PRESERVING THE EUROPEAN CONVENTION ON
HUMAN RIGHTS: WHY THE UK’S THREAT TO LEAVE
THE CONVENTION COULD SAVE IT

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I. INTRODUCTION

Whether you agree with the holding of the Grand Chamber in Vinter v. United Kingdom1 that Article 3 of the European Convention on Human Rights2 (Convention) requires all life sentences to incorporate a review mechanism for early release,3 one thing is certain: the British do not. According to an online poll conducted by The Telegraph, over 90% of Brits favor “boycotting” the European Court of Human Rights (ECHR or Court).4 Prime Minister David Cameron even indicated that, should his political party win another election, it would consider abandoning the Convention altogether.5 These comments, coupled with similar remarks made by other prominent politicians in the United Kingdom,6 sparked an

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3 Vinter, App. Nos. 66069/09, 130/10, 3896/10, ¶ 34.
6 Id. (noting that Justice Secretary Chris Grayling, Home Secretary Theresa May, and Member of Parliament (MP) Dominic Raab have all advocated a withdrawal from the Convention). “Speaking in March at a conference organised by ConservativeHome, the home secretary, Theresa May, said that by the next general election her party would need a plan for dealing with the European [C]ourt of [H]uman [R]ights.” Joshua Rozenburg, UK (continued)
unusual public reaction from the Grand Chamber. Judge Dean Spielmann, who was appointed to the ECHR in 2004 and is now President of the ECHR, remarked that it would be a “political disaster” if the United Kingdom left the Convention. Responding to a rhetorical question—“‘[T]o what end [is the United Kingdom a] signatory to the Convention?’”—posed by British Home Secretary Theresa May, Judge Spielmann argued that the United Kingdom’s public questioning and defiance of the ECHR’s decisions undermines the rule of law: “‘I must say that I have a problem with such criticism because it goes to the heart of the rule of law. Courts are there to decide and to control action taken by the executive. This is the basic principle of any democracy.’”

It has yet to be seen whether Prime Minister Cameron’s threat is merely political rhetoric from the conservative Tory Party. Regardless of whether United Kingdom takes any action, the point remains clear: the United Kingdom is not satisfied with the ECHR and is considering drastic action. Is it because the Grand Chamber ordered the United Kingdom to pay the complainants, who were three violent murderers, 40,000 euros? Maybe. Is it because the ECHR is infringing on British sovereignty?

Pullout from European Rights Convention Would Be ‘Total Disaster,’ GUARDIAN (June 4, 2013, 9:50 AM), http://www.theguardian.com/law/2013/jun/04/uk-european-human-rights-convention. “She was clear that ‘all options—including leaving the convention altogether—should be on the table.’” Id.


Rozenburg, supra note 6.

Id. More recently, responding to an apparent proposal from the Conservative British government that would limit the power of the European Court of Human Rights, Judge Spielman stated: “It is of course a problem if a country with a long-standing tradition of protecting human rights—and I would like also to pay tribute to the work [that] is done by the UK in the rest of the world promoting human rights—that this country would not comply with the rule of law.” Human Rights Row: UK Quitting Would Be Disaster—ECHR Head, BBC NEWS, http://www.bbc.co.uk/news/uk-politics-25726319 (last updated Jan. 14, 2014).

Perhaps. But, the primary reason, and the reason why the United Kingdom even desires to preserve its sovereignty, seems to be the simple notion that the Grand Chamber’s ruling(s) contradicts the Convention the United Kingdom ratified in 1950. Indeed, how is it that it was neither “inhuman” nor “degrading” to impose a life sentence at the time of the ratification of the Convention, but now such action violates Article 3? Part III of this Article explores this question.

If the ECHR is going to continue to be “more successful than Churchill could ever have imagined,” leading member States like the United Kingdom cannot withdraw. As Judge Spielmann correctly stated, the United Kingdom’s withdrawal would be a “political disaster.” Where Judge Spielmann is incorrect, however, is in his implicit argument that the United Kingdom, and not the ECHR, is responsible for threatening the ongoing viability and success of the Convention. Indeed, the reverse is true. How so? The reverse is true because the ECHR’s current jurisprudential model, which produced Vinter and caused the aforementioned uproar in the United Kingdom, severely undermines the rule of law. The ECHR’s fidelity to the rule of law, and not a commitment

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12 According to Dominic Raab, a British MP:

[The ruling] highlights the need to overhaul our human rights laws, and insulate Britain from such perverse and arbitrary European rulings. It shows the warped moral compass of the Strasbourg court that it allows three brutal murderers to sue Britain for “inhuman treatment” for jailing them for life to protect the public.

13 See infra Part III.C.


15 See Prager v. Austria, 313 Eur. Ct. H.R. (ser. A) at 18 (1995) (“Regard must, however, be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties.”).

16 Rozenburg, supra note 6.

17 Id.
to broadening the protections provided under the Convention, is what will preserve the influence and work of the ECHR for years to come.

In Part II, this Article provides an overview of Vinter. In Part III, the Article discusses why the rule of law is critical to the long-term success of the Convention and how the ECHR’s current jurisprudential model—European consensus—threatens the rule of law. In Part IV, the Article recommends that the ECHR adopt a countervailing historical jurisprudence to strengthen the rule of law and preserve the Convention.

II. OVERVIEW OF VINTER V. UNITED KINGDOM

In Vinter, three British men, sentenced to life imprisonment, claimed that Article 3 of the Convention required all irreducible life sentences to provide some form of review mechanism for early release. The first applicant, Douglas Vinter, stabbed his wife to death less than three years after being released from jail for a previous murder. The second applicant, Jeremy Neville Bamber, was sentenced to an irreducible life sentence after being convicted of shooting and killing his parents, his adoptive sister, and his sister’s two young children. And the third, Peter Howard Moore, was sentenced to life in prison after he, a homosexual, stabbed and murdered four other homosexual men “for his own sexual gratification.”

