Grant v. South-West Trains: Equality for Same-Sex Partners in the European Community

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I. INTRODUCTION

Imagine you have been living with the woman you love for the last two years but are not yet married. You work for an airline company and have been flying for free for several years. Now, you want your partner to receive the same benefits. You should not have a problem because other employees’ partners fly for free despite the fact they are not married. You walk into your boss’s office with all of the proper paperwork, but he refuses to give you the spouse travel pass. “Why?” you ask. It is solely because you and your partner are both female. Even though some employers are beginning to provide benefits to gay and lesbian partners, many still do not.

1. See, e.g., Evan Ramstad, IBM Extends Benefits to Homosexuals, ROCKY MOUNTAIN NEWS, Sept. 20, 1996, at 1B (noting that IBM, one of the largest international companies, announced in the fall of 1996 that it would extend health benefits and other benefits to partners of gay and lesbian employees).

2. See Sherwood Ross, Gay Partner Benefits Spreading Rapidly in Workplace, REUTERS BUS. REP., Nov. 20, 1995 (reporting that according to Common Ground, a workplace education and diversity training consulting firm, there are only 428 companies in the United States that provide domestic partner benefits and that for every company providing benefits there are at least twenty companies in which gay and lesbian employees are asking for these benefits).
Now imagine that you and your partner decide to marry legally in Hawaii. Upon your return to Richmond, you go to your boss's office asking for the spouse travel pass, this time armed with a marriage license from Hawaii. Your state, Virginia, however, does not recognize same-sex marriages. Your boss denies your request again, and you sue. What can a court in Richmond do?

This hypothetical is not yet possible in the United States because Judge Chang in Hawaii issued a stay that prevents the issuance of marriage licenses to same-sex couples until after the Hawaii Supreme Court hears the appeal of Baehr v. Lewin. A situation, however, is occurring in Great Britain where a lesbian sued her employer for travel benefits. This case, Grant v. South-West Trains, Ltd., is currently pending before the European Court of Justice, and recently, the Advocate-General of the European Court of Justice delivered his opinion on this case.

In Grant, Lisa Grant sued her employer, South-West Trains ("SWT"), formerly a division of British Rail, because it denied her lesbian partner spouse travel benefits. SWT admits that it denied Lisa Grant this perquisite because she and her

3. See Baehr v. Miike, No. 91-1394 (Hawaii Cir. Ct., Dec. 3, 1996) available in LEXIS, Hottop Library, Extra File (holding that it was a violation of the state constitution to deny same-sex couples marriage applications).

4. See Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar the Door, N.Y. Times, Mar. 6, 1996, at A13 (describing the trend among states to adopt laws that deny recognition of same-sex marriages); see also Lisa Keen, Good News, Bad News on Marriage: Hawaii Supreme Court Rejects an Attempt to Amend State Constitution, WASH. BLADE, Mar. 28, 1997, at 1 (listing states, including Virginia, which passed laws denying state recognition of same-sex marriages from any other state). Today twenty states have banned the recognition of same-sex marriages from other states. See id. at 23.

In addition to these twenty states, there are similar bills that have either passed or are pending in either the house or senate in state legislatures in another twenty-four states. See id. Interestingly, only three state legislatures so far have rejected this type of legislation. See id. at 1, 23. The United States Congress passed the Defense of Marriage Act and President Clinton signed it into law. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). Section 7 defines marriage as "only a legal union between one man and one woman as husband and wife" and defines spouse as a person of the opposite sex of the other party in the marriage. Id. at § 7.

5. See The Week in Review, INDIANAPOLIS STAR, Dec. 8, 1996, at A21 (noting that the Hawaii Circuit Court ruled that the state could not deny same-sex couples marriage licenses and Circuit Court Judge Chang ordered a stay until the state supreme court rules on the issue).


7. See id. at 2-3 (outlining the reasons why Lisa Grant brought the case against her employer); see also Michael Fleet, Ban on Free Rail Travel for Lesbian 'Is Unjust', DAILY TELEGRAPH (London), May 3, 1996, at 10 (reporting that Lisa Grant brought suit against SWT because she was denied a travel pass for her lesbian companion); Sarah Boseley, Lesbian 'Victim of Bias by Rail Firm' Cherie Blair Takes on Case of Rail Travel Perk as Test for English and European Law on Sex Discrimination, GUARDIAN (London), May 3, 1996, at 4 (reporting that Lisa Grant's suit focuses on sex discrimination by her employer because SWT failed to provide Grant with a travel pass for her lesbian companion); BR Clerk Seeks
partner are lesbians. While the discrimination laws of both the European Community and Great Britain provide for protection from employment discrimination based on sex, these discrimination laws, as of yet, do not provide protection based on sexual orientation. Therefore, Lisa Grant argues that SWT discriminated based on sex, which is illegal under the Treaty establishing the European Economic Community and under British law.

This case is truly a landmark case for gays and lesbians. For many years, gays and lesbians in Europe have sought equal rights from the European Community institutions as well as from various treaty organizations to which most European countries are signatories. The Grant case is uniquely situated to provide gays and lesbians equal protection in the workplace as well as to raise a discussion of the issues surrounding same-sex unions in other areas such as immigration and probate law.

This Comment provides reasons why the European Court of Justice should find in favor of Lisa Grant. Part II of this Comment provides an overview of the framework of the European Community institutions and the various European intergovernmental organizations, reviewing each institution’s political ability and efforts to provide equal treatment for gays and lesbians. Part III describes the European Court of Justice and certain aspects of the Court that make it uniquely situated and prepared to assist gays and lesbians. Part IV reviews the treaties of the

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8. See Grant’s Written Observations, supra note 6, at 2-3 (describing how SWT denied Lisa Grant a travel pass for her lesbian partner). SWT “claims an entitlement to discriminate against Lisa Grant and her partner and asserts that Community Law provides no constraint or protection in the circumstances of the present case.” Id. at 8.

9. See Treaty Establishing the European Economic Community, art. 119, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EC Treaty] (protecting against sex discrimination only); Sex Discrimination Act of 1975, ch. 65, § 1(a) (Eng.) (describing sex discrimination as treating a woman less favorably than a man on the ground of her sex, but not providing for protection based on sexual orientation); see also Grant’s Written Observations, supra note 6, at 8 (outlining Lisa Grant’s argument that SWT’s actions constituted sex discrimination).

10. See Grant’s Written Observations, supra note 6, at 8 (indicating Lisa Grant’s reliance on Article 119 of the EC Treaty, which provides protection from sex discrimination); see also supra note 9 (describing the limits of both the European Community and British protections against sex discrimination).

11. See Andrew Clapham & J.H.H. Weiler, Lesbian and Gay Men in the European Community Legal Order, in HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE 21 (Kees Waaldijk & Andrew Clapham eds., 1993) (noting that the stakes are extremely high for any case like Lisa Grant’s, which reaches the European Court of Justice); see also Paul Edwards, Gay Test Case Goes to Euro Court, PRESS ASS’N NEWSFILE, July 22, 1996, available in LEXIS, News Library, Cumws File (referring to this as a “landmark” case).

European Community, focusing on the goals and objectives of the European Community. The argument in this part indicates that the denial of legal protection for gays and lesbians and the failure to recognize same-sex unions hinder the Community’s ability to reach its goals. Part V reviews the history of the gay and lesbian civil rights movement in Europe and focuses on the recognition of same-sex partnerships. Each part also indicates the important role of the European Court of Justice and provides compelling reasons why the European Court of Justice should find in favor of Lisa Grant. Part VI reviews the arguments and legal analysis in *Grant*. Part VII reviews the recent Advocate-General’s opinion delivered on September 30, 1997, which suggests that the European Court of Justice respond in favor of Lisa Grant. Part VIII combines the conclusions reached in each previous part and articulates the reasons why the European Court of Justice should find for Lisa Grant.

II. OVERVIEW OF THE EUROPEAN COMMUNITY\textsuperscript{13} INSTITUTIONS’ FRAMEWORK AND INTERGOVERNMENTAL TREATY ORGANIZATIONS

Gays and lesbians have lobbied the European Community and intergovernmental organizations,\textsuperscript{14} with mixed results.\textsuperscript{15} One reason for this mixed success is that the institutions that are willing to help gays and lesbians lack the political

\textsuperscript{13} See Josephine Shaw, *European Community Law* 5 (1993) (noting that the European Union has no legal personality). Because the member states established the European Court of Justice as part of the European Community, this Comment refers to the Community as such, as opposed to the European Union. The Comment recognizes, however, that the Maastricht Treaty established the framework of the European Union, which encompasses the European Community Treaties. See also EC Treaty, \textit{supra} note 9, art. 4 (establishing the four European Community institutions discussed in this Comment).

\textsuperscript{14} See, e.g., Tatchell, \textit{supra} note 12, at 15-38 (describing the gay and lesbian community’s relationship with the European Community institutions); see also Alexandra Duda, *The Council of Europe and What It Can Do For Gay Men and Lesbians*, in ILGA \textit{EuroLetter} 30, Jan. 1995 (visited Sept. 10, 1997) \textlangle http://figb.qrd.org:8080/fqrd/assocs/ilga/euroletter30.html#EU\textrangle [hereinafter ILGA \textit{EuroLetter} 30] (discussing the International Lesbian and Gay Association’s (“ILGA”) lobbying of the Council of Europe and other inter-governmental organizations since the ILGA was established in 1978; ILGA’s \textit{EU Policy}, in ILGA \textit{EuroLetter} 30, \textit{supra} (describing the ILGA’s plans to continue to lobby the European Community institutions). “ILGA should influence the institutions of the European Union in order to gain full equality for lesbians and gays in the European Union as well as in member states.” Id.

power to implement pro-gay or pro-equality changes.\textsuperscript{16} The institutions that have the power, however, tend to be too preoccupied with economic issues to use their power to promote equality for gays and lesbians.\textsuperscript{17} The European Court of Justice possesses the right mix of power and willingness to improve the situation for gays and lesbians in, at the very least, the workplace.\textsuperscript{18} For these reasons, \textit{Grant} is a relatively rare opportunity for a dramatic, positive change for gays and lesbians in Europe.

\section*{A. OVERVIEW OF THE EUROPEAN COMMUNITY}

In 1957, a group of six nations signed the Treaty of Rome ("EC Treaty") establishing a European Economic Community, similar to earlier economic agreements such as the European Coal and Steel Community and the European Atomic Energy Community.\textsuperscript{19} This new European Economic Community was often considered the "everything else" community.\textsuperscript{20} The EC Treaty established the European Parliament, the Council of Ministers, the European Commission, and the European Court of Justice.\textsuperscript{21} Defining this organization and the relationship between the institutions of the European Community is difficult at best.\textsuperscript{22}

The European Community resembles neither the typical governing structure of an international organization, in that its institutions exercise sovereign powers transferred by the member states, nor the institutional framework of a modern parliamentary democracy.\textsuperscript{23} It is, for example, not possible to identify a clear separation of powers between the legislative and the executive functions.\textsuperscript{24} While difficult to describe, each institution that makes up the European Community has a different willingness and political ability to assist gays and lesbians in achieving protections such as workplace discrimination protection or recognition of same-sex partnerships.

\textsuperscript{16} See infra Part II.B (describing the limited political power of the gay-friendly European Parliament).

\textsuperscript{17} See infra notes 38-67 and accompanying text (describing the power of the Council of Ministers and the European Commission but noting their resistance to enact legislation that will help gays and lesbians in the European Community).

\textsuperscript{18} See infra Part III; see also infra notes 99-101 and accompanying text (describing the freedom of the European Court of Justice to promote equal rights for gays and lesbians).

\textsuperscript{19} See SHAW, supra note 13, at 4 (discussing the creation of the European Community). The Treaty of Rome is often referred to as the European Economic Community Treaty. It is referred to as the "EC Treaty" in this Comment.

\textsuperscript{20} Id.

\textsuperscript{21} See EC Treaty, supra note 9, art. 4 (establishing these institutions); see also SHAW, supra note 13, at 7.

\textsuperscript{22} See id. at 51 (describing the intertwined relationships between the European Community institutions).

\textsuperscript{23} See SHAW, supra note 13, at 3 (providing an introduction to European Community law).

\textsuperscript{24} See SHAW, supra note 13, at 51.
B. EUROPEAN PARLIAMENT

The European Parliament is a body of elected officials from the member countries, which serves a quasi-legislative role. Often the Parliament is limited to unenforceable recommendations and statements. Of the four European Community institutions, the European Parliament is the weakest. Even though the European Parliament’s power has expanded under the Single European Act and more recently under the Maastricht Treaty on European Union ("TEU") to include cooperation and co-decision rights in the Community’s legislative process, including veto powers, it is still relatively powerless in the European Community. Despite this lack of power, or perhaps because of this lack of power, members of the European Parliament ("MEPs") speak out more frequently on gay and lesbian issues than members of the other European Community institutions. In addition to rais-


26. See SHAW, supra note 13, at 25 (discussing the formation, duties, and limited powers of the European Parliament).

27. See TATCHELL, supra note 12, at 15 (noting that "with no real authority to initiate legislation, [the European Parliament] has little more than a consultative and advisory role in relation to the more powerful European Commission and Council of Ministers"). The Parliament’s recommendations are often ignored. See id. at 18. Yet, the Maastricht Treaty provides the European Parliament the right to be consulted by the Council of Ministers and the European Commission before either institution takes action in certain areas of the law. See FOLSOM, supra note 25, at 43. For example, the European Parliament can prepare a report for the Commission or Council. See id. Even though this report is non-binding, the Council or Commission acts illegally if it acts without waiting for the report. See id. The European Parliament can use this as an effective tool to delay legislation it opposes. See id.


30. See EC Treaty, supra note 9, art. 189(b)-(c) (providing cooperation and co-decision powers to the European Parliament); see also FOLSOM, supra note 25, at 43-46 (describing in detail the new powers granted to the European Parliament). Since the Single European Act, the Parliament has had the opportunity to provide amendments on legislation proposed by the Commission and has worked with the Council of Ministers proposing common positions, which the Council can adopt. See The Single European Act, 1987 O.J. (L 169) 1; FOLSOM, supra note 25 at 43-44. In addition, the European Parliament can veto certain legislation dealing with specific articles of the EC Treaty. See id. at 45-46. Of interest to gays and lesbians is that the European Parliament can veto legislation dealing with Article 48 of the EC Treaty (free movement of people). See id. It is, however, the Council of Ministers who makes decisions to pass legislative acts. See SHAW, supra note 13, at 51-52.

31. See TATCHELL, supra note 12, at 15.

32. See FOLSOM, supra note 25, at 47 (describing the use of questions by MEPs); see, e.g., EUR. PARL. DEB. (No. 432) 210 (June 9, 1993) (documenting that Mrs. Crawley, MEP, asked about recognition of same-sex partnerships and related immigration issues); Written question by Nel van Dijk and Claudia Roth to the Commission, 1996 O.J. (C 280) 117 (noting that Claudia Roth, MEP, inquired about a ban on marriages between two persons of the same sex); see also Hein Verkerk, Questions in European Parliament on Dutch Gay
ing questions about equal protection and recognition of same-sex couples, the Parliament has produced many pro-gay resolutions, reports, and recommendations. Even so, the European Parliament does not have the power to enforce these

Marriage, in ILGA EUROLETTER 41, Apr. 1996 (visited Sept. 10, 1997) <http://fglb.qrd.org:8080/fqrd/assocs/ilga/euroletter/41.html#Question> [hereinafter ILGA EUROLETTER 41] (describing Nel van Dijk’s and Claudia Roth’s question, which asked if the European Commission agreed with the Dutch Parliament’s decision to lift the ban on gay marriages); infra note 134 (describing MEP Glyn Ford’s question calling for the European Commission to acknowledge how discrimination of gays and lesbians creates obstacles for the European Community to achieve its goals and objectives); Gay Friendly Question in the European Parliament, in ILGA EUROLETTER 43, Aug. 1996 (visited Sept. 10, 1997) <http://fglb.qrd.org:8080/fqrd/assocs/ilga/euroletter/43.html> [hereinafter ILGA EUROLETTER 43] (quoting Swedish MEP, Joern Svensson’s, question: “What has the Commission done since [the adoption of a resolution calling for the end of discrimination against gays and lesbians] to combat discrimination against homosexuals in society?”). But see, e.g., Anti Gay Question in the European Parliament, in ILGA EUROLETTER 43, supra (describing the anti-gay question, which, asked the European Commission to study the effects on society of the “union of individuals who are not naturally compatible” and “characteristics of any children who are adopted by or the result of such unions”). The Commissioner’s answer to this anti-gay question was evasive and referred the Member of the European Parliament to a report co-financed by the Commission—HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE. See id.

