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Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights

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Articles

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The European Court of Human Rights (ECtHR) balances along two axes: individual right vs. government interest and national vs. supranational judgment. The Court calibrates the level of deference it affords States through the margin of appreciation, a doctrine designed to vary how strictly the supranational court will scrutinize national decisions. This Article challenges the way in which the Court deploys margin of appreciation in order to defer to "sensitive moral and ethical" decisions taken by domestic institutions. I call this deference the "moral margin." Although the European Convention on Human Rights explicitly authorizes the Court to take "protection of morals" into account when weighing rights claims, I argue that the Court has used this authorization in a manner that fails to honor its role within Europe. I critique the "moral margin" on two grounds. First, in practice, the Court has narrowed its definition of "sensitive moral and ethical" issues to cover almost exclusively

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cases that implicate reproductive choices and family formation. Second, I argue that when the Court chooses to defer to Member States, it should instead employ approaches—namely consensus analysis and proceduralization—that foster dialogue among Europe's rights-protecting institutions. Using the recent gestational surrogacy judgments as a case study, I demonstrate how the ECtHR can engage with domestic institutions to allocate rights-protecting responsibility and encourage Europe-wide change.

"By reason of their direct and continuous contact with the vital forces of their countries, the State authorities are, in principle, in a better position than the international judge to give an opinion, not only on the 'exact content of the requirements of morals' in their country, but also on the necessity of a restriction intended to meet them."

– S.H and Others v. Austria[1]

INTRODUCTION

In 2016, the United Kingdom's Human Fertilization and Embryology Authority approved an *in vitro* fertilization ("IVF") treatment that would produce a baby with three genetic parents.[2] That same year, an Italian minister from the governing coalition supported a law making gestational surrogacy a "sex crime" and calling it "the most vile, illegal trade that man has invented."[3] At around the same moment in France, left-wing feminists and Catholics aligned to protest expanded legal recognition for children born through surrogacy.[4] These reactions to emerging reproductive technology may be worlds apart, but the three governments operate under shared obligations to protect the rights to private life and to family life enshrined in the European Convention on Human Rights and Fundamental Freedoms (the Convention).[5] The European Court of Human Rights (the ECtHR), sitting in Strasbourg, monitors and guides how Convention rights are protected at the domestic level. This supranational human rights court continually confronts the question: How much and what kinds of national variation can the Convention regime accommodate?

For the Member States of the Council of Europe (the forty-seven signatories of the Convention[6]), national decisions about

1. S.H. and Others v. Austria, 2011-V Eur. Ct. H.R. 295, 321 (2011).

2. James Gallagher, *Babies Made From Three People Approved in UK*, BBC (Dec. 15, 2016), http://www.bbc.com/news/health-38328097 [https://perma.cc/5W2Z-BLSU].

3. *Surrogacy is like Sex Crime–Italian Minister Alfano*, BBC (Jan. 6, 2016), http://www.bbc.com/news/world-europe-35247320 [https://perma.cc/5UQH-SKHR].

4. Anna Momigliano, *When Left Wing Feminists and Conservative Catholics Unite*, THE ATLANTIC (Mar. 28, 2017), https://www.theatlantic.com/international/archive/2017/03/left-wing-feminists-conservative-catholics-unite/520968/ [https://perma.cc/2NT2-SVPV].

5. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

6. The Council of Europe is a treaty-based regime, which extends its jurisdiction over

parenthood and family formation must, at least in theory, comply with Article 8 of the Convention. Article 8(1) protects every person's "right to respect for his private and family life, his home and his correspondence,"[7] while Article 8(2) permits government infringements on this right in the following circumstances:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[8]

The second half of Article 8 is known as a "limitations clause:"[9] it sets out the grounds which a state may invoke to justify limits on individual rights. This does not mean that all a State must do is invoke "public safety" or "prevention of crime" in order to prevail. The "proper purpose" inquiry, as it is often called, is only the first step.[10] In most cases, the decisive question is whether the government action is "necessary in a democratic society."[11] For our purposes, however, the key feature of Article 8's limitation clause is that it permits states to infringe on the rights to private life and family life in the name of protecting morals.[12] What counts as moral, however, remains undefined. This Article addresses the amorphous and changing definition

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47 countries. It is entirely distinct from the European Union. *See Who We Are,* THE COUNCIL OF EUROPE, https://www.coe.int/en/web/about-us/who-we-are [https://perma.cc/72H4-7J4Y].

7. European Convention on Human Rights, *supra* note 5, art. 8(1).

8. *Id* art. 8(2).

9. Vicki Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3111 (2015) (explaining that many constitutional rights include limitations clauses, which invite proportionality analysis); Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 GLOBAL CONSTITUTIONALISM 53, 59 (applying the "limitation clause" concept to the European Convention on Human Rights).

10. AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 245 (2012).

11. Stone Sweet, *supra* note 9, at 74 ("The European Court typically balances within necessity analysis.").

12. Convention articles protecting due process, freedom of religion, freedom of expression, and freedom of assembly contain similar limitations clauses, all of which include references to protection of morals. European Convention on Human Rights, *supra* note 5, arts. 6, 9, 10, 11.

of moral issues that the Court employs.

Why would the Convention framers grant fundamental rights to private and family life only to qualify them with a list of permissible infringements? The answer lies in the form of rights review used by courts across Europe and the globe: proportionality analysis.[13] Proportionality analysis provides a mechanism by which courts balance state actions against claims of individual rights.[14]

When and how the supranational court should intervene into domestic controversies remains a much-debated question in Europe. Some have questioned why States should be permitted to defend their policies on majoritarian moral grounds at all. Under this view, the Court's moral compass derives from the principle of universal human rights not from parochial preferences.[15] To that end, George Letsas's influential critique rejects the Court's current doctrine insofar as it violates liberal principles by elevating majoritarian moral preference over individual choice.[16]

This Article takes a more pragmatic view. I accept that respect for Member States' moral choices is baked into the Convention. Courts are explicitly authorized to take a State's moral justifications into account when balancing individual rights against State interests. This textual authorization, however, provides relatively little guidance to the ECtHR. It does not determine what kinds of moral argu-

13. BARAK, *supra* note 10, at 133.

14. Although proportionality takes different forms in courts from Canada to Israel, the Convention, and courts applying its provisions, employ the following approach. The court first inquires whether a particular interest falls within the scope of the right. Next, the court will ask if the State action was taken in accordance with law, furthers a legitimate end, and is necessary in a democratic society. Necessity analysis serves a function similar to the American constitutional "least restrictive means" test, ensuring that there is a proper fit between the State's interest and its actions. Article 8(2) then provides a specific limitations clause, which enumerates the "legitimate ends" that can justify infringing on an individual's rights. Finally, the court considers whether the State's action unduly burdens the right, a step often called "strict balancing." *See* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 74–75 (2008). ("The core of necessity analysis is the deployment of a 'least-restrictive means' . . . test: the judge ensures that the measure does not curtail the right any more than is necessary for the government to achieve its stated goals. [Proportionality analysis] is a balancing framework: if the government's measure fails on suitability or necessity, the act is per se disproportionate; it is outweighed by the pleaded right and therefore unconstitutional.").

15. *See* ALAIN ZYSSET, THE ECHR AND HUMAN RIGHTS THEORY: RECONCILING THE MORAL AND POLITICAL CONCEPTIONS 11 (2017) (collecting scholarship on the moral dimension of human rights); George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. L. STUD. 705, 707 (2006).

16. GEORGE LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN COURT OF HUMAN RIGHTS 121 (2008).

ments deserve consideration, how much weight should be given to States' claims that their laws protect morals, or how to balance public morals against individual rights. These choices are left for the Court to determine through iterative case law.

The ECtHR employs a set of texts, doctrines, and strategic choices to navigate between respect for national autonomy on the one hand and building a supranational system of human rights on the other. The primary doctrinal tool for calibrating deference is the margin of appreciation. The margin of appreciation is explained in greater detail below, but the essential point is that the doctrine permits the ECtHR to vary the scope of deference it grants to Member States in a given case. Put differently, the margin of appreciation determines how strictly the ECtHR will scrutinize the State's actions.[17]

In Europe's pluralist system, domestic institutions engage regularly with the ECtHR in ways that expose the inherent tension between supranational human rights and deep local difference. ECtHR judges are not of one mind about the proper approach to deference and have experimented over the years with a variety of techniques for permitting domestic difference, while also ensuring a standard level of rights protection across the Convention system.[18]

The Court's rulings are often pragmatic balancing acts: not too intrusive, but not too obsequious. In the current political climate, the Court may have good reason to take a deferential posture. We do not live in an era of optimism for Europe's supranational institutions. A nationalist current underlies Brexit,[19] the rule of law collapse in Hungary, Poland, and Russia,[20] and the rise of populism across Europe. This nationalism threatens to undermine the legitimacy of even

17. *See e.g.*, Alastair Mowbray, *Subsidiarity and the European Convention on Human Rights*, 15 HUM. R. L. REV. 313 (2015) (tracking the ECtHR's "evolution" in its relationship to domestic institutions); Robert Spano, *Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity*, 14 HUM. R. L. REV. 487 (2014) (describing the careful balance that European Court of Human Rights judges employ).

18. *See* Mowbray, *supra* note 17; Spano, *supra* note 17.

19. Erik Voeten, *Competition and Complementarity between Global and Regional Human Rights Institutions*, 8 GLOBAL POL'Y 119, 121 (explaining "the UK may exit the ECtHR regime over controversial rulings on prisoner voting rights, the extradition of suspected terrorists, and, more generally, an anti-European backlash that culminated in the Brexit referendum.").

20. *See* R. Daniel Kelemen & Mitchell Orenstein, *Europe's Autocracy Problem: Polish Democracy's Final Days?*, FOREIGN AFFAIRS (Jan. 7, 2016), https://www.foreignaffairs.com/articles/poland/2016-01-07/europes-autocracy-problem [https://perma.cc/L2HK-P7BV] (describing the shift in Hungary and Poland toward autocratic rule).

firmly entrenched supranational institutions like the ECtHR.[21] In this context, moral traditions can become a salient marker of national identity. Supranational institutions that overrule domestic decisions about "the family" and "protection of morals" risk serious backlash. In the face of this threat, the Court has three options: (1) forge ahead undeterred; (2) retreat and defer; or (3) engage national institutions in the shared project of rights protection.

This Article brings to light and critically assesses a distinct form of margin of appreciation in situations that involve "sensitive moral and ethical" questions. I call this the "moral margin." Several of the Convention's core rights list "protection of morals" within their limitations clauses. In earlier eras, the Court focused on sensitive moral questions in freedom of expression cases (Article 10), as well as Article 8. In the last decade, however, the Court's references to "sensitive moral and ethical" issues have increased and migrated almost exclusively to cases implicating private life and family life.[22] Although the Convention text permits the Court to take protection of morals into account, the Court's choice to grant special deference to a subset of cases that it deems "sensitive" poses significant problems.

The risk both to the Court's legitimacy and to the human rights project is that excessive deference to Member States will undercut the Court's central role in European rights development. The Convention could operate without a supranational court, much as other international treaties with rights components have done.[23] But it would be a far weaker instrument, and the prospect for harmonization across Europe would dissipate.

How much deference, then, is too much? I propose to measure whether the Court's deferential posture is warranted based on the extent to which deference promotes rights-enhancing exchanges across European institutions. Under this view, the ECtHR should strive to build doctrines that encourage actors in institutions at vari-

21. *See* Robert Spano, *Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity*, 14 HUM. R. L. REV. 487, 488 (2014) ("It is true, that the Court has over the years been criticised for 'judicial activism', but the [recent] charges levelled against the Court . . . have been unpredecented, the Court having been accused of, among other things, being the 'international flag-bearer for judge-made fundamental law', lacking in 'democratic legitimacy,' 'encroaching on Parliamentary sovereignty' and even 'human rights imperialism!'").

22. *See* European Convention on Human Rights, *supra* note 5, at section II.B, appendix.

23. *See* Judith Resnik, *Comparative (in)equalities: CEDAW, the Jurisdiction of Gender, and the Heterogeneity of Transnational Law Production*, 10 INT'L J. CONST. L. 531, 533 (2012) (emphasizing national variation in implementation of the Convention on Elimination of All Forms of Discrimination Against Women).

ous levels—from the individual social worker to the Strasbourg judge— to consider the human rights implications of their decisions and to take into account the human rights judgments provided by other actors and institutions across the Council of Europe (both vertically and horizontally). Those committed to the project of European constitutional pluralism ought to measure the Court's judgments by how well it keeps the lines of communication between European institutions open, supported, and clear. In this model, Strasbourg both channels information from domestic systems into its articulation of rights and also helps domestic institutions to take rights into account.

This Article contextualizes, introduces, and analyzes the moral margin as follows: Section I situates the ECtHR within European constitutional pluralism. It emphasizes the importance of the Court's role in supporting rights-protecting practices within Member States. Section II confronts the moral margin and shows how the Court has reached a deferential position, grounded in avoidance of what it deems to be moral and ethical questions. Section II also provides several possible explanations as to why the Court has come to rely on the moral margin in a particular subset of cases. Section III then contrasts the moral margin with two other forms of deference that the ECtHR has developed: consensus analysis and proceduralization. Finally, Section IV provides a case study of the ECtHR's judgments relating to surrogacy. These cases involve intended parents and children whose home countries rejected, and even criminalized, their family ties based on powerful domestic objections to surrogacy. Across the analyzed cases, the Court employs all three doctrinal tools: consensus analysis, proceduralization, and moral deference. I contend that Strasbourg can protect itself from backlash and honor its subsidiary role by using the dialogue-enhancing approaches rather than moral deference.

I. STRASBOURG'S PLACE IN EUROPE

Constitutional pluralism defines the European system and the ECtHR's role within it. Multiple courts with overlapping jurisdictions interpret multiple constitutional texts with overlapping content. For instance, the jurisdiction of the Court of Justice of the European Union is distinct from, but overlaps with, that of the German Constitutional Court, which in turn shares rights-protecting responsibility with the ECtHR.[24] An individual claimant might plead EU law,

24. NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW 110, 170 (2012) (describing the relationship between the German

German constitutional rights, Convention rights, or some combination of the three. Each court asserts its own authority as an apex rights-protecting court while acknowledging, and in many instances deferring to, the other courts within the pluralist system.[25] That no single court can claim definitive supremacy might seem unstable or inefficient to an American jurist, but Europeans have lived with this dialogic and pluralist system for decades.[26] Out of it has come some of the most robust and comprehensive rights protection the world has ever seen.

Europe has developed a dialogic model[27] structured around constitutional pluralism.[28] The supranational and national courts serve different functions within a pluralist system, but they communicate through reasoned decisions that convey information to one another. Much has been written on notable examples of exchanges

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Constitutional Court, the EU courts, and the ECtHR).

25. *See* Alec Stone Sweet, *The Structure of Constitutional Pluralism*, 11 INT'L J. CONST. L., 491, 494 (2012); Neil Walker, *The Idea of Constitutional Pluralism*, 65 MODERN L. REV. 317 (2002).

26. For an influential description of the EU dialogue model, see Miguel Poiares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, *in* SOVEREIGNTY IN TRANSITION 501 (Neil Walker ed., 2003).

