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Abstract

Focusing on gay rights in the European Union, this Article addresses questions all dealing with the likely dynamics of gay-rights development in Europen in the near future. This is done by applying to the legal context of the European integration project of Kreimer's vision of federalism, Karst's analysis of the "freedom of intimate association," and Koppelman's representation of sexual-orientation discrimination as sex discrimination. The argument will proceed as follows: Part I gives a short outline of the importance of federalism for the preservation of liberty. Part II will build on Koppelman's analysis of the nature of sexual orientation discrimination as sex discrimination. Part III will apply the reasoning of the first two Parts to the legal context of European integration, looking both at its potential and the limitations which its practical use in the European context is likely to face.

ON OPTIONS OF CITIZENS AND MORAL CHOICES OF STATES: GAYS AND EUROPEAN FEDERALISM

*Dimitry Kochenov**

"It is meaningless to speak of morality when there is no choice."
—Kenneth Karst[1]

"Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale . . . to justify a law that discriminates among groups of persons."
—Sandra Day O'Connor[2]

INTRODUCTION

There is no disagreement about the fact that "to be human is to need to love and be loved."[3] Disagreements emerge once legal/political decisions are to be taken to answer a question of how far and under what conditions states can interfere with such a vital aspect of our existence. Focusing on gay rights[4] in the European Union ("EU" or "Union"), this Article addresses this and a number of related questions, all dealing with the likely

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1. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 692 (1980).

2. Lawrence v. Texas, 539 U.S. 558, 574 (2003) (O'Connor, J., concurring).

3. Karst, *supra* note 1, at 632. For an analysis of the freedom of intimate association in the context of more recent developments in the United States, see Nancy C. Marcus, *The Freedom of Intimate Association in the Twenty-first Century*, 16 GEO. MASON U. CIV. RTS. L.J. 269 (2006).

4. For the sake of simplicity, the term "gay" is used in this Article in reference to both homosexual men and lesbian women.

dynamics of gay-rights development in Europe in the near future. This is done by applying to the legal context of the European integration project of Kreimer's vision of federalism,[5] Karst's analysis of the "freedom of intimate association,"[6] and Koppelman's representation of sexual-orientation discrimination as sex discrimination.[7]

Federalism protects liberty in many ways. Probably the simplest of those is an exit option that it provides, as described by Kreimer and other commentators.[8] Simply put, if the moral choices made by the member state of your residence (or nationality) do not suit you, the obvious option open to all EU citizens[9]—just as to their U.S. counterparts—is to choose a different state of residence, where the laws are less restrictive.

An exit option provided by federalism can teach us a great deal about the future of protecting the "freedom of intimate association"[10] in the EU. While the presence of an exit option is indisputably inherent in the nature of virtually any federal system, the legal specificity of the supranational community in Europe[11] with its goal-oriented reading of competences and the growing awareness of possible implications of its actions for human rights protection[12] potentially opens a way also to an "entry option" that would oblige member states to recognize less

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5. Seith F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI., 66, 72–73 (2001).

6. Karst, *supra* note 1, at 624–25.

7. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

8. *E.g.*, Kreimer, *supra* note 5, at 72–73. *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970) (discussing the exit option concept).

9. On the concept of European Union ("EU" or "Union") citizenship, see, *inter alia*, Dimitry Kochenov, Ius Tractum *of Many Faces: European Citizenship and a Difficult Relationship Between Status and Rights*, 15 COLUM. J. EUR. L. 169 (2009), and the literature cited therein.

10. Karst, *supra* note 1, at 625.

11. For analysis, see Alexander Somek, *On Supranationality*, 5 EUR. INTEGRATION ONLINE PAPERS 1 (2001), http://eiop.or.at/eiop/pdf/2001-003.pdf.

12. On the protection of human rights in the EU context, see Bruno de Witte, *The Past and Future of the European Court of Justice in the Protection of Human Rights*, *in* THE EU AND HUMAN RIGHTS 859 (Philip Alston ed., 1999); *see also* Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi* (Jean Monnet Ctr. for Int'l & Regional Econ. Law & Justice, Jean Monnet Working Paper No. 01/09, 2009), *available at* http://centers.law.nyu.edu/jeanmonnet/papers/09/090101.pdf (describing the relationship between the EU and the international legal order after the European Court of Justice ("ECJ") delivered the *Kadi* opinion).

restrictive or simply different moral choices made by other states. Outside of ideologically-charged areas of sexuality, gender identity, and family law, such an "entry option" is already a day-to-day reality in the EU. Home-country rule in the free movement of services law exemplifies the case in point.[13]

Besides the law of the EU and the member states, the law of the Strasbourg human rights protection system is also capable of influencing the legal regime governing EU member states' deviations from the ideal of unrestricted freedom of intimate association in Europe.[14] Consequently, analyzing the member states' capacity to regulate, it is necessary to keep in mind three important vectors of influence which can either fine-tune or even overrule the regulation in question: other member states, the EU, and the Council of Europe ("CoE").

In the words of Karst, "[s]ome of the primary values of intimate association depend on th[e] sense of collectivity, the shared sense that 'we' exist as something beyond 'you' and 'me.'"[15] The defense of these values comes down to upholding the right to love and consequently, to happiness. Given its overwhelming significance in the lives of virtually all human beings, the freedom of intimate association, although unwritten, is truly fundamental. As such, "[t]he freedom to choose our intimates and to govern our day-to-day relations with them is more than an opportunity for the pleasures of self-expression; it is the foundation for the one responsibility among all others that most clearly defines our humanity."[16]

This freedom provides an ideal testing ground for the level of liberty in any constitutional system, national or supranational. The scope of this freedom is very broad, potentially including a huge variety of moral choices, such as the accessibility of divorce, the right to have children (or not), intimate friendships, adoption, abortion, cohabitation etc. The gay rights perspective embraced herewith is thus just an illustration, opening the way to the analysis in the context of other fields.

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13. As articulated in Council Directive No. 2006/123/EC, 2006 O.J. L 376/36.

14. On the relations between the EU and the Council of Europe, see Tony Joris & Jan Vandenberghe, *The Council of Europe and the European Union: Natural Partners or Uneasy Bed-Fellows?*, 15 COLUM. J. EUR. L. 1 (2008–2009).

15. Karst, *supra* note 1, at 629.

16. *Id.* at 692.

The current climate of rising tolerance and acceptance of same-sex marriages[17] and unions,[18] as well as the growth in importance of the principle of nondiscrimination did not result, as of yet, in equal rights for homosexual citizens of the EU.[19] To be fair, Europe is not a unique negative example in this regard, as gay rights remain severely restricted on both sides of the Atlantic and elsewhere in the world.[20] Different rhetorical constructs and "moral" justifications are cited in support of the lasting injustice.[21] Adopting Koppelman's perspective on sexual orientation discrimination as sex discrimination[22] and building on the legal edifice of the internal market and, in particular, EU citizenship, this Article argues that the EU already possesses all

17. For an overview in the U.S. context, see Craig W. Christensen, *In for Marriage? On Securing Gay and Lesbian Family Values by "Simulacrum of Marriage,"* 66 FORDHAM L. REV. 1699, 1700 (1998).

18. *See* YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES (2002) (analyzing the historical path of increasing acceptance and legal rights for same-sex couples); *see also* Kees Waaldijk, *Same-Sex Partnership, International Protection, in* MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2009) (providing an overview of same-sex partnership law though the world). For a country-by-country list of European rules related to same-sex marriage and partnerships, see ILGA-Europe, Marriage and Partnership Rights for Same-Sex Partners: Country-by-Country, http://www.ilga-europe.org/europe/issues/lgbt_families/marriage_and_partnership_rights_for_same_sex_partners_country_by_country (last visited Nov. 17, 2009).

19. *See* Kochenov, *supra* note 9, at 218; *see also* Dimitry Kochenov, *Gay Rights in the EU: A Long Way Forward for the Union of 27*, 3 CROATIAN Y.B. EUR. L. & POL'Y 469 (2007) [hereinafter Kochenov, *Gay Rights in the EU*] (discussing the evolution of gay rights in the EU and providing a sketch of necessary developments to expand those rights).

20. *See* Waaldijk, *supra* note 18. The EU's attempts to promote gay rights protection in the countries of Central and Eastern Europe during the pre-accession process that led those countries to full membership of the EU were not very successful either. *See* Dimitry Kochenov, *Democracy and Human Rights—Not for Gay People?: EU Eastern Enlargement and Its Impact on the Protection of the Rights of Sexual Minorities*, 13 TEX. WESLEYAN L. REV. 459 (2007); *see also* Travis J. Langenkamp, *Finding Fundamental Fairness: Protecting the Rights of Homosexuals Under European Union Accession Law*, 4 SAN DIEGO INT'L L.J. 437, 459–60 (2003) (discussing the restriction of rights in Bulgaria, Cyprus, Estonia, Hungary, Lithuania, and Romania).

21. *See, e.g.*, *Spain Approves Gay Marriage Bill*, BBC NEWS, Oct. 1, 2004, http://news.bbc.co.uk/2/hi/europe/3706414.stm (addressing the Catholic Church's position that gay marriage is morally wrong and that marriage is by nature a heterosexual institution); *see also* Charles J. Russo, *Same-Sex Marriage and Public School Curricula: Preserving Parental Rights to Direct the Education of Their Children*, 32 U. DAYTON L. REV. 361 (2007). *But see* Victor C. Romero, *An "Other" Christian Perspective on* Lawrence v. Texas, 45 J. CATH. LEGAL STUD. 115 (2006).

22. *See infra* Part II.

the necessary tools to deal with discrimination that gay citizens suffer from in the most constructive way.

The focus lies, in particular, on the likely developments in the EU that are bound to diminish the member states' ability to undermine free movement of citizens in the Union by discriminating against EU citizens on the basis of sex, which is currently the norm in a situation when the member states are seemingly free not to recognise the same-sex marriages and unions legally concluded outside of their borders even in situations where EU law is involved.

When moral exceptions are not available to the member states to deviate from the free movement of persons principle of EU law[23] and since public policy exceptions[24] should be narrowly construed and have to be able to withstand strict levels of scrutiny with regard to the soundness of their justifications, the member states are bound to lose absolute control over the notion of "family" where EU law is involved.[25] Thus, besides an exit option

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23. Article 45(3)–(4) TFEU ("Treaty on the Functioning of the European Union") (article 39(3)–(4) EC ("Treaty Establishing the European Community")) is mute about such ground. Consolidated Version of the Treaty on the Functioning of the European Union art. 45, 2008 O.J. C 115/47, at 66 [hereinafter TFEU Treaty]; Consolidated Version of the Treaty Establishing the European Community art. 39, 2006 O.J. C 321 E/37, at 51 [hereinafter EC Treaty].

All references in this Article to the to the Treaty Establishing the European Community ("EC Treaty") and Treaty on the European Union ("TEU") use a parallel citation format and provide numbering both before and after the entry into force of the Treaty of Lisbon. While the Treaty of Lisbon, Dec. 13, 2007, 2007 O.J. C 306/1, partially renamed the treaties and renumbered all of their provisions entirely, the text of the articles referred to in the published form of the treaties is largely left unchanged. The EC Treaty was renamed the Treaty on the Functioning of the European Union ("TFEU"). While the TEU has kept its original name, for the purpose of clarity this Article will refer to the original version as "TEU pre-Lisbon" and the updated version as "TEU post-Lisbon." *See generally* Consolidated Version of the Treaty on European Union, 2008 O.J. C 115/13 [hereinafter TEU post-Lisbon]; Consolidated Version of the Treaty on European Union, 2006 O.J. C 321 E/5 [hereinafter TEU pre-Lisbon]. The consolidated version of the treaties with the new numbering is available at http://eur-lex.europa.eu/en/treaties/index.htm. The new, consolidated version of the treaties entered into force on December 1, 2009, and contains a table of equivalences between pre-Lisbon and post-Lisbon numberings.

24. *See, e.g.*, Orfanopoulos & Oliveri v. Land Baden-Württemberg, Joined Cases C-482 & C-493/01, [2004] E.C.R. 5257; Commission v. Belgium, Case 149/79, [1981] E.C.R. 3881.

25. *See* Eugenia Caracciolo di Torella & Emily Reid, *The Changing Shape of the "European Family" and Fundamental Rights*, 27 EUR. L. REV. 80, 84 (2002). *See generally* Eugenia Caracciolo di Torella, *Under Construction: EU Family Law*, 29 EUR. L. REV. 32

which the European legal order already provides, a rudimentary "entry option" is to be articulated, as the homophobic member states will need to come up with justifications of their limitations of the freedom of intimate association and will be failing to prove, compellingly, the soundness of their policy. While, given the logic of wholly internal situations that can still limit the rights of EU citizens,[26] the member states cannot be required to change their own family law, it is clear that their ability to deviate from the recognition of less restrictive notions of family proliferating from other member states will become negligible within the ever growing scope *ratione materiae*[27] of EU law.[28]

The argument will proceed as follows. Following Part I, a short outline of the importance of federalism for the preservation of liberty, Part II will build on Koppelman's analysis of the nature of sexual orientation discrimination as sex discrimination[29]. Part III will apply the reasoning of the first two

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(2004) (discussing the extent to which the EU has developed a coherent body of principles on family relation despite the absence of treaty provisions for this area).

26. The case law on reverse discrimination in the area of free movement is abundant. *See, e.g.*, Morson & Jhanjan v. Netherlands, Joined Cases 35 & 36/82, [1982] E.C.R. 3723. For the fundamental critical analysis of the wholly-internal situations in EU law of free movement of persons, see Alina Tryfonidou, *Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe*, 35 LEGAL ISSUES OF ECON. INTEGRATION 43 (2008). *See also* Alina Tryfonidou, REVERSE DISCRIMINATION IN EC LAW (2009); Niamh Nic Shuibhne, *Free Movement of Persons and the Wholly Internal Rule: Time to Move on?*, 39 COMMON MKT. L. REV. 731 (2002).

27. *See* Schempp v. Finanzamt München V, Case C-403/03, [2005] E.C.R. 6421, ¶ 22 ("[T]he situation of a national of a Member State who . . . has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation."); Carpenter v. Sec'y of State for the Home Dep't, Case C-60/00, [2002] E.C.R. 627 (explaining that the jurisdiction of the ECJ includes a member state's refusal to grant a right of residence to a third-country national married to an EU citizen, when the EU citizen resided in his country of nationality and regularly provided services in other member states).