18 See infra Part II.
19 See infra Part III.
20 See infra Part IV.
22 Id. ¶¶ 15–17.
23 Id. ¶¶ 20–21.
24 Id. ¶ 26. Under § 269 of the Criminal Justice Act 2003, judges, when issuing mandatory life sentences, must decide the minimum term for when the prisoner is eligible for early release. Criminal Justice Act, 2003, c. 44, § 269(2) (U.K.). Section 269 provides the trial judge with discretion to determine that the prisoner is not eligible for early release, which in effect amounts to an irreducible life sentence or a “whole life order.” Vinter, App. Nos. 66069/09, 130/10, 3896/10, ¶ 36 (discussing Criminal Justice Act § 269(4)). When considering the length of the minimum term, a judge must consider the “seriousness of the offence,” which involves analyzing a series of factors that place the offense in the categories of “exceptionally high,” “particularly high,” and all other cases. Criminal Justice Act § 269(3)(a); Vinter, App. Nos. 66069/09, 130/10, 3896/10, ¶ 39. If the “seriousness of the offence” is “exceptionally high,” the starting point for the sentence, prior to considering aggravating or mitigating factors, is a whole-life order. Criminal Justice Act § 269; Vinter,
After serving different amounts of their sentences and appealing through the English courts, the applicants appealed to the ECHR.25 The Chamber held that no Article 3 issue had “arisen in the applicants’ cases since they had not demonstrated that their continued incarceration served no legitimate penological purpose.”26 Indeed, Mr. Vinter had only served three years of his sentence, and Mr. Bamber and Mr. Moore, who served twenty-six and seventeen years respectively, had recently applied to the High Court for review of their sentences, which resulted in the High Court finding “that the requirements of punishment and deterrence [in their cases] could only be satisfied by whole life orders.”27 Accordingly, the Chamber held the United Kingdom’s imposition of whole-life orders in these cases did not violate Article 3 because each sentence served a “legitimate penological purpose.”28

The applicants then appealed to the Grand Chamber.29 There, they argued that “a whole life order[,] which was imposed purely for the purposes of punishment[,] directly undermined human dignity, destroyed the human spirit[,] and ignored the capacity for countervailing justifications for conditional release which could arise in the future.”30 The applicants also argued that a whole-life order, which “permanently excluded a person from society,” ran counter to the predominant European penal policy of rehabilitation and reintegration.31 At the outset, the ECHR noted that member States should be granted a “certain” margin of

App. Nos. 66069/09, 130/10, 3896/10, ¶ 39. An offense is “exceptionally high” if the convicted party: (1) murdered two or more people and each murder involved “a substantial degree of premeditation or planning, the abduction of the victim, or sexual or sadistic conduct”; (2) murdered a child if the murder involved abduction of the child or sexual or sadistic motivation; (3) murdered “for the purpose of advancing a political, religious or ideological cause”; or (4) was previously convicted of murder. Criminal Justice Act, c. 44, § 269, sch. 21. The trial judge, in the cases of Mr. Vinter and Mr. Moore, found that their murders fell within the “exceptionally high” classification of “serious offenses” and ordered irreducible whole-life sentences. See Vinter, App. Nos. 66069/09, 130/10, 3896/10, ¶¶ 18, 28. Mr. Bamber received a whole-life tariff through an order made by the Secretary of State. Id. ¶ 21.

26 Id. ¶ 91.
27 Id.
28 Id.
29 Id. ¶ 8.
30 Id. ¶ 99.
31 Id.
appreciation in matters of sentencing. However, the ECHR held that “[t]here are a number of reasons why, for a life sentence to remain compatible with Article 3, there must be both a prospect of release and a possibility of review. . . . It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention.”

Because “the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence,” the ECHR held that Article 3’s prohibition on degrading and inhumane treatment requires a review mechanism to ensure legitimate penological grounds remain for the detention.

Several factors helped the ECHR arrive at this conclusion. First, the ECHR noted that a review mechanism is necessary to ensure that a prisoner can “atone for his offence.” Second, relying on a decision from the German Federal Constitutional Court, the ECHR held that respect for human dignity mandates that, if a State forcefully deprives a citizen of his freedom, it must also provide a chance for him to “regain that freedom.” Next, and probably most important to the ECHR’s decision and this Article, was the fact that both European and international law support the principle that life sentences must have some review mechanism to evaluate whether “rehabilitation is achieved.” Because the prevailing policy in the Council of Europe, Contracting States, and states beyond Europe was “the

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32 Id. ¶ 105.
33 Id. ¶¶ 110–11.
34 Id. ¶ 111.
35 Id. ¶¶ 110–11.
36 The Grand Chamber also relied on Kafkaris v. Cyprus, wherein the Court noted that “the imposition of an irreducible life sentence on an adult may raise an issue under Article 3.” Kafkaris v. Cyprus, 2008-I Eur. Ct. H.R. 223, 269 (citation omitted). However, in Kafkaris, the Court found no violation of Article 3 when Cyprus imposed a mandatory life sentence on a man convicted of murder. See id. at 270–71. The Court noted:

[At the present time[,] there is not yet a clear and commonly accepted standard amongst the member States of the Council of Europe concerning life sentences and, in particular, their review and method of adjustment. Moreover, no clear tendency can be ascertained with regard to the system and procedures implemented in respect of early release.

Id. at 271.
37 Vinter, App. Nos. 66069/09, 130/10, 3896/10, ¶ 112.
38 Id. ¶ 113.
39 Id. ¶ 114.
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rehabilitation of life sentence prisoners and to the prospect of their eventual release,"40 some form of review mechanism was necessary to ensure consistency with this allegedly primary goal.41 Accordingly, the ECHR held:

Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress toward[ ] rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.42

Because the United Kingdom’s Criminal Justice Act effectively had no mechanism for reviewing the applicants’ sentences, the Grand Chamber found a violation of Article 3.43

III. EUROPEAN CONSENSUS AND THE RULE OF LAW

After the Vinter ruling, United Kingdom’s Justice Secretary Chris Grayling44 remarked that the drafters of the Convention “would be turning in their graves” over the notion that judges could not sentence violent murderers to whole-life sentences.45 Implicit in the justice secretary’s provocative statement is the argument that the original authors’ opinions matter when interpreting the Convention.46 This position stands in stark contrast to that of the ECHR, which has repeatedly held that the Convention is a “living instrument.”47 Before analyzing these views and their respective relationships to the rule of law, however, it is necessary to discuss the rule of law and its relationship to the Convention and the ECHR.

40 Id. ¶ 117
41 See id. ¶ 119.
42 Id.
43 Id. ¶ 121.
45 Id. (internal quotation marks omitted).
46 Id.
A. The Rule of Law: The “Inspiration” for the Entire Convention

Upholding the rule of law is of paramount importance for the long-term success of the Convention because the rule of law is one of three foundations of the Convention. In 1949, the Statute of the Council of Europe “defined its core business as promoting ‘democracy, rule of law[,] and human rights.’” Indeed, “[o]ne reason why the signatory Governments decided to ‘take the first steps for the collective enforcement of certain of the [r]ights stated in the Universal Declaration’ was their profound belief in the rule of law.” In fact, preserving democracy, freedom, and the rule of law was of such great importance to the drafters of the Convention that it even exceeded their commitment to safeguarding individual liberties. So important is the “rule of law” to the Convention


Contrary to popular belief, however, the Convention’s primary “goal was hardly to alter substantially the protection of human rights in the member States but collectively to guarantee against a return to totalitarianism in Western Europe.” Mikael Rask Madsen, The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence, in THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS 43, 44 (Jonas Christoffersen & Mikael Rask Madsen eds., 2011). Indeed, the rise of communism in Eastern Europe posed the greatest threat to individual rights. See Ed Bates, The Birth of the European Convention on Human Rights—and the European Court (continued)
today that the Council of Europe recently passed a resolution clarifying that the phrases “rule of law” (English) and “prééminence du droit” (French) “are substantive legal concepts [that] are synonymous.” The Council of Europe specifically passed the resolution to ensure that the proper understanding of the “rule of law”—as used in English and French—was not undermined by other definitions of the legal term of art surfacing in positivistic eastern European countries where “certain traditions of the totalitarian state, contrary to the ‘rule of law,’ are still present both in theory and in practice.”