33. See, e.g., Hein Verkerk, Resolution in European Parliament on Romania, in ILGA EUROLETTER 45, Nov. 1996 (visited Sept. 10, 1997) <http://fglb.qrd.org:8080/fqrd/assocs/ilga/euroletter/45.html> [hereinafter ILGA EUROLETTER 45] (discussing the draft resolution that the MEPs debated in the European Parliament condemning Romania’s decision to introduce heavy penalties for consensual homosexual acts); European Parliament Repeats Its Commitment to Lesbian and Gay Rights, in ILGA EUROLETTER 45, supra (indicating that on September 15, 1996 the European Parliament reaffirmed its continued work toward ending discrimination of gays and lesbians in the European Community by adopting a resolution calling for the end to such discrimination); see also Grant’s Written Observations, supra note 6, at 26 (citation omitted) (noting that as early as 1984, the European Parliament adopted a resolution dealing with sexual discrimination in the workplace, including under that topic a discussion on the problems of sexual orientation discrimination).


35. See Important Votes in the European Parliament, in ILGA EUROLETTER 30, supra note 14 (discussing the Parliament’s recommendations on gay and lesbian issues). The European Parliament debated and voted on recommendations to the Council of Ministers that considered whether “family policy should include the recognition of different households, including non-traditional and alternative families without any form of discrimination . . . [and to] adapt family legislation to the changes that have occurred in the function and structure of the modern family at the national as well as European level. . . .” Id. While the vote on certain portions of this recommendation did not pass, eventually an amended compromise was passed by roughly a 3-to-1 margin. See id.
Parliament’s inability to provide gays and lesbians with their fundamental rights indicates the importance of Grant and the European Court of Justice to the gay and lesbian movement. Arguably, no European institution, other than the European Court of Justice, has the willingness, the focus, and the political ability to protect gay and lesbians in the workplace.

C. COUNCIL OF MINISTERS

The Council of Ministers is essentially the main legislative body of the Community. Unlike the United States Congress, however, the Council of Ministers is not a body that initiates legislation. Instead, the European Commission decides what legislative proposals the Council of Ministers considers. Thus, while this Comment suggests that the Council is not very gay-friendly, all blame cannot rest with the Council, as the organization of the European Community institutions limits each institution’s powers to some extent. The Council of Ministers is the final decision making institution. It is not, however, the institution that initiates the process. The Council of Ministers can only react to the European Commission’s proposals. Absent Commission proposals on the issue of gay and lesbian rights, the Council is not in a position to take a stand. Yet, under Article 152 of the EC

36. See infra notes 56-66 and accompanying text (discussing the European Commission); see also TATCHELL, supra note 12, at 18-19 (describing the Commission’s adamant denial that it has responsibility for gay and lesbian issues). The Commission even argued that “the EC Treaties restrict what it is legally empowered to do.” Id. “Since there is nothing explicit in the EC Treaties about the rights of lesbians and gay men, the Commission insisted it has no legal competence to take action on matters of sexuality.” Id.; see also Clapham & Weiler, supra note 11, at 28 (noting the consistent argument by the Commission that it cannot act on gay and lesbian issues).

37. See, e.g., TATCHELL, supra note 12, at 16-18 (noting that even though the Commission indicated that it would take action on the Squarcialupi Report, which called for the end of discrimination of gays and lesbians, it never did); see also FOLSOM, supra note 25, at 44-45 (noting that, under the cooperation procedure, of the nearly 1,000 amendments the Parliament suggested, the Council of Ministers acted on less than half).

38. See SHAW, supra note 13, at 7 (describing the powers of the Council of Ministers). But see, SHAW, supra note 13, at 51 (indicating that “[t]he legislative function is presently divided between the Council of Ministers and the Parliament, with inputs from the Commission and other subsidiary bodies.”). “There is no single legislative or executive procedure which can be described in simple terms.” Id.


41. See SHAW, supra note 13, at 7, 51-53.

42. See id.

43. See id.

44. See id.
Treaty, the Council can request that the Commission work on a proposal for the Council.45

Even though the Council cannot initiate legislation, the Council is the final decision-maker. Under the TEU, the Council of Ministers and the European Parliament share decision-making authority with respect to certain areas of European Community law.46 Even so, the Council of Ministers clearly maintains more political power than the Parliament.47 Furthermore, the Council has expanded its legislative powers to include influencing the initiation of policies and controlling the implementation of those policies.48

While the Council of Ministers has more power49 than the Parliament to institute change in the European Community, it is not likely to do so for gays and lesbians.50 The Council of Ministers has been very reluctant to act on the pro-gay recommendations and reports of the European Parliament.51

Even if the Council of Ministers will not openly help gays and lesbians achieve equality, gays and lesbians may increase their chances for support from the Council of Ministers if gay and lesbian issues are framed as economic integration issues.52 Economic integration is a major goal of the EC treaty.53 Social issues in

45. See EC Treaty, supra note 9, art. 152 (providing the Council of Ministers with the power to request that the Commission work on proposals relating to the attainment of the European Community goals).
46. See supra note 30 and accompanying text (describing the relationship between the European Community institutions).
47. See, SHAW, supra note 13, at 52 (noting that the Council of Ministers “has largely retained the core legislative power. . . . [While the European Parliament [is] unable to overcome the dominance of the Council, it has gradually emerged as a more significant political actor.”).
48. SHAW, supra note 13, at 52 (discussing the Council of Minister’s usurpation of power from other institutions within the Community’s institutional framework).
49. See FOLSOM, supra note 25, at 51 (describing the role of the Council of Ministers in the legislative process as “dominant”); see also TATCHELL, supra note 12, at 15 (noting that the Council of Ministers is the “main policy-making and legislative institution of the EC” with the ability to over-rule both the European Parliament and the European Commission).
50. See supra note 37 and accompanying text (describing the failure of the Council to act on pro-gay initiatives from the European Parliament); see also TATCHELL, supra note 12, at 22-23 (noting that the Council of Ministers does not want to deal with employment issues affecting gays and lesbians).
51. See id.
52. See infra notes 127-134 and accompanying text (discussing the focus on economic integration as opposed to the relatively recent expansion of the European Community institutions’ focus on social issues). Even with social issues receiving more attention from the Council of Ministers, because of its poor gay record, the more a gay related issue can be framed as an economic integration issue the more likely it is that any Community institution will take action on it because the primary purpose of the Community is economic integration. See EC Treaty, supra note 9, art. 2.
53. See EC Treaty, supra note 9, art. 2. Article 2 of the EC Treaty sets out the goals of the European Community:
member states were not — and are still not — the main emphasis of the EC Treaty, unless they affect economic unity. In 1987, however, the European Community adopted the Single European Act which expanded the focus of the European Community to include social issues.

Even with the European Community now focusing some of its energy on social issues, the European Commission’s and Council of Ministers’s records on gay and lesbian issues suggest that an argument for equal protection absent some connection to the European Community’s economic goals, based solely on an “equality” argument, may continue to fall on deaf ears. Although times are changing and the Community recognizes the relationship between social issues and the economic goals of the European Community, it is unlikely that any significant action regarding equality for gays and lesbians will come from the Council of Ministers.

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

See also Tatchell, supra note 12, at 16 (explaining that economic unity is the purpose behind the creation of the European Community); Josephine Steiner, Textbook on EEC Law 3-5 (4th ed. 1994) (noting that the EC treaty was established to create an economic community modeled after the European Coal and Steel Community but on a larger scale).

See Steiner, supra note 53, at 7 (indicating that the primary concern of the EC Treaty is economic in nature, but it did include social goals). Compare Council Directive 75/129, 1975 O.J. (L 48) 29 (approximating various national laws on redundancies) and Council Directive 80/987, 1980 O.L (L 283) 23 (approximating various national laws regarding the protection of employees after business insolvency) with Tatchell, supra note 12, at 22-23 (noting that the Council of Ministers does not want to deal with employment issues affecting gays and lesbians). “Currently, [the Council of Ministers] see[s] lesbian and gay equality as too controversial. They also treat it as a low priority compared with the completion of the Single European Market, plans for economic and monetary union, and other preoccupying issues such as . . . economic aid to the ex-Soviet republics.” Id. The Council of Ministers has failed to approximate the various national laws providing varying recognition of same-sex partnerships, which have an impact on economic integration and the free movement of people. The more people express the impact that gay and lesbian discrimination has on the economic integration goals of the European Community, the more likely the institutions of the European Community will address the issues important to gays and lesbians.

See Steiner, supra note 53, at 7 (noting that with the adoption of the Single European Act, the focus of the European Community began to include social issues).

See infra notes 127-134 and accompanying text (discussing the recent expansion of European goals to include social issues).

See discussion supra Part II.C & infra Part II.D (discussing the failure of both the Commission and the Council in adopting measures that would protect gays and lesbians from inequality).

Compare infra notes 127-134 and accompanying text (discussing the Community’s expansion into social rights) with supra notes 37-57 and accompanying text (discussing the failure of the Commission and Council to actively promote and adopt measures that would protect gays and lesbians).
It appears that neither the European Parliament nor the Council of Ministers has the right combination of willingness and power to provide protection for gays and lesbians in the workplace. The European Commission is no different.

D. EUROPEAN COMMISSION

The European Commission is, essentially, a high powered executive civil service. The Commission consists of seventeen commissioners, with at least one from each member country. The Commission is "responsible for proposing and [to a lesser extent,] implementing the decisions of the Council of Ministers." Simply put, it alone drafts legislative proposals on which the Council may or may not act. "Almost all the provisions of the [EC T]reaty which grant law-making power to the Council of Ministers begin on proposals from the Commission. . . ." Furthermore, the EC Treaty requires that the Commission work with the Council of Ministers to correct situations that violate the EC Treaty's objectives of economic integration, such as problems effecting the free movement of people.

Like the Council of Ministers, the European Commission has a poor record on gay and lesbian issues. Even so, gays and lesbians have lobbied the Commission with little success. There is hope that with increasing effort, both the Council and
the Commission will become more responsive to the needs and requests of the gay and lesbian community, however, until then gays and lesbians should pursue additional alternatives to obtain protections in the workplace. The European Court of Justice is an appropriate forum to provide relatively swift justice for gays and lesbians. Even so, gays and lesbians have often looked to other international courts and organizations for similar relief.67

E. INTERNATIONAL TREATY ORGANIZATIONS

1. Council of Europe & European Convention on Human Rights

Other alternatives to which gays and lesbians can turn are the various intergovernmental organizations and treaty organizations throughout Europe.68 This is an alternative to the European Community institutional framework.

Although the Council of Europe is a separate and distinct entity from the European Community institutions, the European Court of Justice considers and weighs decisions and recommendations from intergovernmental bodies, such as the Council of Europe, in connection with its consideration of the EC Treaty.70 It is important to note that this consideration is not natural, but is part of the unique teleological interpretation of the treaties by the European Court of Justice.71

67. See discussion infra Part I.E.
68. See Peter Van Dijk, The Treatment of Homosexuals Under the ECHR, in HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE, supra note 11, 184-185 (noting that gays and lesbians often seek justice from the European Court of Human Rights).
69. SHAW, supra note 13, at 7.
70. See Clapham & Weiller, supra note 11, at 24 (noting that the European Convention of Human Rights constitutes a clear bench mark which "the European Court of Justice will always accept as binding within the field of community law"); see also MARK BREALEY & MARK HOSKINS, REMEDIES IN EC LAW 19-20 (1994) (citing Case 222/84, Johnson v. Chief Constable of the Royal Ulster Constabulary, 1986 E.C.R. 1651 and noting that "[a]lthough the European Convention on Human Rights is not directly a part of Community law, the Court of Justice has stated that "the principles on which the Convention is based must be taken into consideration in Community law.".
71. See generally Kenneth M. Lord, Bootstrapping an Environmental Policy from an Economic Covenant: The Teleological Approach of the European Court of Justice, 28
Gays and lesbians have successfully lobbied the Council of Europe, getting the Council of Europe to pass recommendations calling for equal treatment of gays and lesbians. While the Parliamentary Assembly of the Council of Europe passed pro-gay recommendations, these have limited value because they are only recommendations to signatory countries, and the Council cannot enforce these on signatory countries. Despite its inability to enforce the Parliamentary Recommendations, the Council of Europe has a more effective way of pursuing recognition of human rights—the European Convention on Human Rights ("Convention"). The Convention established two bodies: the European Commission on Human Rights and the European Court of Human Rights.

The European Court of Human Rights has a mixed record on gay and lesbian issues. The Court of Human Rights has held in three separate opinions that Great Britain, Ireland, and Cyprus's decisions to criminalize consensual homosexual sex violated the convention, which prompted the British government to repeal its law. Yet even though it has addressed the issue of gay rights, the Court of Human Rights has not expanded protection for gays and lesbians beyond this right of pri-

**CORNELL INT'L L.J. 571 (1996).**

72. See, e.g., Alexandra Duda, The Council of Europe and What It Can Do for Gay Men and Lesbians, in ILGA NEWSLETTER 30, supra note 14, (describing the founding of the ILGA in 1978 and its success in lobbying the Council of Europe). The ILGA works with the Parliamentary Assembly, the legislative body of the Council of Europe, which has passed recommendations calling for equal treatment of gays and lesbians. See id. For example, in 1981, the Parliamentary Assembly passed Recommendation 924 which called for: 1) equal treatment in the workplace; 2) the destruction of records collected on homosexuals; 3) the abolishment of legislation which criminalizes homosexuality; 4) and the ending of "all compulsory medical action or research designed to alter sexual orientation of adults." Id.

73. See infra note 81 (suggesting that member countries are not bound to act on the decisions handed down from the Council of Europe and European Court of Human Rights).

74. See TATCHELL, supra note 12, at 26 (describing how the Council of Europe uses the Convention to protect human rights). The European Commission on Human Rights [hereinafter Commission] administers the Convention. See id. When individuals claim that a country violated their rights under the Convention, the Commission determines which of these claims have merit and should proceed to the European Court of Human Rights. See id.

75. See id.

76. Compare Kurt Krickler, Written Presentation to the OSCE Review Conference, Vienna, November 1996, in ILGA EUROLETTER 45, supra note 33, (noting that "[o]n three occasions, the European Court of Human Rights ruled that the prohibition of homosexuality among consenting adults to be a violation of the European Convention on Human Rights") with infra note 79 (listing four cases in which the Court of Human Rights decided against the gay or lesbian party).


vacy of sexual activity. For example, the Court of Human Rights failed to find that deportation of one member of a same-sex partnership violated the Convention. This suggests that if Grant were before the Court of Human Rights, that Court probably would not stop the discrimination against Lisa Grant. In addition, because the Court of Human Rights is an intergovernmental organization (as opposed to a super-governmental organization like the European Community), it lacks the authority to effectively enforce its decisions without offending signatory countries.

Even with the possibility of limited enforcement powers of the Court of Human Rights, the European Court of Justice considers the general principles embodied in the European Convention on Human Rights part of Community law and often


80. See X v. United Kingdom, 11 Eur. H.R. Rep. at 50 (deporting a lesbian partner in a same-sex couple); see also Van Dijk, supra note 68, at 184-85 (suggesting that the European Court of Human Rights does not take a pro-gay and lesbian stance).

81. See Lawless v. Ireland, 1 Eur. Ct. H.R. (ser. B) at 408 (1960-61) (noting the fine line that the European Court of Human Rights walks in enforcing the Convention and showing deference to the national governments).

The concept of the margin of appreciation is that a government’s discharge of its responsibilities is essentially a delicate problem of appreciating complex factors and of balancing conflicting considerations of the public interest; and that, once the Commission or the Court is satisfied that the Government’s appreciation is at least on the margin of its powers . . . then the interest which the public itself has in effective government and in the maintenance of order justifies and requires a decision in favor of the legality of the Government’s appreciations.

Id.; see also, e.g., TATECHL, supra note 12, at 26 (noting that even if the Court of Human Rights decides a case against a member country, that country is not necessarily obligated to comply with the Court of Human Rights’s order); Tymr v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) at 15 (1978); James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A) at 44 (1986) (conceding that “[c]ontracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations permit a different treatment in law”); Malone v. Commissioner of Police, 2 All E.R. 620, 647 (Ch. 1979) (noting that the Convention has no direct effect on British law); ARTHUR HENRY ROBERTSON & JOHN GRAHAM MERRILLS, HUMAN RIGHTS IN THE WORLD 230 (1989) (noting the difficulty intergovernmental organizations face in enforcing their decisions on signatory countries). Compare Clapham & Weiler, supra note 11, at 39-40 and Patrick Dillon-Malone, Individual Remedies and the Strasbourg System in an Irish Context, in HUMAN RIGHTS: A EUROPEAN PROSPECTIVE 48 (Liz Heffernan ed., 1994) (noting that the Convention is not incorporated into the Irish law, and thus the Irish courts have not applied it to cases) with TATECHL, supra note 12, at 25 (noting that the Irish government eventually changed its law, that made consensual adult homosexual sex illegal, after the European Court of Human Rights handed down its decision).
looks to decisions by the Court of Human Rights in reaching its own decisions.\textsuperscript{82} Lisa Grant correctly relies on certain Court of Human Rights decisions in her Written Observations to the European Court of Justice.\textsuperscript{83} The restrictive and conservative nature of the Court of Human Rights, a Court established under an international, not super-national treaty, combined with its unwillingness to protect gays and lesbians in areas other than private consensual sex, suggests that Lisa Grant's suit might fail if before the European Court of Human Rights.\textsuperscript{84} While gays and lesbians may find certain decisions from the European Court of Human Rights helpful in making their arguments before the European Court of Justice, reliance on additional treaties or covenants may further increase the strength of their arguments before the European Court of Justice.

