FREEDOM OF EXPRESSION, PUBLIC MORALS, AND SEXUALLY EXPLICIT SPEECH IN THE EUROPEAN COURT OF HUMAN RIGHTS

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ABSTRACT

Although the European Court of Human Rights (ECtHR) has frequently favored supporting freedom of expression, some observers worry that the "public morals" clause of Article 10 may generate Court deference to states' speech-restrictive rulings. We draw on an ongoing collaborative effort to construct a Global Free Speech Repository of all Article 10 freedom of expression cases, combining a quantitative overview of patterns of outcomes with a close reading of a number of related cases. We find that the public morals clause is associated with deference only to a limited extent. Instead, cases closely related to public morals—those containing what we term "sexually explicit speech"—are far more prone to elicit Court deference to state restrictions. These findings suggest that underlying ideas about the type of speech involved rather than the text of the institutional provisions shape European Court of Human Rights decisions in these cases.

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The European Court of Human Rights (ECtHR) is time and again tasked with balancing the importance of freedom of expression against other rights and values. Since its founding in the late 1950s, the ECtHR has evolved into an institution with considerable influence over a broad range of human rights issues within the forty-seven member states of the Council of Europe (Arold 2007; Goldhaber 2008; Bates 2011; Anagnostou 2013; Madsen 2016). For example, in cases involving freedom of expression, a right enshrined in Article 10 of the European Convention on Human Rights (ECHR), the Court has consistently found fault with how national authorities regulate freedom of speech. It has determined that states violated this core right in 79 percent of cases it ruled on between 1961 and 2016, demonstrating its willingness to exercise its judgment even if it contradicts findings of its members' judicial branches (Cichowski and Chrun 2017; Keck 2019).[3]

Although the Court has shown a propensity for upholding freedom of speech, scholars and activists have long raised concerns that one particular clause within Article 10(2) of the European Convention that permits speech restrictions "for the protection of . . . morals" encourages deference to national authorities (Feingold 1977; Letsas 2006). The ECtHR steadfastly claims that the "lack of a uniform conception of morals" allows for a "margin of appreciation"—a certain leeway—for member states when morals claims are involved (Letsas 2006, 725). This is so because the margin of appreciation doctrine implies judicial deference to domestic courts, especially in cases where the national court is considered to be better placed to rule on an issue (Arold 2007). According to Letsas (2006), as a substantive concept, the doctrine allows states to protect *collective* goals at the cost of *individual* freedom, especially through accommodation clauses, such as the morals clause. As a structural concept, the doctrine recognizes state-level variations in social, moral, cultural, and other traditions as well as differences in local laws, thus maintaining

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3. Some national authorities have begun to criticize Court decisions and to call for more deference to member states. British Prime Minister David Cameron warned, for example, "As the margin of appreciation has shrunk, so controversy has grown" (Cameron 2012). At a formal level, the Brighton Declaration of 2012 emphasized the principles of subsidiary, the idea that the responsibility of applying the Convention text lies first and foremost with domestic courts (https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf), and the adoption of Protocol 15 in 2013 amended the Preamble of the ECHR to incorporate the principles of subsidiary and margin of appreciation (https://www.echr.coe.int/Documents/Protocol_15_ENG.pdf).

the Court's position as a subsidiary to national authorities (Letsas 2006, 706). In examining the application of the margin of appreciation doctrine to public morals cases, the core concern is that once the Court accepts that public morals are at stake, it is especially likely to uphold speech restrictions.

This article examines the hypothesis that European Court of Human Rights holdings involving an accepted public morals claim more commonly lead to deference to national authorities than cases involving no Court-accepted public morals claim. In so doing, our goal is to explore an area of Court action that some worry runs counter to the Court's general tendency to support freedom of expression and to examine more closely why certain cases may become exceptions to the norm. We draw on an ongoing collaborative effort to construct a Global Free Speech Repository (GFSR) of all Article 10 freedom-of-expression cases that enables us to combine a numerical pattern of outcomes with a close reading of a number of these cases (Keck 2018). We find that the Public Morals Clause is associated with deference to some extent but not to the degree anticipated by skeptical observers. We refine common understandings of this relationship by demonstrating that a type of speech very closely related to morals—revolving around what we term "sexually explicit speech"—is far more prone to elicit Court deference to state restrictions than are public morals cases. In other words, the sexual nature of the speech act is more strongly associated with a No Violation ruling (in favor of the national authorities' speech restrictions) than whether the Court accepts the government's argument that the speech restriction aimed to protect morals.

Our findings contribute to a larger discussion about the role of ideas and institutions in judicial decision making. Scholars such as Helfer and Voeten (2014), for example, demonstrate that the ECtHR has engaged in "majoritarian activism" to reach progressive decisions on issues of LGBT rights, even if there was no explicit basis for those decisions in the text of the Convention itself. Cichowski (2006) shows, however, that the written rules and procedures—the institutional structures—of the ECtHR have a substantial effect on who participates in Court decisions, granting individuals "a powerful tool to engage in participation through law enforcement, rights claiming, and expanded protection" (Cichowski 2006, 70). Examining forty years of French Supreme Court rulings, Bleich (2018) demonstrates both that ideas about hate speech influence judicial outcomes and that parties exploit the letter of the law to win cases that run counter to the dominant pattern. Our goal, therefore, is to understand the extent to which European Court of Human Rights decisions in one specific area are influenced by written rules about public morals or by underlying ideas about the actual meaning and purpose of the Public

Morals Clause. We find that the Court's approach in this area is guided more by prevailing ideas about acceptable speech than by the specific wording of the text of the ECHR.

I. PUBLIC MORALS AND SEXUALLY EXPLICIT SPEECH: WHAT LEADS TO COURT DEFERENCE?

Article 10 of the European Convention on Human Rights, also known as the Convention for the Protection of Human Rights and Fundamental Freedoms, reads:

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

Scholars have previously identified public morals as an area in which the Court often rules in favor of the national authorities. Criticizing the Court's decision against the speech claimant in the landmark case *Handyside v. the United Kingdom,* Feingold (1977, 96) noted that "[t]he category of 'protection of morals' is so vague as to be meaningless. . . . In view of this potential abuse, one would expect the Commission and Court to examine carefully any Member State's claim that a measure restricting the right to freedom of expression is necessary for the protection of morals. It is clear, however, that this is not the case." Even since that early time period, observers have consistently expressed concern about the wording of that clause. According to Greer (2000, 10), "A broad margin has been permitted with respect to the 'protection of health or morals' on the grounds that these notions vary between member states." Bakircioglu (2007, 717) writes that "the Court, when dealing with public morals, generally submits that contracting states have a wide margin of appreciation and defers to the national authorities' judgments." In light

of these concerns, Perrone (2014, 378) argues, "[it is necessary] for the Court to devise a definition of public morals, in order to deny states an unlimited discretion in curtailing rights protected by the Convention." The overarching concern these and other authors share is of a Court drawing on the wording embedded in Article 10 to defer to member-state restrictions of free-speech rights where the protection of public morals is concerned (Tsarapatsanis 2015; McGoldrick 2016).