28. As far as the outcome of the argument of this Article is concerned, it will coincide with Allison O'Neill's argument that the formulation by the ECJ of the requirement for the recognition of same-sex marriages all over the Union is a necessary step in application of the treaty's free movement provisions. *See* Allison R. O'Neill, *Recognition of Same-Sex Marriage in the European Community: The European Court of Justice's Ability to Dictate Social Policy*, 37 CORNELL INT'L L.J. 199, 201 (2004). My reasoning, however, differs significantly.

29. For a compelling analysis of this argument, see Koppelman, *supra* note 7. *See also* Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 631–650 (1992); Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 154–64 (1988); Sylvia Law, *Homosexuality and the Social Meaning of*

Parts to the legal context of European integration, looking both at its potential and the limitations which its practical use in the European context is likely to face. Karst's approach to the necessity for states to justify the legislation that follows the moral choices of the majority impeding the freedom of intimate association will become a starting point for the assessment contained in this Part. The Part then outlines the near-future of EU citizens' free movement law, which is bound to include the notion of "family" in order to keep up with the promise of the gender-blind wording of article 21(1) TFEU ("Treaty on the Functioning of the European Union") (article 18(1) EC ("Treaty Establishing the European Community")).[30] An optimistic conclusion will summarise the main arguments once again.

Both entry and exit options offered to gay citizens by European federalism contribute to the liberty of EU citizens and also participate in the slow, general evolution of the nature of intimate association we have witnessed during the last 150 years. It partly has to do with the changing function of marriage in contemporary, liberal societies.

Historically, marriage played an important ideological role, disadvantaging and subordinating women.[31] As societies change, it becomes clear that the niche previously occupied by "family" as a legal and social construct is on the verge of disappearing; "for all relevant and appropriate societal purposes we do not need marriage, *per se*, at all."[32] The role of marriage in legitimizing children, cohabitation, or sexual intimacy–among numerous others–has enormously diminished, directly affecting mutual obligations of *all* individuals and overwhelmingly demonstrating

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Gender, WIS. L. REV. 187, 188–96 (1988). Koppelman restated his argument in a number of publications. *See, e.g.*, Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519 (2001) [hereinafter Koppelman, *Defending*].

30. "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect." TFEU Treaty, *supra* note 23, art. 21(1), 2008 O.J. C. 115, at 57; EC Treaty, *supra* note 23, art. 18(1), 2006 O.J. C 321 E, at 49.

31. *See* Martha Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181 (1995) (arguing that continued adherence to an unrealistic and unrepresentative set of assumptions about family affects the way U.S. citizens perceive and attempt to solve persistent problems of poverty and social welfare).

32. Martha Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239, 245 (2001).

the hollowness of the elevated status which marriage used to enjoy "in the hierarchy of models of human intimacy."[33] Moreover, it is clear that today a "[f]ormal associational status plainly is neither a necessary nor a sufficient condition for the realization of the values of intimate association."[34] Yet, it would be unwise to announce the death of marriage as a legal status and social institution; it is here to stay.

The fight for same-sex marriage recognition could be perceived as strange,[35] if not the likely importance of this institution also in the future. The main reasons behind the fight for same-sex marriage are summarized excellently by Franke: "the refusal to distribute this public benefit and status to same-sex couples is motivated by and perpetuates both heterosexism and homophobia."[36] Moreover, once a link between marriage and citizenship is explored, it becomes clear that denying the right to marry a partner of one's choice can also be viewed as "a "cultural message that certain groups are not suited for full citizenship."[37] Consequently, the potential contribution of the EU federalism to the destruction of the illiberal, prejudicial approach to marriage and gay rights is worth exploring, the fall of marriage notwithstanding.

I. *FEDERALISM, LIBERTY, AND THE EUROPEAN UNION*

Federalism contributes to freedom in at least two ways: by providing a minimal rights denominator at the federal level which is to be followed by all the states and—in the issues where such denominator is either not available, or not sufficient—by

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33. R.A. Lenhardt et al., *Forty Years of* Loving*: Confronting Issues of Race, Sexuality, and the Family in the Twenty-first Century*, 76 FORDHAM L. REV. 2669, 2673 (2008).

34. Karst, *supra* note 1, at 647.

35. For the argument that marriage is a "problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism," see Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalising Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1536 (1993).

36. Katherine M. Franke, *Longing for* Loving, 76 FORDHAM L. REV. 2685, 2687 (2008).

37. Angela P. Harris, Loving *Before and After the Law*, 76 FORDHAM L. REV. 2821, 2823 (2008) (exploring the link between the right to marry and full citizenship). This is so because "the legitimacy and respectability that law confers on marital couples reinforces the illegitimacy and deviance of those whose sexual, intimate, and affective commitments, if not merely contacts, lie in nonmarital contexts." Franke, *supra* note 36, at 2689. See also the literature cited in *id.*

providing an exit option for those who are unhappy in their native state.

The CoE can be viewed in this context as the provider of the most general common denominator of rights available in Europe, while the EU is the guarantor of the exit option that it granted to its citizens.[38] Wherever you move in the EU, you are always covered by important CoE rules,[39] including, especially, the European Convention on Human Rights ("ECHR")[40] as interpreted by the European Court of Human Rights in Strasbourg.[41] All in all, however, the exit option becomes the

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38. TFEU, *supra* note 23, art. 21, 2008 O.J. C 115, at 57; EC Treaty, *supra* note 23, art. 18, 2006 O.J. C 321 E, at 49.

39. This is so because all the member states of the EU are also members of the Council of Europe ("CoE"). The Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") also impacts the EU. TEU post-Lisbon, *supra* note 23, art. 6(2), 2008 O.J. C 115, at 19; TEU pre-Lisbon, *supra* note 23, art. 6(2), 2006 O.J. C 321 E, at 12; *see also* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, *amended by* Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, Restructuring the Control Machinery Established Thereby, May 11, 1994, 2061 A-2889 U.N.T.S. 12 [hereinafter ECHR]. According to the case law of the ECJ, the ECHR possesses "special significance" in the EU legal system, serving as a source of legal principles for Union legal order. *See, e.g.*, Kremzow v. Austria, Case C-299/95, [1997] E.C.R. 2629, ¶ 14; Elliniki Radiophonia Tiléorassi AE v. Pliroforissis, Case C-260/89, [1991] E.C.R. 2925, ¶ 41; *see also* Coote v. Granada Hospitality Ltd., Case C-185/97, [1998] E.C.R. 5199, ¶¶ 21–23; Johnston v. Chief Constable of the Royal Ulster Constabulary, Case 222/84, [1986] E.C.R. 1651, ¶ 18. Notwithstanding its importance as a source of principles, the ECHR does not apply within the EU legal system directly. *See* D.J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 28–29 (2d ed. 2009). The Treaty of Lisbon amendments allow the Union to change the current status quo by becoming a party to the ECHR. *See* TEU post-Lisbon, *supra* note 23, art. 6(2), 2008 O.J. C 115, at 19; Treaty of Lisbon, Protocol No. 8, Dec. 13, 2007, 2007 O.J. C 306/1.

40. ECHR, *supra* note 39.

41. In the specific context of gay rights protection, the European Court of Human Rights has taken many measures to promote crucial rights in Europe, ranging from decriminalisation of consensual homosexual acts, *see, e.g.*, Modinos v. Cyprus, 259 Eur. Ct. H.R. 1 (1993); Norris v. Ireland, 142 Eur. Ct. H.R. 1 (1988); Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. 1 (1981), equalisation of the minimal ages of consent of homosexual and heterosexual acts, *see, e.g.*, Sutherland v. United Kingdom, App. No. 25186/94, 24 Eur. Comm'n. H.R. Dec. & Rep. 182 (1997), and the prohibition of discrimination on the basis of sexual orientation in the military, *see* Lustig-Prean v. United Kingdom, 31 Eur. Ct. H.R. 601 (2001), to adoption and child custody rights of homosexuals, *see* E.B. v. France, 47 Eur. Ct. H.R. 509, 509 (2008); Salgueiro da Silva Mouta v. Portugal, 31 Eur. Ct. H.R. 1055 (2001), nondiscrimination between unmarried homosexual and heterosexual couples, *see* Karner v. Austria, 38 Eur. Ct. H.R. 528, 530, 537 (2003), and the protection of their freedom of association, *see* Byrzykowski v. Poland, 46 Eur. Ct. H.R. 675 (2007).

most important one in terms of empowering EU citizens, since the EU, by its very nature, is not empowered to act in the majority of fields,[42] and given that rules of the CoE are just as basic as they are important.

It is clear that when a federal system is integrated to such an extent that the local differences are negligible, the ability of such a system to enhance liberty is likely to be negligible too. Indeed, "removing borders loses much of its value if what is on the other side is the same."[43] This point can also be proven with a simple use of numbers:

> For example, assume that there are only two states, with equal populations of 100 each. Assume further that 70 percent of State A, and only 40 percent of State B, wish to outlaw smoking in public buildings. The others are opposed. If the decision is made on a national basis by a majority rule, 110 people will be pleased, and 90 displeased. If a separate decision is made by majorities in each state, 130 will be pleased and only 70 displeased. The level of satisfaction will be still greater if the smokers in State A decide to move to State B, and some anti-smokers in State B decide to move to State A.[44]

Thus when the political or legal regimes across an internal border differ, federalism turns into an asset for the promotion of liberty. Such liberty is not an apodictic ideal of the totalitarian states, but is rooted in the tandem of diversity and mobility. Extreme interpretations of this facet of federalism give the exit option more importance than political participation: "a sufficiently decentralized regime with full mobility could perfectly satisfy each person's preferences even with no voting at all."[45] Practically, individual freedoms of citizens moving freely

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42. TEU Post-Lisbon, *supra* note 23, art. 5(2), 2008 O.J. C 115, at 18 ("[T]he Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein."); EC Treaty, *supra* note 23, art. 5, 2006 O.J. C 321 E, at 46 (The Union can only act "within the limits of the powers conferred upon it by [the EC Treaty] and of the objectives assigned to it therein.").

43. GARETH T. DAVIES, A TIME TO MOURN—HOW I LEARNED TO STOP WORRYING AND QUITE LIKE THE EUROPEAN UNION 18 (2008).

44. Michael McConnel, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1494 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)).

45. *Id.* at 1494 n.37.

are potentially amplified since "state-by-state variation leaves open the possibility to each individual of choosing to avoid repression by leaving the repressive jurisdiction."[46] This is an effective way to deal with what Madison saw as the greatest potential threat to individual liberty, the tyranny of the majority.[47] Although not a panacea, the exit option provided by federalism should not be underestimated.

The ability of the EU to advance liberty through federalism is extremely rich, as the member states vary greatly. Only a marginal part of legal regulation has been harmonised, allowing citizens to benefit from the existing variations from one member state to another. These variations are particularly important with regard to the positions that the member states take on moral issues, such as abortion, same-sex marriage, divorce, and the like. The citizens thus have infinitely more possibilities to choose the legal regime that suits them best by moving from one member state to another, compared with unitary systems, whereby moving one can find little more than a change in weather. The situation of EU citizens thus approaches that of their U.S. counterparts. "Today, the lesbian who finds herself in Utah, like the gun lover who lives in Washington, D.C., and the gambler in Pennsylvania, need only cross the state border to be free of constraining rules."[48] Similarly, in Europe a Latvian of Russian descent[49] can move to Spain, just like a Greek gay couple can, trading the lack of acceptance to the possibility of normal life.

Besides an assumption that the states are self-governing and that there are important differences between them in terms of regulation of some issues of potential moral disagreement, in order to provide citizens with an "exit option" able to have far-reaching effects on their freedom, three features of the federal system that would limit the states themselves are absolutely

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46. Kreimer, *supra* note 5, at 71.

47. *See* THE FEDERALIST NO. 10 (James Madison) (introducing the concept of "tyranny of the majority").

48. Kreimer, *supra* note 5, at 72.

49. On the Russian minority in Latvia, see Gulara Guliyeva, *Lost in Transition: Russian-Speaking Non-Citizens in Latvia and the Protection of Minority Rights in the European Union*, 33 EUR. L. REV. 843 (2008). *See generally* Dimitry Kochenov, *A Summary of Contradictions: An Outline of the EU's Main Internal and External Approaches to Ethnic Minority Protection*, 31 B.C. INT'L & COMP. L. REV. 1 (2008) (discussing ethnic minority protection in the EU).

crucial. Agreeing with Kreimer, these should include the free movement right granted to citizens, equality between newcomers and native citizens in the new state of residence, and territorially-limited state jurisdictions.[50] Only when all the three elements are in place is it possible to talk about the exit option within the federal systems that would provide an opportunity to safeguard liberty for the citizens. All the three are now found both in the United States and in the EU.

In the United States, freedom of travel,[51] which includes the freedom from being punished in any way whatsoever for leaving one's native state,[52] and equality among citizens[53] are core elements of the constitutional system. The same applies to the third component outlined: the Supreme Court is clear about the fact that "[a] State does not acquire power of supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State . . . ."[54]

Although the EU citizenship is merely an *ius tractum* status dependent on the nationalities of the member states,[55] it is nevertheless a status grounded in EU law, bringing with it a set of rights specific to the EU legal order.[56] The most important of these are nondiscrimination on the basis of nationality[57]—in the

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50. Kreimer, *supra* note 5, at 73.

51. *See* Edwards v. California, 314 U.S. 160, 178 (1941). The right of interstate travel is viewed as a freedom that "occupies a position fundamental to the concept of [the] Federal Union." United States v. Guest, 383 U.S. 745, 757 (1966); *see also* Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 254–55 (1974) (addressing freedom of travel within the context of federalism); Dunn v. Blumstein, 405 U.S. 330, 338 (1972) (same); Griffin v. Breckenridge, 403 U.S. 88, 106 (1971) (same).

52. *See* Crandall v. Nevada, 73 U.S. 35, 48–49 (1897) (discussing the constitutionality of taxing citizens of Nevada for departing from the state); *see also* Shapiro v. Thompson, 394 U.S. 618, 627 (1969) (concerning durational residency requirements for welfare entitlements), *overruled in part by* Edelman v. Jordan, 415 U.S. 651 (1974).

53. *See* U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States."); *see also* Saenz v. Roe, 526 U.S. 489, 500–03 (1999) (discussing the effects of the Privileges and Immunities Clause on newly arrived citizens in a state).

54. Bigelow v. Virginia, 421 U.S. 809, 824 (1975).

55. *See* Kochenov, *supra* note 9, at 181.

56. *See, e.g., id.* at 193–206.