2. Other Treaties and Covenants

In addition to relying on the Convention and the Court of Human Rights, there are other treaties that are useful to Lisa Grant's case and the gay and lesbian civil rights movement in Europe. In an argument for same-sex marriage, for example, the International Covenant on Civil and Political Rights ("ICCPR") is helpful because it considers marriage, albeit not specifically same-sex marriage, a fundamental right.\textsuperscript{85} While the ICCPR outlaws discrimination based on sex,\textsuperscript{86} neither the

\textsuperscript{82} See supra note 70 (describing the deference the European Court of Justice has for the Convention and the European Court of Human Rights); see also Case C-13/94, P v. S and Cornwall County Council, 1996 E.C.R. I-2145, 2 C.M.L.R. 247 (1996) (Advocate-General's opinion) (relying on various decisions by the European Court of Human Rights).

\textsuperscript{83} See Grant's Written Observations, supra note 6, at 14 n.1 (citing the European Court of Human Rights's decisions in Dudegon and Norris).

\textsuperscript{84} See supra note 79 (citing the cases involving deportation of gays and lesbians in which the Court of Human Rights failed to interpret the Convention to protect them); see also Van Dijk, supra note 68, at 185 (suggesting that bringing a case before the European Court of Human Rights might not be worthwhile for gays and lesbians). "Is it mainly a waste of energy, time and money—apart from an interesting experience and possibly a visit to the pleasant city of Strasbourg..." Id.


\textsuperscript{86} See ICCPR, supra note 85, arts. 2(1), 26 (noting that the fundamental right of equality is available to all people). Article 2(1) states that "[a]ll persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination based on any ground such as race, colour, sex,..."
ICCPR nor the International Covenant on Economic, Social and Cultural Rights ("ICESCR") specifically provide equal rights to gays and lesbians. Lisa Grant, however, cites a decision by the Human Rights Committee, which the ICCPR established, that has interpreted the ICCPR's sex discrimination language to include protections for discrimination based on sexual orientation. This decision, Toonen v. Australia, coupled with the various covenants' broad protective language on human rights, suggest that these treaties are important safeguards of human rights on which gays and lesbians can rely for protection. While the European Court of Justice may find the reasoning of the Toonen case helpful in reaching its decision, unlike prior European Court of Justice decisions and relevant Court of Human Rights decisions, Human Rights Committee decisions carry no precedential value before the European Court of Justice.

Although gays and lesbians have rightly looked to intergovernmental organizations for protection, the legal value of these treaties and decisions are questionable and not binding as precedent on the European Court of Justice, as are European Community legislation or prior decisions from the Court of Justice itself. While these decisions are influential and useful when arguing before the European Court of Justice, relying solely on decisions from the Court of Human Rights or Grant's Written Observations, supra note 6, at 11 (citing ICCPR, supra note 85, arts. 2(1), 26).


90. See Grant's Written Observations, supra note 6, at 10-14 (citing several Court of Human Rights decisions as well as the Human Rights Committee's decision in Toonen). Unfortunately the only pro-gay cases from the Court of Human Rights focus on the privacy rights of gays and lesbians to engage in consensual homosexual sex, thus it is unlikely that cases such as Dudegon will significantly influence the European Court of Justice's decision in the Grant case. See also supra note 79.

91. See, e.g., supra note 77 and accompanying text (listing cases in which gays and lesbians looked the European Court of Human Rights to deal with signatory country laws that made consensual adult homosexual activity illegal).


93. See supra note 70 and accompanying text (noting the European Court of Justice's
the United Nation’s Human Rights Committee for the advancement of gay and lesbian issues before the European Court of Justice is unwise.

3. Other European Union Treaties

After the Treaty of Rome, the Community signed various instruments dealing with social issues, including the Social Policy Protocol and the Community Charter of Fundamental Social Rights of Workers of 1989. These instruments are not as influential as the EC Treaty, but have more persuasive authority than the ICCPR or the European Convention on Human Rights. The fact that they are not binding international agreements but have legally binding force of lesser value limits their effectiveness.

All of these institutions, intergovernmental organization and treaties, while important to the gay and lesbian movement, none are more useful than the European Court of Justice to provide gays and lesbians with equal treatment in the workplace and at the least some discussion of same-sex partnerships. Furthermore, the European Court of Justice, while considering the Grant case, can fulfill its obligation to ensure attainment of the European Community goals, by finding in favor of Lisa Grant.

III. THE EUROPEAN COURT OF JUSTICE

The European Court of Justice offers a unique forum for gays and lesbians working for equality. The European Court of Justice interprets the EC Treaty as a constitution, from which individuals derive certain rights. Grant, therefore, is a consideration of the European Court of Human Rights’ decisions).


95. See Clapham & Weiler, supra note 11, at 39-40 (noting that these agreements have an “uncertain and inconclusive place within the Community’s constitutional framework”). Arguably, the amendments to the EC Treaty, including the Social Policy Protocol and Community Charter of Fundamental Social Rights of Workers of 1989 probably have a stronger influence on the Court of Justice than the ICCPR or the Convention because they are European Union agreements. See id.

96. See id.; see also Evert van der Veen & Astrid Mattijssen, Lesbian and Gay Rights in Europe: Homosexuality and the Law, in THE THIRD PINK BOOK: A GLOBAL VIEW OF LESBIAN AND GAY LIBERATION AND OPPRESSION 225-46 (Aart Hendriks et al. eds., 1993) (noting that in the Netherlands the national courts cannot declare a national law unconstitutional, but they can declare it void if it contradicts an international treaty such as the Convention or ICCPR).

97. See Case 294/83 Parti Ecologiste “les Verts” v. Parliament 1986 E.C.R. 1339, 1365 (referring to the treaties as the Community’s “constitutional charter”); see also Ball, supra note 94, at 307 (noting that “the European Court of Justice . . . has interpreted the [EC Treaty] as a constitution, forming the foundation of an international legal order that imposes substantive obligations on the Member States and confers corresponding rights on individu-
perfectly situated case to require equal pay to gay or lesbian employees, specifically gay or lesbian partners in a same-sex partnership. In addition, while a pro-gay decision by the Court of Justice in this case would not provide instant recognition of same-sex unions in all areas of the law, it could start a dialogue as well as lay a foundation to help establish eventual legal recognition of same-sex partnerships.

A. ORGANIZATION OF THE EUROPEAN COURT OF JUSTICE

The European Court of Justice is a body of fifteen judges. Although not appointed for life, these judges and their decisions are expected to be free from political and social pressures. Among other reasons, due to this independence from politics or because of the integrity and impartiality of the judicial system, the European Court of Justice has found that European Community law protects groups of people that the member states and the other European Community institutions have often ignored. The European Court of Justice is the European Community institution that is most likely to produce enforceable pro-gay results, more so than the European Parliament, the European Commission, or the Council of Ministers. For example, the Court of Justice in P v. S and Cornwall County Council, a case similar to Grant, found that Council directive 76/207, which prohibited sex discrimination, protected transgendered persons from discrimina-
The willingness of the Court of Justice to address difficult issues, such as equality of transgendered persons as it did in P, is one more reason the Court is a viable avenue for gays and lesbians. But, exactly how does such a case get to the European Court of Justice?

1. Article 177

Article 177 of the EC Treaty “permits the national courts of the Member States to request a preliminary ruling from the Court of Justice when, inter alia, matters relating to the interpretation of Community law are raised before them, usually by individual litigants.” Many Article 177 cases derive from actions by individuals brought before the national courts. Then, when and if a question arises about the interpretation or application of the Community law, the highest national court must refer the case to the European Court of Justice, while the lower national courts have complete discretion.

For example, in Lisa Grant’s case, the Southampton Industrial Tribunal asked the European Court of Justice to answer six questions as to whether unequal treat-


104. EC Treaty, supra note 9, art. 177. Article 177 of the EC Treaty states:

(a) the interpretation of this Treaty;
(b) the validity and interpretation of acts of the institutions of the Community;
(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. . . Where such a question is raised before any court or tribunal of a member State, that court or tribunal may, if it considers that a decision on the question is necessary to give judgment, request the Court of Justice to give a ruling thereon.

Id.

105. Ball, supra note 94, at 325-26 (discussing the use of Article 177 actions brought to the European Court of Justice); see Shaw supra note 13, at 15 (discussing the importance of Article 177 and noting that “[t]he key to the structure of indirect enforcement lies in the organic connection between the Court of Justice and the national courts in Article 177. . . ”); Steiner, supra note 53, at 319 (noting that fifty percent of all cases heard before the European Court of Justice are Article 177 proceedings).

106. See Shaw, supra note 13, at 15.

107. See EC Treaty, supra note 9, art. 177; see also Steiner, supra note 53, at 325-26 (noting that any member country’s national courts or tribunals can and, in some cases, must refer cases to the European Court of Justice pursuant to Article 177 of the EC Treaty). The highest level national courts must bring a case under Article 177(3) to the European Court of Justice if it involves interpretation of EC law and if there is no judicial remedy under national law. See id. at 326. This is referred to as mandatory jurisdiction, whereas permissive jurisdiction provides the national courts unfettered discretion to refer cases to the European Court of Justice. See id. at 328.
ment of gays and lesbians is a violation of Article 119 of the EC Treaty. Once the European Court of Justice answers these questions it will return the case to the Southampton Tribunal to decide the case consistent with the European Court of Justice’s answers.

Even though Article 177 decisions are narrowly tailored, the decisions often have an impact on the member states, pursuant to Article 5 of the EC Treaty. For example, the European Court of Justice’s decision in Defrenne v. Sabena, a landmark equal pay case brought to the Court under Article 177, had implications on all member states. Therefore, a decision by the European Court of Justice in Grant will have an impact throughout the European Community on the treatment of gays, lesbians, and same-sex partnerships in the workplace. If the Court answers the submitted questions in favor of Lisa Grant, it would conclude that the unequal treatment of same-sex partnerships in the workplace is a violation of Article 119.

The European Court of Justice’s decision in an Article 177 case will prevail over conflicting member countries’ laws. Under the doctrine of supremacy, when the national law conflicts with the EC law, the EC law prevails.

2. Supremacy

Even though there is no supremacy clause in the EC Treaty, the European Court of Justice concluded that when European law and national laws conflict, European

108. See Grant’s Written Observations, supra note 6, at 3; see also infra note 223 and accompanying text (quoting the six questions before the European Court of Justice in Lisa Grant’s case).

109. See Shaw, supra note 13, at 16 (noting the Court of Justice’s ability to frame its decisions in a way that requires the national court to apply Community law). “[T]he Court of Justice does not have the power in the context of an Article 177 hearing to invalidate a provision of national law. . . . But the manner in which the Court of Justice has often chosen to frame its rulings has given little choice to the referring court but to apply Community law in preference to national law, and in effect to invalidate provisions of national law.” Id.

110. See Steiner, supra note 53, at 336 (noting that in an Article 177 proceeding the European Court of Justice’s decision is binding on the individual case).

111. See EC Treaty, supra note 9, art. 5. Article 5 of the EC Treaty requires member states to “take all appropriate measures . . . to ensure fulfillment of the obligations arising out of this treaty or resulting from action taken by the institutions of the Community.” Id. Furthermore, in Great Britain, the United Kingdom’s European Communities Act of 1972 requires the United Kingdom to take “judicial notice of any decision of the European Court[,] it should also be applied in all subsequent cases.” Steiner, supra note 53, at 244.


113. See Shaw, supra note 13, at 146-47 (describing the authority and effects of European Court of Justice decisions).

114. See discussion infra Part III.A.2 (describing in detail the doctrine of supremacy).
law trumps the national law. The Court can find a member country's law to be inconsistent with Community law, a conclusion which requires national agencies and courts to no longer apply their domestic law. The Court's ability to bind all member countries, regardless of the individual national laws that vary in their treatment of gays and lesbians, is just one aspect of the Court's power, making it an immensely important Community institution for the gay and lesbian movement.

In Grant, the Court could hold that Article 119 requires all employees to provide gays and lesbians with equal pay, including travel benefits for their partners. This would make discriminatory treatment of gays and lesbians in the workplace illegal in all member countries. In order to enforce this decision against member countries that fail to enforce the decision on their own, the EC Treaty allows individuals to bring claims against their member country for the country's failure to comply with the ruling under the doctrine of direct effect.

3. Direct Effect

The European Court of Justice's power over member states grew with the adoption of supremacy of European law and the notion of direct effect. The doctrine of direct effect allows individuals to raise Community law issues in their national tribunals. The doctrine allows individuals to bring an action in court to enforce his or her rights even though the member state has failed to make the respective Community law effective. Therefore, by allowing individuals to bring a claim based on European Community law the European Court of Justice, through the doctrine of direct effect, allows gays and lesbians to have their rights enforced, even absent actions by the Parliament, the Council, the Commission, or any inter-


116. See Case 6/64, Costa v. ENEL, 1964 E.C.R. 585 (showing the supremacy of European Community law).

117. Although this Comment does not discuss it, a pro-gay decision in Grant would likely have a substantial impact on gays in the military.

118. See discussion, infra Part III.A.3.

119. See FOLSOM, supra note 25, at 86 (describing the concept of direct effect). The right to commence litigation in national forums must be given to the plaintiff by national law. In other words, European Union law has not (as yet) been interpreted to create national causes of action. What it does do, according to the 'direct effects doctrine,' is give litigants the right to raise many EU law issues . . . in national courts and tribunals.

Id.

120. See FOLSOM, supra note 25, at 86 (noting that the individual citizen, like the Commission, functions as a guardian of the EC Treaty, by raising a complaint against the member country).
governmental organization. If the European Court of Justice finds in favor of Lisa Grant, then gays and lesbians throughout the European Community could enforce this right of equal treatment by bringing claims based on European Community law in their national courts.

B. SUMMARY – THE EUROPEAN COURT OF JUSTICE’S ROLE IN PROTECTING GAYS AND LESBIANS

The European Court of Justice has the power to help gay and lesbian causes in an absence of willingness or political ability on the part of the other Community institutions to use their power in this respect. Clearly, both the Commission and Council of Ministers are powerful legislative bodies. They are, however, preoccupied with other issues and constrained from acting independently of one another. Therefore, many individuals have turned to the European Court of Justice to protect their rights under the EC treaty and in Lisa Grant’s case to determine the exact nature of gay and lesbian rights in the workplace. Because of the understandable focus of the Commission and Council on economic issues, the European Court of Justice represents the most appropriate institution from which gays and lesbians can achieve equality, including protections for gays and lesbians in the workplace.

In addition to those arguments previously discussed there are additional arguments that support a finding for Lisa Grant. For example, the Court should consider the growing trend of member countries that legally recognize same-sex partnerships and that provide protections for gays and lesbians in the workplace.

Another compelling argument is that the failure to recognize same-sex partnerships and to discriminate against gays and lesbians throughout the European Community impedes the progress of European integration and the achievement of the goals of the European Community.

121. See Shaw, supra note 13, at 7, 51 (indicating the intertwined relationship between the European Community institutions); see also supra note 54 (describing the European Community’s focus on economic issues). There is no doubt that the European Community’s main focus is on economic related issues. It is obvious, however, that discrimination of gays and lesbians is as much an economic issue as it is a social issue.

122. See Ball, supra note 94, at 348 n.187 (discussing the actions brought by individual citizens before the European Court of Justice seeking protection under the EC Treaty); see also Folsom, supra note 25, at 86 (noting that the individual citizen acts like the Commission by raising a complaint against the member country).

123. See Robert Wintemute, Sexual Orientation and Human Rights 2 (1995) (noting that “marching on legislatures with banners and loudspeakers, or lobbying elected and appointed government officials behind the scenes, is not the only option”).

124. See discussion infra Part V (providing analysis of the various laws providing legal rights to same-sex partnerships in certain member countries).

125. See discussion infra Part IV (describing the goal of economic integration and how the unequal treatment of gays and lesbians limits the attainment of these goals).
IV. GOALS AND OBJECTIVES OF THE EUROPEAN COMMUNITY

Having concluded that the European Court of Justice is probably the European Community institution from which gays and lesbians most likely can obtain certain protections, and considering that Grant is currently before the Court, this Comment reviews arguments that support Lisa Grant's claims. This part of the Comment discusses the goals and objectives of the European Community and how unequal treatment of and discrimination against gays and lesbians prevents the European Community from achieving those goals. This is important to the European Court of Justice because one of the Court's responsibilities is to ensure the achievement of these goals.  

