

Do European Court of Human Rights Judgments Promote Legal and Policy Change?

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This paper is preliminary and based on incomplete data. Comments are very welcome.

Abstract

Do the rulings of international courts set precedents that influence actors other than the parties to the dispute? Are international courts agents of change or do their judgments merely reflect ongoing social and political trends? We answer these questions in the context of European Court of Human Rights (ECtHR) judgments on lesbian, gay, bisexual and transgender (LGBT) issues. ECtHR judgments often explicitly reflect evolving practices in Council of Europe's member states. We suggest three mechanisms through which such judgments could push lagging states toward adopting policies and laws in line with those of more progressive countries. First, national courts can rely on ECtHR jurisprudence to invalidate domestic laws. Second, ECtHR rulings can help inform and mobilize domestic constituencies to push for legislative change. Third, ECtHR rulings can have an indirect effect by affecting the conditions the EU and the Council of Europe set for membership. We investigate these hypotheses using a new dataset that matches ECtHR judgments on LGBT issues with national laws and policies in Council of Europe member countries. We address endogeneity concerns by modeling the Court's decision-making process. We find that ECtHR judgments have a significant and positive effect on the probability that lagging countries will adopt legal reforms that expand LGBT rights and that all three mechanisms contribute to this. Even though the implementation of ECtHR rulings is far from perfect, the precedential effect of these rulings sometimes induces states to adopt policies that they might otherwise not have adopted or would have adopted later.

Acknowledgements: An earlier version of this paper was presented at Berkeley Law School, an NYU Law School conference on human rights, the International Studies Association, and Georgetown University's Political Economy Workshop. We thank Marc Busch, Zach Elkins, Tom Ginsburg, Ryan Goodman, Andrew Guzman, Ron Hassner, Jonah Levy, Katerina Linos, Saira Mohamed, Lindsay Oldenski, Tonya Putnam, Dennis Quinn, Peter Rosendorff, Beth Simmons, Jennifer Tobin, Mike Tomz, Geir Ulfstein, and Kees Waaldijk for helpful comments and suggested. We thank Kristina Alayan, Laura Duncan, and Sharanbir Grewal for exceptional research assistance.

The last two decades have seen a marked expansion in the number of international judicial decisions.¹ To what extent do these decisions influence the behavior of nation states? The burgeoning literature on the effectiveness of international law focuses on the impact of treaty ratifications, ignoring the interpretation of treaty commitments by international tribunals after ratification.² Research on international court rulings defines judicial influence narrowly, focusing on whether the parties to a particular dispute comply with a judicial decision against them.³ We focus on a broader question: whether international tribunals function in a manner similar to their domestic judicial counterparts by developing precedents that influence the behavior of all actors within a legal system without the need for repeat litigation or threats of coercive sanctions. Phrased differently, we ask whether international courts develop norms that influence policy choices across a community of states.

Although scholars have recognized that international tribunal rulings can have broad precedential effects,⁴ we are unaware of any systematic empirical study that directly analyzes this issue. We examine the influence of European Court of Human Rights (ECtHR or Strasbourg Court) rulings that interpret the European Convention on Human Rights in cases involving lesbian, gay, bisexual, and transgender (LGBT) individuals. Our analysis is based on a new dataset that includes LGBT decisions of the Strasbourg Court (as well as the now defunct European Commission on Human Rights) and the dates when member states changed national laws and policies that were inconsistent with previous rulings against other treaty parties.

¹ Alter (2009) estimates that there are about 30,000 judgments by international courts as of 2008.

² *E.g.*, Hathaway 2002, Hafner-Burton & Tsutsui 2005, Simmons 2009.

³ *E.g.*, Anagnostou 2010, Hawkins & Jacoby 2010, Hillebrecht 2010; Von Staden 2007.

⁴ For example, Guzman and Meyer (2009) have argued that “by establishing a tribunal to interpret legal obligations in a way that gives rise to a soft-law jurisprudence, states are able to expand the tribunal’s influence beyond those states that submit to the tribunal’s jurisdiction”). Busch (2007) has argued that governments strategically bring trade disputes to the forum where they think the precedent may serve them best. Carrubba et al (2008) find that third party government observations (motivated by potential precedential effect of anticipated rulings) influence ECJ behavior.

The ECtHR has become increasingly progressive on LGBT issues over the past three decades. It has, for example, found violations of the European Convention against countries that criminalize consensual same-sex sodomy, that impose a higher age of consent for gay men, that prohibit lesbians and gay men from serving in the military, and that restrict the ability of transsexuals to change identity documents and to marry someone whose sex is opposite to their newly-acquired gender. For all these issues the Court reversed one or more earlier decisions rejecting challenges to these policies. This pattern suggests a high degree of judicial discretion in expanding the scope of the European Convention.⁵ However, the evolution of Court's jurisprudence tracks similar progressive trends in the national laws and practices of the Council of Europe (CoE)'s member states. In many of its rulings on LGBT rights, the Strasbourg Court has referred to this evolving "European consensus"⁶ in deciding how broadly to interpret the Convention. We ask, then, whether ECtHR rulings increase the likelihood of policy reform in all CoE countries, or whether the Court merely confirms or at most solidifies preexisting social and political trends.

As we explain below, although ECtHR judgments (including those on LGBT issues) are legally binding only on the defendant state, we find that the judgments have a significant impact on the likelihood that states throughout the CoE will adopt more progressive LGBT policies. The annual probability that a state changes policy is about eight percent higher when there is an ECtHR ruling than when such a ruling does not exist. A specific finding of a violation against a state increases the probability of policy change by an additional seventeen percent. These findings are partially explained by the fact that both the CoE and EU demanded that candidates

⁵ Some scholars have referred to the discretion that international courts exercise in interpreting international obligations and imposing constraints on treaty parties as judicial "agency." Burley & Mattli 1993; Alter & Meunier-Aitsahalia 1994.

⁶ For an early analysis of consensus, see Helfer 1993.

for membership comply with some ECtHR rulings on LGBT issues, confirming earlier findings that membership conditionality has affected human rights policies of accession states in Eastern Europe.⁷ However, we also find that ECtHR judgments significantly increased the likelihood of policy reform for issues and countries not subject to membership conditionality. Consistent with a developing literature on the domestic sources of compliance with international treaty obligations,⁸ we attribute this to two factors: the persuasive influence of ECtHR rulings in national courts, and the agenda setting and mobilization effects of ECtHR rulings. These mechanisms do not merely enhance compliance with narrowly defined legal obligations; they also strengthen the interpretive authority of supranational judges for all CoE member states. We find especially strong precedential effects of ECtHR rulings in countries where courts can invalidate domestic legislation if it is incompatible with the Convention.

Although our findings support the contention that ECtHR judgments have a substantively important and statistically significant effect on national-level LGBT legal reforms, the results do not imply that the ECtHR aggressively promotes the adoption of pro-LGBT policies when it interprets the European Convention. Moreover, implementation often remains partial and imperfect even a decade or more after the Court first establishes a legal principle. In this sense, the decentralized mechanisms of domestic influence that we describe are not perfect substitutes for the robust enforcement regime that exists in advanced constitutional democracies. Thus, although recent research has rightfully challenged the rigid separation between the study of domestic and international courts,⁹ important differences remain.

The next section provides a brief overview of the European Convention system and discusses the mechanisms by which Court rulings could affect policies across Council of Europe member

⁷ Kelley 2004, Schimmelfennig 2001.

⁸ E.g. Cichowski 2007; Dai 2007; Simmons 2009.

⁹ See: Staton and Moore 2011.

states. We then discuss ECtHR case law relating to LGBT rights and how it has responded to evolving trends in national laws and practices. The following section turns to an analysis of how member states have responded to ECtHR rulings. We first examine descriptive trends in national laws and practices and then offer a more sophisticated regression analysis that seeks to account for the confounding influence of social and legal trends.

ECTHR RULINGS AND THEIR EFFECTS ON NATIONAL POLICIES IN EUROPE

Following World War II, the governments of Western Europe established a Council of Europe to promote economic and social progress. The Council's mandate including drafting a regional human rights treaty to protect a broad panoply of civil and political liberties. The European Convention entered into force in 1953 with thirteen member states. It has since been amended by numerous Protocols and has seen its membership expand nearly fivefold to 47 countries, with the largest increase following the accession of former Soviet bloc countries beginning in 1989.

In addition to setting forth substantive legal provisions, the Convention creates a judicial system to review complaints filed by private actors alleging violations of treaty-protected rights by one or more ratifying states. Prior to 1998, this system was comprised of three separate bodies—the European Commission of Human Rights, the ECtHR, and the Committee of Ministers. The Commission subjected complaints to a rigorous screening process. It dismissed the vast majority of cases as groundless, and issued a decision on the merits for those complaints that revealed a plausible violation of the Convention. The Commission or the state could then appeal this decision to the ECtHR, which reviewed the facts and the law *de novo* and issued a legally binding judgment. Following an institutional overhaul of the Convention in 1998, the ECtHR became a permanent, full-time court with compulsory jurisdiction, and it assumed all of

the Commission’s review functions from screening to final judgment. The Committee of Ministers—the Council of Europe’s executive and political arm—supervises the implementation of ECtHR judgments (and, prior to 1998, any merits decisions of the Commission not appealed to the Court).

ECtHR rulings have the same effects as do the judgments of all international courts—they are legally binding only on the parties to the dispute.¹⁰ They do not bind other treaty members, even states with laws and policies identical to those that the Strasbourg Court has found to violate the European Convention. This established principle is grounded in national sovereignty concerns as well as a “desire to limit the power of the judiciary relative to legislative and executive institutions.”¹¹ By ratifying a treaty that creates an international court, a state agrees to accept the court’s jurisdiction and to abide by the judgments against it. But the state does not consent to be bound by rulings in which it did not participate, nor to forego the opportunity to argue that its national laws are distinguishable from those that the court has previously considered.¹²

Over time, however, the ECtHR has asserted a broader conception of its institutional role in the European Convention system. In addition to resolving the cases that come before it, the Court also “determin[es] issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States.”¹³ In giving effect to this bolder vision, the

¹⁰ European Convention, Art. 53(1) (“The High Contracting Parties undertake to abide by the final judgment of the Court *in a case to which they are parties.*”) (emphasis added).

¹¹ Conant (2002).

¹² As Greer (2006, 279) explains in his study of the ECtHR, the “orthodox view” is that a state “is obliged to observe only those judgments made directly against it.”

¹³ *Karner v. Austria*, App. No. 40016/98, ECHR 2003-IX (2003); *see also Ireland v. United Kingdom*, 25 Eur. Ct. H.R. at para. 154 (ser. A) (1978) (ECtHR judgments “elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them”). A nonbinding resolution of the Parliamentary Assembly of the CoE describes this function even more broadly,

Court has rather momentously proclaimed the Convention as a “constitutional instrument of European public order,”¹⁴ and it has used interpretive tools—such as the doctrine of effectiveness, the principle of autonomous interpretation, and an evolving understanding of human rights—in an effort to bring about “a slow but constant change of the sphere of sovereignty of the modern [European] state.”¹⁵ The result, some scholars argue, is a “jurisprudence [that is] capable of changing how national politico-legal systems operate, in a wide range of policy settings, at the most fundamental levels.”¹⁶

The extent to which ECtHR judgments in fact have such broad effects remains an open question. Recent studies have found that compliance is sometimes delayed or insufficient even for the states against whom a violation was found.¹⁷ This suggests that adherence to ECtHR legal principles in states against whom the Court has *not* found a violation is likely to be even lower. As far as we know, however, there is no systematic empirical study that addresses this issue.

Many theoretical mechanisms relating to the effectiveness of and compliance with international law do not apply in a straightforward manner when measuring the wider influence of international court rulings on non-parties. For example, some scholars see (potential) reputational costs as the key reason why states comply with international law.¹⁸ Yet these costs are unlikely to be substantial in the absence of a formal legal obligation to comply. Other scholars stress that states can make compliance commitments more credible by incurring

asserting that the “the case law of the [ECtHR] forms part of the Convention, thus extending the legally binding force of the Convention *erga omnes* (to all other parties).” Res. 1226, Parliamentary Assembly of the Council of Europe, Execution of Judgments of the European Court of Human Rights (2000), at para. 3.