57. *See generally* GARETH DAVIES, NATIONALITY DISCRIMINATION IN THE EUROPEAN INTERNAL MARKET (2003) (highlighting the relationship between the principle of nondiscrimination based on nationality and the right to free movement); Astrid Epiney,

words of Davies, de facto "abolishing" the nationalities of the member states[58]—and free movement.[59] The latter does not only include a right to travel around the EU, but also a right to settle anywhere you like with your family, take up employment,[60] and to be treated exactly the same way as the natives of your new member state of residence are treated.[61] Ability to change one's member state of residence, and nondiscrimination on the basis of nationality, are thus the core rights of citizenship stemming from the EU legal order. Additionally, the member states are prohibited from creating obstacles to free movement of citizens that would discourage their own nationals to move to other member states.[62] The first two of Kreimer's components of federalism necessary to enable effective exit option are thus in place. The third is part of the EU system too: the member states are *Herren der Verträge*, sovereign states also under international law,[63] so their jurisdiction is most often limited to their own territory.[64] Applied to the situation of the gay communities in the member states the "exit option" of European federalism already provides a viable alternative to life in potentially homophobic societies, such as Poland, Ireland, or Latvia, as moving to the Netherlands or Sweden is a protected EU citizenship right.

The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship, 13 EUR. L.J. 611, 612 n.4 (2007) (listing the ECJ's most recent and relevant case law for the interpretation of article 12 of the EC Treaty (article 18 of TFEU)).

58. Gareth Davies, *"Any Place I Hang My Hat?" or: Residence Is the New Nationality*, 11 EUR. L.J. 43, 55 (2005).

59. TFEU, *supra* note 23, art. 21, 2008 O.J. C 115, at 57; EC Treaty, *supra* note 23, art. 18, 2006 O.J. C 321 E, at 49.

60. *See* Kochenov, *supra* note 9, at 183.

61. *See* Council Directive No. 2004/38, art. 24, 2004 O.J. L 158/77, at 112.

62. *See* Francis G. Jacobs, *Citizenship of the European Union—A Legal Analysis*, 13 EUR. L.J. 591, 596–98 (2007); *see also infra* note 76 and accompanying text.

63. Sovereignty of the member states and supranationality of the Union produce an interesting mix. *See* Dimitry Kochenov, *The Case of the EC: Peaceful Coexistence of an Ever Powerful Community and Sovereign Member States?*, *in* L'UNION EUROPÉENNE ET LA GOUVERNANCE 243 (Francis Snyder ed., 2003) (considering member state sovereignty in the European Community ("EC")).

64. There exist examples to the contrary, which are not easily accepted by the member states. *See, e.g.*, Massimo Fichera, *The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?*, 15 EUR. L.J. 70 (2009) (discussing the saga of the European arrest warrant and the tension between state sovereignty and the power of European institutions).

It is clear that, as Kreimer also underscores, "the exit option is no panacea."[65] A guarantee of a viable degree of legal unity of the Union is indispensable: member states cannot specialize in accepting only citizens adhering to certain ideologies and rules of morality, which can potentially result in the fragmentation of the Union.[66] Moreover, moving across internal borders can often be difficult. In the EU, where citizenship rights are usually connected with the personal and financial situation of the citizen concerned,[67] not merely the status of citizenship, it can even be impossible in some cases. In one example, EU citizens without work or independent means are not entitled to the enjoyment of a full-fledged free movement right and can only stay in a member state other than their own for a period of three months.[68] Notwithstanding the case law of the European Court of Justice ("ECJ"), narrowing down such limitations of the free movement right,[69] as the law stands at the moment, not all EU citizens can actually benefit from the right which article 21 TFEU (article 18 EC) provides.

Given that the "exit option" is unable to solve all the problems and is even not always available in practice, a certain degree of legal convergence with regard to the most important issues, particularly related to human rights, is needed. Such

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65. Kreimer, *supra* note 5, at 72.

66. This loosely compares to the U.S. principle that the states are not free to choose their citizens. Saenz v. Roe, 526 U.S. 489, 510–11 (1999) ("The States, however, do not have any right to select their citizens.").

67. *See* Kochenov, *supra* note 9, at 234–37 (listing the factors affecting the enjoyment of EU citizenship rights).

68. Workers, able to travel around the EU and stay in any of the member states as long as it pleases them, enjoy much better protection than the European citizens experiencing health problems and economic hardship, because all persons not falling within the EU definition of a worker should, according to the general rule, be covered by sickness insurance and have sufficient resources in order to benefit from the right "of residence on the territory of another [member state] for a period of longer than three months." Council Directive No. 2004/38, art. 7(1), 2004 O.J. L 158/77, at 93. Job-seekers can stay longer. *See* The Queen v. Immigration Appeal Tribunal *ex parte* Antonissen, Case C-292/89, [1991] E.C.R. 741, ¶ 21 (holding that a national of one member state who proves that he is "continuing to seek employment and that he has genuine chances of being engaged" in another member state cannot be forced to leave).

69. *See, e.g.*, *In re* Bidar, Case C-209/03, [2005] E.C.R. 2119; Trojani v. Centre public d'aide sociale de Bruxelles, Case C-456/02, [2004] E.C.R. 7573; H. de Waele, *Europees burgerschap en studiefinanciering: Nieuwe rechten, nieuwe beperkingen na het arrest* Bidar, 2005(6) NEDERLANDS TIJDSCHRIFT VOOR EUROPEES RECHT 122 (2005).

convergence can theoretically come in three ways: via full harmonization, via the introduction of European terminology to be applied within the material scope of EU law, or via the federal requirement of recognition of national rules even outside the member states in which such rules were initially adopted. In all these cases, deviations from the rules are to be strictly checked against the principles of federal (EU) law. Yet another way stems directly from the availability of the pan-European human rights minimum introduced by the CoE, reinforcing the overall framework of human rights protection.

While harmonization is always an option,[70] mutual recognition enforced by EU institutions can be more attractive in the European legal setting. Following several unsuccessful attempts to reform the treaties,[71] it becomes clear that the introduction of new areas of harmonization, especially dealing with the issues of deep moral disagreement between the member states, is highly unlikely at the moment. Consequently, the treaties currently in force need to be optimally used in order to bring about change without full harmonisation. This can be done using two avenues already mentioned: either via the formulation of European legal notions for some ambiguous terms to be used

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70. If needed, the treaties can be changed if they do not permit such harmonization. *See* TEU post-Lisbon, *supra* note 23, art. 48, 2008 O.J. C 115, at 41–43; TEU pre-Lisbon, *supra* note 23, art. 48, 2006 O.J. C 321 E, at 34 (permitting member states to amend treaties). This has happened on numerous occasions. *See, e.g.*, Treaty of Amsterdam, art. 2(7), 1997 O.J. C 340/1, at 26 (amending the TEU, and authorizing member states to "combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation").

71. *See, e.g.*, KRISTIN ARCHICK, CONG. RESEARCH SERV., THE EUROPEAN UNION'S REFORM PROCESS: THE LISBON TREATY (2008), *available at* http://italy.usembassy.gov/pdf/other/RS21618.pdf (explaining how Irish voters rejected the Lisbon Treaty, which sought to reform the EU's governing institutions); Thomas Christiansen, *The EU Treaty Reform Process Since 2000: The Highs and Lows of Constitutionalising the European Union*, EIPASCOPE (Eur. Inst. of Pub. Admin., Maastricht), 2008 (No. 1), at 39. *But see* Press Release, Swedish Presidency of the European Union, Final Piece of the Puzzle in Place (Nov. 3, 2009), http://www.se2009.eu/en/meetings_news/2009/11/3/final_piece_of_the_puzzle_in_place (announcing that the Lisbon Treaty will enter into force on December 1, 2009). For an analysis of the drafting process for the Treaty Establishing a Constitution for Europe and subsequent developments, see GENESIS AND DESTINY OF THE EUROPEAN CONSTITUTION (Giuliano Amato et al. eds., 2007).

within the scope *ratione materiae* of EU law (i.e. "family"),[72] or through the formulation of the principle of unconditional recognition of the national understanding of such terms even outside the borders of the member states where they were formulated.

The ECJ is in the position to choose either way. Consequently, the EU legal system is likely to offer more than a simple "exit option", but also what will be called an "entry option", i.e., a legal possibility to enter a member state other than your own and carry the rules of your old member state with you. The "entry option" thus constitutes a clear deviation from Kreimer's third principle, limiting the territorial jurisdictions of the member states. This is so, since a number of EU citizens who exercised their rights to move to another member state can be better off in their new member state of residence because the law of the first member state would still apply to them.[73] Such situations, when mandated by EU law would be outside the realm of private law: the functioning of the "entry option" is a direct consequence of the way that EU law functions vis-à-vis national law of the member states. This entry option is the emanation of the specific nature of European federalism.

The most important difference between EU and U.S. federalism with implications for the freedom of intimate association is the goal-oriented nature of EU competences,[74] disallowing the member states from putting up barriers on the way of free movement of persons. Indeed, in its importance, free movement in Europe can be compared with freedom of speech in the U.S. hierarchy of constitutional values. Consequently, the obligations lying on the member states to accept the nationals of other member states should they wish to move in and stay potentially go further than the U.S. example, as EU law working

72. The ECJ has a rich history of articulating EU legal terminology—for example, "worker" or "the court or tribunal of the Member States"—much broader than the national definitions available in the legal systems of the member states.

73. Such situations can be criticised as undermining the principle of equality among European citizens. *See, e.g.*, Gareth Davies, *Services, Citizenship and the Country of Origin Principle* (Europa Institute, Mitchell Working Paper Series 2/2007); Tryfonidou, *supra* note 26, at 43; Kochenov, *supra* note 9, at 237.

74. For a compelling analysis of EU competences, see Armin von Bogdandy & Jürgen Bast, *The European Union's Vertical Order of Competences: The Current Law and Proposals for Its Reform*, 39 COMMON MKT. L. REV. 227 (2002).

through the principles of supremacy and direct effect (where applicable) is likely to overrule any national law able to have a negative impact on the exercise of the free movement right. In a way, this is comparable to the U.S. principle that the states are not able "to select their citizens,"[75] but goes somewhat further, as any law, even potentially not discriminating on the basis of nationality, can be struck down if it puts a burden on the exercise of free movement rights by EU citizens.[76] So the potential "entry option" acquires its shape.

II. *SEXUAL ORIENTATION DISCRIMINATION OR SEX DISCRIMINATION?*

Sex discrimination is usually easy to spot, as it burdens one of the sexes. If John is refused enrolment at a nursery school or if Mary earns less than Edward both doing the same job, direct sex discrimination is obvious. With gay persons, sex discrimination is seemingly not as straightforward, which is probably why a different prohibited ground of discrimination is often preferred in such cases: discrimination on the basis of sexual orientation. At a closer look, however, it is apparent that often very simple sex discrimination gets rebranded as sexual orientation discrimination once a person belonging to sexual minorities is involved.

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75. Saenz v. Roe, 526 U.S. 489, 511 (1999).

76. *See, e.g.*, Morgan v. Köln & Bucher v. Düren, Joined Cases C-11 & C-12/06, [2007] E.C.R. 9161 (determining that a student studying in another member state is entitled to the same benefits and rights provided by that member state to its own citizens); Schwarz v. Gladbach, Case C-76/05, [2007] E.C.R. 6849 (striking down legislation that prevents citizens of one member state from receiving a tax deduction for tuition paid to school in another member state); Tas-Hagen v. Raadskamer WUBO van de Pensioen- en Uitkeringsraad, Case C-192/05, [2006] E.C.R. 10451 (concluding that a member state cannot withhold benefits from its citizens despite the citizen having residence in another member state at the time that the benefits application was made). The main idea of this groundbreaking case law is summarised by Advocate General Jacobs in *Pusa* with great clarity. Opinion of Advocate General Jacobs, Pusa v. Vakuutusyhtiö, Case C-224/02, [2004] E.C.R. 5763, ¶ 22 ("[S]ubject to the limits set out in Article 18 [EC; article 21 TFEU] itself, no unjustified burden may be imposed on any citizen of the European Union seeking to exercise the right to freedom of movement or residence. Provided that such a burden can be shown, it is immaterial whether the burden affects nationals of other Member States more significantly than those of the State imposing it."); *see also* Jacobs, *supra* note 62, at 596–98; Editorial, *Two-Speed European Citizenship? Can the Lisbon Treaty Help Close the Gap?*, 45 COMMON MKT. L. REV. 1, 1–2 (2008).

The exact type of discrimination in question invoked in each concrete case is of overwhelming importance, as the level to which the law tolerates discrimination on different grounds can also differ (and it almost always does). So while sex discrimination is virtually prohibited in the EU,[77] discrimination on the basis of sexual orientation is a rather new addition to the treaties. This ground was mentioned for the first time only in article 19 TFEU (article 13 EC), introduced by the Treaty of Amsterdam.[78] In other words, before the Amsterdam amendment and the passage of the relevant directive, gay people in the EU did not have a specific prohibited ground of discrimination to rely on,[79] should discrimination occur.[80] Even now, with discrimination on the basis of sexual orientation outlawed by the treaties and secondary legislation,[81] the prohibition of such

77. Nondiscrimination on the basis of sex has been recognised by the ECJ as one of the fundamental principles of EU law. *See* Defrenne v. Société anonyme belge de navigation aérienne Sabena, Case 43/75, [1976] E.C.R. 455, ¶ 12 (stating that the "principle of equal pay forms part of the foundations of the Community" and there should be equal pay for equal work with no distinction based on sex). In *Deutsche Telekom AG v. Schröder,* the court held that the economic aims of the TFEU's sex equality provisions in article 157 (article 141 EC) is "secondary to the social aim pursued . . . which constitutes the expression of a fundamental human right." Deutsche Telekom AG v. Schröder, Case C-50/96, [2000] E.C.R. 743, ¶ 57; *see also* SUSANNE BURRI & SACHA PRECHAL, EU GENDER EQUALITY LAW 3–4 (2008); Ann Humhauser-Henning, *EU Sex Equality Law Post-Amsterdam, in* EQUALITY LAW IN AN ENLARGED EUROPEAN UNION: UNDERSTANDING THE ARTICLE 13 DIRECTIVES 145 (Helen Meenan ed., 2007).

78. Treaty of Amsterdam, *supra* note 70, art. 2(7).

79. Before the Treaty of Amsterdam was ratified, Mr. Flynn confirmed on behalf of the commission, "at present the Treaty on European Union does not confer specific powers on the institutions to eradicate discrimination on grounds of sexual orientation." Written Question No. 2224/96, 1996 O.J. C 365, at 95; *see also* Written Question No. 2134/83, 1984 O.J. C 152, at 25 (stating that the European Council does not have the power to curtail sexual discrimination); Written Question No. 2133/83, 1984 O.J. C 173, at 9 (same).