Yet looking more closely into the concept reveals that the underlying concerns about public morals may, at their foundation, be connected to ideas about sex. Writing about obscene speech, Clor (1969, 3) claims, "Laws against obscenity are often made or defended in the name of public morality. Obscenity has some connection with sex, and sex is related to love—an intimate private concern of all men." On a similar note, Nowlin (2002, 265) argues that the relationship between morality and sex in legal philosophy is both old and fundamental:

> [T]raditional legal-philosophical analyses about the legal enforcement of morality has a distinctively sexual bearing. Pornography, adultery, prostitution, group sex, anal sex, and sadomasochistic sexual practices occupy the debates about how far the state should be entitled to restrict freedoms in the name of morality, yet it is fair and important to ask why these activities, as opposed to distinctively asexual phenomena, such as tax evasion, discriminatory employment practices, and advertising misrepresentations, typically raise political and legal concern for the protection of morality.

The traditional relationship between morals and sex was itself explicitly discussed during the formation of the Convention and the ECHR. Johnson (2014, 302), citing a European Commission report in *Glasenapp v. Germany*, writes, "[T]here is evidence to suggest that the Strasbourg organs have regarded the inclusion of 'the protection of morals' to specifically relate to pornography." In fact, original documents from the Council of Europe archives that recount the framing of Article 10 reveal that the UN Conference on Freedom of Information submitted a draft version of Article 10(2) that read, "[T]he right of freedom of expression may be subject to penalties, liabilities or restrictions clearly defined by law, but only with regard to […] expressions which are obscene" (Strasbourg 1956, 5). Following this draft, the British government proposed a version of Article 10(2) on January 4, 1950. This proposal, among other revisions, replaced the aforementioned statement with this: "The exercise of this freedom may be subject to penalties, liabilities and restrictions provided by law, which are necessary […] for the protection of health or morals" (Strasbourg 1956, 8). While this is not a definitive statement of how the Court interprets the morals clause today, the Council of Europe document

highlights that the "protection of morals" phrase was introduced into the Convention as a direct substitute for a similar limitation with regard to obscene speech, thereby drawing a strong connection between morals and sex at the time of writing.

If concerns surrounding sex form the underlying purpose of the morals clause, it may be helpful to amend existing views about when the Court is most likely to defer to member states by shifting the focus away from the morals clause—that is, the specific *wording* of the Convention—and toward the presence of sexually explicit speech—that is, the *type* of speech that deserves restriction. Even though the margin-of-appreciation doctrine has been traditionally associated with public morals, since the Court tends to utilize the doctrine in cases where "there is no uniform conception of morals," this seems to apply equally well to cases with sexually explicit content. As Greer (1998, 25) notes, "[I]t is not so clear that any given society is less democratic than others because it places more restrictions upon, for example, the artistic expression of certain forms of sexuality. There may, in other words, be more room for different national standards here than in other areas."

To the extent that there is an allowance or even encouragement for the Court to defer to states in free-speech matters, it is worth asking if this is primarily rooted in the legalistic interpretation of statutory language or whether it is based in ideas about the type of speech that merits restriction. In this article, we answer this question by examining cases that involve a public morals component and those with a sexual component, which we have termed "sexually explicit speech" cases. We explore which factor is more closely associated with the Court's decision to defer to state decisions to restrict freedom of expression.

II. CASE SELECTION, DATA, AND PATTERNS OF OUTCOMES

The cases analyzed in this article are Article 10 freedom-of-speech cases that belong to either the category of public morals or sexually explicit speech or to both. In selecting which cases to examine, we start with the complete set of ECtHR cases available on the online database (HUDOC). To identify relevant public morals cases, we filter for the keywords "Art. 10.2- Protection of morals" within a case document and then search for those for which a substantive decision was made on Article 10 grounds.[4] For our purposes, public morals cases are those in which the Court accepts the state's claim that the speech restriction aimed to protect morals; that is, it accepts

4. The Public Morals Clause appears in Articles 6, 8, 9, 10, and 11 and Article 2(3) of the Fourth Protocol to the Convention, but given our focus on freedom of expression, this paper examines only cases that fall under Article 10, thus excluding landmark public morals cases such as *Dudgeon v. United Kingdom*, Application No. 7525/76, ECtHR (1983), concerning homosexual acts and sexual morality in general.

the protection of public morals as a "legitimate aim."[5] In every case where the Court accepts the relevance of the morals clause, it is guaranteed to consider the right to protect morals. Thinking about such cases helps focus our attention on the impact this Convention provision has on freedom-of-expression outcomes. Following these steps narrows the database down to twelve "public morals cases."[6]

Defining sexually explicit speech is a more complex task. Sexually explicit speech encompasses, but is not limited to, obscenity and pornography. As Harchuck (2015, 9) writes, "All obscene materials are sexually explicit, but not all sexually explicit materials are obscene." Writing about obscenity in particular, Hixson (1996, 9) traces the legal standards of obscenity laws back to nineteenth-century English case law, where obscenity was defined in terms of its capacity to corrupt the young, the mentally weak, or other particularly susceptible subclass of the wider community. Known as the *Hicklin* test of obscenity, this definition forms the basis of the British Obscene Publications Act of 1959, amended in 1964. In spite of criticism for its broad-reaching and ambiguous definition of obscenity, this statute continues to have a significant role in British law. According to Tubbs and Smith (2018, 512), pornography has been regulated on three grounds in the past: respect for human dignity, the need to protect the private realm of life, and affirming human responsibilities, such as the needs of children and the basic duties of parenthood.