A. HISTORICAL BACKGROUND—GOALS OF THE EUROPEAN COMMUNITY

The EC Treaty created the European Economic Community and focused mainly on economic integration issues. While this focus has broadened, with the adoption of the Single European Act, the European Community remains preoccupied with economic integration. The preamble to the Single European Act indicates a focus on social justice and fundamental rights. Since the adoption of
the Single European Act, the European Community has continued its expansion into social issues, specifically through the signing of the TEU. Yet, even as the Community’s focus expands to include social issues, its main focus remains economic unity. The European Community, however, should not forget that social issues, such as recognition of same-sex partnerships and equal treatment of gays and lesbians in the workplace, do impact the goals of economic integration and the free movement of people.

Community law). Perhaps, as this seems to suggest, these rights have been present from the moment the member states signed the EC Treaty.

131. See Folsom, supra note 25, at 29 (discussing the impact of the TEU). The TEU greatly expanded the Union’s focus to include social issues. See id. at 29-30. The TEU went so far as to include a “formal commitment to respect the rights protected by the European Human Rights Convention,” and adopted a Social Protocol, of which Great Britain has opted out. See id. at 30. But see Ball, supra note 94, at 331 (observing the confusion around the TEU and the Social Policy Protocol).

The result was that the Community’s social policy commitment was once again relegated to an ineffectual (and confusing) compromise in which all (the then) twelve Member states assigned a Social Policy Protocol to the TEU in which they agreed that eleven of the Member States (excluding the United Kingdom) shall ‘have recourse to the institutions, procedures, and mechanisms of the [Community] Treaty for the purposes’ of implementing a Social Policy Agreement (attached to the Social Policy Protocol) agreed to by all the Member States’ except for the United Kingdom.

Id. Making matters worse, some scholars argue that this is nothing more than an intergovernmental agreement, while others consider it a crucial element of EC law, raising questions as to the legal value of the agreement. See id.

132. See Folsom, supra note 25, at 29 (noting that “[t]he most important Maastricht amendments to the Treaty of Rome [EC Treaty] concern . . . economic and monetary integration, notably a detailed timetable for the convergence of national economies and creation of a common currency.”); see also Ball, supra note 94, at 331 (describing the European Community’s social policy in relation to its economic integration agenda); Philippa Watson, Social Policy After Maastricht, 30 COMMON MKT. L. REV., 480, 486-87 (1993) (arguing that the European Community’s stance on social policy has not been inspiring—simply declarations, pledges, and promises but no true action); Tatchell, supra note 12, at 22-23 (indicating that the European government remains focused on economic issues).

133. See Ball, supra note 94, at 328 n.104 (suggesting that reaching these goals would require some focus on social issues). In 1986, Jacques Delors, then the President of the European Commission, noted that “[t]he creation of a vast economic area, based on the market and business cooperation, is inconceivable—I would say—unattainable—without some harmonization of social legislation.” Id.; see also id. at 309 (referring to Nielsen & Szyszczak, supra note 127 and indicating that “[e]conomic integration, however, has not occurred in a political or social vacuum, and it is generally agreed that the Community has developed a social policy component that arises from, and is consistent with, its broader economic objectives.”).

134. See Nicholas Green et al., THE LEGAL FOUNDATIONS OF THE SINGLE EUROPEAN MARKET 92 (1991) (discussing the need for free movement of goods, people, workers, and capital). The issue of free movement of gays and lesbians has been raised on several occasions. See Tatchell, supra note 12, at 18, 21 (indicating that Members of the European Parliament have raised the concern that discrimination of gays and lesbians makes achievement of the European Community goals more difficult).
B. FREE MOVEMENT OF PEOPLE

There are certain articles in the EC Treaty that allow for the free movement of people and for the elimination of obstacles to this goal. Specifically, Articles 3, 48, 100, 100a and 101 require the Council of Ministers and the European Commission to ensure that the goal of free movement of people is achieved. This goal is so fundamental to the success of integration that the European Commission created a high level taskforce to deal with aspects and problems associated with the goal of

called:

on the Commission to acknowledge that discrimination against lesbians and gay men was a 'disincentive and an obstacle' to the achievement of three key objectives of the EC [set out in articles 48, 49, 100, 100a and 101 of the EC treaty]: the free movement of people, the creation of a barrier-free internal market, and the harmonization of the laws of the member states.

Id. at 21. Jacques Delors acknowledged that this discrimination was a barrier to certain goals, especially the free movement of people. See id. at 18.

135. See EC Treaty, supra note 9, arts. 3, 48, 100, 100a, 101 (requiring action by various European Community institutions to ensure achievement of the Community goals); see also TATECHELL, supra note 12, at 55 (discussing the articles in the EC Treaty that focus on the issue of freedom of movement). See generally BREALEY & HOSKINS, supra note 70 (describing the EC Treaty articles that provide for the free movement of people).

136. See TATECHELL, supra note 12, at 55 (briefly discussing and listing the EC Treaty articles); see also Martin, supra note 85, at 438 n.131 (noting that article 48 of the EC Treaty allows a European Community citizen to enter another European Community member country to look for work or to start work in that country). The relevant articles of the Treaty are:

Article 3:(c) ... the abolition, as between Member States, of obstacles to freedom of movement for persons ... (f) the institution of a system ensuring that competition in the common market is not distorted. ...

Article 48: 1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest. ...

Article 49: As soon as this Treaty comes into force, the Council shall, acting by a qualified majority on a proposal from the Commission ... issue directives or make regulations setting out the measures required to bring about, by progressive stages freedom of movement for workers. ...

Article 100: The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States that directly affect the establishment or functioning of the common market. ...

Article 100a: 1. By way of derogation from Article 100 ... The Council shall, acting by a qualified majority on a proposal from the Commission in co-operation with the European Parliament and after consulting the Economic Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. ...

Article 101: Where the Commission finds that a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the common market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned. ... If such consultation does not result in an agreement eliminating the distortion in question, the Council shall, on a proposal from the Commission ... issue the necessary directives. The Commission and the Council may take any other appropriate measures provided for in the Treaty. ...

EC Treaty, supra note 9, arts. 3, 48, 49, 100, 100a, & 101.
free movement of people.\textsuperscript{137} The issue of recognition of same-sex partnerships in the different member countries is an issue that this organization will be forced to address.\textsuperscript{138}

The goal of free movement between member countries has been achieved to a large extent, but gaps remain. One such gap is the inconsistent treatment of gays and lesbians in the European Community.\textsuperscript{139} Gays and lesbians are protected in some European Community member countries, but not in others.\textsuperscript{140} For example, a lesbian couple living in Denmark, where their partnership is legally recognized,\textsuperscript{141} with corresponding legal benefits, is unlikely to move to Great Britain where the government would not recognize their union.\textsuperscript{142} If they did go to London together, the British government would most likely not treat them as spouses under Council Directive 1612/68, art. 10-12(a).\textsuperscript{143} As such, a non-working partner in a same-sex

\begin{footnotesize}
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\item[\textsuperscript{137}] See Steffen Jensen, Free Movement of People Within the EU - New Group Established, in ILGA EUROLETTER 40, Apr. 1996 (visited Sept. 10, 1997) <http://figlb.qrd.org:8080/fqrd/assoc5/lfga/euroletter/40.html> [hereinafter ILGA EUROLETTER 40] (describing the action taken by the Commission to create a taskforce to deal with issues surrounding the free movement of people).

\item[\textsuperscript{138}] See id. (noting that the International Lesbian and Gay Association (ILGA), based in Copenhagen, Denmark wrote to the chairperson of the group, Simone Veil, raising the issue of free movement for gay and lesbian people.

\item For instance, a Danish or Swedish registered couple cannot move to another EU member state and obtain the same rights as a married couple - as they can in Denmark and Sweden. Even though there is a provision of bringing a spouse with you if you as an EU citizen go to another EU country to have a job, your same-sex spouse is not in general permitted to stay in the country. . . . This is a main obstacle for the free movement of gay people.

\item Id.

\item[\textsuperscript{139}] See TATCHELL, supra note 12, at 56-57 (suggesting that gays and lesbians may not feel free to move into member countries that do not provide the same protections as their home country).

\item[\textsuperscript{140}] See discussion infra Parts V.B & V.C (discussing which countries provide protections for gays and lesbians in the workplace and recognize same-sex partnerships).

\item[\textsuperscript{141}] See infra note 169 and accompanying text (discussing The Danish Partnership Act which provides for recognition of same-sex unions).

\item[\textsuperscript{142}] See TATCHELL, supra note 12, at 96 (reviewing Great Britain's stance on homosexual unions). "The law does not recognize committed homosexual relationships. Lesbian and gay partners therefore have no legal rights with regard to pensions, inheritance, tenancy, compassionate leave, or next-of-kin visiting rights. . . ." Id.

\item[\textsuperscript{143}] See Case No. 59/83 Netherlands State v. Reed, 1986 E.C.R. 1283, 2 C.M.L.R. 448 (1986) (noting that Articles 10-12(a) of Council Regulation 1612/68, 1968 O.J. Spec. Ed. (L 257) 2, defines a worker's family as the worker's spouse and his or her descendants but not unmarried persons who live together). In Reed, the question was whether the term "spouse" included a cohabitee (in a heterosexual relationship). See id. at 1285-86. The Court held that the term spouse referred to marital relationships only. See id. at 1299-300. Furthermore, the European Court of Justice found that the Dutch law violated Article 7(2) of Council Regulation 1612/68 because it allowed unmarried heterosexual partners of Dutch nationals to stay in the Netherlands, but not the partners of nationals from other member countries. See id. at 1303. See generally STEINER, supra note 53, at 211-12 (discussing the definition of a spouse).
\end{itemize}
\end{footnotesize}
union would not be allowed to stay in Great Britain with his or her partner, whereas the British government would allow the spouse in a heterosexual married couple from Denmark to stay.\textsuperscript{144}

These laws could violate the spirit of the EC Treaty. These laws and practices, which prevent gays and lesbians from moving freely throughout the European Community, could violate Article 3, which requires the "abolition, as between Member States, of obstacles to freedom of movement for persons."\textsuperscript{145} While the EC Treaty, under Articles 100, 100a and 101, requires action by the European Commission and the Council of Ministers to approximate the laws of various countries to promote the free movement of people,\textsuperscript{146} these institutions have so far not addressed the issue of free movement of gays and lesbians.\textsuperscript{147} The European Court of Justice can rectify problems surrounding gay and lesbian equality in a more efficient manner than other European institutions.\textsuperscript{148}

The European Court of Justice is as concerned about economic integration as the Commission and Council. It has been faced with many cases that combine economic integration and equal rights issues, including equal pay cases, similar to \textit{Grant}.\textsuperscript{149} In the equal pay cases, for example, the European Court of Justice recognized the impact that unequal treatment of men and women had on the economic goals of the Community.\textsuperscript{150} The economic integration argument, coupled with the equal treatment argument, was successful; the Court required equal pay for both men and women in \textit{Sabena}.\textsuperscript{151}

Would the result be the same as in \textit{Reed} if a legally recognized same-sex couple from Denmark or Sweden moved to the Netherlands? Even if the European Court of Justice fails to answer that question with \textit{Grant}, the fact remains that the since the time the European Court of Justice decided \textit{Reed}, certain member countries have established legal partnerships between gay and lesbian couples. This suggests that the definition of a spouse, as defined in \textit{Reed}, is once again open for debate. This is a question that the European Court of Justice may have to address in reaching a decision in \textit{Grant}. Since \textit{Grant} involves a same-sex couple, if the court finds discrimination, the decision would seem to protect gays and lesbians in the workplace, but more specifically it would protect same-sex unions in the workplace.

\textsuperscript{144} \textit{But see} Martin, \textit{supra} note 85, at 437-39 (noting that Great Britain recognizes numerous spouses resulting from polygamous marriages).

\textsuperscript{145} EC Treaty, \textit{supra} note 9, art. 3(c); see also \textit{Tatchell}, \textit{supra} note 12, at 68-69 (discussing hypotheticals that indicate how such varied laws among member states would limit the free movement of people).

\textsuperscript{146} \textit{See supra} note 136 (citing the various articles of the EC Treaty).

\textsuperscript{147} \textit{See} discussion \textit{supra} notes 38-67 and accompanying text (noting the failure of the Commission and the Council of Ministers to recognize the relationship between free movement of people and discrimination of gays and lesbians and to act on it).

\textsuperscript{148} \textit{Compare} discussion \textit{supra} Part III (discussing the role of the European Court of Justice in recognizing gay and lesbian problems and addressing and solving these problems) \textit{with} discussion \textit{supra} Parts II.B, II.C, & II.D.

\textsuperscript{149} \textit{See infra} note 228 (listing several cases, which combined equal pay and equality issues with economic integration issues).

\textsuperscript{150} \textit{See}, e.g., \textit{Sabena}, 1976 E.C.R. 455.

\textsuperscript{151} \textit{See id.}
The economic impact resulting from unequal treatment of gays and lesbians in the European Community indicates how this treatment violates the EC Treaty.

C. HARMONIZATION OF MEMBER COUNTRIES' LAWS

The various laws treating gays and lesbians equally in one member country and unequally in another have hurt the European Community in reaching its goal of full economic integration and has limited the free movement of people. The European Community has a responsibility to create a unified law by harmonizing and approximating these conflicting national laws.

The wide variations in the national laws of the member countries concerning the rights of homosexuals could, for example, be viewed as violating the Treaty commitments to the "harmonious development" (Article 2), "closer relations between the States" (Article 2), "approximation of the laws" (Article 3), "establishment of function of the common market" (Article 100), "improved working conditions and ... their harmonization" (Article 117), "harmonization of social systems" (Article 117), and "close co-operation" in "employment, labour law and working conditions" (Article 118).

D. THE EUROPEAN COURT OF JUSTICE'S RESPONSIBILITY FOR ENSURING THAT THE EUROPEAN COMMUNITY OBTAINS THESE GOALS.

Thus far, this Comment has reviewed the various European institutions and has concluded that the most promising forum for gays and lesbians is the European Court of Justice. While the other institutions have a responsibility to insure proper integration of the national economies and the creation of a single community, the European Court of Justice has accepted the responsibility as the guarantor of the integration process. As such, it should understand how discrimina-
tion based on sexual orientation has harmed and will continue to harm integration and the free movement of people. Arguably, the only way to completely achieve these goals is to end workplace discrimination against same-sex couples and gays and lesbians throughout the European Community. The European Court of Justice, like the other institutions, should assist gays and lesbians in achieving this goal of equal treatment because they are linked to the goals of the European Community as set out in the EC Treaty. This is a compelling argument that gays and lesbians can present to the Court to convince it that inconsistent and varied treatment of gays and lesbians from one member country to the next has a negative effect upon European integration. Jacques Delors, former president of the European Commission, declared as much.

To make this argument, however, it becomes necessary to specify how the member countries, through their laws, treat gays and lesbians. Because the case of Lisa Grant involves the treatment of a lesbian partnership (even though not legally recognized in Great Britain), a review of the same-sex partnership laws of the member countries is discussed in detail. In addition, a review of workplace discrimination protections for gays and lesbians in member countries is also discussed. The reason for a review of these two areas of law pertaining to gays and lesbians is twofold: 1) to show how such varied treatment interferes with the economic integration and free movement goals of the Community and 2) because the European Court of Justice often reviews and considers the various laws of the member countries in reaching its decision.

159. See supra Part IV.B (describing the impact that discrimination based on sexual orientation has on economic integration).

160. See supra note 133 (quoting Jacques Delors admitting that social issues, even those surrounding gays and lesbians, have an effect on economic integration).


In Reed, the European Court of Justice defined “spouse” as found in Council Regulation 1612/68. It did so by reviewing the “variety of practice in different member states as to the recognition of de facto marriages.” Reed, 1986 E.C.R. at 1285. SWT’s Written Observations, supra, at 13. The Court in Reed noted that “[w]hen in support of a dynamic interpretation, reference is made to developments in social and legal conceptions, those developments must be visible in the whole of the Community; such an argument cannot be based on social and legal developments in only one or a few Member States.” Reed, 1986 E.C.R. 1283, 1285 (cited in SWT’s Written Observations, supra, at 13). A comparison of the laws relating to de facto marriages considered in Reed and those same-sex partnership laws as explained in Part V.A of this Comment, indicates how the Court of Justice could fail to expand spouse in Reed, but why it should consider the increase in same-sex partnership laws
V. GAY AND LESBIAN CIVIL RIGHTS MOVEMENT AND THE RECOGNITION OF SAME-SEX PARTNERSHIPS IN EUROPE

A. RIOTS TO RECOGNITION—THE START OF THE GAY AND LESBIAN CIVIL RIGHTS MOVEMENT AND RECOGNITION OF SAME-SEX UNIONS IN THE EUROPEAN COMMUNITY

The gay and lesbian civil rights movement in Europe started shortly after World War I, but neither the movement in the United States nor in Europe gained momentum until the Stonewall Riots in New York City in 1969. Even so, the gay and lesbian movement in Europe is further along in promoting acceptance and recognition of same-sex partnerships than its counterpart in the United States.