Furthermore, the ECHR itself firmly recognizes the rule of law as the foundation for the Convention: “Judicial control is implied by the rule of law, one of the fundamental principles of a democratic society . . . which is expressly referred to in the Preamble to the Convention and from which the whole Convention draws its inspiration.” Moreover, the ECHR has invoked the rule of law on various occasions to elucidate otherwise ambiguous individual rights. For instance, in Golder v. United Kingdom, the ECHR relied on the rule of law to find an implied right of guaranteed access to the courts in Article 6 § 1, stating that “one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.” Additionally, in Lavents v. Latvia, the ECHR found “that, under Article 6 § 1, a ‘tribunal’ must always be ‘established by law.’ This

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expression reflects the principle of the rule of law inherent in the whole system of the Convention and its protocols. 58

If the rule of law is the foundation—even the “inspiration”—for the entire Convention, it is vital for the ECHR’s long-term viability and success that the ECHR uphold, rather than undermine, the rule of law. So, what exactly is it?

B. The Rule of Law: What It Is and How It Applies to the Judiciary

For over two millennia, philosophers, political theorists, and lawyers have praised the concept that law, not men, should govern the citizenry. In the fourth century B.C., Aristotle stated in his Politics: “We should therefore choose that law should rule rather than one single citizen. According to this same train of reasoning, even if it is best that there should be some persons in authority, these persons ought to be constituted merely guardians and servants of the laws.” 59 A few centuries later, Cicero commented: “We are all servants of the laws in order that we may be free.” 60 In 1215, English barons forced King John to sign the Magna Carta 61 —the first time in Western civilization an absolute monarch was required to submit (at least in theory) to the rule of law. 62 In 1780, John Adams penned the rule of law into the Massachusetts Constitution, 63 when he famously wrote: “[T]o the end it may be a government of laws and not of men.” 64 And in 1949, facing the imminent threat of the spread of

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58 The Principle of the Rule of Law, supra note 52, app. II; see Assanidzé v. Georgia, 2004-II Eur. Ct. H.R. 221, 269 (“[T]o detain a person for an indefinite and unforeseeable period, without such detention being based on a specific statutory provision or judicial decision, is incompatible with the principle of legal certainty and arbitrary, and runs counter to the fundamental aspects of the rule of law.”) (citation omitted)).

59 ARISTOTLE’S POLITICS 223 (W.E. Bolland trans., 1877).


64 MASS. CONST. art. XXX.
communism, the Council of Europe was birthed on the twofold premise of human rights and the rule of law.65

The rule of law remains just as crucial for sustaining freedom today as it was in 1215, 1780, and 1949. But, beyond simply stating that the rule of law is “a government of laws and not men,”66 how exactly is this somewhat amorphous concept defined? The World Justice Project67 identifies four elements of the rule of law:

1. The government and its officials and agents as well as individuals and private entities are accountable under the law.
2. The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property.
3. The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.
4. Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.68

The rule of law is generally thought to constrain only the executive (for example, the barons and King John and Judge Spielmann’s comments).69 However, the World Justice Project’s definition makes clear that the rule of law applies not only to the executive, but also to all “government and its officials and agents.”70 The judiciary, then, is also subject to the rule of

65 Statute of the Council of Europe, supra note 48, art. 3 (“[Member States] must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council . . . .”).
66 MASS. CONST. art. XXX.
67 The World Justice Project was founded in 2006 as a presidential initiative of the American Bar Association and, in 2009, it transitioned into an independent 501(c)(3) nonprofit organization. Who We Are, WORLD JUST. PROJECT, http://worldjusticeproject.org/who-we-are (last visited Aug. 20, 2014).
69 See Rozenburg, supra note 6.
70 What Is the Rule of Law?, supra note 68.
law.\textsuperscript{71} This is especially true in the era of what the United States has termed “judicial supremacy.”\textsuperscript{72}

How, though, does the interpreter of the law subject itself to the rule of law? According to U.S. legal scholar David Boies, the rule of law has two components that apply to the judiciary: One is that the result in a particular situation should be reasonably predictable. You should know what the rule of law is and you should know it in advance. The second principle is that the result should be predictable and independent of the identity of the parties.\textsuperscript{73} The ECHR echoes Mr. Boies’s sentiments, stating that its own goal is generally to issue decisions that promote “legal certainty, foreseeability, and equality.”\textsuperscript{74} If issuing predictable and even-handed decisions is the hallmark of a judiciary adhering to the rule of law, the ECHR must commit itself to such a task. The question then becomes whether the ECHR’s current jurisprudential model produces predictability and even-handed application of the law.

\textsuperscript{71} The ECHR itself recognizes that the judiciary must also be subject to the rule of law: “[I]t would be contrary to the rule of law for the legal discretion granted to the executive—or to a judge—to be expressed in terms of unfettered power.” Huvig v. France, 176 Eur. Ct. H.R. (ser. A) 39, 55 (1990) (internal quotation marks omitted).

\textsuperscript{72} See Rachel E. Barkow, More Supreme than Court? The Rise and Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 COLUM. L. REV. 237, 241 (2002). Judicial supremacy is manifested most clearly in the rise of the “constitutional court,” a court that generally has explicit authority to review all laws for their constitutionality regardless of whether an actual “case or controversy” is before the court. See Tom Ginsburg & Zachary Elkins, Ancillary Powers of Constitutional Courts, 87 TEX. L. REV. 1431, 1431 (2009); see also U.S. CONST. art. 3, § 2. For example, the German Federal Constitutional Court’s task “is to ensure that all institutions of the state obey the constitution of the Federal Republic of Germany (Basic Law). . . . Should any conflict arise here, the jurisdiction of the Federal Constitutional Court may be invoked. Its decision is final. All other institutions of government are bound by its case law.” The Federal Constitutional Court: The Task, BUNDES-VERFASSUNGS-GERICHT, http://www.bundesverfassungsgericht.de/en/organization/task.html (last visited Aug. 20, 2014).


