself. Read this way, the focus of the judgment is on the applicant's right to be free from any interference that requires him to make visible his homosexuality rather than the right to be free from the hostility that results when it is rendered visible.

How might the Court have considered directly the social hostility outlined in *Wolfmeyer*? One of the most striking aspects of the Court's case law is that there is no example of the type of 'humiliation' described in *Wolfmeyer* being used to successfully argue for a violation of Article 3 of the Convention that prohibits 'torture or inhuman treatment or degrading treatment or punishment'. In the small number of cases that have attempted to use Article 3 in respect of homosexuality, complaints have focused on 'degrading treatment' and the subsequent effects of such treatment upon the applicant(s). The Court has held that a consideration of whether treatment is degrading, contrary to Article 3, requires an assessment of 'whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality'.[75] Furthermore, any treatment must attain a 'minimum level of severity' to fall under the scope of Article 3, with a relative assessment of 'severity' being made in relation to 'the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim'.[76]

Article 3 has rarely been cited in cases brought on the grounds of sexual orientation. However, the recent judgment in *Ladner v Austria*[77] illuminates

74 *L. and V. v Austria* 2003-I; 36 EHRR 55.
75 *Yankov v Bulgaria* 2003-XIII; 40 EHRR 36 at para. 105.
76 Ibid. at para. 106.
77 Application 18297/03, Judgment of 3 February 2005.

the Court's current interpretation of Article 3 in respect to 'degrading treatment' suffered by non-heterosexuals. *Ladner*, a similar facts case to *Wolfmeyer,* concerned the applicant's conviction in 2002 by the Vienna Regional Criminal Court for sexual offences contrary to Article 209 of the Austrian Criminal Code and, following his conviction and the subsequent repeal of Article 209 from Austrian law, his appeal against his conviction. The appeal was dismissed on the grounds that the charges against the applicant had been served prior to the repeal of Article 209. A subsequent application to the Minister of Justice requesting a pardon also failed. In March 2003, the Minister of Justice replied to questions put by Parliament about the granting of pardons in cases of convictions under Article 209. During his answer, and using the file number and the date of the final decision by the Vienna Court of Appeal, the Minister referred to Mr Ladner's case and stated that a pardon was not granted because the applicant's conduct was contrary to Article 207b of the Austrian Criminal Code (which criminalises sexual acts in cases where an older person takes advantage of an adolescent's immaturity or of a predicament that has rendered them vulnerable). The applicant complained that the Minister, by invoking Article 207b, described him in public as 'a sexual abuser who exploited his partners' and that this constituted a violation of his Article 3 rights.[78] The Court ruled that in 'regard to the Minister's statement and, in particular, the fact that he did not mention the applicant's name' the treatment complained of did not reach the minimum level of severity required to fall within the scope of Article 3.[79]

Three questions arise from the *Ladner* judgment: first, would the use of Ladner's name by the Minister have constituted a form of treatment that was sufficiently degrading to reach the minimum level of severity required to fall within the scope of Article 3? Given the Court's judgment, and that it cites the absence of Ladner's name as the particular fact on which it is based, it seems reasonable to infer that had Ladner's name been mentioned this would have placed the treatment within the scope of Article 3. If this were so, a second question arises: on what grounds would the degrading treatment have been recognised? Would it have been on the grounds that such treatment constitutes a form of degradation because it produces the 'humiliating' and 'destabilising' effects upon the applicant recognised in *Wolfmeyer*? If that were the case, a third question is raised: is the use of Mr. Lander's name really the most relevant factor? It is arguable that the Minister's comments make a link, whether deliberately or not, between homosexual sexual activity and the sexual exploitation of children—a link that has, as argued above, long-standing social and cultural resonances across Europe—and that it is

78 Ibid. at para. 27.
79 Ibid. at para. 28.

this view itself that constitutes the degrading treatment of homosexual men by a public official of a contracting state. In other words, the Minister's actions arguably produce a 'humiliating' and 'destabilising' effect not only upon the applicant but also upon an entire social group and, given that the applicant is regarded as belonging to the group in question, he suffers from the net result of this degrading treatment.