27. The image of judges engaged in dialogue with other branches of government or with the public has a long lineage in North American scholarship. *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); Frank Michelman, *Law's Republic*, 97 YALE L. J. 1493 (1988); Robert Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L. J. 1035 (1977). These authors, among many others, emphasize that issues are rarely "settled" by a single judgment. Instead, the meaning of statutes, common law, and constitutional rights develop over time through engagement between courts and other branches of government. In the United States, there is an ongoing scholarly debate over whether the U.S. Supreme Court has the "final word" on constitutional rights, or whether judicial pronouncements are simply one step in a multi-layered exchange among Congress, the executive, civil society, states, and other actors within the American political system. Canadians took the dialogue model a step further: instantiating a mechanism for exchange within the Canadian Charter in the form of a "notwithstanding" clause that allows Parliament to override a Canadian Supreme Court ruling. For a comparative look at countries that permit parliamentary override of high court judgments, see STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE (2013).

28. *See* Maduro, *supra* note 26, at 513. ("National courts are responsible for the effective incorportation of EU Law into national legal orders. But the other side of that is the dependence of EU law on national courts and litigants. Awareness of this power gives to these legal actors a powerful input into EU law itself. The relationship established between the national courts and individuals on the one hand and the European Court of Justice on the other thus becomes one of dialogue rather than dictation.").

between domestic and supranational courts.[29] In the abstract, supranational court rulings develop a shared language of rights protection which all courts across the system can use, while domestic courts (and other institutions) help fill in the content of rights. In Europe, the shared rights language is proportionality analysis, the analytic tool that courts use to balance rights claims against government interests.[30]

The Convention does not expressly confer on the ECtHR the power to strike down domestic legislation. Its only formal power is to order monetary compensation for aggrieved applicants.[31] Over the years, however, the ECtHR has expanded far beyond its textual mandate and ordered criminal trials re-opened, whole legal systems reorganized,[32] and thousands of migrants protected from threats outside the Convention system.[33] Overall, Member States have been remark-

29. *See* EIRIK BJORGE, DOMESTIC APPLICATION OF THE ECHR: COURTS AS FAITHFUL TRUSTEES 140–42 (2015) (recounting Germany's resistance and acceptance of ECtHR judgments in domestic law); *see also*, Wojciech Sadurski, *'Solange, chapter 3': Constitutional Courts in Central Europe—Democracy—European Union*, 17 EUROPEAN L. J. 1, 5–6 (2008) (describing the three "chapters" of domestic court resistance to European Union law).

30. *See* ALEC STONE SWEET & CLARE RYAN, A COSMOPOLITAN LEGAL ORDER: KANT, CONSTITUTIONAL JUSTICE, AND THE ECHR,Chapter 3 (forthcoming 2018) (manuscript on file with author) (cited page numbers are provisional due to further edits in the publishing process).

31. European Convention on Human Rights, *supra* note 5, art. 41 ("If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.").

32. Wojciech Sadurski, *Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and Eastern European States to the Council of Europe, and the Idea of Pilot Judgments*, 9 HUM. RTS. L. REV. 397 (2009) (describing the transformations of Central and Eastern European legal systems through the pilot judgment procedure).

33. *See* ALEC STONE SWEET & CLARE RYAN, *supra* note 30, at 68 (describing the ECtHR's transformation on general measures). This transformation has taken place primarily through the ECtHR's assertions of authority, followed by relative acquiesence by Member States. *See also, e.g.*, Opuz v. Turkey, 2009-III Eur. Ct. H.R. 107, 155. ("[T]he Court provides final authoritative interpretation of the rights and freedoms defined in Section I of the Convention, [and it] will consider whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern other States."); Scozzari and Giunta v. Italy, 2000-VIII Eur. Ct. H.R. 471, 528. ("[A] judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose ... the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects.").

ably compliant.[34]

Many scholars have examined the extraordinary fact that the Court has maintained a record of compliance, notwithstanding its limited coercive power, and have posited theories as to why the Strasbourg system has been so successful.[35] One theory focuses on how States' political and economic interests—namely gaining access to the European Union—drove them to seek membership in the Council of Europe and to comply with ECtHR judgments.[36] Some scholars emphasize how domestic actors used supranational judgments to increase a particular institution's power within the national legal order.[37] Another approach explains that compliance by one

34. *See* Comm. of Ministries, Supervision of the Execution of Judgments and Decisions of the European Court of Justice 11 (2016), https://rm.coe.int/prems-021117-gbr-2001-10e-rapport-annuel-2016-web-16x24/168072800b, [https://perma.cc/AN88-WXB6] (describing the trends toward increased compliance with structural judgments, but also noting that some cases remain unresolved and there is a need for new reforms). There have been some notable exceptions. In Greens & M.T. v. the United Kingdom, 2010-VI Eur. Ct. H.R. 57, 69, the Court found that the United Kingdom was in continued violation of the Convention due to its failure to enact new laws regarding prisoner voting. The Court held that "On 4 March 2010 the Committee of Ministers adopted a decision in which they noted that notwithstanding the Grand Chamber's judgment in *Hirst*, [and] the large number of persons affected, the automatic and indiscriminate restriction on prisoners' voting rights remained in force; reiterated their serious concern that a failure to implement the Court's judgment before the general election and the increasing number of persons potentially affected by the restriction could result in similar violations affecting a significant category of persons, giving rise to a substantial risk of repetitive applications to the European Court; and strongly urged the authorities rapidly to adopt measures, even if of an interim nature, to ensure the execution of the Court's judgment before the then pending general election." No such measures have yet been taken.

35. *See, e.g.* Mads Andenas & Eirik Bjorge, *National Implementation of ECHR Rights*, *in* CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT 181–262 (Andeas Follesdal, Brigit Peters, & Geir Ulfstein, eds. 2013) (explaining how powerful domestic courts, such as the UK Supreme Court and the German Constitutional Court have adopted the Convention and the ECtHR's case law into their judgments); Dia Anagnostou, *Untangling the Domestic Implications of the European Court of Human Rights*, *in* THE EUROPEAN COURT OF HUMAN RIGHTS: IMPLEMENTING STRASBOURG'S JUDGMENTS ON DOMESTIC POLICY 2–4 (Dia Anagnostou ed., 2013).

36. Sadurski, *supra* note 32, at 404 (describing how Central and Eastern European Countries were required to join the Council of Europe in order to gain membership in the European Union).

37. Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 GLOBAL CONSTITUTIONALISM 53, 76 (2012) ("[T]he incentives facing national judges push them toward implementing the Court's progressive rulings, as well as raising standards on their own. Simplifying a complex topic, there are several basic logics at work. The first is an 'avoidance of punishment' rationale: enforcing Convention rights will make the state—in practice, the judiciary—less vulnerable to censure

State can serve to induce changes in other Member States.[38]

Whatever explains the high rates of compliance, the only way that the ECtHR can maintain this standard is by enlisting the support of domestic actors, especially courts, to enforce and expand Strasbourg rulings in their domestic legal systems. The Court encourages domestic courts to engage in rights-protection through its judgments, rewarding robust rights-oriented analyses and highlighting failures in challenged domestic systems. Domestic courts respond by incorporating Convention rights into domestic law and refining the content of Convention rights through domestic judgments that go beyond Strasbourg's rulings.

In spite of its considerable influence, the ECtHR's ability to protect rights is limited both by its institutional capacity and by its reliance on Member States to incorporate its case law. Aware of its fragile place in the European system, the Court has worked for decades to develop techniques for engaging domestic actors, particularly courts, in dialogue over the scope and enforcement of Convention rights. In order to do so, the ECtHR must be careful about what it communicates with its judgments. If it overreaches, it risks serious backlash. But if it relies on a deferential posture that does not activate European dialogue, then it risks becoming irrelevant. Even when the ECtHR does not articulate new substantive rights, it can still cultivate rights-oriented domestic choices.

Subsidiarity, which situates the ECtHR in relation to domestic institutions, constitutes a core component of Strasbourg's constitutional[39] structure.[40] In the international human rights context, subsid-

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in Strasbourg. This logic is especially pronounced in national systems that otherwise prohibit the judicial review of statute, or do not have a national charter of rights. A second dynamic is embedded in domestic politics. Individuals and NGOs may seek to leverage the ECHR to alter law and policy, and national judges may work to entrench Convention rights in order to enhance their own authority with respect to legislators and executives. Third, as the [supranational order] gains in effectiveness, the interest high courts have in using the Convention, and seeking to influence the evolution of the ECHR, increases . . .").

38. *See* Laurence Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77, 80 (2014).

39. Federicco Fabrini & Miguel Poiares Maduro, *Supranational Constitutional Courts* 22 (iCourts, Working Paper No. 98, 2017) (defining the ECtHR's position in the European legal order).

40. Samantha Besson, *Subsidiarity in International Human Rights Law—What is Subsidiary About Human Rights?*, 61 AM. J. OF JURISPRUDENCE 69, 70–71 (2016) (emphasizing the centrality of subsidiarity in contemporary international human rights reasoning); Neil Walker, *Subsidiarity and the Deracination of Political Community: The EU and Beyond*, *in* EUROPA ALS IDEE 2 (Stefen Oter et al. eds., 2015) (describing the reemergence of "subsidiarity" as "an important term within the lexicon of contemporary

iarity generally creates a "rebuttable presumption for the local,"[41] and "implies that the[] legal and judicial dimension [of international human rights are] . . . *primarily* to be found at the level of internal state practices independently of the international level."[42] Subsidiarity does not, however, imply unexamined deference to local choice: "States have the primary responsibility to secure human rights under their jurisdiction, and international human rights institutions have a complementary review power in cases where international minimal human rights standards are not protected effectively domestically."[43] This means that when States are unable or unwilling to protect rights, the ECtHR has the authority to review their practices and to require structural changes to their legal systems.[44] Thus, subsidiarity places the responsibility on States to engage in primary rights protection, and it entrusts the ECtHR with the responsibility to interact with Member States in ways that build those States' capacities to protect rights.

In the last decade, actors across Europe have made a concerted effort to place national institutions at the center of human rights protection, with the ECtHR serving a supporting role.[45] This move toward the local is "an express manifestation of the diversified character of the implementation of human rights guarantees at the nation-

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theoretical reflection and institutional design" across a number of institutions and jurisdictions).

41. Andreas Føllesdal, *Subsidiarity and International Human Rights Courts: Respecting Self Governance and Protecting Human Rights—or Neither?*, 79 L. & CONTEMP. PROB. 147, 148 (2016).

42. ZYSSET, *supra* note 15, at 13 (emphasis added).

43. Besson, *supra* note 40, at 78.

44. *See* Sadurski, *supra* note 32, at 402. Sadurski comments on a shift in the Court, toward "judgments finding systemic and widespread violations, and ordering the State to undertake wide-reaching steps to redress the breach. This more constitutional role (compared with the traditional role taken up by the Court in individual cases, whereby no judgment is implied as to the law underlying the claim) has been largely driven by a number of systemic deficiencies within CEE [Central and Eastern European] legal systems."

45. High Level Conference on the Future of the European Court of Human Rights, Apr. 19–20 , 2012, Brighton Declaration (April 20) ("[T]he Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation."); Protocol No. 15 Amending the Convention on the Protection of Human Rights and Fundamental Freedoms, Preamble, June 23, 2013, C.E.T.S. No. 213 (not yet entered into force).

al level."[46] This newly invigorated interest in subsidiarity finds textual form in the revised preamble to the Convention:

> Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.[47]

If we think of Strasbourg as one actor in a broad European dialogue, then the recent emphasis on subsidiarity has several positive features. The Strasbourg system only works if domestic actors participate. In principle, Convention rights should be respected at every level of governance, starting from the first interaction between the State—as embodied in a teacher, social worker, police officer, civil servant, or judge—and the individual. Local actors should not only faithfully execute commands from Strasbourg, but also should be actively engaged in creating the European human rights framework.

There are democratic and epistemic benefits to enlisting domestic institutions in forming the content of Convention rights. In a system with a massive base (forty-seven countries with millions of inhabitants) and a very narrow top (one court with forty-seven judges), for human rights regulation to be effective, States cannot wait for a definitive ruling from Strasbourg on every issue. Rather, they must be prepared to engage in the primary function of human rights balancing.[48] Furthermore, domestic contexts vary widely among European States and local actors are embedded in these unique contexts. Consequently, local or national judges and other decision-makers could understand the facts of a particular case with far more nuance and detail than the Strasbourg judges.

Domestic court participation is an essential element of the Convention system. Cases do not arrive before the ECtHR until the applicant has "exhausted domestic remedies," meaning that national courts will almost always have a chance to rule on an issue before it reaches the supranational level.[49] The ECtHR does not serve as a "fourth instance" court of appeals. Instead, it functions as an institu-

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46. Spano, *supra* note 21, at 491.

47. Protocol No. 15, *supra* note 45.

48. BJORGE, *supra* note 29, at 3 (framing domestic courts as "faithful trustees" of the Convention system).

49. European Convention on Human Rights, *supra* note 5, art. 35.

tion outside of the national judicial hierarchy, which reviews whether the State acted in compliance with the Convention.[50]

Importantly, applicants can only file cases before the ECtHR against Member States, not against individuals or non-State actors. In cases where the applicant complains about a State law or practice, proportionality analysis makes sense. Does the State have a legitimate, enumerated reason for its law? Is the law rationally related to the aim? Is the provision necessary (i.e., the least restrictive means) for achieving that goal? Does the societal benefit outweigh the harm to the individual right?

However, the posture of ECtHR cases, and the Court's proportionality framework, sometimes obscure the crucial issue that individual rights claims can conflict, especially in cases about private conduct. In family law disputes, for instance, the key parties are usually not an individual against the State, but rather two or more private parties. In those cases, the question is not the proportionality of the State's actions, but instead whether the State court properly balanced competing rights. Consider a custody dispute. There, we see a triadic relationship, as the State navigates a dispute between individuals claiming conflicting family rights. In those cases, before the ECtHR the State stands in for the unrepresented third party, who prevailed under domestic law. The Court can either re-balance the rights *de novo* or review whether the domestic system for balancing rights claims follows procedures that ensure a fair outcome—even if the outcome is not the exact balance that the Strasbourg judges would have chosen.[51]

II. THE MORAL MARGIN

The ECtHR confronts two connected challenges: not only must it balance individual rights against State interests (sometimes framed as protection for third-party rights), but it must also decide how much deference to give national decisions about what the proper balance should be. For instance, when a State decides that a certain activity—from drug use to sexual activity to the sale of certain technologies—should be penalized, the ECtHR must develop principles for deciding when the prohibition is or is not *in fact* necessary in a

50. EUR. CT. H. R., PRACTICAL GUIDE ON ADMISSIBILITY CRITERIA 83 (2014).

51. *See* Stijn Smet, *Introduction*, *in* WHEN HUMAN RIGHTS CLASH AT THE EUROPEAN COURT OF HUMAN RIGHTS 4–5 (Stijn Smet & Eva Brems eds., 2017) (delineating the range of contemporary views on the correct way to resolve apparent conflicts between human rights).

democratic society.