\textsuperscript{74} Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1, 26; see Brumarescu v. Romania, 1999-VII Eur. Ct. H.R. 201, 222 (“[O]ne of the fundamental aspects of the rule of law is the principle of legal certainty . . . .’’); see also Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 7–8 (1997) (“[T]he [r]ule of [l]aw should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions.”).
C. European Consensus: A Direct Threat to the Rule of Law

How is it that it was neither “inhuman” nor “degrading” to impose an irreducible life sentence at the time of the adoption of the Convention, but now the imposition of a life sentence violates human dignity to impose such a sentence? The answer lies in “European consensus,” the ECHR’s current jurisprudential model for interpreting the Convention. A key factor in the ECHR’s ruling in Vinter was that the majority of member States, the Council of Europe’s policy, and international law all incorporate some form of review mechanism for whole-life orders. The practice of surveying these laws, and even the laws of nations outside of Europe, is the ECHR’s primary means of interpreting the Convention and is often the justification for the ECHR to find a member State’s action to be outside the State’s “margin of appreciation.” Rather than interpreting the text of the

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75 For example, even the death penalty was still proper punishment (that is, not cruel, inhuman, or degrading punishment) until 1985, when the member States ratified the Sixth Protocol to the Convention abolishing the death penalty. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty art. 1, Apr. 28, 1983, C.E.T.S. 9. Protocol 6, however, allowed the death penalty in times of war. Id. art. 2. In 2002, the member States of the Council of Europe ratified Protocol 13, which abolished the death penalty in all circumstances. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances art. 1, Mar. 5, 2002, C.E.T.S. 9.


78 See Brauch, supra note 76, at 145 (describing how the Court has relied upon “international trends”).

79 Margin of appreciation refers to:

[T]he latitude of deference or error [that] the Strasbourg organs will allow the national legislative, executive, administrative, and judicial bodies before it is prepared to declare a national derogation from the Convention, or restriction or limitation upon a right guaranteed by the Convention, to constitute a violation of one of the Convention’s substantive guarantees. It has been defined as the line at which international supervision should give way to a State Party’s discretion in enacting or enforcing its laws.

(continued)
Convention based on the text’s historical meaning, the ECHR thus interprets the text based on the modern-day interpretations of other nations. This is called “European consensus.”

The ECHR’s use of European consensus has been anything but predictable, however. The “European consensus” approach dates back as early as the late 1970s. In *Tyrer v. United Kingdom*, the ECHR considered whether the caning of a juvenile offender violated Article 3. To bolster its conclusion that caning did violate Article 3, the ECHR noted:

> [T]he Convention is a living instrument which . . . must be interpreted in the light of present-day conditions. In the case now before it[,] the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.

Shortly after using European consensus as “influence” in *Tyrer*, the ECHR took a step further in *Marckx v. Belgium*, both enhancing the weight given to consensus and expanding when and where the ECHR might find a consensus exists. *Marckx* involved a challenge under Articles 8 and 14 of the Convention to a Belgian law that denied automatic recognition of maternal affiliation to illegitimate children. Importantly, before turning to its analysis of European consensus, the ECHR unambiguously conceded that discrimination between legitimate and illegitimate family was “permissible and normal” at the time of the Convention’s drafting. Nonetheless, citing *Tyrer*, the ECHR stated:

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80 See Brauch, *supra* note 76, at 147.
81 *Id.*
83 *Id.* at 11.
84 *Id.* at 15–16.
86 See *id.* at 11.
87 *Id.* at 19. The Court justifies its authority to interpret the Convention under a “living text” or “evolutive” approach on both the Convention itself and the Vienna Convention on the Law of Treaties (VCLT). See Françoise Tulkens, Section President, European Court of Human Rights, Address at the Dialogue Between Judges 2011, in EUROPEAN COURT OF (continued)
The Court cannot but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, toward[] full juridical recognition of the maxim “mater semper certa est.”88

The ECHR then cited two treaties,89 both of which had been ratified by only four members of the Council of Europe.90 Desiring to find consensus where none existed, the ECHR highlighted that “[b]oth the relevant Conventions are in force and there is no reason to attribute the currently small number of Contracting States to a refusal to admit equality between ‘illegitimate’ and ‘legitimate’ children.”91 The mere existence of the treaties, according to the ECHR, “denotes that there is a clear measure of

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89 The two treaties cited were the Brussels Convention on the Establishment of Maternal Affiliation of Natural Children and the European Convention on the Legal Status of Children Born out of Wedlock. Id.
90 Id.
91 Id.
Although “common ground” is hardly synonymous with “consensus,” which is defined as a “general agreement” or “an opinion held by all or most,” the ECHR found it sufficient to rule against the respondent State.

Beyond examining European law, the ECHR sometimes finds “consensus”—not based on Council of Europe policy or the laws of member States—but based on the laws of nations outside Europe. In the tandem cases \textit{I. v. United Kingdom} and \textit{Goodwin v. United Kingdom}, the ECHR relied on an “international trend” to overcome the United Kingdom’s margin of appreciation. Both cases involved challenges under Article 8’s guarantee of “respect for private and family life.” These challenges came from transsexuals who were denied the ability to change their birth certificates after receiving sex changes. Despite

\begin{itemize}
  \item \textit{Id.} The Court also noted that several Contracting States had recently reformed their laws on maternal affiliation. \textit{Id.} (“[T]he Court cannot but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved . . . .”).
  \item \textit{WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE} 302 (2d college ed. 1985).
  \item \textit{Id.}

  As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied . . . .

\textit{Id.} at 23–24.
  \item \textit{Id.} at 30; \textit{I.}, App. No. 25680/94, ¶ 65.
  \item Convention on Human Rights, \textit{supra} note 2, art. 8, at 230.
\end{itemize}
finding no violation just four years earlier in *Sheffield v. United Kingdom*\(^\text{101}\) because there was no “common European approach” on the issue,\(^\text{102}\) the ECHR inexplicably held that “now” the UK’s refusal to change the applicants’ birth certificates violated Article 8.\(^\text{103}\)

To arrive at this conclusion, the ECHR noted that it “must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved.”\(^\text{104}\) Turning to “conditions within the respondent State and within Contracting States generally,”\(^\text{105}\) the ECHR acknowledged that there was still a “lack of a common European approach” in addressing transsexuals’ legal rights following sex-change operations.\(^\text{106}\) One would assume that this would end the analysis, considering that the lack of a “common European approach” was the basis for the ECHR’s decision in *Sheffield* just four years earlier; because without a “common European approach,” there could be no European consensus sufficient to justify the ECHR’s reversing itself\(^\text{107}\) and


\(^\text{102}\) *Id.* \(\text{¶¶} 57–58\). The Court found “no common European approach,” despite the fact that thirty-three (of the then-thirty-seven) nations within the Council of Europe provided for birth certificate changes for transgendered individuals by law. *Goodwin*, 2002-VI Eur. Ct. H.R. at 20. The string of cases involving the rights of transsexuals and the UK began in 1986 with *Rees v. United Kingdom*. *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) at 16 (1986) (“In the United Kingdom[,] no uniform, general decision has been adopted either by the legislature or by the courts as to the civil status of post-operative transsexuals.”). In *Rees*, the Court found no violation, holding that “there is at present little common ground between the Contracting States in this area” and the law “appears to be in a transitional stage.” *Id.* at 15. Four years later, in *Cossey v. United Kingdom*, by a narrow 10–8 margin, the Court again ruled in favor of the UK, finding “little common ground between the Contracting States . . . .” *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) at 16 (1990).