Given the failure of the complaint in *Ladner*, the future scope for Article 3 complaints on the grounds of degrading treatment in respect of sexual orientation seems limited. Article 3 was most recently invoked in *Marangos v Cyprus*, which concerned an individual's refusal to perform military service with the Cypriot National Guard because of his belief that, as a homosexual, he would be subject to degrading treatment.[80] The applicant's case, however, rested on an Article 6 claim and, in rejecting it, the Court did not consider the Article 3 issue. This is unfortunate, since it provided an opportunity for the Court to judge whether the prevalence of the institutional and systematic homophobia complained of by the applicant would have reached the minimum standards of Article 3. The absence of any such judgment leaves the focus of the Court's case law in relation to issues such as 'humiliation' firmly within the realms of the rights associated with Article 8 and, as such, the emphasis remains on the right to maintain the privacy of one's sexuality rather than to be free from degrading treatment once it becomes publically known. Therefore, in terms of the 'closet', and the symbolic and material relations around which it is organised, Strasbourg jurisprudence is problematic since it fails to recognise, and directly address, the crucial difference between maintaining sexual orientation as 'private' and keeping it secret, invisible and hidden because of a fear of social hostility.

5. 'In' or 'out'? The Role of the Closet in Adjudicating Human Rights

The Court's failure to adequately address the difference between a right to determine the scope of one's sexual privacy, and the socially enforced secrecy of one's sexual orientation, has produced a discursive landscape in which the closet functions in its jurisprudence in contrasting and competing ways. On the one hand the idea that homosexuals can (and should) maintain their sexual orientation as a hidden or 'closeted' aspect of their 'personality' has been used by the Court as the key factor in upholding complaints on Article 8 issues. In *A.D.T. v United Kingdom*, for example, the Court found in favour of the applicant's right to engage in private group sex because he had 'gone to some lengths not to reveal his sexual orientation' to anyone and had

80 23 EHRR CD192.

demonstrated a 'desire for anonymity'.[81] For this applicant, being 'in' the closet functioned as evidence, forensic proof, of the 'genuinely "private"' nature of his private acts.

By contrast, in two similar facts cases against the Royal Air Force and the Royal Navy of the United Kingdom, and the then ban on homosexuality operated by the armed forces, it was the applicants' 'coming out' of the closet that determined the success of their complaint. In *Smith and Grady v United Kingdom*, for example, the applicants complained successfully to the Court that investigations conducted by the Royal Air Force into their sexual practices, and their subsequent discharge because of it, constituted an interference with their Article 8 rights.[82] In considering the specific issue of whether such interference during the investigation of the applicants' lives pursued a legitimate, and therefore justifiable aim, the Court ruled that there was 'doubt' that 'the investigations continued to serve any such legitimate aim once the applicants had admitted their homosexuality'.[83] The 'exceptionally intrusive character' of the investigation, which had included 'detailed questions of an intimate nature about their particular sexual practices and preferences',[84] was deemed unjustified 'once they [the applicants] had confirmed their homosexuality to the air force authorities'.[85] Similarly, in *Lustig-Prean and Beckett v United Kingdom*, the Court ruled 'that the Government [of the United Kingdom] has not offered convincing and weighty reasons justifying the continued investigation of the applicants' sexual orientation once they had confirmed their homosexuality to the naval authorities'.[86]

In both *Smith and Grady* and *Lustig-Prean and Beckett* a central determining factor of the success of the applicants' Article 8 claims was their readiness to 'admit' their homosexuality. This is clear because, although a blanket ban against homosexuals serving in the armed services was found to be a violation of the applicants' Article 8 rights, the Court remained equivocal about the violation of Article 8 rights created by the investigations into the applicants' private lives. The Court did not rule, for instance, that investigations into sexual orientation interfere with Article 8 rights *per se* but, rather, that there was disproportionate interference once the applicants had 'admitted' their homosexuality. Nor did the Court uphold the applicants' complaint, in *Smith and Grady*, that the intrusive investigation into their private life that produced their 'admission' constituted a form of 'degrading treatment' under Article 3.[87] It follows from this that where a public authority requires knowledge of

81 Supra n. 47 at para. 25.
82 Supra n. 26.
83 Ibid. at para. 74.
84 Ibid. at para. 91.
85 Ibid. at para. 110.
86 Supra n. 25 at para. 103.
87 In *Smith and Grady*, supra n. 26 at para. 122, the applicants complained that the intrusive investigations into their private lives constituted a form of degrading treatment. The Court

sexual orientation, and where individuals do not 'admit' their homosexual identity and/or practice, investigations (which could mean, in the loosest sense of the term, 'attempts to ascertain') in contracting parties might be deemed both legitimate and proportionate.[88]