¹⁴ *Loizidou v. Turkey*, 310 Eur. Ct. H.R. at 27 (ser. A) (1995).

¹⁵ Ress, *supra* note __, at 364. For a discussion of the ECtHR’s interpretive methodologies, see Mowbray (2005).

¹⁶ Stone Sweet (2008).

¹⁷ Hillebrecht 2010, Von Staden 2009. This is so notwithstanding the fact that the Council of Europe has developed an elaborate institutional structure to monitor the implementation of ECtHR judgments. Execution of Judgments of the European Court of Human Right (http://www.coe.int/t/dghl/monitoring/execution/default_en.asp).

¹⁸ E.g. Guzman 2008.

nontrivial ex ante (audience) costs when they ratify a treaty.¹⁹ But states make no specific commitment to implement the legal principles developed by the ECtHR (as opposed to the Convention and Court judgments against them), and it is much harder to hold them accountable for a promise they did not make.

There are, however, at least three theoretical mechanisms that provide plausible causal links between the ECtHR's development of legal principles and national-level policy changes by all CoE member states. First, domestic courts may view ECtHR rulings as persuasive authority when interpreting national-level guarantees of individual rights. Second, ECtHR rulings may have an agenda-setting effect that catalyzes domestic mobilization in favor of legislative changes in policy. Third, ECtHR rulings have shaped membership conditions for admission to the EU and the Council of Europe. We discuss each of these mechanisms in turn.

The Persuasive Influence of ECtHR Rulings in National Courts

The European Convention is now an integral part of the domestic legal orders of all CoE member states. This enables national courts to apply the rights and freedoms protected by the treaty, either directly (in countries where the Convention has direct effect) or as they appear in national constitutions and statutes. However, Strasbourg judgments—both those against the state in which a national court sits and those against other countries—have only persuasive authority. National judges are not obligated to follow the ECtHR's jurisprudence. To the contrary, “[w]ithin the domestic legal order, the Convention is only one element in the mosaic of different constitutional provisions and its interpretation in that context may differ considerably from an interpretation based on the Convention alone.”²⁰

There are, however, numerous examples of domestic courts citing to ECtHR case law as

¹⁹ For an overview, see Simmons 2010.

²⁰ Rens, *supra* note __, at 376. Only in two countries—the the Netherlands and the Ukraine—are ECtHR judgments directly “executable within ... domestic legal systems.” *Ibid.* at 374.

support for striking down domestic laws that are incompatible with the Convention or with national constitutions that protect civil and political liberties. Concerning LGBT issues, both the Hungarian (2002) and the Portuguese Constitutional Courts (2005) relied heavily on the *Sutherland v. United Kingdom* decision in finding that unequal age of consent laws violated constitutional equality rules.²¹ Irish laws that prohibit changing a birth certificate following gender reassignment surgery were found incompatible with the European Convention by the Irish Supreme Court, relying heavily on the ECtHR's decision in *Goodwin v. United Kingdom*.²² Although the Irish government initially challenged this judgment, it later withdrew its appeal and created a committee to draft legislation to grant legal recognition to a change of sex following gender reassignment.²³

These examples do not, of course, prove that ECtHR jurisprudence had a causal influence on the policy change in these countries. It may be that national courts would have reached the same conclusions in the absence of ECtHR case law, or that governments would have changed their policies anyway due to social or political pressures.²⁴ The examples do, however, illustrate a plausible route through which ECtHR judgments may influence policy changes across Europe. Moreover, they suggest that the effect of ECtHR rulings may be especially strong where national courts have the ability to invalidate legislation if it is incompatible with the Convention.²⁵ In this circumstance, individuals have better opportunities to challenge domestic laws and judges have more leeway to invalidate those laws in reliance on the Convention. This hypothesis is also consistent with a developing literature in political science, which argues that the effect of

²¹ Waaldijk *supra* XXX

²² *Foy -v- An t-Ard Chláraitheoir & Ors*, [2007] IEHC 470.

²³ "State drops transgender challenge" *The Irish Times*, June 21, 2010.

²⁴ For this argument in the U.S. context, see Rosenberg (1991).

²⁵ Keller and Stone Sweet. 2008..

international law and courts may be conditional on characteristics of domestic legal systems.²⁶

Agenda Setting and Legislative Change

A second mechanism by which international court rulings may generate policy change is by raising the domestic salience of a legal issue and increasing the likelihood that it will appear on the agenda of national parliaments. Beth Simmons makes this point with respect to treaties:

It is one thing not to *initiate* policy change on the national level and quite another not to *respond* once a particular right is made salient through international negotiations. Silence is ambiguous in the absence of a particular proposal, but it can easily be interpreted as opposition in the presence of a specific accord. (Simmons 2009, 128).

International court rulings operate in a similar fashion by clarifying that a country's policies are inconsistent with international legal norms.²⁷ This poses a new question: should a country change its policies in order to make them more compatible with these international norms? Even in countries where constituencies in favor of changing a policy already exist, issues may not achieve the political salience needed for legislative reform. Opponents of policy change may be successful in keeping an issue off the agenda. Issues that concern marginal groups may be especially likely to escape legislative attention. International court rulings plausibly raise the stakes by making the issue not just about the rights of marginalized individuals but also about the degree to which a country's policies meet international human rights standards. Moreover, since the ruling comes from a Court, it also raises the prospect of a future negative legal ruling.

Together, these may provide incentives for legislative change.

For example, the ECtHR's 1999 decision finding that the UK violated the Convention by not allowing gay men and lesbians to serve openly in the army (*Lustig-Prean*) enabled activists and opposition forces in other CoE countries with discriminatory military service rules to highlight that the policies diverged from European standards. In 1999, the German military faced

²⁶ E.g. Kelley 2007, Mitchell-McLaughlin and Powell 2011, Simmons 2009.

²⁷ See Dai 2005, 2007.

a court challenge to its “glass ceiling” policy that denied officer positions to gay men and lesbians. The case was brought by Lieutenant Winfried Stecher, who had been dismissed after admitting his homosexuality during a hearing.²⁸ Defense minister Rudolf Scharping (Social-Democrats (SPD)) initially vowed to fight the case, declaring homosexuals “unfit for leadership” in a leaked letter to fellow cabinet members.²⁹ The coalition government (SPD and Green Party) initially backed Scharping, and German courts rejected Stecher’s appeals. However, the liberal (right-wing) opposition party (FDP) demanded a debate on the topic in the Bundestag on March 23, 2000. The FDP’s spokesperson, Hildebrecht Braun, argued that:

The European Court has already decided that the discrimination of homosexual soldiers is a violation of human rights. Even though the judgment concerned a British soldier, it is clear that it applies directly to the German army.³⁰

Other opposition parties made similar arguments, including the Christian Conservative Party (CDU/CSU). SPD parliamentarians pointed out that the CDU/FDP coalition had failed to act on this issue during their sixteen years in power. Nevertheless, the SPD also highlighted the ECtHR decision and their general support for non-discrimination. Although Defense Minister Scharping argued that the British and German exclusionary policies were different,³¹ he announced his intention to reinstate Stecher and revisit the army’s discriminatory policy.³²

This anecdote does not prove that Germany changed its policy because of the ECtHR decision against the UK.³³ The anecdote does, however, illustrate a plausible mechanism of influence through the legislative channel. The ECtHR judgment did not so much change

²⁸ Meisner 2001.

²⁹ “Gays and Women put Army to Test,” *The Guardian* Friday July 2, 1999.

³⁰ Deutscher Bundestag, Plenarprotokoll 14/95, March 23, 2000, p. 8838.

³¹ Ibid p. 8844.

³² Ibid p. 8844. Scharping also chided the opposition CDU in the debate for using potential ECtHR rulings as an argument for changing policy while in the past they had opposed implementing similar rulings mandating the integration of women into the armed forces. Regardless of whether the CDU’s reliance on ECtHR rulings was sincere, it provided a convenient excuse for a conservative Christian-Democrat party to oppose a policy ostensibly on behalf of LGBT individuals

³³ For other analyses that stress the influence of the ECtHR and a 2000 EU Employment Directive, see: Meisner 2001, Rand 2010, Kujat 2000.

preferences as it changed incentives. Politicians and interest groups already favorably disposed towards LGBT rights received additional encouragement to advocate for abolishing discrimination in the military. Those who were more ambivalent saw opportunities to cast opponents in a poor light.³⁴ In this sense, ECtHR decisions may have an agenda-setting effect that differs from treaties. Beth Simmons argues that treaties confer agenda-setting power on executive branch officials, who have control over negotiating and signing treaties and presenting them to the legislature for ratification. In contrast, ECtHR decisions create more dispersed opportunities to put the executive in a bad light. We thus hypothesize that ECtHR judgments are more likely to lead to policy change when a larger number of actors can influence the legislative agenda. In the German case, for example, the opposition FDP rather than the left-wing government parties introduced the debate in the Bundestag. Stated more generally, the more dispersed the opportunities for legislative action, the more likely it is that some party or interest group will take up the issue.³⁵

Membership Conditionality

The CoE's supranational institutions have little leverage to compel member states to implement the legal principles developed by the ECtHR. Yet they do have leverage on states seeking accession by imposing conditions that states must meet before their applications are accepted. Earlier studies have demonstrated that such membership conditionality has been surprisingly effective in the area of minority rights.³⁶ CoE institutions imposed similar conditions relating to legal protection of LGBT individuals.

³⁴ For example, the FDP spokesperson argued that: "It is difficult to stomach that many young people see the SPD as the party of freedom even though they now position themselves as a party of yesteryear on constitutional rights issues."

³⁵ We note that this goes against the conventional wisdom on policy change. Systems that require the approval of multiple parties are generally less likely venues for policy change (e.g. Keefer and Stasavage 2003).

³⁶ Kelley 2004.

In 1993, the CoE's Parliamentary Assembly detailed specific commitments that each new member state should follow. The Assembly directed its Political Affairs Committee and its Committee on Legal Affairs and Human Rights to monitor whether accessing countries honored these commitments.³⁷ Among these was the decriminalization of consensual homosexual conduct in private—a principle adopted in the ECtHR's 1981 judgment in *Dudgeon v. United Kingdom*. For example, the report on Romania's application for membership to the Council stated that:

The Rapporteur notes with concern that under Article 200 of the Romanian Criminal Code, homosexual acts conducted in private between consenting adults remain a criminal offence. A number of persons are currently serving prison sentences after having been convicted of this offence. The Rapporteur would draw attention to the fact that the European Court of Human Rights has consistently held that such a prohibition, even in the absence of actual prosecution, violates Article 8 of the European Convention on Human Rights [...]. The Court would thus *a fortiori* come to a similar finding where people have actually been convicted, as in Romania.³⁸

The effectiveness of such conditionality is unclear, however. Despite the public opprobrium, Romania did not immediately fulfill its promise to decriminalize homosexual conduct.³⁹ Yet, the country was still granted CoE membership. On the other hand, the remaining candidate states in Romania's cohort did decriminalize prior to admittance.

A similar story can be told for the EU. After initially ignoring LGBT standards altogether, the EC Commission included LGBT issues in its reports on candidate countries.⁴⁰ Since such standards were not explicitly part of its *acquis*, the Commission relied heavily on ECtHR case law in its evaluation of candidates. As Kochenov (2007, p.30) explains: “the Commission opted for promoting uniquely those elements of the standards that found firm reflection in the case-law of the ECtHR [...] in practice, the ECtHR served as a gay rights

³⁷ Order No. 488 (1993), adopted on 29 June 1993.

³⁸ <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc93/edoc6901.htm>

³⁹ Consensual homosexual acts were decriminalized in 1996, although homosexual acts leading to “public scandal” were only decriminalized in 2000.

⁴⁰ Kochenov 2007.

standard provider in the course of the pre-accession exercise.” Like the CoE, the EU restricted its attention to criminal issues, which included the requirement that there should be equal ages of consent for same- and opposite-sex sexual conduct after the 1996 *Sutherland* decision.