\(^\text{107}\) *Sheffield v. United Kingdom*, 1998-V Eur. Ct. H.R. 2012, 2028. I call this decision a “reversal,” but, perhaps under an “evolutive” theory of the Convention, it is improper to call any decision a reversal, considering that at any moment the Convention can grow and morph into meaning something entirely different than it did previously, just as in *Goodwin*. 
overcoming the respondent State’s margin of appreciation. Shockingly, however, the ECHR held:

[T]he lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising. In accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction . . . . The Court accordingly attaches less importance to the lack of evidence of a common European approach . . . than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.108

Finding such a “trend”—primarily in Australia and New Zealand— the ECHR found a “consensus” sufficient to overcome the United Kingdom’s allegedly “wide” margin of appreciation under Article 8.109

Despite implying that evidence of an “international trend” was dispositive in Goodwin, the ECHR has also contradictorily held that the existence of a European consensus (whether European or international) “cannot . . . be determinative.”110 In Hirst v. United Kingdom, the Grand Chamber held that the United Kingdom’s refusal to allow prisoners to vote violated Article 3 of Protocol 1.111 The United Kingdom argued that, because “there is no clear consensus among Contracting States,” its blanket

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109 Goodwin, 2002-VI Eur. Ct. H.R. at 29–30; I., App. No. 25680/94, ¶ 64. In Appleby v. United Kingdom, the Court relied on American and Canadian case law to reject the petitioner’s claim. See Appleby v. United Kingdom, 2003-VI Eur. Ct. H.R. 187, 194–96. The Court held: “It cannot be said that there is as yet any emerging consensus that could assist the Court . . . .” Id. at 200.
ban did not violate the Convention.\textsuperscript{112} The ECHR noted that, despite disagreement among member States,\textsuperscript{113} “the fact remains that it is a minority of Contracting States in which a blanket restriction on the right of convicted prisoners to vote is imposed or in which there is no provision allowing prisoners to vote.”\textsuperscript{114} Strangely, the apparent consensus among Contracting States was not dispositive in this case: “Moreover, and even if no common European approach to the problem can be discerned, this cannot in itself be determinative of the issue.”\textsuperscript{115} The ECHR then held that, regardless of consensus, it was outside the United Kingdom’s margin of appreciation to impose a “blanket” ban and the Court subsequently struck down the law.\textsuperscript{116}

\textit{Vinter v. United Kingdom} persuasively indicates that the European consensus model continues to govern the ECHR’s interpretation of the Convention. In \textit{Vinter}, the ECHR devoted seventeen paragraphs to discussing “Relevant European, International[,] and Comparative Law on Life Sentences and ‘Grossly Disproportionate’ Sentences”\textsuperscript{117} and six paragraphs on “Relevant International Instruments on the Rehabilitation of Prisoners.”\textsuperscript{118} Because European and international law “now” demonstrated “clear support” for some form of a review mechanism for

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\item \textsuperscript{112} \textit{Hirst}, 2005-IX Eur. Ct. H.R. at 215.
\item \textsuperscript{113} \textit{Id.}
\item \textsuperscript{114} \textit{Id.} at 216. Thirteen member States at the time refused to allow prisoners to vote. \textit{Id.}
\item \textsuperscript{115} \textit{Id.}
\item \textsuperscript{116} \textit{Id.} Interestingly, the basis of the dissenting opinion was that there was not a clear consensus amongst the Contracting States on the issue. \textit{Id.} at 229 (Wildhaber, Costa, Lorenzen, Kovler, & Jebens, JJ., dissenting). The joint dissenters noted that, although the majority opinion did not admit that its decision was based on the living text theory of the Convention, such an omission “does not in our opinion change the reality of the situation that [the majority’s] conclusion is in fact based on a ‘dynamic and evolutive’ interpretation of Article 3 of Protocol No 1.” \textit{Id.} The dissent also criticized the majority for relying heavily on South African and Canadian decisions, but only including “summary information concerning the legislation on prisoners’ right to vote in the Contracting States.” \textit{Id.} at 230. After analyzing the legislation amongst Contracting States, the joint dissent found “the legislation in Europe shows that there is little consensus about whether or not prisoners should have the right to vote.” \textit{Id.} Accordingly, the dissent found that the United Kingdom was within its margin of appreciation in refusing to allow prisoners to vote. \textit{Id.}
\item \textsuperscript{117} \textit{Vinter v. United Kingdom}, App. Nos. 66069/09, 130/10, 3896/10, ¶¶ 59–75 (Eur. Ct. H.R. July 9, 2013), \url{http://hudoc.echr.coe.int/webservices/content/pdf/001-122664?TID=gpaqosuso}
\item \textsuperscript{118} \textit{Id.} ¶¶ 76–81.
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whole life sentences, the ECHR concluded that Article 3 prohibits irreducible life sentences. This brief survey of ECHR cases demonstrates that the ECHR’s invocation of European consensus is hardly certain or predictable. Greater scrutiny of case law affirms this proposition. Jeffrey Brauch, dean and professor at Regent University School of Law in Virginia, discussed the threat of the European consensus jurisprudential model on the rule of law in *The Dangerous Search for an Elusive Consensus: What the Supreme Court Should Learn from the European Court of Human Rights*. In his article, Dean Brauch commented: “The ECHR’s experience of over thirty years in hundreds of cases demonstrates that it is simply unable to articulate and apply a clear, predictable, and workable consensus standard.” Through his survey of ECHR cases, Brauch found that the “European consensus” standard was never clearly defined. He noted that the ECHR confusingly defined the standard as “‘common ground,’ a ‘common European approach,’ ‘European and [i]nternational consensus,’ and ‘a continuing international trend.’” Indeed, in *Tyrer*, the

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119 Id. ¶ 114.
120 Id. ¶ 119; see id. ¶¶ 114–18 (discussing further about European consensus).
121 Beyond undermining the rule of law, the European consensus model is antithetical to democracy, one of the three foundations of the Convention. *Council in Brief: Who We Are*, COUNCIL OF EUR., http://www.coe.int/aboutCoe/index.asp?page=quisommesnous&l=en (last visited Aug. 20, 2014) (“All Council of Europe member [S]tates have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy[,] and the rule of law.”). “[I]n a democratic society[,] legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.” Gregg v. Georgia, 428 U.S. 153, 175–76 (1976) (first alteration in original) (quoting Furman v. Georgia, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)). Accordingly, the Court should defer to the legislature, rather than permanently enshrining in the Convention what the Court perceives to be a consensus on any given issue. *See Hirst*, 2005-IX Eur. Ct. H.R. at 230 (Wildhaber, Costa, Lorenzen, Kovler, & Jebens, JJ., dissenting). The *Hirst* dissent even went so far as to chastise the majority for legislating: “[I]t is essential to bear in mind that the Court is not a legislator and should be careful not to assume legislative functions.” Id.
123 Id.
124 Id. at 288.
125 Id. at 317.
126 Id. at 282 (citing Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1, 3).
ECHR referred to “commonly accepted standards” among the member States and Council of Europe policy, but in Goodwin, the ECHR found it inconsequential that there were no commonly accepted standards among Contracting States and instead relied on an “international trend.”