Perhaps the most striking ruling from the Court in relation to ideas about the homosexual closet is in *Fretté v France*[89] that concerned the case of a refused application for the adoption of a child to the Child Welfare and Health Department of Paris Social Services. During the adoption selection process the applicant 'revealed' to a psychologist that he was a homosexual and because of this was urged, he claimed, not to continue with the process. He did continue, but Paris Social Services formally rejected his application citing his inability to provide a 'stable maternal role model' and, subsequently, that his 'choice of lifestyle' was unsuitable for child-rearing.[90] The applicant complained to the Court that this decision was based solely on the grounds of sexual orientation and that the only way of avoiding that conclusion would be to show that the decision had been based on another ground that had been applied to other unmarried heterosexual single persons or to 'a homosexual who had kept his homosexuality secret'.[91] The Court ruled that '[t]he fact was that there was no such ground'.[92] The applicant claimed that the policy adopted by Paris Social Services required him to 'choose between denying his sexual orientation or being penalised' and therefore constituted a choice between becoming a parent or remaining 'true to his sexual orientation'.[93]

The Court ruled that the applicant's 'avowed homosexuality' was the decisive factor in determining his rejection from the adoption process.[94] Yet, in considering the 'delicate issue'[95] of whether the grounds for this rejection were proportionate, the Court ruled that because it pursued a legitimate and

ruled that while the investigations produced 'distressing and humiliating' effects upon the applicants that this did not reach the level of severity to fall under Article 3. The Court reached the same conclusion more recently in the similar facts case of *Beck, Copp and Bazeley v United Kingdom* Application Nos 48535/99, 48536/99 and 48537/99, Judgment of 22 October 2002.

88 The Court ruled in *Norris*, supra n. 46, that a criminal law prohibiting homosexual sex violated the Article 8 rights of the applicant even though he had never been subject to any police investigation. Bamforth argues that it follows from this that the mere existence of a law that allows investigations into sexual orientation to take place can be seen to contravene Convention rights. However, it does not follow from *Norris* that all investigations into an individual's sexual orientation will be deemed unacceptable under Article 8. *Norris* relates to the interference with private sexual activity and not with, as I explore below, civil contexts in which the disclosure of sexual orientation is deemed necessary by public authorities. See Bamforth, 'Sexual Orientation Discrimination after *Grant* v *South-West Trains*', (2000) 63 *Modern Law Review* 694.

89 2002-I; 38 EHRR 21.

90 Ibid. at paras 10–11.

91 Ibid. at para. 28.

92 Ibid.

93 Ibid.

94 Ibid. at para. 32.

95 Ibid. at para. 36.

necessary aim, and because of the absence of a European consensus on adoption by homosexual parents, there was no violation of Articles 8 and 14. One crucial issue that *Fretté* highlights is the way in which discrimination is often organised in respect to the fundamental principles of secrecy and invisibility associated with the closet. The discriminatory policy of Paris Social Services (a policy legitimised by the Court) reiterates the normative social relations of secrecy associated with the closet: it makes staying 'in' the closet a requirement for those non-heterosexuals who wish to access services available to heterosexuals. This presents no real 'choice' to individuals in Mr. Fretté's position since being 'in' or 'out' of the closet will result in some form of loss in relation to their private life, home and family. Furthermore, in light of the judgments discussed above, had Mr. Fretté 'chosen' to stay in the closet then an investigation into his private life may have been regarded as legitimate and necessary until he 'admitted' his homosexuality.

Fretté raised a number of important questions about homosexuality, adoption and family life in relation to Convention rights, which the Court recently revisited in *E.B. v France*.[96] The applicant in *E.B.*, an 'avowed lesbian', complained that French adoption authorities had rejected her application to adopt a child on the grounds that her 'lifestyle' was considered to be unsuitable. There were two main reasons given by the authorities for this: first, that the applicant was unable to provide a child with a male parental referent and, second, that her female partner at the time was not sufficiently committed to the adoption process. Whilst the Court did not deem either of these issues to be matters reducible to sexual orientation alone, since they could equally concern single or cohabiting heterosexuals, it did find that considerations of the applicant's sexual orientation by the adoption authorities in relation to these issues had been a 'contaminating' factor in reaching the decision to refuse her application. The Court made the significant decision to uphold Ms E.B.'s complaint that refusing an application to adopt based on a consideration of the applicant's sexual orientation amounts to unacceptable discrimination under Article 14 taken in conjunction with Article 8.