Going beyond obscenity and pornography, our understanding of sexually explicit speech is intended to include those cases in which both the government's and the Court's reasoning is similar to that in an obscenity case (such as concerns about protecting minors from sexual content) but the speech act itself is not extreme enough to be considered obscenity. For example, the case *I. A. v. Turkey* (2005) involved a book containing a passage about the Prophet Mohammad's sexual life.

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5. We did not include cases where the government claimed to protect public morals, but the Court did not accept the government's claims, as in the case of *Bayev and Others v. Russia*, Application No. 67667/09, ECtHR (2017). While such cases might contain substantive consideration of whether the matter at hand relates to public morals, the morals clause itself does not play a role in the Court's final decision. We are interested in whether the clause encourages Court deference, and that cannot be accurately tested unless the morals clause is accepted by the Court as a legitimate aim. For more information on excluded cases, see Appendix 2.

6. The comprehensive search process for public morals cases involved the following steps: Starting with the complete universe of cases available online on the ECtHR database, we filtered for those (1) chamber and grand chamber judgments (2) containing the keywords "Art. 10.2- Protection of morals" within a case document, (3) published in either English or French, since they are the two official languages of the Court, (4) published within the time period 1976 to June 2018. The search based on these filters yielded a total of thirty results, which we narrowed down to thirteen unique cases by removing duplicate rows from the output. Last, we excluded *Bayev and Others v. Russia* from the dataset for reasons cited in Appendix 2 and footnote 5.

Parts of the impugned passage read, "God says that all the words are those of his messenger. Some of these words, moreover, were inspired in a surge of exultation, in Aisha's arms. . . . God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual relations with a dead person or a live animal."[7] While this cannot be called an instance of obscenity, the speech act depicts sexual activity in a way that some may consider offensive.

Using the HUDOC database, we obtained a list of potentially relevant Chamber and Grand Chamber judgments by identifying Article 10 cases that included any of the following terms in the two official languages of the Court: "obscène," "obscenity," "obscene," "naked," "nude," "nudity," "nudité," "nue," "sexual," "sexuel," "sexuels," "pornography," and "pornographie."[8] From this initial list of 121 cases, we used the following criteria to finalize the list of sexually explicit speech cases:

1. The case includes materials that are conventionally defined as obscene or pornographic, using definitions such as "material depicting sexual activity or erotic behavior that have the sole purpose of sexual arousal"[9] or "speech that poses the potential to deprave and corrupt minors."

   OR

2. The case includes speech that describes sexual acts in a way that is deemed illegal by the state.

   AND

3. The Court recognizes the sexually explicit element of the speech act in its ruling.

Since the search terms we used were broad, there was considerable variety in the ways the terms "nude," "obscene," "sex," "porn," etc., appeared in the case documents. For example, a number of cases involved newspaper articles containing allegations of sexual assault, scandals involving illicit sexual relations, reports on the torture of prisoners, and the like.[10] These cases, while containing the general

7. *I. A. v. Turkey*, Application No. 42571/98, ECtHR (2005), para. 13.

8. We limited the search to English and French documents, since they are the two official languages of the Court. Furthermore, we restricted the time period to 1976–June 2018 and excluded judgments that were ultimately struck out of the list.

9. *Black's Law Dictionary* defines pornography as "material depicting sexual activity or erotic behavior in a way that is designed to arouse sexual excitement." http://blacks_law.enacademic.com/37732/pornography.

10. Another subset of excluded cases contained the relevant keywords but in a context outside our interest. For example, one case document (*Emir v. Turkey*, Application No. 10054/03, ECtHR 2007, para. 8)

keywords used for our search, were ultimately excluded from the dataset because they did not meet the criteria of sexually explicit speech outlined above. In this way, we narrowed the list of relevant cases down to ten "sexually explicit speech cases."[11]

For ease of reference, and as illustrated in Figure 1, we identify five categories that an individual case can fall under:

1. Sexually Explicit Speech Only (SES Only): Cases that contain sexually explicit speech but do *not* have the protection of public morals as an accepted legitimate aim.
2. All Sexually Explicit Speech (All SES): All cases that contain sexually explicit speech (these cases *may or may not* have the protection of public morals as an accepted legitimate aim).
3. The Intersection of Public Morals and Sexually Explicit Speech (Intersection): Cases that contain both sexually explicit speech *and* have the protection of public morals as an accepted legitimate aim.
4. All Public Morals (All PM): All cases where the protection of public morals is an accepted legitimate aim (these cases *may or may not* involve sexually explicit speech).
5. Public Morals Only (PM Only): Cases that have the protection of public morals as an accepted legitimate aim and do *not* contain sexually explicit speech.

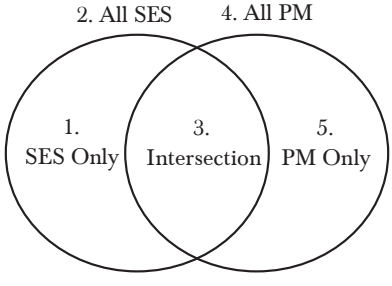

FIGURE 1. Venn Diagram Representing the Five Categories of SES Only, All SES, Intersection, All PM, and PM Only

states, "In her letter, Kaya tells in all its nakedness the situation lived in the Turkish prisons," another case document (*Manole and Others v. Moldova*, Application No. 13936/02, ECtHR 2009, para. 51) outlines a public service policy which contains the phrase, "They must reject any cultural, sexual, religious or racial discrimination." Many other similar cases were part of the initial search output, and by reading through each case, we systematically narrowed down the list to the 10 cases in our final dataset.

11. In addition, it is important to note that some sexually explicit cases are linked to other elements, such as religion, which may also influence Court decisions. Yet, for reasons we explain, we maintain that the sexual content of these speech acts plays a significant role in the ultimate outcomes and count these cases as "sexually explicit speech cases."