As straightforward as these criteria may appear, it is unclear whether EU conditionality influenced policy change. For example, Bulgaria changed its penal code within a year after being criticized by the EC Commission, Estonia amended its code before the Commission had the opportunity to demand change, and Hungary refused to alter its laws altogether, leading to the aforementioned ruling by the Constitutional Court.⁴¹ Implementation may also have been hindered by the fact that not all existing EU member states met the Commission’s conditions.⁴²

As these examples illustrate, ECtHR judgments heavily influenced membership conditionality by both the CoE and the EU. Although in practice implementation of Strasbourg precedents was a desideratum rather than a mandatory requirement, it is a plausible hypothesis that applicant states had increased incentives to change their policies on issues where the CoE and EU were paying attention.

Conclusion

Our principal goal in this paper is to assess whether, on average, ECtHR rulings influenced policy changes or whether those changes are just as easily explained by social trends or factors unrelated to supranational judicial rulings. The three mechanisms discussed in this section establish the plausibility of such a link. To the extent possible, we will distinguish between these mechanisms in our empirical analysis. It is important to recognize that these mechanisms do not necessarily compete with each other. In particular, the two domestic mechanisms may well be complementary, as an increasing body of literature on the effectiveness of international law has

⁴¹ Ibid.

⁴² For example, Greece did not have equal ages of consent.

argued.⁴³ The conditionality mechanism is more restrictive in its applicability across time and space. If ECtHR judgments matter only in the subset of countries and issues that experienced membership conditionality, then we should be cautious about drawing conclusions about more general effects of international legal precedent on domestic policy outcomes.

ECTHR CASE LAW RELATING TO LGBT RIGHTS

LGBT rights provide a good test for the influence of ECtHR judgments for several reasons. First, there is considerable evidence of the exercise of judicial discretion. As we detail below, Strasbourg jurisprudence on these issues has evolved markedly. Challenges to criminal convictions of gay men for engaging in private consensual sexual conduct and to refusals to permit transsexual marriage were once dismissed out of hand. Over the last two decades, however, the ECtHR has interpreted the Convention's privacy and equality guarantees to invalidate an increasingly broad range of national laws and practices that discriminate against LGBT individuals.⁴⁴ As a result of these developments, scholars and human rights advocates hail the ECtHR as a judicial pioneer whose progressive rulings have "been instrumental in socialising a pan-European consensus on intimate and sexual privacy" for LGBT individuals.⁴⁵ However, these developments may simply reflect the fact that "European states lead the world in sexual

⁴³ For an overview, see Simmons 2009.

⁴⁴ Although the ECtHR, like other international courts, is not bound to follow its prior judgments, it generally does so "in the interests of legal certainty, foreseeability and equality before the law." However, "[s]ince the Convention is first and foremost a system for the protection of human rights, the Court must . . . have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved." *Chapman v. United Kingdom*, Application No. 27238/95, 2001–I Eur. Ct. H.R., para. 70 (Grand Chamber). The ECtHR has repeatedly invoked this "European consensus" doctrine to find fault with national laws and practices that it once found to be unobjectionable.

⁴⁵ Johnson 2010, De Schutter 2008. The Court has even held that restrictions based on sexual orientation require particularly convincing or compelling justification, a standard that has been exceptionally difficult for governments to satisfy. *E.g. Kozak v. Poland*, Application No. 13102/02 (2010), para. 99 (finding that the government had failed to provide "convincing or compelling reasons" to discriminate against same-sex couples).

orientation law reform,”⁴⁶ with the Court’s role limited to confirming or at most solidifying preexisting legal and social trends in Europe. As we also detail below, the ECtHR explicitly takes these developing trends into account, including when adjudicating LGBT issues.

Second, despite these progressive trends, implementation of ECtHR decisions involving LGBT rights remains politically controversial in many Eastern European states. There has been a growing backlash against LGBT individuals in the socially conservative and religious countries of Europe.⁴⁷ LGBT rights that are clearly protected by the Convention—such as the decriminalization of consensual gay sex in private and the organization of pride rallies—are now under siege in Russia, Poland, Latvia, the Ukraine, among others.⁴⁸ Elsewhere in Europe, discrimination against LGBT individuals and same-sex couples persists in many areas of public and family life,⁴⁹ triggering new complaints to the ECtHR.⁵⁰ In short, implementation of the Court’s LGBT judgments may be quite costly for some states parties.

In this section, we detail how the ECtHR’s case law has developed and how it has responded to regional trends. In the next section, we analyze national laws.

The ECtHR’s Case Law on LGBT Rights

The Strasbourg case law concerning LGBT legal issues has evolved substantially since the Convention’s earliest days and has followed a consistent pattern that one prominent scholar has described as a “standard sequence” of small changes toward more extensive legal protections for

⁴⁶ Lau 2004.

⁴⁷ E.g. Bob 2009, 2010.

⁴⁸ E.g., Amnesty Int’l, Poland: LGBT Rights Under Attack, AI Index: EUR 37/002/2005 (Nov. 25, 2005), available at <http://web.amnesty.org/en/library/asset/EUR37/002/2005/en/dom-EUR370022005en.html> (reporting that Polish homosexuals were denied the right to organize a pride march in Warsaw); Alex Rodriguez, *Russia Gays Hear Call: Go Back to the Closet*, Chi. Trib., May 25, 2006, at 13 (quoting a “prominent member” of Russia’s Motherland Party as saying that, if homosexuals seek public rights and recognition, “that encroaches on our rights—our right to a normal life”).

⁴⁹ E.g., European Union Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Members States: Part I -- Legal Analysis* (2009).

⁵⁰ E.g., *Schalk & Kopf v Austria*, App. No. 30141/04 (June 24, 2010), paras. 61, 94 (concluding that the Convention does not require member states to recognize same-sex marriages but that a “cohabiting same-sex couple living in a stable de facto partnership” is protected by the right to respect for “family life”).

LGBT individuals and couples.⁵¹ Table 1 below illustrates this pattern for several lesbian and gay legal issues in our study. The date of the first violation for each legal issue by the Court appears in bold text. Table 2 reveals a similar trend for transsexual rights, including the change of gender on identity documents and birth certificates and the right to marry.

TABLE 1 AND TABLE 2 ABOUT HERE

Table 1 and Table 2 reveal four noteworthy patterns, which we refer to as (1) progressive evolution, (2) incrementalism, (3) no retrogression, and (4) geographic concentration.

First, the ECtHR and European Commission have become increasingly receptive to LGBT human rights claims. The earliest complaints, rejected by the Commission for over two decades, challenged the criminalization of private, consensual homosexual conduct between adults. When the Court, in the landmark 1981 case of *Dudgeon v. United Kingdom*, held that such laws violate the right to privacy, it did so with circumspection.⁵² The cases involving transsexual rights reveal a similar trend. The Commission suggested as early as 1977 that states must revise the sex recorded in birth registries following a gender reassignment. However, the Court rejected that interpretation in judgments issued in 1986, 1990, and 1998 while cautioning in each case that “[t]he Convention has always to be interpreted and applied in the light of current circumstances” and that the “need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments.”⁵³

In later LGBT judgments, the ECtHR became progressively bolder. Beginning in 1999, it found fault with laws, regulations, and judicial decisions that discriminate on the basis of sexual

⁵¹ Waaldijk 2001.

⁵² See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. at 24 (ser. A) (1981) (“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.”).

⁵³ E.g., *Rees v. United Kingdom*, App. No. 9532/81, para 45 (1986).

orientation in employment, family life, social benefits, and freedom of association.⁵⁴ And in a watershed judgment in 2002, the Court used forceful language when reversing its prior rulings and requiring full legal recognition of transsexuals, including their right to marry.⁵⁵

Second, the European tribunals have proceeded incrementally in recognizing additional LGBT rights. For each legal issue in Table 1 and Table 2, the Commission or the Court initially rejected complaints alleging violations of the Convention before later shifting course. In addition, the tribunals have moved in small steps, each of which represents a modest advance that builds on previous rulings.⁵⁶ Finally, with one distinguishable exception, there is a gap of at least three years between the finding of a violation for one legal issue and the finding of a violation of the next issue in the sequence.⁵⁷

Third, the trajectory is only one way—toward more extensive protection of LGBT rights. After initially finding a violation in a given issue area, the ECtHR does not back track when it later reviews challenges to the same or similar laws and practices in force in other member states⁵⁸—even if those states claim to be more conservative than their fellow CoE members.⁵⁹ Strasbourg rulings thus establish general interpretations of the rights and freedoms protected by

⁵⁴ Helfer 2001.

⁵⁵ *Goodwin v. United Kingdom*, App. No. 28975/95, ECHR 2002–VI, para. 90 (“In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy . . .”).

⁵⁶ In cases involving the inability of transsexuals to change all of their identity documents, this advance is also reflected in a progressive narrowing of the numerical gap between the number of majority and dissenting judges. *Rees*, 1986 (12-3, no violation); *Cossey*, 1990 (10-8, no violation); *Sheffield & Horsham*, 1998 (11-9, no violation); *Goodwin*, 2002 (unanimous, violation).

⁵⁷ The exception is *Goodwin v. United Kingdom*, in which the ECtHR found that the inability to revise all identity documents following gender reassignment violated the right of privacy as well as the right to marry. However, our coding of national law reforms, discussed in Section III.A below, reveals that these two legal issues almost always change in tandem. That is, once a state permits revision of all identity documents, nothing prevents the individual whose documents have been revised from marrying someone of the opposite sex.

⁵⁸ The Commission’s early view of transsexual marriage is a partial exception. In 1979 the Commission found a violation of the right to marry in *Van Oosterwijk v. Belgium*, App No. 7654/76. It changed course in 1984 in *Rees v. United Kingdom*, App. No. 9532/81, but it again found a violation in 1989 in *Cossey v. United Kingdom*, App No. 10843/84.

⁵⁹ E.g. *Alekseyev v. Russia*, App. No. 4916/07 (2010) (rejecting the argument that Russia’s conservative religious, moral and cultural values should be taken into account when reviewing bans on gay pride rallies).

the Convention.

Fourth, litigation involving LGBT rights has been concentrated geographically, focusing on three countries—Austria, Germany, and the United Kingdom. Nevertheless, the no retrogression pattern, as well as the handful of judgments against other nations, demonstrates that ECtHR rulings in favor of LGBT rights in one country have a trans-jurisdictional effect that all Council of Europe member states can readily observe.

A. ECtHR Case Law and Regional Trends

The four trends reflected in Table 1 and Table 2 have not occurred in a vacuum. To the contrary, the evolution of Strasbourg rulings on LGBT issues has, at least until recently, paralleled a remarkably similar liberalizing trend in national laws and policies across Europe. Kees Waaldijk has extensively documented this trend. He shows that recognition of lesbian and gay rights in Europe begins with “symbolic preparation” followed by “steady progress” taking the form of “small change” in a “standard sequence.”⁶⁰ This process is overwhelming a legislative phenomenon, and it occurs in the following order: decriminalization, establishing an equal age of consent, enacting antidiscrimination laws, recognizing same-sex relationships via registered partnerships and same-sex marriage, and lastly, parenting. This pattern holds for both EU member states and those outside of the EU.⁶¹

Several of the ECtHR judgments listed in Table 1 and Table 2 expressly refer to this evolving European consensus on specific LGBT rights to justify finding a violation of the Convention concerning those rights. In the *Dudgeon* case discussed previously, for example, the Court stated:

[T]here is now a better understanding and . . . an increased tolerance of homosexual behavior to the extent that in the great majority of the member-states of the Council of

⁶⁰ Waaldijk, *supra* at 635. See also Doty 2009.

⁶¹ *Id.* at 635-36.

Europe it is no longer considered to be necessary or appropriate to treat homosexual practices [as] a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member states.⁶²

Aware of the importance that the ECtHR attaches to the European consensus issue, LGBT advocacy groups and NGOs frequently submit amicus briefs that document legal and social trends at the national and regional levels. For example, in *Goodwin v. United Kingdom*, the Court found a violation of the Convention resulting from the government's refusal to revise the birth register to reflect the acquired gender of a male-to-female transsexual or to permit her to marry a person of the opposite sex. In reaching these conclusions, the judges relied heavily on a comparative law study submitted by the U.K. NGO Liberty which found that

[..] over the previous decade there had been an unmistakable trend in the member States of the Council of Europe towards giving full legal recognition to gender re-assignment. In particular, . . . out of thirty seven countries analysed only four (including the United Kingdom) did not permit a change to be made to a person's birth certificate in one form or another to reflect the re-assigned sex of that person. . . .