A. Margin of Appreciation

The margin of appreciation doctrine grants each State a sliding scale of discretion to define the interests involved and balance rights in a manner that is particular to the State. The ECtHR employs a broader or narrower margin of appreciation on a case-by-case basis, rather than applying a set standard like *de novo* review or strict scrutiny.[52] When affording a State a wide margin of appreciation, the ECtHR will defer to the State's claim about the necessity of encumbering the applicant's rights. By contrast, when applying a narrow margin of appreciation, the Court will be stricter about ensuring that the State's measures are truly necessary.[53]

The margin of appreciation is often calibrated based on the Court's assessment of "European consensus."[54] The ECtHR defines its own metrics for identifying trends among Member States, or in the broader international community, regarding the right in question. The greater the agreement among States, the narrower the zone of discretion for outlier States.[55]

The Court articulated the margin of appreciation doctrine in *Handyside v. United Kingdom* (1976), where it confronted a UK ban on a children's book featuring information about sex and drug use.[56] *Handyside* made two equally important points that continue to serve as counter-weights in the Court's analysis. First, "[t]he Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines."[57] Second, the Court "is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with [the Convention]. The domestic margin of

52. *See, e.g.*, Onder Bakircioglu, *The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases*, 8 GER. L. REV. 711, 712 (2007).

53. *See* Alec Stone Sweet & Thomas Brunell, *Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization*, 1 J. L. & CTS. 61, 69 (2013) (Proportionality analysis "is a multistage, analytical procedure that courts use to evaluate the justifications proffered by a state when it claims an exemption from treaty obligations under a derogation clause.").

54. The concept of European consensus will be discussed in detail below.

55. *See* KANSTANTSIN DZEHTSIAROU, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS 2–3 (2015).

56. Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) (1976).

57. *Id.* at 17.

appreciation thus goes hand in hand with a European supervision."[58] States have the primary authority to decide what their particular society needs, but every action taken by a Member State official is potentially subject to Convention review by the supranational court.

Almost since its inception, the margin of appreciation doctrine has also gone hand-in-hand with special consideration for "sensitive moral and ethical" questions. *Handyside* involved a U.K. law banning *The Little Red Schoolbook*, a sexually explicit text written for adolescents by two Danish schoolteachers.[59] A British bookseller claimed the ban violated his freedom of expression under Article 10 of the Convention.[60] In upholding the UK law, the Court made clear the connection between margin of appreciation and moral questions. First noting that "it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals" (in other words, no European consensus), the Court went on to observe more broadly that:

> The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements.[61]

Like Article 10(2), implicated in *Handyside*, Article 8(2) expressly permits States to limit individual rights in order to protect morals. Both provisions, however, include morality in a laundry list of permissible justifications: "the interests of national security, public safe-

58. *Id.* at 18.

59. *Id.*

60. European Convention on Human Rights, *supra* note 5, art. 10. ("1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.").

61. *Handyside*, 24 Eur. Ct. H.R. at 17–18.

ty or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[62] There is nothing in the text to suggest that sensitive moral issues warrant particular solicitude.

The *travaux préparatoires* say little about why the Convention's framers included "protection of... morals" in its limitations clauses. The UK delegation, which proposed the language that ultimately became Article 8, borrowed the phrase from the International Covenant on Civil and Political Rights (ICCPR).[63] The draft Covenant included several rights that contained limitations clauses permitting restrictions on rights in the name of "public safety, order, health, or morals or the fundamental rights and freedoms of others."[64] However, at the time that Article 8 was framed, the ICCPR's right to family life had not yet been written. Nor does the record include a specific reason why the Convention's protection of private and family life ought to include a reference to morality.

In any event, the fact that States *may* justify infringements on rights on the grounds that they are protecting morals has done little to hamper the ECtHR's expansive interpretation of rights. The ECtHR has gone far beyond core human rights violations like torture and political repression to touch nearly every aspect of the relationship between individuals and the State. The Court has incrementally required States to transform their legal systems to decriminalize homosexuality;[65] provide IVF to incarcerated couples;[66] permit same-sex second parent adoption;[67] recognize gender-identity changes;[68] create a domestic legal process for civil unions;[69] and ensure

62. European Convention on Human Rights, *supra* note 5, arts. 8, 10.

63. At the time, the ICCPR was still in draft form and was referred to as the draft International Covenant on Human Rights. COUNCIL OF EUROPE, PREPARATORY WORK ON ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 7–9 (1956).

64. International Covenant on Civil and Political Rights, arts. 12 (freedom of movement); 14 (protections for criminal defendants); 18 (freedom of thought, conscience, religion); 19 (freedom of expression); 21 (freedom of assembly); 22 (freedom of association) all contain different versions of this enumerated limitations clause. Dec. 16, 1966, 999 U.N.T.S. 171.

65. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981).

66. Dickson v. United Kingdom, 2007-V Eur. Ct. H.R. 99.

67. X. and Others v. Austria, 2013-II Eur. Ct. H.R. 1.

68. Christine Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1.

69. Oliari v. Italy, App. No. 18766/11, Eur. Ct. H.R. (2015), http://hudoc.echr.coe.int/eng?i=001-156265 [https://perma.cc/2P3E-7M2A].

equal status for children born out of wedlock.[70] The Court has not been uniformly deferential on Article 8 matters. Empirical evidence of State practice suggests that, by combining Article 8's protection of private and family life with Article 14's equality guarantee, in the area of LGBT rights the ECtHR has transformed European domestic practices in many countries.[71]

The ECtHR has been instrumental in instigating societal shifts around sensitive issues. In a 1981 case concerning criminal penalties for homosexual sex, for instance, the Court concluded:

> 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. . . . [T]he moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant's private life to such an extent.[72]

As the Court began to articulate doctrine around LGBT equality, it soundly rejected claims of moral offense and instead rested its judgments on a combination of European consensus analysis and arguments about third-party harms.[73] After *Dudgeon*, the Court reviewed State practices that discriminated against gays and lesbians with particular scrutiny.[74] This is not to say that the Court has always ruled in favor of LGBT rights claims, but the early entrenchment of an anti-discrimination principle did foreclose the type of moral deference claims that later took hold in some of the reproduction and family formation cases detailed below.

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70. Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) at 25–26 (1979) (finding that laws excluding children born out of wedlock for inheritance and other rights violated the Convention).

71. Helfer & Voeten, *supra* note 38, at 80 (observing that the ECtHR judgments have lead to policy change even in countries that appeared resistant to LGBT rights).

72. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R.(ser. A) at 20 (1981).

73. *See* Fretté v. France, 2002-I Eur. Ct. H.R. 345, 369 (relying on the lack of consensus on homosexual adoption and on the "scientific" arguments for harm to children); E.B. v. France, App. No. 43546/02, Eur. Ct. H.R. ¶ 61 (2007), http://hudoc.echr.coe.int/eng?i=001-84571 [https://perma.cc/HH6C-WJ9Z] (finding that "[i]n Europe there had been a steady development in the law in favour of adoption by same-sex couples since the *Fretté* judgment.").

74. *See Oliari*,. App. No. 18766/11, Eur. Ct. H.R. ¶ 177; Smith & Grady v. United Kingdom, 1999-VI Eur. Ct. H.R. 45, 82.

B. Mapping the Moral Margin

To track the progression of deference to sensitive moral questions, I conducted several term searches through the ECtHR database HUDOC.[75] This study relies on the Court's own references to morality and does not posit an external conception of what constitutes the "moral." I do not contend that my searches cover all, and only, the cases where morality was a decisive factor, but these term searches do reveal some important trends. I searched for the phrases "sensitive moral," "moral and ethical," "requirements of morals", "*moral et éthique*," and "*exigences de la morale*."[76] I include only cases where the majority opinion employed the search term at least once. I removed cases where the reference to moral issues was unrelated to the Convention issue (e.g., where it referred to a component of proving defamation in domestic law). Lastly, many cases included the phrase "sensitive moral and ethical," which encompasses two of the search terms. In these cases, I noted the use of both terms separately.[77]

Although some cases concerning freedom of expression still use the "moral and ethical" language, a large percentage of recent cases that use this language involve private and family life. For the thirty years after *Handyside* (1976), seven of the eleven "moral" cases involved freedom of expression under Article 10, while only two cases involved private and family life under Article 8. In the last decade, however, references to moral issues have increased and shifted focus. Since 2007, out of twenty-eight cases, twenty-four concern private and family life, while only two are freedom of expression cases. In recent years the "moral" has become almost synonymous with reproduction and family formation. Of the twenty-eight cases from the last ten years, fifteen involve reproduction (including abortion and use of fertilized embryos), childbirth and parentage, while another seven involve the rights of couples.

Although reference to moral issues is tethered to the Convention text by way of the limitations clause, it would be a mistake to think that the Court's identification of "sensitive" issues perfectly tracks the moral salience of the issue at the domestic level. In other words, when the Court references morality in its Article 8 cases, it may not be doing so at the behest of the Member State-defendant.

75. The ECtHR case law database is available online at: http://hudoc.echr.coe.int/ [https://perma.cc/NRW3-8SPX].

76. Because not all ECtHR judgments are translated into both French and English, it is important to capture terms in both languages, but I counted only French cases that were not also published in English.

77. *See* Appendix.

Often States do not justify their actions by reference to morality, but rather by reference to health, safety, or the protection of the rights of others. For example, in the Grand Chamber judgment *Dubska and Krejzova v. the Czech Republic* (2016), regarding regulations prohibiting home births, the applicant emphasized that the Czech Republic had made no mention of "sensitive moral" issues, implying that the ECtHR had invented a moral question where one did not exist at the domestic level.[78] Indeed, the Czech government justified its regulations as protecting health and safety, not morals.[79] Nevertheless, the Grand Chamber referred to "sensitive moral and ethical" issues in its margin of appreciation analysis.[80]

The Court's targeting of a particular subset of cases suggests that there might be obscured justifications for the moral margin. In other words, the term "sensitive" might be a proxy for the Court's implied or otherwise unexpressed concerns.

C. The Moral Margin as Heightened Deference

In this sliver of "moral" or "sensitive" Article 8 cases, the Court affords States extra deference—different in kind from the deference it gives in cases involving, say, economic well-being or crime. As I argue later, this added deference fails to serve the Court's core function.

The paradigmatic case in which moral margin trumped the Court's standard consensus-based margin of appreciation technique is *A, B & C v. Ireland* (2010), where the Court found that although there was a clear European consensus toward greater access to abortion, Ireland was permitted to remain an outlier.[81] The Grand Chamber asserted that, notwithstanding the strong tide against Ireland's approach, in this national decision concerning "profound moral and ethical values," "the Convention afforded a significant margin of appreciation."[82]

Although references to "sensitive moral or ethical issues" are relatively common in the Court's jurisprudence, the decisional work

78. Dubska and Krejzova v. the Czech Republic, App. No. 28859/11, Eur. Ct. H.R. ¶ 91 (2016), https://hudoc.echr.coe.int/eng#{"itemid":["001-168066"]} [https://perma.cc/9L4T-ZX6B].

79. *Id.* ¶ 112.

80. *Id.* ¶¶ 178, 182 (The Court did recognize that the issue of home birth was less "acute[ly]" sensitive than abortion.)

81. A, B & C v. Ireland, 2010-VI Eur. Ct. H.R. 185.

82. *Id.* at 246.

that such references perform is not always clear. In most cases, the Court is not acting against as clear a trend in European law and practice as it confronted in the Irish abortion case. Often, when the Court deems a case to be "sensitive," there is also a lack of consensus among States. The standard language, cited and recited by the Court is: "Where . . . there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, *particularly* where the case raises sensitive moral or ethical issues, the margin will be wider."[83] This quotation, in isolation, is ambiguous. Is the moral salience of the issue an add-on factor that broadens the margin in cases where there is also a lack of consensus? Or is the Court merely acknowledging that consensus is unlikely on deep moral issues? The Irish abortion case does not follow either of these interpretations; instead, it uses moral and ethical considerations to justify a wide margin of appreciation, *notwithstanding* the clear European consensus. Although the two concepts are deeply connected, in practice, consensus analysis differs from the moral margin, even in cases where they are both operating to expand the margin of appreciation.

D. Reasons for the Moral Margin

There may be compelling grounds for deferring to a State's judgment about what is necessary within its society. Indeed, the Court has a number of avenues to avoid ruling on the merits of a controversial issue. The "moral margin" is unique among these avenues. Rather than serving as a trans-substantive tool for assessing the weight of a government's argument or the strength of an applicant's claims, this deference doctrine allows the ECtHR to single out a narrow subset of cases and side-step or diminish the force of its standard proportionality analysis.

There are a number of possible explanations for why the Court has focused its citations to "moral and ethical" questions on this particular set of cases. First, the Court might be concerned about backlash. Second, it might be hesitant to intervene in issues relating to new technologies or emerging social facts. Third, it might refer to the moral margin as a matter of course without putting significant decisional weight in the term. Fourth, some judges on the Court might wish to rule in favor of substantive domestic choices about morality but prefer to do so through deference rather than express agreement.

In the cases described, and others in which the moral margin

83. *Id.* at 260 (emphasis added).

is invoked, judges may genuinely believe that deference to moral difference is the optimal and principled approach to addressing such sensitive issues. They may even understand subsidiarity to require granting a wide margin to Member States. For judges who perceive moral deference to be a necessary structural element of the Strasbourg system, I hope that this critique might persuade them that this view is mistaken.

The narrowing definition of "moral" seems, at least in some cases, to serve as a proxy for deference to religion. The Catholic Church has mobilized a strong opposition to IVF, embryo research, and surrogacy.[84] As Reva Siegel has noted, Catholicism has played an important role in shaping reproductive rights since at least the 1970s, across Europe and elsewhere.[85] The ECtHR has long been careful to avoid direct conflict with the Catholic Church, perhaps because it fears the potential backlash or because the judges share the Church's opposition to new reproductive choices.

The ECtHR's worry about religious backlash is grounded in experience. In *Lautsi v. Italy* (2009), a Chamber judgment held that the Italian practice of hanging crucifixes in classrooms violated the education and religious freedom rights of atheist children and their mothers.[86] This judgment was one of the most controversial in Strasbourg's history. The Lautsi family was harassed, political and religious leaders condemned the Court's ruling, and the Pope spoke

84. *See* Anna Momigliano, *When Left Wing Feminists and Conservative Catholics Unite*, THE ATLANTIC (Mar. 28, 2017), https://www.theatlantic.com/international/archive/2017/03/left-wing-feminists-conservative-catholics-unite/520968/ [https://perma.cc/68TV-HMZQ] (describing the coalition of feminists and Catholics opposing surrogacy and other forms of reproductive technology across Europe). The Catholic Church's official position on reproductive technology was formalized in 1987 by the Congregation for the Doctrine of the Faith. *See* The Congregation for the Doctrine of the Faith, *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation*, VATICAN, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html [https://perma.cc/4SUC-LMHF]. In 2008, the Congregation of the Doctrine of the Faith updated its instructions with *Dignitas Personae* in light of technological developments, particularly in embryonic transfer and research. *See* The Congregation for the Doctrine of the Faith, *Instruction Dignitas Personae of Certain Bioethical Questions*, VATICAN, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20081208_dignitas-personae_en.html [https://perma.cc/GQ48-998Z].

85. Reva Siegel, *The Constitutionalization of Abortion*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1057, 1057–63 (Michael Rosenfeld & András Sajó eds., 2012).

86. Lausti and Others v. Italy, App. No. 30814/06, Eur. Ct. H.R. (2009), http://hudoc.echr.coe.int/eng?i=001-95589 [https://perma.cc/8EVZ-ZYRY].

out against it.[87] The case then went to the Grand Chamber, which reversed and held that crucifixes in classrooms fell within Italy's margin of appreciation.[88]

Fear of backlash remains a vital concern as recent conservative, nationalist, and anti-cosmopolitan European political movements have focused on "traditional" family values as a mechanism for consolidating power around a particular vision of the state.[89] At the same time, Euro-skeptic administrations have pushed back against ECtHR judgments by citing national difference as a core value.[90] Taken together these two political shifts suggest that evolving human rights norms around more expansive family forms already face a backlash in some parts of Europe and that overly progressive Court judgments will galvanize nationalist opposition to the cosmopolitan human rights regime.