Our core dataset comprises sixteen judgments.[12] In these cases, the Court examined whether the national authorities violated an applicant's freedom of expression, as protected by Article 10 of the ECHR. Table 1 outlines details about the cases and

TABLE 1. Summary of Cases

Year	Cases	Outcome (Article 10)
	Public Morals Only	
1992	Open Door and Dublin Well Woman v. Ireland	Violation
2003	Gündüz v. Turkey	Violation
2006	Erbakan v. Turkey	Violation
2006	Aydin Tatlav v. Turkey	Violation
2018	Sinkova v. Ukraine	No Violation
2018	Sekmadienis Ltd v. Lithuania	Violation
	Intersection	
1976	Handyside v. UK	No Violation
1988	Müller and Others v. Switzerland	No Violation
2005	I. A. v. Turkey	No Violation
2010	Akdas v. Turkey	Violation
2012	Mouvement raëlien suisse v. Switzerland[1]	No Violation
2016	Kaos GL v. Turkey	Violation
	Sexually Explicit Speech Only	
1994	Otto-Preminger-Institut v. Austria	No Violation
1996	Wingrove v. UK	No Violation
2007	Vereinigung Bildender Kunstler v. Austria	Violation
2011	Palomo Sanchez and Others v. Spain	No Violation

[1]The speech act in *Mouvement raëlien Suisse* was a poster containing a link to the organization's website in bold font, but the central issue was the website's contents (such as the promotion of human cloning, the advocating of "geniocracy") and the possibility that the Raelian Movement's literature and ideas might lead to sexual abuse of children by some of its members, thus posing the potential to deprave minors.

The Court protects speech when it finds an Article 10 violation, ruling in favor of the applicant. Data generated from GFSR collected data, European Court of Human Rights online database HUDOC, and Global Freedom of Expression database from Columbia University.

12. For both PM and SES cases, we include both Chamber and Grand Chamber judgments. We excluded reports from the European Commission on Human Rights, as well as judgments that were eventually struck out of the list.

organizes them according to their placement in one of the three mutually exclusive categories among our five listed categories: SES Only, Intersection, or PM Only. Together, these three categories thus contain the complete constellation of cases.

Using the original five categories, we can create a scale that indicates how often the Court has found an Article 10 violation (i.e., how often the Court has disagreed with the state's rationale for restricting speech) in each of the five categories, as indicated in Figure 2. As we move from left to right, the Article 10 violation rate increases, indicating that the Court has chosen to protect speech more for the categories to the right relative to those on the left.

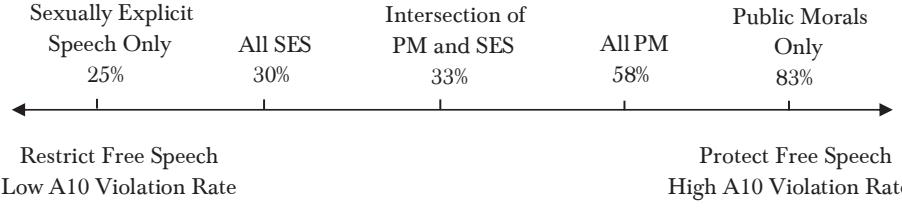

FIGURE 2. A10 Violation Rates for Categories of Sexually Explicit Speech and Public Morals Cases (Judgments, N = 16)

This scale facilitates examination of the claim that the Court often defers to state authorities where public morals cases are concerned. The 83 percent violation rate in PM Only cases is even higher than the rate for all Article 10 cases (79 percent), suggesting that the morals claim functions very differently from the expectations found in existing scholarship. As we move back to the left and include some cases with sexually explicit content, we see that the Article 10 violation rate for All PM cases is 58 percent. This *is* lower than the overall violation rate but not by as much as one might expect, since the majority of these cases still results in a ruling against the government. Looking at the Article 10 violation rate in the Intersection, All SES, and SES Only categories (at 33 percent, 30 percent, and 25 percent, respectively) demonstrates the stark difference in outcomes when sexually explicit speech is unambiguously involved. The fact that the rate is lowest in the absence of a public morals claim suggests that sexually explicit speech is, most likely, the truly distinctive factor.

We recognize that the data presented here draw on a small sample of cases, because there haven't been a large number of free-speech challenges involving public morals claims or sexually explicit speech. It is therefore important to be cautious in interpreting the numerical patterns. At the same time, the stark differences in average violation rates across the categories suggest that it would take an unusual number of such cases in the opposite direction of the norm to reverse the patterns we see in the data.

Because of the limited number of judgments, we also examine inadmissibility findings to check the robustness of the patterns we identify. The Court may rule an application inadmissible for a wide variety of procedural or substantive reasons, effectively finding that there is no justifiable claim that the state violated Article 10 protections for freedom of expression. We focus on decisions based on the admissibility criteria in Article 35, Section 3 (a), of the Convention—called "manifestly ill-founded" cases—rather than procedural grounds or rationales related to the Court's jurisdiction (Council of Europe 2017, 54), selecting both public morals and sexually explicit speech cases using the same process identified above. If the Court excluded large numbers of public morals cases at the admissibility stage, this might support initial fears about the morals clause and indicate that the Court is, in fact, so responsive to states' claims about public morals concerns that it often does not even bother to conduct a full hearing.

Yet the patterns in inadmissibility outcomes reinforce our findings that public morals claims matter less than the presence of sexually explicit speech. Figure 3 displays the Article 10 violation rates of different categories when the inadmissibility cases are included.[13] Accounting for inadmissibility decisions moves the Article 10 violation rate lower by a similar amount for all categories, thus maintaining the order of the five categories.[14] This indicates that the pattern of decision making we found when looking at the judgments holds true even when we include inadmissible cases adjudicated on substantive grounds. There is no hidden pattern of activity whereby the Court defers to states by declaring a number of public morals cases inadmissible. In sum, inclusion of inadmissibility findings maintains the pattern discovered when looking at the data from the judgments: The Court is much more likely to rule No Violation in cases with sexually explicit content than in public morals cases.

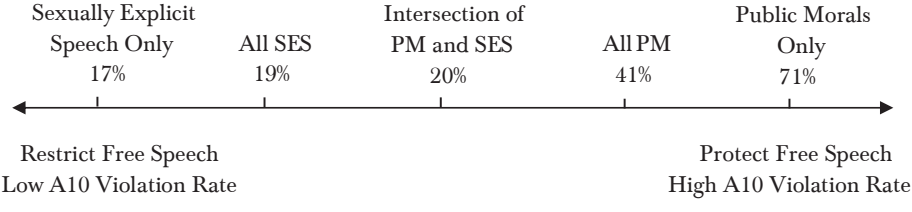

FIGURE 3. A10 Violation Rates for Categories of Sexually Explicit Speech and Public Morals Cases (Judgments and Inadmissibility Decisions, N = 23)

13. The full list of judgments and inadmissibility decisions is available in Appendix 1.

14. The statistics that include inadmissibility decisions are not strictly comparable to the overall Article 10 violation rate of 79 percent cited above, as the Article 10 violation rate provided there is based on judgments alone. We count inadmissibility cases as No Violations.