The first country in the world to recognize same-sex partnerships was Denmark.

162. For an excellent review of advancements of gays and lesbians in the European Community see, e.g., Kees Waaldijk, The Legal Situation in the Member States in Homosexuality: A EUROPEAN COMMUNITY ISSUE, supra note 11, at 70-130; Alan Reckie, Positive Developments at a National Level in Europe, in ILGA EUROLETTER 44; Comparative Survey of the Legal Situation for Homosexuals in Europe, in ILGA EUROLETTER 42, June 1996 (visited Sept. 10, 1997) <http://fglb.qrd.org:8080/qrd/assoc/s/Ilga/euroletter/42.html> [hereinafter ILGA EUROLETTER 42] (providing a chart listing whether the countries recognize same-sex partnerships, whether there are anti-discrimination laws, age of consent laws, and whether the country bans homosexuality). See generally TATECHELL, supra note 12, at 84-133.


164. See BARRY D. ADAMS, THE RISE OF A GAY AND LESBIAN MOVEMENT 81-124 (1995) (discussing the Stonewall Riots, which were seen as the catalyst for the gay and lesbian movement).

165. See MARTIN DUBERMAN, STONEWALL 181-212 (1993) (noting that many consider the Stonewall Riots, which occurred on June 27-28, 1969, the beginning of the gay and lesbian civil rights movement in the United States). Even though gays and lesbians had been organizing in Europe for years before the Stonewall Riots, these riots have taken on mythical and legendary status. One gay and lesbian civil rights organizer referred to the riots as the "hairpin drop heard round the world." EDWARD ALWOOD, STRAIGHT NEWS: GAYS, LESBIANS AND THE NEWS MEDIA 90 (1996) (citing TOBY MAROTTA, THE POLITICS OF HOMOSEXUALITY 77 (1981)) (explaining that "[t]he reference to dropping hairpins was a humorous code among gays that goes back to the 1940's. "He let a hairpin drop" gays would say, describing a cue someone had given that he was a homosexual." Id. at 339 n.26.

166. Compare infra Part V.A (discussing laws in Europe recognizing same-sex unions) with supra note 4 and accompanying text (discussing the surge in state laws in the United States denying recognition of same-sex marriages and noting that President Clinton signed the Defense of Marriage Act).

167. The distinction must be made between same-sex marriages and same-sex unions or

First, the national government of the Netherlands recently passed a same-sex partnership law, which will become effective on January 1, 1998, and the government is currently considering a same-sex marriage law. See Steffen Jensen, *Partnership Law in the Netherlands, in ILGA EUROLETTER, 51 June 1997* (visited on Oct. 20, 1997) <http://www.france.qrd.org/fqrd/assoc/ils/ga/euroletter/51.html>. Prior to this only certain local jurisdictions within the Netherlands recognized same-sex unions. See TATECHELL, supra note 12, at 122 (indicating that "the legal system doesn't give specific recognition to same-sex partnerships" but certain towns and cities do); see also Waaldijk, supra note 162, at 97 (noting that towns in the Netherlands have recognized same-sex unions since 1991, but that absent national law these have little legal force). In addition, these towns in the Netherlands recognized same-sex couples for immigration purposes. See TATECHELL, supra note 12, at 122-23 (noting that over fourteen towns sanction same-sex marriages and that "[f]oreign partners of Dutch lesbians and gay men have been permitted to immigrate and take up residence with their lovers on much the same basis as people in heterosexual relationships."). Even absent the right to marry, in the Netherlands, gay and lesbian couples have rights relating to rent protection, income tax, and social security. See Rob Tielman & Hans Hammeburg, *World Survey on the Social and Legal Position of Gays and Lesbians, in THE THIRD PINK BOOK: A GLOBAL VIEW OF LESBIAN AND GAY LIBERATION AND OPPRESSION 308* (Aart Hendriks et al. eds., 1993). Unlike gay couples, heterosexual couples in the Netherlands possess rights that gay couples do not—pension, inheritance tax, and adoption rights. See id.

The Dutch Parliament has taken two different steps towards recognition of same-sex couples. See generally LIFTING THE BAN, supra. It has asked the government to prepare two bills: one allowing same-sex marriages and the other allowing same-sex couples to adopt. See id.; see also Michael Odiijk, *Dutch Second Chamber of Parliament Agrees on Partnership Registration, in ILGA EUROLETTER 46, December 1996* (visited Sept. 10, 1997) <http://iglb.qrd.org:8080/fqrd/assoc/ils/ga/euroletter/46.html> [hereinafter ILGA EUROLETTER 46] (indicating that the Second Chamber was in favor of opening up civil marriage by a vote of 81 to 60); Alex Spillus, *Marriage of Inconvenience; Queen Beatrix Disapproves but Holland and Hawaii Are Set to Legalize Same-Sex Marriage, GUARDIAN (London), Apr. 20, 1996, at 27* (noting that Queen Beatrix is horrified by the idea, but absent extraordinary intervention the law will be ratified within a year). Because it will be a long time before the Dutch government, which does not favor same-sex marriage or adoption, acts, the Dutch Parliament introduced bills that would allow registered partnerships, but not marriage. See LIFTING THE BAN, supra. As noted, the government acted earlier this year by passing the same-sex partnership bill.

Many have blurred the distinction between the two forms of status, but for the most part registered partnerships do not include certain rights that married heterosexual couples enjoy, such as the right to adopt. See LIFTING THE BAN, supra (noting that a registered partnership "will have almost all legal consequences of marriage, with notable exceptions of the marital status and of any form of parenthood or parental rights and duties"). Unfortunately, the fact that marriage and partnership are used interchangeably has caused some confusion. Presently, no law in any country provides same-sex couples with all the rights of marriage.
mark, which did so in 1989. This law, however, like those that followed it, fell short of providing same-sex partners the same legal rights married heterosexual couples have. No country has legalized same-sex marriages. Instead those that

No country legally recognizes same-sex marriages. The legislative activity in the Netherlands shows the distinction between the two types of commitment. Yet, it can be confusing when the parliament asks the government to recognize same-sex marriages, and then also asks, separately, for the government to give same-sex couples the right of adoption. If the same-sex couple is legally married, they would already have that right.

168. See Gays Legalize Partnerships in Denmark, ST. LOUIS POST-DISPATCH, Oct. 2, 1989, at 6A (noting that a new national law went into effect making Denmark the first country to legalize homosexual unions). There is confusion as to which country was the first to recognize same-sex unions. See Danish Parliament Legalizes Gay Marriages, CHI. TRIB., May 27, 1989, at C3 (suggesting that Sweden preceded Denmark in passing such legislation). Compare The Swedish Registered Partnership Act, infra note 174 (signed June 23, 1994) with The Danish Partnership Act, infra note 169 (signed June 7, 1989).

169. Because this Danish act serves as a model for this type of legislation, an English translation follows:

1. Two persons of the same sex may have their partnership registered.

REGISTRATION

2. - (1) Part I, sections 12 and 13(1) and clause 1 of section 13(2) of the Danish Marriage (Formation and Dissolution) Act shall apply similarly to the registration of partnerships, cf. subsection 2 of this section.

(2) A partnership may only be registered provided both or one of the parties has his permanent residence in Denmark and is of Danish nationality.

(3) The rules governing the procedure of registration of a partnership, including the examination of the conditions for registration, shall be laid down by the Minister of Justice.

LEGAL EFFECTS

3. - (1) Subject to the exceptions of section 4, the registration of a partnership shall have the same legal effects as the contracting of marriage.

(2) The Provisions of Danish law pertaining to marriage and spouses shall apply similarly to registered partnerships and registered partners.

4. - (1) The provisions of the Danish Adoption Act regarding spouses shall not apply to registered partners.

(2) Clause 3 of section 13 and section 15(3) of the Danish Legal Incapacity and Guardianship Act regarding spouses shall not apply to registered partners.

(3) Provisions of Danish law containing special rules pertaining to one of the parties to a marriage determined by the sex of that person shall not apply to registered partners.

(4) Provisions of international treaties shall not apply to registered partnerships unless the other contracting parties agree to such application.

DISSOLUTION

5. - (1) Parts 3, 4, and 5 of the Danish Marriage (Formation and Dissolution) Act and Part 42 of the Danish Administration of Justice Act shall apply similarly to the dissolution of a registered partnership, cf. subsections 2 and 3 of this section.

(2) Section 46 of the Danish Marriage (Formation and Dissolution) Act shall not apply to the dissolution of a registered partnership.

(3) Irrespective of section 448c of the Danish Administration of Justice Act a registered partnership may always be dissolved in this country.

COMMENCEMENT ETC.

6. This Act shall come into force on October 1, 1989. . . .

enacted legislation utilized the quasi-status of partnership. While similar to marriage, a partnership does not have all of the same benefits that are associated with marriage. Specifically, the Danish Partnership Act denies same-sex couples the right to adopt children, as do other partnership laws which are modeled after the Danish Partnership Act. Nevertheless, gays and lesbians took advantage of the law and the benefits as registered partners under the Danish Partnership Act.

Following Denmark’s lead, in 1994, Sweden became the next European Community member country to pass a same-sex partnership law, which was virtually identical to Denmark’s law. Gay and lesbian Swedes also enthusiastically re-

170. See Waaldijk, supra note 162, at 91 (noting that “[i]n all Member States marriage is a form of legally registered partnership between one woman and one man.”).
171. See, e.g., Waaldijk, supra note 162, at 96 (describing the creation of the registered partnership).
172. See discussion supra note 167 (distinguishing between same-sex marriages and same-sex partnerships).
175. See The Danish Partnership Act, supra note 169, § 3(1) (indicating that same-sex couples under the Act receive the same benefits as married couples, with certain exceptions, specifically that same-sex couples are not allowed to adopt); see also Lou Chibbaro, Jr., 1,049 Laws Affect Married Couples, GAO Says, WASH. BLADE, Feb. 21, 1997, at 17 (describing a United States Government Accounting Office study concluding that there are 1,049 federal laws that provide benefits based on a person’s marital status); Baehr v. Lewin, 852 P.2d 44, 59 (Haw. 1993) (describing the legal benefits of marriage in the United States).
176. See Denmark Counts 648 Gay Marriages in 1990, ST. LOUIS POST-DISPATCH, Apr. 19, 1990, at 4A (noting that numerous same-sex couples entered into partnerships in the first three months after the law went into affect). But see Happy to be a Bachelor Boy?, OBSERVER (London), May 12, 1996, at 8 (describing gays and lesbians who do not plan to marry even if it is legal); Evert Van Der Veen & Adrianne Dercksen, The Social Situation in the Member States, in HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE, supra note 11, at 143 (noting that a debate continues in the gay and lesbian community regarding same-sex marriages). “Some lesbians and gay men see marriage as an institution which reinforces the unequal position of women and of homosexuals in this society; not an institution they would want to emulate.” Id.
177. See The Swedish Partnership Act, supra note 174, ch. 3, § 1 (providing benefits to same-sex couples, similar to the benefits found in the Danish Partnership Act); see also A Renewed Push for Gay Marriage, PHILADELPHIA INQUIRER, Oct. 19, 1994 (reporting that on
ceived this law, even though it did not allow adoption and other rights associated with marriage. For example, the Swedish Partnership Act denied same-sex couples the right to be guardians or to have children through artificial insemination.

In the European Community, the Netherlands has become the third member country to pass a same-sex partnership law. Perhaps even more interesting, the Netherlands could still become the first country to pass a same-sex marriage law.

In addition to these European Community countries, several other European countries, specifically—Norway, Iceland, and Hungary—have adopted same-sex partnership laws. As recognition of same-sex unions explodes in Europe, more countries, both within and outside of the European Community, are considering legislation to legalize same-sex unions.

In addition to the European countries that already passed partnership legislation, six European Community member countries are considering partnership legislation—Belgium, Luxembourg, Finland, France, Spain, and Portugal. January 1, 1995 Sweden will “become the third country to sanction same-sex marriages”).

178. See 85 Gay Couples Use New Same-Sex Marriage Law, AGENCE FRANCE PRESSE, Mar. 16, 1995, available in, LEXIS News Library, Curnws File (noting that in the first two months after The Swedish Partnership Act was in force, 85 same-sex couples took advantage of the new law).

179. See The Swedish Partnership Act, supra note 174, ch. 3, § 4 (limiting the legal rights of these newly recognized same-sex partnerships). But see Swedes Ponder Gay Adoptions, AGENCE FRANCE PRESSE, Mar. 6, 1997 available in, LEXIS News Library, Curnws File (noting that in a recent seminar experts agreed that gays and lesbians make “as good parents as heterosexuals, but were split over their right to adoption”).


181. See discussion supra note 167 (discussing same-sex partnerships in the Netherlands and that the Netherlands has become the third European Community country to pass a same-sex partnership law).

182. See discussion supra note 167 (noting that Hawaii and the Netherlands both are considering providing same-sex marriage rights to gays and lesbians).

183. See The Norwegian Partnership Act, supra note 174.

184. See The Iceland Partnership Act, supra note 173.

185. See Sandor Borso, Hungary is Set to Legalize Same-Sex Partnerships, in ILGA EUROLETTER 41, supra note 32 (describing the way in which the Hungarian government established its same-sex law). Hungary adopted a same-sex partnership law after a surprise decision by the Constitutional Court, which ruled that “the non-recognition of same-sex couples [violated] the Constitution of Hungary.” Id. The Constitutional Court called on the government to “cease discrimination within a year.” Id. But see Kurt Krickler, Homosexuality in Eastern Europe, in ILGA EUROLETTER 43, supra note 32 (noting that the Hungarian Constitution fails to specifically list sexual orientation as a protected class).

186. See discussion infra notes 187-201 and accompanying text (discussing the expansion of legislation that would recognize same-sex unions).

and at least one non-Community country, Switzerland, is also considering same-sex partnership legislation. The Spanish Parliament most recently acted on this issue passing a request for the government to consider a relatively less stringent partnership bill that provides gay couples access to health care benefits, to state widower’s pensions, and to alimony in a separation situation. This bill, like the others, does not include any adoption rights, whereas a prior gay partnership bill failed in March of 1997, before the same parliament, perhaps because that bill included an adoption provision.
While passage is likely in France and Spain, the chance of passage of partnership laws in the remaining countries varies. However, even if only Spain and France pass legislation legalizing same-sex partnerships, one-third of all European Community countries will recognize same-sex partnerships.

Furthermore, there is the strong possibility that the Netherlands could become the first country in the world to recognize same-sex marriage. Regardless of the outcome of the same-sex partnership bills in member countries, the eight-year trend within the European Community and also throughout the world has been toward the recognition of same-sex partnerships. Since the European Court of Justice often considers the laws of the member countries when deciding cases, the European Court of Justice should consider this trend when deciding a case involving discrimination against not only a lesbian but discrimination against a same-sex couple. Grant is just as much a case about equal pay for a gay man or lesbian, as it is about equal treatment for same-sex couples in the European Community.

196. See supra note 190 (indicating that the French government plans a liberal partnership or union law).
197. See discussion supra notes 194-195 and accompanying text (discussing the passage of a partnership bill in Spain).
198. See, e.g., Lou Chibarro, Jr., Clinton Appoints Gay Man to Post as Ambassador, WASH. BLADE, Oct. 10, 1997, at 1, 27 (noting that the Luxembourg Parliament is considering the same-sex marriage bill, but that passage of the bill is not expected in the near future).
199. See supra note 167 (discussing the possibilities that the Netherlands could be the first country in the world to recognize same-sex marriages, perhaps before Hawaii).
200. See discussion infra Parts V.B & V.C (discussing the rights and protections of gays and lesbians in the workplace and recognition of same-sex unions).
201. See supra note 161 and accompanying text (discussing cases in which the European Court of Justice has considered the growth of a particular area of law in various member states).
202. See P, 1996 E.C.R. at I-2149 (Opinion of Advocate-General) (noting that the Court reviewed the member countries’ laws on the issue of transgendered persons); see also supra note 161 (listing cases where the court surveyed member countries’ laws). For a useful description of the relationship between the Advocates-General and the Judges of the European Court of Justice as well as an indication of the authority of these opinions, see STEINER, supra note 53, at 14. Even though the Advocate-General’s opinion is published regardless of whether his or her opinion is the same as the Court’s, both the Court and Advocate-General Tesouro reached the same conclusion in P. See P, 1996 E.C.R. at I-2160.
203. See SWT’s Written Observations, supra note 161 (stating that the applicant claims a benefit intended specifically for married employees (whether the marriage is legal or at common law)).
B. PROTECTION FOR GAYS AND LESBIANS AROUND THE WORLD

In addition to these advancements, progress has been made in countries throughout the world to prohibit discrimination based on sexual orientation. Some countries have even included protections for gays and lesbians in their Constitutions. Other countries have passed legislation that protects gays and lesbians from discrimination in the workplace, in housing, and in other areas. The United States, at least on a national level, is not a leading country, in recognizing same-sex unions, or in prohibiting discrimination against gays and lesbians. On a state and local level, however, legislation in the United States has been passed in numerous jurisdictions providing protections for gays and lesbians.