As regarded the eligibility of post-operative transsexuals to marry a person of sex opposite to their acquired gender, Liberty's survey indicated that 54% of Contracting States permitted such marriage . . . , while 14% did not The legal position in the remaining 32% was unclear.⁶³

Legal scholars have long noted the correlation between the ECtHR's evolving jurisprudence and legal and social trends at the national level, both for LGBT issue and other rights protected by the Convention.⁶⁴ However, the fact that the Court takes evolving trends into account in making its decisions does not necessarily mean that the judgments are not effective in pulling lagging CoE member states in a progressive direction. We now turn to this question.

⁶² Dudgeon, *supra* note __, at 23-24. The Court repeated this statement in the *Norris* and *Modinos* cases in 1988 and 2003. [confirm *Modinos*]. In a 2010 ruling on same-sex marriage, the Court referenced the "rapid evolution of social attitudes towards same-sex couples [that] has taken place in many member States," and the legal recognition of same-sex couples by "a considerable number of member States." Schalk & Kopf, *supra* note __, at para. 93.

⁶³ *Goodwin v. United Kingdom*, App. No. 28975/95, ECHR 2002-VI, at paras. 55, 57.

⁶⁴ Helfer 1993; Waaldijk 2001; Wintemute 1995.

III. DO ECtHR JUDGMENTS INFLUENCE NATIONAL LAWS AND PRACTICES?

This part turns to an analysis of whether ECtHR case law has influenced member states, and it sketches trends in national laws and practices relating to LGBT rights. We first consider how overall trends in policy adoption correspond to ECtHR judgments. We then use more sophisticated statistical techniques to examine the potential confounding influence of social and legal trends.

A. An Overview of National Laws and Practices

We gathered data on whether and in what year the policies and practices of European states conformed to LGBT legal principles developed by the ECtHR. Coding a state as “no” for a given legal issue implies that, in our assessment, the ECtHR would find that state in violation of the Convention were its practices challenged after the Court’s initial judgment establishing the relevant legal principle. We gleaned data from multiple surveys and reports by international organizations and NGOs and secondary academic sources.⁶⁵ We are collecting the remaining data ourselves, often by consulting country experts on LGBT legal issues.⁶⁶ Some issues (e.g. criminal law issues) were much easier to code than others. At the moment, we have data on two criminal issues, military service, and two transsexual issues. We discuss specific challenges as we introduce each issue. Ultimately, we will publish an appendix that includes all sources and explains coding methods in greater detail.

Figure 1 shows the number of states⁶⁷ that decriminalized homosexual conduct and that adopted equal age of consent laws from 1955 to 2008. Coding the criminal law issues involved

⁶⁵ Several of these sources are accumulated in: Cees Waaldijk, “Legal recognition of homosexual orientation in the countries of the world - A chronological overview with footnotes,” March 2009, <http://hdl.handle.net/1887/14543> (accessed October 6, 2010). We coded laws when they were adopted rather than when they went into force.

⁶⁶ We are tremendously grateful to Laura Duncan for her terrific research assistance in this. This is an ongoing project, so some of the data we analyze here is incomplete,

⁶⁷ We excluded Andorra, San Marino, and Monaco from the analysis.

relatively straightforward assessments of whether an existing law violates the Convention as interpreted by the ECtHR.⁶⁸ The figure also shows the crucial ECtHR and European Commission decisions that established the legal principle for each issue. As shown in Table 1 above, the *Dudgeon* judgment (1981) first found that criminalizing homosexual conduct was a violation of the Convention and the *Sutherland* decision (1996) reached the same conclusion for laws that established unequal ages of consent.

FIGURE 1 ABOUT HERE

The figure reveals several interesting items of information. First, with regard to the meaning of “European consensus,” when the *Sutherland* case was decided in 1996, only about half of the CoE’s member states had adopted an equal age of consent. This reveals that the “consensus” need not be unanimity or even a supermajority of states. It also illustrates that the court has wide discretion to decide when an evolving regional trend should be incorporated into the Convention.

Second, the visual evidence provides some support for the notion that the *Sutherland* decision spurred new equal age of consent laws, although the upward trend predated the decision. The impact of the *Dudgeon* decision is more difficult to evaluate given that most CoE member states had already decriminalized by the time the judgment was issued. Nevertheless, *Dudgeon* could have had an influence through the mechanism of conditionality. The overall pattern in decriminalizations in the 1990s closely tracks patterns in CoE membership and is consistent with the hypothesis that countries adopt laws one or two years before they joined the CoE. This demand did not apply to unequal age of consent laws, which neither the Commission nor the Court had yet declared to violate the Convention. As a result, a large number of countries decriminalized consensual homosexual conduct in private without equalizing the age of consent.

⁶⁸ Coding based on laws on the books. Actively enforced and unenforced laws are treated the same. Almost all data is from Waaldijk *supra* XXX

Between 1989 and 1995 sixteen states decriminalized homosexual conduct, but only three of them adopted equal age of consent laws. This gap closed rapidly after the 1996 *Sutherland* decision. These patterns are consistent with, although they do not prove that, the ECtHR judgments shaped the timing of policy changes.

Figure 2 shows the number of states whose armed services permit lesbians and gay men to serve openly. The total number of states is somewhat smaller here since we exclude states that do not have militaries. Discriminatory practices relating to the military are somewhat more difficult to code than criminal law issues as there are situations where explicitly discriminatory laws may not exist even when discriminatory practices are rampant. In the absence of a law or official policy, we require evidence of a systematic pattern of conduct, not merely one or a small number of isolated incidents. For example, in some countries there is no formal law that bans homosexuals from the military but there is a widespread practice of classifying homosexuality as a psychiatric disorder, which is a common ground for dismissal, harassment or discrimination.⁶⁹

FIGURE 2 ABOUT HERE

Similar to *Sutherland*, at the time of the key ECtHR judgment in 1999, less than half the member states had non-discriminatory policies. This is another reminder of the Court's discretion in determining when a "European consensus" is reached. The visual evidence is again suggestive of a relationship between the ECtHR judgment and policy change. Between 1991 and 1998, not a single country abandoned its discriminatory policies and practices. Between 1999 and 2007, fifteen countries changed their policies.

Legal issues relating to transsexual rights are more difficult to code as they require judgments about the broader context in which laws operate. Figure 3 plots the trends in policy adoption for two transsexual issues: the right to change identity documents following gender reassignment

⁶⁹ Cyprus is an example. See: ILGA World Wrap-Up Survey 2006.

surgery (which the ECtHR first recognized in *B. v. France* (1992))⁷⁰ and the right to marry (first recognized in *Goodwin v United Kingdom* (2002)).⁷¹ The extent to which these issues are independent depends on the manner by which the new sex is registered in a given country. In some states, the right to change one's sex on a birth certificate automatically implies a right to marry. In other countries, this is not necessarily so, either because sex at birth is kept in a different register that is authoritative for marriage or because birth certificates cannot be altered even though other identity documents can. For example, the UK had long allowed transsexuals to change their sex on driver's licenses, passports, and other official documents, thus making it compliant with the 1992 judgment. However, in 2002 the Court found that the UK's failure to revise the birth registry and allow transsexuals to marry constituted a violation of the Convention (a claim the Court had previously rejected on several occasions). In other countries, such as France, complying with the 1992 decision essentially implies guaranteeing a right to marriage.⁷²

⁷⁰ Our coding instructions are:

- i. A specific law indicating that transsexuals can or cannot change their identity documents is controlling. In the absence of such a law, use the following presumptions.
- ii. Laws that permit change of identity documents only for certain enumerated or identified issues (e.g. name, paternity, correction of errors) do *not* permit change of sex.
- iii. A general law on revision of identity documents that allows for a change of gender on identity documents—but does not expressly mention transsexuals—*does* permit a change of sex (and would therefore be coded as “yes”). The presumption is stronger if there is evidence (based on practice or from experts) that some transsexuals have changed their identity documents pursuant to such a general law.
- iv. A general law on revision of identity documents whose scope is uncertain, for example, concerning the type of information can be changed, should be coded as *not* permitting a change of sex. This presumption is stronger if there is no evidence (based on practice or from experts) that transsexuals have not attempted to change the gender on their identity documents pursuant to such a law, or that they have applied and been rejected.

⁷¹ Our coding instructions are:

- i. A law indicating that transsexuals can or cannot marry is controlling. In the absence of such a law, use the following presumptions.
- ii. If gender can be changed on all identity documents, assume that transsexuals have the right to marry unless law expressly provides otherwise.
- iii. If gender can be changed on birth certificate/registry, assume that transsexuals have the right to marry unless law expressly provides otherwise.
- iv. If gender can be changed only for other documents (e.g. passport), then no effect on whether transsexuals can or cannot marry.

⁷² We have not yet sufficiently discriminated between these groups of countries. Moreover, we still have a lot of missing data on these issues.

This explains the parallel trends in the adoption of these policies.

FIGURE 3 ABOUT HERE

As before, the data show that the “European consensus” need not consist of more than a bare majority of CoE member states. The visual evidence here is inconclusive: while there are many countries that adopt policies to legally recognize sex changes, there is a similar trend preceding the 1992 judgment.

The descriptive evidence shows that the ECtHR’s adoption of a legal principle does not result in rapid and widespread repeal of laws that violate that principle. On several of the issues, discriminatory laws and practices persisted in some CoE member states a decade or more after the Court’s first judgment. Yet, the visual evidence is generally consistent with the notion that ECtHR judgments may affect the adoption of non-discriminatory policies and practices in a probabilistic manner. To further probe the plausibility of this conclusion, we now turn to a more sophisticated model of the policy adoption process that considers competing explanations.

B. Regression Analysis

We now turn to an analysis that addresses the potential confounding influence of other factors on the effect of ECtHR rulings. We start with an aggregate approach, which considers only the overall number of countries that change policies in a given year on a given issue (not which individual countries changed their policies). This is a more formal way to analyze Figures 1, 2, and 3. However, in order to test the three theoretical mechanisms we describe earlier, we also analyze the decisions of individual countries to adopt reforms that protect LGBT rights.

B1. Aggregate Analysis

The dependent variable is the annual change in the number of countries that have a progressive policy (in the sense that it favors LGBT rights) on issue j () The key

independent variable $ECtHR_{jt}$ takes the value 1 when an ECtHR ruling exists at time t that establishes the legal principle that states who have not adopted policy j are in violation of the Convention. Our main hypothesis is that such a judgment should encourage a larger number of noncompliant countries to adopt more progressive policies. We estimate a simplified error-correction model:⁷³

Y_{jt} is the lagged number of states with a progressive policy on issue j . The more states already have adopted a policy the smaller the additional number of states we expect to change in a given year. Y_{jt-1} is a control for the changing number of states. The more states there are, the more countries can change their policies. α_j is a fixed effect for the separate legal issues, capturing that some issues may exhibit lower or higher rates of change. β_j is our coefficient of interest: the annual estimated increase in policy changes when an ECtHR judgment is in place. Unfortunately, the estimate of β_j may be biased by not taking into account that both the propensity of ECtHR judges to find violations and the propensity of countries to adopt progressive LGBT policies and practices may be motivated by changing social norms and political trends. As such, this model may inaccurately attribute policy change to the ECtHR judgments that is a consequence of norms and practices that are changing for other reasons.

We address this by explicitly modeling the ECtHR's decision-making process. Given that a case on issue j in year t comes before the Court,⁷⁴ the ECtHR finds a violation if a majority of its

⁷³ An error-correction model generally includes the key independent variable as a lagged term and in first differences to capture both immediate and long-run impact. Since we could not reject the hypothesis that these effects were identical in this case, we simplified the model to that in equation 1.

⁷⁴ Note that the ECtHR does not have the power to select cases in the same way that the US Supreme Court can through its certiorari process.

judges vote in favor of doing so.⁷⁵ The selection process is relatively straightforward compared to studies that estimate the effect of treaty ratification on outcomes, for which one would have to model as many different political processes as there are countries in the data. If we observed the ECtHR's votes for all issues and all years, we could insert the vote proportion into equation (1) and obtain an unbiased estimate of β . To see why this is so, it is important to remember that we need to control for the *confounding* influence of changing norms and practices, i.e. the degree to which social trends affect both the Court's decisions and changing policies across the region. The vote proportion captures how the Court is influenced by unobserved social trends, thus removing the confounding effect of the omitted variable. If policy changes respond to these unobserved trends, then it shouldn't make much of a difference whether 49% or 51% of judges believe that a practice violates the Convention. Thus, the vote proportion rather than the dummy indicating the presence or absence of a finding of a violation should be correlated with policy changes. In contrast, if the finding of a violation has a causal effect, then this dummy variable should be positive and significant even after controlling for the proportion of judges that voted in favor of the finding.