III. COMPARISON OF CASES ACROSS CATEGORIES

Understanding how the Court accounts for public morals versus sexually explicit speech in its decisions requires us to go beyond the identification of patterns across cases. We therefore turn now to a closer examination of specific cases within each of the three mutually exclusive categories we note in the preceding section. Criticism of the Court's tendency to defer to state governments in public morals cases under Article 10 usually focuses on the landmark cases of *Handyside v. the United Kingdom* (1976) and *Müller and Others v. Switzerland* (1988) (Nowlin 2002; Feingold 1977; Letsas 2006). While it is true that the two cases used the public morals argument to defend restriction of free speech, both cases also involved sexually explicit content. To better understand whether morals or sexually explicit content drives Court decisions, we begin by examining PM Only cases, followed by SES Only cases, and last, those cases that fall into the Intersection of both of these components. For purposes of brevity, we select cases that are representative of each group and discuss them in depth. A more detailed description of remaining cases within a category can be found in Appendix 3.

A. Public Morals Only

Looking at PM Only cases allows us to estimate the influence of the morals clause when the sexual nature of the speech act is no longer a factor. As indicated in Table 1, the Court ruled in favor of the national authorities only in a single case in this category, *Sinkova v. Ukraine* (2018). In all other cases, the Court found an Article 10 violation, suggesting that the morals clause is not as much of a gateway to state power as the literature suggests. Two cases exemplify this point: *Open Door and Dublin Well Woman v. Ireland* (1992) and *Sekmadienis Ltd. v. Lithuania* (2018).

In *Open Door,* the Irish government banned various counseling clinics from disseminating information to pregnant women about traveling abroad to obtain an abortion. The protection of morals was the only recognized aim in this case, with the government arguing, "The view that abortion was morally wrong was the deeply held view of the majority of the people in Ireland and it was not the proper function of the Court to seek to impose a different viewpoint."[15] The Court, however, still ruled against the government and concluded that the government's actions were not proportionate to the aim pursued. The Court recalled that traveling abroad to obtain an abortion was not illegal under Irish law. Since other contracting states tolerated abortions within their own borders, a state restriction on this topic would be subject to a higher level of scrutiny. Moreover, a restriction on

15. *Open Door in Dublin Well Woman v. Ireland*, Application No. 14234/88, ECtHR (1992), para. 65.

medical advice and proper counseling for pregnant women seeking to obtain abortions had only led to women searching for unregulated medical advice, thereby incurring a higher health risk for both themselves and their unborn child. Even though abortion is a sensitive issue, especially for a country deeply influenced by religion, the Court still ruled against the national authorities.

In *Sekmadienis*, the Court not only ruled against the government but also went so far as to criticize the government's use of the Public Morals Clause. This case involved three advertisements for a clothing line featuring models that resembled Jesus and Mary, with captions suggesting the same. The government received complaints about the ads, and after several committee deliberations, it concluded that the ads were offensive to the religious sentiments of the people. The Court, however, stated that the government's reasons for restricting and imposing a fine on the ads, which "were contrary to public morals because they had used religious symbols for 'superficial purposes,' had 'distort[ed] [their] main purpose' and had been 'inappropriate,'"[16] were neither relevant nor sufficient for restricting freedom of expression. The Court concluded that in the name of protecting morals, the government had simply valued protecting the sentiments of the majority without giving the same value to protecting the applicant company's right to freedom of expression.

In *Sinkova v. Ukraine* (2018), the only Article 10 No Violation ruling in this category, the applicant was fined for committing an "act of performance" by frying an egg over the Eternal Flame at the Tomb of the Unknown Soldier at the Eternal Glory Memorial in Kyiv. The Court, when ruling in favor of the government in this case, made clear that it did not consider the government's actions particularly speech restrictive in nature, since the charge against Sinkova did not concern the video she took of her performance nor the text that accompanied the video. The Court stated, "The applicant was not convicted for expressing the views that she did or even for expressing them in strong language. Her conviction was a narrow one in respect of particular conduct in a particular place."[17] Both *Sekmadienis* and *Sinkova* are similar cases insofar as the speech acts were not particularly vulgar but were likely to cause offense to the general populace. The Court ruled differently in *Sinkova* because, unlike restricting the ads in *Sekmadienis*, the government did not limit the right of the applicant to express a particular idea but only sanctioned the applicant's behavior in a specific environment. In this regard, the Court did not explicitly embrace the idea that states have the right to restrict speech for the sake of protecting morals. In fact, the Court did not consider the state's actions to be

16. *Sekmadienis Ltd. v. Lithuania*, Application No. 69317/14, ECtHR (2018), para. 13.

17. *Sinkova v. Ukraine*, Application No. 39496/11, ECtHR (2018), para. 108.

traditionally speech restrictive in nature. An examination of these cases thus suggests that the morals clause does not carry particular weight; even when the Court accepts the relevance of the clause, it is not a trump card that states can play to obtain a ruling in their favor. Instead, morals cases tend to get treated similarly to the majority of Article 10 cases, with violation rates more or less in the same range.

B. Sexually Explicit Speech Only

To understand if concerns about sexually explicit speech, rather than the morals clause, motivate the Court to rule in favor of the government, it is essential to examine cases where the sexual nature of the speech act does not interact with the morals claim. As Table 1 indicates, the Court is much less likely to protect freedom of expression in SES Only cases.

Otto-Preminger-Institut v. Austria (1994) and *Wingrove v. the United Kingdom* (1996) are two cases from the 1990s in which the Court ruled in favor of the government. In both cases, the government prohibited the showing of a video or film that it considered blasphemous and obscene. In *Wingrove,* the short video work called *Visions of Ecstasy* portrayed St. Teresa and Jesus in an obscene manner intended to incite sexual arousal. The relevant portions of the video can be described as follows: "A segment of the film featured the wounded body of Christ lying on the ground where St. Teresa first kisses the stigmata of his feet before moving up his body and kissing or licking the gaping wound in his right side of body. Then, she sits alongside of Christ, seemingly naked under her habit, all the while moving in a motion reflecting intense erotic arousal and kisses his lips."[18] In *Otto-Preminger*, a film that depicted the Islamic, Jewish, and Christian God consorting with the Devil, involved scenes of "erotic tension between the Virgin Mary and the Devil" and "other scenes that include the Virgin Mary permitting an obscene story to be read to her."[19] The Court held in both cases that "respect for the religious feelings of believers can move a State legitimately to restrict the publication of provocative portrayals of objects of religious veneration."[20] The sexual nature of the speech act was a meaningful offensive element in both cases, and the Court ruled in favor of the government.