80. While a number of the member states outlawed sexual-orientation discrimination at the national level before the Treaty of Amsterdam was ratified, many national legal systems in the EU needed to introduce a prohibition of such discrimination for the first time only as a consequence of the obligation to implement the directive. These states included Austria, Belgium, Germany, Greece, Italy, Portugal, and the United Kingdom. *See* Kees Waaldijk, *Legislation in Fifteen EU Member States Against Sexual Orientation Discrimination in Employment: The Implementation of Directive 2000/78/EC, in* THE GAYS' AND LESBIANS' RIGHTS IN AN ENLARGED EUROPEAN UNION 17, 23 (Anne Weyembergh & Sînziana Cârstocea eds., 2006).

81. *See* Council Directive No. 2000/78, 2000 O.J. L 303/16. For an analysis, see Dagmar Schiek, *A New Framework on Equal Treatment of Persons in EC Law?,* 8 EUR. L.J. 290 (2002); *see also* B. Koopman, *De bijzondere inkadering van de Algemene Kaderrichtlijn,* 5 NEDERLANDS TIJDSCHRIFT VOOR EUROPEES RECHT 126 (2001).

discrimination can be activated in a narrower array of cases, compared with sex discrimination, which has been outlawed from the time of the first steps of integration.[82] A worrisome hierarchy of different grounds of discrimination came to be created in the EU,[83] when the prohibition of discrimination on the basis of sex is much more far-reaching, applying to more situations than discrimination on the basis of sexual orientation, which is only outlawed in work and work-related relationships.[84] The choice of a prohibited ground of discrimination can thus have direct implications on the likelihood of success of a discrimination claim.

Consequently, answering a simple question of which prohibited ground of discrimination to use in each particular case is extremely important. The answer does not always seem obvious to the courts. The ECJ provides an excellent example of confusion in this regard. Deciding all the cases involving transsexuals on the sex discrimination grounds,[85] once gay rights are in sight, the court automatically switches the prohibited ground of discrimination from sex to sexual orientation, ruining the scholarly predictions[86] and departing from Advocate General Elmer's opinion arguing on the basis of sex discrimination.[87] This is not in any way logically mandated, since a fact that a gay person is involved in the case should not automatically mean that sex is disqualified as a prohibited ground of discrimination, although this is what the ECJ seems to suggest by its reasoning.

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82. *See* TFEU, *supra* note 23, art. 157, 2008 O.J. C 115, at 117–18; EC Treaty, *supra* note 23, art. 141, 2006 O.J. C 321 E, at 110 (in terms of "equal pay for equal work" and then as a general principle of EU law); *see also* Helen Meenan, *Introduction* to EQUALITY LAW IN AN ENLARGED EUROPEAN UNION: UNDERSTANDING THE ARTICLE 13 DIRECTIVES 3 (Helen Meenan ed., 2007).

83. For an analysis, see Lisa Waddington & Mark Bell, *More Equal than Others: Distinguishing European Union Equality Directives*, 38 COMMON MKT. L. REV. 587, 588 (2001).

84. Council Directive No. 2000/78/EC, art. 3(1), 2000 O.J. L 303/16, at 19.

85. *See* Richards v. Sect'y of State for Work & Pensions, Case C-423/04, [2006] E.C.R. 3585, ¶ 1; K.B. v. Nat'l Health Serv. Pensions Agency, Case C-117/01, [2004] E.C.R. 541, ¶¶ 6–7; P. v. S., Case C-13/94, [1996] E.C.R. 2143, ¶ 12.

86. *See, e.g.*, Paul L. Spackman, *Grant v. South-West Trains: Equality for Same-Sex Partners in the European Community*, 12 AM. U. J. INT'L L. & POL'Y 1063 (1997) (written before *Grant* was decided).

87. *See* Opinion of Advocate General Elmer, Grant v. South-West Trains Ltd., Case 249/96, [1998] E.C.R. 621, ¶ 16 ("[T]he [EC] Treaty [is] precluding forms of discrimination against employees based exclusively, or essentially, on gender.")

In fact, it seems that the very difference between sex discrimination and sexual orientation discrimination is often far from being a helpful logical tool in dealing with discrimination cases. Often invocation of sex orientation discrimination simply means that the court interprets the notion of sex discrimination in an unjustifiably narrow way. The reasons for such misunderstanding are unknown to the author and are beyond the scope of this Article, lying anywhere from the homophobic bench to a genuinely bizarre vision of sex espoused by the court.[88]

What is clear, however, is that, whatever underlying reasons the court had, the approach "does the European Court of Justice little credit as a constitutional court."[89] *Grant v. South-West Trains Ltd.*[90] is the clearest example of the court's strange approach. Greatly criticized in literature,[91] it is yet to be overruled; the court still refuses to apply sex discrimination in cases involving a homosexual in which only the sex of the person involved triggers discrimination, following its redundant *Grant* reasoning. In justifying its stance, the court largely hides behind two far from convincing justifications. The first is concerned with its "unwillingness" to enlarge the scope *ratione materiae* of EU law

88. There are more practical explanations available in the literature relating to the costs of guaranteeing equality as well as political considerations affecting the court's judgement. *See, e.g.*, Eugenia Caracciolo di Torella & Annick Masselot, *Under Construction: EU Family Law*, 29 EUR. L. REV. 32, 42 (2004) (discussing financial considerations); Mark Bell, *Shifting Conceptions of Sexual Discrimination at the Court of Justice: From P. v. S. to Grant v. SWT*, 5 EUR. L.J. 63, 74–77 (1999) (discussing political and moral considerations).

89. Nicholas Bamforth, *Sexual Orientation Discrimination After Grant v. South-West Trains*, 63 MOD. L. REV. 694, 720 (2000).

90. Case C-249/96, [1998] E.C.R. 621.

91. *See, e.g.*, Bamforth, *supra* note 89, at 720; Katell Bethou & Annick Masselot, *La CJCE et les couples homosexuelles*, 12 DROIT SOC. 1034 (1998); Iris Canor, *Equality for Lesbians and Gay Men in the European Community Legal Order—"They Shall Be Male and Female"?*, 7 MAASTRICHT J. OF EUR. & COMP. L. 273 (2000); Bruce Carolan, *Judicial Impediments to Legislating Equality for Same-Sex Couples in the European Union*, 40 TULSA L. REV. 527, 529–30 (2005); Andrew Koppelman, *The Miscegenation Analogy in Europe, or, Lisa Grant Meets Adolf Hitler*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN, AND INTERNATIONAL LAW 623 (Robert Wintermute & Andenæs eds., 2001); Adrian Williams, *An Evaluation of the Historical Development of the Judicial Approach to Affording Employees Protection Against Discrimination on the Basis of Their Sexual Orientation*, 25 BUS. L. REV. 32, 34–35 (2004). The only analysis to date that is somewhat court-friendly is contained in Christa Tobler, *Kroniek: Discriminatie op grond van geslacht*, NEDERLANDS TIJDSCHRIFT VOOR EUROPEES RECHT 74, 78–79 (1998).

without an explicit legislative mandate[92]—this is strange news for those at least a little bit familiar with the court's activism that eventually led to the very creation of the EU legal order.[93] The second is rooted in the constitutional traditions of member states that the court used in *Grant*[94] in order to deny rights just as freely as it first invoked them to start its own human rights protection jurisprudence from scratch.[95] To say that the constitutional traditions of the member states prohibit outlawing discrimination on the basis of sex is simply wrong.[96]

Discrimination against homosexuals burdens both sexes, instead of just one. "The fact that the burdened class is not limited simply to all the members of exactly one sex reinforces the superficial appeal of the single-standard counterargument and its claim that discrimination against same-sex couples or lesbian and gay men embodies no sex-based classification at all."[97] The sex nature of the discrimination in question thus gets masked by the fact that it applies to both sexes. Clark's analogy with access to certain types of employment is very useful to illustrate the problems inherent in such reasoning. Indeed, if it is contended that women are not entitled to occupy positions reserved to men and men are not entitled to positions reserved

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92. *Grant*, [1998] E.C.R. 621, ¶¶ 35–36.

93. *See* Flaminio Costa v. ENEL, Case 6/64, [1964] E.C.R. 585, ¶ 3; N.V. Algemene Transport en Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen, Case 26/62, [1963] E.C.R. 1, ¶ II.B; *see also* Bruno de Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order*, *in* THE EVOLUTION OF EU LAW 177 (Paul Craig and Gráinne de Búrca eds., 1999).

94. [1998] E.C.R. 621, ¶ 32.

95. *See, e.g.*, J. Nold, Kohlen-und Baustoffgroβhandlung v. Commission, Case 4/73, [1974] E.C.R. 491, ¶ 13; Internationale Handelsgesellschaft mbH v. Einführ-und Vorratsstelle für Getreide und Futtermittel, Case 11/70, [1970] E.C.R. 1125, ¶ 4; Stauder v. City of Ulm-Sozialamt, Case 29/69, [1969] E.C.R. 419, ¶ 7. For the whole story, see, for example, HENRY G. SCHERMERS & DENIS F. WAELBROEK, JUDICIAL PROTECTION IN THE EUROPEAN UNION 38–46 (6th ed. 2001). *See also* Joseph R. Wetzel, *Improving Fundamental Rights Protection in the European Union: Resolving the Conflict and Confusion Between the Luxembourg and Strasbourg Courts*, 71 FORDHAM L. REV. 2823, 2834–37 (2003).

96. To do justice to the ECJ, the court did not state this directly. However, should the facts in *Grant* be viewed through the prism of *P. v. S.*, Case C-13/94, [1996] E.C.R. 2143, as the learned Advocate General suggested, reliance on the constitutional traditions of the member states would result in exactly this kind of statement.

97. Stephen Clark, *Same-Sex but Equal: Reforming the Miscegenation Analogy*, 34 RUTGERS L.J. 107, 123 (2002).

to women, sex discrimination seemingly ceases to apply.[98] However, while in the case of access to employment we sense that there might be a logical inconsistency, with same-sex couples it is not always the case, making the courts deliver opinions like the ECJ in *Grant.*

Looking beyond the simple reality that sex discrimination can and does affect both sexes, it becomes clear that sexual orientation discrimination is in fact sex discrimination.[99] Koppelman is one of the first scholars who started advocating this seemingly obvious point of view, coming up with an argument which is as simple as it is persuasive. It can be reduced, as Clark has done, to the following syllogism: "'(1) Laws that make people's rights depend on their sex are sex-based classifications. (2) Laws that discriminate against gay people are laws that make people's rights depend on their sex. . . . Therefore, (3) Laws that discriminate against gay people are sex-based classifications.'"[100]

If Jane is fired for kissing Masha and Mark would not be, it is obvious that if Jane were a man, she would not be fired. If Jacques cannot marry Mark, but marrying Jane is ok, it is only Jacques' sex that disqualifies him. If sex is the only factor bringing discrimination, we are dealing with a sex-based classification and need to treat the situation as an instance of prohibited sex discrimination, not sexual orientation discrimination.

Analogy between sex discrimination negatively affecting gay men and lesbian women and race discrimination affecting people belonging to different races is a very informative one.[101] In a series of now-obsolete cases, the U.S. Supreme Court upheld the prohibition of miscegenation on the ground that the prohibition concerned both the white race and the black race (a white woman could not spend a night with a black man just as a black woman could not spend a night with a white man). In *Pace v. Alabama* the Court held that, because both races were affected

98. *See id.* at 144.

99. *See* Koppelman, *supra* note 7; *see also* Clark, *supra* note 97, at 115–119.

100. Clark, *supra* note 97, at 118–19 (quoting ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 53–54 (2002)).

101. For the application of this analogy within the European context see Koppelman, *Defending*, *supra* note 29, at 538 n.9.

equally, there was no race discrimination.[102] The logical flaw resulting in a "true perversion of the common-sense notion of equality"[103] is apparent here. Consequently, in the landmark cases of *McLaughlin v. Florida*[104] and *Loving v. Virginia*[105] the Supreme Court outlawed antimiscegenation statutes as discriminatory on the basis of race.[106] As applied to same-sex couples, the logic of *Loving* is simple: stating that lesbians are not discriminated against because they have as many rights as gay men is directly discriminatory on the basis of sex—a discrimination the ECJ did not have the courage (common sense) to see in *Grant*.[107]

A number of scholars, including Karst himself, viewed the sex discrimination argument as simplistic, doubting the applicability of the miscegenation parallel, as the antimiscegenation laws, as it was submitted, were unconstitutional not so much because they discriminated on the basis of race, but because they promoted white supremacy.[108] As Clark explained, such an argument mixes two lines of reasoning, one being concerned with the issue of discrimination, another with the degree of scrutiny applied.[109] Virginia lost in *Loving* not merely because of an existence of a race-based classification, but because the justifications for antimiscegenation it provided could not meet the standard of scrutiny required. This standard, in turn, was set high precisely because antimiscegenation legislation was aiming to promote white supremacy.[110] With regard to sex

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102. 106 U.S. 583 (1883) (upholding laws on equal protection grounds), *overruled in part by* McLaughlin v. Florida, 379 U.S. 184 (1964).

103. Bruce Carolan, *Rights of Sexual Minorities in Ireland and Europe: Rhetoric Versus Reality*, 19 DICK. J. INT'L L. 387, 405 (2001).

104. 379 U.S. at 184.

105. 288 U.S. 1 (1967).

106. The Court reasoned that an antimiscegenation law "treats the interracial couple . . . differently than it does any other couple." *McLaughlin*, 379 U.S. at 188.

107. In *Grant*, the ECJ stated, "Since the condition imposed by the undertaking's regulations applies in the same way to female and male workers, it cannot be regarded as constituting discrimination directly based on sex." Grant v. South-West Trains Ltd., Case C-249/96, [1998] E.C.R. 621, ¶ 28.

108. *See* Karst, *supra* note 1, at 683–84.

109. *See* Clark, *supra* note 97, at 118, 146–47.

110. The Supreme Court determined that "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white

discrimination it is possible to appeal to the freedom of intimate association which can be severely undermined once discriminating on the basis of sex is a norm, in order to argue for the same or at least similar standard of scrutiny as in the race discrimination cases.