Beyond failing to define clearly the actual standard for consensus analysis, the ECHR’s jurisprudence leaves member States guessing as to “whether the relevant group to be observed in finding such a consensus or trend is the member States of the Council of Europe or nations internationally.” These issues go hand in hand. What is the standard? A consensus, an emerging consensus, an international trend, common ground, or a common European approach? And, whatever the test is, to whom do we look to see if the test is met? Member States, international law, or both? Additionally, to whomever we look to see if such a consensus is present, how much weight is given to the existence of a trend or consensus? These simple rhetorical questions reveal that the ECHR’s current jurisprudential model of European consensus utterly fails to provide predictability and even-handed application.

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129 Brauch, supra note 122, at 287.
130 The negative effects on the rule of law of the Court’s use of European consensus are well illustrated by a basic rule of law legal doctrine: vagueness—the concept that a law that is ambiguously drafted is not law at all. 1 WILLIAM BLACKSTONE, COMMENTARIES 45–46 (1979). William Blackstone articulated the vagueness doctrine in his Commentaries on the Law of England. Id. When describing the elements of law, Blackstone noted that, to be a law, it must be “prescribed, [b]ecause a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law.” Id. at 45. Blackstone then stated a law must be promulgated “in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people.” Id at 46. Failing to publicize written laws is just as contrary to the rule of law as is promulgating vague or imprecise laws. In each situation, citizens, to whom the law is directed, do not know what is required of them and cannot direct their conduct accordingly, nor can they be certain when and how officials will apply the law.

ECHR case law firmly recognizes the Blackstonian principle that a law is not a law if not written with “sufficient precision.” Svyato-Mykhaylivska Parafiya v. Ukraine, App. No. 77703/01, ¶ 127 (Eur. Ct. H.R., June 14, 2007), http://hudoc.echr.coe.int/webservices/content/pdf/001-81067?TID=gakzqqorwz. Without such precision, the Court has held, citizens will not be able to foresee reasonably the consequences of their actions, nor will they have protection from the arbitrary discretion of officials:

(continued)
IV. THE ECHR SHOULD ADOPT A HISTORICAL CONSENSUS JURISPRUDENTIAL MODEL TO UPHOLD THE RULE OF LAW

Because the ECHR’s use of European consensus has been completely unpredictable, and therefore undermines the rule of law, it is the ECHR, not the United Kingdom, that poses a threat to the long-term success of the Convention. Accordingly, the ECHR must seriously consider overhauling its jurisprudential model. To ensure predictability in its decisions—i.e., to ensure that the law, the Convention, is “king”—the ECHR should abandon the living European consensus model and interpret the text based on a historical European consensus model that focuses solely on Contracting States. In short, the ECHR should interpret the words of the Convention as they were understood by the Contracting States that ratified the Convention.

It would be contrary to the rule of law for the legal discretion granted to the executive in areas affecting fundamental rights to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity . . . .

_Id._ ¶ 128.

Although the ECHR (at least here) only highlights the threat of the executive in applying vague laws, danger exists from the judiciary as well: “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” _Grayned v. City of Rockford_, 408 U.S. 104, 108–09 (1972) (emphasis omitted). Accordingly, whether members of the executive branch are selectively enforcing the laws or members of the bench are selectively interpreting the laws, vague laws seriously threaten the rule of law because of the very real potential for “arbitrary and discriminatory application.” _Id._

The ECHR’s consensus paradigm fails to meet its stated standards of crafting laws with “sufficient precision” and issuing judicial decisions that promote “legal certainty, foreseeability, and equality.” _Goodwin_, 2002-VI Eur. Ct. H.R. at 7. One may contend that the ECHR is not the legislature and, therefore, the vagueness doctrine is inapposite. But, has the ECHR not made law? Take _Vinter_ for example. When the Convention was adopted in 1950, no member State had mandatory review mechanisms for life sentences and no member State was in violation of Article 3. _See Kaftaris v. Cyprus_, 2008-I Eur. Ct. H.R. 223, 271 (“[A]t the present time there is not yet a clear and commonly accepted standard amongst the member States . . . concerning life sentences and, in particular, their review and method of adjustment.”). If the ECHR is going to legislate, then, it must adhere to basic legal principles to promote the rule of law. The living European consensus standard, as currently applied, is vague, imprecise, and arbitrary.
in 1950. Using history (i.e., context) to interpret the Convention provides clear guideposts to Contracting States and citizens who seek to ensure that their conduct is compliant with the law. For example, the phrase “inhuman or degrading treatment or punishment” would be interpreted based on the consensus among Contracting States at the time the Convention was ratified. If no Contracting State at the time of ratification considered it inhuman or degrading to impose a whole-life sentence without possibility of parole, such a law could not violate the Convention.

Interpreting the text of the Convention based on the historical meaning of the words will, for one, ensure predictability. James Madison, considered by many to be the chief architect of the United States Constitution, understood this well:

If the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the government must partake of the changes to which the words and phrases of all living languages are constantly subject. What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense!... I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation.

131 See Vienna Convention, supra 87, art. 31(1), at 340 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

132 Convention on Human Rights, supra note 2, art. 3, at 224.

133 Of course, any member State would be free to enact greater protections for its citizens, including prohibiting whole-life tariffs.


The same is true of the Convention. Without an objective anchor to guide the ECHR’s interpretation, the Convention—and therefore the laws of the Contracting States—will continue to undergo a “metamorphosis” to the point where not only do the ECHR’s decisions lack predictability, but the Convention will not be recognizable. This objective anchor must be history.