204. See generally Wintemute, supra note 123, at app. II, 265-67 (listing countries that have protections).

205. See id. (noting that at least three countries, Brazil, Germany and South Africa, include in their constitutions anti-discrimination language protecting people based on sexual orientation); see also Clapham & Weiler, supra note 11, at 14 n.9 (noting that the Dutch Constitution includes a ban on any grounds whatsoever which supposedly includes discrimination based on sexual orientation). But see Jane Ferguson, Poland: Constitution Bans Gay Marriage, WASH. BLADE, June 27, 1997, at 12 (noting that Polish voters approved a new constitution that prohibits Gay marriages). Prior to this vote, Poland was considering adding language to the new constitution that would protect gays and lesbians. See id. (noting “[t]he original clause on human rights in the new constitution included sexual orientation, but the Catholic Church reportedly demanded that the clause be removed . . .”). But see Marcel Ryser, Switzerland: Gay and Lesbians Are Second-Class Citizens, in ILGA EUROLETTER 46, supra note 167 (noting that the Swiss Government’s proposal for the new Swiss Constitution did not incorporate the views of various organizations and citizens requesting an expansion of Article 7 of the new Constitution to include sexual orientation with race, religion, gender, and other aspects, which are listed under the article on anti-discrimination). See Goncalo Diniz, Anti-Discrimination Clause in Portuguese Constitution, in ILGA EUROLETTER 41, supra note 32 (discussing the consideration of Portugal’s adoption of anti-discrimination language for gays and lesbians in its constitution).

This Comment uses the same logic expressed by Nuno Baltazar Mendez and suggests that protection against discrimination based on sexual orientation, especially discrimination of same-sex couples in the workplace, will eventually lead to recognition of same-sex unions. See id.

206. See Wintemute, supra note 123, at app. II, 265-67 (listing those countries that provide protections for gays and lesbians). Certain territories or provinces in Australia and Canada have passed legislation prohibiting such discrimination. See id. Moreover, countries such as Denmark, France, Ireland, Israel, the Netherlands, New Zealand, Norway, and Sweden have national laws prohibiting such discrimination. See Grant’s Written Observations, supra note 6, at 34 (reviewing laws of various European countries that protect against discrimination based on sexual orientation).

207. See supra note 166 (comparing gay and civil rights in United States with the rights of gays and lesbians in Europe).

208. See Wintemute, supra note 123, at. app. III, 268-69 (listing jurisdictions in the United States that provide protection for gays and lesbians). States prohibiting sexual orientation discrimination include: California, Connecticut, the District of Columbia, Hawaii, Massachusetts, Minnesota, New Jersey, Vermont and Wisconsin. See id. In addition, the
Governments across Europe and around the world are beginning to recognize gays and lesbians and are starting to provide them with equal protection and benefits. The European Court of Justice should consider this increase in the number of laws protecting gays and lesbians and the increase in the number of jurisdictions that recognize unions of same-sex couples when deciding Grant.

C. WORKPLACE DISCRIMINATION PROTECTIONS IN EUROPEAN COMMUNITY COUNTRIES

Discrimination similar to SWT's conduct toward Lisa Grant is illegal in seven European Community countries: Denmark, Finland, France, Ireland, the Netherlands, Spain, and Sweden. France was the first country in the European Community to protect gays and lesbians in the workplace. Interestingly, SWT cites to a case in a French court that held that homosexual unions are not equivalent to heterosexual marriages. Yet, SWT fails to point out that that case was decided in 1989. Since then, France became the first country to pass legislation protecting gays in the workplace (whether in a partnership or not). Furthermore, SWT failed to note that the new French government is taking steps to pass same-sex partnership legislation.

The fact that nearly half of the member countries protect gays and lesbians in the workplace is another factor the European Court of Justice should consider when reaching its decision. As it has in the past, the European Court of Justice has surveyed member countries' treatment of a particular subject during its decision making. This case should be no exception.


209. See id. at app. II, 265-67 (indicating growth of protections since 1989, when Denmark passed its same-sex partnership law).

210. The Advocate-General in P reviewed the growth of laws in member countries regarding transgendered persons. See P, 1996 E.C.R. at I-2149 (opinion of the Advocate-General); see also supra note 161 (listing cases in which the court reviewed a survey of the national laws on the particular topic before the Court).

211. See Grant's Written Observations, supra note 6, at 34 (citing Wintemute, supra note 123); see also Waaldijk, supra note 162, at 105 (discussing the creation of workplace anti-discrimination legislation by France and the Netherlands). But see Waaldijk, supra note 162, at 106-08 (noting that several courts in the member countries have allowed discrimination against gays and lesbians in the workplace).

212. See Waaldijk, supra note 162, at 100-06.

213. SWT's Written Observations, supra note 161, at 15 (citing Waaldijk, supra note 162, at 100, n.148).

214. See Waaldijk, supra note 162, at 100-106.

215. See Ferguson, supra note 190, at 12 (discussing the new French Governments decision to fulfill a campaign promise to gays and lesbians by providing them with a same-sex partnership law).
To summarize, Part V of this Comment has provided an updated survey of member countries' laws regarding gays and lesbians. SWT, in its written observations, suggested that this information was necessary in deciding this case, but failed to provide this information, perhaps, because this information supports a finding in favor of Lisa Grant.\(^{216}\)

**VI. ANALYSIS OF GRANT V. SOUTH-WEST TRAINS, LTD.**

So far, this Comment has discussed in detail the reasons and factors that the European Court of Justice should, and normally does, consider in reaching its decisions. Part VI outlines the facts of Lisa Grant's case and the arguments made by both sides, incorporating many of the arguments made in this Comment.

**A. FACTS**

Lisa Grant challenged SWT's refusal to provide her lesbian partner with travel benefits\(^{217}\) and brought an action before the Southampton Industrial Tribunal in Great Britain.\(^{218}\) The person who previously held Lisa Grant's position, Mr. Potter, obtained these travel benefits for his unmarried female companion after they had lived together for two years.\(^{219}\) Lisa Grant and her partner lived together in a relationship for over two years prior to asking for the travel benefits, yet SWT denied them these benefits.\(^{220}\) Lisa Grant and SWT both agree that SWT denied her these travel benefits because she and her partner are lesbians.\(^{221}\) Lisa Grant sued SWT for this denial. Without deciding the case, the Industrial Tribunal referred the case, with questions, to the European Court of Justice asking that Court to determine if Article 119 of the EC Treaty prevents this kind of discrimination.\(^{222}\) The questions referred to the European Court of Justice are as follows:

1. Is it (subject to (6) below) contrary to the principle of equal pay for men and women established by Article 119 of the Treaty establishing the European Community and by Article 1 of Council Directive 75/117 for an employee to be refused travel concessions for an unmarried cohabiting same-sex partner where such concessions are available for spouses or unmarried opposite sex cohabiting partners of such an employee?

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216. See SWT's Written Observations, *supra* note 161, at 14 (noting that SWT "has not been able to conduct a fully up-to-date survey of the extent of recognition of same-sex partnerships in all member states").

217. See Vicky Powell, *Rail Company Gives Travel Perks for Gay Employees*, *GAY TIMES*, Jan. 1997, at 53 (reporting that another spin-off of British Rail, Great Western Trains, announced that it will give gay and lesbian partners the same travel benefits it gives to heterosexual couples).


219. See *id*.

220. See *id*.

221. See *id*.

2. For the purposes of Article 119, does "discrimination based on sex" include discrimination based on the employee's sexual orientation?

3. For the purpose of Article 119 does "discrimination based on sex" include discrimination based on the sex of that employee's partner?

4. If the answer to question (1) is yes, does an employee, to whom such concessions are refused, enjoy a directly enforceable community right against his employer?

5. Is such a refusal contrary to the provisions of Council Directive 76/207?

6. Is it open to an employer to justify such refusal if he can show (a) that the purpose of the concessions in question is to confer benefits on married partners or partners in an equivalent position to married partners and (b) that relationships between same-sex cohabiting partners have not traditionally been, and are not generally regarded by society as equivalent to marriage; rather than on the basis of an economic or organizational reason relating to the employment in question?\(^\text{223}\)

**B. LISA GRANT'S ARGUMENTS**

1. The Acts by South-West Trains Constitute Sex Discrimination, in Violation of Article 119 of the EC Treaty

   Because neither the EC Treaty nor British law explicitly provide protection from sexual orientation discrimination,\(^\text{224}\) Lisa Grant relies heavily on Article 119\(^\text{225}\) of the EC Treaty, arguing that SWT discriminated\(^\text{226}\) against her.\(^\text{227}\) She ar-

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\(^{223}\) Id.

\(^{224}\) See supra note 9 and accompanying text (noting the limits of Article 119 and the Sex Discrimination Act).

\(^{225}\) See EC Treaty, supra note 9 art. 119. Article 119 states:

Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work. For the purpose of this article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

\(^{226}\) See Grant's Written Observations, supra note 6, at 5. Lisa Grant submits that:

(a) Travel concessions are pay within the meaning of Article 119. This point was conceded by South-West Trains before the Industrial Tribunal.

(b) Article 119 creates directly effective rights for employees.

(c) Since the case involves "pay" covered by Article 119, the Equal Treatment Directive is in applicable; equal treatment is assured under Article 119.

\(^{227}\) See Grant's Written Observations, supra note 6, at 20 (noting that "[s]pecial vigilance is called for in ensuring that this occurs in relation to women who have characteristics which render them particularly vulnerable to discrimination resulting from subjective preju-
guessed that SWT denied her the same benefits a man in her position received, in violation of Article 119.228

In any sex discrimination case, to determine if discrimination has occurred, a comparison must be made between a man and a woman to determine if the employer treated the woman differently from the man or vice versa. Both sides in this case disagreed on the type of comparison that the Court of Justice should make.229 SWT argues that the proper comparison should be between Lisa Grant, a lesbian, and a gay male in the same position, so that SWT could rightly deny either the gay man or the lesbian woman the travel benefits.230 The Southampton Industrial Tribunal and the European Court of Justice, however, have rejected arguments similar to SWT's arguments.231

dices."]. Lisa Grant focuses on the fact that as a woman and a lesbian she is more susceptible to discrimination than a heterosexual male or gay man. See id. Furthermore, Lisa Grant notes that empirical research shows that women are more at risk of sex discrimination. See id. at 21. While this focus perhaps strengthens her argument for the type of comparison she makes, it could have a negative impact on the breadth of the decision from the European Court of Justice. This not only provides an opportunity for the European Court of Justice to limit its responses to lesbians, but it shines a spotlight on a division between lesbians and gay men. The strength of the Court's reasoning regarding the comparison in P should make Lisa Grant's focus on the distinctions between lesbians and gay men unnecessary.

228. See Grant's Written Observations, supra note 6, at 4-6 (arguing that SWT discriminated against her); cf. Sabena, 1976 E.C.R. 455 (noting that Article 119 prohibits discrimination between men and women in both public as well as private contract situations); Case 129/79, Macarthy's Ltd. v. Smith, 1980 E.C.R. 1275 (dealing with the member states' obligations to ensure equal pay for equal work under Article 119 of the EC Treaty); Case 96/80, Jenkins v. Kingsgate Ltd., 1981 E.C.R. 911 (regarding equal pay in part-time employment situations); Case 12/81, Garland v. British Rail Eng'g Ltd., 1982 E.C.R. 359 (resolving an issue similar to the instant case—concluding that providing rail travel benefits to men, but not women, after retirement violated Article 119 of the EC Treaty). For an excellent summary of these and other leading cases in equal treatment law in the European Community, see generally DIRECTORATE-GENERAL FOR EMPLOYMENT, INDUSTRIAL RELATIONS AND SOCIAL AFFAIRS, EUROPEAN COMMISSION, supra note 112. Lisa Grant's argument, that if she were a man in a relationship with a woman she would have received the benefits, is indisputable. The employee in her position prior to her was a man who received spousal travel benefits for his unmarried female companion. See Grant's Written Observations, supra note 6, at 4-6.

229. See Grant's Written Observations, supra note 6, at 8 (describing the comparisons each party suggested).

230. See id. at 8, 23 (analogizing the SWT comparison (discriminatory treatment for both a gay male and a lesbian) with that of Virginia's argument in Loving v. Virginia, 388 U.S. 1 (1967), a case in which the Commonwealth of Virginia argued that a ban on interracial marriages would equally affect whites and blacks).

231. See id. at 8 (arguing that the proper approach to a sex discrimination case is "to change only the sex of the applicant and to hold all other circumstances constant"). When this test is applied, she argues that sex discrimination is obvious. See id. SWT argues that a different comparison is appropriate, suggesting that the comparison should be between a lesbian in that position versus a gay man in that position. See id. The European Court of Justice, however, rejected that type of argument in P v. S and Cornwall County Council.
Having concluded that the European Court of Justice will most likely adopt the proposition that the proper comparison is between Lisa Grant and a male, excluding any reference to sexual orientation, Lisa Grant argues that this comparison shows SWT's blatant discrimination in violation of Article 119. She bases her argument on the facts—Mr. Potter, a male, received travel benefits for his unmarried female companion. Lisa Grant, a female in the same position as Mr. Potter, was denied travel benefits for her female companion. To conclude that this violates Article 119 of the EC Treaty requires no great manipulation of the definition of sex discrimination. Because this activity results in treating a woman differently than a man, with no objective justification for this differential treatment, it violates Article 119 of the EC Treaty.

SWT's justification for not providing Lisa Grant with the same benefits as her male predecessor is that she is a lesbian; this is unbridled prejudice. See P, 1996 E.C.R. at I-2153-54. The court rejected an argument that a sex discrimination case regarding a transgendered female (a person who was born male) should be compared to a transgendered male (a person born female). See id. Instead, the court held that the proper comparison is male against female, regardless of prior gender. See id.; see also Sex Discrimination Act, supra note 9, § 5 (noting that the comparison "must be such that the relevant circumstances in the one case are the same, or not materially different, in the other").

See Grant's Written Observations, supra note 6, at 9 (suggesting that to consider sexual orientation in this comparison would be contrary to the principle of equal treatment).

See id. at 7-10.

See, e.g., Defrenne, 1971 E.C.R. 445 (considering travel benefits as pay for purposes of Article 119 analysis); Case 12/81, Garland v. British Rail Eng'g, 1982 E.C.R. 359 (same).

See Grant's Written Observations, supra note 6, at 8.

See id. at 2.

See Grant's Written Observations, supra note 6, at 8 (noting that "[s]uch an approach is factually accurate and requires no purposive construction of Article 119 in order to provide redress.").

See Case 170/84, Bilka-Kaufhaus GmbH v. Weber von Harz, 1986 E.C.R. 1607 (holding that an employer can discriminate between sexes if the measure is objectively justified). "If one can prove that the discriminatory measures correspond to a genuine need of the enterprise, are suitable for obtaining the objective pursued by the enterprise, and are necessary for that purpose the courts will allow this discrimination." STEINER, supra note 53, at 211. In Bilka-Kaufhaus, unlike Grant, the state proved that its welfare-type program, which caused unintentional discrimination against women was objectively justified. See id.

See Grant's Written Observations, supra note 6, at 7 (arguing that "South-West Trains claims an entitlement to discriminate against Lisa Grant and her partner and asserts that Community Law provides no constraint or protection in the circumstances of the present case.").

See id. at 7 (noting that if "South-West Trains were correct, unmarried men and women employees living with same sex partners could receive a lower hourly rate of pay than those living with opposite sex partners and yet have no remedy under EC law against this blatantly unequal policy"). In P the employer reasoned that it fired a transgendered person because she was redundant. See P, 1996 E.C.R. at I-2147 (opinion of the Advocate-General). In Grant, the reasoning SWT puts forth is that the employee is a lesbian. See Grant's Written Observations, supra note 6, at 2. If the European Court of Justice can con-
Justification for the differential treatment of men and woman is based on sexual orientation. This form of discrimination cannot be objectively justified. Lisa Grant has a strong argument that SWT’s actions are the type of sex discrimination that Article 119 protects against. If this argument fails, however, Lisa Grant has suggested an alternative argument—the European Court of Justice should interpret sex discrimination broadly to include protection from sexual orientation discrimination.