It is also possible to make another argument: that gender-role stereotyping and same-sex marriage prohibitions are directly connected with male supremacy[111] and the perpetuation of heteronormative society,[112] necessarily connected with an idea of sex-gender purity.[113] Analogy to miscegenation is instrumental here again because both antimiscegenation legislation and the prohibitions for gay people to marry, adopt children, and the like are undermining the vision of the world limited to binary divisions. Still now, when the advances in science demonstrate how difficult establishing a "sex" can be,[114] to say nothing of gender identity of a person, "our laws and culture continue to think about sex-gender in essentialised and binary ways."[115] Agreeing with Ball, who masterfully approached the miscegenation analogy from the parentage stand-point,

> one of the reasons why same-sex marriage is so threatening to so many is that the raising of children by same-sex couples blurs the boundaries of seemingly preexisting and static sex/gender categories in the same way that the progeny of interracial unions blur seemingly preexisting and static racial categories.[116]

It is submitted that the sexual discrimination argument, applied to discrimination negatively affecting sexual minorities, is a very powerful instrument to deal with injustice. Yet, the ECJ never moved to include gays within its scope, despite dozens of years of prohibition against sex discrimination in the EU. While

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persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy." *Loving*, 288 U.S. at 11.

111. *See* Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 20–21 (1994).

112. *See* Franke, *supra* note 36, at 2687.

113. *See* Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 FORDHAM L. REV. 2733, 2756 (2008).

114. For a discussion of this, see Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999).

115. Ball, *supra* note 113, at 2735.

116. *Id.*

the potential of the sex discrimination argument has not been lost because of this, so far the predictions as to the reluctance of the court to embrace this argument made by scholars in the beginning of the nineties have proved justified.[117] That sex discrimination argument is not a merely theoretical construct can be proven with reference to the case law of the UN Human Rights Committee, which interpreted article 26 of the International Covenant on Civil and Political Rights[118] accordingly.[119]

III. *GAY RIGHTS IN THE FREE MOVEMENT OF CITIZENS CONTEXT*

To agree with Koppelman, while "the consequence of our moral divisions need not be hysteria or chaos[,]" it is clear that "the largest concern arises from the fact that people move around."[120] What should happen to the legally married same-sex couples when they move from one jurisdiction to another within a federation? Clearly, "the answer should not be mysterious"[121]—although in practice it *is* in many ways both in the EU and the United States. Potentially, both the frameworks of private and public law can offer nonmysterious answers the gay couples are seeking.

A. *Member State-Level Solutions*

Upon the introduction of homosexual marriages in four of the twenty-seven EU member states, the legal landscape for such

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117. *See, e.g.*, Andrew Clapham & Joseph H.H. Weiler, *Lesbians and Gay Men in the European Community Legal Order*, *in* HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE 11, 21 (Kees Waaldijk & Andrew Clapham eds., 1993).

118. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

119. *See* U.N. Human Rights Comm. [HRC], *Communication No. 941/2000: Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights* (Young v. Australia), ¶¶ 10.2–13 (2003); HRC, *Communication No. 488/1992: Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights* (Toonen v. Australia), ¶¶ 6.9–7.6 (1994).

120. Andrew Koppelman, *Against Blanket Non-Recognition of Same-Sex Marriage*, 17 YALE J.L. & FEMINISM 205, 206 (2005).

121. Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2144 (2005).

families, should they decide to use their EU citizenship right to free movement,[122] remains fragmented.[123] Although same-sex partnerships are recognized in the majority of the member states,[124] some of the member states offer absolutely no rights to same-sex couples. Italy, Ireland, the Baltic States, Romania, Bulgaria, and Slovakia appear especially hostile to the idea of legally recognizing same-sex relationships.[125]

The application of sophisticated and at times contradictory rules of private international law to same-sex marriage has a clear impact on the rights of the couples in question.[126] Many scholars agree that a simple conflict of laws is at stake here and thus usual rules should apply.[127] A number of possible situations are distinguished,[128] including "the evasion scenario" and "mobile marriage scenario," as well as "transient scenarios."[129] Yet, the national courts of the member states "have neither allowed the formalization of same-sex relationships nor have they recognized same-sex relationships concluded abroad if specific statutory

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122. TFEU, *supra* note 23, art. 21, 2008 O.J. C 115, at 57; EC Treaty, *supra* note 23, art. 18, 2006 O.J. C 321 E, at 49–50.

123. For an overview of national legislation and practices of EU member states concerning the legal recognition of same-sex relationships, see Katharina Boele-Woelki, *The Legal Recognition of Same-Sex Relationships Within the European Union*, 82 TUL. L. REV. 1949 (2008). For the comparison between free movement of same-sex couples in the EU and in the United States, see Adam Weiss, *Federalism and the Gay Family: Free Movement of Same-Sex Couples in the United States and the European Union*, 41 COLUM. J.L. & SOC. PROBS. 81 (2007).

124. *See* ILGA–Europe, *supra* note 18.

125. *See* Boele-Woelki, *supra* note 123, at 1960. The EU itself is partly to blame for the current legal-political climate in the Eastern European member states, as not enough has been done with regard to gay rights during the pre-accession process leading to the incorporation of these states into the Union. Kochenov, *supra* note 20.

126. For an example of sophistication of such rules see Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws*, 153 U. PA. L. REV. 2195 (2005) (using the United States as an example).

127. *See, e.g.*, id. at 2198.

128. *See* Boele-Woelki, *supra* note 123, at 1952–53; Koppelman, *supra* note 120, at 2143; Silberman, *supra* note 126, at 2198–209.

129. For a compelling analysis, see Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998). *See also* Andrew Koppelman, *Interstate Recognition of Same-Sex Civil Unions after* Lawrence v. Texas, 65 OHIO ST. L.J. 1265 (2004); Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105 (1996) [hereinafter Koppelman, *Same-Sex Marriage & Pub. Policy*]; Mark Strasser, *For Whom the Bell Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriages*, 66 U. CIN. L. REV. 339 (1998); Koppelman, *supra* note 120; Koppelman, *supra* note 121.

rules are lacking."[130] They barely moved beyond the tautological explanations of the first U.S. cases involving same-sex couples, building on a proposition that "same-sex couples . . . [are] not constitutionally entitled to marry because they . . . [are] not eligible to marry . . . ."[131]

The result of this stance is an entirely chaotic situation with marriage recognition in Europe, unable to withstand any minimal test of common sense and legal certainty. So while a Dutch same-sex marriage is treated in Belgium, France, Spain, and Sweden like marriage,[132] it is not recognized at all in Poland and treated as a registered partnership in the United Kingdom.[133] The contrary is also possible: foreign-registered same-sex partnerships resembling marriage are recognized in Belgium as same-sex marriages.[134] Private-law approaches to the recognition of same-sex marriages in the EU have abundantly demonstrated their inability to tackle the outstanding issues. The courts are too timid or hostile and the legislatures are unwilling to guide them. All of this notwithstanding, the situation in the EU seems to be giving more ground for optimism than that in the United States.

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130. Boele-Woelki, *supra* note 123, at 1949.

131. Ball, *supra* note 113, at 2752.

132. *See* Boele-Woelki, *supra* note 123, at 1964 n.93 (noting that certain conditions apply (citing Effet en France du mariage homosexuel valablement célébré dans un pays de l'Union européenne, Rep. Min. No. 41533 of July 26, 2005, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 26, 2005, p. 7437)); *see also* Boele-Woelki et al., *The Evaluation of Same-Sex Marriages and Registered Partnerships in the Netherlands*, 8 Y.B. PRIVATE INT'L L. 27 (2006).

133. For some examples of how recognition of same-sex marriages functions (or does not function) in the EU, see Boele-Woelki, *supra* note 123, at 1963–70. *See also* MATTEO BONINI BARALDI, DIFFERENT FAMILIES, SAME RIGHTS? FREEDOM AND JUSTICE IN THE EU: IMPLICATIONS OF THE HAGUE PROGRAMME FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILIES AND THEIR CHILDREN 21–23 (2007). Bonini Baraldi provides an example in which the Italian state recognized a same-sex marriage of its employee posted in Brussels, thus deviating from the stance of the Italian courts regarding such recognitions impossible. *Id.* at 23.

134. Dutch same-sex partnerships constitute an exception, as Dutch same-sex *marriages*, not *partnerships*, are treated as marriages in Belgium. *See* Circulaire du 29 mai 2007 modifiant la circulaire du 23 septembre 2004 relative aux spects de la loi du juillet 2004 portant le Code de droit international privé consernant le statut personnel, 177 MONITEUR BELGE [OFFICIAL GAZETTE OF BELGIUM] 29,469 (May 31, 2007). The recognition of partnerships and marriages can be very problematic in itself, as not all individuals entering a partnership necessarily would like to be married, or recognized as married.

In the United States, the issue is complicated by the federal Defence of Marriage Act ("DOMA")[135] and state-level "mini-DOMA" acts,[136] which potentially break the coherence of the rules determining which law is to apply by attempting to introduce blanket nonrecognition of same-sex marriages. Strong arguments exist explaining the unconstitutionality of this approach.[137] But for now this is the law. Miscegenation analogies are very helpful in analyzing the potential limitations of these acts, as even the states penalizing miscegenation (note that no mini-DOMA penalizes same-sex marriages)[138] used to recognize marriages between whites and blacks[139] when legally concluded in other states before the couple changed residence, as Koppelman has abundantly demonstrated.[140] Consequently, in theory at least, "[a] prohibition on same-sex marriage—even one expressed in legislation—does not necessarily mean that all economic benefits should be denied."[141] Although Europe does not have its own DOMA (only the Vatican, with equally blurred and identically negative powers in this respect), the cases of recognition of same-sex marriages in member states not allowing for such marriages under their national legislation are extremely rare.[142] Private law failed the field test.

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135. Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738C (2008)).

136. For current information on the positions taken by states on same sex marriage (including mini-DOMA and constitutional amendments), see DOMA Watch, Issues by State, http://www.domawatch.org/stateissues/index.html (last visited Nov. 17, 2009).

137. *See, e.g.*, Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1, 24–32 (1997); Koppelman, *supra* note 120, at 210–15.

138. Should it be the case, it would be awkward in the light of *Lawrence v. Texas*, 539 U.S. 558 (2003).

139. At the same time, these partnerships were considered as "connections and alliances so unnatural that God and nature seem to forbid them." Koppelman, *Same-Sex Marriage & Pub. Policy*, *supra* note 129, at 1270 n.28 (quoting Kinnely v. Commonwealth, 71 Va. (30 Gratt.) 858, 869 (1878)).

140. *Id.* at 105; *see also* Strasser, *supra* note 129, at 340 n.11.

141. Silberman, *supra* note 126, at 2209.

142. For some examples of (partial) recognition of same-sex marriages by the member state with no statutory provisions allowing for it, see Bonini Baraldi, *supra* note 133, at 22–23.

B. *EU-Level Solutions*

The EU is an obvious candidate for the introduction of at least some consistency into the current situation with gay couples' rights through the use of EU (i.e. public) law. The force to drive the EU in this direction is not to be its will to take up the regulation of family issues in Europe, which is not within its sphere of competences at the moment, but the necessity to safeguard the internal market,[143] of which free movement of persons is an integral part. Moreover, agreeing with Advocate General Ruiz-Jarabo Colomer, "it is not a question of developing 'European matrimonial law' but of ensuring that the principle that there should be no discrimination based on sex is fully effective."[144] In other words, two approaches are potentially instrumental in changing the stance that EU law currently holds toward same-sex couples: (1) internal market reasoning (with appeals to strict limitations on any potential deviations from internal market law); and (2) sex discrimination reasoning.

In a situation in which an EU citizen's status can undergo a fundamental change as a result of crossing one of the internal borders within the EU, the achievement of the ideal of economic integration[145] and, specifically, freedom of movement of citizens, becomes very problematic. It is the court's obligation to make sure that the law of the Union remains a functional instrument of integration, rather that a hostage to the diversities between the differences in the legal systems of the member states.[146] The main right of EU citizenship, which is free movement, cannot be made dependent on the sex or, for that matter, the sexual preferences of citizens: article 20 TFEU (article 17 EC) that established this

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143. *See* TFEU, *supra* note 23, art. 26(2), 2008 O.J. C 115, at 59; EC Treaty, *supra* note 23, art. 14(2), 2006 O.J. C 321 E, at 48.

144. Opinion of Advocate General Ruiz-Jarabo Colomer, K.B. v. Nat'l Health Serv. Pensions Agency, Case C-117/01, [2004] E.C.R. 541, ¶ 76.

145. *See* TEU Post-Lisbon, *supra* note 23, art. 3, 2008 O.J. C 115, at 17; EC Treaty, *supra* note 23, art. 2, 2006 O.J. C 321 E, at 44.

146. The first opportunity to clarify the law almost arose for the ECJ in 2004, when an immigration case involving a U.S. citizen married to a German citizen of the same sex in the Netherlands was heard in Austria, to where the couple moved from the Low Countries. Although European law was obviously applicable, the Austrian constitutional court dismissed the case without granting residence rights or using article 267 TFEU (article 234 EC) procedure. *See Austria's Constitutional Court Dismisses Same-Sex Freedom of Movement Case,* ILGA, Apr. 11, 2004, http://www.ilga.org/news_results.asp?LanguageID=1&FileCategory=1&FileID=367.

ius tractum status does not make either the possession of it, or the array of rights stemming from it, dependent on sex.[147] The TFEU thus makes it clear that possessing EU citizenship should logically be enough in order to qualify for the full free movement rights offered by article 21 TFEU (article 18 EC), your sex notwithstanding.[148]

The internal market logic underlying the European integration process should nevertheless be used with caution, despite all of its potential. Sometimes free movement, although extremely important, is invoked to hide other issues, probably unpopular with the majority of citizens. Agreeing with Weiss, "arguments for respecting same-sex couples' right to travel may appear to be nothing more than an elaborate ruse to avoid the larger question posed by simple equal protection claim."[149] For many reasons this theoretical supremacy occurs often in EU law: free movement enjoys apparent precedence in the legal thinking and discourse, taking a place above other, presumably more fundamental, rights.[150] This is not to say that free-movement logic is not to be used. Although it can misrepresent or even hide the core issues at stake, it is certainly to be employed as a legal tool in the quest for the broadening of the scope of rights enjoyed by sexual minorities.

Besides the ECJ, other EU institutions are equally obliged to do everything in their power to facilitate the achievement of the goals of integration.[151] At present, their capacity, and willingness

147. TFEU, *supra* note 23, art. 20, 2008 O.J. C 115, at 56–57; EC Treaty, *supra* note 23, art. 17, 2006 O.J. C 321 E, at 49.

148. TFEU, *supra* note 23, art. 21(1), 2008 O.J. C 115, at 57; EC Treaty, *supra* note 23, art. 18(1), 2006 O.J. C 321 E, at 49.