The Court also appears to be particularly hesitant when new reproductive technology is a factor, such as in *S.H. v. Austria* (2011). There, the Court identified "a clear trend in the legislation of the Contracting States towards allowing gamete donation for the purpose of *in vitro* fertilisation, which reflects an emerging European consensus."[91] Nevertheless, it concluded that the "consensus is not . . . based on settled and long-standing principles established in the law of the member States but rather reflects a stage of development within a particularly dynamic field of law and does not decisively narrow the margin of appreciation of the State."[92] Undergirding its hesitancy to find consensus, was the following:

> Since the use of *in vitro* fertilisation treatment gave

87. Giulo Itzcovich, *One, None, and One Hundred Thousand Margins of Appreciations: The Lautsi Case*, 13 HUM. R. L. REV. 287, 289 (2013).

88. Lautsi and Others v. Italy, 2011-III Eur. Ct. H.R. 61.

89. *See, e.g.*, *Poland's Tussle over Abortion Ban*, BBC (Oct. 6, 2016), http://www.bbc.com/news/world-europe-37449903 [https://perma.cc/X2GE-3EH2] (describing the Polish government's recent unsuccessful attempt to pass a near-total abortion ban); *Slovenia Rejects Gay Marriage in Referendum*, BBC (Dec. 20, 2015), http://www.bbc.com/news/world-europe-35147257 [https://perma.cc/9BUG-9XRB] (describing Slovenia's popular vote rejecting same sex marriage).

90. This is an ongoing issue with the UK government. Prime Minister May has advocated for the UK to leave the Convention, often linking issues with Strasbourg judgments to Brexit, even though the Council of Europe and the European Union are separate. *See Theresa May: U.K. should Quit European Convention on Human Rights*, BBC (Apr. 25, 2016), http://www.bbc.com/news/uk-politics-eu-referendum-36128318 [https://perma.cc/GW2M-XY5E].

91. *S.H. and Others*, 2011-V Eur. Ct. H.R. at 322.

92. *Id.*

> rise then and continues to give rise today to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the present case touch on areas where there is not yet clear common ground among the member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one. . . .[93]

Ryan Thoreson's survey of international human rights treaties provides some context beyond Europe. He observes, "[n]one of the foundational supranational instruments define 'morals,' but in practice, clauses that allow States to limit rights in the name of morality—what I call *morals provisions*—have been invoked by governments primarily on issues of sex and sexuality."[94] Thoreson's thesis rings true in the European context, albeit with some modifications. The ECtHR has been quite forceful that discrimination on the basis of sexual orientation is prohibited.[95] Its "moral" cases, at least in the last decade, have focused on reproductive rights and touched less directly on other aspects of sex and sexuality. The ECtHR has not given the reproductive rights cases the same anti-discrimination frame available in the LGBT cases.[96]

It is also possible that some Strasbourg judges agree with the moral conclusions of defendant States. Invoking the moral margin helps entrench particular moral views without the Court rendering judgments on the merits. A ruling, for instance, that permitting surrogacy violates the Convention would be more vulnerable to critique and to potential overruling in the future. If the Court relies on the moral margin, then the judge's preferred holding—that surrogacy violates the Convention—would not apply to other Member States. Even the defendant State would be free to make its laws more surrogacy-accepting in the future. The invocation of the moral margin does, however, temporarily remove recognition of families formed using surrogacy from more robust human rights scrutiny. It also permits judges to signal that they are allies of a particular position

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93. *Id.*

94. Ryan Thoreson, *The Limits of Moral Limitations: Reconceptualizing Morals in Human Rights Law*, 59 HARV. J. INT'L L. 4 (forthcoming 2018) (on file with author).

95. *See Smith & Grady*, 1999-VI Eur. Ct. H.R.

96. *See* Liiri Oja & Alice Ely Yamin, *"Woman" in the European Human Rights System: How is the Reproductive Rights Jurisprudence of the European Court of Human Rights Constructing Narratives of Women's Citizenship*, 32 COLUM. J. L. & GENDER 62, 94 (2016) (arguing that equality has not been a significant aspect of the ECtHR's reproductive rights jurisprudence).

without having to risk their legitimacy by affirmatively endorsing the position.

Cases like *A, B & C*, where the Court explicitly rejects a strong trend within Europe, are quite rare. Much more common are cases that blend different forms of analysis, without making any single factor dispositive. Quite likely, in some cases, the reference to sensitive moral and ethical issues is not decisive. The Court often uses identical language from case to case for consistency, ease of translation, and efficiency, but the standard set of quotations from past cases may have little impact on the outcome of a case. The "general principles" section of a judgment sometimes recites key quotations from foundational cases without directly explaining how those particular quotations apply in the instant case. Thus judges may agree with the outcome and sign on to the majority opinion even if they would not apply a moral margin to reach this specific decision.

Even in cases where the Court does not intend for the moral margin to be decisive, references to morality in the margin of appreciation analysis signal to States and applicants that certain areas receive special treatment. Specifically, when the ECtHR assesses certain Article 8 cases, it will look to the government's actions with less scrutiny. Even if the Court does not intend to stifle dialogue by referring to "sensitive moral and ethical" issues, that language can communicate to domestic systems that they need not delve into the human rights elements of a case because their choices are protected by deference to national morality. This poses a problem for both rights protection and for backlash. If Strasbourg *mis*communicates its intention to revisit the issue as a European consensus emerges, then the defendant State might be more resistant to that change because it did not have notice that majoritarian activism might override its initial victory.

Because it goes hand-in-hand with consensus analysis, and because the Court is not always clear about the deferential weight given to sensitive questions, it is rarely possible to determine what influence the moral margin has on the outcome of a particular case. It is this ambiguity surrounding the moral margin that makes it particularly difficult to excise from the Court's practice.

III. FORMS OF DEFERENCE

The ECtHR has several doctrinal tools available to indicate deference, which would be preferable to the "moral margin." I focus here on two approaches that the Court can take to engage Member

States, even when it chooses not to rule on the underlying substantive rights question. These doctrines for channeling deference—consensus analysis and proceduralization—share several important features.[97] First, I will demonstrate how these moves are not *fully* deferential to State decisions. Even where the ECtHR does not find that the State violated a substantive right, the judgments help shape domestic actors' future actions. Second, I argue that when the Court engages in consensus analysis or requires procedural reform at the domestic level, it initiates dialogue with Member States. Consensus and proceduralization rely on participation from both the national and the supranational courts. Unlike the "moral margin," which is merely deferential, these other tools ensure that rights remain a part of the decision-making process at all levels.

These approaches have implications beyond the ECtHR. They serve to underscore the relationship between some higher supranational, international, or even federal institution and domestic or local actors. What sort of information should be communicated from the top down and the bottom up? When new technologies or social changes raise sensitive questions, how should courts navigate new rights claims? This Section serves as a pragmatic answer to that question. There are tools that the ECtHR has devised to allow the Court to communicate with Member State institutions while not overtly intervening in domestic affairs. Although subject to warranted critique from judges and scholars, I contend that these tools ultimately serve the Strasbourg system far better than reliance on the moral margin.

A. Consensus Analysis

When faced with a new legal challenge, the ECtHR looks first to Member States. It asks whether the defendant State's law is an outlier or whether it fits the general European practice. In the typical case, the margin of appreciation varies based on the type of claim and the strength of the European consensus.[98] To assess the strength of

97. *See* Thomas Kleinlein, *Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control*, 28 EUR. J. INT'L L. 871, 872 (2017) (highlighting the link between consensus analysis and procedural review and emphasizing their recent centrality for the ECtHR in its efforts to enhance legitimacy).

98. STEVEN GREER, THE MARGIN OF APPRECIATION: INTERPRETATION AND DISCRETION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2000), http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf [https://perma.cc/5YJ5-7DBM] (defining margin of appreciation as "the room for manoeuvre the Strasbourg institutions are prepared to accord national authorities in fulfilling

the consensus, the Court counts States and their practices.[99] Where there is a strong trend among European countries, the margin is narrower. Outliers from the general trend are shepherded into the fold.[100] By contrast, when there is wide variation among States, the Court recognizes less need for conformity. Unless there is a European-wide shift in national consensus around a particular issue, it is unlikely that the ECtHR will change a deferential stance.

The Court uses a dynamic "living instrument" theory of Convention interpretation, which allows the contours of Convention rights to shift over time.[101] As European consensus grows, the Court's position on a particular right might change. In this way, the ECtHR harnesses social transformations at the national level to shift rights analysis in the supranational system. Counting States permits the Court to engage in "majoritarian activism," a term coined by Alec Stone Sweet and Miguel Maduro to describe how "[t]he [ECtHR] raises the standard of protection in a given domain when a sufficient number of states have withdrawn public interest justifications for restricting the right."[102]

Consensus analysis serves two crucial functions. First, it grants primary authority over balancing new rights claims to the States individually and collectively, such that the ECtHR must listen to States' values and preferences. Second, it enables the Court to single out States that fail to act as primary rights protectors, using the very terms established collectively by the Member States. States learn that they must remain vigilant to changing times or risk falling out of compliance with the Convention.

As Kansantsin Dzehtsiarou describes in his comprehensive catalogue of consensus cases, there are four main categories: (1) the absence or existence of consensus cannot be definitively established; (2) absence of European consensus; (3) the law or practice at issue falls within an established consensus; and (4) the law or practice at

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their obligations under the European Convention on Human Rights.").

99. How this operates in practice varies considerably from case-to-case. For a detailed description of the Court's methods, see DZEHTSIAROU, *supra* note 55.

100. *See* Stone Sweet & Brunell, *supra* note 53, at 78. ("[T]he margin of appreciation shrinks as consensus on higher standards emerges.").

101. For an early articulation of the Court's interpretive method, see Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) at 12 (1978). ("[T]he Convention is a living instrument which . . . must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the [] policy of the member States of the Council of Europe in this field.").

102. Stone Sweet & Brunell, *supra* note 53, at 78.

issue falls outside of an established consensus.[103] The consensus might be at the level of rules—for instance, the number of States that criminalize marijuana—or it might be at the level of principles or values—for instance, a trend among European countries toward greater acceptance of same-sex relationships.[104] In some exceptional cases, the Court has also considered trends within the international community as relevant data in determining consensus.[105] Because of the range of options for applying consensus analysis, there is not one set formula by which the ECtHR determines when a sufficient number of States have shifted to a particular position.

Employing consensus analysis, the Court recognizes that "the meaning and scope of contested Convention terms is established by investigating the current practices of State Parties . . . [which] gives credence to the evolutive meaning of Convention rights across Europe without bypassing the practices of State Parties."[106] When the Court evokes consensus—even to find that there is none—it signals to the States that it will be looking to emerging trends in European law. By extension, to remain in compliance with the Convention, Member States should also pay attention to their neighbors.

The Court's evolution on transgender rights illustrates the consensus approach. In the early cases, where individuals sought legal recognition, the Court found that although a small number of States provided for name and sex changes in civil records, "[t]o require the [Member State] to follow the example of other Contracting States is . . . tantamount to asking that it should adopt a system in principle the same as theirs for determining and recording civil status."[107] Though the practice of a minority of States was insufficient to create consensus, the Court put the Member States on notice that it would be looking for trends moving forward:

> [I]t must for the time being be left to the respondent State to determine to what extent it can meet the remaining demands of transsexuals. However, the

103. DZEHTSIAROU, *supra* note 55, at 24.

104. *Id.* at 15–16.

105. *See Christine Goodwin*, 2002-VI Eur. Ct. H.R at 29–30. There is disagreement among scholars about the legitimacy of using international trends, a course which Dzehtsiarou criticizes and Letsas commends. *Compare* DZEHTSIAROU, *supra* note 55, at 66 *with* George Letsas, *The ECHR as a Living Instrument: its Meaning and Legitimacy*, *in* CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN, AND GLOBAL CONTEXT 106, 116 (Andreas Føllesdol, Birgit Peters, & Geir Ulfstein eds 2013).

106. ZYSSET, *supra* note 15, at 130.

107. Rees v. the United Kingdom, 106 Eur. Ct. H.R. (ser. A) at 12 (1986).

> Court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in the light of current circumstances ... *The need for appropriate legal measures should therefore be kept under review* having regard particularly to scientific and societal developments.[108]

When the famous transgender model Caroline Cossey was "outed" by the tabloids and sought legal recognition as a woman at the ECtHR, the Court was split. The (now defunct) Commission and dissenters concluded that by 1990 scientific and societal developments were sufficient that the UK had fallen out of compliance with the Convention, but the majority disagreed and found "little common ground" among the Member States.[109]

By *Christine Goodwin v. United Kingdom* (2002), the Grand Chamber found that the UK's refusal to recognize sex changes had fallen outside the European trend. It first appeared that the Court would find a lack of consensus because few European laws had changed since it last pronounced the UK's regime to be within the margin.[110] The Court, however, was not looking only to the current laws but to the direction of change. In a now famous pronouncement, the Court determined that there was "clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals."[111] In light of this international trend, outright denial of transgender identity was disproportionate.

As the Court has come to rely more frequently on consensus analysis, its procedures for obtaining comparative data have become more systematized.[112] It relies first on its own internal research to determine European trends. Because requests for comparative law research are at the judges' discretion, a key issue arises early in the process: what exactly to compare? How the research request is framed influences the results. The Irish abortion case illustrates this challenge. There, the Court began by saying that there was a clear

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108. *Id.* at 14 (emphasis added).

109. Cossey v. the United Kingdom, 184 Eur. Ct. H.R. (ser. A) at 12 (1990).

110. *See Christine Goodwin*, 2002-VI Eur. Ct. H.R at 24.

111. *Id.* at 25.

112. Paul Mahoney & Rachael Kondak, *Common Ground: A Starting Point or Destination for Comparative Law Analysis by the European Court of Human Rights?*, *in* COURTS AND COMPARATIVE LAW (Mads Andenas & Duncan Fairgrieve eds., 2015).

trend toward liberalizing abortion across Europe. Nevertheless, the Court concluded, there was no European agreement about when life begins. Therefore, Ireland's abortion law fell within its margin of appreciation to determine what constituted "life," even though it appeared that the consensus on abortion pointed in the opposite direction.[113]

Much ink has been spilled trying to make sense of consensus. Scholars and judges complain that it is inconsistently applied, that there are no clear measures for determining when legal trends have changed, that the Court lacks the institutional resources to do thorough comparative analysis, and that consensus is jettisoned as soon as it does not serve the Court's preferred outcome.[114] I agree with much of this critique, though a close look at the case law reveals more consistency than some critics suggest.[115] The ECtHR certainly has room to improve its consensus analysis, but the underlying principle is sound. The Court moves as Europe moves.

B. Proceduralization

We can also think of the ECtHR as a teacher, not of the substantive content of rights, but of a shared European legal language for addressing rights claims. The Strasbourg judges cannot, and do not want to, answer every rights question that arises across Europe. Instead, they want domestic institutions to take rights questions seriously and provide remedies to rights violations at the State level. In service of that goal, the Court has begun to focus more and more on domestic process—from administrative adjudication to parliamentary debate.[116] According to the ECtHR Judge Yudkivska: "Today the so-called 'proceduralization' of fundamental rights is mentioned a great deal. It is the way to the decentralization of the Court's role in human rights protection and the allocation of the burden of such protection to [domestic] judicial bodies."[117]

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113. *A, B & C*, 2010-VI Eur. Ct. H.R. at 260–261.