One might argue that rather than the sexual nature of the speech per se, it is the offense felt by the more religious sectors of society that played a pivotal role for

18. *Wingrove v. the United Kingdom*, Application No. 17419/90, ECtHR (1996), para. 9.

19. *Otto-Preminger-Institut v. Austria*, Application No. 13470/87, ECtHR (1994), para. 22.

20. *Wingrove v. the United Kingdom*, Application No. 17419/90, ECtHR (1996), para. 46; *Otto-Preminger-Institut v. Austria*, Application No. 13470/87, ECtHR (1994), para. 47.

the Court in upholding the ban on free speech in favor of national authorities. Such a claim, however, would be too simplistic. First, there are a number of cases where the speech at issue upset religious minorities but the Court protected it anyway. The two cases discussed in the previous sections, *Sekmandienis* and *Open Door*, are prime examples. Second, what sets apart cases like *Wingrove* and *Otto-Preminger* from others involving religious objections is the sexual nature of the speech itself. The sexually explicit elements in the speech are at the heart of the religious offense in these cases, and it is the sexual explicitness that motivates the Court when making its decision.

The only Article 10 violation case in this category comes in the form of a closely divided case, *Vereinigung Bildender Kunstler v. Austria* (2007), about an obscene painting that depicts several well-known public figures in sexual positions.[21] In this case, the Court ruled that the painting constituted satire, a highly protected form of speech. Interestingly enough, the Court ruled in the opposite direction in another case that involved satire and sexually explicit speech, *Palomo Sanchez and Others v. Spain* (2011). In *Palomo*, trade union employees published a satirical cartoon in a newsletter that portrayed other employees performing sexual favors on the human resources manager. The Court, ruling against the applicant, stated that the criticism could have been communicated in a less insulting manner, especially since the speech act was intentional in nature.[22] Moreover, private individuals, unlike the public figures portrayed in *Vereinigung*, enjoy greater protections from offensive depictions. In *Vereinigung*, the Court also emphasized the political nature of the speech act: "The Court does not find unreasonable the view taken by the court of first instance that the scene in which Mr. Meischberger was portrayed could be understood to constitute some sort of counter-attack against the Austrian Freedom Party, whose members had strongly criticized the painter's work."[23] The dissenting judges passionately disagreed with this designation of the painting and argued that the dignity of others cannot be allowed to be attacked for the sake of artistic expression, going so far as to challenge whether the obscene painting should count as "art" in the first place. This decision was therefore fairly contentious and more divided than any other case in the category. Generally speaking, the Court has acted in a predictable way in leaving matters that concern sexually explicit speech in the hands of member states.

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21. In *Vereinigung*, the government also advanced a public morals claim, which the Court rejected. We therefore classify this case as a sexually explicit speech case but not a public morals case.

22. *Palomo Sanchez and Others v. Spain*, Application Nos. 28955/06, 28957/06, 28959/06, and 28964/06, ECtHR (2011), para. 73.

23. *Vereinigung Bildender Kunstler v. Austria*, Application No. 68354/01, ECtHR (2007), para. 34.

C. Intersection of Public Morals and Sexually Explicit Speech

In public morals cases without a sexual component, the Court tends to rule in favor of the applicant. In sexually explicit speech cases without an accepted public morals argument, the Court tends to rule in favor of the government. Do cases involving both sexually explicit speech and public morals more closely resemble the pattern of sexually explicit speech cases or of public morals cases? In fact, they are quite similar to sexually explicit speech cases. This suggests that the sexual component of the speech sits at the core of a persuasive government argument for protecting morals. In other words, it is the sexual component of the speech act that appears to make the Public Morals Clause "work" as a tool for restricting free speech.

Consider again the classic cases of *Handyside* and *Müller* mentioned earlier, two cases that have often been used by scholars to exemplify the faults of the morals clause. In both cases, the sexually explicit nature of the speech act forms the core of the Court's reasons to restrict speech. In *Handyside*, the British government seized copies of a publication called *The Little Red Schoolbook* under the Obscene Publications Act of 1959 and 1964. The *Schoolbook* talked about sex, porn, and other matters, and it targeted schoolchildren between the ages of twelve and eighteen. The English courts considered this book obscene because of their fears that it may "deprave and corrupt" children who came into contact with the book. It was in *Handyside* that the Court first noted that there was no "uniform conception of morals" among the contracting states and that the state authorities, as a result of their "direct and continuous contact with the vital forces of their countries" were much better placed than the European Court to rule on issues concerning morals.[24] The Court echoed this sentiment in *Müller*, a case about obscene paintings displayed in an art exhibition. In both cases, the Court upheld the speech restriction, and the protection of public morals ostensibly remained under the primary control of the states. Commenting on the usage of the morals clause, a Council of Europe document in 1997 acknowledged the sexual nature of the speech act as a decisive factor: "Despite the emphasis placed upon the importance of freedom of expression in a democratic society, the *Handyside* and *Müller* cases indicate the reluctance of the Court to interfere with restrictions based upon the protection of morality, *particularly where sexual matters are concerned*" (emphasis ours; Greer 1998, 25). Simply put, the sexual component of the speech act in Intersection cases seems to play a central role in the Court's decision-making processes.

The impact of the sexual component of the speech act on the Court's decision to restrict free speech is also visible when comparing two similar cases, *I. A. v. Turkey*

24. *Handyside v. the United Kingdom*, Application No. 5493/72, ECtHR (1976), para. 48.

(2005) and *Aydin Tatlav v. Turkey* (2006). In *I. A.*, a case where Turkish authorities convicted the publisher of a book that was considered blasphemous, the Court found No Violation of Article 10 and specifically agreed with the Turkish Court of First Instance's reasoning. The ECtHR supported its conclusion that the speech act was hate speech and an "abusive attack" on the Prophet based on a passage from the banned publication that described sexual activities of the Prophet Muhammad.[25] *Aydin Tatlav*, similar to *I. A.*, concerned publication of a book that allegedly criticized Islam. The book contained phrases such as "the policies of Islam toward children are constituted by a barbaric violence," "God doesn't exist," the "founder of Islam" makes "violence his fundamental policy," and "the Koran/Quran only contains commentaries full of tired repetitions, lacking any depth, more primitive than most ancient books."[26] In this case, the Court ruled against the government and protected speech through a finding that there had been a violation of Article 10. This suggests that the sexual component of the speech act in *I. A.* played an important role in the Court's reasoning and that the morals clause, when unaccompanied by sexually explicit speech as it was in *Aydin Tatlav*, is not especially likely to persuade the Court to rule in favor of the speech restriction. In keeping with our earlier discussion, this contrast also suggests that the Court is more likely to protect religious sentiments when the offending speech is sexually explicit than when it is not.