But, even if the ECHR adopted some other predictable method of interpreting the Convention (e.g., once 75% of Contracting States interpret something a certain way, then all Contracting States are bound by that interpretation), the historical consensus approach is still necessary to uphold the rule of law because it reinforces the notion of the Convention as a contract. Black’s Law Dictionary defines “convention” as “[a]n agreement or compact, esp[ecially] one among nations.” Moreover, the Convention itself repeatedly refers to “Contracting Parties.” For example, Article I states: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” Therefore, the Convention is a contract, and the ECHR, like the Contracting States, has obligations under the contract. For example, the ECHR is required to interpret the Convention, only accept cases after domestic remedies have been exhausted, afford just satisfaction to an injured party, and provide reasons for its decisions.

All contracts have specific terms with specific meanings that each party is bound to follow. Although the parties may dispute the actual

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136 See Barrett, supra note 44 (available in the video embedded in the article) (Secretary Justice Chris Grayling stated, “I don’t believe the people who wrote that Convention ever imagined that it would stop a judge saying to a really evil offender you’ll spend the rest of your life behind bars . . . .”).


138 Convention on Human Rights, supra note 2, art. 1, at 224; see id. at 232, 234, 236, 242, 246, 248, 250 (detailing the rights and duties of the contracting parties).

139 Id. art. 32, at 246.

140 Id. art. 35, at 246.

141 Id. art. 41, at 248.

142 Id. art. 45, at 248.

143 See Black’s Law Dictionary 341 (9th ed. 2009) (”[C]ontract [is] 1. An agreement . . . creating obligations that are enforceable or otherwise recognizable at law . . . . 3. A promise . . . enforceable or otherwise recognizable at law . . . . 6. The terms of an agreement, or any particular term . . . .”).
meaning of the words in the contract, the meanings of the terms cannot change over time and certainly cannot take on new meanings attributed to the words that the parties never contemplated. 144 If they could, the rule of law would be destroyed.

Imagine the following scenario. Paul and Andre enter into a contract whereby “Andre will lease Paul’s property for residential purposes on a year-to-year basis.” The term “property” is not defined in the contract. Paul’s entire property is rather large, and it encompasses two dwellings. When Paul and Andre ratify the contract, Paul and his family live in the second house in the rear of the property. They have lived there for fifteen years and the house is much larger than the vacant, empty house at the front of the property. Andre moves into the front house and lives there without problems. Halfway through the fourth renewal of the contract, Andre tells Paul that Andre is moving into Paul’s house because the lease says that Andre is “leasing Paul’s property.” Paul objects, explaining that, when they signed the contract, they both understood—based on context—that the term “property” did not encompass both houses and that, even if they could not agree on the exact definition of “property,” at a minimum they knew that it could not mean what Andre was suggesting. Andre says he knows, but that Helen and Julia, Andre’s friends, just entered into a separate contract under which they interpret “property” to encompass all of Helen’s property. Paul objects, arguing that Helen’s contract has nothing to do with their contract, they formed their contract at a different time, and Helen only had one house. Andre says it does not matter and kicks Paul out of the house.

This simplistic example highlights the need for the ECHR to interpret the Convention—a contract—through a historical lens. The United Kingdom and the other Contracting States signed the contract and gave the ECHR jurisdiction to interpret the Convention 145 and issue binding judgments. 146 However, the ECHR’s delegated authority is just that—a


145 Convention on Human Rights, supra note 2, art. 32, at 234.

146 Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No. 11 and 14, supra note 87, art. 46, at 13 (“The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.”).
limitation to interpreting the Convention, a contract with words that have fixed meanings arising out of a specific context. Indeed, it was only in the post-World War II context that the Contracting States agreed to surrender some of their sovereignty and ratify the Convention.\footnote{See \textit{PUB. RELATIONS UNIT, EUROPEAN COURT OF HUMAN RIGHTS, THE ECHR IN 50 QUESTIONS} 3 (2012), available at http://www.echr.coe.int/Documents/50Questions_ENG.pdf (“The Convention . . . established an international judicial organ with jurisdiction to find against States that do not fulfill[1] their undertakings.”).} If the meanings of the words in a contract could be subject to continuous change at the pronouncement of one party, the rule of law means nothing. The “High Contracting Parties” never agreed to be bound by how Australia, New Zealand, the United States, or future contracting parties yet to join the Convention would interpret provisions of the Convention.\footnote{See \textit{Convention on Human Rights}, supra note 2, art. 19, at 234 (“To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up . . . (2) [a] European Court of Human Rights . . . .” (emphasis added)).} Interpreting the Convention using the historical model is the only way the ECHR can perform its obligations under the contract. If the ECHR continues to interpret the Convention under the \textit{living} European consensus model, it will be in willful breach of its contractual obligations, not to mention outside the scope of its legitimate judicial authority, thereby seriously threatening the rule of law and providing legal justification for discontented Contracting States like the United Kingdom to withdraw.

The need to follow the historical model is especially clear in the context of a Convention drafted in broad language. A cursory reading of the Convention reveals that the text of the Convention is not “precise,” but is “full of general, imprecise notions, frequently referring to non-legal standards and values such as ‘inhuman and degrading treatment’ (Art[.] 3), ‘respect for private and family life’ (Art[.] 8), and ‘necessary in a democratic society’ (Arts[.] 8(2) to 11(2)).”\footnote{Bates, \textit{supra} note 51, at 34. “In any event, the lack of precision in the wording of . . . Article [3 of Protocol 1] and the sensitive political assessments involved call for caution.” \textit{Hirst v. United Kingdom} (No. 2), 2005-XI Eur. Ct. H.R. 187, 229 (Wildhaber, Costa, Lorenzen, Kovler, & Jebens, JJ., dissenting).} The drafters purposefully drafted the Convention in this manner to ensure agreement among Contracting States by codifying only those transcendent rights on which free governments have always agreed.\footnote{\textit{EUR. CONSULT. ASS. DEB.} 1st Sess. 197 (Sept. 5, 1949), available at http://assembly.coe.int/Conferences/2009Anniversaire49/DocRef/Teitgen6.pdf.}
Committee on Legal and Administrative Questions on the Establishment of a Collective Guarantee of Essential Freedoms and Fundamental Rights to the Consultative Assembly of the Council of Europe in September 1949, Mr. Teitgen, the presenter, noted:

The Committee unanimously agreed that for the moment, only those essential rights and fundamental freedoms could be guaranteed which are, to-day, defined and accepted after long usage, by the democratic regimes. These rights and freedoms are the common denominator of our political institutions, the first triumph of democracy, but also the necessary condition under which it operates. That is why they must be the subject of the collective guarantee.\(^{151}\)

Thus, the historical approach promotes the transcendency of the rights agreed on by the Contracting States and honors the contractual nature of the Convention. Therefore, to honor the rule of law and its contractual obligations, the ECHR must interpret the Convention through a historical framework.