114. *See, e.g.*, ZYSSET, *supra* note 15, at 132 (collecting scholarly critiques of margin of appreciation); Jeffrey Brauch, *The Margin of Appreciation and the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113 (2004).

115. Stone Sweet & Ryan, *supra* note 30, at 83–84 (describing current debates over consensus and analyzing its application in the case law of the Grand Chamber).

116. Janneke Gerards & Eva Brems, *Procedural Review in Fundamental Rights Cases: Introduction*, *in* PROCEDURAL REVIEW IN EUROPEAN FUNDAMENTAL RIGHTS CASES 1, 3–4 (Janneke Gerards & Eva Brems eds., 2017).

117. Ganna Yudkivska, *The Evolution of the Role of the European Court of Human Rights in the Context of the Continuous Increase in the Number of Individual Applications*,

The Court has turned to proceduralization with increasing regularity in recent years to focus on what process is due at the domestic level, rather than on the substantive right.[118] The line between procedure and substance is permeable. The trend toward proceduralization certainly has implications for substantive law, but what sets it apart from a substantive ruling is the focus of the Court's attention. In procedural review cases, the ECtHR looks to two main elements: the extent to which domestic actors have taken rights claims into account in their decision-making processes and the capacity of individuals to plead rights within domestic legal processes.

Commenting on the ECtHR's turn to procedural rights, Janneke Gerards explains, "the Court often evaluates the substance of the arguments that have been exchanged before the national courts or in the national legislative process."[119] By focusing on the quality of domestic review, and requiring more or better processes when the Court finds the national system lacking, the ECtHR can insert rights review into domestic decision-making. This procedural review serves to promote dialogue: "When national authorities realise that meeting their procedural obligations under the Convention . . . helps to improve their record of protection of fundamental rights, this may provide an important incentive for them to pay attention to fundamental rights in national procedures in the first place."[120]

Although Article 8 does not contain a textual commitment to due process, the Court has developed a procedural "layer" over Article 8 rights as a way to ensure that the individual's substantive rights are "effective."[121] The Convention also contains explicit due process rights, such as Article 6, which protects trial rights and Article 13, which guarantees a right to effective remedy.[122] Combining the due

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2011 UKR. L. J. 214, 217 (2011).

118. *See* Eva Brems, *Procedural Protection: An examination of procedural safeguards read into substantive Convention rights*, *in* SHAPING RIGHTS IN THE ECHR: THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN DETERMINING THE SCOPE OF HUMAN RIGHTS 137, 159 (Eva Brems & Janneke Gerards eds., 2013) ("While procedural obligations are autonomous in the sense that procedural shortcomings may be the sole basis for finding a violation of a substantive right, they are at the same time instrumental, in the sense that the identification and scope of procedural obligations are designed to improve protection of the substantive right.").

119. Janneke Gerards, *Procedural Review by the ECtHR: A Typology*, *in* PROCEDURAL REVIEW IN EUROPEAN FUNDAMENTAL RIGHTS CASES 127, 127 (Janneke Gerards & Eva Brems eds., 2017).

120. Gerards & Brems, *supra* note 116, at 4.

121. Helen Keller, *Article 8 in the System of the Convention*, *in* FAMILY FORMS AND PARENTHOOD 3, 19 (Andrea Büchler & Helen Keller eds., 2016).

122. European Convention on Human Rights, *supra* note 5, arts. 6, 13.

process requirements of other provisions, with the guarantee of effective protection, the Court has crafted a new procedural mode of review.

Proceduralization has been particularly pronounced in child welfare cases, where the Court has held that domestic institutions must have safeguards in place to ensure that the child's interests are taken into account.[123] If the Court determines that the State had adequate procedural safeguards, then it will not second-guess the domestic conclusions about the necessity, for example, of removing a child from her home.

Returning to the landmark abortion judgment *A, B & C v. Ireland*, there the Grand Chamber ruled that the strong European trend toward liberalizing access to abortion was not sufficient to narrow the margin of appreciation for Ireland in light of the "profound moral views of the Irish people as to the nature of life."[124] Under *Irish* law, however, some women whose lives were at risk were entitled to an abortion. The Court determined that Ireland's lack of an "accessible and effective procedure" for obtaining an abortion when a pregnancy threatens the life of the mother violated Article 8's right to private life.[125] Leaving the underlying substantive issue alone, the Court found that Ireland's abortion law was out of compliance with human rights norms on procedural grounds.

Proceduralization has two dialogue-enhancing benefits. First, by finding a violation of the Convention, the ECtHR induces change at the domestic level. Because the national system cannot remain static, the ECtHR judgment provides a platform for domestic discussion. Second, by identifying the ways in which domestic institutions failed to take rights into account, the supranational court gives guidance to Member States on how to be better rights-protectors in the future. The more process the Convention requires, the more domestic institutions—especially courts—are empowered to consider rights.

Adding procedural requirements, however, is not without cost. More procedural requirements might cause delays in already-overburdened domestic courts. It might also make rights vindication more expensive, as the applicant must pass more domestic hurdles before arriving in Strasbourg. Nor does proceduralization always solve the backlash problem; procedural review is not necessarily the more deferential option. Judge Nussberger cites the Chamber judgment in *Konstantin Markin v. Russia* as a cautionary tale. There, the

123. Keller, *supra* note 121, at 18.

124. *A, B & C*, 2010-VI Eur. Ct. H.R. at 260–261, 263.

125. *Id.* at 270.

Court sternly rebuked the Russian Constitutional Court for its failure to justify its conclusion with evidence. The Russian Court took offense and, even though the Grand Chamber softened its language considerably, the relationship between the two institutions suffered.[126] Nussberger suggests that the Russian judges were less willing to support incorporation of ECtHR precedent into the domestic legal system after this exchange.[127]

C. The Moral Margin in Theory

Notwithstanding the limitations associated with consensus analysis and proceduralization, I argue that the ECtHR has taken a wrong turn in calibrating the level of deference owed to national governments on the basis of the "sensitive moral or ethical" nature of the issue.[128] Rather than training Member States to become ever-better human rights protectors, deference to moral difference may halt States' development.

By comparing consensus analysis, proceduralization, and the moral margin, I hope to demonstrate the costs of choosing the latter option. All three choices communicate forms of deference to Member States. Yet they do not all require the same response from States, nor do they signal the same expectations from the ECtHR.

When the Court employs majoritarian activism to grow the "living tree" of human rights, it does so because Member States have built a new European consensus. In other words, the Court's consensus doctrine signals to States that they are the primary location for rights development. Even when there is no European consensus, such a configuration does not freeze rights protection.[129] National law can be dynamic, as domestic institutions balance and rebalance State interests against individual rights, developing their understanding of rights protection by reference to their neighbors' practices.

Equality for same-sex couples highlights this dynamic. In a 2010 case against Austria, the Court concluded that denying legal recognition for same-sex relationships did not violate the Convention because: "States enjoy a certain margin of appreciation as regards

126. Angelika Nussberger, *Procedural Review by the ECHR: View from the Court*, *in* PROCEDURAL REVIEW IN EUROPEAN FUNDAMENTAL RIGHTS CASES 161, 162 (Janneke Gerards & Eva Brems eds., 2017) (citing Konstantin Markin v. Russia, 2012-III Eur. Ct. H.R. 77).

127. *Id.*

128. *S.H. and Others*, 2011-V Eur. Ct. H.R. at 295.

129. BJORGE, *supra* note 29, at 247.

the exact status conferred by alternative means of recognition."[130] In *Oliari v. Italy* (2015), however, the Court rejected the Italian Government's claim that, in light of "'the different sensitivities on such a delicate and deeply felt social issue' and the search for a 'unanimous consent of different currents of thought and feeling, even of religious inspiration, present in society.' . . . [the Government should have a wide] margin of appreciation . . . considering that they were better placed to assess the feelings of their community."[131] Instead, the Court relied on the "movement towards legal recognition of same-sex couples which has continued to develop rapidly in Europe"[132] and held that Italy's failure to provide for same-sex civil unions violated Article 8. The Court moved from significant deference towards Austria's reasons for protecting "traditional marriage" in *Schalk and Kopf*, to a much more searching review of Italy's justifications for denying civil unions. In *Oliari*, the Court looked beyond Italy's assertions, finding that the state's references to a "delicate and deeply felt social issue" did not outweigh the "core" right to form legal relationships.

Proceduralization allocates responsibility for taking rights into account even more directly than does consensus analysis. When the ECtHR finds a violation for a procedural failing, it orders domestic institutions to provide more robust mechanisms for realizing Convention rights. This can take many forms—from an individualized hearing to rights-oriented discussions in parliament—but the idea remains the same. Even if there is not one, singular substantive outcome that the Convention requires, States must include Convention rights in their decision-making processes. In figuring out how to include Convention rights, while maintaining the integrity of national law, a State has to address if not reevaluate the values that animate domestic policy. Incidentally, this national consideration helps fuel subsequent European trends that feed into consensus analysis.

To illustrate, after the *A, B & C* judgment, the Irish Oireachtas convened a series of hearings to discuss how Ireland should respond to the abortion ruling. The hearings included testimony by religious leaders, civil society representatives, medical professionals, politicians and lawyers. They set out not only the possible methods for complying with the procedural requirements of the ECtHR judgment, but also the underlying values animating Irish abortion law.[133] As a

130. Schalk and Kopf v. Austria, 2010-IV Eur. Ct. H.R. 409, 439 (2013).

131. *Oliari*, App. No. 18766/11, Eur. Ct. H.R. ¶ 176.

132. *Id.*

133. HOUSE OF THE OIREACHTAS, JOINT COMMITTEE ON HEALTH AND CHILDREN, REPORT ON PROTECTION OF LIFE DURING PREGNANCY BILL 2013 (Ir.),

result, the Irish legislature passed a new law designed to secure the rights of women to a life-saving termination.[134] In 2017, the newly elected Prime Minister promised to organize a referendum on the question of broader access to abortion by the end of 2018.[135]

In contrast, domestic law might freeze in the shadow of the moral margin. When the ECtHR rejects majoritarian activism, or the potential for future consensus by identifying a "sensitive" issue, the Court does not give Member States a reason to engage in rights analysis. Though States might rights-balance anyway, moral deference suggests that States do not need to worry that ignoring certain types of rights claims will violate the Convention in the future. The moral margin does not prompt change or reevaluation of national policy in light of Convention rights.

Change may not be a necessary element of human rights subsidiarity, but it is through national contestation and norm creation that States participate in the "living instrument" interpretation of the Convention. Providing States with mechanisms through which they are encouraged to confront emerging human rights issues, then, serves the larger dialogue-enhancing goal of subsidiarity.

The surrogacy case study, detailed below, illustrates these three paths: moral deference, consensus, and proceduralization. In some instances, the Court chose to rely on consensus analysis or proceduralization, thereby sending signals to the Member States about their role in European rights protection. In the final Grand Chamber judgment, however, the Court failed to take the pro-dialogue path and instead simply deferred to the domestic decision.

IV. THE MORAL MARGIN IN PRACTICE

A. Surrogacy in Europe

Surrogacy provides a fascinating case study of moral deference. Reproductive technologies challenge Europe's shared understanding of the basic foundations of parenthood by upending many

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http://www.oireachtas.ie/parliament/media/committees/healthandchildren/Volume1.pdf [https://perma.cc/2PB3-9B7K].

134. Protection of Life During Pregnancy Act 2013 (Act No. 35/2013) (Ir.), http://www.irishstatutebook.ie/eli/2013/act/35/enacted/en/pdf [http://perma.cc/E5ZC-HT27].

135. Karl McDonald, *Taoiseach Leo Varadkar Announces Abortion Referendum Despite Pope's Visit*, I NEWS (June 5, 2017), https://inews.co.uk/essentials/news/world/irelands-new-leader-announces-abortion-referendum-despite-popes-visit/ [https://perma.cc/Y25A-QRF6].

traditional notions of family, biology, and motherhood.[136] Western societies have long dealt with questions relating to paternity: is the man married to the woman giving birth automatically the father? Does a genetic unmarried father have legal rights? By contrast, the question of maternity has seemed relatively clear-cut.[137] The woman giving birth is the mother; the maxim *mater semper certa est* applies.[138] Gestational surrogacy challenges that core assumption. The genetic mother, the gestational mother, and the intended or commissioning mother may be three different women. There might also be situations in which no woman would designate herself as the "mother" (where, for example, a gestational surrogate uses a donated ovum to provide a baby for a gay couple). Centuries-old legal presumptions seem less and less to fit people's lived experiences.

States within Europe have had divergent responses to reproductive technological innovations. Some have embraced new avenues for aspiring parents.[139] Others have outlawed surrogacy agreements, even criminalizing the very act of engaging in surrogacy or

136. *See* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L. J. 2260, 2260 (2017) ("Those who form families through assisted reproductive technologies (ART)—donor insemination, in vitro fertilization, and gestational surrogacy—frequently establish parental relationships in the absence of gestational or genetic connections to their children. In seeking legal parental recognition, they do not deny the importance of biological ties, but simply urge courts and legislatures to credit social contributions as well."); Yehezkel Margalit et al., *The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood*, 37 HARV. J. L. & GENDER 107, 108–09 (2014) ("ARTs have been referred to as a 'revolution,' and their purveyors have been accused of operating in the 'Wild West' of American medicine. These terms connote both a hope for a more promising future, and a deep underlying anxiety concerning what that future might hold. Indeed, the encroachment of science into a realm historically embedded in socio-religious notions of sanctity and divinity raises the age-old specter of playing god, and implicates the fear that Dr. Frankenstein is at society's helm."); Jennifer S. Hendricks, *Essentially A Mother*, 13 WM. & MARY J. WOMEN & L. 429, 474–75 (2007) ("A gestational mother has both a biological connection with the child and the same caretaking relationship as the prototypical mother. She may lack the genetic tie of the prototypical mother, but she has, by virtue of biological connection and nine months of caretaking, as strong a claim to parental rights as a genetic father who establishes a caretaking relationship after birth.").

137. *See* NeJaime, *supra* note 136, at 2279 (explaining gender differentiation in parenthood).

138. This principle entered into the ECtHR's case law in its early judgment striking down discriminatory treatment against "illegitimate" children. *Marckx*, 31 Eur. Ct. H.R. (ser. A) at 5–6.

139. For a summary of the surrogacy regulations of EU Member States, see *A Comparative Study on the Regime of Surrogacy in EU Member States*, EUR. PARLIAMENT (May 15, 2013), http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET(2013)474403, [https://perma.cc/H7LK-DGQ6].

trying to claim the child as belonging to the intended, rather than the genetic, parents.[140] Although there have been some interesting comparative studies, as well as commentaries on "reproductive tourism,"[141] little has been said about how the supranational structures in which local decisions about surrogacy are embedded shape those laws.

The novelty of gestational surrogacy is important because its human rights implications are not pre-determined. Instead, various institutions within Europe have the opportunity to compete with each other and form alliances to construct the proper interpretation of the rights involved. In such contexts, the ECtHR's role is open to contestation from within, *i.e.* from judges, and from without, *e.g.* from States and civil society actors. Through the case study of surrogacy, this Article assesses what the Court could do, what it does, and what it should do to honor subsidiarity and enhance dialogue within the pluralist European system.