2. The European Court of Justice Should Interpret Sex Discrimination Broadly to Include Sexual Orientation Discrimination

While Lisa Grant focuses on the facts of her case, which constitute sex discrimination, she also makes a strong alternative argument that the European Court of Justice should interpret sex discrimination to include discrimination based on sexual orientation. A recent decision from the European Court of Justice, P v. S and Cornwall County Council, may be helpful to this argument.
GRANT v. SOUTH-WEST TRAINS, LTD.

a. P v. S and Cornwall County Council

The issue referred to the European Court of Justice in P was whether discrimination based on a person's transgendered status constituted sex discrimination. The European Court of Justice decided this case only two days before the Southampton Industrial Tribunal heard Lisa Grant's case. P is probably the strongest authority for either of Lisa Grant's arguments because it shows the Court's willingness to protect sexual minorities from discrimination.

In P, which like Grant is an Article 177 case, the question before the European Court of Justice was whether Council Directive 76/207, which protects persons from being terminated because of their sex, either male or female, would protect a transgendered person from being fired because of his or her status as a transgendered person. The Court held that discrimination based on gender reassignment status was sex discrimination.

This Comment uses transsexual and transgendered interchangeably. For a definition of transgendered, see supra note 102.


See Allison Clarke, Gender Case is Just the Ticket: A Lesbian Railway Worker Who Took Legal Action After Her Partner Was Denied a Free Travel Pass May End Up Changing Outdated Laws, INDEPENDENT (London), June 5, 1996, at 20 (reporting that Lisa Grant's solicitor indicated that the P decision, handed down two days before Grant was heard by the Southampton Industrial Tribunal, would be helpful to Grant because of the broad interpretation of the ban on sex discrimination in the Council directive).

See P, 1996 E.C.R. at I-2165 (deciding in such a way as to protect transgendered persons and expand Article 119).

See P, 1996 E.C.R. at I-2145 (opinion of the Advocate-General) (indicating that this is an Article 177 case); see also discussion supra Part III.A.1 (explaining the process for referring a question to the European Court of Justice under Article 177).

See P, 1996 E.C.R. at I-2145-48 (opinion of the Advocate-General) (including the questions referred to the European Court of Justice); Council Directive 76/207, supra note 247, art. 1. The questions referred to the European Court of Justice in P are similar to those in Lisa Grant's case. In P the Court is asked:

(1) Having regard to the purpose of Directive 76/207 which is stated in Article 1 to put into effect the principle of equal treatment for men and women as regards access to employment, etc. . . . Does the dismissal of a transsexual for a reason related to gender reassignment constitute a breach of the Directive?

(2) Does Article 3 of the Directive, which refers to discrimination on grounds of sex, prohibit treatment of an employee on the grounds of the employee's transsexual state?

P, 1996 E.C.R. at I-2148 (opinion of the Advocate-General). The Council Directive clearly spells out the discrimination it is trying to protect people from: "the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status." Council Directive 76/207, supra note 247, art. 2(1).

See supra note 102 (defining transsexualism).

See P, 1996 E.C.R. at I-2165 (holding that sex discrimination includes discrimina-
In reaching its decision in P, the European Court of Justice reviewed several issues, including those raised in parts IV and V of this Comment. Furthermore, the Advocate-General's opinion examined the laws of the member countries, as well as the goals and objectives of the European Community when formulating his decision. In reaching his conclusion, the Advocate-General reviewed the laws of member countries on the issue of transgendered persons. Some member countries have laws that protect transgendered persons, other countries only allow this type of medical procedure to change the gender of the person, but do not allow a transgendered person to change his birth certificate to reflect the new gender. Regardless, this analysis of member countries' laws suggests that in Grant the Court will review not only recognition of same-sex partnership laws, but anti-discrimination laws protecting gays and lesbians in the workplace. In addition, in P, the European Court of Justice also examined the goals of the European Community, specifically the harmonization of living and working conditions. It concluded that the protections of the Council directive should protect "all workers . . . including those who have changed [their] sex . . . ."

In P, both the Court and the Advocate-General interpreted the Council directive broadly to ensure that transgendered persons fell under the directive's protection. It is this language and reasoning that is so helpful to Lisa Grant's case.
By holding that the general purpose of the Council directive is to protect all people when discrimination occurs related to sex (expanding beyond just male/female discrimination), the European Court of Justice has provided an opportunity for gays and lesbians to find protection under those directives and articles of the EC Treaty that deal with sex discrimination in the workplace.  It is for these reasons that P is a strong case supporting Lisa Grant's argument.

The similarities between discrimination against homosexuals and transgendered persons should convince the European Court of Justice that gays and lesbians are entitled to the same protections that transgendered persons receive under Community law.

(1) South-West Trains Tries to Dismiss P

SWT tries to dismiss the relevance of P before presenting its legal submissions. SWT argues that because P dealt with transsexuals, its holding cannot be relied on in Grant because Grant involves a homosexual, not a transsexual.

261. See P, 1996 E.C.R. at I-2153-54 (opinion of the Advocate-General) (adopting a strict male/female comparison disregarding any other irrelevant factors such as sexual orientation or transgendered status).

262. See P, 1996 E.C.R. at I-2165 (defining the broad scope of the Council directive). The "scope of the directive cannot be confined simply to discrimination based on [one's] sex. . . . [T]he scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned." Id.

263. See id. But see Clapham & Weiler, supra note 11, at 31 (suggesting that "it would be difficult to construe Directive 76/207/EEC on Equal Treatment for Men and Women . . . as applying to lesbians and gay men").

264. But see Grant's Written Observations, supra note 6, at 6 n.6 (citing to P v. S and Cornwall County Council only once). Lisa Grant does not rely heavily on this case to make her argument that sex should include sexual orientation. One reason could be that Lisa Grant's case does not rely on Council Directives and instead focuses on Article 119 of the EC Treaty. P on the other hand, does not rely on Article 119 of the Treaty. See P, 1996 E.C.R. at I-2145 (opinion of the Advocate-General). Both the Council directives and the EC Treaty are equally binding on the member states, but in terms of equal treatment between men and women the Council Directives and Article 119 focus on separate issues. See Steiner, supra note 53, at 204-224 (explaining the protections the various Council directives provide). Specifically, Council Directive 76/207 provides equal treatment, in terms of promotions, hiring, and terminations. See id. at 204, 214-16. Thus, because the issue in P focused on the termination of the transgendered person, the analysis in that case focused on Council Directive 76/207. See P, 1996 E.C.R. at I-2145 (opinion of the Advocate-General). Because Lisa Grant's case is specifically about equal pay, however, she relies more on Article 119 of the EC Treaty. See Grant's Written Observations, supra note 6, at 2-6; see also Steiner, supra note 53, at 206-09.

265. See infra note 267 (explaining similarities of these two sexual minorities).

266. See SWT's Written Observations, supra note 161, at 4-5 (trying to dismiss the relevance of P).

267. See id. at 4 (noting that "[i]t has been suggested that the approach taken by the
SWT argues that there is a difference between a person's sexual identity and their sexual orientation. Yet, as SWT notes, in P, both the opinions of the European Court of Justice and the Advocate-General focus on the principle of equality. SWT attempts to discount this element of equality in the opinion, even suggesting that "[t]he principle may be a guide to the correct interpretation of Community legislation in disputed areas; but it cannot give rights in an arena where the Community has not legislated at all." It seems, however, that if the European Court of Justice can rely on equality to determine that transgendered persons are protected in the workplace, they can reach a similar conclusion regarding a gay couple's right to employee benefits.

b. International Decisions Which Consider Sex Discrimination and Sexual Orientation Discrimination the Same

Lisa Grant also relies on decisions from the Human Rights Committee expanding sex to include sexual orientation in terms of discrimination. The Human Rights Committee, under the ICCPR, adopted an argument identical to Lisa Grant's alternative argument that sexual orientation is part of sex in Toonen v. Australia.

The additional support on which Lisa Grant relies upon in making this argu-

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268. See id. at 5 (suggesting a difference between transsexuals and homosexuals).
269. See id.
270. See id.
272. See supra note 85 and accompanying text.
273. See supra note 271 and accompanying text.
ment focuses on the desire and responsibility for tolerance and equal treatment.\textsuperscript{274} The cases supporting this argument stand for the proposition that the advancement of equality of the sexes is a major goal.\textsuperscript{275} With the exception of the Human Rights Committee's decision, however, none of these cases counsel cited specifically makes the argument that "sex" discrimination language should include sexual orientation discrimination. Regardless, both \textit{P} and \textit{Toonen} support Lisa Grant's argument that sex discrimination protections under Community law can include sexual orientation discrimination.\textsuperscript{276} Based on either of Lisa Grant's arguments, the European Court of Justice should conclude that employers can no longer treat gay and lesbian partnerships unfairly in the workplace.

\textbf{C. SOUTH-WEST TRAINS' ARGUMENTS}

SWT raises several arguments in its Written Observations:

(1) The discrimination complained of is discrimination not on the ground of sex, but on the ground of sexual orientation.


(3) The denial to same-sex partners of benefits given to spouses (or common-law spouses) cannot be treated as discrimination because the status of an opposite-sex marriage cannot be equated with that of a same-sex relationship.

(4) Even if the difference in treatment of same-sex and opposite-sex employees can be analyzed as discrimination, it is capable of being justified.

(5) The extension of the prohibitions against discrimination between men and women contained in art. 119 and the Equal Treatment Directive to discrimination against homosexuals would offend against the principle of legal certainty.\textsuperscript{277}

SWT's first argument—the discrimination is based not on sex but sexual orientation—is incorrect. SWT argues that "[t]ravel concessions are denied to same-sex partners of either-sex: there is no distinction between the treatment of male homosexuals and female homosexuals."\textsuperscript{278} This type of comparison failed in the Southampton Industrial Tribunal and before the European Court of Justice in the \textit{P


\textsuperscript{275} See supra note 274 and accompanying text (noting cases which support the argument that equality of the sexes is a major goal).

\textsuperscript{276} See supra notes 271-273 and accompanying text (describing Lisa Grant's reliance on \textit{Toonen}, which held that the ICCPR's definition of sex discrimination was broad enough to include sexual orientation discrimination).

\textsuperscript{277} SWT's Written Observations, supra note 161, at 5-6.

\textsuperscript{278} Id. at 7.
"The employer who said that a sexual relationship with Mr. Potter is conduct permissible in a female employee but conduct impermissible in a male employee has clearly differentiated in treatment of male and female employees."

The second argument SWT raises is that neither Article 119, nor the Equal Treatment Directive prohibits discrimination based on sexual orientation. While this is true, SWT fails to realize that the proper comparison between Lisa Grant and a male in her position, indicates discrimination based on sex and is thus subject to the protections of both Article 119 and Council Directive 76/207. If that argument fails, the alternative is that the European Court of Justice has already expanded the definition of sex in sex discrimination. It appears now that SWT is trying to confine protections, which the European Court of Justice already has expanded. It seems that either of these arguments indicates how SWT's second argument fails; sex or gender means more than just sex or gender.

Next, SWT argues that "the status of an opposite-sex marriage cannot be

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279. See supra note 231 and accompanying text (discussing how both the Southampton Industrial Tribunal and the European Court of Justice concluded that the proper comparison is between the party raising the discrimination issue and a person of the opposite sex, without considering their original gender, in the case of a transgendered person or sexual orientation).

280. Grant's Written Observations, supra note 6, at 19 (quoting DAVID PANNICK, SEX DISCRIMINATION 203 (1985)).

281. See Grant's Written Observations, supra note 6, at 6.

282. See discussion supra Part VI.B.2.a (examining in detail the European Court of Justice's ruling in P and how the Court of Justice broadly interpreted the definition of sex, expanding it to protect transgendered persons).

283. But does it mean sexual preference? SWT cites cases, other than P, to suggest that sex is limited to discrimination based on a person's gender. See SWT's Written Observations, supra note 161, at 8-10; see, e.g., De Santis v. Pacific Telephone & Telegraph Co., 608 F.2d 327 (9th Cir. 1979). SWT relies on a statement made by the President of the Commission, Jacques Delors, which SWT believes shows the European Court of Justice's inability to expand the protections of Council Directive 76/207 and Article 119 to gays and lesbians. See SWT's Written Observations, supra, note 161, at 9-10. Delors stated, in an answer to a written question in the European Parliament:

The Community has no powers to intervene in respect of possible discrimination by the Member States against sexual minorities. The powers deriving from the Treaties enable it to intervene only in the event of discrimination because of nationality and to ensure equal treatment of male and female workers in employment relationships with regard to social security.

Id. at 10 (emphasis supplied). Clearly, this statement, made in 1988, failed to include the role of the European Court of Justice, which has used its powers to deal with possible discrimination against sexual minorities. See P, 1996 E.C.R. at I-2160-65. This suggests that protections for these minorities are most likely going to come from the Court of Justice and not the other Community institutions. SWT also suggests that "[r]espondent believes that in most member states it has not been thought appropriate to enact legislation prohibiting discrimination against homosexuals in the field of employment." SWT's Written Observations, supra note 161, at 10. That is not true. See discussion supra Parts V.A, V.B, and V.C (indicating the growth of laws prohibiting sexual orientation discrimination in the workplace and recognition of same-sex unions throughout the European Community and the world).
equated with that of a same-sex relationship.\textsuperscript{224} It is submitted only that [same-sex partnerships] are not, from the point of view of society, the same or equivalent.\textsuperscript{225} Such an argument ignores, however, the numerous laws in Europe and in European Community member countries that recognize same-sex partnerships.\textsuperscript{225} The respondent, SWT, asks the Court of Justice to consider and "recognize the special status accorded in British society . . . to marriage between a man and a woman . . . which is rooted in the traditional concept of the family."\textsuperscript{227} SWT questions whether a same-sex relationship is equivalent to marriage.\textsuperscript{228}

SWT continues its argument by suggesting that there is no "consensus within the member states as to the extent to which stable relationships between homosexuals can be regarded as equivalent to a same-sex-marriage."\textsuperscript{229} If a member country recognizes de facto marriages, what about countries that have legally recognized partnerships? Clearly, a marriage license is not the determining factor; perhaps it is a legal partnership or maybe only a committed relationship. Furthermore, the respondent, SWT, admits that it has not conducted an up-to-date survey of same-sex partnership laws within the member countries.\textsuperscript{230}

SWT's argument fails in that the European Court of Justice does not need a consensus among member states regarding same-sex partnerships in order to protect same-sex couples in the workplace. For example, the Advocate-General in \textit{P} reviewed various member country laws regarding the treatment of transgendered persons.\textsuperscript{231} There was no consensus among all member states about how to treat or how to legally recognize a transgendered person.\textsuperscript{232} For example, with regard to official documents, i.e. birth certificates and driver's licenses, some countries allow the transgendered person to change their gender, while some do not.\textsuperscript{233} This lack of consensus, however, did not keep the Advocate-General from finding that a transgendered person was protected by Council Directive 76/207.\textsuperscript{234}

SWT failed to fully develop its fourth argument—Justification. Instead, SWT

\begin{itemize}
\item \textsuperscript{224} SWT's Written Observations, supra note 161, at 12.
\item \textsuperscript{225} Id.
\item \textsuperscript{226} See supra Part V.A (discussing in detail the laws of Denmark, Sweden, the Netherlands, Norway, Iceland, and Hungary, as well as bills being considered in Belgium, Luxembourg, France, Spain, Finland and Portugal).
\item \textsuperscript{227} SWT's Written Observations, supra note 161, at 12 (arguing that a same-sex partnership is not equivalent to a marriage between a heterosexual couple).
\item \textsuperscript{228} See id.
\item \textsuperscript{229} SWT's Written Observations, supra note 161, at 14. Although Parts V.A, V.B, and V.C suggest that a consensus is growing in the member countries, perhaps the European Court of Justice should take this opportunity to establish a uniform view on this subject.
\item \textsuperscript{230} See id. For an up-to-date survey of same-sex partnership laws in Europe, see supra Part V.A.
\item \textsuperscript{231} See P, 1996 E.C.R. at I-2149-50 (opinion of the Advocate-General) (analyzing the various member country laws relating to recognition and status of transgendered persons).
\item \textsuperscript{232} See id.
\item \textsuperscript{233} See id.
\item \textsuperscript{234} See id.
\end{itemize}
suggests that "[t]he factors relied on as constituting such justification are . . . the same as those relied on [in its third argument about same-sex partnerships]." This Comment, however, suggests that because there is an advancing trend in the recognition of same-sex partnerships and of protections of sexual minorities in the workplace, that there is no justification for unequal treatment of gays and lesbians.

Lisa Grant's Written Observations suggest that there is no justification for this discrimination, especially not an employer's moral beliefs. SWT's justification is based on morality, as well as the lack of laws protecting gay and lesbian couples. SWT argues that it is just for SWT to discriminate against Lisa Grant in Great Britain. Lisa Grant suggests that this type of justification could "compromise the equality of competitive conditions between companies [and would] permit the employer to reduce labour costs by denying equal pay conditions for all of its workers." Furthermore, according to the Southampton Industrial Tribunal's findings, SWT did not suggest any economic or organizational justification for this discrimination. SWT has failed to adequately justify this discrimination.