There was significant disagreement in the Court as to whether *E.B.* overturns the earlier decision in *Fretté* (see the concurring and dissenting opinions of individual judges) given the different grounds for the complaints. There was also disagreement about the legitimacy of upholding the applicant's complaint on the grounds of Article 14 in respect of the provisions of Article 8. Judge Mularoni, in his dissenting opinion, argued that, since the Convention does not guarantee any right to adopt a child, allowing homosexuals to complain about discrimination under Article 14 in relation to Article 8 discriminates against heterosexuals who would have no recourse to Article 8 rights if an application to adopt had been refused. By contrast, Letsas regards *E.B.* as

96 Application No. 43546/02, Judgment of 22 January 2008 (GC).

significant because, far from creating any form of discrimination, it 'reaffirms a fundamental liberal-egalitarian principle that . . . no one should suffer a disadvantage or be deprived of a liberty or opportunity because of one's choice of lifestyle'.[97]

It is unclear whether *E.B.* actually amounts to the reaffirmation of such a principle in relation to sexual orientation and adoption (and issues relating to the 'family' more generally) given the considerable disagreement between the judges in respect of its relationship to *Fretté*. What is significant about *E.B.* is that it addresses the interrelationship between the 'private' and 'family' rights guaranteed by Article 8 and, in doing so, widens their scope in respect of homosexuality. In upholding the applicant's claim that she had a right not to be discriminated against on the basis of her sexual orientation, the Court recognised that this right applies not simply to privacy in the narrow sense but to the wider sphere of 'family life' that Article 8 protects. This is significant because, whilst Article 12 guarantees the rights of 'men and women' to form relationships and 'found a family', no such provision exists for homosexuals—although the Court has previously recognised that the meaning of 'family' in Article 8 is not limited to heterosexual nuclear families founded in marriage.[98]

E.B. is a welcome development in recognising that 'private' homosexual intimate relationships will often be founded and lived in relation to, and not in abstraction from, others and that those others may be children. Many of the reasons given by those who oppose 'gay adoption' relate to the way in which it challenges the privatisation of homosexuality so that others become 'exposed' to it—a view clearly expressed by dissenting Judge Loucaides in *E.B.*: 'I believe that the erotic relationship with its inevitable manifestations and the couple's conduct towards each other in the home could legitimately be taken into account as a negative factor in the environment in which the adopted child was expected to live'. Establishing that the 'inevitable manifestations' of Ms E.B.'s homosexuality in the private sphere was not a sufficient ground for discriminating against her in the adoption of the child is a further step in smoothing the distinction between the rights associated with private sexual activity and those of social and civil participation.

What the cases discussed in this section show is that the Court's interpretation of the Convention is a powerful site at which the discursive relations of the closet are reproduced and a number of social divisions, between those who are 'outside' and those who are 'inside', are both imagined and maintained. It shows the complex ways in which being 'out' of the closet produces both forms of vulnerability and protection for non-heterosexuals. On the one hand, coming out of the closet is the basis for asserting a human right to have one's

97 See Letsas, 'No Human Right to Adopt', (2008) 1 *UCL Human Rights Law Review* 134 at 148.
98 See *Marckx v Belgium* A 31 (1979); 2 EHRR 330; and *Keegan v Ireland* A 290 (1994); 18 EHRR 342.

'admitted' and 'avowed' private life protected; on the other hand, coming out, continues to render individuals excluded from the civil institutions that they wish to be 'in'. As Fuss argues, to be 'out' does not necessarily mean that one will be outside of the exclusions and deprivations that outsiderhood imposes but, on the contrary, that being 'out' produces one's status as an outsider.[99] The vulnerabilities of outsider status remain costly for individuals in contracting states where, although statutory criminal laws in relation to homosexual sex have been abolished, there remain strong social and cultural relations of homophobic discrimination. Such relations will determine, to varying degrees, the interaction between individuals and the legal and civil institutions of nation states and, not least, the 'public' demands that homosexual individuals make for the protection of 'private' life.