The research design described in the previous paragraph is a regression discontinuity design, which is widely recognized as the strongest framework for making causal inferences from observational data and has properties akin to randomized experiments.⁷⁶ Unfortunately, we observe judicial votes only spottily. Our strategy is to estimate the missing vote proportions (using observed characteristics of the court, issues and trends on LGBT issues and then insert

⁷⁵This selection process is relatively straightforward compared to studies that estimate the effect of treaty ratification on outcomes, in which case one would have to model as many different political processes as there are countries in the data.

⁷⁶Lee 2008. .

these estimates into equation (1), thus following a two-step procedure.⁷⁷ We model ECtHR judgments on LGBT issues with three variables. First, to capture the influence of developing practices, we include the proportion of CoE member states that have passed LGBT friendly policies on issues on which the ECtHR has had no influence: hate speech and informal cohabitation.⁷⁸ Second, previous research has shown that a cleavage exists among judges that want the court to be more “activist” and those who want the court to be more prudent in how it exercises its authority.⁷⁹ This research has produced measures of the judicial activism of judges based on their vote choices on all judgments.⁸⁰ The average degree of activism on the Court varies over time, largely influenced by the replacement of judges. Third, we include dummy variables for each issue. We include votes on all LGBT issues on which the Court voted multiple times, giving us 42 votes. The model fits the data well and all variables are significant.⁸¹

We can now estimate the following equation:

The predicted vote probabilities enter into the equation both as levels and as first differences, to capture the possibility that the Court may be influenced by short-term changes in trends or practices that may also shift the rate of policy adoption. We can think of this variable as an issue-specific trend that captures the likelihood of an ECtHR ruling if a new case would be brought to the Court. If both the Court and member states are picking up trends in policy innovation, then

⁷⁷ The regression discontinuity design is identical to the propensity score approach with the difference that in a regression discontinuity design the propensity scores (vote proportions) are observed (Heckman et al. 1999).

⁷⁸ The data on informal cohabitation is from Waaldijk, we collected data on hate speech. This data is incomplete, so we limited ourselves to 28 CoE countries. The resulting yearly proportion correlates at .81 with the proportion of all states that have decriminalized consensual homosexual conduct.

⁷⁹ Voeten 2007.

⁸⁰ Ibid.

⁸¹ The adjusted R-squared is .50. Judicial activism and the trend in LGBT policies are both significant at the .01 level. We are currently collecting more data on public opinion and policy trends to improve the estimates of vote shares.

this variable should affect the likelihood of policy changes rather than the structural break imposed by an ECtHR finding of a violation.

We estimate the model using fixed effects panel regression, with robust standard errors. Given that these are count data, we fitted both a negative binomial and a poisson regression but we present the results from a linear regression as they are easier to interpret and the coefficients of interest were very similar across the three models.⁸² ECtHR rulings only have legal effect in Council of Europe member states. However, we allow for the possibility that countries on the verge of joining the CoE adjust their policies and practices to ECtHR case law. We therefore include countries both during their CoE membership and in the five years preceding it. Models (3) and (4) account for the changing composition in member states over time by including the number of Eastern European states, EU members, and EU applicants in the data.

TABLE 3 ABOUT HERE

Table 3 shows the results. The lagged dependent variable has a negative effect, capturing that there is likely to be less change on issues where most countries already have LGBT friendly policies. The estimates for the effect of an ECtHR ruling are remarkably consistent across the models: on average, an ECtHR ruling in favor of LGBT rights increases the number of progressive policies by about .6 a year. Thus, over a ten year period, an ECtHR ruling is expected to lead an additional six countries to adopt more progressive policies. This effect is roughly consistent with what we gleaned from the graphs in the previous section. The predicted vote choices have the expected effect. In two of the three models, it is the changes in the likelihood that the Court will make an LGBT ruling that appear correlated with actual policy change. This suggests that short-term trends that affect the Court also make states more likely to change policies. Nevertheless, even controlling for this, the presence of an ECtHR ruling still has

⁸² Implemented using STATA's xtreg command, fixed effects for issues.

an independent and significant effect on policy changes. The results hold when we include the proportion of states with hate speech and informal cohabitation recognition directly in the regression equation (both as levels and first differences). Moreover, the estimated impact of the ECtHR ruling is even stronger if a Heckman treatment effect model is estimated.⁸³

One may expect that the rate of innovation decreases as the number of Eastern European states increases, and increases the more EU members and EU applicants there are. These hypotheses do not bear out in the analysis. More importantly, the introduction of these controls does not significantly alter our estimate of the effect of ECtHR judgments. Nevertheless, the aggregate analysis is not sufficiently flexible to model country-level variation. For that, we now turn to a country-level analysis.

B2. Country-Level Analysis

The aggregate analysis obscures two important issues. First, an aggregate approach does not allow us to separate the effect of ECtHR judgments on countries in which the court did and did not explicitly find a violation. Second, the effect of ECtHR judgments could be heterogeneous in interesting ways. Earlier, we hypothesized that ECtHR judgments are more likely to have an effect in countries that are under membership conditionality, where national judges can strike down laws based on the Convention, and where multiple political parties can control the legislative agenda.

We therefore estimate an analysis with the country (i)-year (t)-issue (j) as the unit of analysis.

The dependent variable y_{ijt} denotes the policy or practice that country i has in place on issue j in year t, where $y_{ijt} = 1$ if the policy is progressive (in the sense that it favors LGBT

⁸³ Using `treatreg` in STATA 11, the effect of the ECtHR ruling is .71, with $p=.001$ in all three models estimated in table three. The variables in the selection equation are identical to those described above. The exclusion restriction is the activism variable. We prefer the results presented in table 3 because they utilize the actual observed votes to estimate the propensity scores.

rights) and 0 otherwise. The primary independent variable $\text{ECtHR}_{i,t}$ takes the value 1 if the Court has ruled that not having policy j is a violation of the Convention at time t and if country i has ratified the Convention.⁸⁴

We are specifically interested in the effect of ECtHR judgments on European countries for which the Court did *not* explicitly find a violation. We therefore include $\text{ECtHR}_{i,t}$, which takes the value 1 from the time the Court explicitly rules that a country's policies violate the Convention on a given legal issue. For example for the decriminalization issue, this variable takes the value 1 for the UK in 1981 after the *Dudgeon* ruling but also for Ireland in 1988 (*Norris*) and Cyprus in 1993 after the *Modinos* judgment (see Table 1). If ECtHR rulings matter only in the narrow sense that they change the behavior of countries against whom violations are found, then we would expect this variable to exert a significant effect rather than $\text{ECtHR}_{i,t}$.

To examine whether conditionality affects policy change, we coded a variable that takes the value 1 if a country in a given year and on a specific issue is under the scrutiny of the Council of Europe and/or EU and 0 otherwise.⁸⁵ We also include indicator variables for Council of Europe and EU membership.

To investigate the influence of ECtHR legal principles via domestic litigation, we coded a dummy variable whether domestic courts in each state possess the authority to invalidate legislation that is incompatible with the Convention.⁸⁶ To capture the legislative mechanism we

⁸⁴ Note that accepting the compulsory jurisdiction of the Court was optional until Protocol XI, although all of the countries who ratified had accepted the jurisdiction of the Court by the mid-1980s.

⁸⁵ As discussed earlier in the paper, this applies to membership applicants after 1989 for the CoE on decriminalization, after 1996 for the CoE on age of consent, after 1998 for the EU on both criminal issues and after 2000 for the EU on the military issue.

⁸⁶ This coding is still in progress and is primarily based on Drzemczewski (1982), Blackburn & J. Polakiewicz (2000), Hofmeister (2006), Keller and Stone Sweet (2008), and Anagnostou and Psychogiopoulou (2010). We also gathered data on the domestic legal status of the European Convention in each member state, including whether each state had incorporated the treaty and, if so, at which level in the national legal hierarchy (equivalent to the constitution, superior to domestic statutes, or equivalent to ordinary legislation). We also indicated whether the Convention's legal status had changed over time as occurred, for example, when United Kingdom adopted the

used the Database of Political Institution's CHECKS variable, which takes a higher value as the chief executive needs to rely more on coalition or opposition parties to achieve majorities in parliament (Keefer and Stasavage 2003). We expect that the more policy-making depends on multiple parties, the more likely it is that opposition forces can utilize ECtHR judgments to force an issue on the legislative agenda and achieve policy change. More generally, the CHECKS variable is used as a measure of multiple veto players and thus negatively associated with policy change. Yet, a political system with dispersed power also may lead to issues reaching the legislative agenda that would otherwise not make it. We argue that ECtHR rulings may increase this likelihood.

We estimate a logit model with fixed effects for countries and issues.⁸⁷ The country fixed effects capture that there are difficult to observe cultural reasons why some countries may be more likely than others to adopt LGBT friendly policies, regardless of the issue.⁸⁸ The issue fixed effects capture that, as argued before, there appears to be a standard sequence in which LGBT policies are reformed.⁸⁹ An additional issue is how to model time dependence across observations. Once a policy is progressive it usually remains so, although there are a few examples of backtracking. For example, the Polish Supreme Court recognized the right for

Human Rights Act in 1998 that incorporated the Convention into its domestic law at a level equivalent to a statute. We do not use this data in the current version of the paper.

⁸⁷ Implemented using STATA's xtlogit. We also estimate a linear probability model, which generally yields more stable estimates in panel regressions with fixed effects. The estimates from the linear probability model are generally consistent with but have smaller standard errors than the logit estimates.

⁸⁸ All our substantive findings are consistent to estimating the model with random country effects using mixed effects logit. This is somewhat more flexible (e.g. fewer dropped countries) and yields similar and sometimes better estimates than fixed effects models (Beck and Katz 2007). Stable country effects are modeled by including indicators for whether a country is pre-dominantly catholic and whether the country is located in Eastern Europe, as well as degree to which a country's public supports LGBT rights, measured by the 2008 European Values Study (EVS), which asked citizens from all countries in our study whether they "justify homosexuality" on a scale from 1 "never" to 10 "always." The correlation between the average scores of citizens on this scale in the 29 countries included in both the 2008 and the 1990 EVS is .90. The average scores of the 35 countries that were included both in 2008 and 1999 correlate at .95. This implies that there is tremendous stability in the countries that are relatively more and less progressive, which suggests that the average score from 2008 may adequately capture persisting cultural differences among countries.

⁸⁹ Waaldijk XXX.

transsexuals to change documents in 1978,⁹⁰ changed its position in 1989,⁹¹ and then reversed that position yet again in 1991.⁹² Theoretically, this makes sense as there are no assurances that LGBT rights remain in place after their establishment. Moreover, ECtHR rulings presumably prevent or at least decrease the likelihood of such backtracking. Yet, given the rarity of backtracking⁹³ and the problems of temporal dependence, we exclude observations from the data after their last adoption of the LGBT friendly policy (although our substantive results do not depend on this).⁹⁴

We thus estimate the annual probability that an ECtHR ruling will lead a country that does not yet have a policy in place to change its policy. Substantively, this is precisely the quantity of interest that we wish to obtain. This is identical to a hazard model where the fixed country and issue effects acknowledge that each country and issue has its own hazard rate.

As before, we also include _____ to model issue-specific trends that may make a Court ruling more likely. We also include time-varying country-specific covariates _____ that have been found important in the literature. First, LGBT rights are often referred to as a post-materialist issue, generating more support as a country becomes more developed economically.⁹⁵ We include real GDP per capita as a measure for economic development.⁹⁶ Second, religious parties are often opposed to extending LGBT rights.⁹⁷ We thus include a variable that indicates whether

⁹⁰ Judgment of the Supreme Court of 02.02.1978, CZP 100/77. Based on: Rzeplinski (2008).

⁹¹ Decision of the Supreme Court of 22.06.1989, No. III CZP 37/89.