Although one might have strong policy preferences for banning surrogacy or for permitting its liberal use, there is no definitive human rights answer. There are powerful, genuine,[142] and complex reasons for arguing that the practice of surrogacy is wrong and should be eradicated, as well as for arguing that recognition of surrogacy is a fundamental right. I recount these early surrogacy stories in some detail, not only because the details are pertinent to the Court's judgments but also because they show what is at stake. The normative allocation of power among institutions can have a profound impact on individual lives. Theoretical scholarship too often forgets that point, but the extraordinary facts of the surrogacy cases remind us why this analysis matters.

B. Surrogacy in Domestic Courts

In 2013, Parisians took to the streets to protest a controversial new policy. Then-Minister of Justice, Christiane Taubira, had proposed a change to gestational surrogacy regulations, allowing the State to legally recognize the parent-child relationship between ba-

140. *Id.*

141. *See* Britta Van Beers, *Is Europe Giving in to Baby Markets? Reproductive Tourism in Europe and the Gradual Erosion of Existing Legal Limits to Reproductive Markets*, 23 MED. L. REV. 103 (2014).

142. By which I mean not a cover for a discriminatory, corrupt, or otherwise impermissible motive for advocating a certain policy.

bies born through surrogacy and their genetic parents.[143] Since 1994, France had banned all forms of surrogacy, making such parental recognition impossible.[144] The law not only deemed surrogacy agreements to be unenforceable, but also designated engaging in surrogacy as a criminal offense.[145]

The same year that the controversial Taubira circular was published, France was on the verge of recognizing marriage equality. Surrogacy proved a stumbling block in France's efforts to recognize same-sex marriage: opponents contended that broadening the definition of legal marriage would lead to the erosion of traditional forms of parenthood. Ultimately, when the liberal Hollande government passed marriage equality in 2013, the law on surrogacy remained unchanged.[146]

By 2017, the picture looked quite different. The highest French civil court, the *Cour de Cassation*, ruled that genetic parents of children born through surrogacy were entitled to legal recognition of their parent-child relationship.[147] The Court based its July 5, 2017, surrogacy judgment on a combination of domestic and supranational sources of law. Article 8, as interpreted by the ECtHR, as well as the French law on same-sex marriage and adoption, were both necessary to reach its conclusion.[148] It also concluded that the genetic parent's spouse, whether of the same or opposite-sex, was permitted to adopt their partner's child. Although surrogacy was still outlawed within France, parental links formed abroad could now be legally recognized.

This rapid pendulum shift on family formation can be partially attributed to social and political changes within France. The liber-

143. Van Beers, *supra* note 141, at 108 (collecting French news reports on the controversy).

144. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 16-7 (Fr.) ("Toute convention portant sur la procréation ou la gestation pour le compte d'autrui est nulle.")[Author's translation: "All contracts concerning procreation through the use of gestational surrogacy are invalid."].

145. Mennesson v. France, 2014-III Eur. Ct. H.R. 255 (describing French surrogacy laws).

146. *See* Hugh Bronstein & Deisy Buitrago, *French Anti-Gay Marriage Protestors March to Revive Issue before Polls*, REUTERS (Oct. 16, 2016), http://www.reuters.com/article/us-france-politics-gaymarriage-idUSKBN12G0T9 [https://perma.cc/RM38-RY65].

147. Cour de cassation [Cass.] [supreme court for judicial matters] Paris. 1e civ., Jul. 5, 2017, arrêts [judgments] 824–837, https://www.courdecassation.fr/communiques_4309/gpa_realisee_37266.html [https://perma.cc/8VYL-3UJD].

148. *Id.*

al Hollande government replaced the conservative government of President Sarkozy. Attitudes toward same-sex couples were changing across the Western democracies. But domestic politics alone do not fully explain this transformation. To understand the French high court's 2017 decisions, which would have been shocking only a few years earlier, we must look beyond France.

In 2011, three American teenagers filed human rights applications before the ECtHR.[149] Valentina and Fiorella Mennesson and Juliette Labassee, along with their French parents, sought recognition as families—recognition that they had spent over a decade litigating in French courts. Why had France refused to legally recognize the Mennesson and Labassee families? The answer derives from the nature of the girls' births. All three were conceived and born through gestational surrogacy, which was legal in the U.S. states where they were born, but outlawed in France—the native country of the girls' parents.[150]

When the Mennessons traveled to California to have children, they made a choice that has become increasingly common in recent years— they went forum shopping for parental status. They knew that the kind of family they wanted was not legal in their home country, so they found an American woman who was willing to act as a surrogate and give birth to their twins in California.[151] According to the Mennessons, "in accordance with Californian law, the 'surrogate mother' was not remunerated but merely received expenses. . . . [S]he and her husband were both high earners and therefore had a much higher income than the [Mennessons] and that it had been an act of solidarity on her part."[152] The California court honored the agreement struck between the Mennessons and the surrogate. Before the twins' birth, the parents obtained a legal certification affirming that they were the girls' intentional and legal parents: "[T]he Supreme Court of California, to which the [Mennessons] and the surrogate mother and her husband had applied, ruled that [Mr. Mennesson] would be the 'genetic father' and [Ms. Mennesson] the 'legal mother' of any child to whom the surrogate mother gave birth within the following four months."[153]

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149. *See Mennesson*, 2014-III Eur. Ct. H.R.; Labassee v. France, App. No. 65941/11, Eur. Ct. H.R. ¶ 1 (2014), http://hudoc.echr.coe.int/eng?i=001-145180 [https://perma.cc/NN9E-6DQF].

150. *See Mennesson,* 2014-III Eur. Ct. H.R. at 264; *see Labassee*, App. No. 65941/11, Eur. Ct. H.R.

151. For an explanation of the California system, see NeJaime, *supra* note 136, at 2.

152. *See Mennesson*, 2014-III Eur. Ct. H.R. at 264.

153. *Id.*

The trouble began when Mr. Mennesson tried to register his daughters with the French consulate in Los Angeles so that they could be listed on his passport. The consulate refused to transcribe the birth certificates. Suspecting surrogacy, the consular officers forwarded the case to a prosecutor in France.[154] The family was allowed to return to France, but the girls carried American passports, which listed the Mennessons as their parents, in accordance with American but not French law.[155]

One year later, Juliette Labassee was born in Minnesota under a similar surrogacy agreement. Her situation was identical to that of the Mennesson twins. Both families returned to France, as they had always intended to do, but their legal status remained uncertain.[156]

Over the next ten years, as the girls grew up, their parents fought prolonged legal battles in French courts and bureaucracies to ensure filial recognition in France. From 2000 to 2004, French police and prosecutors even conducted a criminal investigation against the Mennessons for "false representation infringing the civil status of children."[157] The case was ultimately closed, and no charges were brought against the couple because the French authorities determined that "the acts had been committed on U.S. territory, where they were not classified as an offence, and therefore did not constitute a punishable offence in France."[158] Still, the public prosecutor "observed that an agreement whereby a woman undertook to conceive and bear a child and relinquish it at birth was null and void in accordance with *the public-policy principle that the human body and civil status are inalienable*."[159] Although the girls' American birth certificates listed the Mennessons as their legal parents, "the judgment of the Supreme Court of California . . . was contrary to the French conception of international public policy and of French public policy, it could not be executed in France . . . ."[160]

During the Mennessons' final appeal at the French Court of Cassation, they were supported by the Advocate-General, who pled their case under Article 8 of the Convention, asking whether "our international public policy[161] . . . can frustrate the right to family life

154. *Id.* at 265.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* (emphasis added).

160. *Id.*

161. The "international public policy" refers to the recognition of foreign legal

within the meaning of Article 8 [of the Convention]?"[162] The highest French court held that recognizing the girls' civil status would violate French public policy: the weight of the families' Article 8 claims did not outweigh France's interest in prohibiting surrogacy.[163]

Only a few years after the Mennesson and Labassee girls came "home" to France, Donatina Paradiso and Giovanni Campanelli, an Italian couple who were struggling with fertility, decided to engage a Russian surrogacy clinic.[164] The details of the Russian arrangement are murky and contested.[165] It appears Ms. Paradiso travelled to Russia carrying a sample of her husband's sperm so the Russian clinic could fertilize a donated ovum and engage a gestational surrogate to carry the fertilized embryo to term.[166] Under Russian law at the time, such arrangements were legal (or at least not illegal), and both the Italian couple and the gestational surrogate signed an agreement.[167] Teodoro Campanelli was born in Moscow and obtained a Russian birth certificate naming Donatina and Giovanni as his parents, with no mention of the surrogacy arrangement.[168] Donatina brought him back to Italy with her a few months later, where she and her husband began to raise the child as their son.

Allegedly, one month after Donatina's return to Italy, the Italian Consulate in Moscow contacted local Italian authorities to warn them that information in Teodoro's civil documents might be false.[169]

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documents, such as birth certificates, within domestic French law because such recognition is determined in part by treaties to which France is a party. France also relied on domestic public policy objections, namely that surrogacy was contrary to domestic law. *See id.* at 268.

162. *Id.*

163. Throughout this period, any time that the girls enrolled in school or did anything that required a birth certificate, they used their American birth certificates rather than official French documents. While the girls were minors and thus not at risk for expulsion, there was no certainty that their right to remain would continue past their eighteenth birthdays. They never received a formal answer to inquiries regarding whether they were French nationals or would be able to obtain nationality as adults. Nor was it clear what would happen in the event of a custody battle, the death of a parent, or the like. *See id.* at 280.

164. Paradiso and Campanelli v. Italy, App. No. 25358/12, Eur. Ct. H.R. ¶ 11 (2017), http://hudoc.echr.coe.int/eng?i=001-170359 [https://perma.cc/877K-KPSQ].

165. Oral Argument at 1:18-1:19, *Paradiso and Campanelli*, App. No. 25358/12, Eur. Ct. H.R., http://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2535812_09122015&language=lang&c=&py=2015 [https://perma.cc/E68X-WWUE].

166. *See Paradiso and Campanelli*, App. No. 25358/12, Eur. Ct. H.R. ¶ 11.

167. *Id.*

168. *Id.*

169. *Id.* ¶ 19.

Donatina and Giovanni were placed under criminal investigation for forgery, breach of the adoption code, and for "altering civil status."[170] The local court demanded a DNA test, with which Giovanni complied—confident that it would prove that he was Teodoro's biological father. The DNA tests came back negative; Teodoro bore no genetic relationship to either Donatina or Giovanni.[171] Either the couple had lied about using Giovanni's genetic material or the clinic in Russia had switched the samples.[172]

Permeating this case is a deep uncertainty about how the Italian couple came to have Teodoro in their custody. It is possible that they bought the baby from his mother or purchased him from the clinic. Such actions would have crossed the line from a surrogacy agreement, which was plausibly legal in Russia at the time, to child trafficking.

The local court determined that baby Teodoro was in a "state of abandonment" because his genetic parents were unknown and the people who claimed to be his parents had committed a series of crimes to obtain him.[173] Local authorities requested that Teodoro be removed from the Paradiso and Campanelli household, that all parental rights be terminated, and that Teodoro be placed for adoption.[174] The County Youth Court decided that Teodoro should be immediately removed, with no contact allowed between the baby and the couple who had raised him for the first eight months of his life. The court reasoned that because Paradiso and Campanelli "had preferred . . . to circumvent the adoption legislation, . . . it could be thought that the child resulted from a narcissistic desire on the part of the couple or indeed that he was intended to resolve problems in their relationship."[175] The very day of the court's judgment, social service workers came to their home and took Teodoro away.

All of Donatina and Giovanni's appeals were denied, and they never saw Teodoro again.[176] In 2013, the Italian government as-

170. *Id.*

171. *Id.* at 5.

172. *Id.* at 5. (During oral argument, *supra* note 165, at 12:10–12:30, counsel for the applicants explained that they had tried to find out what happened at the clinic, and the director promised he would conduct an internal investigation, but noted that it would be unlikely to reveal any explanation since most of the staff who were working there at the time had since left the clinic).

173. *See Paradiso and Campanelli*, App. No. 25358/12, Eur. Ct. H.R. ¶ 22.

174. *Id.*.

175. *Id.* at ¶ 190.

176. All attempts to appeal the original removal were in vain. Oral argument, *supra* note 165, at 13:10–13:40.

signed Teodoro a new identity and placed him in a pre-adoptive foster home.[177] Paradiso and Campanelli faced criminal charges in Italy.[178] Before the ECtHR, the couple did not ask to have Teodoro returned to them, since he has now spent most of his young life with another family. Instead, they sought recognition that their right to private and family life was violated, as well as some possibility to have contact with the child that they once claimed as their own.[179]

C. Mennesson & Surrogacy in Strasbourg

The French cases arrived first before the ECtHR and presented a cleaner issue than the later Italian case, in part because the underlying facts were not disputed. Before the Court, the French couples made two arguments explaining why France's policy violated the European Convention. Under the right to family life, they claimed that France's refusal to recognize the filial link of children born by surrogacy in a foreign jurisdiction violated both the parents' and the children's rights. Under the right to private life, they argued that France deprived the children of the right to know one's origins and develop parental ties.[180]

Both parties relied on a different concept of margin of appreciation: France on the moral issue and lack of consensus and the applicants on an emerging European trend. The French government relied on deference due to its moral and ethical choices in an emerging field. The government claimed that "French law [banning surrogacy] . . . reflected ethical and moral principles according to which the human body could not become a commercial instrument and the child be reduced to the object of a contract."[181] Consequently, "as surrogacy was a moral and ethical issue and there was no consensus on the question among the States Parties, the latter should be afforded a wide margin of appreciation in that area."[182]

In response, the applicants claimed that there was "a favourable trend in Europe towards taking account of situations such as theirs,"[183] but that "the rigid position of the [French court], which set

177. *See Paradiso and Campanelli*, App. No. 25358/12, Eur. Ct. H.R. ¶¶ 49–50.

178. *Id.* ¶ 63.

179. Oral argument, *supra* note 165, at 14:00–14:45.

180. *See Mennesson*, 2014-III Eur. Ct. H.R.

181. *Id.* at 276.

182. *Id.* at 281.

183. *Id.* at 276.

out to maintain a blanket 'deterrent effect' of the prohibition of surrogacy, amounted to precluding any pragmatic arrangement that would recognise—in the child's best interests—the effects of a situation that had been lawfully created abroad."[184]

The Fifth Section, a chamber of the ECtHR comprised of seven judges, unanimously decided the *Mennesson* and *Labassee* cases in June 2014. The Court gestured multiple times to the wide margin of appreciation it granted to States when deciding "sensitive moral or ethical issues."[185] Although the applicants cited a "favorable trend" in Europe, the Court concluded that there was no consensus among Council of Europe Member States regarding surrogacy, which "reflect[ed] the fact that recourse to a surrogacy arrangement raises sensitive ethical questions."[186]

With deference to the French system, the Court recognized that France:

> [in the] interests of proscribing any possibility of trafficking in human bodies, guaranteeing respect for the principle that the human body and a person's civil status were inalienable, and protecting the child's best interests, the legislature—thus expressing the will of French people—had decided not to permit surrogacy arrangements. The domestic courts had duly drawn the consequences of that by refusing to register the particulars of the civil-status documents of persons born as the result of a surrogacy agreement performed abroad.[187]

Because of this State interest, and because the Mennessons had been permitted to live together as a family and had not suffered many tangible hardships as a result of their clandestine status, the Court found no violation of their right to family life.[188]

The Court confronted two weights—one in favor of narrowing and the other in favor of widening the margin of appreciation. On the one hand, the lack of consensus and sensitive ethical nature of the case suggested France had wide latitude, but on the other hand, the case implicated a "core" question of the children's identities (fil-

184. *Id.* at 277.