In England and Wales, for example, the Crown Prosecution Service recognises that homophobic 'hate crimes' are regularly not reported to the police because victims fear the repercussions that 'coming out' will produce.[100] The need to stay 'in' the closet for fear of such repercussions will determine the extent to which non-heterosexuals can further their human rights through their national legal systems. This is a common problem across many contracting states. For instance, it has recently been reported by the European Region of the International Lesbian and Gay Association, that in Georgia 'the act of coming out cannot be underestimated, both in terms of the courage required to speak openly about one's sexuality and also in terms of the psychological pressure of feeling forced to stay hidden'.[101] Whilst homophobia and intolerance on the grounds of sexual orientation are arguably variable across contracting states, it is also arguable that this 'pressure' continues to be felt to some degree, as Sedgwick notes, by non-heterosexuals in all contracting states.[102] To fully appreciate how the Court might exacerbate the social and cultural enforcement of the homosexual closet and, as a result, encourage a form of sexual privatisation that often renders homosexuality invisible, we need to consider the ways in which the Court has interpreted Articles 10 (freedom of expression) and 11 (freedom of assembly and association) of the Convention in relation to sexual orientation.

99 Fuss, 'Inside/Out', in Fuss (ed.) *inside/out: Lesbian Theories, Gay Theories* (New York: Routledge, 1991) at 1–12.

100 Crown Prosecution Service, *Policy for Prosecuting Cases of Homophobic and Transphobic Hate Crime* (London: CPS, 2007) at 16.

101 The European Region of the International Lesbian and Gay Association, *Forced Out: LGBT People in George. Report on ILGA-Europe/COC fact-finding mission* (2007) at 27, available at: http://www.ilga-europe.org/content/download/9372/55934/version/3/file/georgia.pdf. [last accessed 16 November 2009].

102 Supra n. 69.

6. A right to the 'Public Manifestation' of Homosexual 'Personality'? Steps Towards Protecting Assembly and Expression

I want to turn to assess the extent to which Strasbourg jurisprudence supports (or excludes) non-heterosexuals enjoying the full social and civil rights afforded to heterosexuals by considering the Court's interpretation of Articles 10 and 11 of the Convention. The rights guaranteed by Articles 10 and 11—rights of expression, which include the freedom to hold opinions and to receive and impart information and ideas, and of peaceful assembly and association—are of significant importance to gay men and lesbians in contemporary societies. They are also the rights that are subject to continual conflict and contestation in many of the states contracted to the Convention. Before considering the Court's interpretation of Articles 10 and 11 in relation to homosexuality, I will discuss a recent legal dispute in Turkey that, although not reaching Strasbourg, serves to highlight the current importance of Article 10 and 11 rights to sexual minorities and the ongoing attempts of national authorities to deny them.

The case concerns a ruling by the Third Civil Court of First Instance in the Beyoðlu district of Istanbul, in May 2008, that *Lambda Istanbul*, a lesbian, gay, bisexual, and transgender (LGBT) human rights organisation, must cease operating. The grounds for the Court's decision originated in a complaint from the Istanbul Governor's Office in respect of the lawfulness of the name of the organisation and of its objectives. In respect of the name, the Governor's Office argued that the right of freedom of association, outlined in the Turkish Civil Code, required that the name of any association be clearly understandable and that the word 'Lambda' was not comprehensible in Turkish. In respect of the objectives of the organisation, the Governor's Office argued that these were contrary to Article 56 of the Civil Code that prohibits association for 'unlawful or immoral purposes'. The Court ruled in favour of the Governor's Office on both of these grounds:

> because the Turkish meaning of the word "Lambda," mentioned in the name of the association, was not explained; and because the aims of the association . . . are in breach of the abovementioned provision [Article 56], which states that 'no association may be formed for unlawful or immoral purposes,' and Article 41 of the Constitution of the Turkish Republic, which states that 'The state shall take the necessary measures and establish the necessary organisation to ensure the peace and welfare of the family, especially where the protection of the mother and children is involved, and recognising the need for education in the practical application of family planning,' it is decided that these breaches consist

> sufficient grounds for obstruction of freedom of assembly and association.[103]

Following the ruling, various human rights organisations and commentators quickly reported that it represented a manipulation of the rules governing the naming of organisations to advance repressive sanctions against LGBT organisations. Human Rights Watch, for instance, argued that the Court had 'failed to address' the important issue of homosexuality and morality and closed the organisation on 'purely procedural grounds'.[104] However, the published judgment shows that the Court, far from relying on procedural grounds, gave significant consideration to the question of social morality and sexual orientation. In reaching its decision, the Istanbul Court argued that it was legitimate to curtail the activities of *Lambda Istanbul* in order to 'protect public morality and [the] rights of others'. It ruled:

> It is observed that encouragement and propaganda, in all levels of the society, of the sexual orientation of the members of the association through organising instructive programs are predominant in the association's aims, and that these activities are likely to bring about a tyranny of a minority over the majority, which is against legal and constitutional regulations, and that this would jeopardise the rights and freedom of the family and children, as mentioned in Article 41 of the Constitution.[105]

Had the decision by the Istanbul Court not been subsequently overturned by the Court of Appeal, *Lambda Istanbul* would certainly have lodged a complaint in Strasbourg and the Court would have been asked to consider the legitimacy of a decision to limit freedom of association on the grounds of protecting the rights, freedom and morality of the 'majority' (heterosexuals) from the 'tyranny' of non-heterosexual sexual orientations.