⁹² Judgment of the Supreme Court of 22.03.1991, No. III CRN 28/91

⁹³ So far we only have two such cases in our data.

⁹⁴ An alternative is to include splines that capture the duration of a spell (Beck, Katz, and Tucker 1998). Since there are so few of them, these models are difficult to estimate in a logit model. The linear probability version of this model yields near identical results as the main model presented here.

⁹⁵ Cite Inglehart.

⁹⁶ From World Development Indicators.

⁹⁷ For example, in the U.S., gay rights are more likely to be liberal in states where the presence of religious conservatives is smaller (Lax and Philips 2009).

a country's executive is from a religious party.⁹⁸ Third, we include an indicator that captures whether countries are within five years of achieving independence following a state secession. These countries are both unlikely to be subject to the ECtHR's jurisdiction and unlikely to grant extensive LGBT rights. Fourth, many Eastern-European countries have decentralized systems for regulating changes in identity documents. We often encountered difficulties coding whether they were in compliance with ECtHR precedent on the transsexual issues. We therefore include an indicator variable that takes the value 1 for Eastern European states on these issues. Finally, EU membership can be a confounding influence. In 2000, the EU adopted a Directive mandating nondiscrimination on the basis of sexual orientation in employment.⁹⁹ Although the directive did not explicitly address the military, it may still influence country policies on this issue. We thus create a dummy variable that takes the value 1 for EU members on the military issue starting in 2000.

TABLE 4 ABOUT HERE

Table 4 presents the main results from three models. Model (1) shows that there is a positive and significant probabilistic impact of ECtHR judgments on the policies and practices of states. All else equal, an ECtHR judgment increases the probability of policy change by 8 percent in any given year.¹⁰⁰ There is an additional seventeen percent impact on the country against whom the violation is found. These effects are robust to modeling time trends with issue specific cubic polynomials rather than the predicted ECtHR vote.¹⁰¹

Models 1-3 include progressively more interaction terms but also exclude progressively more

⁹⁸ The measure is taken from the Database on Political Institutions.

⁹⁹ Council Directive 2000/78/EC of 27 Nov. 2000.

¹⁰⁰ In the future, we will present marginal effects in the table.

¹⁰¹ Carter and Signorino 2010. We prefer the predicted vote specification as the time trend here is theoretically motivated.

observations as a consequence of increasing numbers of missing values.¹⁰² The coefficients on now indicate the effect of an ECtHR ruling when the interacted variables are zero and cannot be interpreted directly.

First, as we hypothesized, ECtHR rulings have a greater impact in countries in which the executive needs to work with multiple parties. Figure 4 illustrates the substantive impact of the interaction effect graphically. The horizontal axis includes the value of the CHECKS variable, the histogram offer insight in how these values are distributed across countries. The horizontal line in the left panel demonstrates that there is no relationship between checks and balances and the probability of policy change in the absence of an ECtHR judgment. This is understandable, since more actors are needed to agree on policy change. The right panel demonstrates that the probability of policy change is significantly higher at any level of checks and balances when the ECtHR has ruled on a legal issue. Yet, the sharp positive regression line also shows that given the court's finding of a violation, reform of LGBT policies is significantly more likely when multiple parties can affect the agenda. Indeed, on the upper range of observed values for checks and balances, the annual probability of policy change is about twice as high as on the lower range.

FIGURE 4 ABOUT HERE

Second, the conditionality variable is positive and statistically significant in two out of the three models. The significance level of the conditionality variable reduces when we include CHECKS in the model. This can perhaps be attributed to the fact that CHECKS has many missing values for Eastern European countries during the late 1980s and early 1990s.¹⁰³ Third, we find robust evidence that ECtHR precedent is much more likely to lead to policy change in

¹⁰² We are collecting more data to remedy this issue.

¹⁰³ We are looking for alternative measures or ways to fill in the missing values.

countries where courts can theoretically invalidate national laws because these are incompatible with the Convention.

Figure 5 illustrates the strength of these effects. The figure divides cases into mutually exclusive categories and plots the 95% confidence intervals of the annual predicted probability of policy change. The first two categories are those whether there is no ECtHR judgment finding a violation of a practice. Among these cases, the probability of policy change is similar across countries that do and do not have judicial review of ECtHR rulings (as one would expect). The third and fourth categories compare cases where there *is* a Court ruling, albeit no explicit finding of a violation against the state itself. Here, there is clear evidence that countries in which judges have the authority to invalidate national laws that violate the Convention are much more likely to change their policies in favor of LGBT rights than countries where judges do not have this authority. This pattern provides strong evidence for the hypothesis that the *erga omnes* effect of ECtHR rulings is strongly conditional on the existence of domestic judicial review of Convention violations. The fifth set of cases are those that were experiencing membership conditionality on a given issue. The sixth category is the small set of cases where countries had a specific finding of a violation against them.¹⁰⁴ The estimated annual probability of policy change in these two sets of cases is about equal to the estimated probability in countries that had no specific finding against them but in which domestic courts could invalidate legislation.

FIGURE 5 ABOUT HERE

Most of the control variables have coefficients in the expected direction. The marginal effect of religious executives is especially strong (the marginal effect is about 15-20%, depending on the model). Economic development has the expected positive impact on policy change. EU

¹⁰⁴ The estimates were too imprecise to distinguish countries against whom violations were found into separate groups for judicial review.

membership is negatively and significantly associated with policy change. Outside of the military issue, the EU's *acquis* has traditionally been quite limited on LGBT issues. This suggests that when countries are not subject to conditionality, EU members are more likely to persist in their policies (e.g. Greece on the age of consent). The other control variables do not have a consistent effect on policy change.

We should note that all these findings are preliminary, based on incomplete data, and have not yet been subjected to extensive robustness checks.

IV. CONCLUSION

This paper was motivated by two related questions. First, do the legal principles that international courts develop influence states and private actors that are not party to the dispute? Second, are international courts agents of change or do their judgments merely reflect ongoing social and political trends?

Based on our preliminary results, the answer to both questions appears to be: yes, but only moderately so. ECtHR judgments on LGBT issues do not effectively nullify discriminatory laws, although they have an impact on the likelihood that states will adopt more progressive LGBT policies. Given that we are working with observational data, we cannot fully exclude the possibility that this effect is due to unobserved factors that influence both ECtHR judgments and national policy change. Yet, the statistical impact of ECtHR judgments survives our best efforts to address such concerns.

These results do not, however, imply that the ECtHR led the trends in more progressive policy adoption that we observed in this paper. Rather, Strasbourg Court judgments influenced some countries to adopt progressive policies earlier than they otherwise would have. We estimate that about 20% of the change in progressive policies between 1980 and 2008 may not have been

in place by 2008 without the ECtHR judgments in favor of LGBT individuals. Since these policies have real quality of life consequences for large numbers of European citizens, this is a non-trivial effect.

Theoretically, our findings illustrate that the discretion that ECtHR judges exercise when they interpret the Convention affects state policies. This provides new evidence in longstanding debates in political science over the degree to which supranational judges and the officials of international organizations independently influence consequential state behavior. Moreover, we offer new evidence of the mechanisms by which this influence occurs. Our findings suggest that EU and CoE membership conditionality were part of the story, but only part, since we also find observable effects of ECtHR judgments in states that were not seeking membership in these organizations. We attribute these effects primarily to the ability of national courts to invalidate domestic legislation as contrary to the Convention, and to the agenda setting effects of ECtHR rulings in increasing the likelihood of legislative change. These findings suggest that the value of ECtHR precedent is not equal across time and place, results that are consistent with a developing literature on the differential effect international law has across countries.

We conclude with a cautionary note. The results in this paper are based on incomplete data collection and have not yet been subjected to rigorous robustness checks. As such they are subject to change when we examine the full dataset using alternative model specifications. Moreover, we should be cautious in making causal inferences from this type of observational data. Nevertheless, the inclusion of covariates, country fixed effects, and issue-specific trends go some way towards constructing a plausible model for causal inference. Moreover, the evidence for the mechanisms is consistent with other findings in the developing human rights literature and is supported by anecdotal evidence.

References

- Alter, Karen J. 2008. Delegating to International Courts: Self-Binding vs. Other-Binding Delegation, *Law and Contemporary Problems* 71.
- Alter, Karen and Sophie Meunier-Aitsahalia. 1994. Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision, *Comparative Political Studies* 24: 535-561.
- Amnesty International. 2005. Poland: LGBT Rights Under Attack, AI Index: EUR 37/002/2005, available at <http://web.amnesty.org/en/library/asset/EUR37/002/2005/en/dom-EUR370022005en.html>
- Anagnostou, Dia. 2010. Does European Human Rights Law Matter? Implementation and Domestic Impact of Strasbourg Court Judgments on Minority-Related Policies, *International Journal of Human Rights* 14.
- Arai-Takahashi, Yutaka. 2002. The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR. New York: Transnation Publishers.
- Barkuysen, Tom and Michiel L van Emmerik. 2005. A Comparative View on the Execution of Judgments of the European Court of Human Rights. In T. Christou and J.P. Raymond, eds., *European Court of Human Rights: Remedies and Execution of Judgments*, British Institute for International and Comparative Law.
- Beck, Thorsten, George Clarke, Alberto Groff, Philip Keefer, and Patrick Walsh, 2001. "[New tools in comparative political economy: The Database of Political Institutions](#)." 15:1, 165-176 (September), *World Bank Economic Review*.
- Beger, Nico J. 2004. *Tensions in the Struggle for Sexual Minority Rights in Europe*. New York: Manchester University Press.

- Bob, Clifford. 2009. Globalizing the Anti-Gay Agenda: Conservative Activism and Implications for Transnational Politics and Law (copy on file with authors).
- Bob, Clifford. 2010. Globalizing the Culture Wars: The United Nations Battle Over Sexual Rights, Paper presented at the annual meeting of the American Political Science Association.
- Braumoeller, Baer. 2004. Hypothesis Testing and Multiplicative Interaction Terms. *International Organization* 58(4):807-820.
- Burley, Anne-Marie and Walter Mattli. 1993. Europe before the Court: A Political Theory of Legal Integration, *International Organization* 47: 41-76.
- Busch, Marc. 2007. "Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade", *International Organization* 61: 735-61.
- Carrubba, Clifford, Matthew Gabel, and Charles Hankla. 2008. Judicial Behavior Under Political Constraints: Evidence from the European Court of Justice, *American Political Science Review* 102: 435-52
- Carter, David and Curtis Signorino. 2010. Back to the Future: Modeling Time Dependence in Binary Data. *Political Analysis*.
- Cichowski, Rachel A. 2007. The European Court and Civil Society: Litigation, Mobilization and Governance. Cambridge, United Kingdom: Cambridge University Press.
- Conant, Lisa J. 2002. Justice Contained: Law and Politics in the European Union. Ithaca, New York: Cornell University Press.
- Dai, Xinyuan. 2005 Why Comply? The Domestic Constituent Mechanism. *International Organization* 59, Spring 2005, pp. 363-398
- _____. 2007. *International Institutions and National Policies*. New York: Cambridge University

- Press.
- De Schutter, Olivier. 2008. Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis. European Union Agency for Fundamental Rights.
- Doty, Kathleen A. 2009. From Fretté to E.B.: The European Court of Human Rights on Gay And Lesbian Adoption, *Law and Sexuality* 18.
- Drzemczewski, Andrew. 1983. *The European Human Rights Convention in Domestic Law*. Oxford: Oxford University Press.
- Greer, Steven. 2003. Constitutionalizing Adjudication under the European Convention on Human Rights, *Oxford Journal of Legal Studies* 23(3).
- Greer, Steven. 2006. *The European Convention on Human Rights: Achievements, Problems and Prospects*. Cambridge, United Kingdom: Cambridge University Press.
- Guzman, Andrew T. 2008. *How International Law Works: A Rational Choice Theory*. New York: Oxford University Press.
- Guzman, Andrew T. and Timothy L. Meyer. 2009. International Common Law: The Soft Law of International Tribunals, *Chicago Journal of International Law* 9:515-535.
- Hafner-Burton, Emilie and Kiyoo Tsutsui. 2005. Human Rights Practices in a Globalizing World: The Paradox of Empty Promises, *American Journal of Sociology* 110(5).
- Hathaway, Oona. 2002. Do Human Rights Treaties Make a Difference?, *Yale Law Journal* 111.
- Hawkins, Darren and Wade Jacoby. 2008. Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights, Paper presented at the annual meeting of the American Political Science Association (Aug. 28).
- Heckman, James J., Robert J. Lalonde, and Jeffrey A. Smith. 1999. The Economics and