185. *Id.* at 282–83. The Court referred to the "margin of appreciation" at least six times in the course of its judgment, not including the several references made by the parties.

186. *Id.* at 283.

187. *Id.* at 281.

188. *Id.* at 287.

ial recognition) about which States had a narrow margin.[189]

Ultimately, the French judgments reveal a path through which the Court can emphasize the Member State's responsibility without passing judgment on the underlying substantive right.[190] The Court went on to hold that the French law *did* violate the children's right to private life because the French legal system failed to provide a process by which the girls could establish their identities. Because "[r]espect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship" and "[a]s domestic law currently stands, the [children] are in a position of legal uncertainty," France must provide a process by which children born in foreign surrogacy arrangements can legally establish their status as the biological children of French citizens and as French citizens in their own right.[191] In other words, the Court ruled that although France could keep its laws outlawing surrogacy, it could not deny children a chance to establish genetic parental links.

The French cases demonstrate the complex way in which the Court relies on the moral margin without clarifying the role that it plays in the ultimate decision. Had the Court relied exclusively on the lack of consensus, it would have signaled that European trends might change the calculation in future cases. If it was driven by consensus, the Court could look to other States' practices to test France's claim that criminalization was, in fact, *necessary* to effectively prohibit surrogacy. Instead, the judgment does not explain what weight consensus carries and how much deference was tied to the sensitive moral question.

The fuzziness of the Court's margin of appreciation analysis is partially rescued by its conclusion that France must have a process by which children born of surrogacy could gain clarity and legal recognition of their rights. This decision put the rights question back into the hands of French legislators and courts. Although it is impos-

189. *Id.* at 283.

190. *Cf.* Nila Bala, *The Hidden Costs of the European Court of Human Rights Surrogacy Decision*, 40 YALE J. INT'L L. ONLINE 11, 15 (2014). Nila Bala suggests a consequence of the Court's minimal decision, which she contends "sends a symbolic message that it is acceptable to protect domestic wombs at the cost of foreign wombs" by allowing France to prohibit domestic surrogacy but requiring an opening for families using international surrogacy to bring children back to France.

191. *See Mennesson*, 2014-III Eur. Ct. H.R. at 288–89 ("by . . . preventing both the recognition and establishment under domestic law of their legal relationship with their biological father, the respondent State overstepped the permissible limits of its margin of appreciation.").

sible to know what would have happened had the Court ruled otherwise, the aftermath of the *Mennesson* case suggests that the procedural ruling was dialogue-enhancing insofar as it forced France to reassess elements of its surrogacy regulations in light of Article 8.

When the French cases returned to the domestic sphere, the controversy over surrogacy was by no means resolved. However, the Court's insistence that France provide a legal avenue for children with a genetic link to French fathers to establish their identities provided at least a partial human rights framework in which French institutions could shape national policy. As a former judge of the European Court of Human Rights observed:

> It is only in the last few years that, due to the "influence" of the ECtHR's case law, the French public administrations and French judges face a challenge in finding a balance between the law in force and the criticism of the ECtHR's judges. Therefore, the recent national case law seems to be at a turning point, heading towards conformism with the requirements of the Strasbourg judges, in order to prevent further similar findings of violations against France.[192]

As a consequence of the ECtHR judgment, the *Conseil d'Etat* validated the controversial 2013 circular granting citizenship rights to the genetic children of French citizens who had been carried by surrogates.[193] The individual remedies France provided for the applicants marked a shift in the general law, which lead to the 2017 *Cour de Cassation* judgments described above.[194]

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192. Elisabeth Steiner & Andreea Maria Rosu, *Medically Assisted Human Reproductive Technologies (ART) and Human Rights: The European Perspective*, 11 FRONTIERS L. CHINA 339, 361 (2016).

193. Le Conseil d'État et la Juridiction Administrative, *CE 12 décembre 2014, Association Juristes pour l'enfance et autres*, http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/CE-12-decembre-2014-Association-Juristes-pour-l-enfance-et-autres [https://perma.cc/CC2H-2NVQ].

194. The ECtHR decided one other surrogacy case against France since the *Mennesson* and *Labassee* judgments, but it involved factual situations nearly identical to the earlier cases, and the French government did not contest that the applicants were entitled to the procedures that the ECtHR had found lacking in the first two cases. The *Foulon* case highlights the issue of delay between a Strasbourg judgment and national compliance, but it did not add to the substantive doctrine. Foulon & Bouvet v. France, App. No. 9063/14, Eur. Ct. H.R. ¶¶ 55-57 (2016), http://hudoc.echr.coe.int/eng?i=001-164968 [https://perma.cc/39HX-H78T] (available only in French).

D. Paradiso & The Power of Genetic Ties

The *Paradiso* case was more complicated. The judgment could not rest on a genetic link between Teodoro and his putative parents. Because the applicants could not rely on the *Mennesson* precedent, the absence of a genetic link proved dispositive.

The interests of the parties further complicated the Italian case. As a threshold matter, the chamber that first reviewed the case determined that the couple did not have standing to represent Teodoro's interests—they had no genetic link to him, he had received a new identity, and he was under the guardianship of a new family.[195] This posed a significant quandary because the child *né* Teodoro had no way to assert his distinct interest in the case. Additionally, in a choice that troubled many observers, the applicants' lawyers were provided by the Russian surrogacy clinic.[196]

The Italian government framed its argument around the patent illegality of Paradiso's and Campanelli's attempt to obtain a baby in Russia. Rather than emphasize the reasons for banning surrogacy, the government focused on the need to enforce its law.[197] The very question, however, before the Court was the *necessity* of Italy's law.

In spite of the fact that the Court denied the couple's standing to argue for Teodoro's rights, it took on a sort of guardian role and framed its analysis in terms of the best interest of the child: "[I]t remains to be ascertained whether, in such a situation, the measures taken in respect of the child—in particular, his removal and placement under guardianship—can be regarded as proportionate, namely whether the child's interests were taken into account sufficiently by the Italian authorities."[198] The Court concluded that the Italian authorities' decision to permanently remove Teodoro from Paradiso and Campanelli was disproportionate and violated Article 8. Even if the couple had broken the law, the national authorities still needed to consider the child's best interest in an individualized way: "[T]he reference to public order could not . . . be considered as giving *carte blanche* for any measure, since the State had an obligation to take the child's best interests into account irrespective of the nature of the pa-

195. Paradiso and Campanelli v. Italy, App. No. 25358/12, Eur. Ct. H.R. (2015), http://hudoc.echr.coe.int/eng?i=001-151056 [https://perma.cc/Z4Y9-64RA], *overruled by Paradiso and Campanelli*, App. No. 25358/12, Eur. Ct. H.R. ¶ 49 (2017).

196. *Id.* ¶ 2.

197. *Id.* ¶ 66.

198. *Id.* ¶ 78.

rental link, genetic or otherwise."[199]

The Chamber's conclusion demonstrates another facet of proceduralization. The Court did not require a change to Italy's statute regulating surrogacy, but it did impose a standard of individualized review for domestic courts deciding custody cases for children born through surrogacy.

Unlike the French cases, the ECtHR's Italian judgment was not unanimous. Judges Raimondi and Spano dissented on the ground that: "Article 8 § 1 cannot, in our opinion, be interpreted as enshrining 'family life' between a child and persons who have no biological relationship with him or her, where the facts, reasonably clarified, suggest that the origin of the custody is based on an illegal act."[200] In other words, the dissenters thought that the couple's claim did not fall within the scope of family rights. The dissenters concluded by warning that:

> [T]he majority's position amounts . . . to denying the legitimacy of the State's choice not to recognise gestational surrogacy. If it suffices to create, illegally, a link with the child abroad in order for the national authorities to be obliged to recognise the existence of 'family life', then . . . the States' freedom not to give legal effect to gestational surrogacy . . . is reduced to nought.[201]

The dissenters are mistaken, insofar as the majority did not require the State to allow the child to remain with the putative parents, but only to provide an individualized procedure by which the child's best interests could be taken into account. However, the dissenters' fear shows the permeable line between procedure and substance: that ex-post judicial recognition of family rights in surrogacy cases would erode the state's power to prohibit surrogacy through deterrence.[202]

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199. *Id.* ¶ 80.

200. *Id.* ¶ 3 (Raimondi and Spano, J., dissenting).

201. *Id.* ¶ 15.

202. This is, in fact, what happened in the United Kingdom. Commercial surrogacy is prohibited, but judges are required to consider the best interest of the child in deciding whether to authorize parental rights ex post for parents who use a surrogate. In many cases, the child's interests prevail over the public policy against surrogacy. *See* In Re X and Y (Foreign Surrogacy) [2008] EWHC (Fam) 3030 at 24 (Eng.) ("What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions."). However, when the case arrives at a judge ex post, "it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child

The Court selected *Paradiso* for rehearing by the Grand Chamber, which heard oral argument in 2015.[203] The Grand Chamber issued its judgment on January 24, 2017 and reversed.

The Court went through almost its entire analysis before specifically addressing the margin of appreciation, which typically is set before it engages in proportionality analysis. When it did reach the question of margin, the Court hardly mentioned consensus. Instead, it stated without further comment that "the facts of the case touch on ethically sensitive issues—adoption, the taking of a child into care, medically assisted reproduction and surrogate motherhood—in which member States enjoy a wide margin of appreciation."[204] The Court mentioned consensus elsewhere in its judgment, but only when reciting the boilerplate "general principles" and without explaining how these principles applied to the case at hand: "Where . . . there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider."[205]

Rather than conduct new comparative research, the Court referenced the analysis conducted four years earlier for the French cases, noting that in thirteen out of the thirty-five surveyed countries, "it is possible for the intended parents to obtain legal recognition of the parent-child relationship between them and a child born from gestational surrogacy carried out legally in another country."[206] Looking backward, without updating its consensus data, the Court's reference

(particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order." *Id.*

203. In this case, the issue was likely communicated to the Grand Chamber because the Court's case law on surrogacy is sparse and the volume of litigation is likely only to increase as the practice becomes more widespread. The decision to communicate the case might also have been motivated by the Second Section dissent's view that the Court's procedural intervention went too far in altering the domestic legal regime. The choice to rehear the Italian case, rather than the French case is intriguing. In many ways, the French families represent a much more typical case—there was no dramatic twist in the girls' genetic identity, they were never removed from the home, the types of challenges they faced are likely to be faced by many more like them. It might seem reasonable for the Court to rest its Grand Chamber judgment on a more representative case. Alternatively, the Court might have chosen to rehear *Paradiso* because of its unique facts. It forces the Court to address whether genetic link is dispositive. It also requires the Court to confront the "pure" question of whether a couple that circumvents national law in order to obtain a baby through surrogacy has any rights with respect to the child.

204. *Paradiso and Campanelli*, No. 25358/12. Eur. Ct. H.R. ¶ 194 (2017).

205. *Id.* ¶ 182.

206. *Id.* ¶ 81

to consensus was incomplete and a poor signaling tool to the Member States. It did not indicate that Strasbourg is concerned with emerging trends. Rather, it showed that the Court took as given that it would not be possible to find common ground on surrogacy.

The Grand Chamber primarily distinguished *Mennesson* and *Paradiso* on the absence of a biological link between the Italian couple and Teodoro.[207] It concluded that the couple had a "mere desire" to form a family, which was not protected within the scope of Article 8.[208] Although the couple has "developed a parental project and had assumed their role as parents,"[209] the short duration of their time with Teodoro, compounded by the fact that they always knew what they were doing was illegal in Italy, meant that this intended parent-child relationship never became a de facto family as recognized by Article 8.[210]

However, even though the trio was not a family in the eyes of the Court, the couple's private life (their plan to be parents) was implicated.[211] The majority's analysis then came down to whether the permanent removal of Teodoro from the couple's lives was "necessary" to further Italy's aim. The Court's margin of appreciation analysis was most pronounced when it reaffirmed that its:

> task is not to substitute itself for the competent national authorities in determining the most appropriate policy for regulating the complex and sensitive matter of the relationship between intended parents and a child born abroad as a result of commercial surrogacy arrangements and with the help of a medically-assisted reproduction technique, both of which are prohibited in the respondent State.[212]

The Court accepted that Italy's actions responded to a "pressing social need" and were, thus, proportionate.[213] Crucially, the Court accepted that "[b]y prohibiting surrogacy arrangements, Italy has taken the view that it is pursuing the public interest of protecting the women and children potentially affected by practices which it regards as highly problematic from an ethical point of view."[214] The majority

207. *Id.* ¶ 132.

208. *Id.* ¶ 141.

209. *Id.* ¶ 151.

210. *Id.* ¶¶ 152–57.

211. *Id.* ¶ 166.

212. *Id.* ¶ 180.

213. *Id.* ¶ 181.

214. *Id.* ¶ 203.

concluded that Italy need not provide individualized review and could maintain its blanket ban on surrogacy.

The Grand Chamber judgment was fractured, with six judges dissenting and three separate concurrences joined by five judges. The concurrences paid no heed to the consensus question. Instead, they delved much deeper into the underlying moral questions surrounding surrogacy, revealing the judges' considerable skepticism that *permitting* surrogacy arrangements could be compatible with human rights. Judges De Gaetano, Pinto de Albequerque, Wojtyczek, and Dedov concluded that "gestational surrogacy, whether remunerated or not, is incompatible with human dignity. It constitutes degrading treatment, not only for the child but also for the surrogate mother."[215] The concurrence suggested that surrogacy should be banned throughout Europe: "From the outset, surrogacy is focused on drastically severing this [mother-child] link. . . . Both the child and the surrogate mother are treated not as ends in themselves, but as means to satisfy the desires of other persons. Such a practice is not compatible with the values underlying the Convention."[216]

In his separate concurrence, Judge Dedov discussed the main concern of this article, but came to the opposite conclusion. He commended the Grand Chamber for "plac[ing] greater emphasis on values than on the formal margin of appreciation"[217] and considered that the Court was moving toward resting its judgments on "values rather than on the margin of appreciation in 'ethical' cases."[218] Judge Dedov contended that the concept of "morals" was too vague and could not, ultimately, stand up against individual claims to private and family life, but a society's "values"—"dignity, integrity, equality, inclusiveness, curiosity, self-realisation, creativity, knowledge and culture"[219]provided a more robust bulwark against surrogacy; a practice he views as contrary to human dignity. What makes Judge Dedov's concurrence surprising is that the majority opinion rests so clearly on the "moral margin" and not on his list of societal values, of which the majority makes no mention. But the concurrence suggests that at least some judges believed that the ruling entrenched an anti-surrogacy policy, even if it did so behind the cover of a moral margin.

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215. *Paradiso and Campanelli*, App. No. 25358/12., Eur. Ct. H.R. ¶ 7 (2017). (De Gaetano, Pinto de Albequerque, Wojtyczek, and Dedov, J., concurring).

216. *Id.*

217. *Id.* ¶ 61 (Dedov, J., concurring).

218. *Id.* ¶ 64.