149. Weiss, *supra* note 123, at 121–22.

150. The ECJ repeatedly refused to introduce hierarchy between the four freedoms and fundamental rights, opting instead for a flexible case-by-case analysis. *See, e.g.*, Eugen Schmidberger, Internationale Transporte und Planzüge v. Österreich, Case C-112/00, [2003] E.C.R. 5659.

151. The duty of loyalty of article 4(3) TEU Post-Lisbon (article 10 EC) does not only bind the member states, but also the institutions of the EU. Imm., Zwartveld and Others, Case 2/88, [1990] E.C.R. I-3365, ¶ 1 (recognizing the EU institutions' duty of cooperation with national judicial authorities). *See generally* John Temple Lang, *Developments, Issues, and New Remedies—The Duties of National Authorities and Courts Under Article 10 of the EC Treaty*, 27 FORDHAM INT'L L.J. 1904, 1905–06 (2004) (discussing the duty of loyalty within the context of article 10).

to act in the area of gay rights, varies greatly.[152] This is explained by the nature of the powers of the EU and the interests represented by each of the institutions. Consequently, it would be difficult to expect the council, for instance, to advocate gay rights. An institution chiefly representing the interests of the member states, many of which are still quite uncomfortable with the idea of gay rights protection, is thus unlikely to play an important role here. The abilities of the commission are limited because of a different consideration. The powers of the EU to act in the domain of family law are largely limited to the realm of negative integration, consisting in outlawing the national legislation and policies of the member states with a potential to harm the achievement of the goals of integration. Besides the court, holding the keys to the practical application of "negative integration," the European Parliament seems to be the only institution that is "pro-gay." Although the resolutions it releases[153] do not have binding force of a law,[154] they obviously enjoy important political weight. The European Parliament used this tool on a number of occasions, advocating nondiscrimination on the basis of sexual orientation in a variety of contexts ranging from employment relationships to marriage[155] and accession of the new member states.[156] Also, individual members of the European Parliament ("MEP") have

152. For an assessment of institutional involvement in dealing with diversity in the EU, see Gabriel N. von Toggenburg, *Who Is Managing Ethnic and Cultural Diversity Within the European Condominium? The Moments of Entry, Integration and Preservation*, 43 J. COMMON MKT. STUD. 717, 719 (2006).

153. *See, e.g.*, European Parliament Resolution on Homophobia in Europe, P6_TA(2007)0167; European Parliament Resolution on the Increase in Racist and Homophobic Violence in Europe, P6_TA(2006)0273; European Parliament Resolution on Homophobia in Europe, P6_TA(2006)0018; European Parliament Resolution on Equal Rights for Gays and Lesbians in the European Community, 1998 O.J. C 313/186; European Parliament Resolution on Equal Rights for Homosexuals and Lesbians in the European Community, 1994 O.J. C 61/40.

154. *See* Bruno de Witte, *Legal Instruments, Decision-Making and EU Finances*, *in* THE LAW OF THE EUROPEAN UNION AND THE EUROPEAN COMMUNITIES 273, 292 (Paul J.G. Kapteyn et al. eds, 4th rev. ed. 2008).

155. *E.g.*, European Parliament Resolution on Equal Rights for Homosexuals and Lesbians in the European Community, 1994 O.J. C 61/40.

156. *E.g.*, European Parliament Resolution on Equal Rights for Gays and Lesbians in the European Community, 1998 O.J. C 313/186.

been active in condemning homophobia and arguing for equal rights for the sexual minorities.[157]

Following a history of reluctance to accept nondiscrimination on the basis of sexual orientation as one of the principles of EU law and having seemingly ruled out a possibility to hold that sexual orientation discrimination is actually sex discrimination,[158] the ECJ has earned a very orthodox image as far as the protection of sexual minorities is concerned. In fact, notwithstanding the availability of the legal instruments at hand, it simply refused to protect sexual minorities, opting instead for rhetorical arguments lacking common sense from the era of miscegenation laws in the United States.[159]

The stance of the court had to change with the introduction of article 19 into the TFEU (article 13 into the EC Treaty) at Amsterdam and the adoption of the equality directive based on this article.[160] Yet, in the use of the directive, the court proved absolutely reluctant to demonstrate any measure of activism whatsoever to protect the newly-acquired rights of gay citizens.[161] Most recently, the reluctance of the ECJ to protect the EU legal order from the clashes between the national understandings of "family" (and related issues) became apparent in its *Tadao Maruko* decision.[162] The court ruled:

> The combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation . . . under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit. It is for the referring court to determine whether a surviving life partner is in a situation comparable

157. *See, e.g.*, Gay and Lesbian Rights Intergroup, European Parliament, Current News, http://www.lgbt-ep.eu/news.php (last visited Oct. 11, 2009).

158. *See supra* Part II.

159. *E.g.*, Grant v. South-West Trains Ltd., Case C-249/96, [1998] E.C.R. 621.

160. Council Directive No. 2000/78/EC, 2000 O.J. L 303/16. For the analysis of the directive, see, for example, Waaldijk, *supra* note 80, at 17.

161. For an overview of the relevant case law, see Gabriel N. von Toggenburg, *"LGBT" Go Luxembourg: On the Stance of Lesbian Gay Bisexual and Transgender Rights Before the European Court of Justice*, EUR. L. REPORTER 174, 180 (2008).

162. Maruko v. Versorgungsanstalt der Deutschen Bühnen, Case C-267/06, [2008] E.C.R. I-01757.

> to that of a spouse who is entitled to the survivor's benefit . . . .[163]

In other words, the application of EU law on nondiscrimination on the basis of sexual orientation is made totally dependent on the national legal regulation of same-sex partnerships. While, on the face of it, the ECJ protected the right of Maruko to receive the pension of his pre-deceased partner, the court also reconfirmed its own reluctance to treat nondiscrimination on the basis of sexual orientation seriously in the EU legal context. It is impossible but to agree with von Toggenburg that the court "provides no protection against discrimination where it is most needed";[164] if the national law on same-sex partnerships either provides a legal framework significantly different from marriage, which is the case in many member states, or is simply *nonexistent*, the ECJ will not find a violation of the directive. In other words, *Maruko* is "a slap in the face of any *effet utile* reasoning so commonly used by the Court of Justice."[165] In the constant tension between unity and diversity, the unity of EU law seems to be losing ground: whether the court finds discrimination depends entirely on the national law of the member states.

This situation begs the question of what is actually the point of prohibiting discrimination at the supranational level? It is clearly impossible that the ECJ would not be confronted with this issue during its deliberations, which means that subjecting EU law on equality to national law is a choice made by the court for some strange purpose. Once this is clear, somewhat less room for optimism is left for those who expect the court to actively promote equality and human rights. This is notwithstanding the commission's position that "the issue of eradication of discrimination on grounds of sexual orientation is directly linked to the broader issue of fundamental rights and freedoms."[166] All the history of gay rights protection in the EU suggests that we have a truly orthodox court ready to sacrifice unity and *effet utile* of EU law only to make sure that the narrowest possible reading

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163. *Id.* ¶ 73.

164. Von Toggenburg, *supra* note 161, at 181 (emphasis omitted).

165. *Id.* at 182.

166. Reply of Mr. Flynn, on behalf of the Commission, to Written Question E-2224/96, 1996 O.J. C 365/95, at 95.

is given to the Treaty instruments and secondary legislation aimed at safeguarding the rights of gay EU citizens.

C. *EU Law Entry Options Analyzed*

However the ECJ (mis)interprets the law, the difference between national regulation of family among the member states, coupled with free movement of citizens law in the EU guarantee that the exit option is always available. What is not yet clear, however, is the accessibility of the "entry option" that European federalism is likely to provide. The entry option comes down to bringing the status legally acquired in one of the member states to your member state of residence. In the light of Directive 2004/38/EC,[167] three different situations affecting the nascent entry option can be looked at in the context of same-sex couples' free movement. They concern free movement of couples legally married in one of the member states,[168] free movement of registered partners, and free movement of cohabiting couples. As will be demonstrated in the following pages, all the necessary tools to bring about an effective entry option in all the three situations described are already in the hands of the ECJ. The question is, then, whether the court, whose gay-rights jurisprudence has so far been very limited, indeed will be willing to use the instruments at its disposal?

Before outlining the relevant provisions of the Citizen's Free Movement Directive, it is necessary to turn to the wording of article 19 of the TFEU (article 13 EC). Advocate General Poiares Maduro outlined the aims of this article in the protection of dignity and autonomy of persons belonging to suspect classifications.[169] Interpreting the directive, even though article 19 TFEU is not among its legal bases, this should always be kept in mind, as the "adoption of legislation that would be inconsistent with (article 19 TFEU) aims and spirit and limit the protection that the drafters of the treaty intended to offer"[170] is

167. Council Directive No. 2004/38/EC, 2004 O.J. L 158/77. For analysis of this directive, see, for example, MARK BELL, EU DIRECTIVE ON FREE MOVEMENT AND SAME-SEX FAMILIES: GUIDELINES ON THE IMPLEMENTATION PROCESS (2005).

168. This does not necessarily cover marriages concluded outside of the EU.

169. *See* Opinion of Advocate General Maduro, Coleman v. Attridge Law, Case C-303/06, [2008] E.C.R. I-5603, ¶¶ 8–10.

170. *Id.* at ¶ 7.

illegal. This observation acquires amplified relevance once the instruments having article 19 TFEU as a legal basis are considered. It is especially important to see Directive 2000/78/EC[171] in the context of national law: the law implementing the directive cannot possibly result in legalization of discrimination on any of the prohibited grounds which article 19 TFEU covers. Yet, as the court has demonstrated in *Maruko*,[172] it can still take a while before such common-sense reading of the directive is established in the law, as applied. At present, strangely, the *effet utile* of EU law is made dependent on the national law of the member states, which cannot last long, as it clearly contradicts the very rationale of the European legal order.

Out of all the three situations outlined, the entry option for the married same-sex couple seems the easiest to establish. Having specified that a "family member means . . . the spouse,"[173] Directive 2004/38/EC arguably makes it impossible to argue that only different-sex spouses are covered, because, as Bell argued,[174] it would clearly introduce discrimination on the basis of sexual orientation prohibited by the same directive.[175] He went on: "marriage is a status granted by national law; therefore, the EU should not distinguish between legally contracted marriages within the Member States."[176] While, logically speaking, there is no reason to disagree with what Bell submits, the directive does not function like this in practice, as the member states refuse to treat legally contracted same-sex marriage from other member states as marriages.[177]

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171. 2000 O.J. L 303/16.

172. Maruko v. Versorgungsanstalt der Deutschen Bühnen, Case C-267/06, [2008] E.C.R. I-1757.

173. Council Directive No. 2004/38/EC, art. 2(2), 2004 O.J. L 158/55, at 88; *see also* Reed v. Netherlands, Case 59/85, [1986] E.C.R. 1283, ¶ 16. In *Reed*, the reference was in the context of interpretation of the term "spouse" in article 10(1) of regulation 1612/68, on freedom of movement of workers within the EC. *See Reed*, [1986] E.C.R. 1283, ¶ 16; Council Regulation No. 1612/68, art. 10(1), 1968 J.O. L 257/2, at 5, O.J. Eng. Spec. Ed. 1968 (II) at 475, 477.

174. *See* BELL, *supra* note 167, at 5.

175. *See* Council Directive No. 2004/38/EC, pmbl. ¶ 31, 2004 O.J. L 158, at 86.

176. BELL, *supra* note 167, at 5.

177. ILGA–Europe, Freedom of Movement, http://www.ilga-europe.org/europe/campaigns_projects/freedom_of_movement (last visited Nov. 17, 2009) (observing the resistance of some member states to include same-sex married couples in the directive).

Moreover, in *D & Sweden,* the ECJ pointed to the fact that it views marriage as a union between the persons of opposite sex, justifying this position by the general acceptance of such approach by the member states.[178] Since the time when *D & Sweden* was decided the reality has changed significantly: four member states allow same-sex couples to get married. Other member states (such as France), not having such law on the books, nevertheless recognized same-sex marriages legally concluded in Belgium, the Netherlands, and Spain as "marriages."[179]

Yet, the ECJ can repeat the "different sex" mantra also in the future. This is so because the constitutional traditions of the member states inspiring it should not be identical or similar—once the majority is clear, some member states can simply be "outvoted" among their peers. The situation is complicated by the fact, as Canor also highlighted, that no clear methodology has been used by the court so far with regard to detecting the legal traditions common to the member states, as the court "has not developed an intelligible, generally accepted, and consistently applied theory of interpretation."[180] In practice this means that the "common traditions" can actually be used virtually randomly in order to support whatever decision the ECJ has already come to.[181] Dealing with a *Maruko* Court,[182] having *D & Sweden*[183] (to say nothing of *Grant*)[184] among its achievements, it is most unlikely that the ECJ will actually help to defend fundamental EU rights of gay citizens, preferring instead to stick

178. D & Sweden v. Council, Joined Cases C-122, 125/99P, [2001] E.C.R. I-4319, ¶ 34. For the analysis of this case in front of the Court of the First Instance, see Christine Denys, *Homosexuality: A Non-Issue in Community Law?*, 24 EUR. L. REV. 419 (1999).

179. *Gay Couples with Foreign Marriages, Partnerships Win Recognition Battle in France,* UK GAY NEWS, Apr. 29, 2009, http://ukgaynews.org.uk/Archive/09/Apr/2901.htm.

180. Canor, *supra* note 91, at 272, 282 n.45 (collecting an informative selection of literature).

181. *See generally* IRIS CANOR, THE LIMITS OF JUDICIAL DISCRETION IN THE EUROPEAN COURT OF JUSTICE, SECURITY AND FOREIGN AFFAIRS ISSUES (1998).