Moreover, the historical approach removes politics from the judicial decision-making process. Politics are the chief enemy of even-handed application of law because politics are subject to the whims of individuals.\(^{152}\) But, “[t]he historical approach, if employed with intellectual honesty, has the effect of squeezing political prejudices out of judicial decisionmaking.”\(^{153}\) The ECHR’s current European consensus

\(^{151}\) *Id.* at 198. It may argued that, because the report states “for the moment” only certain rights are agreed upon, the drafters intended the Convention to be a “living document” where the Court would have power to create new rights not originally contemplated within the Convention. This objection does not withstand scrutiny. The report was most certainly referring to, among other powers of the Council of Europe, the ability of member States to adopt additional protocols to the Convention clarifying and guaranteeing more rights *upon which Contracting States expressly agreed*. For example, Protocol 1 guarantees additional rights, including the protection of property, the right to education, and the right to free elections. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 75; Protocol 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances, *supra* note 75.

\(^{152}\) *See* Boies, *supra* note 73, at 61–62 (noting that a threat to a democratic society is when a democratically elected government infringes on the rights of the minority).

model is simply political sentiment by another name. Indeed, if the meaning of the text of the Convention changes as the laws of nations change (i.e., as political preferences change), nothing exists to protect citizens from the latest political sentiment—whether those of other nations or those of the ECHR itself.

Former ECHR Vice President Françoise Tulkens recognizes the importance of “legal certainty” (i.e., the historical model and binding precedent), but argues that it must be balanced against the need for “flexibility” (i.e., the living European consensus model or “evolutive” approach)\textsuperscript{154} so that the ECHR can advance the Convention’s alleged goal of the “further realisation of human rights.”\textsuperscript{155} Not only does this argument

\textsuperscript{154} Tulkens, supra note 87, at 10.

Ultimately I believe that a balance must be struck between legal certainty and flexibility. On the one hand, the Court accepts the importance of “legal certainty[,”] what Fuller calls the “internal morality of law[,]” particularly in order to define the nature of the obligations imposed on the States. At the same time, a flexible interpretation of the Convention, responsive to the evolution of facts and ideas, is also necessary to pursue its fundamental goals, notably the maintenance and further realisation of human rights.

\textsuperscript{155} Convention on Human Rights, supra note 2, at 222. The argument that the reference to the “further realisation of human rights and fundamental freedoms” in the Convention’s preamble supports the living European consensus model contradicts a straightforward textual reading of the Convention. See Tulkens, supra note 87, at 7. The Council of Europe was formed in 1949, prior to the adoption of the Convention and creation of the ECHR. Statute of the Council of Europe, supra note 48. One purpose of the Council of Europe was the promotion of human rights and fundamental freedoms. See id. art. 1, 3. The Council of Europe created the European Convention on Human Rights the following year. See Convention on Human Rights, supra note 2, at 221 (noting the Convention was signed in 1950). Thus, the adoption of the Convention itself was the “further realisation of human rights” referred to in the preamble. Id. Reading the preamble in context makes this point clear:

The Governments signatory hereto, being members of the Council of Europe, . . . [c]onsidering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms . . . [h]ave agreed as follows . . .

(continued)
contradict the actual text of the Convention (the contract), and is therefore outside the scope of the ECHR’s legitimate authority, but it incorrectly presupposes that the Council of Europe can only achieve further realization of human rights through the ECHR. On the contrary, the Council of Europe, made up of forty-seven member States, has the complete ability to achieve the further realization of human rights without the Court invoking European consensus. Through signing and ratifying protocols, of which the Court has explicit jurisdiction to interpret, the Council of Europe can expand human rights in Europe. Moreover, the Council of Europe has a variety of other mechanisms—including conventions, resolutions, recommendations, and reporting and monitoring—by which it can achieve the “further realisation of human rights.” Thus, to achieve both legal certainty (the rule of law) and flexibility (greater protection of human rights), the ECHR must adhere to “legal certainty” and allow the other bodies of the Council of Europe to pursue “flexibility.”

Id. at 222, 224.

The Council of Europe advocates freedom of expression and of the media, freedom of assembly, equality, and the protection of minorities. It has launched campaigns on issues such as child protection, online hate speech, and the rights of the Roma, Europe’s largest minority. The Council of Europe helps member States fight corruption and terrorism and undertake necessary judicial reforms. Its group of constitutional experts, known as the Venice Commission, offers legal advice to countries throughout the world. The Council of Europe promotes human rights through international conventions, such as the Convention on Preventing and Combating Violence against Women and Domestic Violence and the Convention on Cybercrime. It monitors member States’ progress in these areas and makes recommendations through independent expert monitoring bodies. All Council of Europe member States have abolished the death penalty.

Accordingly, the ECHR must adopt a historical jurisprudential model that focuses solely on Contracting States. Interpreting the text of the Convention through a historical lens is the only way the ECHR can uphold the rule of law and ensure the continued viability of the Convention. Without an objective anchor to guide the ECHR’s interpretation, every right in the Convention will be subject to the ever-shifting trends of various countries, many of which have different cultures and traditions, and many of which have nothing to do with the Convention. Moreover, Contracting States will be left guessing whether their actions comply with the Convention. The historical framework removes the uncertainty pervading the living consensus model and ensures that the transcendent rights agreed upon by the original Contracting States are honored.160

V. CONCLUSION

The European Court of Human Rights has been an incredible success, and for good reason. The ECHR hears thousands of cases each year161 and stands as the guarantor of freedom against the threat of government oppression. Yet, without credibility, the ECHR is nothing. If the United Kingdom and other Contracting States continue to defy publicly the ECHR, the Convention will collapse.162 To ensure the ECHR’s credibility, and therefore the long-term viability of the Convention, the ECHR must honor the rule of law. Indeed, the rule of law is the inspiration for the

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160 EUR. CONSULT. ASS. DEB., supra note 150, at 198.
162 Human Rights Commissioner Niels Muižnieks stated:

If the UK, a founding member of the Council of Europe and one which has lost relatively few cases at the Court, decides to “cherry pick” and selectively implement judgments, other states will invariably follow suit and the system will unravel very quickly. Thus, my message is clear: the Court’s judgments have to be executed and the automatic and indiscriminate ban on voting rights for prisoners should be repealed. If the court system is to continue to provide protection, there is no alternative to this for member [S]tates, other than leaving the system itself.

Cohen, supra note 157 (internal quotations omitted). This quote is in reference to the United Kingdom not complying with Hirst v. United Kingdom, in which the Court held that the United Kingdom’s ban on British prisoners voting violated Article 3, Protocol 1. Hirst v. United Kingdom (No. 2), 2005-IX Eur. Ct. H.R. 189, 216.
entire Convention. To honor the rule of law, the ECHR must abandon the living European consensus model and interpret the Convention through a historical lens. The historical method of interpretation will ensure predictability and even-handed decision making, thus upholding the rule of law and preserving the ECHR’s credibility.

163 See discussion supra Part III.A.