There are Intersection cases where the Court has found an Article 10 violation, but the reasoning has been markedly different from the four cases discussed above. For example, in *Akdas v. Turkey* (2010), the Court found that the ban on the publication of a translation of Guillaume Apollinaire's *Les 11000 Verges* violated Article 10 because the erotic novel had first appeared in 1907 and had become part of the "European literary heritage."[27] In *Kaos GL v. Turkey* (2016), a case involving pornography, the Court essentially concluded that had the government decided to restrict access to the material in order to protect minors, it would have been an acceptable action, but the decision to ban the material entirely was disproportionate to the narrower aim of protecting minors and violated Article 10.[28] Therefore, when the

25. The quoted passage reads, "Look at the triangle of fear, inequality and inconsistency in the Koran; it reminds me of an earthworm. God says that all the words are those of his messenger. Some of these words, moreover, were inspired in a surge of exultation, in Aisha's arms. . . . God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual relations with a dead person or a live animal." *I. A. v. Turkey*, Application No. 42571/98, ECtHR (2005), para. 13.

26. *Aydin Tatlav v. Turkey*, Application No. 50692/99, ECtHR (2006), para. 12.

27. *Akdas v. Turkey*, Application No. 41056/04 ECtHR (2010), para. 30.

28. *Kaos GL v. Turkey*, Application No. 4982/07, ECtHR (2016), para. 58.

Court has ruled against the government in public morals cases that contain sexually explicit speech, the ruling has not focused on the sexual nature of the speech but on technical factors regarding the circumstances of the case. This suggests that barring certain exceptions, the morals clause might operate in the way that critics of the Court fear—as a provision that supports the government's arguments and restricts free speech—when the case itself involves sexually explicit speech. A government claiming that its speech-restrictive measures aim to "protect morals" is less likely to achieve a ruling in its favor if the speech act did not concern sexual matters, since it is the sexually explicit nature of the speech act that often forms the basis for the Court's decision to restrict speech.

D. Inadmissibility Decisions

To expand the evidence available for assessing our argument, we also examine the texts of inadmissibility decisions to better understand the Court's approach to public morals and sexually explicit speech. Reasoning in inadmissibility decisions, particularly in manifestly ill-founded cases, is comparable to fuller judgments because the Court considers whether "a preliminary examination of [the] substance [of a case] does not disclose any appearance of a violation of the rights guaranteed by the Convention, with the result that it can be declared inadmissible at the outset without proceeding to a formal examination on the merits (which would normally result in a judgment)" (Council of Europe 2017, 54). This thus allows us to understand the rationale used by the Court to deem a case inadmissible and the role that sexually explicit speech plays in these decisions.

Starting with the sole case in the PM Only category, *Nilsen v. the United Kingdom* (2010) involved a convicted murderer who drafted a book manuscript describing the killings in detail. The prison's governor refused to pass on the manuscript from a solicitor to the applicant so that he could revise it for publication. The Court deemed the reasons for the interference with the applicant's freedom of expression relevant and sufficient, emphasizing "the anguish that the publication would cause to surviving victims and to all victims' families, and the sense of outrage which [the] publication would cause among the general public."[29] The Court thus declared this PM Only case inadmissible.

In line with our findings with respect to judgments, however, most inadmissibility decisions turn on the sexually explicit content of the case. In the four Intersection cases, the sexual component of the speech act is once again at the core of the

29. *Nilsen v. the United Kingdom*, Application No. 36882/05, ECtHR (2010), para. 52.

morals claim—*Perrin v. the United Kingdom* (2005) was about pornographic pictures available on the preview page of a website; *V. D. & C. G. v. France* (2006) concerned a film that had pornographic elements; *S. B. & D. B v. Belgium* (2006) involved soliciting for sex on the street; and *Karttunen v. Finland* (2011) involved the display of child pornography. In addition, there have been two SES Only cases[30]: *Pay v. the United Kingdom* (2008) turned on a probation officer's involvement in a BDSM organization; *Sigma Radio Television Ltd. v. Cyprus* (2011) touched on a television show that used sexually explicit slang deemed inappropriate for minors. These more recent decisions suggest that there has been a consistent deference to states in cases involving sexually explicit speech across multiple decades. All in all, the number of inadmissibility cases that center around sexually explicit speech supports our hypothesis that it is the type of speech that meaningfully affects the Court's decisions about freedom of expression rather than the statutory language itself.

IV. CONCLUSION

In this article, we examine the role played by the Public Morals Clause and sexually explicit speech cases in the jurisprudence of the European Court of Human Rights. We argue that the public morals clause does not pave the way for the Court to restrict speech to the degree presumed by a number of observers. We find that it is not the specific *wording* of the Convention but rather the *type* of speech—sexually explicit speech—that is a more germane category for understanding when the Court is likely to defer to states. Our findings build on scholarship that focuses on obscenity and pornography in the ECtHR, demonstrating that these form part of a broader conceptual category of sexually explicit speech that is relevant to the Court's decision making. We also contribute to scholarly discussions about the role of institutions and ideas in judicial decision making by identifying a specific issue area in which underlying ideas are more closely associated with patterns of judicial decision making than with the written text of the Convention itself.

Our multifaceted analysis gives us greater confidence in our findings than if we relied exclusively on numerical patterns or on a close reading of cases. Nevertheless, the small number of cases makes additional research on the role of sexually explicit speech in judicial decision making necessary. It is notable that the original wording of the morals clause revolved around obscenity; this may have a legacy

30. An SES case, *Rujak v. Croatia*, Application No. 57942/10, (ECtHR 2012), involved a soldier in the Croatian Army who used obscene language to insult his fellow recruits and superiors. The Court's reasoning, however, declared the case inadmissible not on the grounds of its being "manifestly ill-founded" but on the grounds of *ratione materiae*. It is for these reasons that we decided to exclude the case from our list.

that influences contemporary Court judgments. It is worth exploring the historical roots of the Public Morals Clause to understand whether it has always been intended to apply to sexual concerns. Such a hypothesis could be tested through archival or documentary analysis coupled with interviews of current and former ECHR judges. It would also be fruitful to look beyond Article 10 cases to understand whether a similar pattern exists in cases involving rights other than freedom of expression. Article 8 of the ECHR, for example, enshrines the right to respect for private and family life. The Court may take a different approach in cases where private interests are concerned, and it is worth testing whether the Court becomes more or less deferential to states in Article 8 cases.