182. Maruko v. Versorgungsanstalt der Deutschen Bühnen, Case C-267/06, [2008] E.C.R. I-01757.

183. D & Sweden v. Council, Joined Cases 122/99P & 125/99P, [2001] E.C.R. I-4319.

184. Grant v. South-West Trains Ltd., Case C-249/96, [1998] E.C.R. 621.

to rhetorical arguments for a "stereotyped notion of the European family."[185]

If the court chooses to act this way, should the opportunity arise, it will undermine the idea of member states' autonomy in the issues of family law, since it will ignore the legal definitions of family adopted by three member states. Moreover, it will also depart from a long tradition of respecting fundamental legal statuses grounded in national law of the member states in the situations when harmonization of acquisition of such statuses has not occurred. When the treaties do not grant the Union powers to decide on a certain fundamental status, the member states should be left free to confer such a status and could reasonably expect the ECJ to defend the choice they made, should any other member state disagree to recognize the status conferred. The status of "nationality for the purposes of Community law" is a good illustration of this practice.[186] Not only the member states were free to decide who their nationals for the purposes of Community (and now Union) law are (a status which EU itself cannot confer): the ECJ in *Micheletti* also famously defended the ability of member states to do so without running a risk of having such a status not recognized by any other member state of the EU.[187]

By analogy, the same should apply to family. Although the EU is not entitled to establish a "matrimonial law of the Union," it certainly should oblige the member states to respect each others' definitions of family. Just as "nationality for the purposes of Community law," "family" is a notion fundamental for the functioning of the internal market, as both notions affect EU citizens' ability to benefit from the right of free movement of article 21 TFEU (article 18 EC).[188] Consequently, within the scope of application of EU law, the member states cannot

185. Caracciolo di Torella & Reid, *supra* note 25, at 84.

186. Stephen Hall, *Determining the Scope* Ratione Personae *of European Citizenship: Customary International Law Prevails for Now*, 28 LEGAL ISSUES OF ECON. INTEGRATION 355, 360 (2001). This is not to say that such practice is always beneficial for the development of EU law; it is better than nothing. However, vague customary law rules prevail for now. *See id.*

187. *See* Micheletti v. Delegación del Gobierno en Cantabria, Case C-369/90, [1992] E.C.R. 4239.

188. TFEU, *supra* note 23, art. 21, 2008 O.J. C 115, at 57; EC Treaty, *supra* note 23, art. 18, 2006 O.J. C 321 E, at 49.

possibly be given the right to disagree with the fundamental status choices legally made by other member states of the Union. Here, an entry option comes naturally: the ECJ has to protect the legally acquired marital status of same-sex couples once one of the family members decides to exercise her free movement rights.

Once the entry option is successfully implemented, the application of the principle of nondiscrimination of article 18 TFEU (article 12 EC) and related *lex specialis* instruments[189] to the families exercising free movement rights will ensure that they are entitled to the same rights as enjoyed by the local families, resulting in full recognition. Were there no *Grant*,[190] one would be safe to suppose that the directive actually cannot be possibly interpreted otherwise than as obliging the ECJ to defend the legally acquired national-law statuses of EU citizens exercising their free movement rights. Thus, while it is true that at present "Community law accepts each Member State's definition of marriage, singleness, widowhood, and the other forms of civil (marital) status,"[191] this situation is likely to start changing in the nearest future as, together with respect of the member states' choices in this domain, there will come a requirement for the member states to respect each others' legally conferred statuses. This evolution is inescapable. Moreover, the next step to follow this evolution, using European Court of Human Rights vision demonstrated in *Goodwin* as an analogy,[192] is likely to be requiring the analysis of equality that goes deeper than just the surface. The European Court of Human Rights underlined in *Goodwin* that "[i]t is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory."[193]

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189. TFEU, *supra* note 23, art. 45, 2008 O.J. C 115, at 65–66; EC Treaty, *supra* note 23, art. 39, 2006 O.J. C 321 E, at 57–58. The same principle is also restated in Council Directive No. 2004/38, art. 24(1), 2004 O.J. L 158/86, at 112.

190. Grant v. South-West Trains Ltd., Case 249/96, [1998] E.C.R. 621.

191. Opinion of Advocate General Ruiz-Jarabo Colomer, Maruko v. Versorgungsanstalt der Deutschen Bühnen, Case C-267/06, [2008] E.C.R. I-1757, ¶ 74.

192. Goodwin v. United Kingdom, 35 Eur. H.R. Rep. 18 (2002) (ruling that the United Kingdom violated the ECHR in not allowing postoperative transsexuals to have their sex changed on the birth certificates, resulting in inability to marry the persons of the sex that is identical to their preoperative sex).

193. *Id.* ¶ 74.

Namely, if discrimination is a result of a national law that makes the acquisition of a certain status leading to the entitlement of nondiscrimination impossible, it is the court's obligation to go further than restating the apparent lack of a formal entitlement, asking the member state to justify its policy of making certain (marital) statuses inaccessible for sexual minorities.

Real protection of human rights, nondiscrimination on the basis of sex included, should go beyond legal formalism, asking the state to provide justifications for the obvious causes of discrimination instead of looking for rhetorical justifications of unjust policies.[194]

The imposition of a requirement on the new member state of residence, to duly recognize marriages legally contracted in other member states at least dealing with the situations genuinely falling within the material scope of EU law[195] is fundamental in order to guarantee that same-sex families that benefited from a free movement right enjoy equal treatment with all the families in the new member state of residence even if such a member state does not allow gays residing there to marry. It can be even more important, however, for the families where immigration law issues can arise.[196] These include the families where both spouses are EU citizens, but one of them does not qualify for self-standing enjoyment of the citizenship free movement right, or families consisting of an EU citizen and a third-country national.

In the first case, if the family status is not recognized and one of the family members fails to meet the requirements of article 7 of Directive 2004/38/EC, this person, just as the very family, ends up in a legal limbo, since, although the ECJ prohibited automatic deportations of EU citizens failing to meet

194. The Supreme Court of Hawaii took this position in Baehr v. Lewin, 852 P.2d 44, 59 (Haw. 1993). That the state was required to justify its policy of not providing same-sex couples with a possibility to marry, *see id.*, is exemplary in this respect.

195. While there is case law and literature suggesting the need to prohibit the "abuse" of the law, it is difficult to see how attempts to use legal opportunities offered by the federal structure for the sake of being granted rights denied in your own member state can possibly be frowned upon. *But see* FABIAN AMTENBRINK & HANS H.B. VEDDER, RECHT VAN DE EUROPESE UNIE 302–05 (3d ed. 2008).

196. For analysis, see Lina Papadopoulou, *In(di)visible Citizens(hip): Same-Sex Partners in European Union Immigration Law*, 21 Y.B. EUR. L. 229 (2002).

the requirements of the directive,[197] the family member's legal situation will not be flawless. In practice this does not usually cause any problems, as there are virtually no practical checks in the member states aimed at the compliance with the rules of the directive.[198] However, it can potentially turn problematic in some situations related to access to healthcare and unemployment benefits.

The second situation can have much more drastic consequences for the family, as the third country national can simply be deported from the new member state of residence, should the family not be recognized.[199] In practice this means that the nonrecognition brings about the "illegality" of the third-country national spouse. Since the free movement rights of the third country nationals in such situations are purely derivative from the rights of an EU citizen,[200] the nonrecognition of a family status effectively means the disappearance of all the EU law rights, including the right to enter and the right to remain for the third-country national spouse.

Similar problems can also arise under the Directive on the Rights of Third Country Nationals Who Are Long Term Residents.[201] The directive allows for a limited free movement right of third country nationals in possession of the "EC Residence Permit."[202] This right includes an entitlement to move

197. *See* Commission v. Belgium, Case C-408/03, [2006] E.C.R. I-2647, ¶ 72.

198. *See* Commission of the European Communities, *The Application of Directive 2004/38/EC on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States: Report from the Commission to the European Parliament and Council*, COM (2008) 840/3, at 8, ¶ 3.8.1.

199. On the rights of third-country nationals in the EU, see, for example, Georgia Papagianni, *Free Movement of Third Country Nationals on the Eve of 1 May 2004: Another Missed Deadline?*, *in* LA LIBRE CIRCULATION DE PERSONNES: ÉTATS DES LIEUX ET PERSPECTIVES 145 (Dominik Hanf & Rodolphe Muñoz eds., 2007); Martin Hedemann-Robinson, *An Overview of Recent Legal Developments at Community Level in Relation to Third-Country Nationals Resident Within the European Union, with Particular Reference to the Case Law of the European Court of Justice*, 38 COMMON MKT. L. REV. 525 (2001); Ian Ward, *Law and the Other Europeans*, 35 J. COMMON MKT. STUD. 79 (1997). For analysis in the context of European citizenship, see Kochenov, *supra* note 9, at 222–34.

200. Cédric Chenevièvre, *Régime juridique des ressortissants d'Etats tiers membres de la famille d'un citoyen de l'Union*, *in* LA LIBRE CIRCULATION DE PERSONNES: ÉTATS DES LIEUX ET PERSPECTIVES, *supra* note 199, at 125.

201. Council Directive No. 2003/109, 2004 O.J. L 16/44.

202. *Id.* art. 14(1), 2004 O.J. L 16/44, at 50. For analysis see Kochenov, *supra* note 9, at 225–29.

from one member state to another[203] accompanied by your "family."[204] The right of residence in the new member state is conditional upon the exchange or a residence permit.[205] Should a same-sex marriage not be recognized in the new member state of residence, the exchange of the residence permit will simply not be performed by the new member state of residence, resulting in a deprivation of one of the family members of the right to enter and to remain in the new member state with his husband.

However, for the reasons outlined above, EU law suggests that the marital status legally acquired in one of the member states would be recognized by all the other member states.[206] This should not only be the case when an EU citizen is involved. Once same-sex marriages involving an EU citizen are recognized, nonrecognition of a same-sex marriage involving third-country nationals concluded in one of the member states when they are exercising their free movement right under Directive 2003/109/EC would constitute a clear violation of article 18 TFEU (article 12 EC), as this situation is certainly within the scope of EU law and the article does not limit the notion of "nationality" to the nationalities of the member states.[207]

The proper application of the Citizens' Free Movement Directive with the ECJ defending the legal status acquired by the couples in their previous member states of residence is likely to exemplify, yet again, the most important drawback of the citizenship of the EU, namely its lack of generality.[208] More and more instances of reverse discrimination will be created, as

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203. Ireland, Denmark, and the United Kingdom are excluded from the scope of application of the directive. *Id.* pmbl. ¶¶ 25–26, 2004 O.J. L 16/44, at 46.

204. *Id.* art. 16, at 51.

205. *Id.* art. 15, at 50–51.

206. *See supra* Parts III.B, III.C.

207. *See* TFEU, *supra* note 23, art. 18, 2008 O.J. C 115, at 56; EC Treaty, *supra* note 23, art. 12, 2006 O.J. C 321 E, at 48. Although article 18 TFEU (article 12 EC) does not contain any references to nationality, the ECJ tended to interpret it restrictively, only allowing nondiscrimination on the basis of nationality between EU citizens. This approach has to change, however, as more and more third-country nationals fall within the scope of this provision. For one of the most compelling arguments for reinterpretation, see Pieter Boeles, *Europese burgers en derdelanders: Wat betekent het verbod van discriminatie naar nationaliteit sinds Amsterdam?*, 12 SOCIAAL-ECONOMISCHE WETGEWING 502 (2005). For an overview of the problem, see Kochenov, *supra* note 9, at 206–09.

208. *See* VINCENZO LIPPOLIS, LA CITTADINANZA EUROPEA 20 (1994).

married same-sex couples from Spain, Holland, and Belgium move to member states disallowing same-sex marriages, like Austria, Latvia, or Italy. With reverse discrimination allowed in EU law, the legal entitlements of the couples who used their free movement rights will be entirely different when compared with those of the local couples that never moved anywhere, resulting in a gap in protections and entitlements as unbridgeable as it is logically unexplainable. So while a young, same-sex family that moved from Belgium to Greece will be entitled to all the rights enjoyed by heterosexual families in Greece, a gay Greek couple can end up imprisoned even for having sex, as the ages of consent for homosexual and heterosexual couples are still not harmonized in Greece,[209] in breach of the law of the Strasbourg human rights protection system.[210] In other words, the cofunctioning of the legal systems of the EU and of the member states can result in diametrically opposed rules of regulation applied to EU citizens residing in the same jurisdiction, which is a big problem begging for resolution. At the same time, the ability of married same-sex couples from other member states to benefit from more rights than local same-sex couples is likely to put pressure of the national governments of the member states of the EU to change national regulation, which can result in positive reforms.

Free movement of registered partners is also covered by the Citizens' Free Movement Directive, as it includes among family members "the partner with whom the Union citizen has contracted a registered partnership . . . ."[211] However, whether the partnership actually falls within the scope of the directive is made directly dependent on the national law of the host member state, as it is only to be regarded as leading to a family member status in the terms of article 2(2)(b) of the directive "if the legislation of the host member state treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host member state."[212] This wording is problematic, because, just as

209. *See* Interpol, Sex Offenses Laws—Greece, http://www.interpol.int/public/children/sexualabuse/nationallaws/csagreece.asp (last updated Aug. 3, 2007).

210. *E.g.*, Sutherland v. United Kingdom, 22 Eur. H.R. Rep. 182 (1997).

211. Council Directive No. 2004/38, art. 2(2)(b), 2004 O.J. L 158/77, at 88.

212. *Id.*

the ECJ in *Maruko*,[213] it brings the application of EU law in total dependence on the national law of the member states. Autonomy of the EU legal order is thus not guaranteed at all. As more member states introduce the partnership option for the same-sex couples, this provision can have important implications for the rights of such couples. However disappointing the wording of the directive, the court is unlikely to strike it down, meaning that the same-sex couples will need to rely either on marriage or the existence of a long-term relationship in order to acquire rights in the new member state of residence should such state have no usable same-sex partnership laws on the books.

The number of situations when reliance on marriage is possible is limited, however. States allowing for same-sex unions or marriages usually incorporate defences against "same-sex marriage tourism" into their legislation, making sure that the relevant legislation only applies to persons sufficiently connected with the forum.[214] So to register a marriage in the Netherlands,[215] the partners need to be either citizens or residents of the country.[216] The Belgian rules are even stricter, demanding that the national law of each partner permits the marriage.[217] Spain broadly followed;[218] however, in practice, the Spanish law is also used to marry Spaniards and foreigners with no regard to the law of the latters' countries of nationality.[219] It has been argued that "[a] state or country makes that judgement not for the world at

213. Maruko v. Versorgungsanstalt der Deutschen Bühnen, Case C-267/06, [2008] E.C.R. I-01757.

214. This is not the case, for instance, in the Canadian provinces, where same-sex marriage is allowed. For a discussion of the Canadian situation, see Mary J. Mossman, *Conversations About Families in Canadian Courts and Legislatures: Are There "Lessons" for the United States?*, 32 HOFSTRA L. REV. 171, 175–83 (2003).

215. Note that to say, specifically, "same-sex marriage" would be discriminatory, hence the same rules should apply to homosexual and heterosexual marriages.

216. *See* Wet openstelling huwelijk [Law on Opening of Marriage], art. I.E, Stb. 9 (2001) (Neth.).

217. Loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil, Wet tot openstelling van het huwelijk voor personen van hetzelfde geslacht en tot wijziging van een aantal bepalingen van het Burgerlijk Wetboek [Law Opening Marriage to Same-Sex and Amending Certain Provisions of the Civil Code], ch. II, art. 7, 173 Stb. 9825 (2003) (Belg.).

218. Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio [Law 13/2005 of July 1, Amending the Civil Code Concerning the Right to Marriage] (B.O.E. 2005, 157) (Spain).

219. Tito Drago, *España: Matrimonio gay se internacionaliza*, IPS NOTICIAS, http://www.ipsnoticias.net/.asp?idnews=34585 (last visited Nov. Mar. 3017, 2009).

large, but for a relevant community in which it has an interest."[220] Yet, to present providing people with an opportunity to marry as an abuse of the law seems to be wrong. Besides being totally arbitrary, restrictions on "marriage tourism" can potentially be discriminatory as it makes the rights enjoyed by EU citizens dependent on their nationality—a situation impossible within the scope *ratione materiae* of EU law.[221] While the Dutch regulation can withstand such criticism, as it uses residence as a criterion for access to marriage, the Belgian rule, connecting access marriage with nationality, not solely residence, is absolutely impermissible, resulting in direct discrimination on the ground of nationality. Any EU citizen legally residing in Belgium is entitled to the same rights as Belgians. If Belgians can enter same-sex marriages, excluding Polish or Greek residents of Belgium from access to the same status would result in a violation of article 18 TFEU (article 12 EC). Residence, however, is a valid consideration under EU law. Given the small number of member states in which same-sex marriage is allowed and the residence requirement, it becomes clear that the absolute majority of same-sex couples residing in the EU are excluded from a possibility to marry, which amplifies the importance of EU law rules regulating the situation of unmarried same-sex couples.[222]

Unmarried partners who are unregistered are also potentially covered by Directive 2004/38/EC. With regard to such partners, the new member state of residence is obliged to "facilitate entry and residence for . . . the partner with whom the Union citizen has a durable relationship, duly attested."[223] Weiss opined in this regard that marriage in another member state

220. Linda Silberman & Karin Wolfe, *The Importance of Private International Law for Family Issues in an Era of Globalisation: Two Case Studies—International Child Abduction and Same-Sex Unions*, 32 HOFSTRA L. REV. 233, 247 (2003).

221. *See* TFEU, *supra* note 23, art. 18, 2008 O.J. 115, at 56; EC Treaty, *supra* note 23, art. 12, 2006 O.J. C 321 E, at 48; *see also* Davies, *supra* note 58.

222. Marrying outside of the EU, in the countries where there is no residence requirement (like Canada) is not the same thing, because EU law could not possibly affect the rules of recognition of third-country marriages by the member states of the EU.

223. Council Directive No. 2004/38, art. 3(2), 2004 O.J. L 158/77, at 89. The host member state is also bound to "undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people" *Id.* Similar wording is found in article 3(4) of the Family Reunification Directive. *See* Council Directive No. 2003/86, art. 3(4), 2003 O.J. L 251/12, at 14.

should attest the durable character of the relationship when same sex couples who moved to a member state not recognizing same sex marriages are concerned.[224] This is a tricky line of reasoning to take. First of all, marriage should not necessarily be concluded after long cohabitation or be a culmination of a durable relationship: the members of a married couple moving from one member state to another probably have only known each other for a couple of days before deciding to get married and to move. Does it affect the legality of their marriage? Obviously not. Yet, such a marriage is unlikely to attest to a durable charter of the relationship that the directive requires for unmarried couples. Secondly, and more importantly, the nature of rights granted to married and unmarried partners of EU citizens using their free movement rights is different in the two cases. While spouses get their rights protected automatically under the literal reading of the directive, with the unmarried couples the new member state of residence is solely obliged to "facilitate" their entry and residence, which means that denying it is also possible.[225]

Sex discrimination argument is potentially crucial in order to make free movement provision work for the unmarried same-sex couples. Since, especially after *Reed*,[226] the majority of the member states easily allow nonmarried heterosexuals to reside with their EU citizen partners upon the change of the member state of residence, the same rules should apply to homosexual couples too, as, following Koppelman's logic explained *supra*,[227] treating homosexual and heterosexual EU citizens differently in such a situation will result in direct sex discrimination, outlawed within the sphere of application of EU law and also by the CoE.[228] Should the court hesitate, the directive also prohibits sexual orientation discrimination, which will also unavoidably catch such situations.[229]

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224. *See* Weiss, *supra* note 123, at 104.
225. Council Directive No. 2004/38, art. 3(2), 2004 O.J. L 158/77, at 89.
226. Netherlands v. Reed, Case 59/85, [1986] E.C.R. 1283.
227. *See supra* Part II.
228. Karner v. Austria, 38 Eur. Ct. H.R. 528, 537 (2003).
229. Council Directive No. 2004/38, art. 31, 2004 O.J. L 158/77, at 86.

All in all, given the ease with which nonmarried heterosexual couples move around the EU,[230] it is clear that moving from one member state to another with your same-sex partner should not be a problem under the current legal regulation.[231] This is not enough, obviously, especially when a married same-sex couple is stripped of any marriage-related rights as a consequence of nonrecognition of the marriage by the new member state of residence. The ECJ is expected to step in, once an opportunity arises, to defend the law—what it is obliged to do under the treaties[232]—and to protect the rights of gay EU citizens. For now, the outline of the scope of rights enjoyed by different categories of same-sex couples, especially compared with the rights of heterosexual couples makes is absolutely clear that European law has not moved away from the conjugal hierarchy tacitly established by the court and the legislator years ago,[233] putting a heterosexual married couple at the top of the pyramid. Consequently, any couple that is not a heterosexual family is surely entitled to fewer rights.

D. *Impossible Exceptions and the Downturn of Family*

Given the political climate in some member states, as well as antigay public opinion,[234] it is clear that once the entry option for the gay families begins to function as it should within the European Union, the less-liberal member states will do their best to block the application of free movement to gay citizens' family

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230. It is established case law that, as such, unmarried partners are covered by Regulation 1612/68, falling within the meaning of the term "social advantage" of article 7(2) (to be afforded with no discrimination on the basis of nationality). *See, e.g.*, *Reed*, [1986] E.C.R. 1283, ¶ 28.

231. The great majority of industrialized democracies managed successfully to decouple the issues of immigration and same-sex marriage, facilitating the immigration of same-sex partners of citizens even where marriages between the persons of the same sex are not allowed. For an overview study, see James D. Wilets, *A Comparative Perspective on Immigration Law for Same-Sex Couples: How the United States Compares to Other Industrialised Democracies*, 32 NOVA L. REV. 327 (2008).

232. *See* TEU Post-Lisbon, *supra* note 23, art. 19(1), 2008 O.J. C 115, at 27; EC Treaty, *supra* note 23, art. 220, 2006 O.J. C 321 E, at 141.

233. *See* Daniel Borillo, *Pluralisme conjugal ou hiérarchie des sexualités: La reconnaissance juridique des couples homosexuelles dans l'Union européenne*, 46 MCGILL L.J. 875, 910 (2001).

234. *See* Waaldijk, *supra* note 80, at 21; *see also* Kochenov, *Gay Rights in the EU*, *supra* note 19, at 482–86.

members. Different exceptions are likely to be invoked in order to justify discrimination.

As far as potential morality exceptions are concerned, Karst's logic can be employed in the analysis of their potential reach. In his fundamental essay on the freedom of intimate association, Karst defended a point that "freedom does not imply that the state is wholly disabled from promoting majoritarian views of morality. What the freedom does demand is a serious search for justifications by the state for any significant impairment of values of intimate association."[235] In other words, "we must search for a state interest of very great importance."[236] The states should not only be allowed to hide behind the screen of "morality," serious justifications for any limitation need to be provided. Once stricter scrutiny in such a context becomes a dominating standard, the states will start losing overwhelmingly and systematically, as the majority of antigay policies are essentially entirely deprived of any sense and largely aim at the perpetuation of prejudice,[237] being "the product of folklore and fantasy rather then evidence of real risk of harm."[238] The potential dangers of such new standard for the states' ability to regulate marriage are evident.[239] Restricting marriage and nonmarital intimate association will be extremely difficult, which is a good thing, as "where marriage is involved . . . the state does not have a contracting party's choice to accept or reject a compact."[240]

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235. Karst, *supra* note 1, at 627. Or, put differently, "[m]easured against the freedom of intimate association, any governmental intrusion on personal choice of living arrangements demands substantial justification, in proportion to its likely influence in forcing people out of one form of intimate association and into another." *Id.* at 687.

236. *Id.* at 672.

237. The need for the state of Hawaii to justify its policy of exclusion of same sex couples from access to marriage was the bottom line of the Hawaii Supreme Court case of *Baehr v. Lewin*, 852 P.2d 44, 74 (Haw. 1993). The Hawaii Circuit Court then held that the State failed to meet the strict standard with the policy justifications it provided. *See* Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996). For the analysis of other relevant cases decided by the U.S. state courts, see, for example, *Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2016–20 (2003).

238. Karst, *supra* note 1, at 684–85.

239. *See* Zablocki v. Redhail, 434 U.S. 374, 399 (1978) (Powell, J., concurring); *see also* Karst, *supra* note 1, at 670–71.

240. Karst, *supra* note 1, at 652.

There is no room, in the European legal context, for the imposition of Karst's vision on the member states willing to suppress certain forms of intimate association at the national level following the perceived interests of the majority of their citizens. However, the Union can apply Karst's reasoning when the law of such a member state is forming an obstacle for a couple exercising free movement rights in the EU, i.e., once the operability of the entry option is at stake. In a situation when the achievement of the goals of the treaties is threatened, the strictest scrutiny is to be required.

Unlike in the free movement of goods,[241] public morality is not included among the TFEU grounds on which a member state willing to justify a restriction can rely. While article 21 TFEU (article 18 EC) allows for "limitations and conditions laid down in [EC] Treaty and by measures adopted to give it effect"[242] the most commonly used *lex specialis* instrument, article 45 TFEU (article 39 EC) only includes "public policy, public security and public health"[243] among the possible grounds. It seems that deviating using these exceptions in order to justify nonrecognition of same-sex partnerships or marriages is virtually impossible, since, in the situation when the usability of health and security arguments can be dismissed right away, public policy cannot possibly consist in discriminating on the basis of sex.[244] The EU legal context is thus very similar to the United States in this respect, as also in the United States "narrow approaches to

241. TFEU, *supra* note 23, art. 36, 2008 O.J. 115, at 61; EC Treaty, *supra* note 23, art. 30, 2006 O.J. C 321 E, at 53; *see, e.g.*, Conegate Ltd. v. Her Majesty's Custom and Excise, Case 121/85, [1986] E.C.R. 1007, ¶ 3 (interpreting article 30 EC (article 36 TFEU) strictly).

242. TFEU, *supra* note 23, art. 21(1), 2008 O.J. 115, at 57; EC Treaty, *supra* note 23, art. 18(1), 2006 O.J. C 321 E, at 49–50.

243. TFEU, *supra* note 23, art. 45(3), 2008 O.J. 115, at 66; EC Treaty, *supra* note 23, art. 39(3), 2006 O.J. C 321 E, at 57–58.

244. Such public policy would be in manifest disagreement with the principles—as outlined in article 6 TEU post-Lisbon (article 6 TEU pre-Lisbon)—on which the Union is founded and used to limit free movement of persons, will amount to the violation of the duty of loyalty of article 4 TEU post-Lisbon (article 10 EC). *See* TEU post-Lisbon, *supra* note 23, art. 6, 2008 O.J. C 115, at 19; TEU pre-Lisbon, *supra* note 23, art. 6, 2006 O.J. C 321 E, at 12; TEU post-Lisbon, *supra* note 23, art. 4(3), 2008 O.J. C 115, at 18; EC Treaty, *supra* note 23, art. 10, 2006 O.J. C 321 E, at 47. Moreover, rather than disqualifying classes of citizens from moving into a particular member state, public policy exceptions are to be grounded in personal conduct. *See, e.g.*, Council Directive No. 2004/38, art. 27(20), 2004 O.J. L 158/77, at 114.

tradition and morality are constitutionally impermissible justifications for denying individual liberties,"[245] as the Supreme Court made is absolutely clear in *Lawrence* v. *Texas*.[246]

While it is ultimately up to the ECJ to establish the possible extent of exceptions from the application of the entry option, the text of the relevant provisions as well as the position usually taken by the court in the cases involving deviations from the main treaty rule make it clear that any exceptions are to be interpreted restrictively and do not entitle the member states to discriminate on the basis of sex. This means that EU law is unlikely to be of assistance for any member state seeking exceptions from general application of the law of free movement of persons in order to respect the homophobic opinion of the majority.

CONCLUSION

Similarly to the possibility to limit the liberty of sexual minorities to make free choices with regard to such vital issues as marriage, immigration, adoption, and others, the member states will necessarily lose their ability to autonomously regulate other moral issues. This taming of the member states can only be welcomed: as a result they have less possibility to intervene, in a prohibitive way in the lives of persons within their jurisdiction. With the help of European federalism, the member states' ability to enforce the moral choices of the majorities on everyone is deteriorating at an increasing pace.

Building on the example of gay rights this Article has demonstrated that the member states will be bound to accept the legal statuses repugnant to their local vision of "morality": besides an "exit option" consisting in a legal right offered by a federal system to change a state of residence to a less oppressive one, in the European context federalism is developing an "entry option" allowing citizens to bring the legal statuses conferred on them by less restrictive jurisdictions to their new member state of residence as they move around the Union making use of their main EU citizenship right. Even though the ECJ is yet to recognize such entry option with regard to gay EU citizens, it is

245. Marcus, *supra* note 3, at 304.

246. Lawrence v. Texas, 539 U.S. 558, 577 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

bound to do so sooner or later as, notwithstanding all the freedom it enjoys, its ability to interpret and apply the law *contra legem* is limited.

By virtue of its very existence, the EU is bound to have an overwhelmingly positive impact on the development of human rights in the member states, as it constantly challenges their ability to impose particular moral views on their populations. The exit option that it provides empowers plenty of individuals who would not have any future in "fully sovereign" states. Complementing this basic federalism argument, the EU's potential in the area of fostering liberty goes even further, which is related to the "entry option" stemming directly from the interplay between EU law and the law of the member states. The "entry option" provides a unique opportunity for EU citizens to benefit from more beneficial law in a legal setting that is otherwise very restrictive. With the rising numbers of EU citizens using such "entry options" the pressure on the more orthodox member states will necessarily grow to change the laws and practices in force.