- Econometrics of Active Labor Market Programs. In: Orley Ashenfelter and David Card (eds) *Handbook of Labor Economics* Vol 3A. Amsterdam: North-Holland, Elsevier Science.
- Helfer, Laurence R. 1993. Consensus, Coherence and the European Convention on Human Rights, *Cornell International Law Journal* 26.
- Helfer, Laurence R. 2001. International Decision: Salgueiro da Silva Mouta v. Portugal, *American Journal of International Law* 95.
- Helfer, Laurence R. 2008. Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime, *European Journal of International Law* 19.
- Hillebrecht, Courtney. 2010. The European Court of Human Rights, Domestic Politics and the Ties that Bind: Explaining Compliance with International Human Rights Tribunals, Paper presented at the annual meeting of the Theory vs. Policy? Connecting Scholars and Practitioners, New Orleans Hilton Riverside Hotel, The Loews New Orleans Hotel, New Orleans, LA, Feb 17.
- Hoffmeister, Frank. 2006. Germany: Status of European Convention on Human Rights in Domestic Law, *International Journal of Constitutional Law* 4.
- Human Rights Watch. 1998. Public Scandals: Sexual Orientation and Criminal Law in Romania.
- Johnson, Paul. 2010. 'An Essentially Private Manifestation of Human Personality': Constructions of Homosexuality in the European Court of Human Rights, *Human Rights Law Review* 10.
- Keefer, Philip and David Stasavage (2003). The Limits of Delegation: Veto Players, Central Bank Independence and the Credibility of Monetary Policy. *American Political Science*

- Review* (August).
- Keller, Helen and Alec Stone Sweet. 2008. A Europe of Rights: The Impact of the ECHR on National Legal Systems. Oxford: Oxford University Press.
- Kelley, Judith G. 2004. International Actors on the Domestic scene: Membership Conditionality and Socialization by International Institutions. *International Organization* 58:425-57.
2007. Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements. *American Political Science Review* 101:573-89.
- Kochenov, Dimitry. 2007. Democracy and Human Rights-Not for Gay People?: EU Eastern Enlargement and Its Impact on the Protection of the Rights of Sexual Minorities, *Texas Wesleyan Law Review* 13.
- Klebes, Heinrich. 1999. 'Membership in International Organisations and National Constitutional Law: A Case Study of the Law and Practice of the Council of Europe' (1999) 99 *St. Louis-Warsaw Transatlantic LJ* 69.
- Kujat, Harald, *Dealing with Sexuality*, Berlin: German Ministry of Defense, 2000.
- Langenkamp, Travis J. 2003. Finding Fundamental Fairness: Protecting the Rights of Homosexuals Under European Union Accession Law, *San Diego International Law Journal* 4.
- Lau, Holning. 2004. Sexual Orientation: Testing the Universality of International Human Rights Law, *University of Chicago Law Review* 71.
- Lax, Jeffrey R. and Justin H. Philips. 2009. Gay Rights in the States: Public Opinion and Policy Responsiveness, *American Political Science Review* 103(3).
- Lee, David S. 2008. Randomized Experiments from Non-Random Selection in U.S. House

- Elections. *Journal of Econometrics* 142(2).
- Mahoney, Paul. 1997. Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgments, *European Human Rights Law Review*.
- Martinico, Giuseppe and Oreste Pollicino, eds. 2010. The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective. Europa Law Publishing.
- Meisner .2001. Minderheiten in den Streitkräften: Homosexuelle in der Bundeswehr. Universität Potsdam
- Mitchell, Sara McLaughlin, and Emilia Justyna Powell. *Domestic Law Goes Global: Legal Traditions and International Courts*. (Cambridge University Press, forthcoming 2011).
- Mowbray, Alastair. 2005. The Creativity of the European Court of Human Rights, *Human Rights Law Review* 5.
- Rand Organization. 2010. *Sexual Orientation and U.S. military Personnel Policy*.
- Ress, Georg. 2005. The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order, *Texas International Law Journal* 40.
- Rodriguez, Alex. 2006. Russia Gays Hear Call: Go Back to the Closet, Chicago Tribune, May 25.
- Rosenberg, Gerald. 1991. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press.
- Rzeplinski, Andrzej. 2008. Legal study on Homophobia and Discrimination on Grounds of Sexual Orientation – Poland: 42, available at http://fra.europa.eu/fraWebsite/attachments/FRA-hdgso-NR_PL.pdf
- Schimmelfennig, Frank. 2001. The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union *International Organization* 55(1): 47–80

- Simmons, Beth. 2009. *Mobilizing for Human Rights*. Cambridge: Cambridge University Press.
- _____. 2010. Treaty Compliance and Violation. *Annual Review of Political Science*. 13:273-96.
- Staton, Jeffrey K., and Will H. Moore, *Judicial Power in Domestic and International Politics*, forthcoming, *International Organization* (2011).
- Stone Sweet, Alec. 2008. On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court, available at http://works.bepress.com/cgi/viewcontent.cgi?article=1032&context=alec_stone_sweet.
- Voeten, Erik. 2007. The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights. *International Organization* 61(4).
- Von Staden, Andreas, *Shaping Human Rights Policy in Liberal Democracies: Assessing and Explaining Compliance with the Judgments of the European Court of Human Rights*, Dissertation, Princeton University, 2009.
- Waldijk, Kees. 2001. Towards the Recognition of Same-Sex Partners in European Union Law: Expectations Based on Trends in National Law. In Robert Wintemute and Mads Andenaes, eds., *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law*. Oxford, United Kingdom: Hart Publishing.
- Waldijk, Kees. 2009. Legal recognition of homosexual orientation in the countries of the world - A chronological overview with footnotes, <http://hdl.handle.net/1887/14543> (accessed October 6, 2010).
- Widdershoven, Rob. 2002. European Administrative Law. In René Seerden and Frits Stroink, eds., *Administrative Law of the European Union, its Member States and the United States*. Antwerpen-Groningen: Intersentia Uitgevers.
- Wildhaber, Luzius. 2002. A Constitutional Future for the European Court of Human Rights,

Human Rights Law Journal 23.

Wildhaber, Luzius. 2007. The European Convention on Human Rights and International Law,

International and Comparative Law Quarterly 56.

Wintemute, Robert. 1995. *Sexual Orientation and Human Rights*. Oxford: Oxford University Press.

Table 1: Key ECtHR Judgments on Lesbian and Gay Legal Issues

<u>Legal issue</u>	<u>Year of Decision or Judgment</u>	<u>Case Name</u>	<u>Violation of Convention?</u>
Decriminalization of consensual homosexual sexual activity in private (“ Decriminalization ”)	1957, 1960, 1962	X v. Federal Republic of Germany	No
Decriminalization	1975	X v. Federal Republic of Germany	No
Decriminalization	1981	Dudgeon v. United Kingdom	Yes
Decriminalization	1988	Norris v. Ireland	Yes
Decriminalization	1993	Modinos v. Cyprus	Yes
Equalize Age of Consent for Homosexual Sexual Activity (“ Age of Consent ”)	1981	Dudgeon v. United Kingdom	No
Age of Consent	1984	Desmond v. United Kingdom	No
Age of Consent	1992	Zukrigl v. Austria	No
Age of Consent	1996	Sutherland v. United Kingdom	Yes
Age of Consent	2002-2005	L. & V. v. Austria & other cases against Austria	Yes
Serving openly in the armed services (“ Armed Services ”)	1983	B. v. United Kingdom	No
Armed Services	1999	Lustig-Prean & Beckett v. United Kingdom	Yes
Armed Services	2002	additional cases against the United Kingdom	Yes
Equal treatment of (1) <u>unmarried opposite-sex</u> couples and (2) unmarried <i>same-sex</i> couples with respect to housing, social security & other benefits (“ Unmarried Couples Benefits ”)	1984	S. v. United Kingdom	No
Unmarried Couples Equality	1996	Roosli v. Germany	No
Unmarried Couples Equality	2003	Karner v. Austria	Yes
Unmarried Couples Equality	2010	Kozak v. Poland	Yes
Equal treatment of (1) <u>married opposite-sex</u> couples and (2) unmarried <i>same-sex</i> couples with respect to housing, social security & other benefits (“ Equality in Marriage Benefits ”)	2001	Mata Estevez v. Spain	No
Equality in Marriage Benefits	2008	Courten v. United Kingdom	No
Equality in Marriage Benefits	<u>2010</u>	Schalk & Kopf v. Austria	No violation, but principle of equality recognized

Table 2: Key ECtHR Judgments on Transsexual Legal Issues

<u>Legal issue</u>	<u>Year of Decision or Judgment</u>	<u>Case Name</u>	<u>Violation of Convention?</u>
Following surgical gender reassignment, refusal to recognize change of sex or forename on identify documents such as a driver's license or passport (" Change of Identity Documents ")	1977	X v. Federal Republic of Germany	Commission: Complaint declared admissible; case settled in 1979 following ruling of Constitutional Court
Change of Identity Documents	1990 1992	B. v. France	Commission: Yes Court: Yes
Following surgical gender reassignment, refusal to recognize change of sex on all official documents, including birth registry and birth certificate (" Change of All Documents ")	1977	X v. Federal Republic of Germany	Commission: Complaint declared admissible; case settled in 1979 following ruling of Constitutional Court
Change of All Documents	1979 1980	Van Oosterwijk v. Belgium	Commission: Yes Court: No exhaustion of domestic remedies
Change of All Documents	1984 1986	Rees v. United Kingdom	Commission: Yes Court: No
Change of All Documents	1988 1990	Cossey v. United Kingdom	Commission: No Court: No
Change of All Documents	1997 1998	Sheffield & Horsham v. United Kingdom	Commission: Yes Court: No
Change of All Documents	2002	Goodwin v. United Kingdom	Court: Yes
Following surgical gender reassignment, refusal to permit marriage to someone of the opposite sex (" Transsexual Marriage ")	1979 1980	Van Oosterwijk v. Belgium	Commission: Yes Court: No exhaustion of domestic remedies
Transsexual Marriage	1984 1986	Rees v. United Kingdom	Commission: No Court: No
Transsexual Marriage	1988 1990	Cossey v. United Kingdom	Commission: Yes Court: No
Transsexual Marriage	1997 1998	Sheffield & Horsham v. United Kingdom	Commission: No exhaustion of domestic remedies Court: No
Transsexual Marriage	2002	Goodwin v. United Kingdom	Court: Yes
Medical or financial impediments to recognition of post-operative gender (" Right to Gender-Reassignment ")	2007	L. v. Lithuania	Court: Yes
Right to Gender-Reassignment	2009	Schlumpf v. Switzerland	Court: Yes

Table 3: Fixed Effect Panel Regression on Number of Changes in LGBT Policies

VARIABLES	(1)	(2)	(3)	(4)
	-0.0493*	-0.0635***	-0.0393	-0.0506**
	(0.0196)	(0.0127)	(0.0266)	(0.0179)
	0.623*	0.626**	0.616**	0.601**
	(0.225)	(0.192)	(0.198)	(0.191)
		0.588*	1.248	0.349
		(0.257)	(0.615)	(0.873)
		0.623	1.168**	1.561**
		(0.730)	(0.376)	(0.408)
	0.0575**	0.0449*	-0.000674	0.0646
	(0.0154)	(0.0205)	(0.104)	(0.130)
	0.206***	0.196**	0.0444	0.143
	(0.0315)	(0.0474)	(0.157)	(0.188)
			0.0466	-0.0449
			(0.136)	(0.181)
			0.278	0.153
			(0.251)	(0.289)
			-0.0690	-0.00462
			(0.0393)	(0.0249)
			-0.0400	-0.147***
			(0.0265)	(0.0285)
				0.0912
				(0.0548)
				-0.0967**
				(0.0245)
Constant	-0.586*	-0.221	1.049	-0.718
	(0.215)	(0.372)	(1.887)	(2.603)
Observations	265	265	265	265
R-squared	0.295	0.305	0.337	0.389
N of Issues	5	5	5	5