The examination of public morals and sexually explicit speech also presents some observations on the function of free speech in society. According to Hixson (1996, ix), the traditional hierarchy of protected speech starts with political and social speech at the top, with personal and aesthetic expression coming in second, moral and religious expression third, and the categories of "fighting words," libelous speech, and commercial speech at the end. Where does sexually explicit speech fall on this hierarchy of protected speech? Our findings suggest that this type of speech is clearly located near or at the very bottom.

Last our article also touches on broader questions about the role of sexually explicit speech in liberal democracies. Sex and sexual topics have historically been a delicate subject in Anglo-American culture. But the public's sensitivities to sex, as reflected in popular media and mass marketing, have changed considerably over time, although these developments likely vary country by country. The forty-seven individual Council of Europe member states' domestic high courts may thus treat sexually explicit speech in quite different manners, even as the ECHR continues to uphold national restrictions in cases involving sexually explicit speech. If, as Helfer and Voeten (2014, 106) suggest, the ECtHR engages in majoritarian activism to expand rights that most countries have accepted, developments in domestic judicial approaches to sexually explicit speech may foreshadow shifting patterns of outcomes within the ECtHR in years to come. For now, however, it is clear that sexually explicit speech plays an important if previously underrecognized role in ECtHR decisions about when to defer to national courts over highly sensitive social topics.

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APPENDICES

Appendix 1: Summary of Judgments and Inadmissibility Decisions

Year	Cases	Outcome (A10)
	PM Only	
1992	Open Door and Dublin Well Woman v. Ireland	Violation
2003	Gündüz v. Turkey	Violation
2006	Erbakan v. Turkey	Violation
2006	Aydin Tatlav v. Turkey	Violation
2010	Nilsen v. The United Kingdom	Inadmissible
2018	Sinkova v. Ukraine	No Violation
2018	Sekmadienis Ltd. v. Lithuania	Violation
	Intersection	
1976	Handyside v. UK	No Violation
1988	Müller and Others v. Switzerland	No Violation
2005	I. A. v. Turkey	No Violation
2005	Perrin v. The United Kingdom	Inadmissible
2006	V. D. & C. G. v. France	Inadmissible
2006	S. B. & D. B v. Belgium	Inadmissible
2010	Akdas v. Turkey	Violation
2011	Karttunen v. Finland	Inadmissible
2012	Mouvement raëlien suisse v. Switzerland	No Violation
2016	Kaos GL v. Turkey	Violation
	SES Only	
1994	Otto-Preminger-Institut v. Austria	No Violation
1996	Wingrove v. UK	No Violation
2007	Vereinigung Bildender Kunstler v. Austria	Violation
2008	Pay v. The United Kingdom	Inadmissible
2011	Palomo Sanchez and Others v. Spain	No Violation
2011	Sigma Radio Television Ltd. v. Cyprus	Inadmissible

The Court protects speech when it finds an Article 10 violation, ruling in favor of the applicant. Data are generated from GSFR collected data, European Court of Human Rights online database HUDOC, and Global Freedom of Expression database from Columbia University.

Appendix 2: Cases Excluded from Dataset

In our definition of public morals cases, we did not count cases where the government's claim of protecting morals was rejected. Examples include *Vereinigung Bildender Kunstler v. Austria* and *Bayev and Others v. Russia*.

Our definition of sexually explicit speech does *not* include

1. Speech that does not explicitly depict sexual activity but has the potential to corrupt minors because it is indirectly related to sex. Examples include *Bayev and Others v. Russia* and *Gough v. the United Kingdom*.
2. Speech, such as news articles, reporting on sexual abuse, torture, or sexual relations but not in a manner that is explicit, offensive, or shocking. Examples include *Erla Hlynsdottir v. Iceland (No. 2)*.
3. Speech that is explicit, but the Court does not recognize the sexually explicit nature of the speech act as a factor in its ruling. Examples include *Unifaun Theatre Productions Limited and Others v. Malta* and *Klein v. Slovakia*.

Appendix 3: Additional Case Summaries

Here we briefly summarize the three cases not covered in the main text.

1. *Gündüz v. Turkey*: *Gündüz v. Turkey* (2004) was a Public Morals Only case about a live televised debate where the applicant made critical comments on democracy and openly called for Sharia law. The national authorities charged the applicant with incitement to hatred and hostility, claiming that restricting his speech was necessary for the protection of morals. The Court ruled that since the speech took place in a debate setting and concerned a topic that was already subject to widespread discussion in the Turkish media, there had been a violation of the applicant's Article 10 rights.
2. *Erbakan v. Turkey*: *Erbakan v. Turkey* (2006) was a Public Morals Only case involving a speech made by the applicant, the former prime minister of Turkey, in the context of a political campaign. The government, using the morals clause, argued that speech sought to divide based on religion, race, and region. The Court, in its decision, recognized the potential divisive impact of using religious terminology in a political speech but also noted that political speech is a greatly valued type of speech that should be restricted only for compelling reasons. As such, the Court ruled that there had been an Article 10 violation.

3. *Mouvement raëlien suisse v. Switzerland*: *Mouvement raëlien suisse v. Switzerland* (2002) was a public morals and sexually explicit speech Intersection case concerning a Raelian Movement poster displaying the organization's website address. The government prohibited display of the posters, arguing that the ideas disseminated in the various publications obtainable through the Raelian Movement's website were capable of offending the religious beliefs of certain persons and that "[t]he content of the works on 'geniocracy' and 'sensual meditation' could lead certain adults to sexually abuse children, the child being described in certain works as a 'privileged sexual object.'"[31] This case was argued under the Public Morals Clause and was also considered a sexually explicit speech case, given concerns about the website content's potential to deprave and corrupt minors.

31. *Mouvement raëlien suisse v. Switzerland*, Application No. 16354/06, ECtHR (2002), para. 12.