The central question in the *Lambda Istanbul* case is the extent to which non-heterosexuals should be able to express facets of their sexual orientations in public and associate with each other on the basis of these shared characteristics. Whilst Articles 10 and 11 of the Convention protect these aspects of social, civil and political life, are members of organisations like *Lambda Istanbul* able to successfully argue to the Court that as non-heterosexual 'minorities' they have the right to freedom of expression and association? The Court's case law in this area is underdeveloped. The seminal *Handyside v United Kingdom* showed the Court upholding the prosecution of a publisher in the United Kingdom under the Obscene Publications Act 1959 for the

103 Republic of Turkey, Beyoglu Court of the First Instance No. 3, File No 2007/190, Ruling No: 2008/238, 29 May 2008.

104 See: http://www.hrw.org/en/news/2008/06/01/turkey-court-shows-bias-dissolves-lambda-istanbul [last accessed 16 November 2009].

105 Supra n. 103.

publication of a book aimed at children that contained a twenty-six-page section on 'sex'.[106] The Court paid special attention to the presentation of homosexuality in this section of the book, arguing that there was 'a very real danger that this passage would create in the minds of children a conclusion that that kind of relationship was something permanent'[107] rather than, as the Court thought appropriate, a manifestation of 'tendencies' that are 'often temporary'.[108] The Court rejected the applicant's Article 10 claim and ruled that his prosecution was legitimate for the protection of health and morals.

In order to ensure the 'protection of health and morals' contracting parties can interfere with the rights afforded by Article 8 as well as Articles 10 and 11. It is significant that while the Court has made it consistently clear that it regards interference with Article 8 rights in cases of 'private' homosexual practice as disproportionate, it has been more equivocal in relation to Articles 10 and 11. For instance, in *Smith and Grady v United Kingdom* the applicants complained that the blanket ban on homosexuals serving in the armed forces interfered with the expression of their sexuality in the form of 'opinions, ideas and information'.[109] The applicants argued that such expression is 'essential to an individual and his or her identity' and that denying them the opportunity to 'communicate openly and freely' forced them to live 'secret lives'.[110] This, in turn, they argued 'had a chilling effect on them and was a powerful inhibiting factor in their right to express themselves'.[111] An essential aspect of this complaint was the argument that the right to freedom of expression in relation to sexual orientation is as fundamental as the right to privacy because privacy rights are weakened if they are dependent upon maintaining a constant and vigilant separation between the public and private spheres.

In this sense, the protection of the social rights afforded by Article 10 can be argued to be a vital element of ensuring the full scope of privacy rights contained in Article 8. This is because prohibitions on public expression in relation to sexual orientation transform relations of privacy into relations of secrecy whereby the right to express sexual orientation 'alone' is severely compromised by fear of the reaction of those 'outside'. In *Smith and Grady* the Court acknowledged that it did 'not rule out that the silence imposed on the applicants as regards their sexual orientation . . . could constitute an interference with their freedom of expression'.[112] However, the Court ruled that the principal issue of the applicants' case was their sexual orientation and that, as 'an essentially private manifestation of human personality', this made the right to freedom of expression 'subsidiary to the applicants' right to respect for their

106 Supra n. 21.
107 Ibid. at para. 34.
108 Ibid. at para. 35.
109 Supra n. 26 at para. 126.
110 Ibid. at para. 126.
111 Ibid.
112 Ibid. at para. 127.

private lives'.[113] As such, the Court felt it was not necessary to examine the applicants' complaint under Article 10.