Robust standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

Table 4: Fixed Effect Logit Estimation of Decision to Adopt Progressive LGBT Policies

VARIABLES	(1)	(2)	(3)	(4)
	0.590**	0.594**	-0.135	-0.339
	(0.349)	(0.360)	(0.425)	(0.435)
	1.282**	1.138*	0.845	1.133*
	(0.714)	(0.778)	(0.750)	(0.844)
	1.587**	1.335*	1.521**	1.626*
	(0.618)	(0.776)	(0.668)	(0.865)
Conditionality		0.181	0.947**	0.703*
		(0.468)	(0.488)	(0.529)
Checks		-0.141		-0.0222
		(0.121)		(0.129)
Checks*		0.287*		0.429**
		(0.154)		(0.168)
Judicial Review			-0.0719	0.387
			(0.446)	(0.470)
Judicial Review*			1.618***	1.280**
			(0.566)	(0.585)
Checks*Judicial Review				-0.504***
				(0.191)
EU, Employment	0.425	0.504	0.547	0.424
	(0.640)	(0.669)	(0.657)	(0.685)
EU Member	-1.823***	-1.727***	-1.572***	-1.300**
	(0.413)	(0.522)	(0.427)	(0.516)
GDP per capita	8.87e-05**	6.70e-05	0.000114**	8.87e-05
	(3.86e-05)	(5.68e-05)	*	(6.49e-05)
Religious	-0.914***	-0.652	-0.784**	-0.902*
	(0.337)	(0.511)	(0.348)	(0.544)
Executive Polity	-0.074***	0.00688	-0.0830***	-0.0192
	(0.0228)	(0.0394)	(0.0250)	(0.0436)
New State	-0.552	-0.814	-1.225	-1.785
	(0.550)	(0.650)	(0.842)	(1.133)
Transsexual	0.247	-0.243	1.353***	0.783
	(0.434)	(0.502)	(0.497)	(0.548)
Eastern Europe				
Observations	3658	2165	3287	1833
Number of Countries	36	36	32	31

Fixed effects for Countries and Issues Omitted. Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0. (one-tailed for ECtHR, ECtHRCountry, and Conditionality)

Figure 1: Decriminalization and Age of Consent Policies Among CoE Members

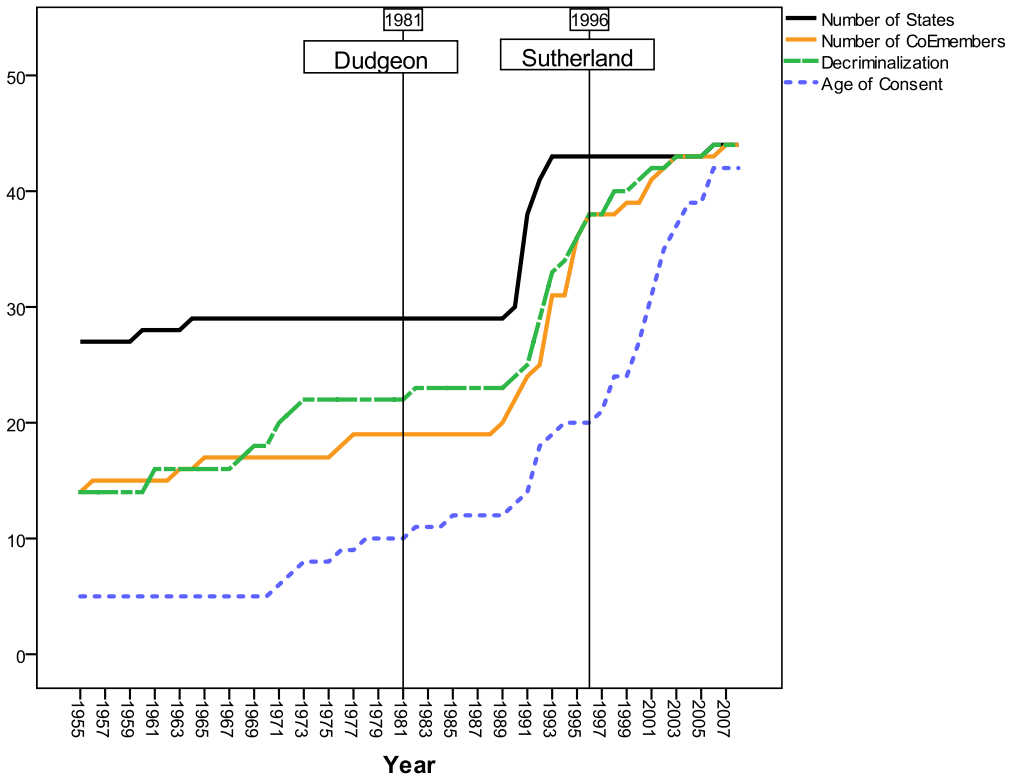


Figure 2: Number of CoE Member States without Discrimination in Armed Services

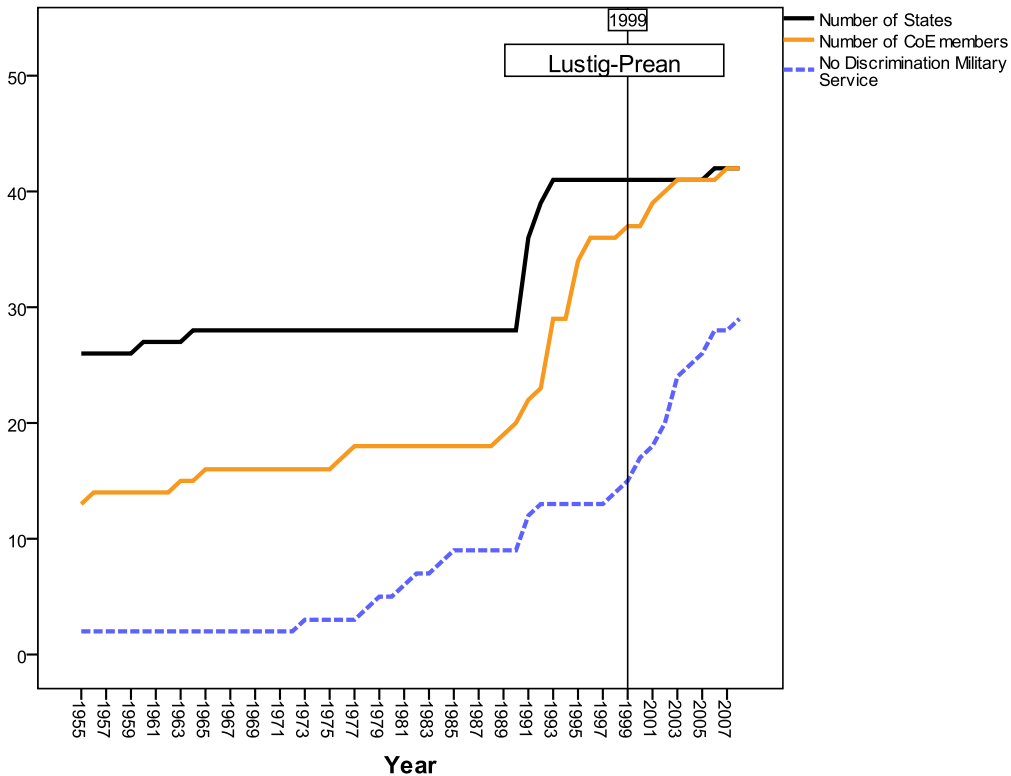


Figure 3: Transsexual Issues

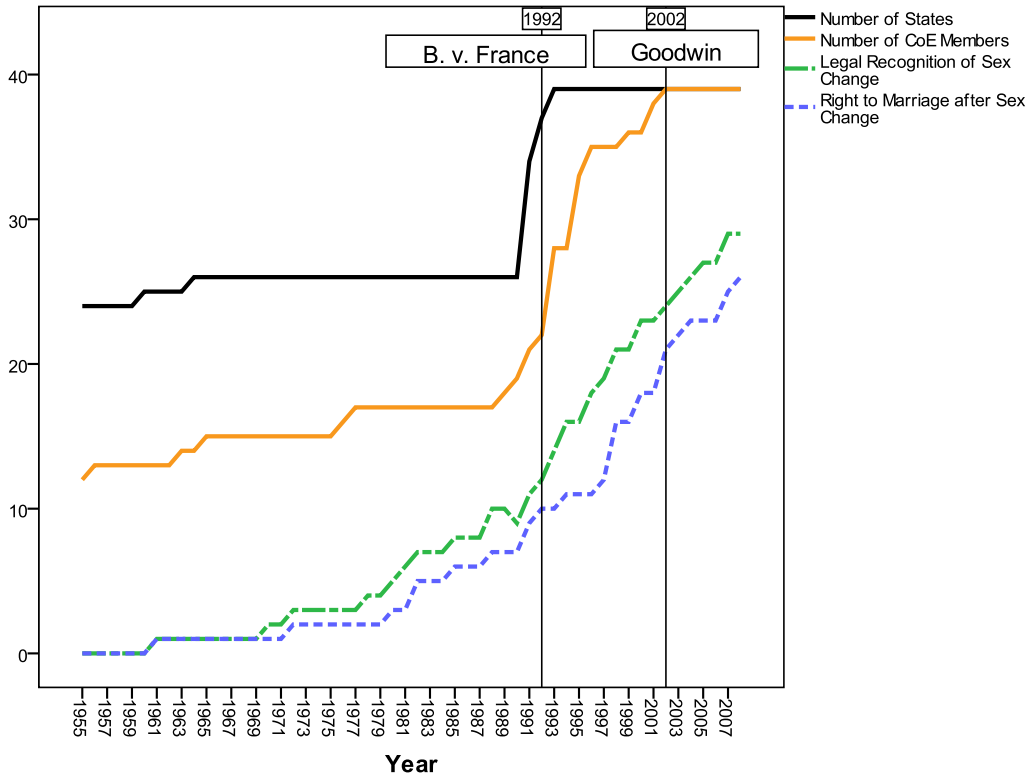


Figure 4: Probability of Policy Change by Checks and Balances and ECtHR Ruling

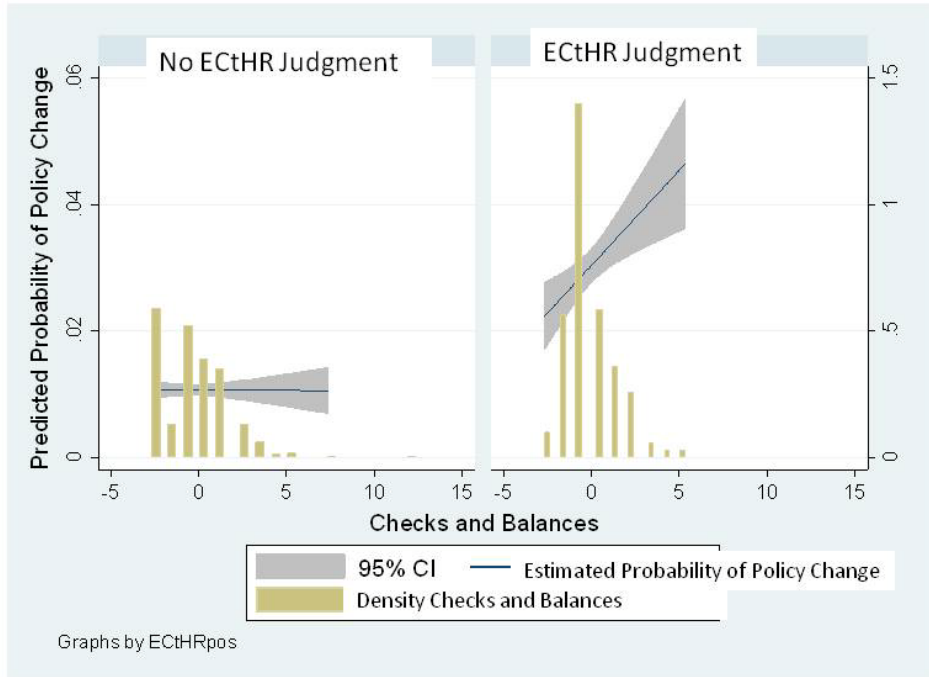


Figure 5: Predicted Probabilities of Policy Change by Judicial Review, and ECtHR Judgment