SWT's fifth argument suggests that if the European Court of Justice found that Article 119 or the Equal Treatment Council Directive protects gays and lesbians, this finding "would offend against the principle of legal certainty." SWT suggests that even if the Court found that Article 119 protected Lisa Grant and her partner, neither would "enjoy a directly enforceable Community right under that

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295. See Grant's Written Observations, supra note 6, at 15-16 (asserting that it would be "fundamentally wrong to allow an employer to invoke its conception of morality as a justification for denying equal treatment of its employees").

296. See SWT's Written Observations, supra note 161, at 16 (relying on its arguments made in its submission (3) regarding the alleged lack of laws throughout the Community protecting gays and lesbians or providing gays and lesbians with marital rights); see also Grant's Written Observations, supra note 6, at 36 (citing Respondent's Outline Submissions Before the Industrial Tribunal, para. 17) (noting that SWT's justification for the unequal treatment is that treating gays and lesbian partnerships equally "is not one which has gained general acceptance in British society."). "[F]or example, Parliament has not recognized homosexual marriages, nor has it outlawed discrimination against homosexuals. It is reasonable for [SWT] to take the view that in deciding what benefits to grant its employees it should reflect what it believes to be current social norms." Id. Yet, others in the British transport industry including British Airways, London Underground, and European Passenger Service provide travel benefits to gay and lesbian partners. See id. at 41-42. Furthermore, while the government of Great Britain may not recognize same-sex partnerships, surveys in Great Britain indicate a continuing increase in the number of people who support equal rights for gay men and lesbians. See id. at 42.

297. Grant's Written Observations, supra note 6, at 16-17 (relying on Case 43/75 Defrenne v. Sabena 1976 E.C.R. 455 and noting that one of the goals of Sabena was the prevention of competition distortions).

298. See Grant's Written Observations, supra note 6, at 35 (discussing the Southampton Industrial Tribunal's findings regarding the justification argued by SWT). Lisa Grant argues further that these two reasons, economic or organizational, are the only sufficient ways to justify a claim of discrimination. See id.

299. SWT's Written Observations, supra note 161, at 17.
article." SWT argues that the discrimination must be "identified solely with the aid of criteria based on equal work and equal pay." This argument suggests that there must be parameters within which the European Court of Justice could determine whether there has been discrimination. This Comment relies on the decision and reasoning in P, which suggests that the European Court of Justice does not utilize these parameters, or if they do, the parameters are not as narrow as SWT would like.

VII. THE ADVOCATE-GENERAL’S OPINION IN GRANT V. SOUTH-WEST TRAINS

This Comment has provided numerous factors that the European Court of Justice could consider in reaching its decision in Grant—the expansion of same-sex partnership recognition in member countries, the member countries’ protection of gays and lesbians in the workplace, P v. S and Cornwall County Council, a broad interpretation and application of Article 119 of the EC Treaty, the goals of the European Community and the European Court of Justice’s responsibilities to the Community in attaining those goals, and the ability and political power of the European Court of Justice to address this issue concerning gays and lesbians. In addition, Advocate-General Elmer recently delivered his opinion in this case. A review of the Advocate-General’s opinion is necessary for a thorough review of this case. It is necessary to note, however, that it is unlikely that the European Court of Justice’s conclusion will stray far from the Advocate-General’s conclusion. Even so, the European Court of Justice can consider the additional arguments this Comment makes.

300. Id.
301. See id. (relying on Sabena, 1976 E.C.R. 455).
302. See SWT’s Written Observations, supra note 161, at 17 (asserting that in the absence of criteria to determine discrimination Lisa Grant is without a remedy). "[T]he concept of a homosexual partnership is not—without criteria or procedures established by national law—capable of definition with sufficient certainty to form the basis for legal rights." Id. SWT supports its argument by quoting from the observations of Advocate-General Lenz in Case 59/85 Reed v. Netherlands 1986 E.C.R. 1283: "If companions are to be treated in the same way as spouses it is imperative to lay down limits, criteria, and conditions (in particular with regard to the duration and nature of the relationship). These are certainly a matter for the legislature. . . ." Id. (citing Case 59/85 Reed v. Netherlands 1986 E.C.R. 1283, 1294). See also P, 1996 E.C.R. at I-2165 (indicating the Court’s broad interpretation of the Council Directive on sex discrimination); Grant’s Written Observations, supra note 6, at 23 (noting that “equality is one of the fundamental principles of the Community’s legal order.”). Also, in P, the European Court of Justice reiterated its belief that the “equal treatment principle is to be broadly applied.” Id. at 25.
303. See Case C-249/96 Grant v. South-West Trains, Ltd., Opinion of the Advocate-General [hereinafter “AG’s Opinion”].
A. THE ADVOCATE-GENERAL'S REMARKS ON GENDER DISCRIMINATION

The Advocate-General relied heavily on the European Court of Justice's opinion in *P v. S and Cornwall County Council.* The Advocate-General believed the Court's ruling in that case "took a decisive step away from an interpretation of the principle of equal treatment based on the [limited and narrow] traditional comparison between a female and a male employee." The expansion of this principle, which the Advocate-General found in Article 119 and not in Council Directive 76/207, is appropriate in the *Grant* case. The Advocate-General concluded that this reasoning, the reasoning in *P*, is applicable to the *Grant* case.

In reviewing the analysis of the *P* case the Advocate-General rejected SWT's comparison of a gay man with a lesbian woman. Instead, the Advocate-General adopted the comparison in *P*. He interpreted the decision in *P* as applying Council Directive 76/207 to discrimination that was "based essentially, if not exclusively, on the sex of the person concerned." The transgenered status of the employee in *P* became irrelevant, just as the homosexuality becomes irrelevant in *Grant*. By irrelevant the Advocate-General suggested that the scope of Article 119 in *Grant*, or Council Directive 76/207 in *P*, is not limited to discrimination "based on the fact that a person is of one or [the] other sex." Instead, he concluded that the European Court of Justice's reasoning in *P* now allows a broader interpretation of the "Community principle of equal treatment in a way that renders the principle appropriate for dealing with the cases of gender discrimination that come before the courts in present-day society." Those cases in present-day society, are cases where the employer discriminates against their employees not necessarily based on their gender alone, but perhaps their gender and the gender of their partner, or their siblings, parent or dependent.

304. *See AG's Opinion, supra* note 303, at I-3 - I-5 (discussing in detail the *P* decision and how the Advocate-General interprets it).
305. *Id.* at I-4.
306. *See id.* (noting that the European Court of Justice refused to confine the equal treatment principle to "discrimination based on the fact that a person is of one or [the] other sex.").
307. *See id.*
308. *See id.* at I-5.
309. *See id.* at I-4 - I-5.
310. *Id.* at I-3 - I-4.
311. *See AG Opinion, supra* note 303, at I-3 - I-4 (interpreting *P* as finding the transsexual or transgendered status of the employee as irrelevant).
312. The Advocate-General concluded that 76/207 does not apply in the *Grant* case, whereas Article 119 does, because 76/207 does not deal with pay benefits. *See id.* at I-3. The questions in the *Grant* case, therefore, should be answered based on Article 119.
313. *Id.* at I-4 (citation omitted).
314. *Id.*
315. *See id.* at I-5 (describing various hypothetical situations in which the sexual orientation of the employee is irrelevant, but where employees are protected from such discrimination).
B. GENDER DISCRIMINATION IN GRANT v. SOUTH-WEST TRAINS, LTD.

The Advocate-General reviewed, in detail, SWT's ticket regulations in reaching his conclusion that SWT's actions constituted discrimination under Article 119 of the EC Treaty. Essentially, he looked specifically at ticket regulation 8 which provided travel benefits for "cohabitee's being of the 'opposite sex' to the employee." Based on the exact language it is obvious that "gender is simply the only decisive criterion in the provision." He continued by indicating that this requirement could only be met by a consideration of the gender of both the employee and his or her partner. Based on this the Advocate-General concludes:

That a provision in an employer's pay regulations under which the employee is granted travel concessions for a cohabitee of the opposite sex to the employee but refused such concessions for a cohabitee of the same sex as the employee constitutes discrimination on the basis of gender which falls within the scope of Article 119.

The Advocate-General's opinion indicates that he adopts both arguments made by Lisa Grant. First, he adopts the interpretation of P that Article 119 is no longer limited to discrimination based solely on a comparison between the treatment of a

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316. See id. at I-5 - I-7 (reviewing the various clauses of the ticket regulations, noting discrepancies between SWT's stated reasons for the discrimination and the language of the ticket regulations). Interestingly, the Advocate-General noted that SWT's stated goal was to prevent gays and lesbians from obtaining these benefits. See discussion, supra note 303 at I-6. Ticket regulation 8 states "Privilege tickets are granted for one common law opposite sex spouse of staff... subject to a statutory declaration being made that a meaningful relationship has existed for a period of two years or more..." Id. at I-1. Yet, ticket regulation 12 indicates that "Privilege tickets may be issued... for a relative acting as a bona fide permanent resident housekeeper to and entirely dependent upon the applicant..." if the employee is either living alone or with an invalid spouse.

317. Id. at I-6.

318. Id.

319. See id. (adopting the view that both parties' sex or gender are considered by the employer in determining whether or not the employee's cohabitee is entitled to the travel benefits).

320. Id. at I-7. The Advocate-General suggested that the Court of Justice reply to the questions posed by this case as follows:

(1) A provision in an employer's pay regulations under which the employee is granted a pay benefit in the form of travel concessions for a cohabitee of the opposite gender to the employee, but refused such concessions for a cohabitee of the same gender to the employee, but refused such concessions for a cohabitee of the same gender as the employee, constitutes discrimination on the basis of gender, which is contrary to Article 119 of the EC Treaty.

(2) Such discrimination on the basis of gender cannot be justified by reference to the fact that the employer's intention is to confer benefits on heterosexual couples as opposed to homosexual couples.

(3) Article 119 of the EC Treaty is directly applicable and it is for the national courts to ensure that the disadvantaged group of employees is treated in the same way as the favoured group.

Id. at I-12.
man with the treatment of a woman. Second, the Advocate-General adopts the factual discrimination argument that Lisa Grant raised, that she was discriminated against as a woman, because a man in her situation would have (and did) receive benefits denied her, because of her gender in relation to the gender of her partner.\textsuperscript{321} Having concluded that this is discrimination under Article 119, is it justifiable in anyway?

C. JUSTIFICATION FOR DISCRIMINATION

The Advocate-General distinguishes between direct and indirect discrimination.\textsuperscript{322} In the Grant case, the Advocate-General concluded that the discrimination was direct, because it was a result of the specific language in the ticket regulations.\textsuperscript{323} This type of discrimination cannot be justified by reference to objective circumstances.\textsuperscript{324} Even if the Court considered justifications for the discrimination in the Grant case, the Advocate-General fails to accept SWT’s reason or justification for treating gays and lesbians in a discriminatory manner as a reasonable justification.\textsuperscript{325} SWT’s reason for denying gays and lesbians this benefit is its desire not to promote homosexuality based on its conception of morality.\textsuperscript{326} The Advocate-General notes that that type of justification constitutes “a purely subjective reason as opposed to objective circumstances such as, for instance, actuarial calculations relating to the value of contributions paid in under certain forms of pension arrangements in relation to average life expectancy for men and women.”\textsuperscript{327} Thus, SWT’s justification argument should fail not only because it is direct discrimination which cannot be justified, but because even if it is indirect discrimination the justification given for it is not sufficient to allow this discrimination to continue.

The Advocate-General’s opinion accepts many of the arguments put forward by

\textsuperscript{321} See id. at 1-6 (noting that “[t]ravel concessions for a male cohabitee may only be obtained if the employee is a woman. . . . [and t]ravel concessions for a female cohabitee may only be obtained if the employee is a man.”).

\textsuperscript{322} See id. at 1-9 (distinguishing between direct and indirect discrimination). The Advocate-General noted that direct discrimination is discrimination that results directly from “the legal criterion.” Id. For, example in the Grant case, the discrimination occurred because the ticket regulation provided the benefit to opposite-sex cohabitees. See id. This is direct discrimination. See id. Indirect discrimination results not from the language of a law or legal criteria, but instead results from the application or practice of that law or regulation. See id.

\textsuperscript{323} See id. (noting that “gender discrimination results directly from the legal criterion laid down in Clause 8 of the Ticket Regulations”).

\textsuperscript{324} See id. (noting that “according to the Court’s case-law such direct discrimination cannot be justified by reference to objective circumstances”). “Only where discrimination is indirect does the Court appear to accept the possibility that it might be justified by reference to objective circumstances.” Id. (footnote omitted).

\textsuperscript{325} See id. at 1-9 (noting that SWT’s reasons are subjective as opposed to a reasonable objective circumstance which would lend to this unequal treatment of gays and lesbians).

\textsuperscript{326} See id.

\textsuperscript{327} Id. at I-9 – I-10.
Lisa Grant. It clearly holds that SWT's actions are discriminatory under Article 119. It is extremely likely that the European Court of Justice will deliver an opinion similar to the Advocate-General's. This Comment suggests that based on the analysis above, it should follow the Advocate-General's opinion. It could at the same-time rely on the additional arguments raised in this Comment that have not been addressed by the Advocate-General's opinion.

VIII. RECOMMENDATION

Lisa Grant's analysis is compelling. Many intergovernmental organizations and judicial bodies have created laws and passed decisions providing protections for gays and lesbians, which the European Court of Justice often considers in its decisions. In addition, numerous countries both within and outside the European Community have passed legislation that legally recognizes same-sex partnerships and protects gays and lesbians in the workplace. These laws show the level and degree of social understanding and acceptance of gays and lesbians that the European Court of Justice should consider in reaching its decision.

In addition to member countries' laws on this issue, the European Court of Justice can rely on its own prior decisions, specifically its holding in P and adopt the Advocate-General's opinion in Grant. In Grant, the Court can follow its decision in P, expanding further its already broad interpretation of sex discrimination to protect gays and lesbians. Even if the European Court of Justice fails to expand the definition of sex discrimination, it can conclude, based on the facts, that the actions by SWT violated Article 119 because it treated a woman differently than a man without legitimate justification.

This Comment articulates numerous factors favoring a finding that SWT's actions constituted discrimination, not only against a lesbian but against a same-sex couple. No other European Community institution has the power to implement a pro-gay decision, combined with the political ability to freely carry out such a decision. Moreover, finding in favor of Lisa Grant would be well grounded in

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328. See discussion supra Part VI.B (discussing Lisa Grant's arguments).
329. See Grant's Written Observations, supra note 6, at 14 n.1 (noting the pro-gay decisions by the European Court of Human Rights).
330. See, e.g., supra Part II.D.1 and accompanying text (discussing the relationship between the European Court of Justice and the European Court of Human Rights).
331. See supra Parts V.A, V.B, & V.C.
332. See discussion supra Part VI.B.2.a (describing P and the close parallels of that case to the Grant case).
333. See discussion supra Part VII.
334. See discussion supra Part III.A. But see Ball, supra note 94, at 387-88 (noting that "[i]t is perhaps now up to the political system and the national and Community leaders, and not so much up to the legal system and judges, to build upon the edifice constructed by the Court in order to achieve successfully a community of nations that is both economically and socially integrated.")
The European Court of Justice should find for Lisa Grant in order to: 1) promote the achievement of the goals of the European Community by treating all workers equally regardless of sexual orientation; 2) to provide a unified European Community position on same-sex unions, gays and lesbians in the workplace; and 3) to provide an interpretation of the EC Treaty and Council directives that is consistent with the European Court of Justice's prior decisions and the Council directives dealing with sex discrimination in the workplace.

IX. CONCLUSION

This Comment provides several reasons why the European Court of Justice should find in favor of Lisa Grant. The unique aspect of the Grant case is that the discrimination involves a lesbian couple. A pro-gay decision would positively affect treatment of gays and lesbians in the workplace, and, at the same time, it can begin a discussion of the growing trend among member countries to afford gay and lesbian partnerships legal recognition. When all the factors are considered it is clear that the European Court of Justice should answer the questions, which the South Hampton Industrial Tribunal sent to it, in such a way as to ensure protection for all gays and lesbians in the workplace. At the same time, this case can help to recognize the growth of legally sanctioned same-sex partnerships in the European Community.

335. See discussion supra Part VI.B.2.a (discussing generally P, Sabena and the goal of the European Court of Justice in providing equal rights and treatment to people in the workplace).

336. See discussion supra Part IV (describing the goals of the European Community and the case law in which the European Court of Justice has found in favor of a particular party in order to move toward achievement of the overall goals of the European Community as outlined in the EC Treaty).

337. See discussion supra Part V.A (describing the growth of legal recognition of same-sex partnerships by countries throughout Europe).

338. See discussion supra Part VI.B.2.a; P, 1996 E.C.R. at 1-2153 (opinion of the Advocate-General) (suggesting a broad interpretation of the current discrimination laws to be more inclusive and protective of all sexual minorities).