The failure to consider Article 10 in *Smith and Grady* is a further example of the Court's fixation on the private sphere in relation to matters regarding sexual orientation. Yet the idea that the public expression of homosexuality is subsidiary to its 'private manifestation' maintains a problematic segregation between the private and public spheres that fails to engage with the ways in which the private sphere depends upon, and is produced because of, the social, cultural, civil, legal and political contexts in which it is situated. It also fails to grasp the ways in which public expression is often a vital mechanism through which citizens of a nation state protect their private freedoms. This is most obviously the case where public expression becomes imperative for contending and resisting attempts by a contracting state to suppress the rights of sexual minorities. The continuing struggle to establish Gay Pride organisations across Europe, for example, is based on the idea that the visibility of non-heterosexuals in social and public life is central to the maintenance of their private rights. The continuing attempts to legally suppress such organisations, and the social hostility towards public assemblies, is evidence of the continuing desire to erase homosexuality from the public and private spheres.[114]

The Court's recent case law does show some signs of evolution in respect of the application of Articles 10 and 11 to complaints relating to homosexuality. In *Kobenter and Standard Verlags GMBH v Austria* the Court considered a complaint by two applicants who had been prosecuted for the publication of an article in the newspaper *Der Standard* that criticised a decision in the Austrian courts and the presiding judge that made it.[115] The case originated in Linz Regional Court and concerned a complaint in relation to the publication of an article, in *The 13th – Newspaper of Catholics for Faith and Church*, that argued 'homosexuals now crawl like rats out of their holes' and that

113 Ibid.

114 In Latvia, for example, there have been significant contestations around attempts to form an annual Gay Pride event in Riga. In 2005, Riga City Council refused permission for the first planned event but the organisers successfully challenged this in the local court. The event met with significant hostility from a range of individuals and groups, including the Prime Minister of Latvia who stated that: 'For sexual minorities to parade in the very heart of Riga, next to the Doma church, is unacceptable'. The following year, Riga City Council again refused permission for Gay Pride and, on this occasion, the local court upheld their decision. The political organisation 'No Pride' has been a significant presence during these disputes. Its goal is 'to fight against the opinion, that homosexual lifestyle is proper and even recommended, which is enforced on Latvian society by EU through mass media, various political parties and non-governmental organisations sponsored by EU'. See http://www.nopride.lv [last accessed 16 November 2009]. Aside from the way in which homosexuality becomes a touchstone for ideas about Latvian sovereignty and nationalism becomes mobilised, the significance of 'No Pride' is that it seeks to limit forms of public expression that 'recommend' homosexuality as 'proper'.

115 *Kobenter and Standard Verlags GMBH v Austria* Application 60899/00, Judgment of 2 November 2006.

'nazi-methods should be applied to them'.[116] Linz Regional Court found that certain passages of the article were insulting and ordered *The 13th* to pay compensation to four plaintiffs. However, the Regional Court acquitted the author of the article and included in its judgment a description of homosexuality that contained statements such as 'homosexuality includes also the lesbian world and, of course, that of animals'.[117] In response to this judgment, the applicants in *Kobenter* published an article that criticised the judgment on the grounds that it lent 'support to a homophobe's venomous campaign with outrageous examples from the animal kingdom' and that the original trial was akin to 'the traditions of medieval witch trials'.[118] The presiding judge in the original case filed a private prosecution against the applicants and the St. Pölten Regional Court, finding in his favour, convicted the applicants of defamation. In Strasbourg, the Court found in favour of the applicants' complaint that their conviction unnecessarily interfered with their rights to freedom of expression. It ruled 'that there is little scope under Article 10 § 2 of the Convention for restrictions on debate on questions of public interest'.[119]

The judgment in *Kobenter* shows support for the protection of the public expression of ideas, opinions and information under Article 10 that challenge homophobic discourse. Similar recent developments in Article 11 jurisprudence show support for that challenge to be made through public and political assembly. In *Baczkowki and Others v Poland,* which concerned a complaint by the organisation *Foundation for Equality* against the Mayor of Warsaw's refusal to permit an assembly with the aim of alerting public opinion on the issue of discrimination against minorities, the Court issued a significant ruling in respect of Article 11 of the Convention.[120] The Court recognised that whilst it had often referred to the essential role of political parties in ensuring the proper functioning of pluralism and democracy, it was also important to recognise the contribution of 'associations formed for other purposes'. It reasoned:

> For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion.[121]

The Court's extension of Article 11 rights to associations based on 'cultural identities', and their mandate of this as an appropriate basis for achieving the 'harmonious interaction of persons', will be a significant platform on which

116 Ibid. at para. 9.
117 Ibid. at para. 11.
118 Ibid. at para. 13.
119 Ibid. at para. 32.
120 48 EHRR 19.
121 Ibid. at para. 62.