219. *Id.*

E. The Next Case

In the surrogacy cases, the Court chose to apply consensus analysis, require procedural changes, and defer to domestic morality. Whatever one thinks of the outcome of these cases, the ECtHR's decisions about how to communicate with domestic institutions can have profound implications for the next round of cases. When the Court chooses to disengage from the underlying process and look only at the moral nature of the issue, it may be showing respect for deeply-held national values, but it also misses the opportunity to help shape rights in future cases. Unlike in the French case or the Chamber judgment for the Italian case, where the Court maintained a role in monitoring domestic rights-protecting processes, in the Grand Chamber's *Paradiso* judgment, the Court failed to take on that responsibility. This choice will have consequences in future litigation.

Imagine the following hypothetical: an Italian couple enters into a contract with a Ukrainian woman to serve as a surrogate, using a donated ovum. She gives birth to a baby who is genetically related to the intended father, but she refuses to give the baby to the couple. The couple sues the woman in Ukrainian court, which grants them custody of the child under Ukrainian law permitting surrogacy agreements. The woman then lodges an application with the ECtHR against Ukraine for violating her right to family life. What do the Court's current judgments tell domestic courts about how it might rule? I argue that it tells them very little.

Now, imagine that when the couple returned to Italy with the baby, the Ukrainian woman followed, seeking access to the child, which the Italian family court granted on the grounds that she is a legal parent of the child. After all *mater semper certa est.* In this case, what if the commissioning mother had donated the ovum? What if the child had been with the Italian couple for five years before the Ukrainian surrogate found them?

These hypotheticals complicate the scenario in part because multiple people's Convention rights stand in direct opposition. Both the Ukrainian woman and the Italian couple have Article 8 claims. So far, the surrogacy cases before the ECtHR have been framed as individual Article 8 rights balanced against countervailing public policy. The cases do not reveal other rights-holders who might have a stake in deciding who becomes the legal parents of children born through surrogacy.

The structure of the Convention prevents the competing parental claimants from suing each other in Strasbourg. Instead, one of the parties must file an application against a Member State claiming that its laws do not adequately protect the applicant's rights. In such

cases, the State's defense might be that it acted to protect the Convention rights of another group or individual. The question for the ECtHR then becomes whether the domestic courts struck a proper balance between competing rights claims.

One option would be for the Court to re-weigh the rights in question—noting, for instance, that certain core aspects of Article 8 can only be limited in the most extreme situations. Maybe if the law treated same-sex and opposite-sex couples differently, the Court would be more likely to intervene.[220] Another option would be for the Court to review the balancing process taken at the domestic level in order to ensure procedural fairness and that all relevant rights claims were taken into account. In either case, the current reliance on a moral margin is of little help. Were the Court to re-weigh, it would be taking a substantial step to intervene not foreshadowed by its current case law. Member States might be reasonably resistant of the Court's second-guessing the domestic rights-protecting process after the Court had been so deferential in its early cases. Instead, were the ECtHR to lay the foundation through consensus analysis or procedural review, the Member States would have much clearer notice about what the Court considered relevant. If the Court had given guidance about what sort of procedures were necessary for the overall policy, then subsequent cases resolving disputes between, for instance, gestational surrogates and intended parents would be much clearer.

If the ECtHR remains committed to the moral margin when it comes to surrogacy, then its capacity to build a framework for balancing rights is limited. The deference articulated in the *Paradiso* case, for instance, provides little guidance for how domestic courts might weigh different parental claims. Even consensus analysis, if done thoroughly, would have put States on notice about whether there are trends developing in Europe to which domestic courts ought to pay attention. Although the ECtHR might clarify its case law in subsequent judgments, its current position does not communicate much about where it might go in the future or what kinds of considerations domestic courts should take into account when weighing

220. The ECtHR surrogacy cases described above involve opposite-sex couples. These couples, at least in theory, have alternative methods for procreation. By contrast, for same-sex male couples, genetic procreation by definition requires a third party. Technology facilitates models of family formation for same-sex couples that permit much greater access to biological children. The equality claims of same-sex couples, especially gay men, remain unheard in the surrogacy context; at least at the European level. We have seen that the Court is more eager to dismantle laws that discriminate against LGBT family forms than it is to tackle questions of motherhood and reproduction. Perhaps framed in equality terms, the ECtHR would be more open to scrutinizing domestic law.

competing parental claims.

The hypotheticals illustrate an important fact: borders are porous and changes in one European jurisdiction are likely to impact its neighbors. [221] If the ECtHR is committed to some level of rights harmonization across Europe, then it cannot remain on the sidelines of this question forever. The phenomena of families moving across borders, coupled with a global reproductive market, permeate domestic policy choices and raise persistent questions about who decides which *de facto* families merit legal recognition.

CONCLUSION

If the Court wishes to navigate this challenging political moment with its legitimacy and the force of the Convention intact, it must do so carefully. The Court may, therefore, rely on deferential review to avoid making a decision that could prove costly to its position and the Convention. Given the challenges that the ECtHR faces in a Europe that is pulling apart at the seams, anything other than a deference model might seem highly idealistic. That said, even if avoiding backlash is a legitimate element of the ECtHR's subsidiary role, this aim is better achieved through consensus and proceduralization, rather than the moral margin. Consensus and proceduralization, unlike the moral margin, are avenues and catalysts for dialogue. When the Court employs these doctrinal moves, it is less susceptible to accusations of abdicating its responsibility under the Convention.

In putting forward this argument, I do not reject all claims for

221. Another consideration is the development of international law, and especially treaties, regulating surrogacy. We have already seen that the ECtHR looks to international law in defining European trends, but the Court also has a role in shaping international law both by providing a possible model and by shifting the positions of domestic participants in treaty formation. For instance, France's position on a parentage treaty or convention probably looks quite different in a world where Strasbourg had not shifted domestic law to require legal recognition of filiation. There is a Hague Convention on Parentage in the works, which could serve to regulate international surrogacy arrangements. The Hague Parentage/Surrogacy Project was convened to report on the feasibility of a new Convention. *The Parentage / Surrogacy Project*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy [https://perma.cc/2V7T-LMRH]. The Group last reported in February 2017, but no formal action has yet been taken. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, REPORT OF THE EXPERTS' GROUP ON THE PARENTAGE / SURROGACY PROJECT (2017), https://assets.hcch.net/docs/ed997a8d-bdcb-48eb-9672-6d0535249d0e.pdf [https://perma.cc/G34W-QW3D]. *See* Louise Ellen Teitz, *Children Crossing Borders: Internationalizing the Restatement of the Conflict of Laws*, 27 DUKE J. COMP. & INT'L L. 519, 525–26 (2017).

domestic difference. Rather, I contend that there is ample space for national variation within a pluralist system that also includes a supranational human rights structure.

The future of Europe's supranational institutions remains uncertain. The ECtHR is vulnerable to de-legitimation and outright noncompliance by Member States if it cuts too deeply into issues that are deemed central to national identity. Rights claims that threaten national conceptions of morality are particularly risky. But the Court has found ways to enlist domestic institutions in the rights-protecting project, without deciding the merits of every human rights case.

When Strasbourg judges define their role in the European legal order, they should consider themselves teachers and interpreters of human rights. They may be rightly wary of balancing State interests against individual rights or telling a Member State that its efforts to protect a core value are unnecessary. But even in this time of uncertainty, supranational judges have a crucial role to play in keeping the wheels of European dialogue turning. For that reason, my conclusion is optimistic. Social and technological change will happen. The question is to what extent individual rights claims are incorporated into a State's decisions reacting to change. By employing tools like consensus analysis and proceduralization, the ECtHR can help assure that human rights are central in decision-making at every level.

APPENDIX

Case Name	Search Term	Year	Article(s)	Violation	Margin
Gard and Others v. the United Kingdom (dec.)	"sensitive moral" used twice; "moral and ethical" once.	2017	2, 5, 6, 8	Inadmissible	Sensitive ethical question/no consensus justifies wide margin for deciding whether to permit experimental treatment for terminally ill baby.
Bayev and Others v. Russia	"sensitive moral" used twice.	2017	10, 14	Violation	Sensitive moral issue does not justify wide margin of appreciation for a ban on "gay propaganda."
A.M. and A.K. v. Hungary (dec.)	"sensitive moral" used once.	2017	8	Inadmissible	Government claims medical cannabis use is sensitive moral issue, Court grants wide margin.
Paradiso and Campanelli v. Italy [GC]	"sensitive moral" used once; "moral and ethical" twice.	2017	8	No Violation	Sensitive ethical question/no consensus justifies wide margin for deciding whether to remove a child because of surrogacy.
Dubska and Krejzova v. the Czech Republic [GC]	"sensitive moral" used three times (once in dissent); "moral and ethical" once.	2016	8	No Violation	Sensitive ethical question/no consensus justifies wide margin for prohibiting home births.
Z.H. and R.H. v. Switzerland	"sensitive moral" used once.	2015	8	No Violation	Sensitive ethical question/no consensus justifies wide margin for

					recognition of religious marriage.
Parrillo v. Italy [GC]	"sensitive moral" used four times (twice in dissents); "moral and ethical" used four times (once in dissent).	2015	8, Art. 1 Prot. 1	No Violation	Sensitive ethical question/no consensus justifies wide margin for donation of embryos to research.
Oliari and Others v. Italy	"sensitive moral" used twice; "moral and ethical" used once.	2015	8, 14	Violation	"Core" right to recognition of same-sex relationship overcomes sensitive nature and wide margin of appreciation.
Annen v. Germany	"moral and ethical" used twice (once in dissent).	2015	10	Violation	Despite moral and ethical question of abortion, the state violated freedom of expression by punishing distribution of anti-abortion leaflets.
Nicklinson and Lamb v. the United Kingdom (dec.)	"moral and ethical" used once.	2015	6, 8, 13, 14	Inadmissible	Wide margin for decisions of assisted suicide.
Hamalainen v. Finland [GC]	"sensitive moral" used twice.	2014	8, 12, 14	No Violation	Sensitive ethical question/no consensus justifies wide margin for marriage for recognition after gender reassignment surgery.
D. and Others v. Belgium (dec.)	"sensitive moral" used once.	2014	8	Inadmissible	Sensitive ethical question/no consensus justifies wide margin for

					requirements around international surrogacy.
Mennesson v. France	"sensitive moral" used once; "moral and ethical" once.	2014	8	Partial Violation	Sensitive ethical question/no consensus justifies wide margin for requirements around surrogacy, but not for "core" identity issue.
Labassee v. France	"moral et éthique" used once.	2014	8	Partial violation	Sensitive ethical question/no consensus justifies wide margin for requirements around surrogacy, but not for "core" identity issue.
M.P. and Others v. Romania (dec.)	"moral and ethical" used once.	2014	2, 8	Inadmissible	Sensitive ethical question/no consensus justifies wide margin for wrongful birth suits.
Gough v. the United Kingdom	"requirement of morals" used once.	2014	8, 10	No Violation	Moral requirements and no consensus justifies wide margin on public nudity.
X. and Others v. Austria [GC]	"sensitive moral" used once.	2013	8, 14	Partial Violation	Sensitive ethical question/no consensus justifies wide margin for requirements around adoption, but narrow margin for distinguishing same-sex and opposite-sex couples.
Hristosov and Others v. Bulgaria	"sensitive moral" used once.	2012	2, 3, 8	No Violation	Sensitive ethical question/no consensus justifies wide margin for decisions regarding experimental medial treatment.

Knecht v. Romania	"sensitive moral" & "moral and ethical" used once.	2012	8	No Violation	Sensitive ethical question justifies wide margin for regulations around use of embryos.
Stubing v. Germany	"sensitive moral" used once; "requirements of morals" twice.	2012	8	No Violation	Sensitive ethical question/no consensus justifies wide margin for criminalizing adult sibling incest.
Van der Heijden v. the Netherlands [GC]	"sensitive moral" used once.	2012	8, 14	No Violation	Sensitive ethical question/no consensus justifies wide margin for scope of testimonial privilege to non-married couples.
Costa and Pavan v. Italy	"sensitive moral" & "moral and ethical" used once.	2012	8	Violation	Despite sensitive moral issue of pre-natal screening, the Italian rule was an outlier and disproportionate.
S.H. v. Austria [GC]	"sensitive moral" used four times; "moral and ethical" three times; "requirements of morals" once.	2011	8, 14	No Violation	Sensitive ethical question/no consensus justifies wide margin for access to IVF.
A, B, & C v. Ireland [GC]	"sensitive moral" used once; "moral and ethical" twice; "requirements of	2010	8, 13, 14	Partial Violation	Sensitive ethical question justifies wide margin for access to abortion, but with some procedural requirements.

	morals" three times.				
Ternovszky v. Hungary	"sensitive moral" used once.	2010	8	Violation	Government claims home birth is a sensitive issue, Court finds violation for lack of legal certainty/foreseeability.
Ostrowski v. Poland (dec.)	"moral and ethical" used twice.	2009	6, 8, 14	Partially inadmissible	Non-exhaustion of domestic remedies regarding inability to obtain a divorce.
Friend v. the United Kingdom (dec.)	"moral and ethical" used once.	2009	8, 9, 11, 14, Art. 1 Prot. 1	Inadmissible	Wide margin to prohibit fox hunting and define the content of "moral and ethical" requirements.
Evans v. the United Kingdom [GC]	"sensitive moral" & "moral and ethical" used four times (once in dissent).	2007	2, 8, 14	No Violation	Sensitive ethical question/no consensus justifies wide margin for regulations of IVF.
Parry v. the United Kingdom (dec.); R. and F. v. the United Kingdom	"sensitive moral" used once in each decision.	2006	8, 12	Inadmissible	Sensitive ethical question of marriage after gender reassignment surgery left to states, claim manifestly ill-founded.
B. and L. v. the United Kingdom	"sensitive moral" used once.	2005	12	Violation	Despite sensitive moral questions, law prohibiting marriage between former in-laws violated right to marriage.
Perrin v. the United Kingdom (dec.)	"requirements of morals" once.	2005	10	Inadmissible	Moral issue and wide margin means conviction for obscene website was not dis-

					proportionate.
Hoare v. the United Kingdom (dec.)	"requirements of morals" once.	1997	10	Inadmissible	Moral issue and wide margin means conviction for obscene videos was not disproportionate.
Reeve v. the United Kingdom (dec.)	"moral and ethical" used once.	1994	6	Inadmissible	The moral and ethical nature of wrongful birth claims fall within the state's margin of appreciation.
Open Door and Dublin Well Woman v. Ireland	"requirements of morals" used twice (once in dissent).	1992	10	Violation	Despite moral issues, state could not prohibit dissemination of information about abortion availability overseas.
Muller and Others v. Switzerland	"requirements of morals" used twice (once in dissent).	1988	10	No Violation	Seizure of paintings deemed obscene, given domestic moral judgment did not violate freedom of expression.
Dudgeon v. the United Kingdom (Plenary)	"requirements of morals" used twice.	1981	8, 14	Violation	Despite moral issue, no justification for prohibiting homosexual sex.
Sunday Times v. the United Kingdom (Plenary)	"requirements of morals" used once.	1979	10, 14, 18	Violation	Despite moral issue, restraint of publication of articles relating to deformed children was disproportionate.
X., Y. & Z. v. Belgium (dec.) (Plenary Commission)	"requirements of morals" used once.	1977	10	Inadmissible	Domestic moral judgment regarding sexually explicit materials fell within the state's discretion.
Handyside v. the	"requirements of	1976	10, Art. 1. Prot. 1	No Violation	Domestic moral judgment regard-

United Kingdom (Plenary)	morals" used once.				ing sexually explicit materials fell within the state's discretion.