LGBT organisations can assert their right to exist across contracting parties. It means that, for example, organisations such as *Lambda Istanbul* will have a basis for arguing that interference with association on the grounds of sexual orientation is not necessary in a democratic society. Nevertheless, whilst both *Baczkowki* and *Kobenter* are important judgments, and develop the provision of Articles 10 and 11 to some matters of sexual orientation, the emphasis of the Court's case law remains on homosexuality as a 'private manifestation' and it remains to be seen what weight these recent judgments will have in the future across contracting parties and in the Court itself.

7. Conclusion

In this article, I have argued that the case law of the European Court of Human Rights continues to maintain a conceptual notion of homosexuality as a domesticated set of sexual activities that are ultimately protectable because they are 'genuinely private'. This discursive construction of homosexuality by the Court produces social and cultural, as well as legal, effects. Most importantly, the Court's discourse helps fashion the social and cultural landscapes in which legal subjects are situated, encouraging the view that human rights afforded on the basis of sexual orientation all emanate from, and are limited to, the private sphere. The continued discursive construction by the Court of homosexuality, as human personality in private, limits an appreciation of how the private sphere depends, to a large extent, upon the public and, furthermore, how the public sphere is created in relation to ideas about the private. How one experiences privacy will depend upon how one experiences, for example, the potential of degrading treatment in public, any limits that are placed upon public expression or assembly, and exclusions from social and public institutions. These aspects of hostility towards homosexuality in social life are forms of discrimination, and mechanisms of social control, that rely on the same conceptual foundations of the Court: that homosexuality is an aspect of human personality that is essentially private.

That same conceptualisation of homosexuality is foundational to ongoing legal discrimination against sexual minorities across contracting parties. For example, during 2009 the Lithuanian Parliament will consider an amendment to the *Law on the Protection of Minors against Detrimental Effect of Public Information* (which regulates 'public information, which might cause physical, mental or moral detriment to the development of minors')[122] that will limit 'information which agitates for homosexual relations' and, as a consequence, prohibit the 'propagation' of information about 'non-traditional' sexual

122 Išvertė: Lietuvos Respublikos Seimo kanceliarija Dokumentų skyrius, 10 September 2002, No. IX – 1067.

orientation to children.[123] The proposed amendment is neither novel nor unique in its conceptual or legal construction (it appears similar to the, now repealed, section 28 of the Local Government Act 1988 of England and Wales)[124] or in its attempt to limit the public expression of non-heterosexual sexuality. If passed, it will almost certainly be deemed by some to be in violation of Articles 8 and 10 and, perhaps, Article 2 of Protocol No. 1 (the right to an education) of the Convention. It will likely be argued by opponents that it is contrary to the spirit of the Court's reading of Article 10 that emphasises that freedom of expression is 'one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment'.[125] Proponents of the law will likely argue that it is justified by Article 10(2) of the Convention that permits interference with freedom of expression for 'the protection of health or morals'.

A reading of the Court's case law gives no straightforward answer to the status of the Lithuanian amendment should a complaint be brought against it under the Convention. The amendment does not propose to interfere directly with an intimate aspect of private life but with the 'promotion' of ideas and opinions about private life. In essence, it seeks to maintain a formal distinction between the private and public manifestations of homosexuality. The Court's case law, as I have argued throughout this article, continues to reiterate this distinction in a number of ways. The result is that there is no clear relationship in Strasbourg jurisprudence between the protection afforded by Articles 8 and the other parts of the Convention in relation to sexual orientation. This is because, whilst the Court's emphasis on homosexuality as a 'private manifestation of human personality' has been decisive in socialising a European consensus on the protection of private sexual expression, it can also be seen to have encouraged a continued separation of 'sexual rights' from 'citizenship rights'. To ensure the existence and preservation of full citizenship rights for non-heterosexuals, homosexuality needs to be comprehended outside of the narrow confines of 'private life' associated with Article 8.

123 See: http://www.pinknews.co.uk/news/articles/2005-10902.html [last accessed 16 November 2009].

124 Section 28 of the Local Government Act 1988 stated that a local authority 'shall not intentionally promote homosexuality or publish material with the intention of promoting homosexuality' or 'promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship'. It was repealed by the Local Government Act 2003.

125 *Lingens v Austria* A 103 (1981); 8 EHRR 407 at para. 41.